

Consumer product safety

A guide for businesses and legal practitioners



This guide was developed by:

- Access Canberra, Australian Capital Territory
- Australian Competition and Consumer Commission
- Australian Securities and Investments Commission
- Consumer Affairs Victoria
- Consumer and Business Services South Australia
- Consumer, Building and Occupational Services, Tasmania
- New South Wales Fair Trading
- Northern Territory Consumer Affairs
- Queensland Office of Fair Trading
- Western Australia Department of Mines, Industry Regulation and Safety, Consumer Protection

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Manager

Communications

The Treasury

Langton Crescent Parkes ACT 2600

Email: media@treasury.gov.au



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Introduction

About this guide

This is one of the guides to the Australian Consumer Law (ACL) developed by Australia’s consumer protection agencies to help businesses understand their responsibilities under the law.

This guide will help businesses and legal practitioners understand the consumer product safety requirements of the ACL.

It covers safety standards, recalls, bans, safety warning notices and mandatory reporting requirements.

These guides:

- explain the law in simple language but are no substitute for the legislation
- give general information and examples – not legal advice or a definitive list of situations where the law applies
- include examples of the ACL’s application by Australian Consumer Protection regulators and by Australian courts.

About the other guides

Other guides in this series cover:

Consumer guarantees

Covers supplier, manufacturer and importer responsibilities when there is a problem with goods and services, refunds, replacements, repairs and other remedies.

Sales practices

Covers unsolicited supplies, unsolicited consumer agreements (door-to-door and telemarketing), lay-by agreements, pricing, proof of transaction and itemised bills, referral selling, pyramid schemes, harassment and coercion.

Avoiding unfair business practices

Covers misleading or deceptive conduct, unconscionable conduct, country of origin, false and misleading representations.

Unfair contract terms

Covers what an unfair term is and which contracts are affected by the law.

Compliance and enforcement

Covers how regulators enforce the ACL.

Australian Consumer Law for fundraising

Covers the application of the ACL to charities, not-for-profits and fundraisers.

Acceptable Quality and the Meaning of Durability

Covers what makes a good ‘durable’ in the context of the consumer guarantee as to acceptable quality.

Acceptable Quality and the Meaning of Safe

Covers what makes a good ‘safe’ in the context of the consumer guarantee as to acceptable quality.

Further information and copies of these and other publications are available from the Australian Consumer Law website:

www.consumerlaw.gov.au

About the Australian Consumer Law

The ACL aims to protect consumers and ensure fair trading in Australia.

The ACL came into force on 1 January 2011 and replaced the *Trade Practices Act 1974* and previous Commonwealth, state and territory consumer protection legislation. It is contained in Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (CCA) and is applied as a law of each state and territory by state or territory legislation.

Under the ACL, consumers have the same protections, and businesses have the same obligations and responsibilities, across Australia.

Australian courts and tribunals (including those of the states and territories) can enforce the ACL.

The regulators of the ACL are:

- the Australian Competition and Consumer Commission (ACCC), in respect of conduct engaged in by corporations, and conduct involving the use of postal, telephonic and internet services
- state and territory consumer protection agencies, in respect of conduct engaged in by persons carrying on a business in, or connected with, the respective state or territory.

Some of the consumer protection provisions in the ACL are mirrored in the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) in relation to financial products and services. The Australian Securities and Investments Commission (ASIC) is responsible for administering and enforcing the ASIC Act.

Aside from compliance and enforcement by ACL regulators, the ACL creates private rights such as consumer guarantees that persons can enforce through Commonwealth, state and territory courts and tribunals.

Objectives of the Australian Consumer Law

The Intergovernmental Agreement for the Australian Consumer Law states that the objective of the national consumer policy framework is to:

- improve consumer wellbeing through empowerment and protection
- foster effective competition
- enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly.

This is supported by six operational objectives:

- to ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition
- to ensure that goods and services are safe and fit for the purposes for which they were sold to prevent practices that are unfair
- to prevent practices that are unfair
- to meet the needs of consumers who are most vulnerable or are at the greatest disadvantage
- to provide accessible and timely redress where consumer detriment has occurred
- to promote proportionate, risk-based enforcement.

The ACL replaced previously separate legislation, which means that:

- a trader who operates across jurisdictions has a single set of rules and responsibilities to comply with (in addition to any jurisdictional legislation that covers their particular industry)
- a consumer moving between jurisdictions or buying from interstate will have the same set of protections as in their home jurisdiction.

One law, multiple regulators

The ACL is a single national law enforced in all jurisdictions by the various jurisdictions' consumer regulators.

Under this arrangement ACL regulators work to:

- ensure that marketplace misconduct is addressed
- employ the most effective means of addressing consumer harm through cooperative and complementary enforcement action
- avoid unnecessary duplication of effort in the effective administration of the ACL
- ensure, wherever appropriate, a consistent approach to dispute resolution and enforcement action.

