

Home building Duty of care and skill

November 2007

*Even after six
years, a legal
liability may still
exist for a builder
to meet claims
arising from a
failure of duty of
care and skill.*

The *Fair Trading Act 1987* (the Act) is designed to encourage fair and honest business practices for the benefit of both consumers and traders. The Act applies to contracts between businesses and consumers, and covers transactions for the supply and purchase of goods and services.

The Act also reflects parts of the Commonwealth *Trade Practices Act*.

This fact sheet is designed to help traders understand and comply with the law on the provision of goods and services. It does not, however, take the place of the *Fair Trading Act* nor does it cover all the provisions of that Act. Copies of the Act can be purchased from the State Law Publisher, 10 William Street, Perth, telephone 9321 7688.

Common law duty of care

Apart from statutory obligations under the *Trade Practices Act*, *Fair Trading Act*, *Home Building Contracts Act* and other legislation, businesses also have obligations at common law. The legal obligation to take reasonable care to avoid causing damage is called the common law 'duty of care'. A duty to take care exists in most situations in which a builder can reasonably foresee that their actions may cause physical damage to another person or their property. This duty of care is owed to all people likely to be affected. Therefore, traders have a 'duty of care' to all of their customers.

What is a 'contract'?

The purchase of anything from a can of paint to the components for a kit home is a 'contract' of sale. To be employed to undertake any work from painting a fence to building a house is a 'contract' for service.

The suitability and performance of any goods or materials supplied under a contract for sale are the responsibility of the supplier. In the same way, the responsibility for a service is the responsibility of the service provider. A contract represents a legal agreement between a business and the customer, where there is an agreement to sell certain goods and/or services at a certain price.



Must a contract be in writing?

The Act does not require a contract to be in writing. However, it is advisable to put the terms and conditions of all contracts, except for small simple purchases, in writing, and for them to be agreed to, and signed, by all parties.

IMPORTANT: The *Home Building Contracts Act* DOES require that all 'home building work contracts' be in writing where the amount payable is within the range of \$7,500 to \$500,000. This includes 'associated work' such as swimming pools, sheds, pergolas, bathroom and kitchen renovations, paving and landscaping.

Implied conditions and warranties

There are a number of conditions and warranties inherent in all contracts with consumers, which are implied under the Act, no matter what the product or service.

The existence of 'implied' conditions and warranties ensure that every product or service provided meets with the conditions imposed by law.

In relation to the supply of goods (including those goods supplied as part of a contract for service) there are implied conditions that goods:

- ▶ are of merchantable quality and reasonably fit for the purpose for which they are sold; and
- ▶ correspond with any description or sample given in the course of negotiations.

In relation to the supply of services there are implied conditions that:

- ▶ the service will be carried out with due care and skill; and
- ▶ any materials supplied in connection with the service will be reasonably fit for that purpose.

Some examples, to help clarify these implied conditions, are given later in this fact sheet.

IMPORTANT: It is not possible for you to stop these conditions and warranties from becoming part of a consumer contract.

Who's responsible for products and materials?

To be successful and to prevent unnecessary problems or expense, it is important for traders and consumers to understand legal obligations.

The definition of 'goods' includes all products and materials supplied or used under the contract. Considerable care and attention must therefore be taken by all traders in the selection of products and materials, to ensure not only that they are of 'merchantable quality' but also that they are 'reasonably fit for the purpose'.

If you supply the goods under a contract to a consumer then you are responsible for the quality and performance of those products and materials. You cannot simply refer the consumer to the manufacturer or supplier. The manufacturer, importer, or your supplier, may have a legal responsibility to you but you are the one, through whom the home owner/consumer can rightfully seek redress should a problem arise.

Builders should be fully aware that, because the Building Code of Australia is 'performance based', they have a further responsibility to show a 'duty of care' over the selection of materials. It is not sufficient for you, as a builder, to construct a home simply 'in accordance with the approved plans and specifications'. If those plans or specifications result in workmanship or materials that do not meet with the requirements of the Building Code, then you may not have properly exercised 'due care and skill'. Under these circumstances you could be liable for the cost of rectification and/or compensation.

The period of liability

It is not possible to provide a general answer to the question of what is an acceptable limit of liability for a product or service. There is no 'rule of thumb' and every case will depend upon a number of individual factors. These include the nature of the product or service, age, quality and price. A court or tribunal will determine the limit of liability based upon what they consider to be reasonable in the particular circumstances of the case.

The Building Disputes Tribunal deals with complaints from home owners over issues relating to faulty workmanship or materials received during construction or within a period of six years from practical completion of the work.

Even after six years, a legal liability may still exist for a builder to meet claims arising from a failure of duty of care and skill.

Regional offices:

Goldfields/Esperance	(08) 9021 5966
Great Southern	(08) 9842 8366
Kimberley	(08) 9169 2811
Mid-West	(08) 9964 5644
North-West	(08) 9185 0900
South-West	(08) 9722 2888

National Relay Service: 13 36 77

Quality of Service Feedback Line: Tel: 1800 30 40 59

Manufacturers' written warranties or guarantees

Guarantees given voluntarily are known as 'express' conditions or warranties. They normally promise to put right certain problems if they arise and they set down various conditions. However, any term or condition which may be contained within an express warranty or guarantee but conflicts with the implied provisions of the Act is void and of no effect.

