

Table of Contents

- Consumers' Rights (Statutory Guarantees)
 - ACL Pt 3-2 (Statutory Action) – AGAINST THE SUPPLIERS OF GOODS
 - ACL Pt 3-2 (Statutory Action) – AGAINST THE MANUFACTURERS
 - ACL Pt 3-2 (Statutory Action) – AGAINST THE SUPPLIERS OF SERVICES
- Liability for Defective Products (Negligence)
 - ACL Pt 3-5 (Statutory Action) – LIABILITY FOR SAFETY DEFECTS
- Liability for Misrepresentation and Unfair Commercial Conduct
 - FRAUD (deceit)
 - NEGLIGENT MISREPRESENTATION (misstatement)
 - MISLEADING OR DECEPTIVE CONDUCT
- Ending a Contract through Discharge & Seeking Remedies
 - TERMINATION (Process and Consequences)
 - REMEDIES
- Agency
- Consumers' Rights (Statutory Guarantees)
 - Definition of Partnership
 - Rules governing partners' relationship
 - Liability of partners to third party
- Company Law (Corporations Act (Cth))
- Duties of Company Directors and Other Offices

Consumers' Rights (Statutory Guarantees)

Actions that an injured person may bring against the manufacturer, distributor or retailer:

- Tort of Negligence
- Actions under ACP Pt 3-5, Pt 3-2 or Pt 5-4 (suppliers are not permitted to exclude, restrict or modify the statutory guarantees, any attempt to do so is void (s64)!)
- Contract Actions under Sale of Good Laws

s3 of the ACL defines a consumer (anyone who receives a gift will also be treated as such!) where:

- s3(1): price for **goods** did not exceed **\$40,000**, or goods where of a kind **ordinarily acquired** for personal, domestic or household use or consumption, or vehicle or trailer for use in the **transport of goods**
- s3(2): However, **not applicable** if goods were acquired for the purpose of **re-supply or transforming** them in the course of a process of production/manufacture or repairing/treating other goods
- ✓ *Atkinson v Hasting Deering (Qld): A bought a defective tractor. Since a tractor was not a good ordinarily acquired nor was a commercial road vehicle, this was not a consumer contract.*
- s3(3): price paid for **services** did not exceed **\$40,000**, or services where of a kind **ordinarily acquired** for personal, domestic or household use or consumption (if services were supplied in trade or commerce!)

ACL Pt 3-2 (Statutory Action) – AGAINST THE SUPPLIERS OF GOODS:

NOTE: **Goods include:** ship, aircraft and other vehicles; animals including fish; minerals, trees and crops; gas and electricity; computer software; second-hand goods; and any component part, or accessory, to goods (s2).

NOTE: **Supply:** a way of sale, exchange, lease or hire-purchase.

The supplier guarantees that:

- Always apply (even to private sales and traditional auction sales!):
 - s51: The supplier has the right to sell or dispose of the property in the goods
 - s52: The buyer has the right to undisturbed possession of the goods
 - s53: The goods are free from any security, charge or encumbrance not disclosed in writing
- Only apply where there is a supply in trade or commerce (selling action as part of a business!)
 - s54: The goods are of **acceptable quality**
 - s54(2): fit for all purposes, acceptable in appearance and finish, free from defects, safe and durable; according to nature, price, statements, representations and any other circumstances relating to the good (supplier not responsible if defect was pointed out!)
 - ✓ *Paisley v Aitchison: P bought a 8 years old car which had some defects. When compared to similar aged used vehicles, it was of acceptable quality.*
 - *ALSO defects did not amount to a major failure.*
 - ✓ *Barratta v TPA: Used car stalling because of a cracked cylinder. Not of acceptable quality, therefore buyer was entitled to reject the car.*
 - *ALSO defects amounted to a major failure.*
 - s55: The goods are **fit** for any disclosed or represented purpose
 - s55(2): disclosed meaning any purpose for which the consumer acquires the good as long as he/she makes known to seller (consumer needs to rely on seller's judgement!)
 - ✓ *Carpet Call v Chan: C buys a carpet for nightclub which became unsightly. There was insufficient evidence to establish that buyer relied on seller's skills, CC succeeded.*
 - s56: Where the goods are sold **by description**, they correspond with the description
 - s57: Where goods are sold **by reference** to a sample or demonstration, they correspond
 - s57(2): goods correspond in quality, state or condition, free from defect and consumer had reasonable opportunity to compare the goods with sample
 - s59(2): The supplier will comply with any **express warranty** given or made by the supplier
 - ✓ *Malam v Graysonline, RRS (General): A broken table sold in an online auction was subject to ACL and constituted a breach of s54&55 guarantees.*

Limitation of Liability:

Only for good not normally bought for personal, domestic or household use by including an appropriate **limitation clause** in the contract if it is **reasonable** in the circumstances to allow such clause (s64A) (sellers should do it)

- Replacement or repair of the goods
- Paying for cost of replacing or repairing the goods

Remedies:

Only for good not normally bought for personal, domestic or household use by including an appropriate **limitation clause** in the contract if it is **reasonable** in the circumstances.

