When TOO MUCH is NEVER ENOUGH

The notification requirement of the ACL

By Madeleine Kearney and Larissa Cook

While the Australian Consumer Law's new injury reporting requirement may have superficial appeal in terms of providing the Australian Competition and Consumer Commission (ACCC) with a new tool to monitor product safety, will it really benefit consumers? The notification requirement means that a large number of trivial incidents are required to be reported, while a wide variety of more potentially serious product hazards are excluded from its scope. In other words, the effect may simply be to divert scarce regulator resources while achieving little in terms of improved product safety.

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The Australian Consumer Law (ACL) introduces a notification requirement in respect of consumer goods which have caused (or may have caused) death or serious injury/illness. Previously, the only general reporting requirement (other than those existing, for example, under occupational health and safety laws or in respect of specific products such as therapeutic goods) was a requirement to notify product recalls.

This is a watershed moment in Australia's product safety regulatory scheme, and represents a shift away from a system where product safety incidents were largely investigated and managed by suppliers, to one with greater involvement by the Australian Competition and Consumer Commission (ACCC).

Other reforms – including a new power to issue substantiation notices, and enhanced enforcement and remedies provisions – also point to a more interventionist ACCC.

OVERVIEW OF THE REFORMS

Aside from harmonisation of existing consumer laws, the most significant change introduced is a requirement for supplier notification where a consumer product has caused (or may have caused) a serious injury, illness or death. It is notable that this reporting requirement differs significantly from reporting requirements internationally.

Other reforms that are of relevance to the supply of consumer goods include:

- 'best practice' reforms, drawing upon existing consumer protection provisions in individual states and territories;
- a new power for the ACCC to issue 'substantiation notices';
- the replacement of the existing regime of statutory warranties with consumer guarantees, including a guarantee of 'acceptable quality'; and
- enhanced enforcement and remedies provisions.

This article focuses on the reporting requirement, with a brief discussion of substantiation notices and the enforcement and remedies provisions.

REQUIREMENT TO NOTIFY

The ACL includes a requirement that suppliers of consumer goods give notice to the Commonwealth minister where the supplier 'considers that the death or serious injury or illness was caused, or may have been caused, by the use or foreseeable misuse of the consumer good' (s131). A similar requirement has been introduced in relation to the suppliers of product-related services (s132).

Notification must be made within two days of the supplier becoming aware of the injury, illness or death – a requirement which even the most sophisticated supplier will be hard pressed to meet. The practical impact of this is that there may be insufficient time to investigate adequately consumer reports with the result that even those suspected of being dubious will need to be reported.

The reporting obligation attaches to all participants in the supply chain who become aware of the injury, illness or death – including retailers, distributors, importers and manufacturers. As a result, a number of entities may be under an obligation to report the same injury, which could lead to multiple reporting and consequent confusion, or at least, an administrative overburden.

WHAT IS A SERIOUS ILLNESS OR INJURY?

The definition of 'serious injury or illness', contained in s2 of the ACL, is:

> 'an acute physical injury or illness that requires medical or surgical treatment by, or under the supervision of, a medical practitioner or a nurse (whether or not in a hospital, clinic or similar place), but does not include:
> (a) an ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development); or
> (b) the recurrence, or aggravation, of such an ailment, disorder, defect or morbid condition.'

The definition is ambiguous and raises a number of questions. For example, it refers to an injury or illness that 'requires' medical treatment. Does this mean an injury or illness that would normally justify medical treatment, or does it mean that the injured individual did in fact seek such treatment? Is diagnosis (such as an X-ray or a blood test) >>

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Previously, the only general reporting requirement (other than those existing, for example, under OH&S laws or in respect of specific products) was a requirement to notify product recalls.

'treatment' if the results of those tests are negative? The terms 'ailment, disorder, defect or morbid condition' are undefined.

EXCEPTIONS

Section 131(2)(c) and s132(2)(c) of the ACL provide that the notification requirements do not apply where the supplier or another person is required to notify the injury, illness or death under another law specified in the Competition and Consumer Regulations 2010 (Cth) (the Regulations) or under an industry code specified in the Regulations.

The list of exemptions can be found in cl 92 of the Regulations. They are:

- *Agricultural and Veterinary Chemicals Act* 1994 (Cth);
- *Therapeutic Goods Act* 1989 (Cth);
- state and territory coroners' Acts;
- Acts dealing with notifiable diseases (which is potentially relevant to food-borne illnesses); and
- road safety Acts.

No industry codes are currently specified.

The exclusion of adverse event reporting for therapeutic goods comes as no surprise. However, it is important to note that the exemption relates to the specific incident, and not the product or class of products, meaning that there is still the potential for twin-reporting requirements. The upshot is that if an incident is not required to be reported to the Therapeutic Goods Administration (for example, adverse events occurring overseas), a reporting obligation may still exist under the ACL if the triggers are otherwise met.

In addition, the exemption relating to notifiable diseases is unlikely to be significant unless the consumer has already tested positive at the time of making the report. This is because the two-day reporting period under the ACL will be insufficient time to confirm the source of general symptoms that could be associated with a notifiable disease (such as vomiting and diarrhoea).

PROBLEMS

In our view, there are a number of problems with the way the reporting requirement has been drafted.

