

# Product Recall

*Contributing editors*

**Alison Newstead and Harley V Ratliff**



2016

GETTING THE  
DEAL THROUGH

GETTING THE  
DEAL THROUGH 

# Product Recall 2016

*Contributing editors*

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# Australia

Colin Loveday and Ross McInnes

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## General product obligations

### 1 What are the basic laws governing the safety requirements that products must meet?

#### Relevant legislation and responsible minister

Australia's product safety laws are found in both the common law and federal and state legislation. The main statutory provisions prescribing product safety requirements are contained in Parts 3-3 (Safety of consumer goods and product-related services) and 3-4 (Information standards) of the Australian Consumer Law (ACL). The ACL forms Schedule 2 to the Competition and Consumer Act 2010 (Cth) (CCA). The CCA commenced on 1 January 2011, replacing the Trade Practice Act 1974 (Cth) (TPA). The various state and territory fair trading legislation incorporates the provisions of the ACL, in an attempt to establish a single, national law concerning consumer protection and fair trading.

While the provisions of the TPA applied only to corporations engaged in trade and commerce, or interstate business ventures, the ACL effectively applies to individuals partnerships, businesses and corporations.

The product safety provisions of the ACL cover the:

- publication of public warning notices with regard to potentially dangerous goods (section 129);
- banning of unsafe goods (sections 109 and 114);
- making of product information standards (section 134);
- compulsory recall of unsafe goods (sections 122 to 127);
- notification to the authorities of voluntary recalls (section 128); and
- mandatory reporting requirements on suppliers of consumer goods and services (sections 131 and 132).

The federal minister responsible for consumer protection is the Minister for Small Business (the minister). The minister relies on the Australian Competition and Consumer Commission (ACCC) to monitor and audit the effectiveness of product recalls of general consumer goods. The ACCC is also responsible for the investigation, and prosecution, of breaches of the CCA.

#### Legislative safety requirements and powers of the minister

Under the ACL, consumer goods must comply with:

- relevant product safety standards (section 106); and
- relevant product information standards (section 136).

Under section 104 of the ACL, the minister is entitled to publish product safety standards where reasonably necessary to prevent or reduce the risk of injury to any person. These standards may include requirements as to:

- performance, composition, contents, methods of manufacturing or processing, design, construction, finish or packaging of the goods;
- testing of the goods either during or after the completion of manufacturing or processing; and
- the form and content of markings, warnings or instructions to accompany the goods.

Similarly, under section 134 of the ACL the minister is entitled to publish product information standards in respect of goods (not just consumer goods). These standards may set such requirements as:

- the content of information about goods;
- the provision of specified information; and
- the form and manner in which that information is to be disclosed.

Section 105 of the ACL allows the minister to declare all or part of a standard prepared or approved by Standards Australia International Limited or by a prescribed association or body to be a consumer product safety standard for the purposes of section 104. A similar provision exists in respect of information standards (section 135).

The ACL prohibits the manufacture, possession, control and supply (or offer of supply) of consumer goods that do not comply with safety standards (section 106). Goods that fail to meet these requirements may be subject to a compulsory product recall (section 122).

Under section 129 of the ACL, the responsible minister can declare goods to be unsafe where they are of a particular kind that will or might cause injury to any person, or a reasonably foreseeable use (including a misuse) of those goods will or may cause injury to any person. A notice declaring goods to be unsafe remains in force for 18 months. Thereafter, the minister may impose a permanent ban on the goods.

The compulsory product recall mechanism contained in the ACL is discussed in detail below.

Finally, the ACL has introduced a mandatory reporting requirement on suppliers of consumer goods and product-related services (sections 131 and 132). If the supplier becomes aware of the death, serious injury or illness of any person and:

- considers that this incident was caused, or may have been caused, by the use or reasonably foreseeable misuse, of the goods or services; or
- becomes aware that a person other than the supplier considers that the incident was caused, or may have been caused, by the use or reasonably foreseeable misuse, of the goods or services, the supplier has two days to provide the written notification of the incident to the minister.

