BAKER & McKENZIE

Australian Consumer Law Review

Submission by Baker & McKenzie in response to Issues Paper March 2016

1. Introduction

1.1 Baker & McKenzie welcomes the opportunity to comment on the Australian Consumer Law Review Issues Paper (**Issues Paper**).

1.2 As a general comment, Baker & McKenzie supports there being a national consumer protection framework. Many businesses operate across Australia and there are significant compliance costs for businesses when there are differences in the laws applying across the different jurisdictions.

1.3 In this submission, we have not commented, or provided feedback on, a number of the current consumer law provisions or the issues or questions raised in the Issues Paper. We believe that a number of the consumer law provisions are already operating effectively and efficiently in practice. Rather, we have focussed, and provide feedback on those provisions which we believe would benefit from some form of revision or restructuring, either to bring about greater clarity and uniformity in their application, or which may require review or enhancement to meet new and emerging trends in the Australian consumer landscape.

1.4 The feedback we provide is based on our own experiences as practitioners interpreting and advising on the Australian Consumer Law (**ACL**), and the feedback and experiences of our clients.

2. Definition of consumer (2.1.2)

2.1 We consider that the multiplicity of definitions of consumer under the ACL is confusing and unhelpful. To illustrate:

(a) the consumer guarantees, unsolicited consumer agreements[1], lay-by sales agreements, itemised bills and linked credit contracts provisions apply to the supply of goods or services to a "consumer" as defined in section 3 of the ACL, i.e. where the goods are of a "kind ordinarily acquired for personal, domestic or household use or consumption", the amount paid did not exceed $40,000 or the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads. This definition relies on the nature or price of the goods, not the nature of the acquirer. The acquirer could be a business, including a large corporation;

(b) the unfair contract terms for consumer contracts apply to contracts for the supply of goods or services or a sale or grant of an interest in land to an individual whose acquisition is "wholly or predominantly for personal, domestic or household use or consumption". This focuses on the subjective intention of the individual purchaser;

(c) the component pricing prohibition in section 48 applies to the supply or promotion of goods or services "of a kind ordinarily acquired for personal, domestic or household

[1] Regulation 81 provides that a "business contract" is not an unsolicited consumer agreement (section 94 of the ACL provides that the regulations can limit application of Division). "Business contract" is defined as "*an agreement for the supply of goods or services not of a kind ordinarily acquired for personal, domestic or household use or consumption*".

use or consumption" (but does not apply where the representations are made exclusively to a body corporate). This focuses on the ordinary use of such goods, not the intended use by the acquirer; and

(d) the product safety provisions in the ACL apply to "consumer goods" with consumer goods are defined in section 2 of the ACL as goods that are "intended to be used, or are of a kind likely to be used, for personal, domestic or household use or consumption", which mixes several of these concepts.

2.2 While there are policy reasons for different provisions of the ACL having different fields of application, we consider that there is scope for simplifying the current provisions.

2.3 Importantly, the use of the term "consumer" in such different contexts is highly confusing and misleading to the lay reader.

3. Misleading or deceptive conduct (2.2.1)

3.1 We consider that the prohibition against misleading or deceptive conduct in section 18 of the ACL, as well as the specific prohibitions against certain types of misleading representations or misleading conduct in Part 3-1, Division 1 are well established and well understood. We do not consider that there is any reason for these provisions to be amended.

3.2 We do not consider that there is any policy reason for imposing pecuniary penalties for breach of section 18. Section 18 creates of a norm of commercial conduct and applies in a very wide range of business and consumer circumstances which are independent of any involvement by the ACCC. Further, section 18 allows impacted parties to recover damages according to established legal principles. There is no suggestion that the provisions in Part 3-1, Division 1 which apply to certain types of misleading representations or conduct are in any way inadequate such that there are categories of misleading or deceptive conduct that should but are not subject to a potential pecuniary penalty.

4. Unfair contract terms (2.2.3)

4.1 In our view, it would be inappropriate to expose businesses to the risk of pecuniary penalties for the inclusion of an unfair term in a consumer or small business standard form contract. The law should be clear and certain in its application before exposing a person to the risk of pecuniary penalty. This threshold is not met in relation to unfair contract terms as there is significant room for judgment as to whether or not a term may be unfair in all the circumstances.

4.2 The current remedy provisions are appropriate, namely that an unfair term will be unenforceable and that compensation is available where a person seeks to apply or rely upon a term declared by a court to be unfair.

4.3 We continue to have significant concerns about the extension of the unfair contract terms to small business contracts. While we do not repeat our prior submissions as part of the consultation process on these new laws, we note that in the current transition period a number of issues have become particularly apparent.

4.4 First, the use of the concept of "upfront price" to identify what contracts are within the monetary threshold and may be captured by the provisions is problematic. Many business

contracts do not have a fixed upfront price as the price payable will depend on the quantity of goods or services actually supplied under the contract. The ACCC has released guidance on this test in which it states that "any amounts that cannot be calculated with certainty at the time the contract is entered are unlikely to be included in the calculation of the upfront price payable". The ACCC considers that even if the method of calculation is clear, such as a royalty on sales, as the level of sales will be unknown no price based on such a royalty can be part of the "upfront price". This approach results in the presumably unintended scenario where contracts that between two large businesses will be well in excess of the monetary threshold risk being caught because there is no fixed upfront price payable under the terms of those contracts.

4.5 There are also issues with the other aspect of the threshold, namely the employee headcount. At the very least this headcount should refer to the headcount of the relevant corporate group. As it is, subsidiaries of large corporate groups which employee less than 20 employees will come within this threshold. This could occur where the corporate group uses special purpose purchasing vehicles with no or few employees or where the corporate group has a services or administration subsidiary which employees all employees but does not enter into contracts.

4.6 Given the above issues, the description of the law as applying to "small" business is misleading and is likely to lead to many businesses failing to appreciate that it may apply to them.

5. Consumer guarantees (2.3.3)

5.1 In our view, there are a number of areas where the consumer guarantees provisions could be improved. In particular, the laws rely on what is "reasonable" in relation to many key concepts. What is reasonable is open to debate and creates significant uncertainty for all participants from consumers to retailer and manufacturers. We discuss this further below.

