

Guidance on the consumer guarantee:

Acceptable quality and the meaning of 'safe'



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Contents

Introduction	1
About this guide	1
About the other guides	1
About the Australian Consumer Law	2
Guidance on the consumer guarantee as to acceptable quality and the meaning of 'safe'	4
Factors affecting the safety of a good	5
A. The nature of the good	5
B. Price and features of the goods	7
C. Statements made about the goods	8
D. Other relevant circumstances	9
Other matters to consider: The likely user(s)	10





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 consumers, businesses and legal practitioners understand the meaning of 'safe' in the context of the acceptable quality consumer guarantee. This guide outlines factors that may impact the safety of a good and how these may influence whether a good is of acceptable quality under the ACL.

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
- includes examples of the ACL's application by Australian consumer protection regulators.

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, gift cards, 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.

Consumer product safety

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

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.

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 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 Consumer Affairs Senior Officials and other staff level networks.





Factors affecting the safety of a good

A. The nature of the good

When deciding whether a good is safe, the law says a reasonable consumer considers the nature of the good including:

- the normal circumstances of the good's use
- the inherent risks associated with using goods of that kind
- consumable parts of the good that need to be replaced for the good to remain safe.

The good's normal use(s)

To meet the acceptable quality consumer guarantee, a good must be safe when used for its normal use(s) and in normal circumstances.

A good that is safe when used normally may still be considered of acceptable quality even if abnormal use damages a good causing it to become unsafe. The use of a good will be considered abnormal if it does not conform with or deviates from the good's normal use.

Despite the fact that damage caused by abnormal use will not cause a product to fail to be of acceptable quality, manufacturers and suppliers should still be mindful of possible improper or unintended use or misuse of the goods that is reasonably foreseeable. For example, it may be reasonably foreseeable that many consumers would improperly use a chair to step up and fix a light bulb.

The manufacturer or supplier should provide the consumer with appropriate guidance on how the good should be used to ensure that the good's intended normal use is clear.

EXAMPLE

A fashion company releases a new line of mobile phone cases that have a back filled with turpentine and glitter. Turpentine causes irritation and chemical burns after prolonged contact with skin.

The turpentine leaks out if the case is broken or cracked. Mobile phones are frequently dropped, and users who buy cases are likely to have bought the case knowing that they will drop their phone and the case will help to prevent their phone from being damaged when dropped.

The turpentine-filled mobile phone case is likely to fail the consumer guarantee of acceptable quality because it is not acceptably safe when used normally. A reasonable user would expect that a phone case, after being dropped, would still be safe to handle.

EXAMPLE

Leila lives in a small suburban house with a backyard and work shed.

Leila decides to convert her laundry into a second bathroom and turn her work shed into a laundry. Leila purchases a new clothes dryer for the shed. The dryer's manual states the dryer should be in an indoor, well-ventilated environment.

Leila's shed is not enclosed and the dryer sometimes gets rained on. The rain causes damage to the dryer's electrics. This damage causes the electrics to spark, which causes the built up dust in the shed to catch on fire.

In these circumstances, Leila is unlikely to be able to argue the dryer was not of acceptable quality because it was unsafe. The dryer was used in an environment it was not designed for and in a manner that a reasonable consumer would consider abnormal.

Inherently higher risk goods

Some goods have underlying risks that are unavoidable for goods of that kind. These goods may be targeted at users that are aware of these risks and can manage them, but may also be goods that are used in inherently risky activities.

Some goods, such as tobacco and alcohol, are inherently harmful when used as intended. These goods will still comply with the consumer guarantee of acceptable quality provided they are only harmful in the way that a reasonable consumer would expect them to be.

A reasonable consumer will appreciate commonly understood risks when determining what level of safety is acceptable for the good in question.

EXAMPLE

An amateur chef purchases a set of chef's knives for use in her home kitchen. As a reasonable consumer she understands that knives are inherently dangerous even when they function as intended.

However, one knife handle has a manufacturing defect that causes it to snap unexpectedly resulting in injury. A reasonable consumer would expect the handle of a chef's knife to withstand normal use in a commercial kitchen, so the knife with the handle defect would fail the acceptable quality consumer guarantee.

Many inherently risky goods are also subject to other regulatory frameworks, such as mandatory safety standards.

Non-compliance with a mandatory safety standard is likely to increase the safety risk associated with the good and is relevant to determining whether or not the good is safe under the consumer guarantees.

Goods with consumable components

Some goods include consumable components that, if not replaced at appropriate times, could lead to the good becoming unsafe.

Where a good includes consumable components, a reasonable consumer replaces the consumable components at around the time recommended by the manufacturer and assesses the safety of the good in that light.