As a law of each jurisdiction – Commonwealth, states and territories – the ACL will be enforced by courts and tribunals in each jurisdiction subject to the specific rules that apply to enforcement processes, courts and tribunals in each state and territory jurisdiction.

The ACL regulators coordinate their activity through regular engagement via the Consumer Affairs Senior Officials network and other staff level networks.



National consumer product safety laws

The ACL includes national consumer product safety laws. It sets out the responsibilities of the Commonwealth, state and territory ministers and suppliers.

Under the ACL, Australian ministers can regulate unsafe consumer goods and product-related services by:

- issuing safety warning notices
- banning products, either on an interim or permanent basis
- imposing mandatory safety and information standards
- issuing compulsory recall notices.

The ACL also outlines the responsibilities of suppliers, including:

- what to do when a minister bans a product, issues a compulsory recall or imposes mandatory safety and information standards
- when and how to notify the Commonwealth minister of the voluntarily recall consumer goods
- when to report an incident associated with consumer goods or product-related services to the Commonwealth minister
- when manufacturers may be liable for loss or damage caused by a consumer good with a safety defect. A 'manufacturer' is not just the company that made the goods – see Glossary and abbreviations on page 23.

The ACL also allows Australian governments to regulate transactions involving consumer goods or product-related services by imposing mandatory information standards.

These standards require that certain information is provided about a good or service.

Please note that the ACCC is responsible for product safety in the Northern Territory.

In addition to this guide, information to help suppliers with their product safety responsibilities, such as recalling consumer goods and mandatory reporting requirements, is also available from www.productsafety.gov.au.



What consumer product safety laws cover

The consumer product safety laws apply to consumer goods and product-related services.

These are defined in the glossary on page 23, but in simple terms:

Consumer goods are things:

- intended for personal, domestic or household use or consumption
- likely to be used for personal, domestic or household use or consumption.

Product-related services are services for or relating to:

- installation of consumer goods
- maintenance, repair or cleaning of consumer goods
- assembly of consumer goods
- delivery of consumer goods.

Any person who, in trade or commerce, supplies consumer goods or product-related services is responsible for complying with ACL consumer product safety laws.

This means all suppliers in the supply chain (including manufacturers, wholesalers, hirers and retailers) must keep up-to-date with the law and comply with any mandatory standards, recalls or bans.

Suppliers can subscribe for email updates about the latest product safety news including Australian recalls, and mandatory safety standards and bans. To subscribe, go to the Product Safety Australia website: www.productsafety.gov.au.

Specialist agencies

In Australia, there are many thousands of types of consumer goods. Some require specific oversight by specialist agencies due to their technical complexity or risk to consumers.

Products that are covered by a specialist agency may also be covered by the ACL. The ACCC and specialist agencies have arrangements in place to identify which agency is the lead agency for any product safety issue. Generally, if a product is defined as being regulated by a specialist agency, then the specialist agency will be the lead agency for regulation of the product.

Types of products that are regulated by specialist agencies include:

- Food and beverages
- Medicine and medical (therapeutic) devices
- Electrical Goods
- Building products
- Marine safety goods and vessels
- Road vehicles and other transport products
- Agricultural and veterinary chemical products
- Gas appliances
- Industrial chemicals

You can find a list of specialist agencies on the Product Safety Australia website: www.productsafety.gov.au.

All suppliers in the supply chain must keep up-to-date with the law.



Safety warning notices

A safety warning notice is a formal warning issued by a Commonwealth, state or territory minister responsible for administering the ACL. It informs consumers and suppliers about consumer goods or product-related services that may cause injury and/or are under investigation.

A safety warning notice may provide advice to both consumers and suppliers about the possible safety risks associated with goods of the kind in the notice.

The publication of a safety warning notice does not mean that suppliers must stop supplying that good or service. However, suppliers should consider the possible risks in terms of the particular goods they supply.

A safety warning notice should not be confused with an information standard, which may require a supplier to give advice about safe use, or a safety warning, on a product.

ACL reference: sections 129–130

What a safety warning notice includes

A safety warning notice:

- states that the goods or services are being investigated to determine whether the goods, used in a 'reasonably foreseeable' way, may injure someone either directly, or as a result of the supply of related services
- warns of possible risks in using the goods or services.

EXAMPLE

A glass cooking bowl (a 'consumer good') may have been reported to have a defect that results in the glass breaking when filled with hot liquid. The safety warning notice would advise of an investigation into that type of glass cooking bowl and warn consumers and suppliers of the risks of using and selling that particular model.

Reasonably foreseeable use is defined in the glossary on page 23. In simple terms, it covers the predictable ways a consumer good might be used – including using it the wrong way (misuse).

