Australian
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Reporter

Key trends in the Australian products liability space — 2018

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We have seen in recent years an increasing level of activity in the Australian regulatory landscape. The current Banking Royal Commission is just one example of many dominating boardrooms and newsfeeds. Regulators are taking action more often, are seeking higher penalties and are seeking to expand the scope of their supervisory and enforcement powers. In addition to penalties that hurt the bottom line, regulators are increasingly focusing on early intervention and organisational culture, putting compliance and risk functions under the spotlight.

The products liability space is not immune from this heightened regulatory environment. Product safety is an area identified by the Australian Competition and Consumer Commission (ACCC) as being of such importance to consumer welfare that it will always be one of the regulator's key compliance and enforcement priorities.[1]

This article considers the following key recent trends in product safety regulation and enforcement, and their implications for businesses supplying consumer goods:

- the increase in product recall activity over the past decade
- the increasing focus of the ACCC on the adequacy of compliance measures
- proposed increased penalties for breaches of the Australian Consumer Law (ACL)
- recent calls for the implementation of a General Safety Provision (GSP) into the ACL

Australia's product liability regime — an overview

Australia's product liability regime is a mixture of Commonwealth and state legislation, but is primarily regulated under the ACL, Sch 2 to the Competition and Consumer Act 2010 (Cth) (CCA).

The ACCC shares responsibility for product safety with the respective fair trading bodies of the states and territories.[2] Together with the ACCC, those bodies administer and enforce the product safety laws. In addition, specific products, including agriculture, medicine and medical devices, foods, electrical goods and transport, are the responsibility of particular specialist government agencies.

There is currently no express obligation under the ACL for a manufacturer or supplier of consumer products to ensure their quality safety, or to conduct a product recall if they are found to be unsafe or defective. Rather, the ACL provides remedies where the quality or safety of a product is found to be below an acceptable standard.

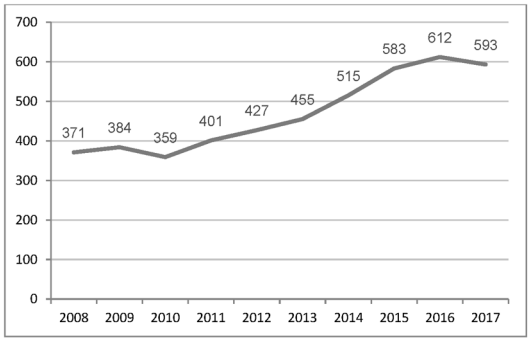
Where a supplier or manufacturer becomes aware of a product safety issue, they have the option of conducting a voluntary recall under the ACL to remove the product from the marketplace and compensate consumers. The Minister can issue a compulsory recall if the Minister considers that the goods will or may cause injury to any person or do not comply with an existing safety standard or ban *and* the Minister is of the opinion that one or more suppliers of the goods have not taken satisfactory action to prevent the goods from causing injury.

Recent trends

Product recalls

Australia has seen a consistent increase in the number of product recalls over the past 10 years, particularly in the "transport" (including motor vehicles, motor bikes and quad bikes), "food and groceries" and "home and living" product sectors. For example, 2017 saw 593 product recalls, compared to 455 in 2013 and 359 in 2010.[3]

Figure 1: Product recalls in Australia



Compulsory recalls are rare. However, the recent compulsory recall of certain Takata airbags, involving the first compulsory recall of motor vehicles in Australia and the largest recall in automotive history,[4] indicates that the ACCC will use its power to issue a compulsory recall notice if it considers it is in the public interest to do so.

Focus on compliance culture

Global and Australian regulators are increasingly emphasising the need for a move towards a compliance-focused culture. Whilst they have been brought starkly into focus through the Banking Royal Commission, the concept of corporate culture and the "social contract" that an organisation has with the society in which it operates are not new. They have been focuses of regulators for years.[5]

The Australian Securities and Investments Commission (ASIC) considers that the culture of an organisation sets the tone for the kind of conduct one expects from that organisation.[6] In its 4-year corporate plan, ASIC has announced that it plans to incorporate consideration of a firm's culture into its risk-based surveillance reviews of the entities it regulates.[7]

This emphasis on proactive and consumer-focused compliance in the corporate cultural context should remain front of mind for businesses in the coming year. This "cultural shift" is only likely to strengthen following the findings of the Banking Royal Commission expected in February 2019.

The ACCC's enforcement powers under s 87 of the CCA include the power to require a person to take steps to reduce the loss or damage likely to be suffered by a consumer in the event of a contravention of the ACL and the power to accept enforceable undertakings. Those powers can be used to require suppliers of consumer goods to implement improved compliance programs, so that they have adequate systems in place to identify and reduce the risk of a breach of the ACL, remedy any breach that occurs, and create a culture of compliance.

