



## WHITE PAPER

April 2019

### How to Conduct a Product Recall in Australia: A Guide

Product recalls are becoming increasingly common. The Australian Competition and Consumer Commission (“ACCC”) and industry-specific regulators are very active in both overseeing product recalls and prosecuting non-compliance with legislative requirements. The ACCC is inclined to target large corporations. A failure to adhere to legislative requirements may be an offence and/or be met with a civil penalty enforced by the ACCC. Since 1 September 2018, penalties for non-compliance have substantially increased. Individuals may be subject to disqualification orders for participation in certain breaches.

Suppliers must comply not only with legislative obligations but the informal requirements of the ACCC in conducting a recall. These include collaborating with the ACCC to develop a recall strategy, providing regular progress reports to the ACCC during a recall and complying with the ACCC’s recall closure procedures. Product recalls can span for years and be highly onerous and expensive.

The product recall regime is complemented by a legislative product-safety framework that concerns product bans, safety warnings and compulsory reporting of serious safety-related incidents caused by consumer products.

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## BACKGROUND

Given strong consumer protection laws and tight regulation, being adequately prepared to carry out a successful product recall is fundamentally important to any enterprise engaged in the manufacturing or distribution of goods in Australia. In March 2017, Consumer Affairs Australia and New Zealand (“CAANZ”) completed a review of the *Australian Consumer Law* (“ACL”) identifying for Ministers’ consideration a package of reforms in pursuit of best-practice consumer law and policy.<sup>1</sup> In respect of product safety, CAANZ recommended greatly increasing fines and penalties proportionate to other ACL penalties; for example, CAANZ recommended increasing penalties for the failure or refusal to notify a voluntary recall. With effect from 1 September 2018, the *Treasury Laws Amendment (2018 Measures No. 3) Act 2018* amended the ACL to strengthen the penalties regime in line with the CAANZ recommendations in relation to false or misleading representations, unconscionable conduct, non-compliance with safety and information provisions and other unfair practices.

Suppliers are responsible for the provision of safe consumer products in Australia and the assessment and (if necessary)

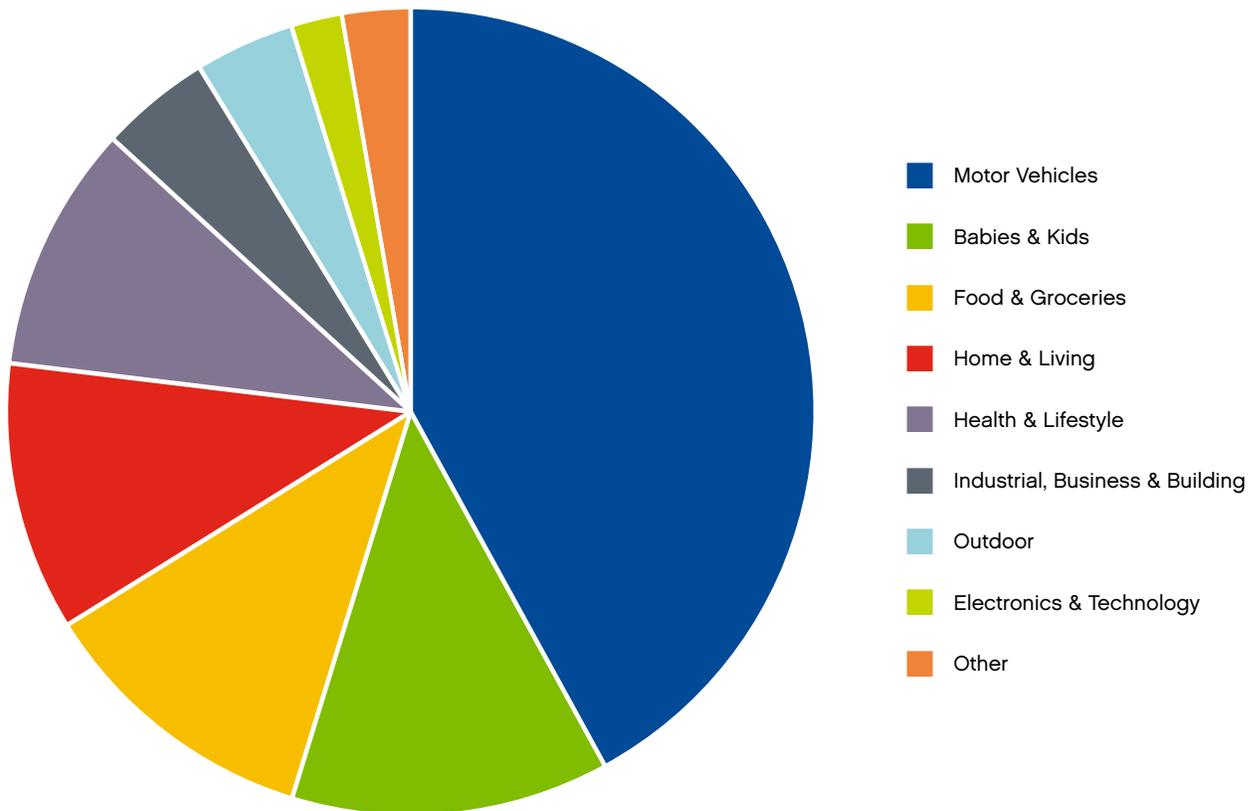
rectification of any safety concerns presented by goods that they supply. Suppliers include manufacturers as well as importers, distributors and retailers. Where goods have been distributed and a safety concern is subsequently detected, suppliers may be required to conduct a product recall.

