

## Sale of Goods Law (CCLA, Part 3)

### Pre-requisites for application

1. The agreement must have monetary consideration for it to be a K under the Act. But if consideration is expressed in monetary terms and they agree payment will be \$100 + 10 loaves = sale under Act.
2. The contract must in substance be a contract for the sale of goods.
  - a. Section 119: Definition of “Goods”- all kinds of movable property but not money (unless antiques) or emblement.
    - i. House could be goods if it was moved to another site.
    - ii. Gas has been, but not electricity.
  - b. So it can't be a contract for services, or labour. That is about skill applied. *Robinson v Graves* - it was a K to paint a portrait = services/labour, not sale of a portrait.

### Contracting out

- Most of the sale of goods provisions can be contracted out of.
- Can just contract out of implied conditions e.g. s 136, 138 and 139 through express statement in K.

### When does property pass?

1. Was there an agreement to sell or a sale?
  - a. **Section 123:**
    - i. Agreement to sell = transfer of the property in the goods is to take place at a future time or subject to a condition or conditions to be fulfilled at a future time.
      1. An agreement to sell becomes a sale when time for transfer of the property to take place elapses or the conditions are met.
    - ii. Sale = there is a sale when property has passed, transaction is complete
  - b. If there is an agreement to sell, property has not passed. If there is a sale, property has passed.
  - c. Use following to figure out which one it is.
2. Did the parties expressly state in K when property should pass?
  - a. If no, then move on.
3. Are the goods “existing” or “future”?
  - a. Definition of existing goods: owned or possessed by the seller at the time the contract is made.
  - b. Definition of future goods: to be manufactured or acquired by the seller after the contract is made.
4. Are the goods specific, ascertained or unascertained?
  - a. **Section 119:** Definition of specific goods: goods identified and agreed on at time K of sale is made. Both parties know subject of K. You can't substitute another good for it.
    - i. “Future specific goods” = Goods that are not yet in existence e.g. K for all the potatoes on my farm. As soon as they exist we will know they are subject to the K.
  - b. Definition of ascertained goods: not identified and agreed at the time the K is made, but become specified at a later time e.g. once something is separated from the bulk.
  - c. Definition of unascertained goods: goods are not not identified or agreed on at the time the contract is made. They can become ascertained once they are identified and selected for sale.
5. If they are unascertained?
  - a. **Section 143:** No property in “unascertained goods” passes until the goods are ascertained
    - i. This is because it would be inconvenient if cases were goods were purportedly transferred were unascertained.
6. If they are specific or ascertained?
  - a. **Section 144:** If the contract is for specific or ascertained goods, property passes when the K intend it to pass. To ascertain the intention of the parties, regard must be had to
    - i. The terms of the contract; and
    - ii. The conduct of the parties; and
    - iii. The circumstances of the case.
      1. *MJN McNaughton* understanding:
      2. Retention of title clause will be evidence of the parties' intention that property is not to pass until payment has been made.

3. Reserving a security interest over goods does not evidence an intention that property is not to pass until payment is made.
4. Conditions restricting the buyer's ability to dispose of the goods, coupled with reserving a security interest, suggests a credit arrangement (which is consistent with property passing on delivery)
5. If there is evidence in the contract as to who is to insure the goods in question, this is strong evidence of the parties intention as to when property passes.
  - a. If not clear, can use CCLA sale of goods law default rules to determine when property passes. [This is to diminish uncertainty.]

**b. Section 146: Default rules to ascertain when goods should pass**

i. Rule 1:

1. Under an unconditional K
2. for the sale of specific goods
3. in a deliverable state.
  - a. the property in the goods passes to the buyer when the contract is made.
  - b. It is immaterial whether the time of payment or time of delivery, or both, is postponed.

ii. Rule 2:

1. If there is a K for the sale of specific goods, and
2. the seller is bound to do something to the goods for the purpose of putting the goods into a deliverable state.
  - a. the property in the goods does not pass to the buyer until
    - i. a) thing this is done AND
    - ii. b) the buyer has notice that the thing is done.
      1. The circumstances may indicate that notice does not need to be given e.g. specifies it will be done by friday.

iii. Rule 3:

