



## WHITE PAPER

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### Product Liability in Australia

Australia's product liability regime is a combination of provisions contained primarily in the Australian Consumer Law (Schedule 2 to the *Competition and Consumer Act 2010* (Cth)). These provisions apply to Australian made products as well as foreign made goods that are imported into Australia for sale.

The regime contains the novel prohibition on misleading or deceptive conduct in addition to prohibitions on various forms of misrepresentation, provides a range of consumer guarantees, and imposes liability on manufacturers and importers for goods with safety defects. The regime embraces both public and private enforcement. The regulator, the Australian Competition and Consumer Commission, is given extensive powers. Moreover some provisions are the subject of civil penalties. Further, substantial class actions have increasingly involved actions for breaches of the consumer guarantees and for products with safety defects, with claims being brought in relation to a wide array of products and incidents.

Manufacturers and retailers need to ensure that adherence to Australia's product liability regime is part of their compliance and risk management procedures.

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## BACKGROUND

The Australian Consumer Law (“ACL”) is the principal consumer protection legislation in Australia and provides consumer rights whilst also imposing obligations on businesses. It is contained in Schedule 2 of the *Competition and Consumer Act 2010 (Cth) (CCA)*.

Before 1 January 2011, Australia’s consumer policy framework comprised a range of Commonwealth, state and territory laws, including the previous *Trade Practices Act 1974 (Cth) (“TPA”)*.

From 1 January 2011, the ACL replaced the consumer protection provisions in the TPA (which was renamed the CCA), establishing a new regulatory environment for consumer protection laws in Australia. The ACL is replicated as a law of each state and territory, making its application universal across Australia<sup>1</sup>.

The ACL does not cover goods and services purchased before 1 January 2011. These consumers will have recourse to the *Trade Practices Act 1974* and relevant state and territory legislation in force at the time of purchase.

| Structure of the ACL |  |
|----------------------|--|
| Chapter 1            | Outlines how the ACL applies, and provides a set of definitions and explanations about consumer law concepts, including a definition of “consumer”. As outlined below, the definition of a “consumer” will broaden significantly from July 2021.   |
| Chapter 2            | Provides a range of general protections, which create standards of business conduct across all industries, including prohibitions against: misleading or deceptive conduct; <sup>2</sup> unconscionable conduct; and provisions that make unfair contract terms in consumer contracts void.  |
| Chapter 3            | Complements the protections in Chapter 2 by offering specific protections which address identified forms of business conduct such as: unfair practices in trade or commerce; making false or misleading representations; providing unsolicited supplies; and multiple pricing.<br><br>Addresses product recalls that are discussed in a separate <a href="#">Jones Day White Paper</a> . The chapter also sets out the statutory rules for dealing with the liability of manufacturers for goods with safety defects and rights in relation to purchasing goods or services (including consumer guarantees). |
| Chapter 4            | Outlines the offences that apply to breaches of the matters covered in Chapter 3.  |
| Chapter 5            | Outlines the enforcement powers, penalties, and remedies that are available under the ACL.   |
| Chapter 6            | Regulations made under the ACL are set out in Parts 6 and 7 of the <i>Competition and Consumer Regulations 2010</i> . These give practical effect to implementing certain ACL provisions, for example, they: provide that certain agreements are not unsolicited consumer agreements; set out the reporting requirements for goods or product-related services associated with death, serious injury or serious illness; and set out requirements for warranties against defects.  |

One of the key concepts of the ACL is the protections afforded to “consumers”.

As it stands, under the ACL, a person is a consumer if they:

- “Acquire” goods or services<sup>3</sup>; and
- The “price” of the goods or services is less than the prescribed amount, being \$40,000<sup>4</sup>; or, if the price exceeds that prescribed amount, the goods are ordinarily acquired for personal, domestic, or household use or consumption.

However, from 1 July 2021, the prescribed amount will more than double, increasing from \$40,000 to \$100,000 under the

Federal Government’s *Treasury Laws Amendment (Acquisition as Consumer - Financial Thresholds) Regulations 2020*.

The amendment to the definition will impose greater obligations on businesses that manufacture or supply goods or services that cost up to \$100,000.