Product recalls in Australia are primarily regulated through the ACL in circumstances where the recall is motivated by safety concerns. If a supplier wishes to recall goods for any other reason, they do so absent the regulation imposed by the ACL.<sup>2</sup>

As at the time of writing, there are 9,991 active recalls with motor-vehicle related recalls (e.g., cars, motor bikes, quad-bikes, boats, trailers) representing more than 40 percent of the total active product recalls.<sup>3</sup> The chart below represents the breakdown by product type of active recalls.

In the 2017–18 financial year, the ACCC published a total of 591 recall notifications.<sup>4</sup> In the 2016–17 financial year, there were 592 recall notifications.<sup>5</sup> The chart below shows the number of recall notifications for those financial years broken down by category.

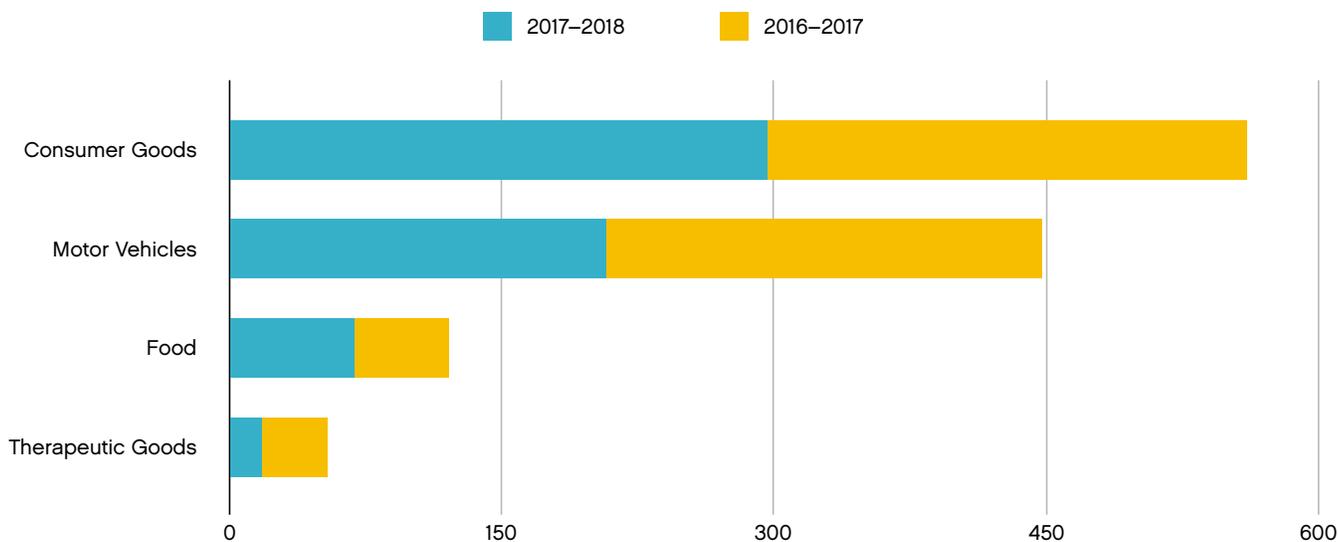
Active Product Recalls – February 2019



For the 2015–16 financial year, there were 670 recalls, which was a significant increase from 596 recorded in the 2014–15 financial year.<sup>6</sup> These figures are part of an upwards trend in

recent years of product recalls with motor vehicles, followed by food and groceries being the most frequent product type to be subject to a recall.

### Recall Notifications by Category



In a study of product recalls in Australia between 1987 and 2010, a period where there were over 10,000 product recalls,<sup>7</sup> the average rate at which products were returned by consumers was 57 percent, but rates varied considerably depending on the type of product. The rate for recalls on motor vehicles and therapeutic goods in the period was found to be very high, at 80 percent and 72 percent respectively, whereas the rate for general consumer goods was only 39 percent.<sup>8</sup>

In 2016, the ACCC conducted a study to determine factors of recall success.<sup>9</sup> The study found that price point, availability of a customer contact list, lifespan of a product and consumer perception of the risk and hazard of the product were factors that most influenced the return of recalled products. The first eight weeks following notification were the most important, with 80 percent of all products likely to be returned being returned within that time. It was also found that 70 percent of consumers were likely to return a product that cost \$25 or more.