In addition to the product safety provisions of the ACL, specific safety requirements and guidelines exist for certain types of products. For example:

- medicines and medical devices are regulated by the Therapeutic Goods Administration (TGA) under the Therapeutic Goods Act 1989 (Cth) ([www.tga.gov.au](http://www.tga.gov.au));
- food must meet the requirements set out in the Australia New Zealand Food Standards Code (Food Standards Code). The Food Standards Code is developed and administered by Food Standards Australia New Zealand (a binational government agency deriving its power from the Food Standards Australia New Zealand Act 1991 (Cth), and is enforced by the various state and territory health departments ([www.foodstandards.gov.au](http://www.foodstandards.gov.au));
- motor vehicles and motor vehicle parts are regulated by the Federal Department of Infrastructure, Transport, Regional Development and Local Government ([www.infrastructure.gov.au/roads/motor/design/index.aspx](http://www.infrastructure.gov.au/roads/motor/design/index.aspx));
- electrical and gas supply and products are regulated by state and territory electrical and gas regulators ([www.erac.gov.au](http://www.erac.gov.au)) and ([www.gtrc.gov.au](http://www.gtrc.gov.au)); and
- agricultural and veterinary products are regulated by the Australian Pesticides and Veterinary Medicines Authority ([www.apvma.gov.au](http://www.apvma.gov.au)).

### 2 What requirements exist for the traceability of products to facilitate recalls?

While there is no general traceability requirement under the ACL, certain industry regulators impose such requirements. For example, lot numbers

must be included on food packaging in accordance with standard 1.2.2 of the Food Standards Code.

### 3 What penalties may be imposed for non-compliance with these laws?

The criminal penalties for non-compliance with product safety requirements are contained in Part 4-3 of the ACL. Section 194 of the ACL makes it an offence to manufacture, possess or have control of, for the purposes of trade or commerce or supply (or offer to supply), consumer goods that do not comply with safety standards. A similar offence exists in respect of banned consumer goods (section 197). A body corporate that contravenes these sections is guilty of an offence punishable on conviction by a penalty not exceeding A\$1.1 million. The maximum penalty for a person other than a body corporate is A\$220,000.

A similar criminal penalty exists under section 203 where a person supplies goods in Australia in respect of which an information standard has been prescribed, and that person has not complied with the standard in relation to the goods.

The penalties for failing to undertake a compulsory product recall are discussed in question 18.

As an alternative to criminal prosecution, the ACCC may either issue infringement notices or pursue civil pecuniary penalties for contraventions of prescribed sections of the ACL. Section 134A of the CCA empowers the ACCC to issue infringement notices in situations where it has reasonable grounds to believe that a person has contravened certain provisions of the ACL including sections 106(1), (2), (3) or (5) (supply of consumer goods that do not comply with safety standards), 131(1) and 132(1) (mandatory reporting requirements) and 136(1), (2) and (3) (supply of goods that do not comply with information standards). In the explanatory memorandum for these amendments, it was stated that they were for use for 'relatively minor' or 'less serious' contraventions. The relevant penalties are set by section 134C of the CCA, and vary depending on the particular provision and the legal status of the person to whom the notice is issued. Penalties range from 600 penalty units (which may be issued to listed corporations in respect of certain provisions) to six penalty units, which may be issued to persons who are not a body corporate. Penalty units are set at A\$170 (an increase from 28 December 2012 on the previous figure of A\$110) by section 4AA of the Crimes Act 1914 (Cth), making the penalty range from A\$1,020 to A\$102,000. These are lower than the pecuniary penalties that might be awarded in court proceedings. Under section 134D of the CCA, compliance with an infringement notice is a bar to further proceedings (both criminal and civil) in relation to an offence constituted by the same conduct that constituted the alleged contravention. For more serious contraventions, section 224 of the ACL allows a court to impose a pecuniary penalty of up to A\$1.1 million for body corporates, and up to A\$220,000 for individuals who contravene certain provisions of the ACL including sections 106(1), (2) (3) or (5), 131(1), 132(1) and 136(1), (2) and (3). An action seeking recovery of a pecuniary penalty is a civil (see section 228), as opposed to being a criminal, action. As such, the ACCC need only prove the contravention to the civil standard (proof on the balance of probabilities) as opposed to the criminal standard (proof beyond reasonable doubt).