1. If there is a K for the sale of specific goods
2. in a deliverable state.
3. but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price.
  - a. the property in the goods does not pass until
    - i. a) thing this is done AND
    - ii. b) the buyer has notice that the thing is done.
      1. The circumstances may indicate that notice does not need to be given e.g. specifies it will be done by friday.

iv. Rule 4:

1. If goods are delivered to the buyer on approval, or on sale or return or other similar terms,
  - a. the property in the goods passes to the buyer
    - i. 1) when the buyer indicates the buyer's approval or acceptance to the seller, or does any other act adopting the transaction; or
    - ii. 2) if the buyer does not indicate the buyer's approval or acceptance to the seller, but retains the goods without giving notice of rejection
      1. a) when the time (if any) that is fixed for the return of goods expires OR
      2. when a reasonable time expires (if no time has been fixed for the return of the goods).

v. Rule 5:

1. If there is a sale for unascertained or future goods by description.
  - a. property in the goods passes to the buyer when goods of that description
  - b. that are in a deliverable state
  - c. are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller.
  - d. The assent may be expressed or implied and may be given either before or after the appropriation is made.

- i. The seller must be treated as having unconditionally appropriated the goods to the contract if a) in performing the contract, the seller delivers the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer AND b) the seller does not reserve the right of disposal.
  2. *Carlos Federspeil* - unconditional appropriation definition = intention of seller to attach K irrevocably to those goods so that those goods and no others are subject to the sale.
    - a. **5 principles to determine it:**
    - b. The parties must have had an intention to irrevocably attach to the contract those particular goods.
    - c. Appropriation takes place by agreement, but in some cases the buyer's assent is conferred in advance by the K or otherwise.
    - d. Appropriation by the seller with the assent of the buyer always involves an actual or constructive delivery of the goods
    - e. If the goods are under the contract said to be at the seller's risk that is prima facie evidence that the property has not passed to the buyer.
    - f. Usually the appropriation act is the last act to be performed by the seller so that if there is further and decisive acts to be performed by the seller then prima facie property does not pass until the final act is done.
  - vi. **Section 119:** Definition of "Deliverable state" = the goods are in a particular state and the buyer is bound under the K to take delivery of the goods when they are in that state.
7. Other rules to consider
  - a. **Section 147:** Seller may reserve right of disposal. No property passes until conditions are met, even up to point of delivery.
  - b. **Section 148:** Unless otherwise agreed, the goods remain at the seller's risk until the property in the goods is transferred to the buyer, BUT when the property in the goods is transferred to the buyer, the goods are at the buyer's risk (whether or not delivery has been made).
    - i. If delivery has been delayed through the fault of either the buyer or the seller, the goods are at the risk of the party at fault with respect to any loss that might not have occurred but for the fault.
    - ii. This section does not affect the duties and liabilities of either the seller or the buyer as a bailee of the goods of the other party.
      1. Even if property has passed, if seller is still in possession of the goods they could be a bailee of the goods.
      2. Normally no agreement, maybe just gratuitous. Thus, they would have a duty to look after the goods/take reasonable care under tort law but depends on circumstances e.g. if a fire burnt the goods, have to ask if the bailee was at fault for the fire or negligent, if so then they breached their obligation.
      3. If bailment was contracted for and/or there is compensation, look to contract for liability.
  - c. Rules for perishable goods
    - i. **Section 127:** If the goods are specific goods and have perished before the contract is made or before risk has passed, without the seller's knowledge, the contract is void.
    - ii. **Section 128:** if there is an agreement to sell specific goods and subsequently the goods without any fault on the part of the seller or the buyer, perish before the risk passes to the buyer, the agreement becomes void when the goods perish.

## Sales without title

**Note: PPSA has overridden a lot of this.** Issues of title don't matter, could just register interest on PPS register.

1. **Nemo dat rule**
  - a. **Section 149(2):** The buyer acquires no better title to the goods than the seller had...
2. **Exceptions to nemo dat :**
  - a. **Section 149(2): Sale by person who is not the owner-** ...unless the owner of the goods is by the owner's conduct precluded from denying the seller's authority to sell.
    - i. EX: Owner makes statement or otherwise represents to the buyer that the seller has authority to sell the goods.

ii. It must be an unambiguous representation and it must be relied on.

iii. *Wrightcars*

**b. Section 153: Seller in possession after sale** - If a person A has sold goods to another person B, and A continues or is in possession of the goods or documents of title to the goods and A, or an agent acting for A, delivers or transfer the goods or documents of title under any sale or any agreement for sale to another person C and C receives the goods or documents in good faith and without notice of previous sale to B [**Seller continues in possession, despite title passing, and sells them to innocent third party**].