- Major Failure (s260)

- If the goods **would not have been acquired** by a reasonable consumer fully acquainted
- If the goods **depart significantly** from the description or sample or model by which were sold
- If the goods are **substantially unfit** for purpose and cannot easily and within reasonable time be remedied
- If the goods are not of acceptable quality because they are **unsafe**
- ✓ *Paisley v Aitchison: P bought a 8 years old car which had some defects. However, defects did not constitute a major failure as none of the above conditions were met.*
 - *ALSO comply with s54, accepted quality.*
- **Notify** the supplier that goods are rejected (**remedy!**)
 - Consumer **must return** the goods within reasonable time unless cost to do so is significant
 - Consumer can choose a **fund** or **replacement of goods** with ones of the same type and value
 - **Can goods not be rejected?**
 - Time limits: Only if during **rejection period** (from supply to when defect should have become apparent) (s262(2))
 - Physical limits: Not if goods were lost, destroyed or disposed; or damaged after being delivered; or attached to any property and cannot be detached or isolated
- **Sue** for compensation (for any reduction in value) and damages (caused by failure to comply with guarantee, if reasonably foreseeable) (**remedy!**)

- Not a Major Failure

- Supplier may remedy the breach by:
 - **Repairing** the goods
 - **Replacing** the goods with goods of an identical type
 - Providing the consumer with a **refund** (s261)
- If supplier refuses or fails to comply:
 - Have failure remedied by **third party** and sue supplier for reasonable costs of doing so
 - Notify the supplier that goods are **rejected**
 - **Sue** for any loss or damage caused by failure to comply with guarantee if reasonably foreseeable

ACL Pt 3-2 (Statutory Action) – AGAINST THE MANUFACTURERS OF GOODS:

NOTE: Supplier is entitled to be **indemnified** if incurs **damages or costs** as a result of a manufacturer's failure (s274). If goods were not of a kind ordinarily acquired, manufacturer may limit its liability to replacing or repairing the goods (if reasonable to do so) (s276A), but they can never exclude these rights (s276).

NOTE: Manufacturers includes manufacturers, growers, extractors, component parts manufacturers, importers, assemblers and own branders (s7).

A consumer may sue the manufacturer for **damages** where:

- **s271(1)**: The goods are not of acceptable quality
- **s271(3)**: The goods do not correspond with the description by (or with consent of) manufacturer
- **s271(5)**: The manufacturer fails to comply with its obligations to provide repair
 - ✓ Only if manufacturer did not take reasonable steps to ensure consumer was aware of limitation in the repair (**ie. facilities and spare parts not being available after certain time**)
- **s271(6)**: The manufacturer fails to comply with an express warranty given by the manufacturer
- ✓ *Graham Barclay Oysters v Ryan: R became infected after eating oysters. Since oysters not fit for purpose, R entitled to damages.*
 - *BUT no negligence, defective good nor misleading or deceptive conduct.*

Defences for manufacturer (s271(2)):

- If problem was caused by someone other than the manufacturer or its employees
- If price charged by retailer is the unacceptable cause (**ie. charging higher prices to consumer**)

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SAMPLE

Liability for Misrepresentation and Unfair Commercial Conduct

FRAUD (deceit):

Need to prove 4 steps: 1. Did defendant make false representation of fact? 2. Did it induce plaintiff to act in some way? 3. Did defendant act dishonest/reckless? 4. Did plaintiff suffer losses due to misrepresentation?

Step 1: Did defendant make false representation of fact?

Determine what the **alleged misrepresentation** is (ie. express statement, conduct) and find out if it is a **STATEMENT OF FACT** or something else.