This provides insight on the onerousness of recalls generally: goods of greater monetary value or necessity have a higher return rate (and place a greater burden on suppliers) than

consumer perishables where consumers are more likely to dispose of the product themselves and wear the cost. In either case, a supplier's exposure to liability can be significant.

An effective recall strategy is vital to ensure a high return rate and to minimise potential liability from the distribution of faulty consumer goods. This guide will provide general guidance to navigate the regulatory requirements to initiate and successfully carry out a product recall.

### PRODUCT SAFETY RECALLS IN AUSTRALIA

Generally, the Australian product recall regime applies to “consumer goods” and “product-related services”. Consumer goods are products *intended for* personal, domestic or household use or consumption, or *likely to be used for* personal, domestic or household use or consumption. Product-related services are services for or relating to the installation, maintenance, repair, assembly or delivery of consumer goods. Any person who supplies consumer goods or product-related services in trade or commerce must comply with the product safety regime prescribed by the ACL. The ACCC is responsible

for overseeing recalls to ensure unsafe products are effectively removed from the marketplace and for the investigation, and prosecution, of breaches of the ACL.

The main statutory provisions prescribing product safety requirements are contained in Chapter 3 of the ACL. Broadly, the product safety provisions of the ACL concern the following:

- the publication of public warning notices in respect of potentially hazardous goods;<sup>10</sup>
- the imposition of ACCC-imposed bans on unsafe goods;<sup>11</sup>
- the publication of information standards for goods and services of a particular kind;<sup>12</sup>
- the compulsory recall of unsafe goods;<sup>13</sup>
- the notification to the ACCC and other regulators of voluntary recalls;<sup>14</sup> and
- the reporting obligations of suppliers of consumer goods and services associated with death, serious injury or illness of any person.<sup>15</sup>

Although “recall” is not defined in the ACL, it is clear that prescribed rules and procedures applying to product recalls apply beyond taking products off shelves and recovering them from consumers. Recall provisions apply to situations even where a product must be taken to a specified service agent in order to have repairs or rectifications completed, or must be disposed of in a certain, safe way.

Specific (specialised) guidelines and requirements exist for certain classes of products, necessitating the involvement of specialist regulators and agencies in a product recall. In that regard:

- food products must meet the standards set out in the Australia New Zealand Food Standards Code, which is developed by the Food Standards Australia New Zealand (deriving its authority from the *Food Standards Australia New Zealand Act 1991* (Cth)) and enforced by the State and Territory health departments;
- the standard of pharmaceutical products, medical devices and medical products must meet the requirements of the *Therapeutic Goods Act 1989* (Cth), as administered by the Therapeutic Goods Administration;
- the quality and safety of motor vehicles and parts are regulated by the Commonwealth Department of Infrastructure and Regional Development;

- the safe use of agricultural and veterinary products is regulated by the Australian Pesticides and Veterinary Medicines Authority; and
- the safety and safe use of electrical and gas appliances are regulated by the relevant State or Territory electrical or gas regulator.<sup>16</sup>

These specialist regulators have their own recall procedures, some of which, like that of the Therapeutic Goods Administration, are highly sophisticated and will require extensive action by the supplier in order to comply.<sup>17</sup>

## INITIATING A PRODUCT SAFETY RECALL

A product safety recall may be initiated either compulsorily or voluntarily by the supplier. Product recall in Australia is primarily a voluntary, supplier-driven process, with compulsory recalls being an “emergency procedure”, in most cases.

### Voluntary Recall

Voluntary recalls are “voluntary” in the sense that the supplier has elected to initiate the recall, although they do so in circumstances where they have realised that the relevant goods:

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

There is little statutory guidance on when and how a voluntary recall should be undertaken. It is uncontroversial that suppliers may owe a duty to recall defective products that may cause harm to consumers in certain circumstances: the threshold for an obligation to do so is fact dependent. Thus, insight may be derived from the common law concerning the ongoing (tortious) duty of care owed by suppliers and manufacturers to ultimate consumers. Broadly, the magnitude of potential harm, probability of harm occurring, causal connection between the product and harm, availability and effectiveness of potential remedial action and degree of risk assumed by the consumers should be considered when determining whether to voluntarily recall a product.

A supplier must provide the responsible Commonwealth Minister with notice within two days of initiating a voluntary

recall.<sup>18</sup> The ACCC receives the notification and oversees the recall to ensure, the unsafe products are effectively removed from the marketplace. The supplier must also provide notice to anyone outside of Australia who has been supplied with the relevant product as soon as possible, identifying the defective product and its defect, dangerous characteristic or non-compliance with safety standards. That notice must be provided to the Minister within 10 days of issue.<sup>19</sup> Penalties for non-compliance with these requirements (as with any discussed below) are contained in the Annexure to this paper.