In the recent *ACCC v Thermomix in Australia Pty Ltd*[8] case, the Federal Court imposed penalties on Thermomix of over $4.6 million in connection with product safety issues involving the TM31 all-in-one kitchen machine. In addition to that penalty, the court ordered that Thermomix must establish a Consumer Compliance Program that met certain requirements and would be implemented for a period of 3 years. Similarly, in the recent *ACCC v Apple Pty Ltd*[9] case, the Federal Court ordered that Apple Incorporated (US) pay $9 million in penalties, and Apple Australia offered an enforceable undertaking to improve its compliance systems and procedures.

The ACCC's support for a GSP, discussed below, is also intended to encourage businesses to improve their product safety compliance and product stewardship from design to point of sale. It demonstrates the emphasis the ACCC is placing on compliance at all stages of the supply and manufacturing process, with a proactive rather than a reactive approach to consumer safety.

Push for increased penalties

In the past 3 years, ASIC, the ACCC, the Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Fair Work Commission have all imposed their highest ever penalties.[10] This year, the ACCC has signalled its intention to agitate for tougher penalties for certain breaches of the ACL.[11]

A Bill has been introduced to strengthen and align the maximum penalties available under the ACL with the maximum penalties available under the competition provisions of the CCA. The Bill is proposed to take effect on the later of 1 July 2018 and the day the Bill receives Royal Assent.[12]

The Bill was introduced in response to findings by Consumer Affairs Australia and New Zealand (CAANZ) as part of the final report of the *Australian Consumer Law Review* that the current maximum penalties available under the ACL are insufficient to deter noncompliant conduct that is otherwise highly profitable or which CAANZ perceives may be rationalised by breaching companies as simply "a cost of doing business".[13]

The current maximum penalty for a breach of the ACL by a body corporate is $1.1 million. The Bill seeks to increase these penalties to the greater of:

- $10 million or
- if the court can determine the value of the benefit obtained from the offence, or act or omission by the body corporate and any related bodies, three times the value of the benefit or
- if the court cannot determine the value of the benefit obtained, 10% of annual turnover

For persons other than bodies corporate, the penalty for an individual is slated to increase from $220,000 to $500,000 per individual.

The proposed new penalties regime would apply to the supply of consumer goods that do not comply with safety standards or those covered by a ban, and noncompliance with compulsory recall notices. It would also apply to various other offences under the ACL, including unconscionable conduct; the making of false or misleading representations about goods or services; misleading conduct as to the nature of goods or services; and bait advertising.

General Safety Provision

Chairman of the ACCC Rod Sims noted in a speech in March this year that "most consumers are surprised to learn that it is not illegal to sell unsafe products in Australia."[14] Rather, both the common law and the ACL provide remedies in the event that a consumer suffers loss or damage because a product has proven to be unsafe, or of unacceptable quality.

There are consumer guarantees in the ACL that goods supplied to consumers are of an acceptable quality, part of which includes that they are safe. A breach of the consumer guarantee provides the consumer with access to remedies, such as replacement goods or a repair of the goods. However, presently, the ACL contains no explicit, positive requirement that all goods supplied to consumers must be safe, and no negative obligation on suppliers of consumer goods not to supply goods that are unsafe.

Under s 104 of the ACL, the Minister can make a safety standard for consumer goods, or product-related services, of a particular kind (mandatory standards). There are currently mandatory standards in place for some 42 products, ranging from sunglasses and sports and exercise equipment to children's toys.[15] Section 106 of the ACL makes it an offence to supply goods that do not comply with these mandatory standards.

The ACL differs in this respect from the consumer laws of a number of other jurisdictions:[16]

- *Canada*: Section 7(a) of the Canada Consumer Product Safety Act SC 2010 c 21 contains a general prohibition against the manufacture, import, advertisement or sale of a consumer product that is a danger to human health or safety.
- *European Union*: Article 3 of the General Product Safety Directive 2001/95/EC provides that producers shall be obliged to place only safe products on the market. A product is deemed "safe" where it conforms to the national law of a member state in whose territory the product is marketed and presumed safe by reference to voluntary national standards.
- *United Kingdom*: Section 5 of the General Product Safety Regulations 2005 (UK) applies to all products, new and second hand, used by consumers. This section places a general duty on producers and distributors to supply only products safe in normal, or reasonably foreseeable, use. Product-specific legislation may take precedence in areas where the provisions have similar objectives to these Regulations.[17]

There have been calls for the implementation of a GSP in the ACL for more than a decade.

In 2006, a Productivity Commission report[18] found that a GSP may facilitate cultural change by creating stronger incentives for businesses to consider safety and make it easier for regulatory authorities to take pre-emptive action before a product causes injury. However, the report was doubtful that such a shift in culture was actually required. It noted that the GSP was likely to have little impact on the behaviour of "recalcitrant and fly-by-night suppliers" and would only result in additional costs arising from more onerous compliance requirements being passed onto the consumer.