5.2 As a matter of principle, the consumer guarantee laws should be clear and provide certainty in their application such that a lay reader, such as a consumer, retail sales person or service manager, can readily understand and comply with the laws. The current uncertainties impose significant compliance burdens on business and do not assist consumers in the exercise of their rights.

Acceptable quality and durability

5.3 The definition of acceptable quality includes that goods are durable as a "reasonable consumer fully acquainted with the state and condition of the goods" would regard as acceptable in light of all of the circumstances, including the nature of the goods and the price of the goods. There is significant uncertainty in the market as to what durable means.

5.4 The uncertainties around what durable means are compounded by the difficulties and uncertainties with the remedy regime for major failures, discussed below.

Major failures

Definition of major failure

5.5 We consider that the inclusion of paragraph (a) in the definition of "major failure" in section 260 is unnecessary and means that even minor faults can constitute major failures.

Paragraph (a) provides that a failure is a major failure if "the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure". Arguably, a reasonable consumer would not acquire goods if they knew that the goods were faulty. This means that failures that are in fact minor and can be readily remedied are major failures.

5.6 The other paragraphs of section 260 are sufficient to cover the type of failures that should be treated as major failures under the consumer guarantees.

Remedies for major failures

5.7 Section 259 of the ACL gives consumers a right to reject goods and obtain a refund or replacement within the "rejection period". The definition of rejection period in section 262(2) is the period of time "within which it would be reasonable to expect the relevant failure … to become apparent" having regard to various matters. This definition is unhelpful, and creates significant uncertainty.

5.8 Further, by their very nature a latent defect may not emerge for some time. Where a consumer has enjoyed the use and benefit of a product over a significant time, it is not fair or appropriate that they be able to demand a full refund or replacement of the product.

5.9 We consider that a better option, which would provide greater certainty to all participants, would be for the rejection period to be limited to a specific time frame from the date of purchase. Outside this time frame, it may be appropriate for consumers to still have access to other remedies, such as repair, for a certain period of time.

5.10 The problems with the use of "reasonable" in relation to consumers exercising a right to reject goods has been extensively considered and acknowledged in the United Kingdom, leading to introduction of the new *Consumer Rights Act 2015* (**UK CRA**). Under the UK CRA consumers are given a 30 day rejection period from purchase/delivery during which they can obtain refund if goods are faulty. Up to 6 months from purchase/delivery, if faulty goods can't be repaired or replaced, then the consumer will be entitled to a full refund in most cases. After this time and up until the end of the 6 year limitation period, consumers may be entitled to a partial refund with deductions made to take account of the use that the consumer has had of the goods.

Remedies for other failures

5.11 Where a failure is not a major failure, then the supplier has the choice of whether to offer a repair, refund or replacement; however, any remedy must be provided within a "reasonable time". There is no guidance in the ACL as to what factors are relevant to determining what constitutes a reasonable time for the repair of goods.

5.12 There is guidance released by the ACCC on this, which notes that what is reasonable "will depend on the circumstances" and then provides the example that a supplier would be expected to respond quickly to repair an essential household item but could take longer for goods used less often. This guidance fails to take account of the factors relevant to the supplier and manufacturer, such as where the product may need to be sent for repair and the availability of parts.

Limitation of liability

Goods not of a kind ordinarily acquired for personal, domestic or household use or consumption

5.13 Suppliers are currently able to limit their liability for breach of the consumer guarantees where goods are "not of a kind ordinarily acquired for personal, domestic household use or consumption". We consider that this is too narrow, and where goods and services are supplied in the context of a commercial transaction, suppliers and manufacturers should be able to limit their liability regardless of whether the goods are of a kind ordinarily supplied for personal, domestic or household use or consumption.

5.14 The requirement that the goods be **not** "of a kind ordinarily acquired for personal, domestic or household use or consumption" is too narrow. First, this means that liability cannot be limited under commercial contracts, including large commercial contracts, for the supply of such goods. For instance, the supply of computers to a business. There is no policy reason why liability should not be able to be limited under such contracts. Second, the current jurisprudence on when goods will be "of a kind ordinarily acquired for personal, domestic or household use or consumption" means that industrial quality versions of such goods will be included. By way of example, reflective foil insulation products supplied to builders for the construction of Bunnings warehouses were found to be goods of a kind ordinarily acquired for personal, domestic or household use,[2] as was commercial quality carpet.[3]

Manufacturers' unlimited liability to consumers

5.15 We consider that the ACL needs to be amended to allow manufacturers to limit their liability to consumers. Currently, the ACL imposes unlimited liability on manufacturers for breach of the consumer guarantees even where the goods supplied are not of a kind ordinarily acquired for personal, domestic or household use or consumption.

5.16 The current law exposes manufacturers to potentially significant consequential loss for the supply of goods where the end-user comes within the definition of a "consumer" in section 3. In addition to the breadth of goods that could be of a "kind ordinarily acquired for personal, domestic or household use or consumption" (as discussed above), the definition of goods includes parts. Many parts - even for major pieces of industrial equipment - are likely to cost less than $40,000 and accordingly attract the benefit of the consumer guarantees.

5.17 This exposure appears to be the result of an oversight in the drafting of the ACL. Section 64A, which enables a supplier to limit their liability to a consumer where the goods and services supplied are not of a kind ordinarily acquired for personal, domestic and household use or consumption, and 276A, which limits the liability of a manufacturer to a supplier for the supply of such goods under the indemnity, were inserted as an amendment to the Bill. However, amendments were not made to the Bill to also give manufacturers the benefit of this limitation in terms of their direct liability to consumers under section 271.

5.18 Manufacturers' liability under the implied conditions and warranties in the Trade Practices Act was so limited. Section 74(2)(a) provided that a reference to goods in Division 2A (the Division providing for actions against manufacturers and importers of goods) was, unless the contrary intention appears, to be read as a reference to goods of a kind ordinarily acquired for

[2] *Bunnings Group Ltd v Laminex Group Ltd* (2006) 230 ALR 269.
[3] *Carpet Call Pty Ltd v Chan (1987) ATPR (Digest) 46-025.*

personal, domestic or household use or consumption". This meant that claims by consumers against manufacturers and importers were only available where the goods were not of a kind ordinarily acquired for personal, domestic or household use or consumption.