## EXAMPLES

Two recent voluntary product recalls include:

- the recall of 144,451 Samsung top-loader washing machines in Australia, which in some circumstances posed a fire hazard. This recall required (and continues to require) immediate remedial action to be taken because of concerns about imminent safety risks to consumers. Samsung offered consumers either a replacement or refund; and
- the recall of SafeTech pool gate latches that remained locked in the open position, causing a safety hazard as unsupervised access to pool areas would not be prevented, posing a potential risk of drowning. Consumers were offered an alternative keyless latch design or replacement lockable latch.
- As is evident from the above examples, recalls can range from complex and expensive to cheap and not overly onerous. In all cases, success is paramount to minimise exposure to potential liability.

## Compulsory Recall

- A compulsory recall notice may be issued in respect of a particular product if:
- it appears that the product will or may cause injury;
- it appears that a reasonably foreseeable use of the product will or may cause injury;
- the product breaches a safety standard imposed (see below); or
- the product is banned, either on an interim basis or permanently (see below).<sup>20</sup>

The compulsory recall notice will require the supplier to take steps to recall the product, including advising consumers on how they can participate in the recall.

A compulsory recall notice may require suppliers of goods to:

- recall the goods;
- disclose the defects or dangerous characteristic of the good;
- explain how to dispose of the goods;
- replace the goods;
- repair the goods; or
- refund the purchase price.<sup>21</sup>

## EXAMPLES

On 28 February 2018, the Assistant Minister to the Treasurer, the Hon Michael Sukkar, issued a compulsory recall notice for vehicles containing faulty airbags manufactured by Takata. This followed an ACCC safety investigation and a voluntary recall that commenced in 2009 whereby 950,000 airbags were replaced. The airbags are at risk of deterioration and mis-deployment, causing death or serious injury. To date, approximately 1 million vehicles have had their airbags replaced, and a further 1.8 million potentially deadly airbags still need replacing. The compulsory recall requires suppliers to replace all faulty Takata airbags in Australian vehicles by 31 December 2020.

It is an offence to fail to comply with the requirements under a compulsory notice. Since 1 September 2018, heavier civil penalties have applied. For an individual, a maximum penalty of \$500,000 is applicable. For a body corporate, the penalty is the greater of:

- \$10 million;
- 3 x the value of the benefit obtained directly or indirectly from the contravention; or
- if unable to determine the benefit, 10 percent of annual turnover from the 12-month period ending at the end of the month in which the contravention occurred.

The ACCC may also issue infringement notices<sup>22</sup> or apply to a court seeking an order that a person be disqualified from managing a corporation for a period the court considers appropriate.<sup>23</sup> Individuals who suffer loss or damage as a consequence of non-compliance with the product safety provisions of the ACL may also seek damages from the supplier responsible for those breaches.<sup>24</sup>

In addition, a manufacturer may be liable to compensate consumers where goods are not fit for purpose and are of unacceptable quality. This, of course, requires those consumers to bring proceedings against the manufacturer.<sup>25</sup> In any case, manufacturers are obligated under s 58 of the ACL to provide repair facilities for their consumer goods.

As is the case for voluntary recalls, if the supplier has supplied the products to a person outside Australia, written notice must be provided concerning the compulsory recall (identifying the product and any defects, dangerous uses, safety warnings or bans) to that person.<sup>26</sup> The notice must also be forwarded to the Minister within 10 days.<sup>27</sup>

The ACCC strongly encourages suppliers recalling products to provide progress reports during the recall, and a final report before the recall is closed (see details below).<sup>28</sup> The Minister may compel the provision of information.<sup>29</sup> Non-compliance with a request for information or the provision of false information are offences.<sup>30</sup>

## CURRENT ISSUE

It is unclear whether the issue of a compulsory recall notice can be judicially reviewed and set aside. In *Pro Teeth Whitening (Aust) Pty Ltd v Parliamentary Secretary to the Treasurer* [2013] FCA 1376, a compulsory notice was issued without consultation on the basis that there was an imminent risk to consumers' health (under the ACL s 122 and Competition and Consumer Act 2010 (Cth) ss 132A and 132J). That expedition of the compulsory recall notice was held, in the circumstances, to have denied the appellant natural justice, and was set aside. The Court was unwilling to set aside the compulsory recall notice itself and left open whether the decision to issue a compulsory recall notice is a reviewable decision. In light of an earlier conflicting decision (under the old legislation, see *Theo Holdings Pty Ltd v Hockey* [2000] FCA 665), the position remains unclear. Paramount to the success of any product safety recall is the supplier's ability to actually recover the relevant goods. As such, the ACCC encourages suppliers to formulate a recall strategy and negotiate that strategy with them.<sup>31</sup>

## Connecting with Consumers

The supplier may initiate the recall process by communicating with other members of the product supply chain to ensure that more products are not shipped or sold. Sometimes, this may be sufficient to complete the recall.<sup>32</sup> For example, if a food product is used exclusively by caterers, then contacting the ultimate consumers for recall would be unnecessary.