For example, an expensive oven included with a new home contract may have a twelve month warranty from the manufacturer but if it fails after, say, fifteen months of normal use it could well be established that the oven should reasonably have lasted longer. The homeowner would then be entitled to have it repaired or replaced at no cost.

In most cases, manufacturers or suppliers will remedy problems with goods or materials supplied to retailers and builders but if the manufacturer should refuse to accept responsibility for repair or replacement then the builder, who supplied and installed the oven, would be responsible. Of course, the builder would in turn be entitled to claim against the supplier, manufacturer or importer.

In this instance the builder would be advised, first, to check the supply agreement with the manufacturer, and then, if necessary, to seek legal advice.

Manufacturers, distributors and importers all have important obligations to the purchasers of their products, and to other users, under the provisions of the *Trade Practices Act*. For more information on this aspect, contact the Australian Competition and Consumer Commission on 1300 302 502.

Customers' instructions

If a consumer asks a builder to supply low quality materials or materials they regard as unsuitable, or requests a service in a manner that the builder does not recommend, you may still be responsible for problems that arise. We suggest you don't go ahead with the request without at least obtaining a clear written note of indemnity, ie a statement signed by the consumer agreeing to accept all the consequences for ignoring your advice. Even then, there is no guarantee that you will not be held liable.

Work undertaken by others

Builders should be particularly careful to ensure that they cannot ultimately be held liable as a result of any work, which the homeowner may elect to carry out separately, eg site works, painting or tiling. Before agreeing, consider all of the possible consequences. In some instances it is advisable to obtain legal advice before entering into any agreement of this kind.

Builders should be careful about building on land that has been cleared and prepared by a developer. For example, check that rubbish has not been buried and that any fill has been fully compacted throughout the entire depth. If you do not check, you may be held liable for problems if they occur at some future date.

Examples of problems to avoid

Provided here are some examples of problems to avoid in the home building industry and the unfortunate consequences that all too frequently arise. You will see from the examples that follow, that 'merchantability', 'fitness for purpose', and 'due care and skill', often go together.

Merchantable quality of goods

As the following examples show, 'merchantability' relates to the general standard of any goods or materials that are supplied.

- ▶ A builder purchased a 'job lot' of face bricks at an auction sale, following the closure of a country brickworks. The bricks were used to build a 'spec' home but after a couple of years they were fretting badly and were found to be so underburnt as to be unmerchantable. The builder was ordered to rectify the problem. This proved to be a very expensive exercise because goods purchased at auction are not subject to normal implied warranties and no claim could be made against the manufacturer.
- ▶ To save a few dollars, a tiler purchased some old bags of grout that had been lying around in the local hardware shop for some time. The grouting failed and the product was later found to be unmerchantable.

The tiler was ordered to remove and replace all the grouting.
- ▶ A swimming pool company installed a below-ground fibreglass pool. After a short time patches of black spots appeared on the inside of the pool

walls, below the water line, trapped under the surface coating. The pool surface was clearly not of merchantable quality and the pool company was ordered to remove and replace the pool, at its cost.

Goods not reasonably fit for the purpose

'Fitness for purpose' means that the goods or materials must be suitable for the use the customer tells you about at the time of purchase, or suitable for the purpose for which you could reasonably expect them to be used. Customers should rightly expect to be able to rely upon your, and your sales staff's, knowledge and advice.

Goods not reasonably fit for one purpose might be of 'merchantable' quality if used in a different manner, location or environment.

When materials are selected, or supplied, by a builder or tradesperson, but are used inappropriately, the problem is compounded by a lack of 'due care and skill', as the following examples illustrate:

- ▶ A builder was employed to carry out additions to an existing home. Where the new roof joined the existing roof the different materials soon proved to be incompatible. The result was that gutters and flashings corroded. The builder was ordered to fix the problem because the materials he had selected, supplied and fixed were not fit for the particular purpose for which they had been sold. It was also noted that in selecting and fixing the incorrect materials the builder had not undertaken the service with due care and skill.
- ▶ A builder used a non-durable species of timber for the exposed timbers to a new home. After a few years, the timber started to rot and the builder was held liable for the cost of rectification. The materials that had been selected and sold were not fit for the purpose for which they had been used. The timber might well have been quite acceptable if used in a different situation.
- ▶ A tiler used an unsuitable type of fibrous cement sheeting as an underlay over a springy boarded floor and then tiled over the top of this using cement-based adhesive. The tiles soon became loose and a number of them started to crack. The tiler was ordered to remove and replace the entire floor. Not only had the tiler used an unsuitable material but clearly the work had not been performed with care and skill. The fibrous cement sheeting was not 'unmerchantable' because it would most likely have performed quite adequately if used for a suitable purpose.

