

Defective Products Checklist

1. Identify defendants

-May be more than one

2. Is this a claim under *ACL* (Cth) or *ACL* (SA)?

- See s.20 Fair Trading Act (SA)

- Does worker's compensation apply? S.146 If yes, then no claim under *ACL*

3. Identify type of claim

s.138	Loss/damage for injuries suffered by individual	Compare s.75AD TPA
s.139	Loss/damage suffered by person other than injured individual -s139(1)(e)-excludes corporations, limited to individual consumers <i>Stegenga</i>	Compare s.75AE TPA
s.140	Loss/damage suffered by person because other goods are destroyed/damaged -s140(1)(c): definition of "acquired" in s4(1)(a) "in relation to goods-acquire by way of purchase , exchange or taking on lease, on hire or on hire-purchase" -s140(1)(d): objective test for "used or consumed", subjective test for "intended to use or consume"	Compare s.75AF TPA
s.141	Loss/damage suffered by person if land/buildings/fixtures are destroyed/damaged -s141(1)(d): definition of "acquired" in s4(1)(a) "in relation to goods-acquire by way of purchase , exchange or taking on lease, on hire or on hire-purchase" -s141(1)(e): objective test for "used or consumed", subjective test for "intended to use or consume"	Compare s.75AG TPA

4. Does this type of claim apply to P?

- Is P an individual? S.138

- Is P a person? s. 139, 140, 141 *ACL*

- If P bringing a claim for loss of dependency (s.139), then is P a natural person? *Stegenga v J Corp*

5. Does this type of claim apply to D?

- s7 *ACL* manufacturer? Actual or deemed (*Leeks*)? s147 *ACL* unidentified manufacturer? If more than 1 defendant liable, then jointly and severally liable s144 *ACL*.

- S2 *ACL* supply?

- s2 *ACL* goods?

- s2 *ACL* Trade and commerce? Is this trade and commerce covered by *CCA* or the state version of *ACL*?

6. Is it a safety defect? S9 ACL

- Apply common law

7. 'Because of' test

- If s138, then has P suffered injuries 'because of' the defect?

- If s139 has P suffered loss/damage because of another's injuries/death? Has loss/damage occurred because of business or professional relationship?

- If s140 have other goods been destroyed/damaged? Are other goods of kind ordinarily acquired for personal, domestic or household use of consumption? Did P use/ intend to use other goods for personal, domestic or household use of consumption? Has P suffered loss/damage because of damage to other goods?

- If s141 has land/buildings/fixtures been destroyed/damaged? Are land/buildings/fixtures ordinarily acquired for private use? Did P use/intend to use land/buildings/fixtures for private use? Has P suffered loss/damage because of damage to land/buildings/fixtures?

8. Can D establish a defence? S142 ACL

-Manufacturer must prove defence on balance on probabilities.

-s142(a)(ii)- No defect at time of supply *Carey-Hazell v Getz Bros* and *Effem Foods Ltd v Nichols* (safety pin in Mars Bar, sabotaged by someone putting safety pin in it while on the shelf, won)

-s142(c)- state of knowledge *Graham Barclay Oysters v Ryan* full court held on appeal that while there was a means of testing oyster for defect, the test would destroy oyster and so no way state of scientific knowledge could have checked every oyster to check if safe.

P's contributory acts or omissions: pre 1 January 2011 TPA s75AN

Post 1 January 2011 CCA s137A- individual's/person's share in responsibility can reduce loss/damage to nil.

9. If no defences, P may recover the amount of loss or damages suffered s138-141 ACL.

10. Can amount of damages be reduced?

- If using ACL (Cth), then consider s137A CCA. Was P's act/omission also a cause of injury/loss/damage? What was P's share in responsibility of the loss/damage? Should amount of loss/damage awarded to P be reduced?

- If using ACL (SA), consider *LR(CNAL) Act 2005 (SA)*? Does *LR(CNAL) Act* apply to claims under ACL?

11. Are there limitations on damages for personal injury or death?

- If using ACL (Cth) consider CCA Part VIB= Definitions s.87D-E. Personal injury damages s.87L-T. Loss of earning capacity s.87U-V. Gratuitous attendant services s.87W-X. Other limits s.87Y-ZC.

- If using ACL (SA) consider *Civil Liability Act 1936 (SA)*= Does Part 8 CLA apply to claims under ACL?

12. Is plaintiff within time to commence action? s143 ACL

- ACL (Cth) - CCA - Personal injury s.87F – S.87K CCA

- ACL (SA) – *Limitation of Actions Act (SA)*

Case Law for Defective Products

Leeks v FXC Corp

-Suing FXC Corp, Australian Parachuting Safety Council, Australian Parachuting Federation under TPA.

-FXC Corp (American company) manufactured device for deploying parachutist's reserve canopy which malfunctioned and resulted in Leeks' injury.