

## Consumer Guarantees (Minimum Standards of Quality)

**Step 1 - Define the consumer (s 3)** - A consumer is someone who has purchased goods/services not exceeding \$40,000 and who has not purchased goods for purpose of re-supply/in course of a process of production or manufacture etc.

### Step 2 – Define supplier to be in trade or commerce

#### Guarantees in respect of goods (extends to manufacturers)

**The goods will be of acceptable quality** (objective test- reasonable consumer) (s 54):

- Fit for all purposes for which goods of that kind are commonly supplied; and
- Acceptable in appearance and finish; and
- Free from defects; and
- Safe; and
- Durable (assessed by reference to period of time a reasonable and informed consumer would expect the goods to function without fault (*Gallant v Larry Woods Used Cars* - guarantee as to acceptable quality had not been breached because failure was due to consumer overusing the vehicle)

**Goods will be fit for any disclosed purpose (s 55)** (if the consumer explains they want a product for a particular purpose)

- Will not apply if although the consumer made a particular purpose known, the circumstances were such as to suggest the supplier had no particular expertise or where the consumer ignored the advice of the supplier

**Goods will fit description (s 56)**

**Goods will correspond with sample or demonstration model if such is used (s 57)**

**Guarantee as to repairs and spare parts (s 58)**

- Manufacturer of goods will take reasonable action to ensure that facilities for repair of goods, and parts for the goods, are available for a reasonable period after the goods are supplied

#### Guarantees in respect of services

**Guarantee as to due care and skill (s 60)**

**Guarantees as to fitness for a particular purpose (s 61)**

- If consumer expressly or by implication makes know to the supplier any particular purpose for which services are being acquired

**Guarantee as to reasonable time for supply**

#### Remedies

**Action against suppliers of goods (s 259)**

- Remedy the failure (s 259(2)(a))
- Recover costs if failure isn't remedied in reasonable time (s 259(2)(b)(ii))
- Recover compensation for any reduction in the value of the goods (s 259(3)(b))

**When consumers not entitled to reject goods (s 262)**

- Rejection period has ended
- goods lost, destroyed or disposed of by consumer
- goods damaged for reasons not related to state or condition at time of supply

**Actions against suppliers of services (s 267)**

- remedy failure within reasonable time (s 267(2)(a))
- have failure remedied and recover costs (s 267(2)(b)(i))
- terminate contract for supply (s 267(3)(a))
- recover damages

## Frustration

Modern approach – “If an event occurs, by fault of neither party and unprovided for in the contract, which makes the performance of the contract impossible or impracticable because the situation or performance are now radically or fundamentally different to what was originally contemplated” (*Codelfa*)

Frustration **not recognised when:**

- Event was provided for in the contract (*Codelfa*)
- Event should have been reasonably foreseeable (*Davis Contractors*)
- Event occurred by fault of the party seeking frustration (*Bank Line Ltd v Arthur Capel & Co*)

Consequences: A frustrated contract comes to an end automatically – rights and liabilities which have accrued unconditionally prior to the time of the frustrating event remain in place, while the parties will be discharged from most future obligations.

Frustration (due to **destruction of subject matter** – impossible performance) – *Taylor v Caldwell* (concert hall destroyed by fire)

Frustration (due to **disappearance of the basis of the contract** – purpose for which contract was entered into ceased to exist) – *Krell v Henry* (Pall Mall coronation case); *Brisbane City Council v Group Projects* (fundamentally different situation commercially)

**Frustrated Contracts Act 1978 (NSW)**

- Court may adjust losses between the parties
- Act steps in after a contract has been decided as ‘frustrated’ by common law

## Termination

### Termination by Agreement

Under the original contract

- By expiration of length clause
- By express termination clause
  - A right to terminate “at will”
  - A right to terminate after a specified period of time
  - A right to terminate triggered by certain event(contingent condition)
- By an implied termination clause
  - Reasonable notice must be given