If products must be recovered from ultimate consumers, those consumers must be advised of the recall. The ACL does not expressly require a particular medium to be used when notifying consumers or other suppliers of a recall. Direct contact by mail, email, or telephone is the most effective and comprehensive way of communicating with consumers, but other methods such as advertising in local newspapers and on social media will also be effective. As direct contact is the most effective manner of communication, suppliers should investigate whether contact details were provided at the point of sale, through a warranty scheme requiring registration, or

through customer loyalty programs. A pre-emptive strategy, even where a recall is not anticipated, can ultimately be useful and cost effective.

Notice through indirect contact requires the supplier to identify the product's consumer demographic such as age and locality. Naturally, it is prudent to direct media announcements to the geographic locations where the affected consumers reside. This consideration is less and less prevalent as the internet becomes the accepted medium for such announcements. With that in mind, an important factor, in some instances, may be the age of the consumers. Providing notice through a local newspaper is likely to succeed in reaching older consumers, and outreach on social media may be more effective with a young audience.<sup>33</sup> The type of product and the level of risk to consumers may also necessitate the use of media that can be used to connect with consumers quickly, such as television or radio, rather than (for example) newspaper.<sup>34</sup>

Finally, the content of the notice will be important in ensuring its effectiveness. For example, downplaying the importance of the recall, especially by addressing it as a "voluntary" one (as opposed to a mandatory recall ordered by the Minister) may lead consumers to believe that they need not return the products, reducing return rates.<sup>35</sup> Also, notices should be concise, engaging and informative to ensure an effective recall.

## **REQUIREMENTS DURING A RECALL AND THE CLOSURE OF A RECALL**

### **The Practical Conduct of a Recall**

The conduct of a recall will differ from case to case. Generally, the ACCC takes a hands-on approach to recalls. It strongly recommends that, aside from its statutory obligations, the relevant supplier notify all relevant regulators of the recall, conduct a comprehensive risk analysis of the danger, formulate a recall plan or strategy (and submit this to the ACCC), cease distribution of the relevant product, cease or modify production of the product, remove the unsafe product from the market, facilitate the return of recalled goods from consumers, safely store and dispose of the dangerous goods, maintain records throughout the recall process, and provide regular progress reports to the ACCC and relevant regulators.<sup>36</sup>

Low-value products may be particularly difficult to recover and may require additional incentives for consumers to return them, such as a free gift.<sup>37</sup> Generally, high value or more "necessary" goods will be easier to recall.

The ACCC requires that the recall be implemented in accordance with the supplier's recall strategy and in consultation with the ACCC. The content of the recall strategy must be negotiated with the ACCC before submission. The strategy may be developed in consultation with the ACCC as the recall progresses.<sup>38</sup>

Further, in light of the importance of cooperation between suppliers in the supply chain in ensuring the success of the recall, the ACCC requires a supplier undertaking a recall to notify in writing any other entity within the domestic supply chain that a recall has been initiated. The ACCC should be notified that this has been completed, to assist in coordinating the recall.

### **Monitoring and Reporting**

The ACCC requires suppliers to inform it when the supplier:<sup>39</sup>

- withdraws products from the market or distribution chain;
- requests consumers or other suppliers to return products for a refund/replacement/modification;
- requests consumers or other suppliers to contact it for a replacement product or repair service to be dispatched; and
- makes arrangements for a service agent to repair or modify a product when it is next presented for servicing.

According to the ACCC, "[i]n order for [it] to be able to monitor the progress of a recall and assess its effectiveness, a supplier should provide progress reports at regular intervals. The ACCC will develop a reporting schedule with a supplier at the beginning of a recall that appropriately reflects the product risk being addressed."<sup>40</sup> This ongoing communication with the ACCC may require a revision of the recall strategy and regular updates on the progress and success of the recall.

### **Closing a Recall**

Generally, a recall will be closed only when the return rate is sufficiently high and all reasonable steps have been exhausted to effectively mitigate the risk created by the relevant product. The recall may occur over a number of years. For example, the

Samsung washing machine recall, mentioned above, has been ongoing since April 2013. While the recall period ending does not alter the rights of consumers, the supplier's obligations to promote the recall and the ACCC's oversight will cease.<sup>41</sup>

The supplier should submit a final report before a recall can be closed. The final report should include confirmation of the number and rate of products recovered, evidence that entities in the supply chain were notified of the recall, a summary of the communication strategy used and its effectiveness, action taken to identify and correct the cause of the hazard prompting the recall, a summary of the number of complaints and inquiries received, a summary of known injuries/illness/deaths caused by the product and evidence of how the product was destroyed or rectified.<sup>42</sup>

## SAFETY STANDARDS AND PRODUCT BANS

Australia's consumer product safety recall regime is complemented by regimes for the imposition of safety standards and bans.