Suppliers do not have to respond to a safety warning notice. However, they must comply with any bans or recalls resulting from any investigation announced in the safety warning notice, so suppliers should stay informed. The Product Safety Australia website (www.productsafety.gov.au) has updates on investigations and further developments.

A Commonwealth, state or territory minister responsible for administering the ACL (a 'responsible minister') can publish a safety warning notice online about consumer goods or product-related services.

Investigations

The ACCC has power to obtain information relating to the safety of goods or services under section 133D of the CCA. The ACCC may issue a section 133D notice to a person who, in trade or commerce, supplies consumer goods or product related services of a particular kind, and there is reason to believe that those consumer goods or product related services will or may cause injury to any person, or a reasonably foreseeable use (including misuse) of the good will or may cause injury to any person.

Prior to issuing a disclosure notice, there must be a reason to believe that a person or supplier is capable of giving information, producing documents or giving evidence in relation to those consumer goods or product related services.

CCA reference: section 133D

Publishing investigation outcomes

If the safety warning notice announced an investigation, the minister must publish the outcome online as soon as possible.

This outcome can include proposed action – for instance, plans to impose a ban, a standard or a mandatory recall. The outcome can also include a supplier undertaking a voluntary recall.

A state or territory minister does not have to announce results if the Commonwealth minister has already published a notice either:

- proposing a ban or mandatory recall of the good or service and giving suppliers the opportunity to call a conference with the ACCC
- imposing an interim ban or mandatory recall. An interim ban is one imposed without delay if the Commonwealth minister considers the goods create an imminent risk of death, serious illness or serious injury.

A safety warning notice is a formal alert to consumers and suppliers



Bans on consumer goods or product-related services

Bans can be placed on consumer goods or product-related services in certain circumstances.

There are two types of bans:

- An interim ban – imposed by any responsible minister, which lasts for 60 days and can be extended twice for up to another 30 days each time (up to another 60 days in total)
- A permanent ban – imposed only by the Commonwealth minister.

Failing to comply with a ban is an offence.

ACL reference: sections 109–119

What a ban does

A ban on a consumer good makes it unlawful for anyone, in or for the purposes of trade or commerce, to:

- supply it
- offer to supply it
- manufacture it
- possess it
- have control of it.

Special rules apply to consumer goods intended for export only. Businesses that intend to export consumer goods subject to a ban should seek legal advice.

A ban on a product-related service makes it unlawful for anyone, in trade or commerce, to supply or offer to supply that service.

CASE STUDY

In 2012, the ACCC and state and territory regulators became aware of small, high-powered magnets found in various products such as desk toys, games, puzzles, modelling kits and jewellery. If a child swallows more than one of these magnets, the magnets can stick together across the walls of the intestine or other digestive tissue. Ingestion of these magnets can lead to tissue death, perforation or fistula formation and even the death of the child.

A number of state and territory ministers imposed interim bans on the supply of these products. The Commonwealth minister subsequently took action to permanently ban the supply of these goods in Australia.

When a minister can impose a ban

Relevant Commonwealth, state and territory ministers can impose interim bans on consumer goods or product-related services in certain circumstances.

All ministers can impose an interim ban if they consider:

- the goods may injure someone, including as a result of the supply of product-related services
- using or misusing goods, including those related to a service, in a 'reasonably foreseeable' way may injure someone
- another minister has imposed a similar ban, which is still in force.

ACL reference: sections 109–111

Commonwealth minister

The Commonwealth minister responsible for administering the ACL can impose permanent bans, as well as interim bans. A permanent ban does not have an expiry date.

Any ban imposed by the Commonwealth minister applies throughout Australia.

If the Commonwealth minister proposes to introduce any sort of ban (interim or permanent), the minister must notify suppliers (a ban notice). The proposed ban notice must, among other things, be in writing and published on the internet.

Unless there is an imminent danger to the public, the minister must also give suppliers an opportunity to request a conference with the ACCC before imposing the ban.

CCA reference: sections 132, 132J

To learn about proposed bans:

- subscribe to receive updates from the Product Safety Australia website: www.productsafety.gov.au
- keep in touch with your industry association
- follow consumer product safety updates on social media via: www.twitter.com/ACCCProdSafety and www.facebook.com/ACCCProductSafety

State and territory ministers

State and territory ministers can only impose interim bans that apply in their state or territory.

There is no requirement to notify suppliers or give them an opportunity to call a conference before imposing an interim ban. Suppliers are responsible for staying informed about their legal obligations.

Commonwealth ban following a state or territory ban

A state or territory ban on consumer goods or product-related services ceases immediately before a Commonwealth minister's ban on the same goods or services comes into force.

Information about bans

All bans are listed on the Product Safety Australia website: www.productsafety.gov.au/bans.

How to comply

A supplier must not supply or offer to supply a banned consumer good or product-related service.

When the ban applies to consumer goods, a supplier also must not, for the purposes of trade or commerce:

- manufacture
- possess
- have control of those goods.