5.19 This oversight should be fixed as a matter of urgency.

Lemon laws

5.20 We do not consider that there is any need for lemon laws. The existing protections are adequate.

6. Warranties against defects (2.3.6)

6.1 Section 102 of the ACL and clause 90 of the Regulations contain requirements for warranties against defects. In our experience there are a number of problems with the current requirements as they:

(a) inaccurately reflect the ACL consumer guarantee requirements. This risks causing confusion for and, potentially misleading consumers which is obviously contrary to the objectives of the ACL;

(b) have been difficult to interpret and apply; and

(c) impose Australian-specific requirements which has raised several practical challenges for global suppliers.

In light of the above concerns, we suggest reviewing if the warranty against defects requirements provide sufficient benefit to consumers to retain. If retained, the requirements should be revised to address the concerns identified.

6.2 First, the mandatory language (contained in sub-regulation 90(2)) for warranties against defects inaccurately reflects the ACL consumer guarantee requirements. Specifically, the prescribed wording:

(a) refers only to the consumer guarantees relating to goods, despite the fact that the ACL warranty against defect requirements in section 102 apply to warranties against defects given with respect to goods "and services";

(b) refers only to the remedies available against suppliers for breach of the consumer guarantees. Under the ACL, a consumer may elect to seek remedies for a failure to comply with certain consumer guarantees (including the guarantee of acceptable quality) against either the supplier, or against the manufacturer directly, regardless of who provided the voluntary warranty. The remedies available to a consumer against a manufacturer are different to those stated in the mandatory wording in subregulation 90(2); and

(c) does not reflect that, where goods are not of a kind ordinarily acquired for personal, domestic or household use or consumption, the issuer of the defect warranty may be entitled to limit its liability to consumers under the statutory guarantees.

6.3 Second, compliance with the warranties against defects requirements can be unnecessarily burdensome. A number of our clients are multinational organisations whose strong

preference is to include with their goods a standard set of global warranty terms. Compliance with the detailed requirements for warranties against defects under the ACL results in a very Australian-centric warranty document, which is often of concern to global businesses for whom Australia is a relatively small market.

6.4 Meeting the Australian-specific requirements is burdensome for suppliers. We suggest reviewing if the burden imposed on suppliers by the warranty against defects requirements is appropriately balanced against the consumer risk the requirements were intended to address and whether that risk is being appropriately addressed by the requirements.

6.5 In today's online consumer economy, businesses should also be entitled to rely on the warranty against defects requirements being met through being set out on websites (with hardcopies or emailed copies made available to consumers on request). For example, issuers of defect warranties should be permitted to comply with the ACL's requirements for warranties against defects by:

(a) referencing the availability/existence of the warranty on-pack, and including information outlining where Australian purchasers can access the local warranty (either online or by requesting a hard copy or an email copy) proximate to the on-pack statement; or

(b) including a prominent statement at the top of any in-pack global warranty that the warranty does not apply to consumers in Australia, and including information as to where Australian purchasers can access the local, ACL compliant warranty (online or by requesting a hard copy from the issuer).

6.6 The ability to satisfy the warranties against defects requirements by referencing warranty terms available online would also deal with the current problem that, for small products there is often not sufficient room to include the warranty against defects requirements on the packaging. While the ACCC has issued guidance stating that the requirements can be satisfied by including a document with all the requirements inside the packaging, this is not a practical solution for all products.

6.7 Third, the breadth of the definition of "warranty against defects" in section 102(3) means that contractual warranties in supply contracts (including commercial contracts where the goods supplied are less than $40,000) can constitute a warranty against defects (if communicated at or about the time of supply as set out in section 102(3)) . This results in the absurd requirement to include all of the prescribed requirements (including the inaccurate mandatory wording) in a commercial contract.

7. Product safety: mandatory reporting (2.3.7)

7.1 Section 131(1) of the ACL requires that if a supplier of consumer goods becomes aware of a death or a serious injury or illness of any person, and the supplier, or any other person, considers that the death or serious injury or illness was caused, or may have been caused, by the use or the foreseeable misuse of the consumer goods, the supplier must submit a report (**mandatory report**) to the ACCC (on behalf of the Commonwealth Minister). Section 132(1) imposes a similar obligation on suppliers of product-related services.

7.2 There are limited exceptions to the reporting obligation in section 131(2).

7.3 This submission addresses two aspects of the mandatory reporting regime:

(a) the fact that the exceptions do not operate as intended. Section 131(2)(c) was intended to exempt from the operation of section 131(1) deaths or serious injuries or illnesses caused by regulated goods which were already subject to an existing safety reporting regime. It does not do so. As a result, suppliers of such goods are subject to an increased compliance burden without any corresponding benefit in terms of consumer safety; and

(b) a number of aspects of the mandatory reporting regime are uncertain, and would benefit from clarification.

Section 131(2)(c): an exception that does not achieve its purpose

7.4 The *Consultation on Draft Regulations – Australian Consumer Law (September 2010)* stated that the rationale for the exemption in section 131(2) was that industries such as "the automotive industry, the pharmaceutical industry and the food industry" were already subject to "comprehensive regulatory regimes" which include "detailed procedures that must be followed when a safety issue is identified with goods or services that have been supplied to consumers". On this basis, and "to avoid duplication of regulatory requirements", it was intended that these industries should be exempt from the new mandatory reporting obligation in the ACL.

7.5 Unfortunately, section 131(2)(c) does not achieve the intended exemption. This is because there is frequently a disconnect between what is required to be reported under section 131(1), and what is required to be reported under the laws and industry codes specified in Regulation 92. This can be explained as follows.

7.6 The trigger for reporting under section 131(1) is the supplier becoming aware of a death or a serious injury or illness. "Serious injury or illness" is defined in section 2 of the ACL as "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) …". This is a very low threshold. Any treatment at all by a doctor or nurse (including such minor treatment as applying a Band-Aid, or giving minor pain relief tablets) is enough to reach the threshold. As a result, injuries or illnesses that are not genuinely "serious" become reportable.

7.7 However, the reporting triggers in the laws specified in Regulation 92 commonly do not correspond with the reporting trigger under section 131. Two examples of how this can happen are:

(a) where the law specified in Regulation 92 has a different threshold for seriousness of an injury or illness that requires reporting. Commonly that other law has a higher seriousness threshold. In such cases, the unfortunate outcome is that the injury or illness will be reportable under section 131 even though the industry-specific law designed for products of that type does not require reporting because the injury or illness is not serious enough; and

(b) where the law specified in Regulation 92 requires reporting not of a death or serious injury or illness, but of some other thing. For example, the *Therapeutic Goods Act*

1989 (Cth) requires product tampering to be reported, regardless of whether or not an injury or illness results. In such cases, the section 131(2)(c) exception is not enlivened, because the other law does not require reporting of a death or serious injury or illness; it requires reporting of tampering.