1. The delivery or transfer to C has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the delivery or transfer.

a. **Section 153 overrides Section 152(1): Revesting of property in stolen goods on conviction of offender.** The property in stolen goods reverts in the person who was the owner of the goods if the offender is convicted despite any intermediate dealing with the goods.

b. This provision mitigates the harshness of the criminal law and recognises the rights of a purchaser, especially when they show all the trappings of ownership.

c. *Sigglekow* - It may be possible if there were no trappings of ownership, s 152 would apply.

**c. Section 154: Buyer in possession after sale** - If a person A has bought or agreed to buy goods and A obtains, with the consent of seller B, possession of the goods and the documents of title to the goods; and A, or an agent of A, delivers or transfers the goods or documents of title under any sale, or agreement for sale and C receives the goods or documents in good faith and without notice of any lien or other right of B in respect of the goods. [**when seller retains title but delivers goods to buyer, and buyers sells them to innocent third party**].

i. Then the delivery or transfer to C has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

1. *Elwin* - Agreement to buy goods must be clear K. Hire purchase agreement with option to cancel is not sufficient.

**d. Section 297: Sale by agent in possession with owner's consent is valid** - This section applies if a mercantile agent A is, with the consent of the owner of the goods B, in possession of the goods or documents of title to the goods.

i. A sale made by A, when acting in the OCB as a mercantile agent, is as valid as if A were expressly authorised to B to make the sale. [**Agent has the appearance of having the right to sell goods**]

ii. However, that rule only applies if the person who takes the good under the disposition acts in good faith and does not, at the time of the disposition, have notice that A has no authority to make the disposition.

1. **Section 296:** Mercantile agent = someone who acts as agent and through the ordinary course of business has authority to sell goods. They just act as agent for the owner, but are never in possession of the goods themselves.

2. Has to be in the ordinary course of business? Have to ask what was the ordinary course of the sellers business and was the sale within the OCB?

**e. Section 151: Defective Title** - If a seller of goods has voidable title to the goods but the seller's title has not become void at the time of the sale

i. The buyer acquires a good title to the goods if the buyer buys the goods in good faith and without notice of the seller's defect of title.

1. Even though true owner can void the seller's title the innocent purchaser can keep goods, as long as the true owner hasn't taken steps to void the title by the time title is passed to the purchaser/sale occurred.

2. Seller's title could be void either because the sale to the seller was valid but defective e.g fraud, or the sale to the seller was void ab initio so they never had title to the goods e.g. K not with that person.

**Why do we have exception to nemo dat for sales without title ?**

- We want to balance the rights of the innocent purchaser unaware of the defect in title they are purchasing and the true owner. While *nemo dat* rule is still overarching, to protect the true owner, we do want some exceptions so that purchasers aren't discouraged from purchasing. We want willing purchasers for goods otherwise it is bad for commercial flow.

## Law around terms of the K

What is the buyer's remedy if goods are not of quality and kind expected?

1. **Section 132:** CCLA states certain K terms are conditions or warranties, and it depends on the construction of the contract.
  - a. Condition = essential terms
    - i. Breach of a condition = substantial failure to perform the K = right to rescind K
  - b. Warranty = co-lateral to the main purpose of the K.
    - i. Breach of warranty = right to damages.

Provisions of CCLA that indicate what the nature of the particular term is

1. **Section 131: Terms as to time:** generally they are not “of the essence of the K” so are only warranties.
2. **Section 135: Terms as to title:** Implied term that seller has title e.g. has the right to sell the goods or will have the right to sell the goods at the time property passes is a condition.
3. **Section 135: Terms as to quiet possession:** implied warranty as to quiet possession, and that the goods are free from charges.