## MISLEADING REPRESENTATIONS OR CONDUCT (ACL CHAPTERS 2 AND 3)

As outlined above, Chapter 2 of the ACL establishes the general standards of business conduct. The general consumer protection provisions of the ACL prohibit misleading or

deceptive conduct, unconscionable conduct, and unfair terms in standard form consumer contracts (“General Protections”). There are also specific protections against certain defined “unfair” practices, including particular instances of misleading or deceptive conduct, pyramid selling, unsolicited supplies of goods and services, component pricing, and the provision of bills and receipts (“Specific Protections”).

Perhaps the broadest of the General Protections is the prohibition on misleading or deceptive conduct, which has been included in Australian Consumer law since 1974. This prohibition is contained in section 18 of the ACL. The provision states:

*(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*

The prohibition is comprehensive, in that:

- It establishes a norm of conduct, making it illegal for businesses to engage in conduct that misleads or deceives, including conduct that is *likely* to mislead or deceive;
- It applies even if the party did not *intend* to mislead or deceive anyone or no one has suffered any loss or damage as a result of the conduct;
- It is not necessary to prove the conduct was misleading *and* deceptive;
- A person can contravene section 18 by either act or omission. The Court, in the case of *Cash Bazaar Pty Ltd v RAA Consults Pty Ltd (No 2)* (2020) 381 ALR 668, adopted the

statutory definition of conduct, which states that “a *reference to engaging in conduct is a reference to doing or refusing to do any act*”<sup>5</sup>. This includes refraining (otherwise than inadvertently) from doing an act<sup>6</sup>.

- Representations made with respect to any future matter (including the doing of, or refusing to do, any act) are taken to be misleading for the purposes of the ACL if the person making the representation does not have reasonable grounds for doing so; and
- It applies to all aspects of “*trade or commerce*” and is not therefore limited to consumer protection. Indeed competitors have utilised the provision.

Similar to section 18 is the prohibition on making false or misleading representations contained in section 29.

The section provides that specific types of representations (including those that relate to the price, quality, or place of origin of the goods, or the availability of statutory warranties) will contravene the ACL when made in connection with the promotion or supply of goods or services.

Contraventions of this section are particularly serious as, in addition to damages and injunctions, Courts may impose large pecuniary penalties. The maximum amounts for these penalties are contained in the table below:

| FOR CORPORATIONS           |   |   |
|----------------------------|---|---|
| The greater of             |   |   |
| \$10 million. <sup>7</sup> | If the court can determine the value of the benefit obtained from the offence by the corporation (and any related bodies corporate)—three times the value of the benefit. | If the court cannot determine the value of the benefit—10% of the annual turnover of the corporation. |
| FOR INDIVIDUALS            |   |   |
| \$500,000. <sup>8</sup>    |   |   |

Proof of misleading or deceptive conduct, or false or misleading representations may also be relevant in determining whether there has been a breach of a statutory warranty (explained further below), and/or whether a product is defective under other provisions of the ACL.

## CONSUMER GUARANTEES (ACL CHAPTER 3)

As outlined above, Chapter 3 of the ACL includes consumer guarantees<sup>9</sup>, which give consumers a statutory basis for seeking remedies.

Under the old regime, certain conditions and warranties were “implied” into contracts for the supply of goods to consumers. However, since 1 January 2011, the ACL has provided guarantees that certain specified rights or other circumstances exist. The guarantees exist independently of contract law such that they cannot be restricted, limited, excluded, or modified in a contract<sup>10</sup>. It is also not possible to avoid providing consumer guarantees by agreeing that the law of another country applies<sup>11</sup>. Further, if a business gives consumers any other warranty, those warranties do not affect the guarantees conferred by the ACL.

The ACL provides guarantees (in addition to any manufacturer’s voluntary guarantees or warranties), including that:

- Goods must be of acceptable quality;
- Goods must match descriptions made by the salesperson;
- Goods and services must be fit for their purpose;
- Goods must have spare parts and repair facilities available for a reasonable time after purchase, unless the consumers are informed otherwise;
- Services must be provided with acceptable care and skill or technical knowledge; and
- Services must be delivered within a reasonable time where there is no agreed end date.

## Remedies for Consumers

Part 5-4 of the ACL provides consumers with a suite of specific remedies for breaches of consumer guarantees.