In addition to pecuniary penalty and infringement notice provisions, the ACCC has been empowered to seek orders disqualifying persons from managing corporations if the court is satisfied that the person has committed, attempted to commit or been involved in a contravention of sections 106(1), (2), (3) or (5), 131(1) and 132(1) or 136(1), (2) and (3) of the ACL (section 248 ACL). The ACCC may also issue public warning notices under section 223 of the ACL for suspected contraventions of the ACL.

In addition to the civil and criminal penalties that may be imposed for non-compliance with Australian product safety laws, if an individual suffers loss or damage as a result of non-compliance with these laws then they may recover damages under the ACL (section 236). In this regard, individuals are assisted by a series of 'deeming provisions' in the legislation. By way of example, under section 106(7) where:

- a person supplies consumer goods in contravention of this section by reason that the goods do not comply with a prescribed consumer product safety standard;
- another person suffers loss or damage by reason of a defect in, or a dangerous characteristic of, the goods, because of a reasonably foreseeable use (including a misuse) of the goods or because contrary to the safety standard he or she was not provided with particular information in relation to the goods; and
- the other person would not have suffered the loss or damage if the

goods had complied with that standard, the person is taken for the purposes of the ACL to have suffered the loss or damage by the supplying of the goods.

Similar deeming provisions exist where an individual suffers loss or damage from consumer goods that have been banned (section 118(7)), or where an information standard exists for goods of a particular kind and that information standard has not been complied with (section 136(8)).

### Reporting requirements for defective products

#### 4 What requirements are there to notify government authorities (or other bodies) of defects discovered in products, or known incidents of personal injury or property damage?

Australia introduced mandatory reporting requirements for suppliers of consumer goods on 1 January 2011. Pursuant to section 131 of the ACL, if a supplier becomes aware of the death, serious injury or illness of any person and considers that this incident was caused, or may have been caused, by the use or foreseeable misuse of the consumer goods, or becomes aware that a person other than the supplier considers that the incident was caused by the use or foreseeable misuse of the consumer goods, the supplier must provide written notification of the incident to the minister. Given the requirement of death or personal injury or illness, the existence of a serious safety defect in a product is not sufficient in itself to trigger the reporting requirement – there must be an incidence of death, serious injury or illness. Further, property damage alone is not a trigger of the mandatory reporting requirement – therefore a fire caused by a defective clothes dryer that solely damaged property would not be reportable.

In addition to the mandatory reporting requirements, section 128 of the ACL requires a person to give the minister notice within two days following a voluntary recall. The ACL contains no definition of 'recall', therefore there is a degree of imprecision. In practice, however, the regulator gives a very expansive definition to the term so that, for example, if a supplier voluntarily asks consumers to carefully dispose of or return defective goods for a refund or replacement, then that is regarded as a recall. The same applies if a supplier asks consumers or other suppliers to return the goods for some form of modification if a defect is safety-related.

It is worth noting that the recall notification obligations arising under the ACL relate only to instances where a product is recalled because:

- the consumer goods will or may cause injury to another person;
- a reasonably foreseeable use (including a misuse) of the consumer goods will or may cause injury to any other person;
- a safety standard for the consumer goods is in force and they do not, or it is likely that they do not, comply with the standard; or
- an interim ban, or a permanent ban, on the consumer goods is in force.

If a product is recalled for some other reason, it would not be subject to the ACL recall provisions.

The other means by which a corporation may be required to notify authorities of defects or injuries arises under section 133D of the CCA. Under this section, the minister or an inspector may give a disclosure notice to a supplier of consumer goods if the person giving the notice has reason to believe that:

- the consumer goods of that kind will or may cause injury to any person; or
- that a reasonably foreseeable use (including a misuse) will or may cause injury to any person, and that the supplier is capable of giving information, producing documents or giving evidence in relation to those consumer goods.

Once this threshold has been met, the minister has broad powers to require the corporation to furnish information, produce documents or give evidence (either written or oral).

There are also a number of industry-specific reporting requirements. By way of example, the Therapeutic Goods Act 1989 (Cth) establishes rigorous reporting requirements in relation to medicines and medical devices.

#### 5 What criteria apply for determining when a matter requires notification and what are the time limits for notification?