7.8 Illustrations of the undesirable consequences of this disconnect between the terms of section 131(2)(c) and the laws specified in Regulation 92 can be drawn from the therapeutic goods industry and the food industry and are set out in Schedule 1 to these submissions.

7.9 Plainly, section 131(2) does not achieve its intended purpose of exempting regulated goods from the ACL reporting obligation.

7.10 The ACCC has published a "*Guide to the mandatory reporting law in relation to consumer goods*" (most recently updated in February 2016). The Guide suggests that therapeutic goods and food-borne infectious diseases are exempted from the mandatory reporting requirements under Regulation 92. For the reasons set out above, it is submitted that this guidance is not accurate. This compounds the difficulty faced by suppliers of these regulated goods.

7.11 It is submitted that the solution to this situation is simple, and an attempt to implement it in relation to food has already been made. On 18 March 2015, the *Competition and Consumer Amendment (Deregulatory and other Measures) Bill 2015* (Cth) (**Bill**) was introduced into the House of Representatives. Relevantly, the Bill removed the requirement for suppliers to report deaths or serious injuries or illnesses to the ACCC if the product associated with the death or serious injury or illness was a food (unless the incident related to the packaging of the food). The Bill proposed that a new paragraph 131(2)(e) be added to the ACL: "*the consumer goods are food but not food packaging.*"

7.12 "Food" was to be defined to have the same meaning as in section 5 of the *Food Standards Australia New Zealand Act 1991*.

7.13 The Explanatory Memorandum to the Bill stated that the ACCC and Australian food safety regulators considered that the ACL mandatory reporting requirement did "not support the food regulation system", was "duplicative" and placed a "disproportionate cost" on the food industry.

7.14 Unfortunately, by the time of the 2016 double dissolution, the Bill had not been passed and accordingly it lapsed.

7.15 It is submitted that the ACL would be improved by:

(a) amending section 131(2), and adding the definition of "food", as proposed in the Bill;

(b) adding a new sub-paragraph 131(2)(f), to the effect of *"the consumer goods are therapeutic goods"* and adopting the definition of "therapeutic goods" in the *Therapeutic Goods Act;* and

(c) introducing exemptions for other regulated goods in the same manner, so as to achieve the exemption from mandatory reporting for regulated goods that was intended, but not achieved, when the ACL was introduced.

Uncertainty regarding various aspects of the mandatory reporting regime

7.16 Although Sections 131 and 132 of the ACL have now been in force for more than 5 years, there has been little cause for judicial analysis of the provisions. Suppliers remain uncertain about a number of aspects of the mandatory reporting regime. In particular, the definition of "serious injury or illness" in section 2 of the ACL causes confusion. There is a question as to whether mere treatment by a medical practitioner or nurse is sufficient to make an injury or illness reportable. There is also a question as to what constitutes "treatment": does attendance on a medical practitioner or nurse for diagnosis and observation constitute treatment? If mere attendance on a medical practitioner or nurse is sufficient, then it is submitted that this sets the bar too low. We discuss this further in Schedule 2 to these submissions.

8. Other 'unfair' commercial practices (2.4.1)

8.1 In our view, there is no need to introduce a general prohibition against unfair practices and that any such general prohibition would, in the language of the Productivity Commission, be more conceptually neat than practically useful[4].

8.2 There would need to be a very clear gap in our legislative regime (beyond a mere academic interest) to justify the introduction of unfamiliar trading standards (such as "professional diligence"). We submit that such a gap does not exist. Given the body of Australian jurisprudence that has developed in respect of the ACL, it is difficult to justify the introduction of unknown legal concepts, particularly when they overlap with current consumer protections, would create unwarranted legal uncertainty, and could potentially stifle market confidence.

8.3 Our review of overseas laws that prohibit unfair commercial practices (UK/EU), combined with our extensive experience in advising local and international clients on the application of the current consumer safeguards under the ACL, informs this position.

European objective has limited relevance to the Australian position

Harmonisation objective not present

8.4 The objective of the Unfair Commercial Practices Directive[5] was to introduce a European-wide general prohibition and to harmonise general concepts in consumer protection law across the EU. The Directive provided for "maximum harmonization", which required the EU Member States to repeal their existing laws and regulations on specifically regulated commercial practices.[6] In contrast, Australian States and Territories have achieved harmonisation by passing legislation adopting the ACL as part of their law.

No general concepts in previous UK consumer protection legislation

8.5 The introduction of an EU-wide ban on unfair commercial practices was particularly attractive for the UK, which had not previously adopted such a general principle in its national consumer protection legislation. This is substantially different from the Australian

[4] *Review of Australia's Consumer Policy Framework*, Productivity Commissions Inquiry Report No. 45, 30 April 2008, Vol 2, page 141.
[5] *Unfair Commercial Practices Directive* 2005/29/EC (**Directive**).
[6] The UK has implemented the Directive via the *Consumer Protection from Unfair Trading Regulations* 2008 (**CPR**).

model, which has included a broad protection against misleading and deceptive conduct for decades. Moreover, the ACL contains broader protections than those envisaged by the Directive or implemented by the UK Consumer Protection from Unfair Trading Regulations 2008 (**CPR**) which only apply to business-to-consumer (**B2C**) practices. This is to be contrasted against the threshold requirement of "in trade or commerce" contained in section 18 of the ACL, which prohibits misleading and deceptive conduct market wide and is not limited to the B2C context.

Current consumer safeguards in the ACL are adequate

8.6 The ACL contains broad, flexible market wide prohibitions against unfair conduct. These include the prohibitions against misleading or deceptive conduct (as well as against specific kinds or misleading representations or conduct), against unconscionable conduct and against harassment and coercion, as well as a range of other specific prohibitions.

8.7 Under the Directive, commercial practices which are not mentioned on the "blacklist"[7] must be evaluated as to see whether they constitute "misleading"[8] or "aggressive"[9] practices. If they do not, it must then be considered whether they infringe a trading standard of "professional diligence" and "materially distort or are likely to materially distort the transactional decision of the average consumer"[10].