- ▶ A tile merchant imported a batch of slate floor tiles. The tiles looked very attractive to start with but when they were walked over, the surfaces broke up because hidden cavities within the slate had opened up. The tile merchant was required to pay for the floor to be removed and replaced because the slate was neither reasonably fit for the purpose, nor of merchantable quality.
- ▶ A painter applied an 'interior' quality paint to the outside walls of a house and it soon started to crack and peel off. The painter was ordered to fix the problem because the paint he used was not suitable for that particular purpose. Also, the painter had not used care and skill in the selection of the product. It could not be said that the paint was unmerchantable because very probably it would have performed well if used for the purpose intended by the manufacturer.

Goods not corresponding with description or sample

Any goods or materials that you supply must match any sample or description you have given or shown to the customer. For example:

- ▶ A builder undertook to build a new home identical to the display home selected by the home buyer. On completion of the home, the carport was significantly smaller and the builder was ordered to rebuild it. The home buyer could not reasonably have been expected to discover the difference by checking dimensions given on the plans.
- ▶ A tile merchant sold a customer a batch of blue floor tiles, selected from his showroom display. After delivery, the customer noticed that the tiles were a significantly darker blue than the display samples and the supplier was required to collect and replace them.
- ▶ A cabinet maker was employed to manufacture and install some additional cabinets to match with those existing in a recently extended kitchen. On completion it was clear that the bench top colours did not match. The mistake had been made by the supplier of the laminate, and was not noticed by the cabinet maker until it was too late. The cabinet maker was responsible for fixing the problem for the homeowner and then had the problem of seeking some reimbursement from the laminate supplier.



Service not undertaken with due care and skill

When you provide a service it must be performed to an appropriate standard to achieve the required result. Some examples of failures, and their consequences, are given here to illustrate how important it is to exercise due care and skill:

- ▶ A builder constructed a brick home and after a few years, the mortar started to fret. A mortar analysis found that too much sand had been included in the mix and the builder was ordered to rectify the problem because due care and skill had not been used in supervising the work.
- ▶ A designer was given a brief to draw up plans and specifications for a house and was given a maximum budget figure of \$120,000. A number of quotes were obtained from builders based on the plans and these showed the home could not be constructed for less than \$150,000. The designer had not shown due care and skill in preparing the design and was ordered to refund in full the fee that had been charged.
- ▶ A designer/cabinet maker was employed to renovate a kitchen. The home owner gave detailed verbal instructions about the layout and the facilities required, accompanied by rough sketches containing some critical dimensions to be achieved. After installation, the kitchen was found not to meet with these requirements because a mistake had been made by the trader when taking measurements of the existing room sizes. The trader was found not to have used due care and skill and was ordered to remove and replace the cabinets.
- ▶ A floor sanding firm was asked to sand and coat a hardwood floor with a clear finish polyurethane coating. After completion, orbital sander marks were very noticeable around the edges, nail heads were visible and other nail holes were seen not to have been filled. The trader was ordered to pay the cost for someone else to re-do the work as due care and skill had not been used.
- ▶ A brick paver was employed to construct a driveway. Soon after completion, depressions formed in the body of the paving, which had also begun to 'spread'. Inspection revealed that the sand base had not been properly compacted prior to the laying of the pavers and also the header courses at the edges had not been properly

restrained. The trader was ordered to re-do the job at his cost, because of the lack of due care and skill.

- ▶ A plumber was employed to install an acrylic bath. After some months, the bath developed a crack along the bottom. Inspection revealed that the bath had not been installed in accordance with the manufacturer's instructions which called for it to be supported on a bed of sand. The plumber was ordered to remove and replace the bath, at his cost, because due care and skill had not been used.

If a consumer/home-owner complains

Things do go wrong occasionally and even the most customer oriented business receives complaints from time to time. If this happens to you, our best advice is to face up to the problem and deal with it promptly. Determine whether the complaint is valid and, if it is, sort it out. This way you'll save the time, inconvenience and added expense that could result from the problem being referred to the Department of Consumer and Employment Protection, Builders' Registration Board, Building Disputes Tribunal or a court.

Sometimes, complaints are only partially justified because acceptable standards are subjective or responsibilities are not clear-cut. In these cases, be prepared to listen and to compromise. Dealing promptly, fairly and effectively with all of your customers' complaints is an excellent advertisement for your business, particularly in an industry, which utilises 'word of mouth'.

A FINAL TIP: Remember that most owner-builders do not have the same knowledge and skills as registered builders. Building tradespeople are wise to take extra care when employed direct by an owner-builder.

Further information

This fact sheet covers only one important aspect of the *Fair Trading Act*. It has been prepared to help you but it doesn't replace the Act. You should read the Act and Regulations or obtain legal advice to be certain of your legal position.

Your industry association may well be able to assist you with further information or advice.

We are available

For further advice contact the Consumer Protection Advice Line on **1300 30 40 54** (cost of a local call from anywhere in the State).

Staff can provide information or refer you to the appropriate authority if you have any queries or problems relating to non-technical aspects of home building or associated work.

Unfortunately, the department cannot deal with complaints from traders against consumers.

The Builders' Registration Board, Painters' Registration Board and Building Disputes Tribunal (tel: 9476 1200) can provide information about registration and about complaint procedures.