The criteria for determining whether notification is required under the mandatory reporting requirement is discussed in question 4. The obligation is triggered by awareness of a 'death or serious injury or illness' that was caused, or may have been caused, by the consumer good. Serious

injury or illness is defined as ‘an acute physical injury or illness that requires medical or surgical treatment by, or under the supervision of, a medical practitioner or a nurse (whether or not in a hospital, clinic or similar place)’. The ACL provides that the obligation does not apply in certain circumstances including where the supplier, or another person, is required to notify the death or serious injury or illness in accordance with a law of the commonwealth, a state or a territory that is a law specified in the regulations. An example of such a law is the Therapeutic Goods Act 1989 (Cth), which requires notification in relation to drugs and medical devices.

The time limit for mandatory notification under section 131 is within two days (not business days) of awareness.

In the absence of any intervention by a regulatory authority, the decision to commence a voluntary product recall is based upon common law criteria. Once a decision has been made to commence a voluntary recall, then the obligations set out in section 128 will apply. The specific obligations are discussed further below. Specific provisions also exist for the provision of information in the case of mandatory recalls. These are discussed further below.

## **6 To which authority should notification be sent? Does this vary according to the product in question?**

The ACL formally requires notification of voluntary recalls of consumer goods (section 128) and mandatory product reports (section 131) to be submitted to the minister. However, in practice there is an expectation that notification will be given to the ACCC, which acts on the minister’s behalf. Notification is also provided in the case of voluntary recalls to:

- the fair trading agencies in relevant states and territories; and
- where relevant, industry regulators such as the TGA (such notification often being required by law).

The ACCC has established an online portal for the provision of notifications under sections 128 (available at [www.recalls.gov.au](http://www.recalls.gov.au)) and 131 (available at [www.productsafety.gov.au](http://www.productsafety.gov.au)).

## **7 What product information and other data should be provided in the notification to the competent authority?**

A notification under section 131 must identify the consumer goods, and must include information about the following matters to the extent that it is known by the supplier at the time the notice is given:

- when, and in what quantities, the consumer goods were manufactured in Australia, supplied in Australia, exported into Australia or exported from Australia;
- the circumstances in which the death or serious injury or illness occurred;
- the nature of the serious injury or illness suffered by any person; and
- any action that the supplier has taken, or is intending to take, in relation to the consumer goods.

Notification of a voluntary recall under section 128 may be undertaken by way of a section 128 form (which is available online at [www.recalls.gov.au](http://www.recalls.gov.au)). Persons can also choose to prepare their own notifications should they wish. To be considered sufficient, such a notification must state that the consumer goods are subject to recall; and

- if the consumer goods contain a defect or have a dangerous characteristic – set out the nature of the defect or characteristic;
- if a reasonably foreseeable use or misuse of the consumer goods is dangerous – set out the circumstances of that use or misuse;
- if the consumer goods do not, or it is likely that they do not, comply with a safety standard for the goods that is in force – set out the nature of the non-compliance or likely non-compliance; and
- if an interim ban, or a permanent ban, on the consumer goods is in force – state that fact.

Other information that may be provided includes:

- a clear description of the product including the name, make, model and serial number, with a photograph or drawing if available;
- full contact details of the supplier;
- a statement of the hazard and the associated risk;
- dates when the product was available for sale;
- the number of products affected;
- where the product has been distributed and exported;
- the action that the corporation proposes to take (including copies of any proposed recall advertisements);

- what actions the other suppliers and consumers should take; and
- detailed information about using or storing the product.

Some industry bodies have their own notification forms. For example, defects in medicines are reported to the TGA using the medicine report form, while problems with medical devices are reported using a medical device incident report.

## **8 What obligations are there to provide authorities with updated information about risks, or respond to their enquiries?**

There is an expectation that corporations will keep the ACCC informed of progress, developments and outcome following the implementation of a recall. Indeed, corporations that have conducted a recall can expect to be audited. Where the authorities have requested information from a corporation using a statutory provision such as section 133D of the CCA, there is a legal obligation to respond. Failure to respond can lead to the imposition of significant penalties.

