A guide to the mandatory reporting law in relation to consumer goods

Suppliers of consumer goods and related services are required to report deaths, serious injuries or illnesses associated with consumer goods

February 2016
Introduction

In June 2010, the second part of the Australian Consumer Law was passed as the *Trade Practices Amendment (Australia Consumer Law) Act (No.2) 2010* (in this guide, this Act will be referred to as the ACL). The ACL introduced a single, national consumer law which will apply the same way nationally as in each state and territory.

The ACL introduces new laws relating to consumer product safety and in particular a mandatory reporting regime that requires suppliers to report consumer product related incidents where a death or serious injury or illness has resulted.

The mandatory reporting requirement stems from a Productivity Commission (PC) Report. The *Review of the Australian Consumer Product Safety System*1 was released in February 2006 and noted that an effective product safety system should identify significant hazards posed by consumer products in a timely fashion.

One of the issues the PC canvassed when considering how significant hazards could be identified was the issue of imposing reporting requirements on suppliers. It was recognised that suppliers will often have more information concerning the safety of their products than government and that having a reporting requirement would give governments access to broader and more timely sources of information. Such access would improve the responsiveness of the regulatory regime to existing and emerging product-related hazards.

In the PC’s view, requiring suppliers to notify government of products associated with serious injury or death is likely to be a cost effective way of enhancing the ability of regulators to identify the most hazardous consumer products.

The PC report recommended that governments require suppliers to report products which have been associated with serious injury or death to the appropriate regulator. These recommendations have been taken up in the ACL.

The ACL sets out the mandatory reporting requirements for consumer goods and product related services. It also outlines confidentiality requirements for notices provided under the mandatory reporting requirements.

This guide has been developed by the Australian Competition and Consumer Commission (ACCC). It has been designed to assist businesses to understand the mandatory reporting laws. It is current as the law presently stands but may be updated over time.

The purpose of the guide is to explain the mandatory reporting laws as simply as possible. However, it is not a substitute for the actual words of the ACL. It is intended to provide general information only and is not intended to provide legal advice.

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Key features of the mandatory reporting regime

Key features of the mandatory reporting regime are as follows:

- When a supplier becomes aware of an incident where a person has suffered death or serious injury or illness that was caused by, or may have been caused by, the use or foreseeable misuse of a consumer good, the supplier must provide a written report (notice) to the Commonwealth Minister.

- The mandatory reporting requirements apply to suppliers of consumer goods and suppliers of product related services associated with consumer goods.

- The mandatory reporting requirements do not apply where other laws or codes require the supplier to notify a different government entity of the death, serious injury or illness. Suppliers are only exempt from the ACL mandatory reporting requirements if the laws or codes giving rise to the exemption are listed in Regulation 92 of the Competition and Consumer Regulations 2010 (See appendix).

- The laws apply whether or not the consumer goods were being used or abused before or at the time the death, serious injury or illness occurred.

- The notice must be provided to the Commonwealth Minister within two days of becoming aware, and must include certain information.

- Where a supplier has provided a notice, it is not to be taken for any purpose as an admission by the supplier of any liability in relation to the consumer goods, product related services or the death or serious injury or illness of any person.

- The information provided in the notice must not be disclosed by the ACCC without consent except under exceptional circumstances defined in the law.

- Generally, the circumstances when disclosure of all or part of a notice is allowed relate to the sharing of information between relevant Ministers and regulators.

- Disclosure is also allowed if the Commonwealth Minister considers that the disclosure is:
  - in the public interest; or
  - required or authorised by or under law; or
  - reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty.
Mandatory reporting guide

1 Mandatory reporting obligations

1.1 When is a mandatory reporting obligation triggered?

Individual suppliers are responsible for reporting incidents where consumer goods have been associated with a death or serious injury or illness of any person.

Broadly there are two triggers to the reporting requirement for suppliers, both of which must be present before the supplier is required to report:

- The goods in question are consumer goods;

- A supplier of such consumer goods, or services related to them, has become aware that a person has suffered death or serious injury or illness associated with the goods.

The second trigger, that the supplier has become aware of a death, serious injury or illness only triggers the reporting requirement if either:

1. The supplier considers that the death or serious injury or illness was caused, or may have been caused, by the use or foreseeable misuse of the consumer goods.