- Although the ACL specifically provides that reporting is not an admission of any *liability* (s131(6)), there is no statutory reason why the report could not be construed as an admission of *fact*. As such, great care will be needed in drafting notifications to avoid admissions that products caused death, serious injury or illness as a result of use (presumably intended use) or foreseeable misuse which otherwise could have consequences in product liability litigation if improperly drafted.
- The definition of 'serious injury or illness' is not clear. For example, choking would normally be thought of as 'serious', on the basis that a choking incident can quickly lead to death. However, injuries that do not require treatment by a medical practitioner or nurse are not reportable – meaning that many choking incidents may not be captured by the requirements.
- Further the 'recurrence, or aggravation' of a pre-existing 'ailment, disorder, defect or morbid condition' are excluded. Could this include an allergic reaction? The definition is also limited to 'acute' injuries – meaning that it does not include injuries or illnesses of gradual onset, such as asbestosis (except in the case of death).
- The reporting requirement is triggered where the injury or illness or death was caused (or may have been caused) by the 'use' or 'foreseeable misuse' of the consumer good. We note that the legislation does not use the words 'normal use', raising the issue of whether all uses of a product, including unforeseeable misuses, are triggered by the reporting requirement.
- Treatment by some categories of health professionals – notably pharmacists, paramedics (unless a registered nurse), optometrists and physiotherapists – do not trigger a reporting requirement.

Further, the reporting obligation is less than comprehensive.

- A serious safety defect is not sufficient in itself to trigger the reporting requirement. Property damage alone is not a trigger – for example, a series of fires caused by clothes dryers would not be reportable;
- There is no requirement that non-compliance with a mandatory standard be reported;
- There is no requirement under the ACL to report extortion or tampering; and
- Foreign recalls are not reportable (although foreign deaths, illnesses or injuries will be if they otherwise fulfil the reporting requirements).

SUBSTANTIATION NOTICES

Another reform that has been introduced is that the ACCC now has the power to issue a notice requiring a person to provide information or documents that could be capable of substantiating product claims within 21 days. A substantiation notice can be issued even where there is no reason to suspect that there has been a breach of the law, meaning that they can potentially be used for 'fishing expeditions'.

The practical effect of this reform is that it is now more important than ever for suppliers of goods to hold credible and complete material that substantiates product claims and is capable of being provided to the regulator on short notice. This is particularly important for suppliers who may be part of large, multi-national groups, where claims may

be developed by a foreign parent for use by the Australian subsidiary.

ENFORCEMENT/REMEDIES

The ACL also includes enhanced enforcement and remedies provisions. Notably these include:

- **the introduction of so-called 'civil pecuniary penalties'.** This means that the ACCC no longer needs to prove contraventions to the criminal standard – that is, beyond reasonable doubt – instead needing to prove contraventions only to the lower, civil standard of the balance of probabilities. Other than the burden of proof, there is no material difference between a civil pecuniary penalty and a fine. The penalties are substantial, up to $1.1 million for a corporation.
- **infringement notices.** While the maximum penalty that may be imposed is relatively low ($6,600 for corporations) the ACCC has adopted a practice of publishing details on its website where a person pays an infringement notice – which could be interpreted as an admission of guilt even where a person decides to pay a notice to avoid the costs associated with fighting it (which may well be higher). Multiple notices may also be issued in relation to substantially similar conduct; for example, an advertising campaign.
- **non-party redress orders.** This opens up the possibility of 'coupon' litigation where the damage suffered by each affected individual is low.

CONCLUSION

The implications for suppliers are obvious. As the reporting timeframe is extremely short, it is important for suppliers to review their internal reporting processes to ensure that these are adequate to deal with the new requirements.

Further, when a report is made, there is a real possibility that the incident will be investigated by the ACCC. Again, because of the short time allowed for reporting, this may occur before the supplier has had time to properly investigate the incident. One concern is that if a supplier is unable to reassure the ACCC that its product is safe, then the supplier may be pressured into taking recall or other remedial action – even if an investigation later demonstrates that this was premature. While some may take the view that it is better to err on the side of caution where product safety is at stake, forcing suppliers to undertake an unjustified recall may have unintended consequences, including that other suppliers may be more reluctant to conduct a recall where a non-reportable safety hazard exists because of the costs incurred in relation to unnecessary recalls.

It is crucial that suppliers ensure that any relevant test reports, such as those demonstrating compliance with mandatory standards, be readily available so that these can be provided to the ACCC swiftly. Suppliers should also ensure that they have adequate technical expertise (either internally or by developing relationships with external experts) to be able to conduct a thorough investigation quickly.

In addition, the notification requirement imposes a significant burden on business while excluding from its scope a wide variety of hazards. For example, if a clothes dryer catches on fire, this will not be reportable if the fire does not result in injury. On the other hand, if consumers use incorrect mounting fixtures to wall-mount a dryer and it falls on them, it will be reportable. Which is the greater hazard? Many trivial matters will be required to be reported, while other matters that suggest a serious safety hazard will not.

Substantial resources on the part of the ACCC will be required to monitor and investigate reports, potentially diverting resources from other areas such as enforcement or product surveys. Accordingly, it is questionable whether the requirement, as drafted, is the best way to advance the government's policy agenda or protect consumers from injury. ■

The authors gratefully acknowledge the assistance of David Smales, Paralegal of Clayton Utz, Sydney in the preparation of this article.

Madeleine Kearney *is a Senior Associate in Litigation & Dispute Resolution at Clayton Utz specialising in product risk issues.*
EMAIL *mkearney@claytonutz.com.*

Larissa Cook *is a Special Counsel in the Product Liability Group at Clayton Utz, Sydney.* **EMAIL** *lcook@claytonutz.com.*