Under subsequent agreement

- Writing not required for an agreement to terminate existing contract (*Tallerman*) but is required to vary original contract
- If subsequent agreement is inconsistent with original, original is terminated and replaced

By abandonment

- If both parties don't consider the contract as operating/don't think it should be performed further (*DTR Nominees*)
- If an inordinate length of time has passed with neither party trying to perform or called the other to perform (*Fitzgerald v Masters*)

### Termination by failure (non-fulfilment) of a contingent condition

For example – **subject to finance**

Not a breach – just a right to terminate

Parties not obliged to perform until condition is fulfilled

There is a **duty to cooperate** – parties must do everything reasonable within their power to ensure condition is fulfilled (failure to cooperate means that party could not rely on non-fulfilment of contingent condition in order to terminate) (*Butts v O'Dwyer*) – damages available if duty to cooperate is not shown

Where the condition is for benefit of a party, that party will have a **right to waive** (e.g. contract for sale of land subject to sale of the purchaser's property was for benefit of purchaser alone so purchaser was capable of waiving condition – *Perri v Coolongatta Investments; Gange v Sullivan*)

Party may lose right to terminate for non-fulfilment of contingent condition if that party has prevented its performance or intimated that they don't intend to perform the contract (*Grieve v Enge*)

### Termination for breach

**Breach of condition** (so important that a party would not have entered the contract without it being assured of strict performance) (*Tramways Advertising*; adopted by HCA in *Associated Newspapers v Banks*)

- entitles aggrieved party to terminate, no matter how slight the breach
- aggrieved party may choose to proceed with contract
- if aggrieved party ignores breach and proceeds it will lose entitlement to terminate – if aggrieved party terminate with no justification it will be treated as repudiating the contract

**Breach of intermediate term** (one which deprives aggrieved party of basically or substantially the whole benefit which it was going to gain from the contract) (*Ankar; HongKong Fir Shipping*)

**Breach of warranty** (usually only classified as warranty if required by something like *Sale of Goods Act* or if there is no possible way that a breach of it would basically deprive aggrieved party from main benefit of contract)

### Termination for repudiation

Where a party's conduct indicates that it no longer intends to be bound (*Shevill*) or is not able to abide by the contract (*Carr v JA Berriman; Foran v Wight*), gives aggrieved party right to terminate, evidenced from:

- Words or conduct (*Carr v JA Berriman*),
- A combination of small breaches depriving aggrieved party of substantially whole benefit of the contract, adding up to total repudiation (*Progressive Mailing House*)
- By an insistence upon an erroneous interpretation of the contract (*DTR Nominees*)

Whether the conduct of a party amounts to repudiation does not depend upon the subjective intention of that party (*Universal Cargo Carriers Corp v Citati*)

*Maple Flock v Universal Furniture Products (Wembley)* (**instalment contracts**)

- 100 tons of rag flock delivered a ton at a time, seller warranted quality, 16<sup>th</sup> delivery not quality, court found there was a breach but given circumstances it wasn't sufficient to repudiate contract

### Termination for Delay (Time is of the essence, Notice)

**Scenario 1:** Contract gives time for performance and states it is **of the essence**, it's essential, breach will give right to terminate

**Scenario 2:** Contract specifies time for performance (but doesn't state **of the essence**)—breach allows immediate issue of notice to perform (can issue next day), specifying reasonable time for it to be done, and specifying that this date is of the essence, essential, or breach of it will give rise to a right to terminate (doesn't have to explicitly say "time is of the essence". Failure to comply with notice allows termination.

**Scenario 3:** Contract does not specify time for performance. After reasonable time has elapsed you may issue notice to perform, specifying reasonable time etc. failure to comply gives right to terminate.

#### Notice (scenario 2)

- There are three requirements (*Louinder v Leis*):
  - 1) the notice must specify time for performance (deadline);
  - 2) the time allowed must be reasonable; and
  - 3) the notice must *clearly convey* that either the time fixed for performance is of the essence or that the party giving notice will regard itself as being entitled to terminate should the notice not be complied with (*Laurinda v Capabala Park Shopping Centre*)