Consumable goods must also meet the guarantee of acceptable quality.

EXAMPLE

Tom buys a new bike which he rides every day without issue. After two years, the bike's brakes have worn with use and become less effective. Tom takes his bike in to the bike shop and is told that his brake pads need replacing.

Tom's bike will not fail the consumer guarantee of acceptable quality despite the fact that a bike being unable to brake is unsafe. A reasonable consumer understands that brake pads are a consumable component that need to be replaced after a reasonable period of use.

B. Price and features of the goods

Sometimes expensive products may have safety features that cheaper versions do not.

While all goods must be safe to meet the consumer guarantee of acceptable quality, the fact that more expensive goods of the same kind have extra safety features does not in itself mean cheaper products are unsafe. Goods need to be as safe as a reasonable consumer would find acceptable, and a reasonable consumer will take into account the price of goods when considering acceptable safety.

However, a higher price is not determinative of how safe a good should be for the purposes of the consumer guarantees. Many other factors affect the price of a good. Often goods are more expensive for reasons unrelated to their safety.

Even if a good is very cheap, is a basic model, or is bought from a discount shop, the good must still be acceptably safe.

EXAMPLE

A company releases a new hair straightener specifically marketed to parents of teenagers. The hair straightener includes a safety switch that turns it off after 30 minutes of no use. This feature is designed to prevent house fires caused by teenagers using the straightener, then leaving it switched on and in contact with things that may be flammable. The hair straightener is more expensive to account for the development costs and extra hardware required to include the safety switch.

Other cheaper hair straighteners on the market do not have an equivalent safety switch. The lack of an equivalent safety switch does not mean that other hair straighteners have failed to meet the consumer guarantee of acceptable quality even though the more expensive product may be safer due to the safety switch.

EXAMPLE

Travis purchases a portable butane gas stove from a discount camping store for \$20. These stoves are relatively cheap and attractive products for hikers and campers because they are compact and affordable.

Travis' stove has a faulty O ring which makes it difficult for him to correctly attach the canister to the unit. The gas leaks and causes a fire. The stove is likely unsafe, as even though it was cheap, a reasonable consumer would still expect the stove's O ring to function correctly.

C. Statements made about the goods

When a good is marketed for a specific purpose, and the good is unsafe for that purpose, the good will likely fail the consumer guarantee for acceptable quality.

EXAMPLE

A company markets a new spray to swimmers and snorkelers for use inside goggles to reduce fog in the goggles with the aim of improving vision under water. After the product has been applied to the goggles, the product undergoes a chemical reaction which may cause temporary loss of sight and extreme discomfort.

This spray would be unsafe because it is not acceptably safe for its marketed use.

EXAMPLE

A company manufactures a Bluetooth speaker for use outdoors. It is advertised as “water-proof”, “dust-proof” and “rugged.” The advertisement includes pictures of the speaker being used while camping in the rain and strapped to people rock climbing.

The speaker has a manufacturing fault that causes water to seep in when used in the rain. The water causes the lithium-ion battery to become unstable, causing the speaker to potentially combust.

The speaker is likely to fail to meet the consumer guarantee of acceptable quality because it is not acceptably safe. While using most Bluetooth speakers in the rain would be considered ‘abnormal use’, this speaker was marketed as appropriate for this purpose and a reasonable consumer would expect the speaker to be safe for this purpose.

When a good is marketed for a specific purpose, representations about the good may also constitute misleading or deceptive conduct, and/or false or misleading representations under the ACL. Further information regarding the potential for advertising to be misleading or deceptive can be found on the ACCC website, www.accc.gov.au/publications/advertising-selling/advertising-and-selling-guide/avoid-misleading-or-deceptive-claims-or-conduct/misleading-or-deceptive-conduct.

D. Other relevant circumstances

Instructions and warnings

Some goods, particularly complex goods, will come with documentation such as instruction manuals and warnings that advise consumers on the product's safe usage. If a user can use a product safely by following instructions and observing warnings, then as a general rule, the product will be considered safe.

However, a product with a safety defect or fault that may injure the user will not be rendered safe merely because its instructions or warnings draw the user's attention to the safety issue.

Where a product is inherently dangerous, and the risk of injury is not caused by a safety defect, a clear and comprehensive instruction or warning about a product's potential safety risk may be sufficient to ensure the product meets the consumer guarantee of acceptable quality.

EXAMPLE

Linh purchases a milkshake maker to make shakes and drinks. The machine is clearly and prominently labelled 'for use with fruit and liquids only: not suitable for use with ice'. Linh decides to use the milkshake maker to make a frappe, adding ice. The ice is thrown around by the blades and causes the container to crack and causes injury to Linh.