Implied conditions relating to the quality of goods

1. **Section 137: Basic rule regarding goods at common law** - Caveat Emptor = Buyer beware. There is no implied warranty or condition as to the fitness or quality of goods supplied.
    - a. There are a limited number of statutory exceptions in 138-141.
    - b. Key issue (*Ashington Piggeries*) : does the buyer have the onus of proving that the defect was due to a characteristic that was within seller’s expertise to detect, or was the onus on the seller to prove that the defect was due to a characteristic which lay within the sphere of the buyer?
      - i. Tussle between principles of caveat emptor (buyer beware) and caveat venditor (seller beware).
  2. **Section 136: Sale by description:** in a contract for the sale of goods by description, there is an implied condition that the goods will correspond to the description
    - i. Was there a sale by description?
      1. [*Unclear if this is still good law*] - Salmond J’s view from *Taylor v Combined Buyers* - in a sale of unascertained goods, everything the seller says about the goods is is part of the description. But in the case of a sale of specific goods, the description means a statement of the kind, class or species to which the article belongs. A statement that goes to the essential or specific nature of the goods. Not a statement relating to quality or attributes.
        - a. If in a sale of unascertained goods, the goods fail in any respect to comply with their contractual description = breach (broader scope).
        - b. If sale for specific goods, only statements relating to the kind, class or species of the goods are part of the description.
      2. *Ashington Piggeries/Herbert Construction* - Goods have to be different in kind/nature/identity to not correspond to the description, if goods are different in quality that is not enough.
        - a. Changes to toxicity will not change the nature of the goods so that they no longer correspond with description.
        - b. Organic eggs - go to kind/class. Old eggs - quality.
      3. *Harlingdon*: Both sales of unascertained and specific goods can be sales by description, but in a sale of specific goods it might not be a sale by description if:
        - a. No description was supplied or
        - b. Description made is not essential to the identity or
        - c. Description is supplied but it is not relied on.
          - i. **Objective test** - would parties reasonably expect description to be relied on?
          - ii. Shows description was not intended to be part of the K.
  - b. If the sale of goods is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond to the description.
3. **Section 138: Fitness for purpose:**
  - a. If the buyer, expressly or by implication, makes known the particular purpose the goods are required.
    - i. *Taylor v Combined Buyers*: Exclusion “particular purpose” is not limited to a special purpose the buyer communicated to the seller. It includes a general purpose for which goods of that type are commonly used, as seller is taken to know goods are required for their ordinary or usual purpose.
  - b. so as to show that the buyer relies on the seller’s skill or judgement and

- i. **Test:** Is the purpose for goods communicated to the seller in a way that a reasonable person in the shoes of the seller would have realised their skill and judgement was being relied on to ensure goods are fit for that purpose? (*Henry Kendall*)
  1. Reliance can be implied e.g. if seller deals with those particular goods and if they are using goods for their usual purpose.
  2. But disclosure of purpose is not by itself enough. If the buyer and seller are equally knowledgeable of goods, it is less likely there will be an inference of reliance. (*Feast Contractors*)
  3. Partial reliance on the seller's judgement will be enough e.g. only rely to source good quality ingredients (*Ashington Piggeries*)
  4. It does not matter if seller does not possess the necessary skill and judgement or that they could not have detected the defects or the goods (*Hamilton*).
  5. All the circumstances were relevant to determine if seller would know it was being relied (*Hamilton*) eg. statutory duty or the fact it could only supply water of one standard.
  6. Any inferences the test raises can be rebutted (*Trelise Cooper*)

c. the goods are of a description that it is in the course of the seller's business to supply (whether or not the seller is the manufacturer) -

1. *Ashington Piggeries*: If this is the first time the seller is dealing in goods of the contract description that doesn't mean seller is not a dealer in goods of that description.

d. There is an implied condition that the goods are reasonably fit for that purpose.

- i. They are fit for purpose if goods were used for any purpose for which goods would normally used
- ii. *Taylor v Combined Buyers*

1. It applies to both unascertained goods and specific goods.
2. Seller is liable for latent defects that make goods not fit for purpose, even if undiscoverable.

iii. (3) However, in the case of a contract of sale for a specified article under its patent or other trade name, there is no implied condition that the article is fit for any particular purpose.

