

Combustible Cladding, Class Actions & Australian Consumer Law

Strata owners facing the cost of council orders requiring the replacement of combustible cladding are looking for potential solutions against the manufacturers under the Australian Consumer Law.

At present Federal Court Class Actions are on foot representing all person who are effected by the apparent failure of Alucobond and Vitrabond cladding panels to meet BCA fire standards.

Those cases, rely on alleged breaches of the guarantees section 54 of the Australian Consumer Law (“ACL” – Schedule 2 to the Competition and Consumer Act 2010 (Commonwealth)).

Section 54 of the ACL- Consumer Guarantees

Under this section anyone who supplies goods to a consumer guarantees that the goods are of acceptable quality.

Acceptable quality means what a reasonable consumer would consider ‘acceptable’ having regard to the nature of the goods, the prices of the goods, any statements or representations about the goods (including statements on packaging) and such other circumstances as may be relevant.

Notions of fitness for purposes, appearance, safety and durability are also imported into section 54.

At face value the Federal Court has accepted that there may be an arguable case that combustible cladding may breach section 54. This occurred in the context of an application to serve the overseas manufacturer of Alucobond, 3A Composites GmbH, with a statement of claim. It remains to be seen whether the court will actually decide whether there has been a breach or not.

Australian Consumer Law

The use of Australian Consumer Law for what is essentially a building claim shows the breadth the ACL provides in terms of protection. Section 54 is only one of many provisions that may have application. The need for this breadth in the context of product liability more generally, was highlighted by recent (October 2019) statistics issued by the Australian Competition and Consumer Commission (“ACCC”):

- Annually, unsafe products are estimated to cause 780 deaths and 52,000 injuries in Australia.
- The annual cost to the Australian economy is estimated at \$5 billion.
- 6.6 million Products are presently under voluntary recall, half of which are still likely to be in Australian homes.



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What is 'Product Liability'?

'Product Liability' is a general term intended to cover the common law and statutory obligations which render manufacturers liable for placing a defective product into the hands of a consumer.

In Australia, there are three basic legal branches to product liability:

- The common law of negligence,
- The common law of contract, and
- The Australian Consumer Law ("the ACL").

In addition to the ACL, there are numerous other pieces of legislation state and federal which may be relevant to specific industries, such as: food, pharmaceuticals, or cars.

Under the ACL a 'consumer' is defined a person to whom goods or services are or may be supplied, provided:

- the amount paid or payable for the goods does not exceed \$40,000 (or such greater amount as may be prescribed), or
- the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption, or
- the goods consist of a vehicle or trailer acquired for use principally in the transport of goods on public roads.

Manufacturer is given a very broad definition under the ACL, and can capture enterprises that do not in fact have a role in the manufacture of products, the definition includes:

- persons who extract, grow, produce, process or assemble goods,
- persons who hold themselves out to the public as the manufacturer of goods, or allows another person to hold them as the manufacturer,
- persons who allow their name to be applied to goods,
- persons who import goods where the actual manufacturer does not have a place of business in Australia at the time of importation.

Where the consumer does not know the name of the manufacturer, they can ask the supplier to identify the manufacturer. If the supplier does not provide the information within 30 days, the supplier is deemed to be the manufacturer.

The ACL is contained in Schedule 2 to the Competition and Consumer Act 2010 (Commonwealth). Each of the Australian states and territories have specifically adopted it. In New South Wales it is implemented by the Fair Trading Act 1987.

The ACCC is responsible for compliance and enforcement of the ACL.

What Protections and Remedies does the ACL Provide?

The ACL covers a number of areas; the avoidance of unfair business practices, the provision of consumer guarantees, and the regulation of sales practices and unfair contract terms.

It also deals extensively with product safety in the form of; safety warning notices, bans of goods or product related services, mandatory safety standards, and product recalls.



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Part 3-5 of the ACL deals specifically with product liability. Manufacturers responsible for unsafe products supplied in trade or commerce are liable to a person if:

- that person has suffered loss or damage because they are injured by the unsafe product,
- that person has suffered loss or damage because someone else is injured by the unsafe product (i.e. a product with a safety defect),
- that person has suffered loss or damage because other goods of a kind ordinarily acquired for personal, domestic or household use or consumption are destroyed or damaged by the unsafe product, and
- that person has suffered loss or damage because land, property or fixtures have been destroyed or damaged by the unsafe product (for example, by causing a fire).

These provisions remove some of the potential difficulties in the common law actions of contract (privity of contract) or negligence (duty of care). However, those common law actions may still be available, and may be useful if there is some doubt about whether the statutory requirements for a claim can be met. The common law alternatives may be pleaded as an alternative basis of claim.

The claims can be pursued in any the Federal Court of Australia, or Supreme, District or County state courts.

Under the ACL the limitation period is 3 years for product liability claim runs from the date from which the person became aware, or ought reasonably to have been aware, of the alleged loss or damage. This is subject to a longstop of 10 years from the date on which the manufacturer supplied the product.

Under the laws of contract or negligence and future consumer guarantees provisions referred to above the limitation period is 6 years from the date on which the cause of action accrued. Although in the case of personal injury claims this is limited to 3 years from the 'date of discoverability' of an injury or a death.

What Constitutes an Unsafe Product for a Product Liability Claim?

Section 9 of the ACL says that goods *"have a safety defect if their safety is not such as persons generally are entitled to expect"*.

This notion of community expectation regarding a level of safety is guided by 'relevant circumstances' including: the manner and purpose for which the goods have been marketed, the packaging, the use of any mark in relation to the goods, any instructions or warnings that accompany the goods, what it might reasonably be expected will be done with the goods, and the time of the supply by the manufacturer.

The ACL provides manufacturers with some statutory defences:

- That the safety defect did not exist at the time the goods were supplied by the actual manufacturer, or in the case of electricity at the time the electricity was generated.
- That the safety defect was caused by adherence to a mandatory standard.
- That the state of scientific knowledge at the time the goods were supplied was such that the safety defect could not have been discovered.

Exclusions

Manufacturers cannot rely on exclusion clauses to limit their liability under the ACL for product liability. To the extent that they may attempt to do so such provisions are void.

The ACL for product liability does not cover claims relating to:

- damage to commercial property;
- loss arising from a business relationship, such as loss of profit;
- losses for claims made for workers' compensation; and
- losses regulated by international agreements.

How to Pursue a Claim

1. Work out an accurate amount of compensation you would need to return you to the financial position you were in before the problem occurred.
2. Contact the business you obtained the product from in writing to explain the problem and present your claim for compensation. You may also want to ask for a refund or replacement. Show proof of purchase with a receipt or bank statement.
3. If the supplier refuses to discuss your compensation claim or you cannot negotiate an agreement, you can seek formal dispute resolution or take legal action. At this stage it may be necessary to review and further enquire into which business is liable as the manufacturer for the purposes of the ACL.
4. Contact the ACCC who may:
 - provide consumer advice, such as whether there is an industry ombudsman relevant to the complaint;
 - attempt to conciliate the issue; or
 - consider whether there is significant public value in the ACCC bringing a representative action against the manufacturer in court.
5. Seek legal advice on the further options available.

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