Article Information

Authors: Steven Pettigrove, Jake Huang, Kelly Kim, Luke Higgins, Luke Misthos, Michael Bacina, Tim Masters
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Blockchain Bites: Fair go mate! Penalties for unfair contract terms coming soon, Senate Report Sinks a Proposed Digital Asset Regulation, Judge rejects US Uniswap class action and critiques developer liability claim, Lufthansa says 'ja' to NFT loyalty program on Polygon, US Treasury tax rules target crypto tax compliance, Visa velocity in crypto climbs with Solana splice

Michael Bacina, Steven Pettigrove, Tim Masters, Jake Huang, Luke Higgins, Luke Misthos and Kelly Kim of the Piper Alderman Blockchain Group bring you the latest legal, regulatory and project updates in Blockchain and Digital Law.

Fair go mate! Penalties for unfair contract terms coming soon

Introduction

The Australian Competition & Consumer Commission (**ACCC**) has repeatedly highlighted the importance of unfair contract terms (**UCT**) provisions, as they 'protect consumers and small businesses against terms…that take advantage of [an] imbalance in bargaining power.' Last year, the Commonwealth Government passed the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth), broadening the scope of the existing UCT regime while introducing monetary penalties for the first time.

The changes take effect from **9 November 2023** and will impact standard form contracts involving consumers and small businesses. Whereas previously a UCT was simply held void, a company which makes or purports to rely on a UCT could now be subject to civil and other penalties which can be directly enforced by the consumer. The applicable penalties are also cumulative so they may apply to each instance of a standard form contract being used.

Cryptocurrency exchanges and other crypto businesses which apply standard form contracts such as Terms of Service, template commercial contracts and click-wrap terms will need to review these contracts and consider necessary changes to terms which are at risk of being deemed unfair.

The significant consequences which may apply were highlighted last week by the ASIC's enforcement action against Paypal seeking orders voiding certain small business contracts which contained terms which placed the burden of identifying improper fees and charges on the business customer. Luckily for Paypal, had the ACCC waited until November to bring its action, it may have been facing potential civil penalties under the new UCT regime.

What is an unfair contract term?

Under the Australian Consumer Law (**ACL**), a term is unfair if:

1. It would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
2. It is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
3. It would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

In considering whether a term is unfair, the Court will have regard to the contract as a whole and whether the term is transparent (e.g. whether it is specifically drawn to the attention of the consumer). The burden of proving that a term is necessary to protect a party's legitimate interests falls on the party seeking to rely on it.

The ACL generally does not govern contracts concerning financial products or supply of financial services, but similar UCT protections will apply to contracts in relation to financial products and services under the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).

What are examples of UCTs?

The determination of whether or not a term is unfair requires a case-by-case analysis of the parties involved and their interests, relevant contractual rights and obligations.

The following are examples of terms identified in the ACL that may be deemed unfair depending on the circumstances. Terms that permit or have the effect of permitting:

- One-sided avoidance or limiting of performance
- One-sided termination rights or penalties
- One-sided unilateral variation rights
- One-sided renewal or non-renewal rights
- Unilaterally varying characteristics of what is being supplied
- Unilateral breach determination
- Limits on one party's vicarious liability for agents
- One sided assignment clauses to detriment of another party
- Limits on one party's right to sue another party

This list is not exhaustive. A number of recent enforcement actions provide additional guidance on those terms which the Courts may regard as unfair.

Certain terms are excluded from the application of the UCT regime, including terms that are required or expressly permitted by law, terms defining the subject matter of the contract and terms setting the upfront price payable. Terms incorporated or implied by law and contracts concerning the operating rules of licensed financial markets, settlement and payment systems, as well as certain life insurance contracts and contracts involving licensed markets will also be exempt.

What contracts do the changes apply to?

The types of contracts that the new UCT regime applies to include standard form consumer and small business contracts that concern the supply of goods or services, or a sale or grant of an interest in land. The supply of financial services and products is also covered under the ASIC Act.

Further changes to the ACL and ASIC Act will expand the scope of contracts covered by the UCT regime.