## **9 What are the penalties for failure to comply with reporting obligations?**

Failure to provide notification of a voluntary recall is an offence punishable on conviction by a fine not exceeding A\$3,300 for an individual, or A\$16,650 for a body corporate (section 201). A similar offence exists in relation to a failure to comply with the mandatory reporting obligations (section 202). Both offences are offences of strict liability. Alternatively, the court may impose a pecuniary penalty for contravention of the section under section 224. Conduct of an individual in contravention of the requirement can also lead to the imposition of a disqualification order under section 248 (see question 3).

Refusal or failure to comply with a notice requesting information under section 133D of the CCA is an offence punishable on conviction by a fine not exceeding 200 penalty units (A\$34,000) for a body corporate and 40 penalty units (A\$6,800) for a person other than a body corporate (section 133F CCA). Should a person knowingly provide information in purported compliance with a section 133D notice that is false or misleading in a material particular, then that person is guilty of an offence punishable on conviction by a penalty of 60 penalty units (A\$10,200) or imprisonment for not longer than 12 months, or both. The penalty for a body corporate is 300 penalty units, or A\$51,000 (section 133G CCA).

## **10 Is commercially sensitive information that has been notified to the authorities protected from public disclosure?**

Typically, when a corporation notifies information to the authorities there is not an expectation that it will be made public. However, the Freedom of Information Act 1982 (Cth) (the FOI Act) provides individuals with a legally enforceable right to obtain access to documents held by ministers and government agencies. This right to access is not unlimited. Access to documents under the FOI Act is subject to prescribed exemptions such as documents evidencing confidential business affairs. Where such documents are requested by an individual, then the corporation to whom the documents relate has a right to submit to the minister that the documents should be exempt from disclosure.

## **11 May information notified to the authorities be used in a criminal prosecution?**

Pursuant to section 131(6), the giving of notice in accordance with the mandatory reporting requirement is not to be taken for any purpose to be an admission by the supplier of any liability in relation to:

- the consumer goods; or
- the death or serious injury or illness of any person.

Information, evidence or documents provided by an individual under, or obtained by the authorities in accordance with, section 133D of the CCA are not admissible in evidence against the person in any proceedings instituted by the person, or in any criminal proceedings, other than proceedings against the person for a contravention of a provision of section 133F or 133G. That is to say, it may only be used to prosecute an individual for one of the offences discussed in question 9. The provisions of section 155 of the CCA also need to be considered. This section entitles the ACCC to obtain information, documents and evidence in certain circumstances.

## Product recall requirements

### 12 What criteria apply for determining when a matter requires a product recall or other corrective actions?

The decision to undertake a voluntary safety-related recall is the responsibility of the supplier. Given the lack of statutory guidance, a corporation will make the assessment as to whether to recall a product in accordance with the common law.

Under the common law, manufacturers and suppliers of products owe a continuing duty to purchasers and users to prevent a product from causing harm, including after the product is sold. Although the case law in Australia is limited, it is reasonably clear that a manufacturer's common law duty of care may extend to a duty to recall in certain circumstances. Where there is a risk of injury connected with product use, the supplier should investigate the risk to determine whether the risk is substantial and causally related to the product. If there is a substantial risk and a plausible causal connection, the supplier ought to consider appropriate remedial action. In deciding what action to take, the supplier should have regard to the:

- magnitude of the potential harm involved;
- probability of such harm occurring;
- availability and effectiveness of alternative remedial action; and
- degree of knowledge in potential users of the potential harm.

If there is no relevant product safety standard or product information standard, it is sometimes a complex and difficult process in deciding whether to initiate a product recall.

In some cases proper analysis will reveal a problem or defect that is neither safety-related nor critical. In such cases, appropriate remedial action may involve no more than a routine service. However, where the problem or defect has potential safety-related consequences or may affect critical product performance, then the appropriate course is much more likely to be the initiation of a product recall.

While the ACCC provided some early figures in respect of the mandatory reporting requirements in August 2011, without long-term data it is too early to assess what impact their introduction has had on the calculus in deciding whether to implement a voluntary recall. It is possible that upon receipt of reports regarding a particular consumer product, the ACCC will be more proactive in the decision-making process.

### 13 What are the legal requirements to publish warnings or other information to product users or to suppliers regarding product defects and associated hazards, or to recall defective products from the market?

