

Consumer product safety

A guide for businesses and legal practitioners



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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.

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

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.



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

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.

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



Glossary and abbreviations

Term	Definition
body corporate	includes a company registered under the <i>Corporations Act 2001</i> (Cth), an incorporated association, a co-operative or an owners corporation.
consumer	<p>a person who buys:</p> <ul style="list-style-type: none">• any type of goods or services costing up to \$100,000 (or any other amount stated in the ACL Regulations)• goods or services costing more than \$100,000, which would normally be for personal, domestic or household use¹• goods which consist of a vehicle or trailer used mainly to transport goods on public roads. <p>Australian courts have said that the following are not normally used for personal, domestic or household purposes:</p> <ul style="list-style-type: none">• an air seeder – <i>Jillawarra Grazing Co v John Shearer Ltd</i> [1984] FCA 30• a large tractor – <i>Atkinson v Hastings Deering (Queensland) Pty Ltd</i> [1985] 6 FCR 331• an industrial photocopier – <i>Four Square Stores (QLD) Ltd v ABE Copiers</i> [1981] ATPR 40–232 at 43,115.
consumer goods	goods intended, or likely, to be used for personal, domestic or household use or consumption.
liability	an obligation to put right a problem – for example, fixing a defective product, providing compensation or taking other action.
manufacturer	<p>includes a person who:</p> <ul style="list-style-type: none">• grows, extracts, produces, processes or assembles goods• holds him/herself out to the public as the manufacturer of goods• causes or permits his/her name, business name or brand mark to be applied to goods he/she supplies• permits him/herself to be held out as the manufacturer by another person or imports goods into Australia where the manufacturer of the goods does not have a place of business in Australia.
product-related services	<p>means a service for or relating to:</p> <ul style="list-style-type: none">• the installation• the maintenance, repair or cleaning• the assembly• the delivery <p>of consumer goods of a particular kind.</p> <p>Without limiting any of the above, the definition also includes any other service that relates to the supply of consumer goods of that kind.</p>

¹ For goods or services supplied before 1 July 2021, a \$40,000 cost threshold applies in order to be considered a consumer under the ACL.



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