8.8 There is likely to be a high degree of overlap between the EU concept of unfairness (being a commercial practice which materially distorts the transactional decision of a consumer), and the Australian prohibitions against various unfair practices and in particular the general prohibition against misleading or deceptive conduct as well as the specific prohibitions against certain types of misleading representations or conduct.

8.9 Our offices in London and Europe regularly advise local and international clients on the implementation of the CPR/Directive. Drawing on that experience, we understand that clients are most concerned with regulation of practices that constitute misleading or aggressive action. The general concept of "unfair commercial practices" is widely regarded as not having added a great deal to consumer protections. This is due to the fact that most (if not all) practices that would be "unfair" would also constitute "misleading practices" or "aggressive practices". This experience accords with enforcement trends, as the UK consumer regulator has yet to successfully pursue traders for engaging in conduct that contravenes the general prohibition on unfair commercial practices.

Potential disadvantages of adopting the European model

8.10 The Directive adopts a very specific, "European" conception of unfairness. Accordingly, its implementation has had a substantial impact on the common law Members States, with the introduction of vague legal concepts which have their origin in European Court of Justice jurisprudence. The introduction of such concepts into Australian law has the potential to similarly cause confusion and increase compliance burdens for business.

[7] Annex I, Directive.
[8] Articles 6 and 7, Directive.
[9] Articles 8 and 9, Directive.
[10] Article 5(1), Directive.

8.11 Australia's trading and legal culture has been successfully moulded and harmonised across the States and Territories through the consumer protection provisions in the Trade Practices Act and more recently through the ACL.

9. Definition of 'financial service' (2.4.2)

9.1 In our view, the definition of "financial service" and the division of regulatory coverage for consumer protection matters between the ACL and the Australian Securities and Investments Commission Act 2001 (**ASIC Act**) by reason of section 131A of the CCA[11] is overly complex and confusing.

9.2 Courts have struggled with the interpretation of the ASIC Act provisions defining "financial product" and "financial service" and have been critical of the complexities created by the provisions in determining which law - the ACL or the ASIC Act - should properly be applied in the particular circumstances. Justice Rares was particularly critical in his judgment in *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (In Liq)* [2012] FCA 1028, when he said:

> *Those Acts, that now deal with misleading and deceptive conduct, apply differently depending on distinctions such as whether the alleged misleading conduct is in relation to "a financial product or a financial service" (s 1041H(1) of the Corporations Act 2001 (Cth)) or "financial services" (s 12DA(1) of the Australian Securities and Investments Commission Act 2001 (Cth)). Those apparently simple terms are nothing of the sort. A "financial product" is defined in mind-boggling detail in 7 pages of small type in Div 3 of Pt 7.1 of the Corporations Act while a "financial service" takes another 6 pages to be defined in Div 4 of Pt 7.1. The ASIC Act only takes about 4 pages to define "financial service" in s 12BAB. Obviously, there are differences in what each of these Acts and definitions cover but why? The cost to the community, business, the parties and their lawyers, and the time for courts to work out which law applies have no rational or legal justification. The Parliament should consider returning to a simple clear two line long universal norm of conduct, as was contained in s 52, if it considers that misleading and deceptive conduct in trade or commerce ought be prohibited.*

9.3 We submit there is much to be said for rationalising and simplifying the task, particularly for consumers and businesses, by discarding the dual operation/regulatory overlap between of the ACL and ASIC Act in the consumer protection sphere and introducing uniformity in application of consumer provisions to goods and services generally, as was previously the case. Until 1998, it was the position that the supply of financial services to a consumer were subject to the predecessor provisions of the current ACL provisions which were contained in Part V of the then Trade Practices Act, and consumer relief was uniformly available under this part - for conduct that was misleading or deceptive, for false and misleading representations, or for a breach of implied warranties, in relation to the supply of goods and services generally, regardless of whether they were considered to be financial services.[12]

---

[11] Section 131A of the CCA provides that (with the exception of certain ACL provisions relating to linked credit providers), the ACL does not apply to the supply or possible supply of financial services or financial products.

[12] Changes were made in 1998 to the statutory scheme applicable to consumer protection for financial service with the introduction of the *Financial Sector Reform (Consequential Amendments) Act 1998* (Cth) for the purpose of shifting regulatory responsibility for financial services and products from the ACCC to the ASIC.

9.4 It is submitted that the overlap in regulatory responsibility in the consumer protection sphere leads to confusion and complexity for consumers and businesses which runs completely counter to the stated objective of the introduction of the ACL as expressed by the Hon Craig Emerson MP, in his second reading speech when he said:

> *"As we move towards a single, national market seamless national economy as called for by the Business Council of Australia and the 2020 Summit, this tangle of consumer laws (referring to the existing consumer protection regime) must be rationalised. We must reduce confusion and complexity for consumers and provide consistency of consumer protection. We must reduce compliance burdens for business."*

9.5 In circumstances where the provisions of two separate regulatory schemes - the ACL and the ASIC Act - largely replicate each other , making it necessary for consumers to work out which regime might apply to the particular wrong for which they seek redress, and adding an inordinate level of complexity and cost to the process, we submit that the explicit exclusion from the ACL of financial services should be removed.

9.6 If there are particular types of financial services or products that should not be subject to the general consumer protection provisions in the ACL on the grounds that there is already an adequate regulatory regime for those products or services, then that could be addressed by excluding those from the operation of the ACL.

10. Unsolicited sales (4.1)

10.1 Part 3-2, Division 2 of the ACL regulates unsolicited consumer agreements. There is some complexity in the requirements for unsolicited consumer agreements. This submission suggests that a review be conducted of the requirements to identify any:

(a) ambiguous requirements and amend to provide certainty; and

(b) provisions that can be simplified.

10.2 Many of the ACL requirements for unsolicited consumer agreements are detailed and proscriptive. However, in some cases it appears that not all aspects for unsolicited consumer agreements have been addressed. This creates gaps and uncertainty for suppliers on the rules they need to follow.

Additional requirements for unsolicited consumer agreements not negotiated by telephone

10.3 Section 80(a) requires that unsolicited consumer agreements not negotiated by telephone must be signed by the consumer under the agreement. Section 80(b) sets out requirements that apply if the agreement is signed on the supplier's behalf.