If a supplier realises they have supplied consumer goods in breach of a ban, they should recall the goods – see Recall of consumer goods on page 14.

It is the supplier's responsibility to ensure that consumer goods and product-related services are not subject to any bans. This means that all suppliers should be aware of current bans and understand how to comply with them. For more information, visit the 'bans' section of the Product Safety Australia website: www.productsafety.gov.au/bans.

Product testing can help assure suppliers that they are supplying safe goods or services. A publication titled *A Guide to Testing: Product Safety* is available on the Product Safety Australia website: www.productsafety.gov.au/product-safety-laws/compliance-surveillance/product-testing.

Special rules apply in relation to goods supplied for export only. Businesses that supply consumer goods for export only should seek legal advice when those goods are subject to a ban.

Penalties

A supplier who fails to comply with a ban may be found guilty of a criminal offence.

The maximum fine is:

- the greater of \$50 million, 3 times the value gained from the conduct or 30% of the adjusted turnover during the breach turnover period for a body corporate
- \$2.5 million for an individual.

Civil penalties for the same amounts also apply.

A court does not have to consider whether or not the person intended to comply with their obligations in order to find them guilty.

ACL reference: sections 197, 198, 224



Mandatory safety and information standards

The Commonwealth minister can impose mandatory safety standards that set specific requirements for consumer goods or product-related services.

It is an offence to supply consumer goods or product-related services that do not comply with mandatory safety standards.

ACL reference: sections 104–108, 194–196

Applying mandatory safety standards

A mandatory safety standard for a consumer good can set requirements including:

- the way the good is made
- what it contains
- how it is designed
- what tests it needs to pass
- whether any warnings or instructions need to accompany the good.

EXAMPLE

A number of children in Australia have died after becoming entangled in the cords used to open and close curtains and blinds. These cords are not inherently dangerous but when not properly secured, can present a strangulation hazard to young children. A mandatory safety standard for curtains and window blinds requires:

- the goods and their packaging to have warnings clearly displayed on them to increase awareness of the dangers
- the goods to be accompanied by instructions, specifying how they should be installed to avoid a strangulation hazard
- any components mentioned in the instructions as necessary for cord safety to be included in the package.

A mandatory safety standard for a product-related service can specify:

- how the services are supplied
- the skills or qualifications of a person supplying the service
- the materials used in supplying the service
- the tests the services must pass.

CASE STUDY

A routine compliance check was undertaken at a maternity and children's retailer. 3 products supplied failed to comply with a relevant mandatory safety standard:

- Two latex soothers failed to comply with a standard requiring the packaging carry a warning regarding the strangulation hazard associated with the product.
- A cot failed to comply with a standard requiring that the top surface of the mattress base provide information about the manufacturer, importer or distributor, the recommended mattress size, a warning notice about the mattresses thickness, a warning notice regarding adjustable bases and the month and year of manufacture.
- A stroller failed to comply with a standard requiring a warning notice to be permanently and conspicuously marked in a prominent position in characters no less than 2.5mm high.

The retailer agreed to provide the regulator with an undertaking to demonstrate its commitment to compliance with its obligations under the ACL. The regulator worked collaboratively with the retailer to establish and implement a national consumer product safety standards compliance program to ensure future compliance nationally.

CASE STUDY

An import and wholesale company that directly imports goods for sale to retail outlets for the Australian marketplace was issued with a number of warning letters and infringement notices regarding children's toys that had breached mandatory safety standards in October 2011. Some of the products had also been permanently banned from sale. The products included children's toys containing magnets, projectile toys and children's plastic products containing more than 1% DEHP. A spot check was undertaken on the company in July 2012 and a number of non-compliant goods were identified, seized and removed from sale. The company was fined \$60,000 and a conviction was recorded. The Director of the company was also fined \$15,000 and directed to pay court and product testing costs.

Legal reference: Queensland Office of Fair Trading v Sunrise Imports [2013] MAG–218235/12(3), Queensland Office of Fair Trading v Xibo Zhu [2013] MAG–211484/12(8)

Mandatory Information standards

Australian ministers can also regulate goods or services by imposing mandatory information standards.

These can require that certain information is provided about a good or service – for example, washing instructions for clothing.

Suppliers must comply with information standard requirements. For more about information standards, see another guide in this series *Avoiding unfair business practices: a guide for businesses and legal practitioners*, available from: www.consumerlaw.gov.au.

ACL reference: sections 134–135

How to comply

A supplier must not supply or offer to supply goods or services that do not comply with a mandatory safety or information standard.

If a standard applies to consumer goods, and the goods do not meet that standard, a supplier also must not in or for the purposes of trade or commerce:

- manufacture
- possess
- have control of those goods.

Special rules may apply if the consumer goods are intended for export. Businesses that intend to export consumer goods that fail to meet a mandatory safety standard should seek legal advice.