In the case of a compulsory product recall under section 122 of the ACL (discussed below in question 19), the responsible minister may require the corporation to publish warnings or other information to product users (see generally section 123). It is an offence to fail to comply with the requirements and directions contained in a notice issued under section 122.

The section 128 notification requirements for voluntary recalls are discussed above.

Further, where goods are recalled, either voluntarily or in accordance with section 122, a person who has supplied or supplies any of the recalled goods to another person outside Australia shall, as soon as is practicable, notify that person of the recall as well as any defect, dangerous characteristic, non-compliance with a product safety standard, or interim or permanent ban in respect of that good (sections 125 and 128(4)). A copy of that notice must also be provided to the minister who issued the recall notice within 10 days of giving the notice (sections 125(4) and 128(6)). Failure to provide such notice to the minister can result in either a criminal or civil penalty, or a disqualification order.

### 14 Are there requirements or guidelines for the content of recall notices?

The content of recall notices is not mandated by the ACL. However, companies are encouraged to use a standard hatched border with the safety triangle. A template is available for download at [www.recalls.gov.au](http://www.recalls.gov.au).

As to content, the ACCC recommends that recall notices contain a clear description of the product, including the name, the date when the product was sold, the potential risk, and what action the consumer should take.

If the recall is a consequence of an identified breach of an ACL mandatory standard or ban, or of a hazard identified by the ACCC, the conduct of the recall should be negotiated with the ACCC.

### 15 What media must be used to publish or otherwise communicate warnings or recalls to users or suppliers?

The ACL does not expressly require the use of any particular medium by suppliers for the publication of product recalls or warnings. It does, however, expressly provide for the publication of public notices (such as safety warning notices) by the minister on the internet. Traditionally, recalls have been publicised in daily newspapers, and indeed there is an expectation that this will occur.

Additional methods of publication may be appropriate depending on the risk associated with using the product, where the product has been distributed, and the nature of the potential audience that needs to be notified. Additional forms of publication include:

- signs in retail outlets;
- issue of media releases to newspaper, radio and television;
- direct customer contact;
- radio and television advertisements;
- advertisement by retail flyers;
- publication through industry and community organisations;
- publication on a website; and
- publication in consumer magazines.

### 16 Do laws, regulation or guidelines specify targets or a period after which a recall is deemed to be satisfactory?

No. But the regulator's expectations will depend on the particular circumstances and the nature of the product concerned.

### 17 Must a producer or other supplier repair or replace recalled products, or offer other compensation?

Where a compulsory recall has occurred (see question 19), section 123(1)(c) of the ACL empowers the minister to require the supplier to either repair or replace the good in question, or refund the purchase price. The standards of repair and replacement are governed by section 124.

Sections 54 and 55 of the ACL require a manufacturer to compensate a consumer who has suffered loss or damage from a good that is either not reasonably fit for the disclosed purpose (and for any purpose for which the supplier represents that it is reasonably fit), or not of acceptable quality. Further, under section 58 of the ACL, manufacturers are under an obligation to provide repair facilities for consumer goods.

### 18 What are the penalties for failure to undertake a recall or other corrective actions?

Under section 199 of the ACL, if a person fails to undertake a compulsory recall or other corrective action in accordance with a notice under subsection 122 then they have committed an offence with a maximum penalty of A\$1.1 million for a body corporate and A\$220,000 for an individual. Similarly, under section 224, a civil pecuniary penalty of A\$1.1 million for a body corporate and A\$220,000 for an individual may be imposed by a court for failure to undertake compulsory recall or corrective action, while the ACCC may issue infringement notices under section 134C of the CCA. Finally, the ACCC may seek disqualification orders under section 248 of the ACL (see question 3).

In addition to the criminal and civil penalties that may be imposed upon conviction for non-compliance with a product recall order, if an individual suffers loss or damage as a result of non-compliance with such an order then they may recover damages under the ACL (section 236). In this regard, individuals are assisted by the 'deeming provisions' contained in section 127(3). These provisions are similar to those discussed in question 3 with regard to general product safety laws.

## Authorities' powers

### 19 What powers do the authorities have to compel manufacturers or others in the supply chain to undertake a recall or to take other corrective actions?