1. *Taylor v Combined Buyers*

- a. Court adopted a limited interpretation.
- b. Seller will not be liable for defects that normally pertain to that class of goods.
  - i. It is different if defect was due to it being wet, or passed used by date. Not known defects of the brand.
- c. It protects vendors who sell branded articles from defects from those brands - purchaser is taken to rely on their own skill and judgement when buying a brand as an ordinary person would have knowledge of the brands defects.

4. **Section 139: Merchantable quality:** There is an implied condition in a contract of sale that the goods are of merchantable quality if the goods are

a. bought by description from a seller

- i. Apply same *Taylor v Combined Buyers* - Test about sales by description @ 1.i.

b. who deals in goods of that description (whether or not the seller is the manufacturer).

- i. *Ashington Piggeries*: If this is the first time the seller is dealing in goods of the contract description that doesn't mean seller is not a dealer in goods of that description.

c. (3) However, if the buyer has examined the goods, there is no implied condition with respect to defects that the examination ought to have revealed.

i. Was it "merchantable"?

1. Just because goods conform with the description does not mean they are merchantable.
2. If goods are not fit for a particular purpose that does not mean they are unmerchantable.
3. [*Unclear if this is still good law*] - *Taylor v Combined Buyers*: Goods will be "merchantable" when they are of such quality as to be saleable under that description to a buyer
  - a. who has full and accurate knowledge of that quality, and
  - b. who is buying for the ordinary and normal purposes for which goods are bought under that description in the market.

4. **Leading Test:** Lord Reid *Henry Kendall*/Lord Diplock *Ashington Piggeries*- Goods will be unmerchantable if, in the form in which they were tendered to the buyer, they were of no use for

any purpose (judged objectively) for which goods which complied with the description under which those goods were sold, would normally be used. In other words, they are not saleable under that description. So if goods of that description are normally used for several purposes, the goods will be merchantable if fit for any of those purposes.

- a. If description was so specific that the goods would normally only be used for one purpose - they must be fit for that purpose.
- b. But if the description is broad, so that goods of that description are normally used for several purposes, the goods will be merchantable if fit for any of those purposes.
- c. Different to Cammell Laird test - goods were used for any purpose for which goods would normally used.
  - i. Lord Reid focuses on the description of the goods in the contract.
- d. This test has been approved (but not necessarily used) in *Feast Contractors, Herbert Construction and Finch Motors* (NZ CASES).

5. **Also good:** Hardie Boys J *Finch Motors*- commercially saleable by the description by which the goods are sold.

6. Dissent in *Harlington*: Merchantability means more than just merchantable qualities. Can consider all the circumstances e.g. who the goods were made by, the price, whether it had been purchased by re-sale.

- ii. **Second hand goods - Different test:** Buyer should be taken to know that they could break down more easily/that defects will appear sooner or later (*Feast Contractors*)

5. **Section 142: Sale by sample:** There is an implied condition in a contract of sale by sample that

- a. the bulk corresponds to the sample in quality and
- b. that the buyer will have a reasonable opportunity to compare the bulk to the sample, and
- c. that the goods are free from any defect that makes them unmerchantable and that would not be apparent on reasonable examination of the sample.

- i. A contract of sale is a contract of sale by sample if there is a term in the contract, express or implied, to that effect

1. *Trelise Cooper*: If the K doesn't set this out clearly, how do we know there is an implied term?

- a. If a sample is produced this does not necessarily mean it was a sale by sample.
- b. **Test:** a contract will be a sale by sample if object of producing sample is to present to the eye the real meaning and intention of parties in regard to the subject matter of the K which owing to the imperfections of language, it may be impossible to express in words?

- ii. Merchantability = Lord Reid's test from *Henry Kendall* @ 4.c.i.4.

## 6. Remedy

- a. If there is a breach of an implied condition buyer will have a right to rescind the K.
- b. **Section 133:** UNLESS the buyer is treated to have accepted the goods, in which case a remedy will only be available as if it were a warranty, which is damages of the value of the good, not the value it would have been if it was of acceptable quality.

- i. **Section 170: Acceptance of goods:** A buyer has accepted goods when the buyer indicates this to the seller, the goods have been delivered to the buyer and the buyer does any act in relation to the goods that is inconsistent with the ownership of the seller or after a reasonable has elapsed with no indication to seller that buyer rejects the goods

1. By taking too long or acting in such a way, their behaviour is inconsistent with the seller's ownership.

- ii. This is a question of fact that depends on the NATURE of the goods and the defect.

iii. Purpose: to compensate if buyer had obtained part of the benefit of consideration made.