It is the supplier's responsibility to ensure consumer goods comply with relevant mandatory safety standards.

A supplier should obtain a copy of:

- the specific mandatory safety standards that apply, from the Product Safety Australia website: www.productsafety.gov.au/mandatorystandards.
- any documents the standard refers to – for example, an Australian Standard. Australian Standards are available from the SAI Global website: www.saiglobal.com.

Product testing can help assure suppliers that they are supplying safe goods or services. See *A Guide to Testing: Product Safety*, available on the Product Safety Australia website: www.productsafety.gov.au/product-safety-laws/compliance-surveillance/product-testing.

When suppliers choose the standard

When there are two or more sets of requirements for a product, some mandatory safety and information standards allow suppliers to choose one to comply with.

EXAMPLE

Suppliers can choose one of several variations to the standard for child restraints. A supplier must be able to identify which variation of the child restraint standard they are complying with, if asked by a regulator.

It is a criminal offence for a supplier to fail to nominate a standard if required to do so by a regulator.

Penalties

A supplier may be found guilty of a criminal offence if they fail to:

- comply with a mandatory safety or information standard. The maximum fine is:
 - the greater of \$50 million, 3 times the value gained from the conduct or 30% of the adjusted turnover during the breach turnover period for a body corporate
 - \$2.5 million for an individual
- nominate a standard if required to do so by a regulator. The maximum fine is \$4,400 for an individual or \$22,000 for a body corporate.

A court does not have to consider whether or not a person intended to comply with their obligations in order to find them guilty of these offences.

ACL reference: sections 194–196

Civil penalties for the same amounts also apply in relation to failure to comply with a mandatory standard.

ACL reference: section 224



Recall of consumer goods

A recall can be initiated by a supplier voluntarily or ordered by a Commonwealth, state or territory minister responsible for administering the ACL. Most Australian recalls are initiated by suppliers.

When a supplier initiates a recall, they are required by law to notify the Commonwealth minister via the Product Safety Australia website (www.productsafety.gov.au) within 2 days of taking action to recall the consumer goods. Supplier initiated recalls are referred to as 'voluntary recalls'.

A responsible minister can also order a recall when a product poses a safety risk and the supplier has not taken satisfactory action to recall the goods voluntarily. Recalls initiated by a responsible minister are 'compulsory recalls'.

**ACL reference: sections 128, 201 (voluntary recall)
122–127, 199–200 (compulsory recall)**

When to recall consumer goods

Suppliers should recall consumer goods if the goods:

- will or may injure someone, or using the goods in a reasonably foreseeable way (including misuse) will or may injure someone
- do not comply with a mandatory safety standard
- are the subject of an interim or permanent ban.

For detailed information about the recall process, *Conducting a consumer product safety recall: A guide for suppliers* are available from the Product Safety Australia website: www.productsafety.gov.au.

Who to notify about a recall

A supplier must give the Commonwealth minister a written notice by completing the 'Submit a recall' notification form on the Product Safety Australia website (www.productsafety.gov.au) within 2 days after taking action to recall the consumer goods.

The information required will depend on the reasons for the recall. For instance, for a recall due to:

- a defect or dangerous characteristic, the notice must describe the defect or dangerous characteristic
- dangers posed by using the goods in a reasonably foreseeable way, the notice must set out the use or misuse that poses the danger
- a failure to comply with a mandatory safety standard in force, the notice must state how the goods do not comply
- an interim or permanent ban, the notice must state that the goods are subject to an interim or permanent ban.

A supplier must also give a notice about the recall to anyone they have supplied the goods to outside of Australia as soon as practicable. The supplier must provide a copy of this notice to the Commonwealth minister within 10 days of issue.



Penalties – supplier-initiated recalls

A supplier who fails to notify the minister as outlined above may be found guilty of a criminal offence.

The maximum fine is \$3,330 for an individual or \$16,650 for a body corporate (**ACL reference: section 201**). Civil penalties for the same amounts also apply.

ACL reference: section 224

A court does not have to consider whether or not a person intended to comply with their obligations in order to find them guilty of this offence.

Assessing the effectiveness of recalls

Suppliers are responsible for initiating and conducting an effective recall.

The ACCC uses its Product Safety Priorities to determine when to take action, including action it can take for recalls when it is the lead agency. These priorities allow the ACCC to direct resources so as to have the most impact on the risks to Australian consumers from unsafe products.

When determining when to escalate a recall, the ACCC considers:

- risk factors such as injury severity, likelihood and availability of the product
- incident reports
- consumer complaints and stakeholder concern
- issues that arose in publishing a suppliers recall notice such as remedies or recall communication strategy
- the performance of the recall compared to similar recalls.