The remedy that will be available to a consumer depends on a number of variables, including the significance of the failure to comply with the guarantee and whether the consumer elects to obtain compensation from the supplier or manufacturer.

If the failure to comply with a guarantee is not a major failure, then suppliers may remedy the failure by providing the consumer with a repair, replacement or refund (note that the supplier elects which remedy is provided).

If the failure is a major failure, the failure to comply cannot be remedied, or the supplier fails to provide a remedy within a reasonable time, a consumer may either:

- Reject the goods and elect to receive a replacement or refund from the supplier or in relation to services, terminate the contract for supply; or
- Recover compensation from the supplier for any reduction on the value of the goods or services below the price paid by the consumer.

In addition to these options, consumers may recover damages from, or seek an injunction against, the supplier in relation to the failure.

Consumers may elect to recover damages from the manufacturer of the goods (as opposed to the supplier) if the goods fail to comply with one or more of the following guarantees:

- Guarantee as to acceptable quality;
- Guarantee that goods will correspond with their description;
- Guarantee as to the availability of spare parts and repair facilities; or
- Guarantee as to express warranties.

## ACCC Enforcement Action

In response to a sharp increase in consumer complaints, consumer guarantees have increasingly become a focus for the Australian Competition and Consumer Commission (“ACCC”). In its 2019-2020 report, the ACCC identified that it had received 37,606 contacts, enquiries or complaints in relation to consumer guarantees. This is an increase from 35,846 contacts, enquiries, or complaints between 2018-2019. Industries most likely to face ACCC scrutiny are automotive, whitegoods, and electronics.<sup>12</sup>

There are many enforcement measures for breaches of the consumer guarantee rules, including pecuniary penalties, infringement notices, and injunctions.

Businesses should be aware that there is a significant risk of litigation if they breach the consumer guarantees regime in the ACL, especially due to the ACCC’s consistent reference to the regime in its statements, publications, and actions.

Where the ACCC takes action against suppliers or manufacturers for a failure to comply with the statutory guarantees, it is often combined with an action for contravention of section 29(1)(m) of the ACL, which prohibits false or misleading representations regarding the existence, exclusion, or effect of the statutory guarantees. This combination allows the ACCC to access the larger pecuniary penalties that accompany contraventions of section 29(1)(m), which are discussed above. The application of the strategy is demonstrated in the below cases.

### Valve v ACCC

Valve, an American video games developer and one of the world’s largest online gaming companies, runs an online game network called “Steam”, which has many subscribers in Australia.

In 2016, the Federal Court affirmed that consumer guarantees applied even though the proper law of the contract with subscribers was the law of Washington State. Nothing in the conflict of laws provision<sup>13</sup> supported the inference that consumer guarantees would only apply where the objective proper law of a contract of supply was Australian law.

Valve’s “no refunds” representations were misleading because consumers would have a right to be refunded if goods were not of “acceptable quality”<sup>14</sup>. The court rejected Valve’s

argument that the representations were not made in Australia as the representations were “*in substance*” made at the place where consumers accessed and read the contract or refund policy on their computers. It was held, even if this were not the case, the relevant provisions of the ACL would apply to Valve as a corporation carrying on business in Australia.

The Federal Court held Valve had breached s 18(1) and 29(1)(m) of the ACL and awarded a publication order, injunction, and pecuniary penalty of \$3 million<sup>15</sup>.

Valve appealed the findings and on 22 December 2017, the Full Federal Court dismissed Valve’s appeal on jurisdiction and the ACCC’s cross appeal on penalty.<sup>16</sup> In April 2018, the High Court of Australia dismissed Valve’s special leave application to appeal from the decision of the Full Federal Court.<sup>17</sup>

### Singtel Optus Pty Ltd v ACCC

The Full Court of the Federal Court ordered Optus Pty Ltd to pay \$3.61m for allegedly advertising the fees for its “off peak” broadband internet plans in a misleading manner. (*Singtel Optus Pty Ltd v ACCC*<sup>18</sup>).