10.4 A pecuniary penalty may be imposed for breaching section 80.

10.5 There is no express requirement for the supplier (or a person on the supplier's behalf) to sign the agreement. This creates some uncertainty on whether a supplier (or supplier's agent) signature is required for unsolicited consumer agreements not negotiated by telephone.

Requirements for amendments of unsolicited consumer agreements

10.6 Section 81 provides that:

> *The supplier under an unsolicited consumer agreement must ensure any amendments to the agreement are signed by both parties to the agreement.*

10.7 A pecuniary penalty may be imposed for breaching section 81.

10.8 Section 81 does not address whether the requirement applies to unsolicited consumer agreements negotiated by telephone and those not negotiated by telephone. The ACL does not require an unsolicited consumer agreement negotiated by telephone to be signed by the parties. In contrast, under section 80(a) an unsolicited consumer agreement not negotiated by telephone must be signed by the consumer under the agreement. Given the different treatment on the making of the agreements, uncertainty arises under section 81 on the need for both parties' signature for any amendment to an agreement under the telephone and not by telephone contracting processes.

10.9 Section 81 also does not address whether it only applies to amendments to standard form terms negotiated when the agreement is made. The alternative interpretation is that section 81 applies whenever an amendment is made to the agreement. This is an important issue of clarity for suppliers who need to know if there are any specific restriction on including terms allowing the supplier to vary an agreement entered into as an unsolicited consumer agreement. A supplier of services for a fixed term for example needs to know if the variation clause may need to differ for an unsolicited and other consumer agreement.

10.10 It is submitted that the ACL would be improved by expressly addressing these issues. For example, amending section 81 to require that if an amendment to the standard form terms is made before the agreement is entered into, a process be followed to record for both parties that the amendment forms part of the agreement.

11. Sharing economy (4.3.1)

11.1 We consider that there is currently a level of uncertainty in the market place as to the application of the ACL to the sharing economy and in particular the respective responsibilities of platform hosts and platform users.

11.2 The evolution of the sharing economy stemmed from a desire to empower individuals to operate as micro-entrepreneurs through use of a platform provided by the platform host. As micro-entrepreneurs, platform users will largely have control over the listing of their goods or services on the platform in terms of such matters as the listing description and any photographs provided, the price payable (including any additional or optional fees) and other terms and conditions (such as cancellation rights).

11.3 In the event of a dispute between platform users regarding the supply of goods or services facilitated by the platform, this is largely a dispute between the supplier and the customer. While a platform host can put in place mechanisms to assist in the resolution of such disputes, the platform host is not a party to the dispute and is unlikely to have any control over the matters that led to the dispute (for instance, if the customer considered that the goods or services provided did not match the listing description).

11.4 However, we understand that dissatisfied platform users will often mistakenly target platform hosts in consumer claims as the platform hosts are perceived to be preferred targets, being corporations with deeper pockets than the counterparty platform user even in circumstances where the platform host clearly has no liability.

11.5 There is however scope to clarify the extent of a platform host's potential liability under the ACL for matters that are beyond their control and within the control of platform users. As noted in the Issues Paper, the ACL does include an exception to the prohibition against misleading or deceptive conduct in section 18 for the publication of matter by an "information provider". The information provider exception in the ACL is however complex in its operation. Further, it is unlikely that that exception would apply to commercial platform hosts.

11.6 We submit that consideration should be given to whether this exception should be re-examined and updated for the sharing economy. In particular, consideration should be given to whether there should be a clear and appropriate exception for platform hosts from the prohibitions against misleading or deceptive conduct. It would be impossible for a platform host to verify the accuracy of information provided by platform users and they should not be exposed to potential liability for platform users who provide potentially misleading information that is then published on the platform.

11.7 In any event, we consider that it would be helpful if the ACCC published guidelines on the application of the ACL to the sharing economy and platforms, covering the responsibility of sharing economy platforms for their own statements and representations on the site and the obligations of platform users under the ACL (e.g. that listings must be accurate and not misleading and that reviews from users are truthful and not misleading).

12. Consumer access to data (4.4.1)

Access to data

12.1 The Issues Paper raises the question as to the role of the ACL and the regulators in support consumers' access to data.

12.2 We have advised extensively on both data retention and access as well as the ACL for both local and overseas clients, and our comments below reflect some of the (non-confidential) issues which have arisen in the context of our advice.

12.3 In our view, concerns with data privacy are comprehensively addressed by both the *Freedom of Information Act 1982* (Cth) (**FOIA**) and the *Australian Privacy Principles* (**APP**) under the *Privacy Act 1988* (Cth).

12.4 As acknowledged in the Productivity Commission's *Issues Paper on Data Availability and Use* released last month (**Data Paper**), "consumers already have the right, under the Privacy Act, to request access to their personal data held by governmental agencies and businesses" and the FOIA "gives all individuals a legally enforceable right of access to public sector documents." We echo the concerns of the Treasury in its *Financial System Inquiry Final Report 2014* (**FSI Report**), which "does not suggest that all, or even most, private sector data should be released publicly." Reasonable and realistic restrictions on data access are key for economic efficiency.

12.5 Under the APPs, consumers already have access to any information about them in which they are reasonably identifiable where it is held by certain organisations. The range of organisations covered by the APPs is broad, such that we query the role for increased consumer access to data beyond the scope of the APPs and the Privacy Act. In line with recommendations made in both the *Harper Review on Competition Policy* (**Harper Review**) and the FSI Report, we consider that the key to consumer access to data is not expanding the regulated topics under the ACL, but clarifying the scope of data already available to consumers under the Privacy Act.

12.6 The Productivity Commission's Data Paper notes that "increasing the availability of data is not costless. Resources are needed to ensure that data is of sufficient quality for release outside of the collecting organisation… There are also costs of maintaining data over time". The regulatory and compliance costs of creating a new consumer data access regime under the ACL could be high, and we doubt that the benefits of a new regime would outweigh the benefits of working within the regulatory framework already provided under the Privacy Act.

12.7 Having multiple pieces of legislation addressing data access will only increase this uncertainty. The Productivity Commission's Data Paper states that unclear regulatory jurisdiction "can make it difficult and time-consuming for agencies and businesses to understand and fulfil their obligations", which accords with our experience. To the extent that further regulation is deemed necessary, the compliance burden would be minimised by retaining the jurisdiction of the Privacy Act in regards to consumer data, rather than by creating further requirements under the ACL.