When the ACCC intervenes in a recall, it may request that a supplier:

- revises recall advertisements and consumer communications so they are consistent with the recall notice
- changes the remedy, including adding extra incentives for the consumer to return the recalled product
- make it easier for consumers to receive a remedy
- ask for the recall messages to be repeated, including in-store advertising, social media posts and emails to consumers
- meets with the ACCC to discuss their recall strategy.

The ACCC may also take other action including:

- issuing a safety alert
- enforcement action for engaging in misleading or deceptive conduct, or making a false or misleading representation that the goods are of a particular standard
- recommending that the Commonwealth minister issue a safety warning notice or a compulsory recall.

Compulsory recalls ordered by a minister

A Commonwealth, state or territory minister responsible for administering the ACL can issue a compulsory recall notice when they consider that the consumer goods:

- will or may injure someone, or using them in a reasonably foreseeable way will or may injure someone
- do not comply with a mandatory safety standard
- are the subject of an interim or permanent ban.

The minister can only issue a compulsory recall notice if it appears a supplier has not taken satisfactory action to prevent the consumer goods injuring someone.

The Commonwealth minister must notify suppliers in writing of a proposed recall (a proposed recall notice). This must be published on the internet.

Unless there is an imminent danger to the public, the minister must also give suppliers an opportunity to request a conference with the ACCC before publishing the notice.

CCA reference: section 132A

When the Commonwealth minister recalls consumer goods already recalled by a state or territory minister, the state or territory recall ceases as soon as the Commonwealth minister's recall comes into force.

ACL reference: section 126

Compulsory recall notice requirements

Using a compulsory recall notice, a responsible minister can require suppliers to:

- recall the consumer goods
- disclose to the public, or to a particular group of people, that the consumer goods have a defect or dangerous characteristic, and what the defect or dangerous characteristic is
- disclose to the public, or to a particular group of people, the circumstances when a reasonably foreseeable use or misuse of the goods is dangerous
- explain to the public, or to a particular group of people, how to dispose of the goods.

The notice can also include:

- how the supplier must take action
- deadlines for doing so.

ACL reference: section 123

If a minister issues a compulsory recall notice, suppliers must:

- give notice to anyone outside of Australia that they have supplied with the consumer goods stating the consumer goods are subject to recall and provide the reasons why
- give a copy of this notice to the relevant minister within 10 days of its issue.

ACL reference: section 125

A compulsory recall notice may also require suppliers of consumer goods to:

- replace the goods
- repair the goods, unless recalled due to a dangerous characteristic
- refund the purchase price. At the discretion of the Commonwealth minister, the notice can specify a reduced refund for goods supplied more than 12 months before issue of the recall notice.

If the supplier undertakes to repair or replace the consumer goods, the supplier must pay any cost of repair or replacement, including transportation costs.

If a supplier is required to destroy goods that have been returned, the supplier should keep a record of the goods before destroying them.

ACL reference: section 123 and 124.

When a supplier cannot be found

When a supplier cannot be found, a minister can require the relevant regulator to recall the goods.

Penalties – recalls ordered by a minister

A supplier who does not comply with a compulsory recall notice may be found guilty of a criminal offence. The maximum fine is \$220,000 for an individual or \$1.1 million for a body corporate.

ACL reference: section 199

A supplier who does not notify a person outside Australia of a recall may also be found guilty of a criminal offence. The maximum fine is \$3,330 for an individual or \$16,650 for a body corporate.

ACL reference: section 200

A court does not have to consider whether a person intended not to comply with their obligations before finding them guilty of these offences.

Civil penalties of the same amounts are also available.

ACL reference: section 224

Specialist agencies

Where the ACCC is notified of a recall and another specialist agency is the lead agency, the ACCC will refer information about the recall to that agency. The specialist agency decides whether to intervene in the recall and what actions to take. This recognises the mandated and specialist expertise of those agencies, and the need for government agencies to avoid duplication.

You can find a list of specialist agencies on the Product Safety Australia website: www.productsafety.gov.au.

CASE STUDY

In 2018 the Government announced the compulsory recall of vehicles fitted with defective Takata airbags on the basis that:

- they may cause injury or death to drivers and passengers
- suppliers of vehicles with defective Takata airbags had not taken satisfactory action to prevent those vehicles causing injury or death to drivers and passengers.

The compulsory recall requires suppliers to:

- Recall all affected vehicles on a rolling basis and replace the airbag at no cost to the consumer
- Arrange towing/transporting a vehicle or providing loan cars in certain circumstances
- Prioritise the replacement of airbags that presented the highest safety risk
- Contact affected consumers directly in line with an approved communication and engagement plan
- Publish a vehicle identification number search tool on their website to allow consumers to identify if their vehicle is affected
- Publish a recall initiation schedule on their website to advise consumers when vehicles were recalled
- Report to the ACCC on various matters.