### ACCC v Sony

The Federal Court recently ordered that Sony Interactive Entertainment Network Europe Limited pay \$3.5m in pecuniary penalties for misleading consumers as to their rights under the ACL.<sup>19</sup> This was a result of statements made to consumers via email, its support call centre staff, and the terms of service for accessing the PlayStation Network, that:

The consumer guarantees did not apply to purchased digital games; and

refunds were not available for purchased digital games or could only be obtained in specific circumstances (such as if the customer obtained authorisation for the refund from the game publisher or developer).

## MANUFACTURERS’ LIABILITY FOR GOODS WITH SAFETY DEFECTS (CHAPTER 3)

Part 3-5 of the ACL deals with manufacturers’ liability in respect of goods with safety defects that were supplied in trade or commerce. It provides a regime for compensation of persons

who have been injured or had their property damaged as a result of those safety defects and offers an alternative avenue for relief outside the general law (i.e. negligence, breach of contract or breach of statutory warranty as discussed below).

### Who May Seek Compensation?

A plaintiff seeking relief under Part 3-5 of the ACL must be an individual who, as a result of a defective product, has either:

- Suffered injury or death;<sup>20</sup>
- Suffered loss due to the injury or death of another (except where the loss eventuated by reason of a business or professional relationship);<sup>21</sup>
- Suffered loss due to the damage or destruction by the defective product of:
  - a. Another product (of the kind ordinarily acquired for personal, domestic, or household use) that the individual used or intended for personal, domestic, or household use or consumption;<sup>22</sup> or
  - b. Land, building or fixtures (of the kind ordinarily acquired for private use) that the individual used or intended to use for private use.<sup>23</sup>

It is not a prerequisite to seeking compensation pursuant to Part 3-5 of the ACL that the plaintiff purchase the defective product directly from the manufacturer or even be a “consumer” (as is the case for actions under the consumer guarantees provisions discussed above).

The plaintiff must prove the link between the safety defect and the loss or damage.

### Gill v Ethicon Sàrl

The case of *Gill v Ethicon Sàrl (No 5)* [2019] FCA 1905 contains a detailed analysis of the product liability regime in Australia.

The proceeding was a representative action in relation to nine medical devices that were designed to be surgically implanted in women. The devices were promoted as, amongst other things, restoring normal anatomy and having high patient

satisfaction. The respondents did not disclose, or minimized that there were a number of potential complications that could occur with use of the device.

The lead applicants alleged that Ethicon’s actions contravened various provisions of the *Trade Practices Act 1974* (Cth) and *Competition and Consumer Act 2010* (Cth), including in relation to manufacturer liability for the goods being supplied with a safety defect.

In considering whether the applicants’ injuries were suffered because of the defects with the products, the Court found that whether an applicant is entitled to compensation depends on the characterisation of the defect:

*“Where a medical device, when used as intended, exposes consumers to a risk of significant harm, then the device will have a defect unless it is accompanied by warnings sufficient to alert patients to that risk. In such a case, the defect is not the absence or inadequacy of the warnings ... but the fact that the device has a propensity to cause harm that persons would not reasonably expect.*

...

*“The causal connection required ... is a connection between the relevant safety risk posed by the product and the injuries suffered by the user or consumer. In other words an applicant must prove that the risk came home. If she does so, she is entitled to damages unless the respondents can make out a statutory defence or the claim is statute-barred.”*

Ultimately in *Gill* there was a finding that all nine of the products had a safety defect, that the applicants were injured because of the safety defect and that the applicants were therefore entitled to compensation. In April 2021, these findings were approved by the Full Court of the Federal Court following an appeal by the manufacturer parties.

Further findings from *Gill* are discussed in the section below.

### Who is Liable?

A manufacturer of defective goods is liable where the goods were supplied in trade or commerce. “Manufacturer” may include persons (including companies) that:

- Grow, extract, produce, process, or assemble the goods;
- Promote or hold themselves out to be the manufacturer of the goods (or permits another person to do so);
- Use their own business or brand name in relation to the goods;
- Import goods into Australia (if they are not the manufacturer and the actual manufacturer does not have a place of business in Australia).

Supply for the purposes of the ACL is unlikely to include situations where a product, such as a waste product, has been accidentally or deliberately discharged or, in the case of other products, stolen or discarded deliberately. Supply is also unlikely to include assembly of a product on behalf of another person where title was never acquired or where a person supplied a product to another person for the purpose of testing.