	Until 9 November 2023	From 9 November 2023
Standard form contract	To determine whether a contract is a standard form contract, the court must take into account: • Parties' bargaining power • Whether the contract was prepared by one party prior to discussions with the other party • Whether a party was required either to accept or reject the terms in the form they were presented • Whether a party was given an effective opportunity to negotiate • Whether the terms take into account the specific characteristics of the party or the particular transaction	The new regime adds that a standard form contract may be found despite the opportunity to: • Negotiate minor or insubstantial changes • Select a term from a range of options • Negotiate terms of another contract or proposed contract

	Until 9 November 2023	From 9 November 2023
What is a small business contract?	At least one party is a business that: • employs <20 persons; and • Upfront price is ≤ $300k or $1m (if the contract has a duration of more than 12 months).	At least one party satisfies either or both of: • Contract is made in the course of business and at a time when it employs < 100 persons; and/or • Turnover at the end of last income year was < $AUD10M

The new provisions will apply to contracts that are established on or after 9 November 2023 (**commencement date**) and do not apply to contracts made before this date unless:

- the contract is renewed on or after the commencement date, in which case the changes apply to the contract from the renewal date; or
- it is varied on or after the commencement date in which case the changes apply to the varied or newly added term from the date of variation or addition.

What are the potential penalties?

If a UCT is identified under the new regime, the court may for the first time impose civil penalties on the offending party, and can also void, vary or refuse to enforce part or the whole of the contract which may also impose additional financial consequences.

The following table summarises the new penalties under the ACL. It should be noted that similar changes are being implemented in relation to the provision of financial services and financial products under the ASIC Act, which also include significant civil penalties.

	Until 9 November 2023	From 9 November 2023
Maximum penalties for businesses and individuals	UCT held void and other ancillary orders.	Maximum financial penalties for businesses under the ACL are the greatest of: • AUD$50M; • Three times the value of the "reasonably attributable" benefit obtained from the conduct, if the court can determine this; or • if a court cannot determine the benefit, 30% of adjusted turnover during the breach period. Maximum penalty for an individual is AUD$2.5M.

What should you do next?

Given the expanded scope of the UCT regime and very significant penalties which may apply for companies seeking to rely on or impose UCT, it is important that companies review their standard form contracts before the changes come into effect and before renewing or varying any existing contracts.

Prior to **9 November 2023**, companies should:

- review existing standard form contracts (including terms and conditions);
- identify any terms that may be subject to challenge under the new UCT regime;
- consider appropriate revisions to those terms.

Please contact the Piper Alderman Blockchain Team if you require assistance.

Thanks to Tim Masters and Kelly Kim for their assistance in preparing this article.

Down Under Digital Asset Regulation? Senate Report Sinks a Proposed Approach

Australia's journey towards digital asset regulation has had hops forward and slips back, with a brief recap including:

- In 2018, an early hop on the world with one of the first AML/CTF laws applying to centralised exchanges in 2018.
- In 2019, an ICO Review in 2019, for which no report was every published,
- In 2021, a Senate Inquiry into Australia as a Technology and Financial Centre in 2021 making strong recommendations,
- Also in 2021 ASIC consultation on crypto-asset back exchange traded products,
- In 2022 a Crypto Asset Secondary Service Provider Consultation; and
- Earlier this year consideration of tax reform around crypto taxation; and
- Also earlier this year both a Token Mapping exercise and a private members bill being introduced by Senator Andrew Bragg (Liberal) to provide a start on a regulatory framework to licensing for centralised exchanges.

That private member's bill has been officially sunk in the Senate, with the Economics Committee, having held an inquiry into the Bill, and now recommending that the Bill not be passed, but that the Government continue industry consultation, which will take the most immediate form of the widely anticipated Treasury Consultation on crypto-asset custody and centralised exchange licensing.

The speed of which regulation in Australia has occurred has been drawn into sharp contrast as the likes Singapore and Hong Kong have introduced licensing, Dubai is attracting talent and has a specialist regulator, Europe has moved forward with MiCA, and even the US has had bills introduced to create bespoke licensing regimes.

While Australia has debated whether a bespoke regime has advantages over trying to marry digital assets and blockchains into an existing financial services regime, other countries have bespoke regimes up and running, which it is hoped Australia will be able to learn from swiftly.

The industry consultation around Senator Bragg's Bill has further highlighted the ongoing flight of innovation leaving Australia for jurisdictions with greater regulatory certainty and the benefits that Australia is missing out on in not moving faster to follow the rest of the world into bringing a fit-for-purpose regulatory regime for crypto-assets into existence.

Dismissed! Judge rejects US Uniswap class action and critiques developer liability claim

On 29 August 2023, a US District Court judge dismissed a class action lawsuit against Uniswap Labs and certain venture capital firms (**VC**) over allegations that the defendants had facilitated the sale of 'scam' tokens via the Uniswap decentralised exchange in violation of US securities laws.