The compulsory recall required suppliers of vehicles with defective Takata airbags to replace all defective Takata airbags in Australian vehicles by 31 December 2020. Suppliers have an ongoing obligation to replace any remaining defective Takata airbags until they reach 100% actual completion.



When consumer goods or product-related services may have caused death, serious injury or illness

Suppliers must notify the Commonwealth minister within 2 days of becoming aware that a person suffered serious injury, illness or death associated with a consumer good or product-related service they supplied – either in Australia or overseas.

This applies even if the consumer goods or product-related services were misused.

To notify the minister, suppliers should complete the online mandatory reporting form on the Product Safety Australia website: www.productsafety.gov.au/mandatoryreporting.

Failing to comply is an offence.

ACL reference: sections 131–132A, 202

Notifying the Commonwealth minister

Suppliers must notify the Commonwealth minister when they become aware a consumer good or product-related service they supplied has caused, or may have caused:

- death
- serious injury
- serious illness.

A serious injury or illness is an acute physical injury or illness requiring treatment by, or under the supervision of, a qualified doctor or nurse (whether or not in a hospital, clinic, or similar place).

Suppliers must notify the minister within two days of becoming aware of the incident. Suppliers can do this by completing the online mandatory reporting form on the Product Safety Australia website: www.productsafety.gov.au/mandatoryreporting.

For consumer goods, suppliers must identify the goods and include all they know about:

- when, and in what quantities the goods were manufactured or supplied in, imported to or exported from Australia
- the circumstances of the death, serious injury or illness
- the nature of the serious injury or illness
- any action the supplier has taken, or intends to take, in relation to the goods.

For product-related services, suppliers must identify the services and the related consumer goods, and include all they know about:

- when the services were supplied
- the circumstances of the death, serious injury or illness
- the nature of the serious injury or illness
- any action that the supplier has taken, or intends to take, in relation to the services.

This reporting requirement:

- applies when the supplier or another person – for instance, the affected consumer – considers the death, serious injury or illness was caused, or may have been caused, by use or foreseeable misuse of the consumer goods
- does not apply if evidence shows that the death, serious injury or illness was not caused, or was very unlikely to have been caused, by the use or foreseeable misuse of the consumer goods
- does not apply when the supplier has to report the death, serious injury or illness under another law or an industry code of practice specified in the ACL Regulations.

This includes the following Acts and their associated Regulations:

Commonwealth

- *Agricultural and Veterinary Chemicals Act 1994*
- *National Health Security Act 2007*
- *Therapeutic Goods Act 1989*

New South Wales

- *Coroners Act 2009*
- *Public Health Act 2010*
- *Road Transport (Safety and Traffic Management) Act 1999*

Victoria

- *Coroners Act 2008*
- *Public Health and Wellbeing Act 2008*
- *Road Safety Act 1986*

Queensland

- *Coroners Act 2003*
- *Motor Accident Insurance Act 1994*
- *Public Health Act 2005*
- Transport Operations (Road Use Management – Road Rules) Regulation 2009

Western Australia

- *Coroners Act 1996*
- Food Regulations 2009
- *Health Act 2016*
- *Road Traffic Act 1974*

South Australia

- *Coroners Act 2003*
- *Road Traffic Act 1961*

Tasmania

- *Coroners Act 1995*
- *Public Health Act 1997*
- *Traffic Act 1925*

Australian Capital Territory

- *Coroners Act 1997*
- *Road Transport (Safety and Traffic Management) Act 1999*

Northern Territory

- *Coroners Act 1993*
- *Notifiable Disease Act 1981*
- *Traffic Act 1987*

If there is any doubt about whether a mandatory injury report is required, suppliers are encouraged to submit a mandatory injury report.

For more detail on mandatory reporting, see the *Mandatory reporting guidelines*, available from the Product Safety Australia website: www.productsafety.gov.au/mandatoryreporting.



How the information is treated

Information provided when notifying the Commonwealth minister is confidential and cannot be disclosed unless the person giving the information consents. The only exceptions are when the:

- Commonwealth minister shares the information with another minister or the appropriate regulator(s)
- employees of the regulator share the information with the employees of other regulators in the performance of their duties
- Commonwealth minister makes the disclosure in the public interest
- disclosure is required or authorised under law, or is necessary (within reason) to enforce criminal law or a law imposing a financial penalty.

A supplier does not admit liability by notifying the Commonwealth minister.

Penalties

A supplier who fails to notify the Commonwealth minister within 2 days of becoming aware of the incident may be found guilty of a criminal offence.

The maximum fine is \$3,330 for an individual or \$16,650 for a body corporate.

ACL reference: section 202

A court does not have to consider whether or not a person intended not to comply with their obligations in order to find them guilty.

Civil penalties of the same amounts also apply.

ACL reference: section 224





Product liability

Consumers who suffer loss or damage because of safety defects in a manufacturer's goods can:

- make a complaint to a regulator
- take the manufacturer to court. A court can award compensation to cover these losses.