Possibilities:

- Statement of fact or **opinion**?
 - ✓ *Smith v Land and House Property Corporation: Hotel "let to a most desirable tenant", who in fact was a slow payer. False statement of fact as no reasonable person would have held such opinion.*
- Statement of fact or **mere puff**?
 - Expressions such as 'best in the world' and 'finest quality' are **not facts** but mere **advertising exaggerations**
- **Silence** as a statement of fact
 - Half-truths: **Hiding information** but cleverly **making it look** like telling truth
 - ✓ *Re Hoffman; Ex parte Worrell v Schilling: Vendor telling purchaser he is in 'financial difficulty' but omitting he is bankrupt. Silence as false statement of fact.*
 - Altered circumstances: Where something is **true during time of telling** but **ceases to be true**, will be misrepresentation if the representor **does not mention it**
 - ✓ *Lockhart v Osman: Cattle suffering infection after advertising is made. Misrepresentation as the vendor did not make the buyer aware of the change.*
 - Statement that is **true but conveys false message**
 - ✓ *Krakowski v Eurolynx Properties: Vendor of property showing lease but hiding 3 months free agreement with tenant (reduced final rent). Silence as false statement of fact.*

Step 2: Did representation induce plaintiff to act in some way?

Innocent party must have **been induced to act** in some way (ie. enter a contract) and it must be **reasonable** for them to **rely on that representation** (no need to be main inducement, just one of the factors).

- ✓ *Holmes v Jones: Purchaser sent an agent to inspect property. Not misrepresentation as there is no reliance.*

Assumptions:

- The representee is under no duty to investigate the truth of a representation
 - ✓ *Redgrave v Hurd: Purchaser relying on statement about receipts coming from "other business". Misrepresentation as purchaser had no obligation to investigate vendor's claim.*
- Person **may not sue** if fraudulent misrepresentation was **NOT directed at him/her** and was **NOT intended to induce him/her**
 - ✓ *Peek v Gurney: Plaintiff buying shares on the open market from a company with a misrepresentation on a prospectus. Cannot sue as he was unable to rely on any representation in the prospectus.*

Step 3: Did defendant act dishonestly/reckless? (did the representor know the misrepresentation was false?)

Subjective and difficult to prove.

- ✓ *Derry v Peek: P investing because of prospectus giving for granted actions still to happen about operating a tram system. Negligent misrepresentation (careless but not dishonest), fraud.*

Step 4: Did misrepresentation cause plaintiff to suffer loss?

Plaintiff must establish casual connection between fraud and loss. If successful, defendant generally cannot rely on disclaimers to exclude liability for fraud.

NEGLIGENT MISREPRESENTATION (misstatement):

Need to prove 3 steps: 1. Did defendant owe a **duty of care**? 2. Did the defendant exercise **require standard of care**? 3. Were the losses **caused by** defendant's negligence and were the losses **reasonably foreseeable**?

Step 1: Did defendant owe a duty of care?

Negligence applies to words as well as acts. For words:

- A duty of care can be owed when giving advice or information...
 - For for **serious matters** where speaker ought to realise he is being **trusted for information**
 - ✓ *L Shaddock and Associates v Parramatta City Council: Speaker comes under a duty if is being trusted.*
- ...If the representee reasonably rely on the advice or information
 - Having a special skill in giving the advice is not necessary (relevant, but not a necessary element)
 - ✓ *Ta Ho Ma v Allen: Plaintiff relying on a property valuation 9 months old without further inquiries. Not reasonable.*
 - ✓ *Esso Petroleum v Mardon: M buying a garage under inaccurate selling figures. Successful.*

Special Case:

- Professional advisers (ie. lawyers, accountants, engineers) owe duty of reasonable care in providing services to their clients in both contract and tort.

- ✓ *Hill v Van Erp: H prepared a will for a client in front of the beneficiary (which invalidates it). Since H knew that, she was found liable in negligence.*

- Auditors owe duty of care in tort and a contractual duty to the company, and **may** owe a duty of care to the shareholders, investors and lenders.

- To consider it, need to show auditor's intention to **induce** the plaintiff to act on the advice or information (existence of special relationship).
 - ✓ *Esanda Finance Corporation v Peat Marwick Hungerfords: PHM audited Excel and Esanda relied on it. Even though PHM was aware of that, no duty of care owed.*
 - ✓ *Bathurst Regional Council v LGFS: S&P rated a financial product as AAA, ABN sold it to Council, which suffered losses when crisis hit. Both breached duty of care as information induced purchase.*
 - *ALSO misleading conduct.*

Disclaimer (remove a duty of care):

An appropriate disclaimer makes reliance unreasonable.