Under section 122 of the ACL, the responsible minister can order a compulsory recall of a consumer good if it will or may cause injury to a person, and where it appears that the supplier has not taken satisfactory action to prevent the goods from causing injury. Section 122 creates a regime for the compulsory recall of goods in certain circumstances. Subject to meeting the administrative requirements contained in the CCA (discussed below in question 23), a product recall (or other remedial action) can be mandated

### Update and trends

Australia's principal product safety regulator, the ACCC, is becoming increasingly vigilant. In its most recent annual report the ACCC stated that protecting consumers from unsafe products was one of the critical areas of its work. In addition to reporting a large number of consumer product recalls, the ACCC has taken enforcement action against suppliers to ensure compliance with product safety standards. The ACCC reported that it conducted nearly 2,500 site visits resulting in product withdrawals and product recalls.

The ACCC has also commenced proceedings against a major Australian retailer alleging that by offering products for sale, the retailer represented that they were safe. In a novel prosecution the ACCC alleges that by continuing to offer the products for sale following receipt of consumer complaints concerning product safety, the retailer engaged in misleading and deceptive conduct. These proceedings raise a number of important issues including the interplay between those provisions under the ACL which enliven claims for compensation by consumers for defective products and those provisions which enable prosecution for misleading and deceptive conduct.

in circumstances where a person supplies consumer goods and any of the following applies:

- it appears to the responsible minister that the goods are goods of a kind that will or may cause injury to any person;
- it appears to the responsible minister that a reasonably foreseeable use (including a misuse) of such goods will or may cause injury to any person;
- a safety standard for such goods is in force and the goods do not comply with the standard;
- an interim ban, or a permanent ban, on such goods is in force; and
- it appears to the responsible minister that one or more suppliers of such goods have not taken satisfactory action to prevent those goods causing injury to any person.

The steps that may be required are discussed below in question 21.

The penalties for failing to comply with a compulsory recall are discussed above at question 18.

### 20 Can the government authorities publish warnings or other information to users or suppliers?

In the case of a compulsory recall, the minister can require the publication of warnings and other information to users and suppliers under section 123 of the ACL. Similarly, copies of recall notices are published on the Australian recalls website ([www.recalls.gov.au](http://www.recalls.gov.au)).

Under section 129 of the ACL, a responsible minister may publish a written notice on the internet containing one or both of the following:

- a statement that consumer goods of a kind specified in the notice are under investigation to determine whether the goods will or may cause injury to any person, or a reasonably foreseeable use (including a misuse) of those goods will or may cause injury to any person; or
- a warning of possible risks involved in the use of consumer goods of a kind specified in the notice.

This is in addition to the power to publish notices imposing either an interim ban (section 109) or permanently banning goods (section 114), the requirements for which are discussed in question 1.

Australian authorities generally work with suppliers within the framework of the Australian voluntary recall system in order to convey information and notices regarding product safety and product recall.

The Product Safety Australia website provides a facility for members of the public to report apparently unsafe products to either the ACCC or the relevant state and territory regulators (see [www.productsafety.gov.au/content/index.phtml/tag/ReportAnUnsafeProduct#toc1](http://www.productsafety.gov.au/content/index.phtml/tag/ReportAnUnsafeProduct#toc1)). The online form for such reports requires the provision of personal information to enable the authorities to follow up with the individual making the report. These reports are made to the regulators directly and are not published on the website.

### 21 Can the government authorities organise a product recall where a producer or other responsible party has not already done so?

Yes. As discussed above, the Australian system of product recall is primarily voluntary, with reserve compulsory powers. Under section 122 of the ACL, the minister can compel a corporation to conduct a mandatory recall in prescribed circumstances. These are discussed in detail in question 19.

Once the minister has formed the view that action is required in relation to a product, a notice is issued under section 123 requiring the supplier to do any or all of the following:

- recall the goods within a specified time;
- disclose to the public or to a class of persons specified in the notice in the manner and within the period specified in the notice one or more of the following:
  - the nature of the defect in, or a dangerous characteristic of, the goods identified in the notice;
  - the circumstances, being circumstances identified in the notice, in which a reasonably foreseeable use or misuse of the goods is dangerous; or
  - procedures for disposing of the goods specified in the notice;
- inform the public or a class of persons specified in the notice, that the supplier undertakes to do whichever of the following the supplier thinks is appropriate:
  - except where the notice identifies a dangerous characteristic of the goods, repair the goods;
  - replace the goods; or
  - refund to a person to whom the goods were supplied (whether by the supplier or another person) the price of the goods.