   OR

2. The supplier becomes aware that a person other than the supplier considers that the death or serious injury or illness was caused, or may have been caused, by the use or foreseeable misuse of the consumer goods.

Provided at least one of these two elements of the second trigger is met, along with the first trigger, a supplier is required to report the incident.

The requirement applies to incidents that the supplier becomes aware of after 31 December 2010, even if the incident occurred, or the good was supplied, before that date. The requirement applies regardless of whether or not the consumer goods were being used before or at the time the death, serious injury or illness occurred.

The reporting requirement applies to ‘use or foreseeable misuse’ of a consumer good. This includes the use of consumer goods for their primary, normal or intended purpose; using the goods for an unintended purpose; or misusing the goods. Suppliers need to report deaths, serious injuries or illnesses believed to be caused by a consumer good however it might have been used and regardless of whether there were defects with the good or whether misuse of the good may have contributed to the cause of the incident.

There are some circumstances where a supplier is not required to report. These are outlined in section two of this guide.
**Product related services reporting obligations**

Individual suppliers of product related services are required to report incidents where the consumer goods that their services relate to have been associated with a death, serious injury or illness of any person. For example, a supplier who installs blinds would be required to report a serious injury or death that was associated with the blinds, regardless of whether the supplier perceives the injury, illness or death to have related to a problem with the service that was rendered.

The triggers for reporting such incidents are the same as those outlined above.

1.2 Who is required to report incidents where a consumer good is associated with a serious illness, injury or death?

All participants in the supply chain of a consumer good that has been associated with a death, serious injury or illness are required to comply with the reporting requirement upon becoming aware of an incident. This includes a retailer, dealer, distributor, installer, repairer, importer, manufacturer and/or exporter of the consumer goods in question.

Similarly all participants in the supply chain for product related services linked to the goods that are associated with the death, injury or illness of a person, are required to report the incident.

The supplier is not required to report each and every time it is advised of the same incident, even if the information comes from a different source each time. When additional information is obtained it should be provided to the ACCC.

Note that if a supplier becomes aware that the same type of consumer good or product related service has been involved in another incident, the supplier is required to report the new incident to the ACCC.

1.3 Can an agent submit the notice on behalf of one or more suppliers?

A supplier may authorise an agent to submit a mandatory report on their behalf. Such an agent may submit a mandatory report on behalf of multiple suppliers associated with the relevant consumer goods. The ACCC would then not require mandatory reports to be submitted by those suppliers in relation to this same incident if:

- The agent informs the ACCC in writing, on the same day as submitting the report, that they are submitting the report on behalf of one or more identified suppliers
- The agent certifies that they will provide a copy of the submitted report to all of the identified suppliers
- The agent provides written consent for the ACCC to disclose the details of the submitted report to each of the identified suppliers on request.
An example of an agency arrangement would be where a manufacturer becomes aware of a reportable incident and in submitting the mandatory report to the ACCC, indicates that they are also reporting on behalf of all of the retailers of the consumer good associated with the incident. The manufacturer would identify all of these retailers; certify that they will provide each of them with a copy of the submitted report, and consent to the ACCC disclosing the content of the report to each of them. This arrangement would only apply for this specific incident and mandatory report. The ACCC would then not require duplicate reports of this same incident from the identified retailers.

1.4 What are ‘consumer goods’ and ‘product related services’?

‘Consumer goods’ are goods that are intended to be used, or are of a kind likely to be used, for personal, domestic or household use or consumption.

‘Consumer goods’ do not include products in production that have not been released for supply to consumers.

‘Product related services’ include:

(a) the installation of consumer goods; or

(b) the maintenance, repair or cleaning of consumer goods; or

(c) the assembly of consumer goods; or

(d) the delivery of consumer goods; and

(e) without limiting paragraphs (a) to (d), any other service that relates to the supply of consumer goods.

The reporting requirement only applies with respect to product related services and not more broadly to ‘services’ or to ‘consumer services’.

1.5 What is a ‘serious injury or illness’?

Serious injury or illness is defined to mean an acute physical injury or illness requiring medical or surgical treatment by, or under the supervision of, a qualified doctor, nurse or paramedic. The medical or surgical treatment can be provided in a hospital or clinic, or in a similar place such as a regional or rural clinic where in the circumstances hospitalisation may not always be possible.