However, a supplier may be deemed to be a manufacturer in circumstances where the identity of the manufacturer is not known by the plaintiff (and particulars are requested by the plaintiff but not provided within 30 days)<sup>24</sup>. Accordingly, letters requesting manufacturer details under section 147 of the ACL should not be ignored.

### Examples

Repackaging and labelling products are considered to be “processing or assembling” for the purposes of the ACL: *Glendale Chemical Products Ltd v ACCC* (1998) 90 FCR 40.

Service providers such as restaurants which produce or assemble food for customers may be considered as manufacturers within the meaning of the ACL: see *Samaan bht Samaan v Kentucky Fried Chicken Pty Ltd* [2012] NSWSC 381.

### What Limitation Periods Apply?

There are two relevant limitation periods that apply to claims made under part 3-5 of the ACL.

The first is that a claim must be made within 10 years from the date of supply by the *manufacturer*. This date is generally taken to be the date that the goods were supplied to the market by the manufacturer, and may not necessarily be the same date that the complainant was supplied with the goods.

The second is that within that 10-year period, a claim must be commenced within three years of when a person became aware (or ought to have become aware) of the safety defect and the identity of the manufacturer.

### What are “Goods”?

Section 2 of the ACL defines “goods” broadly. “Goods” include, and are specifically not confined to, ships, aircraft, and other vehicles, animals and fish, minerals, trees and crops, gas and electricity, computer software, second-hand goods and any component part of, or accessory to, goods.

### Current Issues

Whilst gas and electricity are specifically included in the definition of “goods” in s 2 of the ACL, water is not. This is in contrast to the definition of “goods” in s 95A(1) of the *CCA 2010* (Cth) which specifically names water, electricity and gas as “goods” in the context of providing for the surveillance of markets for efficient pricing and consumer protection. It is likely that, if tested, water would also be considered as falling under the broad definition of “goods” in s 2 of the ACL for the same reasons that electricity came to be considered as such. In *AGL Victoria Pty Ltd v Lockwood* (2003) 10 VR 596, it was found that electricity met the description of “goods” as it was tangible and deliverable personal property.

It is not clear whether human blood or tissue are “goods” within the definition in s 2 of the ACL. The question of whether blood plasma may be considered “goods” was left open in *E v Australian Red Cross Society* (1991) 31 FCR 299, which considered it in the context of the now superseded s 74 of the TPA. Wilcox J noted however that there would be no more reason to deny reusable human tissue the description than to deny it to leather intended for shoes.

### What is a Safety Defect?

Goods have a safety defect if they do not provide the level of safety that persons are generally entitled to expect.<sup>25</sup> This is known as the “community expectations of safety” test—an objective test that considers the knowledge and expectations of the community (rather than the subjective knowledge and expectations of an injured party)—and is encapsulated in s 9(2) of the ACL.

The level of safety that persons are generally entitled to expect is informed by all relevant circumstances, including:

1. The manner and purposes for which the goods have been marketed;
2. The packaging of the goods including any marks, instructions and warnings;
3. The use to which the goods are reasonably expected to be put;
4. The time at which the goods were supplied.<sup>26</sup>

The effect of the above is that if a manufacturer “gives appropriate warnings about [the] risks associated with a product, defines appropriate limitations on the indications for use, and does not promise more in terms of safety than the product can deliver” the good may not have a defect.<sup>27</sup>

It is also worth noting that a product may be defective, even if the defect does not eventuate in every product. In these circumstances, the chance of the risk occurring will be weighed against the consequences if that risk were to arise. For example, where there was only a 0.5% risk of myocardial infarction occurring due to the use of a pharmaceutical, but the potential consequence of that risk arising was death, the product failed to pass the objective safety standard.

The relevant time for assessing whether a good has a safety defect is the time when the goods were supplied by the manufacturer. Where goods are not directly supplied to a consumer by a manufacturer, or there is an intermediary between the manufacturer and the consumer, a level of ambiguity exists as to the appropriate time at which the goods should be assessed.