7. Note: They can all be excluded by the parties' contract, under this Act will normally be business to business (business to consumer will come under CGA which is harder to contract out of).

8. These are only minimal terms implied by law that relate to the condition of the goods.

# Consumer Guarantees Act

## Objectives of consumer law generally (CGA and FTA)

Protect consumers in four aspects:

1. That the consumer gets adequate and accurate information about what they are purchasing.
2. That the product purchased is of reasonable quality.
3. That consumers are treated fairly in their dealings with suppliers.
4. That consumers have a means of redress in the event that they have a complaint.

Revision to consumer law

- 2009 they began to revise and update consumer law from the 7 Acts that dealt with aspects of consumer protection.
  - We want the law to be principles-based
  - Consumers should be able to transact with confidence.
  - Protect reputable suppliers and consumers from inappropriate market conduct.
- Old consumer law was incorporated into CGA and FTA
- Added new ideas e.g. FTA - unfair K terms, extended powers to prohibit unsafe goods, unsubstantiated representation rules and “purpose provisions” to these Acts.
- They did not change the facilitation of public enforcement of the CGA.
  - Regulation authorities (Commerce Commission) have to act on behalf of people to enforce the CGA.
  - Enforcement still remains on consumers being aware of their rights and taking action.
  - Some types of consumer goods are still subject to their own regulation e.g. cigarettes and alcohol. Potentially natural health products will in the future too.
  - Some are banned e.g. flammable childrens nightwear, microbeads, party pills.
- Sale of goods law still dominates in business to business transactions.
- CGA:
  - Focus: inequality of bargaining power and asymmetry of information.
  - Sets minimum quality standards in relation to the supply of goods and services to consumers.
  - It gives rights of redress against both the supplier and the manufacturer.
  - Limited ability to contract out.
- FTA
  - Main provisions apply to all sales supplies in trade (not just consumers)
  - Mainly concerned to ensure that the purchaser is not misled.
  - Limited ability to contract out.

Why do we have consumer protection laws?

- Economic theory = two parties to K have free will and bargaining power, and will act in ways that promote their own welfare.
- Behavioural economic theory = Consumer law recognises the reality of the imbalance in power between manufacturers and suppliers on the one hand, and the person who ultimately purchases the goods for use on the other.
  - Often consumers are at a disadvantage as regards the information available about products and services e.g. misleading advertising, have less info about product than companies.
  - Consumers have little control over latent defects and are often not able to inspect goods on sale.
  - Consumers usually cannot negotiate terms of sale e.g. take it or leave it K, complex terms.
  - Consumers can have problems in seeking redress if a product is faulty e.g. no access, less money or power than companies.
- Protection for consumers against bad decision making and unsafe products.

## Purpose

Section 1A

- Contribute to a trading environment in which interests of consumers are protected and businesses compete effectively and consumers and businesses participate confidently.
- The Act guarantees that consumers have certain guarantees as to goods and certain rights of redress against suppliers and manufacturers if goods/services fail to comply.

Before:

- No privity of K with manufacturer so no right under K law.
- Tort law was expensive and difficult to establish.



- Sale of goods law does alleviate some issues but can be contracted out of.