### Safety Warnings

The Commonwealth, State or Territory Minister responsible for administering the ACL can publish a safety warning notice online, declaring consumer goods or product-related services to be potentially unsafe. The Minister may impose an Australia-wide ban, whereas State and Territory Ministers may issue only bans enforceable in their State or Territory.

The apparent purpose of a safety warning is to pre-emptively prevent harm caused by potentially dangerous goods or product-related services while investigations are being completed. They are temporary and may be followed by the imposition of safety standards or a ban.

A notice in respect of consumer goods will identify the goods that are under investigation, state that the goods will or might cause injury or that use or misuse of those goods will or may cause injury and warn of the possible risks.<sup>43</sup> The notice for product-related services is substantively similar.

## EXAMPLES

Examples of goods banned in Australia include:

- certain novelty goods such as novelty cigarettes and novelty cigarette lighters;
- certain pharmaceutical goods and drugs such as Glucomannan in tablet form and chewing tobacco;
- certain materials in the manufacture of certain goods such as asbestos breathing devices in gas masks and DEHP in children's plastic items;
- miscellaneous personal and household items such as candles with lead wicks, combustible candle holders, small high-powered magnets and "fire footbags"; and
- certain foods such as mini jelly cups containing konjac.

### Safety Standards

The ACL empowers the Minister to create safety standards that are "reasonably necessary to prevent or reduce risk of injury to any person" for either consumer goods or product-related services.<sup>44</sup> In respect of consumer goods, this could involve directions as to:<sup>45</sup>

- a.) the performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of consumer goods of that kind;
- b.) the testing of consumer goods of that kind during, or after the completion of, manufacture or processing; [or]
- c.) the form and content of markings, warnings or instructions to accompany consumer goods of that kind.

A safety standard may specify the manner in which the product is manufactured, the contents or ingredients of the product, the operation or function of the product, tests that the product must pass in order to be offered to the market and whether warnings or instructions must accompany the product when sold.<sup>46</sup>

The manufacture, possession, control and supply (or offer of supply) by a supplier of consumer goods that fail to comply with safety standards may be an offence or also attract a pecuniary penalty.<sup>47</sup>

## Product Bans

Commonwealth, State and Territory Ministers responsible for consumer affairs may also issue interim or permanent bans on products or related services if they consider that those goods or product-related services will or may cause injury, or that a reasonably foreseeable use of them will or may cause injury.<sup>48</sup> A permanent ban does not have an expiry date but will end after 10 years, as required by the *Legislative Instruments Act 2003* (Cth). An interim ban lasts 60 days but can be extended for an additional 60 days.<sup>49</sup>

A ban on goods or product-related services makes it unlawful for anyone, in trade or commerce, to supply, offer, manufacture, possess or control those goods, or supply or offer to supply that product-related service.<sup>50</sup> A supplier who fails to comply with a ban may be found guilty of a criminal offence.<sup>51</sup> Civil penalties may be imposed on anyone who supplies or offers to supply goods or product-related services in contravention of a ban.<sup>52</sup>

## Notice of Death or Serious Injury

Death, illness or serious injury may prompt a product ban or safety warning to be issued by the Minister. Suppliers are obligated to inform the Minister of any death, serious injury or illness caused, or that may have been caused, by a consumer good or product-related service that they supplied and must do so within two days of having become aware of the situation.<sup>53</sup> Property damage or a safety defect is not sufficient to require such a notice. In respect of consumer goods, the supplier must identify the goods, when and in what quantities they were manufactured/supplied/imported to/exported from Australia, the circumstances and nature of the death, injury or illness and any action that the supplier has or will take in respect of the goods.<sup>54</sup> Similar requirements apply in respect of product-related services.<sup>55</sup>

Failure to comply with the notice requirement is an offence.<sup>56</sup> The ACCC may also issue an infringement notice,<sup>57</sup> seek orders disqualifying persons from managing corporations<sup>58</sup> or seek a pecuniary penalty.<sup>59</sup>

## EXAMPLE

Failure to adhere to this “mandatory notice requirement” has been the subject of an action commenced by the ACCC against Woolworths. In *ACCC v Woolworths Ltd* [2016] FCA 44, Woolworths admitted to failing to notify the Minister of injuries caused by a number of its products (a deep fryer, a drain cleaner, safety matches, a padded flop chair and a folding stool) in the requisite period of two days and was found liable for a \$57,000 penalty. It should be noted that Woolworths was merely the supplier and “brand” behind the dangerous goods and did not, itself, manufacture them. Furthermore, the Court held that while some other (unrelated) contraventions of the ACL could be characterised as being “in the same course of conduct” (and therefore being subject to a cap on the pecuniary penalty payable), the contraventions of s 131 involved different and unrelated circumstances (each in respect of different products and incidents). Each individual failure could be subject to the maximum pecuniary penalty. The temporal and factual relationship between incidents necessitating notice will dictate whether they can be aggregated for the purpose of minimising liability, or whether liability arises in respect of each separate failure to provide notice to the Minister in time.