For example, in *Gill v Ethicon Sàrl* (No 5)<sup>28</sup>, Ethicon Sarl and Ethicon Inc manufactured and supplied medical products to an Australian company. This company then promoted and supplied the goods to Australian hospitals and doctors, who would then implant the products into the applicants, the Court considered which of the following situations constituted the time of supply:

- The time when the manufacturer supplied the goods to the Australian company;
- The time when the goods were supplied to the hospitals or surgeons; or

- The time when the goods were supplied to the applicant.

Ultimately, the conclusion was that the time of supply refers to the time when goods are put into circulation by the manufacturer, i.e., the second of the above options.<sup>29</sup>

An inference that goods have a safety defect is not to be made only because after goods were supplied by a manufacturer safer goods of the same kind were supplied.<sup>30</sup>

Finally, a finding that particular products have a safety defect does not in itself signify that the product should never have been on the market or that it should be removed from the market.<sup>31</sup>

### Examples

In *Glendale Chemical Products Pty Ltd v ACCC* (1998) 90 FCR 40, a manufacturer of caustic soda was found liable to compensate an injured consumer because the product was “defective” under the community expectations of safety test. A consumer purchased the caustic soda to clear a blockage in a drain and used it in conjunction with boiling water causing a volatile reaction in a confined space. The labelling included that the product was potentially dangerous and stated the product’s recommended use but it did not note the product’s volatility with boiling water. The court found that the product was defective because it was reasonable to expect that a consumer would pour hot water down a drain to remove a blockage and adequate instructions to assist the consumer to avoid the hazard were not provided.

The Explanatory Memorandum to the *Trade Practices Amendment Act 1992* cited community expectations of safety as being dependent on the nature and knowledge of the product. An example given was that it is generally known that there are some negative side effects from pharmaceutical products and vaccines but because substantial benefits flow on to the wider community, a small statistical chance of injury does not necessarily mean that those products are defective.

### Defences and Exclusions

Part 3-5 of the ACL prescribes four absolute defences to a manufacturer’s liability. These being that:

1. The safety defect did not exist at the time the goods were supplied;

2. The safety defect only existed because there was compliance with a mandatory standard;
3. The scientific or technical knowledge at the time of supply meant that the defect was not discovered; or
4. The safety defect in a component part of the goods is attributable to the manufacturer of the finished or assembled product.<sup>32</sup>

The ACL also excludes actions for defective goods actions where the loss or damage suffered has, or could be, recovered under the workers' compensation regime or laws which give effect to an international agreement.<sup>33</sup>

## ACCC NOTICES FOR INVESTIGATION AND ENFORCEMENT

The ACCC is an independent Commonwealth statutory authority whose role is to enforce the CCA. The ACCC can investigate alleged breaches of the CCA and where necessary, take legal action against businesses that break the law.

### Infringement Notices

Where the ACCC has reasonable grounds to believe a person has breached the unconscionable conduct, unfair practices, product safety, product information, or substantiation notice provisions contained in the ACL, it can issue an infringement notice.

These notices are designed to provide timely, cost-efficient enforcement outcomes and may be issued where:

- There are relatively minor contraventions of the CCA;
- There are low levels of consumer harm or detriment;
- There have been isolated or non-systemic instances of non-compliance;
- The parties are not in dispute as to the facts;
- The ACCC considers that the facts giving rise to the allegations are not controversial; or

- Issuance of the notice forms part of a broader compliance program as a result of the ACCC raising concerns about industry conduct.<sup>34,35</sup>

The penalty amount in each infringement notice will vary, depending on the alleged contravention, but in most cases is currently fixed, for each alleged contravention, at:

- \$13,320 for a corporation; or \$133,200 for a listed corporation; and
- \$2,664 for an individual.

### Substantiation Notices

A substantiation notice requires the provision of information and/or documents that substantiate a claim or representation, including particular information and/or documents as specified.

Persons who fail to comply with the requirements of the ACL in relation to substantiation notices risk the imposition of civil penalties.

If a substantiation notice is not complied with (including if a response is not provided within the required timeframe), the maximum penalties currently are:

- \$16,500 for a corporation; and
- \$3,300 for an individual.

Additionally, if false or misleading information is given or produced to the ACCC in purported compliance with a substantiation notice, larger maximum penalties apply. These currently being:

- \$27,500 for a corporation; and
- \$5,500 for an individual.