In October 2017, CAANZ recommended the introduction of a GSP to:

> … refocus the product safety provisions of the ACL to ensure the appropriate allocation of risk and incentives and to bring the provisions in line with developments in overseas product safety models.[19]

CAANZ concluded that the absence of a GSP means that consumers are bearing a "disproportionate burden of risk"[20] when it comes to product safety and that consumers tend to underestimate product safety risk because of an incorrect assumption that all products on the market in Australia were assessed as safe prior to sale.[21]

CAANZ proposed a general obligation on traders, including manufacturers, suppliers and retailers, to ensure the safety of their products. No specific wording for such an obligation was suggested; however, a range of design issues were proposed for further consultation.[22] These included:

- *clarity of the law* — whether the duty should be cast as positive or negative, that is, whether to supply safe products or not to supply unsafe products; whether the meaning of "safe" or "unsafe" should be defined; and whether there should be a requirement that the duty holder took "all reasonable steps" to ensure the safety of the product, and, if so, what this might mean
- *efficient allocation of risk* — between manufacturers and importers on the one hand, and suppliers and retailers on the other, recognising that the former often has greater control over product

hazards and safety risks as those occur at the design and manufacturing stages

- *deterrent effects and penalties* — whether to impose the maximum financial penalty available for other breaches of the ACL
- *incentives for compliance* — including the proposal for a "safe harbour" defence

A safe harbour defence would give traders an automatic defence to a GSP breach where they have otherwise complied with an appropriate product safety standard. In the absence of a mandatory safety standard, traders may rely on a voluntary safety standard (international, regional or national).[23] CAANZ suggested that such a defence may overcome stakeholder concerns around the confusion of mandatory versus voluntary standards, as well as the alleged impacts on innovation arising from highly prescriptive product safety requirements.[24]

Early in 2018, ACCC Chairman Rod Sims affirmed the ACCC's (general) support for a GSP in order to reduce the risk of unsafe goods entering the market.[25] However, there has been no announcement of any immediate intention to implement a GSP.

Companies should remain alert to the possible introduction of a GSP into the ACL in the coming years. However, the overall potential impact of such a provision should not be overstated. So long as legislators get the language and allocation of risk right, for most businesses, any such change should be an official codification of an already existing policy to ensure the safety of the products they put on the market.

Getting your business on board

We are likely to continue to see a heightened regulatory focus on businesses taking a proactive approach to identifying risks within their business and having sufficient compliance systems and processes in place to address them. With a heightened regulatory focus also comes the increased risk of consumer claims, including class actions. We have already seen announcements of multiple proposed class actions coming out of the Banking Royal Commission. Until overtaken by securities class actions, products liability and defective goods actions constitute the largest percentage of representative proceedings filed.[26]

Businesses that supply consumer goods have an opportunity to learn from recent regulator activity in other sectors to ensure that they have adequate compliance programs in place to address product safety, before an issue arises.

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Footnotes

1. ACCC "2018 ACCC compliance and enforcement policy and priorities" (February 2018) 4 www.accc.gov.au.
2. These include the Australian Capital Territory Fair Trading, Consumer Affairs Victoria, New South Wales Fair Trading, Queensland Fair Trading, South Australia Consumer and Business Services, Tasmania Consumer Affairs and Fair Trading, and Western Australia Consumer Protection.
3. ACCC, Product Safety Australia "Recalls" www.productsafety.gov.au/recalls.
4. M Sukkar, Assistant Minister to the Treasurer "Compulsory recall of vehicles fitted with defective Takata airbags" media release (28 February 2018) http://mss.ministers.treasury.gov.au/media-release/004-2018/.
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8. *ACCC v Thermomix in Australia Pty Ltd* [2018] FCA 556.
9. *ACCC v Apple Pty Ltd* [2017] FCA 416; BC201702807; ACCC "iPhone and iPad misrepresentations cost Apple Inc $9 million in penalties" media release no 110/18 (19 June 2018) www.accc.gov.au/media-release/iphone-and-ipad-misrepresentations-cost-apple-inc-9-million-in-penalties.
10. ACCC "Record $46 million in penalties for Yazaki cartel" media release no 87/18 (16 May 2018) www.accc.gov.au/media-release/record-46-million-in-penalties-for-yazaki-cartel; ACCC "Full Federal Court orders $6 million penalty for Nurofen Specific Pain products" media release no 244/16 (16 December 2016) www.accc.gov.au/media-release/full-federal-court-orders-6-million-penalty-for-nurofen-specific-pain-products; AUSTRAC "AUSTRAC and CBA agree $700m penalty" media release (4 June 2018) www.austrac.gov.au/media/media-releases/austrac-and-cba-agree-700m-penalty; Fair Work Ombudsman "Record penalty against Townsville café operator over failure to pay compensation" media release (16 May 2018) www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/may-2018/20180516-port-douglas-penalty-media-release; Fair Work Ombudsman "Penalty against MCG head contractor over underpayments a 'wake-up call'" media release (29 May 2018) www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/may-2018/20180529-iss-penalty-mr.
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13. CAANZ *Australian Consumer Law Review* Final Report (March 2017) 87 https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf.
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19. Above n 13, at 34.
20. Above n 13, at 37.
21. Above n 13, at 37.
22. Above n 13, at 40.
23. Above n 13, at 40–1.
24. Above n 13, at 41.
25. Above n 14.
26. Allens "Class actions in Australia" (February 2017) www.allens.com.au/pubs/pdf/class/papclassfeb17-01.pdf.