- ✓ *Hedley Byrne & Co v Heller and Partners: H&P gave the required reference to B with the heading "for your private use and without responsibility on the part of the bank or its officials". Reasonable care only if a special relationship exists, which did not because of the disclaimer. No duty of care.*

Step 2: Did defendant exercise reasonable amount of care?

Professional persons are taken to have exercised reasonable care if that person acted in a manner that was widely accepted in Australia as a competent professional practice at the time the service was provided by peer professional opinion (Wrongs Act 1958 (Vic)).

- ✓ *Rogers v Whitaker: Need to warn the patient properly about the risks of a medical procedure.*

Step 3: Were the losses caused by negligent misrepresentation and were they foreseeable?

Defendant will be liable to plaintiff for all damages caused by the breach, provided that such damage was not too remote (**would I have done that if I had known the truth?**)

- ✓ *Kenny & Good v MGICA: K&G failed to value a property, leading MGICA to pure economic losses. Damage is not too remote if defendant could reasonable foresee the loss. Negligent Misrepresentation.*

NOTE: Damages will be awarded to position the victim where would had been if the tort had not occurred.

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SAMPLE

Agency

Agency exists wherever the agent has the **power to affect** the legal rights and obligations of the principal.

Step 1: Was the person an agent or something else (ie. independent dealer)?

- Indicators of an agent:
 - Agent passes **profit** through to the principal
 - Agent is more likely to be paid a **commission**
 - Agent has an **obligation** to account to the principal for sales (agent's duty!)
 - ✓ *Potter v Customs and Excise Commissioners: P appointed dealers to sell, who passed 70% of recommended price to P; goods were kept under P until account of sale was made, but price above recommended would be kept by dealer as commission. Despite of names and written words, circumstances made the dealers not agents but independent dealers.*
 - **Franchisee is not an agent even though making contracts on behalf of principal!**
- ✓ *International Harvester v Carrigan's Hazeldene Pastoral: C signed a contract for a defective hay baler with an "agent". Since contract was signed independently of I, it was not a sale by an agent.*

Functions of an agent:

- An agent may **make contracts** on behalf of the principal (**exception to the rule of privity of contract!**)
- An agent may **receive moneys** on behalf of the principal and give a valid discharge (**exception: estate agents!**)
 - ✓ *Petersen v Moloney: P instructed estate agent to find purchase for house without giving further express authority, and when agent failed to hand M's moneys over P, P sued. M failed to establish that the estate agent had express or implied authority to receive the purchase moneys.*
 - *ALSO failure to ratify the agent's act and failure by estoppel.*
- An agent may **pay moneys** on behalf of the principal and receive a valid discharge (**ie. solicitors!**)
- An agent may **make representation** on behalf of the principal (**legally enforceable against the principal!**)
 - ✓ *Petersen v Moloney: P instructed estate agent to find purchase for house without giving further express authority, and when agent failed to hand M's moneys over P, P sued. Even though M did not succeed, M had a case against P because of the agent's representation.*
 - *ALSO failure to prove agent's authority and ratify the agent's act and failure by estoppel.*
- An agent may **receive representation** on behalf of the principal (**legally enforceable by the principal!**)

Duties of an agent:

- Duty to perform what he/she has undertaken to perform
- Duty to obey instructions
- Duty to exercise due care and skill
- Duty to act personally
- Fiduciary duties (to account honestly; to avoid a conflict of duty and interest; not to make secret profits (**also an offence under the Secret Commissions Act 195 (Cth)**); accept secret commissions or take bribes; and not to use principal's property or information for personal gain)

Duties of the principal:

- Duty to remunerate the agent according to the agreement between them
 - The agent may withhold the goods until the debt is paid (**lien over principal's goods!**)
- Duty to indemnify (to secure, protect or make compensation) the agent, except for:
 - Unauthorised actions (unless subsequently ratified)
 - Losses caused by the agent's own default or negligence

Step 2: Did agency existed (how was it created)?

The relationship can be created by written or oral agreement or operation of law (no formal requirement) or by deed (signed under seal, gives authority as stated in it).

- By express agreement
 - No need to be binding (**contract!**)
- By implied agreement
 - Only if it is reasonable to infer that they have conducted in a way that a relationship exists
 - ✓ *Norwich Fire Insurance Society v Brennans (Horsham): Consultant recommended N to B for insurance, and N agreed to business be handled by him. Conduct from circumstances gave rise to infer that he was an agent for N and that had authority to collect the premiums from B. B not liable.*