

Guidance on 'unsafe'

Consumer Guarantee as to acceptable quality

The Australian Consumer Law (ACL) creates a basic set of guarantees or rights for consumers who acquire goods. One of these guarantees is that the goods will be of "acceptable quality". This guarantee includes that the goods will be as safe as a reasonable consumer would regard as acceptable.

Where a good fails to meet the consumer guarantee of acceptable quality because it is unsafe, the law says that this is a major failure and you have the right to reject the good and choose between a refund, replacement or repair.

The concept of unsafe is not defined in the ACL and has its ordinary meaning in line with community expectations. In reality, members of the community are likely to consider a good to be safe if it is unlikely to cause actual or potential harm, injury or danger (but not absolutely free from risk).

It is ultimately the role of a court to determine whether or not a good is safe. However, if you are concerned that a good is unsafe you should raise your concerns with the retailer or manufacturer. When considering if a good is safe, the ACL says a reasonable consumer takes into account:

- the nature of the good,¹ which could include the likely user of the good and circumstances of the good's normal use;
- the price of the good;² and
- any statement made about the good, either on the packaging or by the supplier or manufacturer of the good.³

A reasonable consumer would also take into account any other relevant circumstances,⁴ which could include:

- instructions and warnings for assembly and use; and
- any existing mandatory safety standards and bans.

You should be aware that the consumer guarantees are not the only laws applying to goods. In addition to the consumer guarantee remedies, you may also have a right to seek damages for loss or damage you suffer as a result of unsafe goods.

Factors affecting the safety of a good

The nature of the good

The safety of a good is assessed by reference to the nature of the particular good in question. The following may be relevant:

- the likely user(s) of the good
- the normal circumstances of the good's use

¹ ACL reference: section 54(3)(a)

² ACL reference: section 54(3)(b)

³ ACL reference: section 54(3)(c) and (d)

⁴ ACL reference: section 54(3)(e)

- the inherent risks associated with using goods of that kind; and
- consumable parts of the good that need to be replaced for the good to remain safe.

The likely user(s)

A good's safety needs to be assessed with the likely user(s) of the good in mind.

In order to meet the acceptable quality consumer guarantee, goods targeted at children need to account for a child's inability to identify or understand dangers and that they may use goods in unexpected ways.

By contrast, goods targeted at specialist users may be acceptably safe despite having safety risks that could harm an inexperienced consumer, as the specialist user should be aware of and able to manage the risks of the good.

Example

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

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

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

Example

Joanne is an enthusiastic woodworker, and purchases a new table saw for her woodworking shed. The instruction manual says that the safety guard that comes with the saw should be used for certain types of cutting and provides detailed instructions on how to properly fit the guard.

Despite the obvious risk of a consumer cutting themselves, the saw is unlikely to fail the consumer guarantee of acceptable quality because it is unsafe. Table saws are purchased by experienced woodworkers or carpenters who are expected to take necessary precautions when using this equipment, including reading the instruction manual and following warnings.

The good's normal use(s)

To meet the acceptable quality consumer guarantee, a good must be acceptably safe for the environment and circumstances in which the good is normally used. The manufacturer or supplier should provide you with appropriate guidance on how the good should be used to ensure that the good's intended normal use is clear to you.

Where a good is used in a location or manner that a reasonable consumer would consider abnormal, and that environment causes the good to be unsafe, the good is still likely to comply with the consumer guarantee of acceptable quality because a reasonable consumer only expects a good to be safe when used in its intended ways and locations. However where a good is used in a way that a reasonable consumer would consider normal, and that use results in damage that causes the good to become unsafe, the good is unlikely to meet the acceptable quality consumer guarantee because the good is not acceptably safe.

Example

A fashion company releases a new line of mobile phone cases that have a back filled with fluid and glitter. The fluid is turpentine, which can cause skin irritation and chemical burns with prolonged contact.

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

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

Example

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

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

In these circumstances, the dryer is likely to meet the consumer guarantee of acceptable quality, even though it caught fire. The dryer was not used in the environment for which it is designed and in a manner that a reasonable consumer would consider normal.

Inherently higher risk goods

Some goods have underlying risks that are unavoidable for goods of that kind. These goods may be targeted at users that are aware of these risks and can manage them, but may also be goods that are used in inherently risky activities. Some goods, such as tobacco and alcohol, are inherently harmful when used as intended but will be compliant with the consumer guarantee of acceptable quality if they are harmful in the manner that a reasonable consumer would expect them to be.

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

Example

A butcher purchases a set of butcher's knives for use in his business. A reasonable consumer⁵ understands that knives are inherently dangerous even when they function as intended.