It is likely that the smoothie maker would still meet the guarantee of acceptable quality because the warning about adding ice was clear.

Where using the product in a normal way may be unsafe, a reasonable consumer would expect a safe product to warn them of that risk in a clear, effective way.

EXAMPLE

Denis regularly carries out basic maintenance on his car. After driving for several hours he arrives back home and decides to top up the coolant in his radiator. The cap has a warning printed on it saying 'caution hot' and the operating manual for Denis' car says to wait for the car to cool down prior to doing any maintenance.

While topping up the coolant may have an inherent risk of burning when the car is hot, it is likely that Denis has been warned of that risk in a clear and effective way. In this case the radiator would meet the guarantee of acceptable quality.

However, manufacturers must be conscious that including safety warnings and instructions only in the instruction manual may not be sufficient to appropriately inform a consumer.

This is particularly so when a consumer is purchasing a product that they expect to be able to use in a normal way for products of that kind. If use of the good in the same manner as other similar goods may result in injury then clear and permanent warnings should be on the product itself, as well as on the packaging and in the instruction manual. Alternatively the product should be redesigned to ensure that it can be used safely in the same way as other products of that kind.

EXAMPLE

Malachy purchases a new kitchen appliance that can chop, heat and blend ingredients. The appliance is marketed as being able to make hot sauces and Malachy uses it to make gravy. Once the appliance finishes its cycle, Malachy removes the lid and hot gravy splashes out, burning Malachy's arm.

The appliance's instruction manual tells users not to open the lid whilst the contents are still moving.

However, the appliance was opaque and Malachy had no way of knowing whether the hot contents had settled.

Despite the manual's instructions, the good would not meet the guarantee of acceptable quality because it is not acceptably safe due to the limited visibility making it impossible for a user to follow the instruction manual.

Other matters to consider: The likely user(s)

Whether a good is safe will depend in part on the good's likely user(s).

In order to meet the acceptable quality consumer guarantee, goods targeted at, or likely to be used by, vulnerable groups of consumers may need to be safer than other kinds of goods. For example, goods targeted at or likely to be used by children need to account for a child's decreased ability to identify or understand dangers and that they may use goods in unexpected ways.

Many goods used by vulnerable groups, for example children, are also subject to mandatory safety standards. A good that does not comply with a mandatory safety standard is likely to have an increased safety risk. Non-compliance with a mandatory safety standard is relevant to determining whether or not the good is safe under the consumer guarantees. Further information on mandatory safety laws is provided at Section D.

Suppliers should consider all likely users of their goods regardless of who their goods are marketed to. While some goods targeted at specialist users may assume a level of knowledge or awareness of risk, a supplier cannot assume that all users of the product will have specialist knowledge.

If an inexperienced user may be harmed by using a product that is targeted to a specialist user, the supplier should account for the likelihood of the good being used by an inexperienced user in their design of the good, as well as the product packaging and warnings and instruction manuals. For example, if the good is marketed at an adult, but is highly likely to be used by children, then the supplier should account for that likelihood in their design of the good.

EXAMPLE

Robert buys his 5-year-old daughter Sam a remote control toy tractor. The tractor has a tyre which, once removed, exposes a sharp piece of metal.

The box comes with a warning that tyres should only be removed and replaced by an adult, but the toy has nothing restricting Sam's ability to remove the tyre herself.

In this circumstance, the tractor would fail the consumer guarantee of acceptable quality because it is unsafe. Even though the box has a warning, children are unlikely to understand the importance of the warnings and Sam may remove the tyre and injure herself.

EXAMPLE

John purchases a bundle of climbing equipment from an outdoor recreation retailer. One of the items is a climbing rope that has a label on it which states 'Rope deteriorates over time. Replace after 5–7 years.'

John consistently uses the rope for climbing and securing heavy loads, leading it to visibly fray. Eight years after the rope was first purchased, John uses it for rock-climbing at an indoor sports facility. As John begins to place his weight on the rope, it snaps. As the rope was purchased a significant time before it failed, and contained a warning on the label on how long the rope should reasonably last, it would likely meet the consumer guarantee of acceptable quality.

The age and maintenance of the good

Where a good becomes less safe over time, it may still meet the consumer guarantee of acceptable quality. A good will fail the consumer guarantee if it is unsafe when supplied or becomes unsafe within an unreasonably short period of time.

Some goods will require ongoing maintenance in order to remain safe. If it is reasonable that a consumer provide ongoing maintenance to a good and if a consumer does not do so, the good may still meet the consumer guarantee of acceptable quality if it becomes unsafe due to that lack of maintenance.

EXAMPLE

A seller is advertising their table saw for 'experienced woodworkers'.