## LIABILITY AND PENALTIES

A failure to adhere to the requirements of the ACL in respect of recalls, safety warnings, mandatory notices and bans may render a supplier criminally liable (for a fine) or subject to a civil penalty. The ACCC may also issue infringement notices and seek court orders that individuals responsible for those infringements be disqualified as company directors. A summary of the offences, fines and civil penalties that may be made in respect of the various infringements of the ACL discussed above can be found in the annexure to this paper.

## CONCLUSION

As product recalls have become more common, the ACCC and industry-specific regulators have shown increasing interest in overseeing recalls and prosecuting non-compliance with the product-safety legislative scheme. Large corporations, which are most likely to be a target for the ACCC, should seek advice on how to navigate the legislative requirements to ensure compliance with the product safety legislation and to put in place tools and processes to assist a smooth recall if the need arises.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com/contactus](http://www.jonesday.com/contactus).

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## ANNEXURE—TABLE OF CRIMINAL AND CIVIL PENALTIES

ACL	SUBJECT MATTER	FINES	CIVIL PENALTIES <sup>60</sup>
106 & 107	Compliance with safety standards made for consumer goods and product-related services	<p><b>Individual:</b> \$500,000</p> <p><b>Body corporate:</b> The greater of:</p> <ul style="list-style-type: none"> <li>- \$10 million;</li> <li>- 3 x the value of the benefit obtained directly or indirectly from the contravention; or</li> <li>- if unable to determine the benefit, 10% of annual turnover from the 12-month period ending at the end of the month in which the contravention occurred.<sup>61</sup></li> </ul>	<p><b>Individual:</b> \$500,000</p> <p><b>Body corporate:</b> The greater of:</p> <ul style="list-style-type: none"> <li>- \$10 million;</li> <li>- 3 x the value of the benefit obtained directly or indirectly from the contravention; or</li> <li>- if unable to determine the benefit, 10% of annual turnover from the 12-month period ending at the end of the month in which the contravention occurred.</li> </ul>
118 & 119	Compliance with bans on the supply of products and product-related services	<p><b>Individual:</b> \$500,000</p> <p><b>Body corporate:</b> The greater of:</p> <ul style="list-style-type: none"> <li>- \$10 million;</li> <li>- 3 x the value of the benefit obtained directly or indirectly from the contravention; or</li> <li>- if unable to determine the benefit, 10% of annual turnover from the 12-month period ending at the end of the month in which the contravention occurred.<sup>62</sup></li> </ul>	<p><b>Individual:</b> \$500,000</p> <p><b>Body corporate:</b> The greater of:</p> <ul style="list-style-type: none"> <li>- \$10 million;</li> <li>- 3 x the value of the benefit obtained directly or indirectly from the contravention; or</li> <li>- if unable to determine the benefit, 10% of annual turnover from the 12-month period ending at the end of the month in which the contravention occurred.</li> </ul>
125(4)	Notification of the Minister within 10 days of notice provided to customers <i>outside</i> Australia of a compulsory recall	<p><b>Individual:</b> \$3,330</p> <p><b>Body corporate:</b> \$16,650<sup>63</sup></p>	<p><b>Individual:</b> \$3,300</p> <p><b>Body corporate:</b> \$16,500</p>
127	Compliance with a compulsory recall notice issued by the Minister	<p><b>Individual:</b> \$500,000</p> <p><b>Body corporate:</b> The greater of:</p> <ul style="list-style-type: none"> <li>- \$10 million;</li> <li>- 3 x the value of the benefit obtained directly or indirectly from the contravention; or</li> <li>- if unable to determine the benefit, 10% of annual turnover from the 12-month period ending at the end of the month in which the contravention occurred.<sup>64</sup></li> </ul>	<p><b>Individual:</b> \$500,000</p> <p><b>Body corporate:</b> The greater of:</p> <ul style="list-style-type: none"> <li>- \$10 million;</li> <li>- 3 x the value of the benefit obtained directly or indirectly from the contravention; or</li> <li>- if unable to determine the benefit, 10% of annual turnover from the 12-month period ending at the end of the month in which the contravention occurred.</li> </ul>

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ACL	SUBJECT MATTER	FINES	CIVIL PENALTIES <sup>60</sup>
128(2)	Notification to the Minister within 2 days of issuing a voluntary recall notice to consumers <i>within</i> Australia	<b>Individual:</b> \$3,330 <b>Body corporate:</b> \$16,650 <sup>65</sup>	<b>Individual:</b> \$3,300 <b>Body corporate:</b> \$16,500
128(6)	Notification to the Minister within 10 days of issuing a voluntary recall notice to consumers <i>outside</i> of Australia	<b>Individual:</b> \$3,330 <b>Body corporate:</b> \$16,650 <sup>66</sup>	<b>Individual:</b> \$3,300 <b>Body corporate:</b> \$16,500
131	Notification to the Minister within 2 days of death, serious injury or illness caused by consumer product or product-related service.	<b>Individual:</b> \$3,330 <b>Body corporate:</b> \$16,650 <sup>67</sup>	<b>Individual:</b> \$3,300 <b>Body corporate:</b> \$16,500

Note that for each of the above listed provisions of the ACL, other remedies that are available include:

1. On application by the regulator, the court may issue an order disqualifying a person from managing corporations if appropriate (s 248(1) of the ACL);
2. If the ACCC has reasonable grounds to believe that a person has contravened those sections, the ACCC may issue an infringement notice (s 134A of the *Competition and Consumer Act 2010* (Cth)).