## **Prerequisites for application**

1. Goods must be supplied to a consumer by a supplier
  - a. **Section 2:** “supply” defined - in relation to goods, means supply by way of gift, sale, exchange, lease, hire or hire purchase; and in relation to services it means provide, grant or confer.
  - b. **Section 2:** “supplier” defined -
    - i. a person who, in trade, supplies goods to a consumer by
      1. transferring the ownership of the goods under a contract of sale, exchange, lease, hire or hire purchase to which that person is a party; or
      2. Transferring the ownership of the goods as the result of a gift from that person or
      3. Transferring the ownership of possession of the goods as directed by an insurer
    - ii. Or supplies services to an individual consumer or a group of consumers, and includes... a person (other than an auctioneer) who, in trade, is acting as an agent for another person, whether or not that other is supplying in trade.
      1. E.g. a liquidator selling off assets = agent for the business going insolvent. Doesn't matter if “business was a supplier or not.
    - iii. “Is the person in the business of selling that type of goods”?
      1. How often do they sell those goods?
      2. Is it a main source of income?
      3. What is the purpose for selling the goods?
      4. [This could include a school or something like that, as it is carrying on a trade of education and part of that is selling goods at a school fair from time to time, like a charity].
2. The buyer must be a “consumer”
  - a. **Section 2:** “Consumer” defined - A person who acquires from a supplier of goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption and does not acquire the goods or services, or hold himself or herself out as acquiring goods or services, for the purpose of
    - i. Resupplying them in trade or
      1. Even if you may resupply them in some point, will not satisfy this limb if it wasn't the purpose of buying the good.
      2. Especially evidenced if person is not in the business of buying and on-selling.
    - ii. Consuming them in the course of a process of production or manufacture; or
    - iii. in the case of goods, repairing or treating in trade other goods or fixtures on land.
      1. “Treat” = apply substance to goods to change their character in some way.
      2. “Person” = can include incorporated bodies. (So while it is principally aimed at ordinary people, it can protect some parts of businesses).
      3. *Nisbet v Porter*: “Ordinary” = means as a matter of regular practice or occurrence that goods are acquired for personal use. (This is not a disadvantage to sellers bc they can still K out of CGA under s 43 with businesses)
3. Must involve sale of goods (or services)
  - a. **Section 2:** “Goods” defined - personal property of every kind (whether tangible or intangible). Includes - ships, aircraft, and vehicles, animals including fish, minerals, trees and crops, whether on, under or attached to land or not, gas and electricity, water and computer software.
4. **Section 41:** The Act will not apply if the goods/services are not supplied “in trade” or if the goods are supplied by a charitable organisation for the principal purpose of benefiting the person to whom the supply is made.
  - a. **Section 2:** “trade” defined - any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services
  - b. “In trade” - not defined by statute - courts have taken a broad approach - not if supplier is acting in a purely private capacity.
    - i. *Body Corporate v Taylor* - found director liable for misleading comments in advertising.
    - ii. Issues arise over sales online because you don't know if person on deal is in trade, so don't know if CGA will apply. - This problem led to amendment in FTA.

## Contracting out

1. **Section 43: General rule** = CGA will always apply.
  - a. Contracting out is permitted if:
    - i. The agreement is in writing and
    - ii. The goods or services are supplied “in trade”
    - iii. The parties to the agreement are acting “in trade”
      1. If goods/services are partly supplied in trade and partly in private, or the parties are, then the goods will have been acquired in trade, so can K out of CGA.
    - iv. It is fair and reasonable that the parties are bound by the clause.
  - b. (2A) If a court is required to decide what is fair and reasonable, they must take into account all the circumstances of the agreement, including
    - i. The subject matter of the agreement
    - ii. The value of the goods, services etc.
    - iii. The respective bargaining power of the parties, including
      1. The extent to which a party was able to negotiate the terms of the agreement; and
      2. Whether a party was required to either accept or reject the agreement on the terms and conditions presented by another party.
    - iv. Whether all or any of the parties received advice from, or were represented by, a lawyer, either at the time of negotiations leading to the agreement or at any other relevant item.
      1. [Court has discretion to disregard the contracting out clause depending on the circumstances].
  - c. Contracting out clause extends to the manufacturer.
2. It is an offence to K out of the CGA other than in s 43.
  - a. If the seller implies the buyer would have less rights than they have under the CGA they can be held to have purported to K out of s 43, so they could be liable.
3. Tort law may provide a remedy in negligence or negligent misstatement.
4. Equity may provide a remedy.