Joanne is an experienced woodworker and wishes to purchase this table saw for her shed. The instruction manual says that the safety guard that comes with the saw should be used for certain types of cutting and provides detailed instructions on how to properly fit the guard.

Despite the obvious risk that consumers may cut themselves, the saw is likely to meet the consumer guarantee of acceptable quality and be considered safe. Even though it is marketed towards experienced woodworkers, the table saw includes detailed instructions and a safety guard that would also reduce the risk of injury if an inexperienced user were to purchase and use the product.

Existing mandatory safety standards, recalls and bans

In addition to consumer guarantees, the ACL includes a separate product safety regime that provides for mandatory regulated safety requirements, product recalls and bans. The tests under this regime are separate to the test for whether or not a good meets the consumer guarantee of acceptable quality. However, a banned product, a recalled product or a product that does not meet a mandatory safety standard may also fail to meet the consumer guarantee of acceptable quality because it is not acceptably safe.

A good that does not comply with a mandatory safety standard, ban or recall is likely to have an increased safety risk. Non-compliance is relevant to determining whether or not a good is safe under the consumer guarantees.

Compliance will also not automatically make a good safe. A good may still have a safety defect or fault that arises from an aspect of the product that is not captured by a mandatory safety standard, ban or recall.

EXAMPLE

James owns a washing machine that is the subject of a compulsory recall notice because there is a chance that moisture can leak into some electrical components and this has been known to cause fires.

James was not aware of the mandatory recall and continued to use his washing machine to do regular loads of washing. One afternoon it catches fire, melting some of the plastic components inside and filling his laundry with fumes.

As the washing machine has been recalled, the manufacturer is required to contact James to offer him the remedy specified in the compulsory recall notice. However, the consumer guarantees also apply to James' situation. Applying the factors outlined earlier in this guidance, it is likely that the washing machine would fail to meet the guarantee of acceptable quality because it is not acceptably safe.

This means that James can approach the store he purchased the washing machine from and choose a repair, replacement or refund for the washing machine.

EXAMPLE

Aaliyah purchases a car jack. The manufacturer of her car jack receives reports that a number of those jacks are failing. The manufacturer issues a recall for all car jacks of this model.

Following the recall action, the manufacturer investigates to determine the cause of the jacks failing and identifies defects with a batch of steel used during one week of production. This meant that only car jacks manufactured in that week were faulty and car jacks manufactured outside that week were safe. The manufacturer updates the recall information provided to consumers to note the serial numbers of the car jacks made using the defective steel.

Aaliyah checks the serial number of her car jack and discovers that it was not one of the car jacks made from defective steel. While Aaliyah's car jack was initially included in the manufacturer's recall action, it is likely to meet the consumer guarantee of acceptable quality, as the relevant defect did not manifest in her car jack.

As noted above, product safety recalls are separate to consumer guarantees; however, the two regimes do interact. The consumer product safety recall guidelines, available at www.productsafety.gov.au, provide further guidance on recalls including information on how suppliers should assess the safety of products.

Suppliers should undertake a voluntary recall if the goods they supply 'will or may cause injury', or the goods do not comply with a mandatory safety standard or there is an interim or permanent ban in place for the goods. In some cases the Commonwealth Minister may issue a compulsory recall notice, for example, where a supplier fails to take satisfactory action to prevent goods causing injury.

It is important to note that the term 'will or may cause injury' used in relation to recalls is broad and may represent a lower risk threshold than the term 'unsafe' used in relation to consumer guarantees.

If a recall is voluntary, the supplier can choose whether to replace, refund or repair the goods. In the event of a compulsory recall, the recall notice will state whether the consumer will be entitled to a repair, replacement or refund.

If a recalled good does not meet the guarantee of acceptable quality because it is unsafe, a consumer can reject the remedy offered by the supplier under the recall notice and nominate to receive a refund or replacement. Whether a recalled good is considered unsafe under the consumer guarantees depends on the specific circumstances. Given the different terms used in the law, recalled goods may or may not be 'unsafe' for the purposes of the consumer guarantee of acceptable quality.

Suppliers are encouraged to act quickly and recall goods as soon as a potential risk of injury is identified, even if the goods are currently safe but might pose an injury risk in the future. In the event of loss or damage, suppliers may be liable to pay compensation to injured or harmed consumers.

In these circumstances, it is appropriate that recall action is taken for the goods to the greatest extent possible, but whether they are unsafe for the purpose of the consumer guarantees is a separate question.

Manufacturers sometimes provide a way for consumers to register a product alongside their contact details. A consumer has rights under the ACL whether they register the product or not, but registration will make it easier for a manufacturer to contact the consumer in the event of a recall.