## ENDNOTES

- 1 See *Australian Consumer Law Review*, Final Report, March 2017.
- 2 *ACL* ss 122–128.
- 3 See [Product Safety Australia \(ACCC\) website](#).
- 4 ACCC and the Australian Energy Regulator (“AER”), Annual Report 2017-18, October 2018.
- 5 ACCC and AER, Annual Report 2016-17, August 2017.
- 6 ACCC “Check your home for recalled products”, 2 August 2016.
- 7 ACCC “Review of the Australian product safety recalls system” (2010) 1.
- 8 ACCC (2010) at 18.
- 9 ACCC “Check your home for recalled products”, 2 August 2016.
- 10 *ACL* s 129.
- 11 *ACL* ss 109–119.
- 12 *ACL* s 134.
- 13 *ACL* ss 122–127.
- 14 *ACL* s 128.
- 15 *ACL* ss 131–132.
- 16 Victoria: Energy Safe Victoria; New South Wales: NSW Fair Trading; South Australia: Office of the Technical Regulator; Queensland: WorkCover Queensland; Northern Territory: ACCC; Australian Capital Territory: Commissioner for Fair Trading; Western Australia: Department of Mines, Industry Regulation and Safety; Tasmania: Department of Justice—Consumer Affairs and Fair Trading.
- 17 TGA Uniform recall procedure for therapeutic goods—2004 edition (Version 1.7, April 2017).
- 18 *ACL* ss 128 (1) and (2).
- 19 *ACL* ss 128(4) and (6).
- 20 *ACL* s 122(1)(b).
- 21 *ACL* s 123(1).
- 22 *Competition and Consumer Act 2010* (Cth) s 134A.
- 23 *ACL* s 248.
- 24 *ACL* s 236.
- 25 *ACL* ss 54, 55 and 271.
- 26 See *ACL* s 125.
- 27 *ACL* s 125(4)
- 28 ACCC, *Consumer Product Safety Recall Guidelines* (December 2015) at 15.
- 29 *Competition and Consumer Act 2010* (Cth) s 133D.
- 30 *Competition and Consumer Act 2010* (Cth) ss 133F and 133G.
- 31 ACCC (2015) at 11.
- 32 Food Standards Australia New Zealand (“FSANZ”) “Food Industry Recall Protocol” (7th ed. May 2014) 17–18.
- 33 ACCC (2010) at 36–7.
- 34 FSANZ (2014) at 21.
- 35 ACCC (2010) at 38.
- 36 See ACCC, *Consumer Product Safety Recall Guidelines* (December 2015) at 6–9.
- 37 ACCC (2010) at 41.
- 38 See ACCC, *Consumer Product Safety Recall Guidelines* (December 2015) at 11.
- 39 ACCC, *Consumer Product Safety Recall Guidelines* (December 2015) at 9–10.
- 40 ACCC, *Consumer Product Safety Recall Guidelines* (December 2015) at 15.
- 41 ACCC, *Consumer Product Safety Recall Guidelines* (December 2015) at 15–16.
- 42 ACCC, *Consumer Product Safety Recall Guidelines* (December 2015) at 15–16.
- 43 *ACL* s 129.
- 44 *ACL* ss 104–105.
- 45 *ACL* s 104(2).
- 46 *ACL* s 104(3).
- 47 *ACL* ss 106, 194 and 224(3) item 9.
- 48 *ACL* ss 109 and 114.
- 49 *ACL* s 111.
- 50 *ACL* ss 118 and 119.
- 51 *ACL* ss 197–198.
- 52 *ACL* s 224(3)
- 53 *ACL* s 131.
- 54 *ACL* s 131(5).
- 55 *ACL* s 131(5).
- 56 *ACL* s 202.
- 57 *Competition and Consumer Act 2010* (Cth) ss 134A–134C.
- 58 *ACL* s 248.
- 59 *ACL* s 224(3).
- 60 *ACL* s 224(3).
- 61 *ACL* ss 194(8) and 195(4).
- 62 *ACL* ss 197(8)-198(4).
- 63 *ACL* s 200(1).
- 64 *ACL* s 199(4).
- 65 *ACL* s 201(1).
- 66 *ACL* s 201(2).
- 67 *ACL* s 202(1).

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