A ‘serious injury or illness’ does not include an ailment, disorder, defect or morbid condition, whether of sudden onset or gradual development, or the recurrence of such an ailment, disorder, defect or morbid condition. Chronic ailments, disorders, defects or morbid conditions are not reportable. For example, a long term exposure to a substance in a consumer good that causes a chronic disease, such as cancer, is not reportable.

However, if a consumer good causes a death or acute injury or illness requiring medical treatment of a person with a pre-existing sensitivity, then this is reportable. For
example, if a person with a pre-existing allergy to a substance suffers an anaphylactic reaction after contact with a consumer good containing that substance, a report to the ACCC will be required.

For the purposes of the reporting requirements, a serious injury or illness can include:

- an external physical injury, such as a serious burn, deep cut, broken bone, choking or serious fracture;
- an internal injury, such as internal bleeding;
- an acute illness, such as poisoning;

The death, injury or illness may have occurred to a person in Australia or elsewhere. The requirement also applies regardless of the country in which the consumer good involved in the incident was manufactured or sold. If a supplier has supplied that kind of consumer good in Australia and the reporting criteria are satisfied, then a death or serious injury or illness that occurred outside of Australia must be reported.

Injury or illnesses requiring treatment from health professionals other than medical practitioners or nurses do not satisfy the definition of ‘serious injury or illness’. A broken tooth requiring treatment by a dentist, for example, does not require a report to the ACCC. However, if the injury required treatment by a medical practitioner or nurse, a report would be required.

A “near-miss” does not require a mandatory report. For example, a house fire caused by a consumer good but in which no-one was harmed, is not reportable to the ACCC. However, suppliers are encouraged to report to the ACCC and other relevant authorities of such incidents. Other “near-misses” involving consumer goods can be voluntarily reported to the ACCC via the Product Safety Australia website (www.productsafety.gov.au) but these are not classified as mandatory reports.

1.6 How might a supplier ‘become aware’ of a death, serious injury or illness?

A supplier will ‘become aware’ of a death or serious injury upon receiving information from any source. A supplier may become aware of an incident through, for example:

- direct notification by a consumer, through a complaint or simply through information the consumer provides in writing or verbally
- direct notification by a non-government organisation, for example, an industry or consumer organisation
- direct notification by a supplier, for example, an international headquarters
- through information associated with a recall or other measure being initiated by a different organisation
• direct notification by a re-supplier, repairer, or insurer of the consumer goods
• receipt of reports from experts, test reports, scientific or other relevant information

Awareness does not require written notification; the legislation requires the supplier to notify the ACCC when an issue comes to light regardless of how it is conveyed.

A supplier becomes aware as soon as a person within their organisation has been notified of the incident. Mandatory reporting of product-related death, serious injury or illness should be incorporated into the organisation’s complaint-handling procedures, systems and policies.

Suppliers are not required to make themselves aware of anything that they would not become aware of in the ordinary course of their business. However, having received relevant information a supplier will be considered to have ‘become aware’ of the incident and therefore would be required to report.

If the veracity of information is uncertain, suppliers are nonetheless advised to report. However, suppliers are encouraged to include any concerns about the truth of the information in the report to the ACCC.

1.7 How quickly must a supplier report an incident?

Where the reporting requirement applies, a supplier is required to report the necessary information to the Commonwealth Minister in writing within two days of becoming aware that the consumer goods or product related services in question have caused or may have caused a death, serious injury or illness.

The two day period operates according to the *Acts Interpretation Act 1901* and does not include the day on which the supplier becomes aware of the incident. The two day period begins at the start of the next day. Additionally, if the due date falls on a Saturday, Sunday or public holiday, then the reporting period is extended until the next business day.

The following table explains the two day reporting requirement in more detail.

<table>
<thead>
<tr>
<th>Supplier becomes aware of reportable incident on:</th>
<th>Mandatory report to ACCC due by midnight of the next(^1,2):</th>
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<td>Monday</td>
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Notes:
1. The report becomes overdue after midnight in the supplier’s location.
2. If the due day specified above is a public or bank holiday in the supplier’s location, then the mandatory report is due on the next business day.
In order to meet the mandatory reporting requirement a supplier needs to have in place internal policies, processes and procedures to ensure that an appropriate person within the organisation receives information about incidents associated with consumer goods or product related services quickly. However, the supplier is responsible for reporting regardless of the availability and actions of internal staff.

Suppliers are encouraged to submit appropriate and timely notifications, even if they are late, rather than delay notification further.