12.8 The ACL was designed to benefit consumers by providing a variety of consumer protections. In our view, its protections do not constrain consumer capacity to access their data.

Infomediary market

12.9 As the Issues Paper notes in 4.2.3, an 'infomediary' market is already "playing an increasingly important role in online markets" in the consumer space, being comparator websites. Following the 2015 ACCC guide for comparator websites and 2014 review of the comparator industry, this industry is operating in an effective and robust manner within the Australian market. The Issues Paper acknowledges that comparator websites are likely to already be subject to the ACL, and as such, any increased risk that consumers face through such services would already be effectively mitigated by the existing provisions of the ACL.

Disclosure requirements (4.4.2)

12.10 We refer to our comments above regarding some of the disclosure requirements in the ACL.

12.11 We do not see any reason for any further disclosure requirements. In this, we agree with the concern raised in the Issues Paper that the additional costs of any intervention needs to be carefully considered and further that "any enhanced disclosure needs to be consumer-tested to ensure that it actually informs consumer choice".

12.12 We can foresee practical complexity in regards to the proposal to prescribe a minimum consumer contract font size, as this may not be possible across all types of contracts in all industries, and as a result, lengthy exceptions to any such requirement may need to be included. This would likely increase both compliance cost and regulatory burden, and we

caution against this until such time as concrete consumer benefit can be readily ascertained to outweigh these costs.

13. Conclusion

13.1 We trust that these submissions will be of assistance in informing the review on those areas which might be improved in order to clarify and enhance the operation of the ACL. We are happy to provide further comments should they be required on any of the issues and suggestions which these submissions raise.

Baker & McKenzie

30 May 2016

Schedule 1
Product safety examples referred to in paragraph 8.8

Therapeutic Goods

1.1 The *Therapeutic Goods Act* (which is specified in Regulation 92) contains an "adverse event" reporting regime in respect of medical devices, and a similar "adverse effect" reporting regime for pharmaceutical products. In relation to adverse events, for example, sections 4IMP and 41MPA of the *Therapeutic Goods Act* require sponsors of medical devices to notify the Therapeutic Goods Administration of information relating to:

(a) any malfunction or deterioration in the characteristics or performance of the kind of device;

(b) any inadequacy in the design, production, labelling, instructions for use or advertising materials of the kind of device; or

(c) any use in accordance with, or contrary to, the use intended by the manufacturer of the kind of device;

that might lead, or might have led, to the death of a patient or user of the device, or to a *serious deterioration in his or her state of health* …".

1.2 "*Serious deterioration in his or her state of health*" is a significantly higher threshold than that provided for in the definition of "serious injury or illness" in the ACL.

1.3 This discrepancy can lead to situations:

(a) where an incident will be reportable to the Therapeutic Goods Administration but not to the ACCC (because the incident is serious enough to reach the *Therapeutic Goods Act* threshold for reporting, and therefore the section 131(2)(c) exception is enlivened); or

(b) conversely, where an incident will be reportable to the ACCC but not to the Therapeutic Goods Administration (because the incident reaches the low ACL threshold for seriousness, but not the higher *Therapeutic Goods Act* threshold. Because the incident is not reportable under the *Therapeutic Goods Act*, the section 131(2)(c) exception does not operate and the incident must be reported to the ACCC); or

(c) where an incident will be reportable to *both* the Therapeutic Goods Administration and the ACCC (for example, in the case of a death or serious injury or illness caused by tampering: the *Therapeutic Goods Act* requires tampering to be reported to the Therapeutic Goods Administration, but since that Act does not require the death or serious injury or illness associated with the tampering to be reported, the section 131(2)(c) exception is not enlivened and the incident must be reported to the ACCC as well).

Food

1.4 The reporting requirements in the food-related laws specified in Regulation 92 generally relate to the notification by persons in the medical profession (such as medical practitioners

and pathology laboratories) of specific "notifiable diseases". For example, doctors are required to notify health departments about cases of diseases such as Salmonellosis and Cholera (see, for example, section 54 of the *Public Health Act 2010* (NSW) and section 127 of the *Public Health and Wellbeing Act 2008* (Vic)).

1.5 Given the short two-day period between a food supplier becoming aware of a food-related illness and having to submit a mandatory report, the supplier will commonly not know sufficient details of the illness to enable it to assess whether the illness is one which another person is required to notify under a law specified in Regulation 92. In such cases, the supplier will not have been able to determine that the section 131(2)(c) exception will operate, and accordingly will have to submit a mandatory report.

1.6 Further, with respect to "foodborne" illness (where the specific disease is unknown), the reporting requirements to which medical professions are subject vary among the laws specified in Regulation 92. In some States and Territories (NSW, Victoria, Queensland and the Northern Territory) persons in the medical profession are required to notify "*foodborne illness in two or more related cases"*. In circumstances where a food supplier becomes aware of a qualifying product safety incident, it appears unlikely the supplier will know (within the two-day period for submitting a mandatory report):

(a) whether the illness is related to another case (so as to be "*two or more related cases*"); or

(b) if the medical practitioner who treated the illness was aware whether the illness was related to another case (if the doctor was not so aware, the illness would not have been reportable by him/her).

1.7 Without knowing these matters, a food supplier is unlikely to have sufficient details of the serious illness to enable it to ascertain whether the illness is one which another person is required to notify under a law specified in Regulation 92. In such cases, the food supplier will be required to submit a mandatory report under section 131(1).

1.8 In contrast, in the Australian Capital Territory and South Australia, medical professionals are required to report cases of "*food poisoning*" in a patient. Similarly, in Tasmania, medical professionals must report "*suspected cases of food or water borne illness*" in a patient.

1.9 Accordingly, if a food supplier becomes aware of a "*serious injury or illness*" which is a "*food poisoning*" or "*food borne illness*" caused by its product, and in respect of which the person has received medical treatment in the ACT, South Australia or Tasmania, it appears that the illness will not be reportable under the ACL (because, in those jurisdictions, the illness is reportable by another person so the section 131(2)(c) exception is enlivened).