However, one knife's handle has a manufacturing defect that causes it to snap unexpectedly. A reasonable consumer would expect the handle of a butcher's knife to withstand use in the butcher shop, and that the defect could cause injury through normal use. The knife with a manufacturing defect would fail the consumer guarantee of acceptable quality because it is not acceptably safe.

⁵ Generally speaking, a business is also a "consumer" for the purposes of the ACL when they purchase goods below the relevant threshold (\$40,000 at the time of publication).

Many inherently risky goods are also subject to other regulatory frameworks, such as mandatory standards, and whether or not the good complies with those frameworks is relevant to determining whether or not the good is safe.

Goods with consumable components

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

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

Example

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

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

Price and features of the goods

In some markets, manufacturers compete on the safety of goods, and more expensive products may have safety features that cheaper versions do not.

While all goods must be acceptably safe to meet the consumer guarantee of acceptable quality, the fact that more expensive goods of the same kind have extra safety features does not in itself render cheaper products not acceptably safe. Goods are assessed by reference to what a reasonable consumer would find acceptable. A reasonable consumer will take into account the price of the goods and whether the good has additional safety features.

Example

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

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

Even if a good is very cheap, is a basic model or is bought from a discount shop, the good must still be safe in order to meet the guarantee of acceptable quality.

Example:

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

compact and affordable. The butane gas canister does not have a release value because it is a cheap consumable part.

Travis' stove has a faulty 'O ring' which makes it difficult for him to correctly attach the canister to the unit. The gas leaks and causes a fire.

Even though the stove was cheap, it would not meet the consumer guarantee of acceptable quality because the faulty 'O ring' meant it was not acceptably safe.

Statements made about the goods

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

Example

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

This spray would fail to meet the consumer guarantee of acceptable quality because it is not acceptably safe for the specific use it was marketed for.

Example

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

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

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

Instructions and warnings

Some goods, particularly complex goods, will come with documentation such as instruction manuals and warnings that advise consumers on the product's safe usage. An unsafe product will not be safe merely because it includes instructions or warnings that draw the user's attention to a safety issue.

However, in some circumstances, a clear and comprehensive instruction or warning about a product's potential safety risk may be sufficient to ensure the product meets the consumer guarantee of acceptable quality.

Example

Linh purchases elastic luggage straps to secure luggage on a trailer. The strap contains a warning label 'DO NOT overstretch'. Linh has not purchased enough luggage straps to sufficiently secure the luggage to his trailer. He tries to stretch the straps to fit. As he overstretches a strap, it rebounds into his face causing injury to his eye.

It is likely that the luggage straps would still meet the guarantee of acceptable quality because the warning about overstretching the straps was sufficiently clear.

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

Example

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

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

However, manufacturers must be conscious that consumers may not read instruction manuals and warnings. This is particularly likely when the consumer is purchasing a product that they expect to be able to use in a normal way for products of that kind. If the normal use of that product would not include consumers reviewing an instruction manual every time the product is used, then warnings should be on the product itself as well as in the instruction manual.

Example

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

The appliance's instruction manual tells users not to open the lid whilst the contents are still moving. However, the appliance was opaque and Malachy had no way of knowing whether the hot contents had settled, and Malachy had not recently reviewed the instruction manual since he purchased the appliance two months ago. Despite the manual's instructions, the good would not meet the guarantee of acceptable quality because it is not acceptably safe.

Existing safety standards and bans

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

Example

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

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

As the washing machine has been recalled, the manufacturer is obliged to contact James to assess his situation under the product safety regime. However, the consumer guarantees also apply to James' situation. Applying the factors outlined earlier in this guidance, it is likely that the washing machine would fail to meet the guarantee of acceptable quality because it is not acceptably safe. This means that James can approach the store he purchased the washing machine from and choose a replacement or refund for the washing machine, or negotiate another remedy such as a repair.

Example

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

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

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

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

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

With voluntary recalls, the ACL provides that the recalling supplier can choose the appropriate remedy. In practice, this is often a repair. For a mandatory recall the recall notice will state the remedies that are available under the recall. These remedies may include a repair, replacement or refund. In either a voluntary or mandatory recall, you can reject the remedy offered by the supplier and request a refund if the good is unsafe under the consumer guarantees. This assessment often needs to be done on a case by case basis, and as outlined in the examples above, recalled goods will not always fail to meet the consumer guarantee of acceptable quality for reason of them being unsafe.

Suppliers are encouraged to act quickly and recall goods as soon as a potential risk of injury is identified, even if the goods are currently safe but might pose an injury risk in the future. In these circumstances it is appropriate that recall action is taken for the goods to the extent

possible, however, it does not mean that they are unsafe for the purpose of the consumer guarantees.

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