2 Circumstances for not reporting

The mandatory reporting requirement does not apply in any of the following circumstances:

• Where it is clear (that is certain) or very unlikely (that is highly unlikely) that the death, serious injury or illness, was not caused by the use or foreseeable misuse of the consumer goods.

• Where the supplier or another person is already required to report the death, serious injury or illness under a Commonwealth, State or Territory law or industry code specified in the Competition and Consumer Regulations 2010 (see Appendix).

• Where a product was evidently faulty but no death or serious injury or illness occurred.

Suppliers should be very cautious about choosing not to report incidents. If there is doubt about whether to report an incident, it is appropriate to report it.

Specific requirements relevant to particular kinds of goods and circumstances are explained in the following sections.

2.1 Agricultural and veterinary chemicals

Registrants of pesticides and veterinary medicines are required to report to the Australian Pesticides and Veterinary Medicines Authority (APVMA). Pesticides and veterinary medicines are therefore exempted from mandatory reporting to the ACCC under Regulation 92.

2.2 Biological agents

Entities registered under the National Health Security Act 2007 are required to report events in which persons are affected by a security-sensitive biological agent. That situation is exempted from mandatory reporting to the ACCC under Regulation 92.
2.3 Therapeutic goods

Sponsors of therapeutic goods, including medicines and medical devices, are required to report adverse events to the Therapeutic Goods Administration (TGA). Therapeutic goods are therefore exempted from mandatory reporting to the ACCC under Regulation 92.

2.4 Reports to a coroner

If a supplier has evidence that a death was reported to a coroner then they are exempted from mandatory reporting to the ACCC under Regulation 92.

2.5 Motor vehicles

State and Territory road traffic and transport legislation requires motor vehicle accidents on public roads to be reported to the police or other authorities. Motor vehicle accidents on public roads are therefore exempted under Regulation 92 from mandatory reporting to the ACCC.

Other kinds of motor vehicle related deaths, serious injury or illness (e.g. driveway runovers or off-road accidents) are not exempted by the Regulations and the normal mandatory reporting criteria apply.

2.6 Food

State and Territory legislation relating to health, food and notifiable diseases requires food-borne infectious diseases to be reported to health authorities. Food-borne infectious diseases are therefore exempted under Regulation 92 from mandatory reporting to the ACCC.

Other food-related deaths, serious injury or illness (e.g. choking on food-packaging) are not exempted by the Regulations and the normal reporting criteria apply.

Alcoholic beverages and liquor are not food and are not exempted from mandatory reporting. Only incidents where the liquor is believed to have directly caused death or serious injury or illness, such as severe alcohol poisoning, will be reportable.

Incidents where alcohol is believed to have contributed by influencing a person’s behaviour do not need to be reported.

2.7 Electrical and gas appliances

Safety incidents involving electrical or gas appliances that are consumer goods are not exempted by the Regulations and the normal mandatory reporting criteria apply.

In some instances, suppliers of electrical or gas appliances may need to report an electricity or gas safety incident to the State or Territory electrical or gas safety regulator. However, such a report does not satisfy obligations to report to the ACCC.
3 Notice requirements

3.1 What information is to be provided in the written notice?

The ACCC asks suppliers to provide basic details of the injured person for statistical purposes and to cross-check with other data sources.

The online form reminds reporters to only provide personal details of the injured person after appropriate consent is obtained. The online form can be found at: http://www.productsafty.gov.au/MandatoryReporting

The mandatory reporting laws prescribe certain information that is to be included in the written notice:

- Identification of the consumer goods; or the product related services and the consumer goods to which the services relate; and
- the following details, to the extent that they are known by the supplier at the time of reporting:
  - when and in what quantities the consumer goods were manufactured, supplied in Australia or imported into Australia or exported from Australia;
  - when the product related services were supplied (where relevant);
  - the circumstances surrounding how the death, serious injury or illness in question occurred;
  - the nature of any serious injury or illness suffered;
  - any action the supplier has taken or intends to take in relation to the consumer goods and/or the services.

There is no requirement for a supplier to substantiate information prior to making a report.

Suppliers should provide information about the incident to the extent known at the time that the report is due. The two day reporting timeframe means that the supplier will often not have all of the details for a thorough investigation or determination about the incident before submitting the report. The legislation requires that the notice must “include information…to the extent that it is known by the supplier at the time the notice is given”.