### Section 155 Notices

Section 155 of the CCA confers powers on the ACCC to obtain information, documents, and evidence, including through oral examinations, in relation to matters that constitute or may constitute a contravention of the CCA.

Receiving a section 155 notice does not necessarily mean that a company or individual is under investigation. Third parties capable of assisting the ACCC with investigations may also receive section 155 notices.

If a section 155 notice is received, as with the other types of notices compliance is important and penalties can be imposed for non-compliance with the notice.

Currently these penalties are:

- A fine of up to \$22,200 or 2 years imprisonment for individuals; or
- A fine of up to \$111,000 for companies.

### **Criminal Code**

Finally, care should be taken to ensure that information given to the ACCC in compliance with any of these notice provisions is accurate.

The *Criminal Code Act 1995* (Cth) provides that it is an offence to knowingly provide information to the ACCC if that information:

- Is false or misleading; or
- Omits any matter or thing without which the information is misleading.

The consequence of committing this offence is imprisonment for 12 months (if the offender is an individual) or a fine up to \$13,320 (if the offender is a company).

## **THE GENERAL LAW (TORT AND CONTRACT)**

In addition to statutory protections afforded by the ACL, Australian consumers may also rely on the common law to seek damages under principles of contract, negligence, and misrepresentation, following loss or damage from a defective product.

The stage for the development of consumer protection was set with the famous House of Lords decision *Donoghue vs. Stevenson* [1932] AC 562, in which a bottle of ginger beer contained the decomposed remains of a snail. As was the case in this instance, to make out the tort of negligence at common

law, the plaintiff must establish a duty of care was owed to it (by the manufacturer or supplier) and that that duty was breached, (by failing to perform according to the requisite standard of care), and that breach caused loss or damage.

There may also be remedies for breach of contract for consumers who are able to establish the existence and breach of a contract with a supplier/manufacturer.

## **CLASS ACTIONS**

Class actions have existed in Australia since the enactment of the *Federal Court of Australia Amendment Act 1991* (Cth), which provided for 'representative proceedings' through inserting Pt IVA into the *Federal Court of Australia Act 1976* (Cth) ("Federal Court Act"). Part IVA commenced on 4 March 1992. Similar class action regimes exist in a number of the Australian states.

The requirements to commence a class action in the Federal Court are that:

- Seven or more persons have claims against the same person; and
- The claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
- The claims of all those persons give rise to a substantial common issue of law or fact;
- A proceeding may be commenced by one or more of those persons as representing some or all of them.

These requirements are not demanding. Unlike in the United States there is no certification requirement whereby a court must approve the commencement of the class action, nor is there a need for common issues to predominate over individual issues. As a result, product liability claims that may not be able to proceed as a class action in the United States are brought as class actions in Australia.

Claims have been brought in relation to a wide array of products and incidents, including medical devices (e.g., pacemakers, hip and knee implants), pharmaceutical products (such as diet drugs and anti-inflammatory drugs), food and drink, consumer

goods such as cars, agricultural products and disaster incidents such as gas explosions, floods and bushfires.

Empirical studies of the Australian class action regime have found that from 1 June 1992, to 31 May 2017, 70 product liability class actions had been filed (60 in the Federal Court and 10 in state courts), which was 13.6% of all class actions and the third highest type of claim, behind investor and shareholder claims.<sup>36</sup> The studies have also found that 58% of product liability claims settle but that their average duration is the longest of all settled class actions at 1,149 days.<sup>37</sup>

### Example

In *Erin Downie v Spiral Foods Pty Ltd* [2015] VSC 190, the plaintiff brought a class action on behalf of 496 persons who alleged that they suffered injury and loss from consuming Bonsoy soy milk with high levels of iodine.

The claims were founded in negligence and under the predecessor provisions of the CCA that equated with Part 3-2 of the ACL (fitness for purpose, merchantable quality) and Part 3-5 of the ACL (defective goods).

Ms Downie sued:

- The first defendant, Spiral Foods Pty Ltd (Spiral), on the basis that it owned the Bonsoy brand and distributed it in this country;
- The second defendant, Muso Co Ltd (Muso), on the basis that it packaged and exported Bonsoy from Japan to Spiral; and
- The third defendant, Marusan-Ai Co Ltd (Marusan), on the basis that it manufactured Bonsoy.