The Plaintiffs had alleged that they had lost money after purchasing 'scam' tokens from Uniswap liquidity pools. The judge dismissed the Plaintiffs' allegations against Uniswap Labs and its co-defendants, finding that they were not responsible for the actions of issuers of the scam tokens who could not otherwise be identified. The plaintiffs claimed that, under US federal securities laws, the:

> *[t]okens at issue are securities and, by extension…the Uniswap Protocol functions as an exchange of such securities.*

In the absence of information regarding the issuers of the 'scam' tokens, the plaintiffs sought redress from Uniswap Labs, the founder of Uniswap Labs, Hayden Adams, and VC investors in Uniswap Labs, alleging Uniswap had 'provid[ed] a marketplace' in exchange for transaction fees, and that by developing the 'smart contracts that allow the [Uniswap] Protocol to operate' and for making public statements about the Protocol's safety and accessibility on social media the parties were liable. The plaintiffs sought rescission of the contracts embodied in the smart contracts associated with the purchase of the 'scam' tokens and compensation for lost funds.

The claims were ultimately rejected, with the Court:

> *declin[ing] to stretch the federal securities laws to cover the conduct alleged and concludes that Plaintiffs' concerns are better addressed to Congress than to this Court.*

and on the subject of software developer's liability the Court said:

> *it defies logic that a drafter of computer code underlying a particular software platform could be liable…for a third-party's misuse of that platform.*

The Court rejected the plaintiff's assertion that the harm was caused by the defendants by reason of them creating code and a system that *could* facilitate the sale of scam tokens. Instead, it found that a 'collateral, third-party human intervention' had caused the harm, 'not the underlying platform'.

The Court described smart contracts in a sensible way saying that:

> *smart contracts are self-executing, self-enforcing code that contain the terms of the agreement between the buyer and seller.*

and a passing comment was made referring to ETH and BTC as 'commodities' which under US law are distinct from securities:

> *While no court has yet decided this issue in the context of a decentralized protocol's smart contracts, the Court finds that the smart contracts here were themselves able to be carried out lawfully, as with the exchange of crypto commodities ETH and Bitcoin.*

The plaintiffs sought to rely on the unsuccessful class action against Coinbase in 2022, which concerned allegations that Coinbase was operating as an unregistered securities exchange. However, the judge found that the wallets connected to the Uniswap protocol in the current case were distinguishable from user wallets on Coinbase, which is connected to a 'centralized platform'. Justice Failla referred to Uniswap's Whitepaper to further explain that the smart contracts enable the Protocol to carry out its functions 'pursuant to a given party's request'.

The Court also dismissed allegations that the defendants passed title to the tokens to the plaintiffs or that the defendants sold, promoted, and/or solicited the tokens to the plaintiffs. The judge emphasised:

> *Labs is a mere developer…VC Defendants are merely alleged to be liquidity providers.*

Ultimately, the Court held that the defendants were not a party to the relevant smart contracts creating the scam tokens and that the core and router smart contracts underlying the Uniswap Protocol were more akin to overarching terms of service and able to be carried out lawfully as in the case of exchanging crypto commodities such as ETH and Bitcoin.

> *Indeed, this…is more like a suit attempting to hold an application like Venmo or Zelle liable for a drug deal that used the platform to facilitate a fund transfer. There, as here, collateral, third-party human intervention causes the harm, not the underlying platform*

Further, the Court held that the defendants were not liable for the scam token sales merely because of their collateral participation in the sales which the Court analogized was like seeking to hold the NASDAQ and/or New York Stock Exchange liable as a facilitator of a stock purchase that went awry, but noting that Uniswap is not an exchange.

The Court dismissed the class action entirely with prejudice, preventing refiling of the case at the Federal level. However, the state based claims were dismissed without prejudice, leaving the opportunity for the plaintiffs to refile under US state law.

The case has been celebrated both for it's technical unpacking of smart contract principles, because it is simply accepted ETH and BTC as 'commodities', and for pushing back on suggestions that the authors of smart contracts should find themselves to be parties to the dealings under those smart contracts.

Lufthansa says 'ja' to NFT loyalty program on Polygon

Lufthansa, Europe's largest airline group, has launched Uptrip, a new loyalty program in collaboration with Miles & More, on the Polygon Point of Sale (**PoS**) network. This program aims to revolutionise the travel experience by offering Non-Fungible Token (**NFT**) trading cards as rewards for every flight taken by travellers.