Suppliers are asked to provide updated information as it becomes available.
3.2 How must a supplier report an incident?

Suppliers must provide the Commonwealth Minister with written notification of the incident.

A supplier will fulfil the requirement to report to the Commonwealth Minister by completing and submitting a mandatory reporting report via the ACCC’s online form, available at www.productsafety.gov.au/mandatoryreporting. If a business cannot submit using the online form it should contact the ACCC on 1300 302 502.

The online form allows the supplier to provide an email address so that the ACCC can send an automatic email acknowledging receipt of the report with a report number for future reference.

4 Supplier liability implications

Reporting information under the reporting requirement is not taken for any purpose as an admission by the supplier of any liability in relation to the consumer goods, product related services or to a death, serious injury or illness.

A mandatory report may not be taken as an admission that the consumer good involved in the incident is non-compliant with a mandatory standard or ban.

5 Confidentiality of notices

Mandatory reports will not be placed on a public database. Section 132A of the ACL requires that notices be treated confidentially unless the reporter consents to disclosure.

It will not usually be possible for anyone to obtain details of mandatory reports submitted by others in relation to products that they supply, unless those reporters consent for this to occur. For the same reason, mandatory reports may be exempt from release under the Freedom of Information Act.

The ACL allows the Commonwealth Minister to share mandatory report information with another responsible Minister and the ACCC can share mandatory reports with the State and Territory associate regulators. The shared information is still protected by the confidentiality requirements under section 132A of the ACL.

However, the ACL outlines the following exceptional circumstances under which information in mandatory reports may be disclosed (without consent):

- Where disclosure by the Commonwealth Minister is in the public interest
- Where disclosure as required or authorised by or under law
- Where disclosure as reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty.
6 Penalties

A supplier who fails to notify the Commonwealth Minister as required may be found guilty of a criminal offence and be liable to a penalty of $16,650 for a body corporate or $3,330 for a person other than a body corporate. This is an offence of strict liability, so a court is not required to consider whether the person intended not to notify the Minister before finding them guilty.

The ACCC approaches penalties according to its Compliance and Enforcement Policy. When considering whether to seek a penalty in relation to an alleged failure to submit a mandatory report, the ACCC will therefore consider the following:

- Is there a pattern of repeated non-reporting?
- How long was the report delayed?
- Did the delay or non-reporting contribute to consumer detriment?
- Were consumers unduly exposed to unsafe products?
The following is a copy of Regulation 92 from the Competition and Consumer Regulations 2010, correct as of 5 February 2016. Regulation 92 specifies the existing reporting schemes that are exempted from the mandatory reporting requirements. The online link is available at http://www.austlii.edu.au/au/legis/cth/consol_reg/cacr2010374/s92.html

92 Laws specified for supplier reports about consumer goods associated with death, serious injury or illness of any person

For paragraphs 131 (2) (c) and 132 (2) (c) of the Australian Consumer Law, a law of the Commonwealth, a State or a Territory mentioned in an item of the following table is specified.

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<thead>
<tr>
<th>Item</th>
<th>Law of the Commonwealth, a State or a Territory</th>
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<td>1</td>
<td>Agricultural and Veterinary Chemicals Act 1994 (Cth)</td>
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<td>2</td>
<td>National Health Security Act 2007 (Cth)</td>
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<td>Therapeutic Goods Act 1989 (Cth)</td>
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<td>Coroners Act 2009 (NSW)</td>
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<td>Public Health Act 1991 (NSW)</td>
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<td>Road Transport (Safety and Traffic Management) Act 1999 (NSW)</td>
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<td>Coroners Act 2008 (Vic)</td>
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<td>Public Health Act 2005 (Qld)</td>
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<td>Transport Operations (Road Use Management – Road Rules) Regulation 2009 (Qld)</td>
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<td>Coroners Act 1996 (WA)</td>
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<td>Food Regulations 2009 (WA)</td>
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<td>Health Act 1911 (WA)</td>
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<td>Public Health Act 1997 (ACT)</td>
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26  Road Transport (Safety and Traffic Management) Act 1999 (ACT)
27  Coroners Act (NT)
28  Notifiable Diseases Act (NT)
29  Traffic Act (NT)
30  Regulations made under an Act mentioned in items 1 to 12, 14 and 16 to 29