The claims of the group members as to Bonsoy consumption and the alleged effects upon them were described as 'broad and disparate and relate to different iodine-related thyroid conditions', there was also a 'wide variability within the group in respect of the severity and nature of the conditions suffered, and the compensable loss said to have been sustained'.

The claim against all defendants was settled for \$25 million, inclusive of costs of the proceeding and the administration of the settlement. Group members eligible for compensation under the terms of the settlement administration were expected to recover 60% to 70% of their assessed claim value.

## LAWYER CONTACTS

### John Emmerig

Sydney

+61.2.8272.0506

[jemmerig@jonesday.com](mailto:jemmerig@jonesday.com)

### Annie Leeks

Brisbane

+61.7.3085.7023

[aleeks@jonesday.com](mailto:aleeks@jonesday.com)

### Michael Legg

Sydney

+61.2.8272.0720

[mlegg@jonesday.com](mailto:mlegg@jonesday.com)

### Daniel Moloney

Melbourne

+61.3.9101.6828

[dmoloney@jonesday.com](mailto:dmoloney@jonesday.com)

### Holly Sara

Sydney

+61.2.8272.0549

[hsara@jonesday.com](mailto:hsara@jonesday.com)

### Lucas Wilk

Perth

+61.8.6214.5737

[lwilk@jonesday.com](mailto:lwilk@jonesday.com)

*Greta M. Gingell Tulley, an associate in the Sydney Office, assisted in the preparation of this White Paper.*

## ENDNOTES

- 1 An Intergovernmental Agreement for the Australian Consumer Law was signed on 2 July 2009. The parties to the agreement included the Commonwealth of Australia and all the states and territories.
- 2 ACL s 18.
- 3 A person is generally not a consumer if they acquire goods for re-supply or to be used up or transforming them in a production or manufacture process, or of repairing or treating other goods or fixture on land.
- 4 Or, if the price exceeds the prescribed amount, the goods can also be a vehicle or trailer acquired for use principally in the transport of goods on public roads, or goods of a kind ordinarily acquired for personal, domestic, or household use or consumption.
- 5 CCA, Sch 2 s 2(2)(b).
- 6 Above, Sch 2 s 2(2)(c).
- 7 An increase from \$1.1 million prior to August 2018.
- 8 An increase from \$220,000 prior to August 2018.
- 9 ACL Part 3-2.
- 10 ACL s 64.
- 11 ACL s 67. Note also ACL s 276, which makes a term of a contract void to the extent that it attempts to modify or exclude a remedy for breach of a consumer guarantee.
- 12 See the ACCC's [2019-2020 annual report](#).
- 13 ACL s 67.
- 14 ACL s 54.
- 15 *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196.
- 16 *Valve Corporation v Australian Competition and Consumer Commission* [2017] FCAFC 224.
- 17 *Valve Corporation v ACCC* [2018] HCASL 99.
- 18 (2012) 287 ALR 249.
- 19 *ACCC v Sony Interactive Entertainment Network Europe Limited* [2020] FCA 787.
- 20 ACL s 138.
- 21 ACL s 139.
- 22 ACL s 140.
- 23 ACL s 141.
- 24 ACL s 147.
- 25 ACL s 9(1).
- 26 ACL s 9(2).
- 27 *Gill v Ethicon Sàrl (No 5)* [2019] FCA 1905 [3172].
- 28 [2019] FCA 1905.
- 29 *Gill v Ethicon Sàrl (No 5)* [2019] FCA 1905 [3169].
- 30 ACL s 9(3).
- 31 *Gill v Ethicon Sàrl (No 5)* [2019] FCA 1905 [3196].
- 32 ACL s 142.
- 33 ACL s 146.
- 34 See ACCC, "[Infringement Notices: Guidelines on the use of infringement notices by the Australian Competition and Consumer Commission](#)," July 2020.
- 35 To be valid, the ACCC must issue an infringement notice within 12 months of the alleged contravention and the notice cannot relate to more than one alleged contravention of an infringement notice provision.
- 36 Vince Morabito, *An Empirical Study of Australia's Class Action Regimes—Fifth Report* (July 2017) 27.
- 37 *Ibid*, 30.

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