The compulsory product recall provisions apply to goods intended to be used or likely to be used by a consumer. Where no supplier is known to the responsible minister, then the minister may require the regulator to undertake one or more of the steps above (with the exception of the provision of repair, replacement or refund).

### 22 Are any costs incurred by the government authorities in relation to product safety issues or product recalls recoverable from the producer or other responsible party?

It is unclear whether the costs incurred by the government authority are recoverable from the producer or other responsible party. However, if successful legal proceedings are brought by the authorities against a corporation, the corporation will be liable to pay the authorities' legal costs in prosecuting the matter under Australia's 'costs follow the event' rule.

### 23 How may decisions of the authorities be challenged?

Pursuant to section 132(1) of the CCA, the minister must issue a proposed ban notice before imposing an interim ban or a permanent ban on consumer goods or product related services of a particular kind. Section 132A(1) requires the minister to issue a proposed recall notice before issuing the recall notice for goods of a particular kind.

The minister must publish on the internet a draft version of the proposed notice, along with a summary of the reasons for the proposed issue of the notice. This notice must include an invitation to any supplier of the product to request a conference with the ACCC. A person must be given at least 10 days to notify the ACCC that they wish to hold a conference in relation to the proposed ban or recall. However, the notice period may be dispensed with if it appears to the minister that consumer goods or product-related services of a particular kind create an imminent risk of death, serious illness or injury.

If a conference is requested, the ACCC must appoint a date, time and place and provide written notice to that effect to the minister (and each person who notified the ACCC of their request to attend a conference). As soon as is practicable following the conference the ACCC must by notice in writing to the minister make recommendations as to whether a ban notice or recall notice should be published. A copy of this recommendation must be given to all suppliers who were present at the conference. The ACCC's recommendation is not binding; however, the minister is under a statutory duty to have regard to such recommendation, and where the minister decides to depart from it there is an obligation to set out the reasons in a written notice published on the internet.

If a person is aggrieved by the decision of either the ACCC or the minister then it is possible, in certain circumstances, to institute proceedings for such administrative law remedies as are conferred and governed by the Administrative Decisions (Judicial review) Act 1989 (Cth). See, for example, *Theo Holdings Pty Ltd v Hockey* (2000) 99 FCR 232.

#### Implications for product liability claims

##### 24 Is the publication of a safety warning or a product recall likely to be viewed by the civil courts as an admission of liability for defective products?

The mere act of publishing a safety warning or product recall notice is not, in and of itself, an admission of liability (see *Courtney v Medtel* (2003) 126 FCR 219). However, whether there is an admission of liability will depend on the material that is published, the words that are used and the relevant context. Similarly, the provision of a mandatory notification under section 131 of the ACL is not to be taken for any purpose to be an admission of any liability in relation to the consumer goods, or the death or serious injury or illness of any person. As with the publication of a recall notice, there is no reason why the contents of a notification could not be construed as an admission of fact.

##### 25 Can communications, internal reports, investigations into defects or planned corrective actions be disclosed through court discovery processes to claimants in product liability actions?

Under the court discovery processes, a party is obliged to discover – that is to identify and allow the other party to access – all documents in its possession, custody or power that are relevant to a matter in issue in the proceedings. Documentary discovery occurs at the pretrial stage so that all documents relevant to the case are disclosed by the parties before the hearing commences.

The obligation to give documentary discovery extends to documents that are no longer in the parties' possession, custody or power, but that were previously.

Documents that are relevant to a case include those documents on which the party relies; documents that adversely affect the party's own case; documents that affect another party's case; documents that support another party's case and documents that the party is required by relevant practice direction to disclose.

All discovered documents must be listed and the parties' lists sworn and exchanged. Parties are entitled to inspect each others' documents and if desired, copy them, save for those in relation to which a claim for legal professional privilege has been advanced.

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