1.10 Consequently, a food supplier's mandatory reporting obligations in respect of "food poisoning" incidents appeared to differ depending on the State or Territory in which medical attention has been sought. If a person becomes ill as a result of "food poisoning" or "food borne illness" and obtains medical treatment in the ACT, South Australia or Tasmania, that incident will not be reportable under the ACL by the food supplier. If the medical treatment is obtained in other jurisdictions, the incident will likely be reportable under the ACL by the food supplier (subject to whether the supplier knows it is a "food borne illness in two or more related cases", as discussed above).

1.11 For example:

(a) if a person becomes ill from a food product purchased in NSW, but obtains medical treatment in the ACT, then the incident will not be reportable under the ACL (as an ACT medical practitioner is required to report the food poisoning); but

(b) if a person becomes ill from a food product purchased in the ACT, but obtains medical treatment in NSW, then the incident will be reportable under the ACL (as the NSW medical practitioner is not required to report the incident).

1.12 Unless more specific details of the illness are known at the time of reporting (for example, that the illness is Salmonellosis or Cholera, or that the treating doctor was aware that the illness is a food borne illness related to another case of food borne illness), incidents of mere "food poisoning" or "food borne illness" arising from food suppliers' products where medical treatment is sought in States and Territories other than the ACT, South Australia and Tasmania appear to be reportable under the ACL.

Schedule 2
Mandatory reporting issues referred to in 8.16

Medical treatment

1.1 The definition of "serious injury or illness" in section 2 of the ACL causes confusion. There is uncertainty about whether the mere fact that medical treatment was given for an injury or illness means that the injury or illness meets the definition of "serious injury or illness".

1.2 There is one advantage in interpreting the definition in this way: it provides an objective test for suppliers to adopt in deciding whether injuries or illnesses they have become aware of are reportable. When the new mandatory reporting obligation was first being considered before the introduction of the ACL, an objective test was proposed by the Productivity Commission in the 2006 Review of the Australian Consumer Product Safety System for the "seriousness" criterion, that test being whether the injury or illness resulted in admission to hospital. That test was not adopted, however, after it was argued that there are fewer hospitals in remote areas so some serious injuries or illnesses sustained in remote areas are not treated in a hospital. That is likely the case, and the argument warranted appropriate consideration.

1.3 As a result, it was decided to abandon the "admission to hospital" test and instead to include the current definition of "serious injury or illness" in the ACL. With the benefit of hindsight, it is submitted that decision has had unfortunate consequences.

1.4 In order to retain objectivity in interpreting the test, it is commonly thought by suppliers and consumer advocacy groups that the giving of treatment, no matter how minor, by a medical practitioner or nurse is enough to satisfy the seriousness criterion in the section 2 definition, as indicated above. This results in many incidents being reported where the injury or illness is minor.

1.5 Compounding this is the fact that very commonly, all a supplier is told is that the injured or ill consumer "went to the doctor", and the supplier submits a mandatory report solely on that basis. Usually the supplier does not know (at least within the two-day reporting time frame) what treatment was given[13] or whether in fact any treatment was given - the person may have consulted a doctor or nurse but treatment was not required.

1.6 It is submitted that the above interpretation is incorrect. It ignores the presence of the word "acute" in the definition of "serious injury or illness". "Acute" means "brief and severe" (Macquarie Dictionary online) or "serious but of short duration" (Oxford Dictionaries online). An extract from the *Oxford English Dictionary*, Third Edition, December 2011 is also attached to this submission. Therefore, properly construing the definition, an injury or illness should be both serious or severe and requiring of medical treatment in order to be reportable.

1.7 It is submitted that there is significant advantage in having a "seriousness" test which is both objective and also does not place a disproportionate compliance burden on suppliers by requiring reporting of minor incidents which do not provide a corresponding benefit in terms of consumer safety. It is submitted that the "admission to hospital" test strikes the right balance.

[13] Does putting on a Band-Aid, taking a pain-relief tablet, or using some other over-the-counter consumer product - which arguably would not be "medical or surgical treatment" if done at home - become medical or surgical treatment if it is given by a doctor or nurse?

1.8 While it is likely the case that some serious injuries or illnesses suffered in remote areas are not treated in hospital, it is also likely that the number of such injuries or illnesses is a very small proportion of all serious injuries and illnesses, and that the benefits of an "admission to hospital" test outweigh the disadvantage of any such injuries and illnesses not being reported.

1.9 In summary:

(a) suppliers, consumers and consumer groups would all benefit from clarification of whether the mere fact of treatment by a medical practitioner or nurse is sufficient to make an injury or illness reportable under the current definition; and

(b) it is submitted that an objective test for reporting injuries or illnesses triggered by the giving of treatment of any kind by a medical practitioner or nurse sets too low a threshold for reporting. The originally-proposed, objective "admission to hospital" test for whether an injury or illness is sufficiently serious to require reporting under sections 131 and 132 would strike a better balance in terms of promotion of consumer safety, compliance burden on suppliers and demand on regulatory resources than the test currently found in the ACL.

Meaning of "requires"

1.10 The use of the word "requires" in the definition of "serious injury or illness" gives rise to another area of uncertainty. Is it necessary for medical treatment to have been given in the incident in question (with the result that if the supplier is aware that treatment was given, the incident is reportable, but if the supplier does not know whether the treatment was given, the incident is not reportable)? Or alternatively, is the incident reportable if the injury or illness is of a nature which would be expected to require treatment (for example, a serious cut or a serious burn, compared with a minor cut or a minor burn), whether or not the supplier knows if treatment was given?

1.11 The first alternative above has the advantage of being based on an objective criterion, but it is likely to lead to some minor injuries and illnesses being reported and some more serious injuries and illnesses not being reported. On the other hand, the second alternative should lead to injuries and illnesses of an appropriate level of seriousness being reported, but is more difficult to apply because it is not objective.

1.12 If the word "required" had been used in the definition rather than the word "requires", it would have been clear that the first alternative above was intended. That is not the case, however, leading to uncertainty.

1.13 Clarification of this point would be beneficial.

Self-treatment by medical practitioner or nurse

1.14 One perhaps unanticipated situation is where the injured or ill person happens to be a medical practitioner or nurse, and self-treats. Should this be reportable? There are arguments both ways; the strength of the arguments tends to be dictated by the seriousness of the injury or illness or the nature of the treatment. Again, this uncertainty would be removed if the "admission to hospital" test were adopted.