For every flight taken using Uptrip, customers earn an NFT trading card that can be collected to unlock unique rewards. These rewards range from business lounge vouchers to free miles and frequent flier status unlocks.

The NFTs can be minted, transferred and traded using an online wallet, including Metamask, and are divided into major

cities, aircraft and a scattering of special cards.

The collaboration looks to be a move for Lufthansa to how their forward thinking use of technology and for Polygon to demonstrate how their Layer 2 system, which eliminates costly gas fees, can host a large rewards program.

Lufthansa Group already has over 38 million registered members using its existing loyalty program, Miles & More, and while it remains to be seen if this will roll into a fully fledged Web3 loyalty system over time, for example to permit users to trade loyalty points or flights (noting Argentinian airline Bondi moving to put tickets on NFTs), this move starts the airline business rolling down a runway of Web3 take-off Will the recently beleaguered (and most complained about company in Australia!) Qantas look to move it's incredibly valuable Frequent Flyer program into Web3? No word on that yet, but it seems to only be a matter of time.

Call my broker! Treasury tax rules target crypto tax compliance

The US Treasury Department has unveiled proposed regulations aimed at enforcing taxation compliance for cryptocurrency dealings. The objective of the rules is twofold: to curtail tax evasion and raise US government revenue and to simplify tax reporting for those earnestly adhering to the law.

The proposed regulations are the product of provisions included in President Biden's 2021 infrastructure bill that mandated brokers to report crypto sales to the IRS and all businesses to report large crypto transactions like cash transactions. The revenue raising measures were projected to generate approximately $28 billion in tax revenue over a decade. Although the measures were intended to become effective from the 2023 tax year, the Biden administration missed the deadline for implementing regulations.

While industry advocates such as the Blockchain Association suggest that these rules could aid tax compliance for crypto traders if executed appropriately, there are concerns about the scope of the proposed regulations and in particular the range of crypto market participants who may be subject to reporting obligations and whether they can practically comply with the proposed rules.

Blockchain Association CEO Kristin Smith stated:

> *If done correctly, these rules could help provide everyday crypto users with the necessary information to accurately comply with tax laws. However, it's important to remember that the crypto ecosystem is very different from that of traditional assets, so the rules must be tailored accordingly and not capture ecosystem participants that don't have a pathway to compliance.*

The scope of those covered by the proposed regulations as a "broker" in the context of crypto-asset services remains quite unclear despite significant industry concerns raised when the infrastructure bill was first passed. The proposed broker definition would apply reporting requirements to persons that:

> *provide facilitative services that effectuate sales of digital assets by customers…provided the nature of the person's service arrangement with customers is such that the person ordinarily would know or be in a position to know the identity of the party that makes the sale.*

This unwieldy definition risks stretching far beyond just centralised cryptocurrency exchanges to DeFi platforms that operate via autonomous software as well as some wallet providers, although miners and validators appear likely to fall outside scope.

The proposed regulations will require all brokers, including cryptocurrency exchanges like Coinbase and Binance, to report to the Internal Revenue Service (**IRS**) in a manner akin to conventional brokers. A central element of the proposed regulations is the preparation and transmission of annual reports to the IRS, presented as 'Form 1099-DAs', detailing the gross proceeds from transactions.

Cryptocurrency exchanges will also need to report the cost base for crypto-asset transactions (i.e. revealing the amount customers paid for their holdings). The difference between the sale price and the cost base determines the capital gains (as is also broadly the case with Australian taxation law).

The regulations outline a timeline that requires brokers to provide reports on gross sale proceeds from crypto-asset transactions, beginning in early 2026. In the subsequent year, these platforms would be obliged to report the cost base for transactions, but only for assets acquired starting from 2023. It's important to note that these rules do not alter the taxable

nature of transactions; rather, they focus on the methodology of reporting for each transaction and determining the capital gains.

The implementation of these rules also introduces potential challenges. The requirement to track and transmit cost base information when customers transfer assets between different cryptocurrency exchanges could result in complexities.

The newly proposed rules also do not deal with the situation where customers transfer assets from their personal digital wallets into their exchange accounts. For example, the situation where an investor who purchased BTC several years ago may transfer the asset to their exchange account in order to crystallize a gain and realize profit.

Third-party service providers have emerged to assist crypto investors in managing transaction records and tax preparation (like CryptoTaxCalculator). While these services can yield inconsistent results, leaving taxpayers with potential discrepancies in capital gains, they also provide an innovation solution which addresses some of the challenges which the US regulations seek to address.