ACL reference: Part 3–5

When consumers can seek compensation

A consumer can seek compensation from a manufacturer who has supplied goods having a safety defect, if the goods caused loss or damage.

A manufacturer is a person or business that:

- makes, grows or puts goods together
- has their name on the goods
- imports the goods, if the maker of the goods does not have a place of business in Australia.

'Loss' and 'damage' can include:

- injuries to the person making the claim, or to another individual
- economic loss caused by damage to, or destruction of another good, land, a building or a fixture.

The court will consider the safety of the goods by looking at all relevant circumstances, including:

- marketing of the goods
- the warnings and instructions for use
- what may reasonably be expected to be done with the goods
- the time when they were supplied.

If a person takes a manufacturer to court and wins, the court decides how much compensation is due.

A consumer must take action within 3 years of becoming aware, or from when they should have become aware, of all of the following:

- the alleged loss or damage
- the safety defect of the goods
- the identity of the person who manufactured the goods.

They must also claim within 10 years of the date the goods were originally supplied.

ACL reference: section 143



Legal defences for suppliers and manufacturers

Legal defences available for suppliers and manufacturers include:

- the safety defect did not exist at the time the goods were supplied
- the state of scientific and technical knowledge at the time of supply did not enable the supplier or manufacturer to discover the defect
- the good was part of another good, and the defect only arose because of the design, markings, instruction or packaging of that other good
- the defect only existed because a mandatory standard was complied with. In this case, the Commonwealth may have to pay any compensation.

ACL reference: section 142

Representative actions by the regulator

An ACL regulator can take action on behalf of a consumer if the manufacturer has supplied goods that have a safety defect and the goods have caused loss or damage. Any representative action taken is at the regulator's discretion.

A regulator can only take action on behalf of a consumer if that consumer has given their written consent.

ACL reference: section 149

A consumer can seek compensation from a manufacturer who has supplied defective goods, if the goods caused loss or damage



Term	Definition
reasonably foreseeable use	<p>includes using consumer goods for their primary, normal or intended purpose, using the goods for an unintended purpose, or misusing the goods.</p> <p>This reminds suppliers that they need to take into account the way a consumer good might be used – rather than just whether it is free from defects – when considering their responsibilities to consumers.</p>
regulator	the Australian Competition and Consumer Commission or state/territory consumer protection agencies.
responsible minister	the Commonwealth, state or territory minister responsible for administering the Australian Consumer Law.
serious injury or illness	<p>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).</p> <p>It does not include:</p> <ul style="list-style-type: none"> • an ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development) • the recurrence, or aggravation, of such an ailment, disorder, defect or morbid condition.
services	<p>include duties, work, facilities, rights or benefits provided in the course of business, for example:</p> <ul style="list-style-type: none"> • dry cleaning • installing or repairing consumer goods • providing swimming lessons • lawyers' services.
supplier	someone who, in trade or commerce, sells goods or services and is commonly referred to as a 'trader', 'retailer' or 'service provider'.
supply	<p>includes:</p> <ul style="list-style-type: none"> • in relation to goods – supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase • in relation to services – provide, grant or confer.

Abbreviations

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
MAG	Magistrate Court



Contacts

Australian Competition and Consumer Commission

GPO Box 3131
Canberra ACT 2601
T. 1300 302 502
www.accc.gov.au

Australian Capital Territory

Access Canberra

GPO Box 158
Canberra ACT 2601
T. 13 22 81
www.act.gov.au/accessCBR

New South Wales

NSW Fair Trading

PO Box 972
Parramatta NSW 2124
T. 13 32 20
www.fairtrading.nsw.gov.au

Northern Territory

Northern Territory Consumer Affairs

PO Box 40946
Casuarina NT 0811
T. 1800 019 319
www.consumeraffairs.nt.gov.au

Please note that the ACCC is responsible for product safety in the Northern Territory.

Queensland

Office of Fair Trading

GPO Box 3111
Brisbane QLD 4001
T. 13 QGOV (13 74 68)
www.qld.gov.au/fairtrading

South Australia

Consumer and Business Services

GPO Box 1719
Adelaide SA 5001
T. 131 882
www.cbs.sa.gov.au

Tasmania

Consumer Building and Occupational Services

PO Box 56
Rosny Park TAS 7018
T. 1300 654 499
www.consumer.tas.gov.au

Victoria

Consumer Affairs Victoria

GPO Box 123
Melbourne 3001
T. 1300 55 81 81
www.consumer.vic.gov.au

Western Australia

Department of Mines, Industry Regulation and Safety

Level 2, 140 William Street
Perth WA 6000
T. 1300 304 054
www.commerce.wa.gov.au

Australian Securities and Investments Commission

PO Box 9827 (in your capital city)
T. 1300 300 630
www.asic.gov.au