While the proposed regulations could streamline tax procedures for investors, they also exemplify some of the challenges where government seek to simply read across existing regulatory concepts to novel technology. Australia would be well advised to consider these complexities and innovative solutions as part of its pending cryptocurrency taxation update. As the blockchain landscape continues to evolve around the world, the debate over effective regulation and taxation of digital assets remains a crucial point of discussion.

Visa velocity in crypto climbs with Solana splice

This week, Visa announced a new pilot to send USDC, the world's second-biggest stablecoin by market capitalisation, to merchants via the Solana blockchain. Following a similar program with Crypto.com earlier this year, the new pilot is another significant step by Visa to modernise cross-border payment services.

Currently, Visa enables card users to make near-instant payments at merchants by simply tapping or swiping their cards. Behind this simple process, what users don't see is a series of steps at the back-end that make it happen. Visa explains this complicated process below:

> *the funds used for their (note: card users') purchase need to move between their bank (the issuer) and the merchant's bank (the acquirer). This is where Visa's treasury and settlement systems enable the clearing, settlement and movement of billions in transactions a day, making sure the correct amount in the preferred currency is received from the issuer and sent to the acquirer.*

This process happens between nearly 15,000 financial institutions and across more than 25 currencies globally.

Visa is now using stablecoins and blockchains to improve this process. Cuy Sheffield, Head of Crypto at Visa said:

> *By leveraging stablecoins like USDC and global blockchain networks like Solana and Ethereum, we're helping to improve the speed of cross-border settlement and providing a modern option for our clients to easily send or receive funds from Visa's treasury.*

Previous Visa pilot programs

This is not Visa's first stablecoins initiative. In 2021, Visa began testing how USDC could be used inside its treasury operations – making it one of the first major payments networks to test stablecoin settlement on the issuance side.

This work led to a successful pilot with Crypto.com this year, leveraging USDC and the Ethereum blockchain to receive payments from Crypto.com for cross-border volume on their live card program in Australia.

Before that pilot, settlement for cross-border purchases made on Crypto.com Visa cards required a days-long currency conversion process and costly international wire transfers. Now, Crypto.com can send USDC cross-border over the Ethereum blockchain directly to the Visa treasury, which helps reduce the time and complexity of international wire transfers.

Crypto.com now uses USDC to fulfill its settlement obligations on the Visa card in Australia and intends to roll out this capability in other markets.

Expanded merchant pilot

The new pilot program enables Visa to pay USDC to merchant acquirers such as Worldpay and Nuvei, who can then route USDC payments to their end merchants worldwide. Worldpay and Nuvei serve merchants from a diverse range of sectors, including crypto on-ramp providers, games, and NFT marketplaces and others in the blockchain and crypto economy. These end merchants may prefer to receive stablecoins over traditional fiat currencies for the card payments they accept. They may also receive payments faster via on-chain settlement of USDC.

Why Solana?

Visa has said it chose to add support for Solana as a high performance blockchain because of Solana's higher speed and lower cost. This makes Visa one of the first major payments companies to directly use Solana for live settlement payments between its customers. The Solana blockchain sees 400 millisecond block times, averages 400 transactions per second (TPS) and typically surges to more than 2K TPS across a variety of use cases during periods of peak demand.

Good news for USDC

Jeremy Allaire, co-founder and CEO of Circle, the company that issues the USDC stablecoin, said:

> *We are excited about the USDC use cases Visa and its partners are driving to create fundamental blockchain innovation…Expanding the pilot exemplifies how pairing USDC with Visa's innovation opens up the future of payments, commerce and financial applications.*

Future of payment?

Visa said it is eyeing an increasingly digital financial landscape in the future. It is forging ahead with new partnerships and embracing the innovative potential of digital currencies. Visa's work with Worldpay and Nuvei represents a significant stride in this direction.

Visa is certainly not alone in adopting cryptocurrencies for use in traditional electronic payments. Mastercard has also revealed a new suite of crypto offerings, most recently it's so-called Multi Token Network. In August, PayPal launched its own stablecoin in partnership with Paxos in a push into crypto payments.

These recent crypto plays by payment industry giants show that faster payments remains a strong use case for cryptocurrency and blockchain. As Philip Fayer, Chair and CEO of Nuvei said:

> *Stablecoins like USDC are cutting edge payments technology that can enable online businesses around the world to accelerate their growth…Optimizing cross-border transactions is only one use case where stablecoins can benefit businesses.*