## Guarantees

1. **Section 5: Guarantees as to title** - Three guarantees as to title
  - a. That the supplier has a right to sell the goods; and
    - i. Seller has the right to dispose of ownership of the goods to the consumer at the time ownership is passed to the buyer at the date it is intended to pass, ownership = general property in the goods
    - ii. This does not alter *nemo dat* but it does give the buyer some remedies if the seller purports to pass title.
  - b. That the goods are free from any undisclosed security; and
    - i. Security means a charge or encumbrance, interest granted in the property to secure payment of an obligation.
    - ii. Security will be undisclosed unless it is disclosed to the buyer before they have agreed to buy, or if it's been created with the express consent of the buyer.
    - iii. [Registration of the PPS register is not disclosure.]
    - iv. If there is, can have remedies.
  - c. That the consumer has the right to undisturbed possession of the goods, except in so far as that right is varied pursuant to some exceptions (see provision)
    - i. [The right to undisturbed possession can be varied for e.g. in a hire purchase agreement or security in certain circumstances or varied by security agreement that applies to the good or the agreement itself, so long as the buyer has received as advice for the potential for this right to be disturbed and this has been acknowledged in writing].
2. **Section 5A: Guarantees as to delivery** - Where a supplier is responsible for delivering, or for arranging for the delivery of goods to a consumer there is a guarantee that the goods will be received by the consumer
  - a. At a time, or within a period agreed between the supplier and the consumer
  - b. If no time or period has been agreed, within a reasonable time.
    - i. (2) Consumer rights of redress: if the failure is of a substantial character, reject the goods under s 18(3); and in any case, obtain damages under s 18(4) whether or not the consumer also rejects the goods.
    - ii. Seller cannot shift the blame to the carrier. Seller is the agent.

### 3. Section 6: Guarantee as to acceptable quality

a. Where goods fail to comply with the guarantee, Part 2 may give a right of redress against the supplier, and Part 3 may give the consumer a right to redress against the manufacturer.

i. This replaces the condition that goods will be of MQ under CCLA.

**b. Section 7: Meaning of acceptable quality:** Goods are of acceptable quality if they are as

i. Fit for all purposes for which the goods of the type in question are commonly supplied, acceptable in appearance and finish, free from minor defects, safe and durable

ii. as a reasonable consumer fully acquainted with the state and condition of the goods, including hidden defects, would regard as acceptable, having regard to

1. The nature of the goods

2. The price

3. Any statements made about the goods on packaging or label on the goods

4. The nature of the supplier and the context in which the supplier supplies the goods

5. Any representation made about the goods by the supplier or the manufacturer

6. All other relevant circumstances of the supply of the goods.

a. [Court should balance the interests of consumers and sellers].

b. [It doesn't matter if the seller took reasonable care or if they didn't know of the defects, it's just about whether reasonable consumer would find goods acceptable].

c. *Contact Energy Ltd v Jones* - "Would they think the goods were acceptably fit for all the purposes they will be used for/ safe/ durable etc.?"

7. [Other potentially relevant circumstances]:

a. If it is second-hand, it is less likely to be a breach.

b. Does the supplier know a lot about the goods? If not, less likely to be a breach.

c. Is it a serious defect?

d. What was the consumer told about it by the supplier? (or by others?)

iii. *Nisbet v Porter*: Is "acceptable quality" the same as "merchantable quality"? NO.

1. Merchantable quality = if goods are of use for any purpose for which goods which complied with the description under which they were sold would normally be used - if fit for any such purpose they are regarded as saleable under that description.

2. Acceptable quality = only if fit for all purposes for which the goods of the type in question are commonly used and they meet the other standards referred to in s 7(1) (including being free of minor defects, with all of these matters being tested against the opinion of a reasonable and fully-acquainted consumer having regard to matters in the provision.)

iv. Exceptions:

1. (2) Where the defects have been drawn to the customers attention before they agreed to the supply, then whether or not they regarded the goods as acceptable, the goods will not fail to comply with the guarantee only be reason of those defects.

2. (4) Goods will not fail to comply with the guarantee if the goods have been used in a manner, or to an extent which is inconsistent with the manner of extent of use that a reasonable consumer would expect to obtain from the goods and the goods would have complied with the guarantee of acceptable quality if they had not been used in that manner or to that extent.

a. If it was going to break down anyway, it doesn't matter how you used them.

c. [Note: Electricity and gas supplies are specifically decided under a separate provision now 7A - power outages, and power surges.]

### 4. Section 8: Guarantee as to fitness for purpose - Two guarantees

a. That the goods are reasonably fit for any particular purpose that the consumer makes known, expressly, or by implication, to the supplier as the purpose for which the goods are being acquired by the consumer; and

b. That the goods are reasonably fit for any particular purpose for which the supplier represents that they are or will be fit.

i. Can use CCLA law here.

1. If buyer says nothing, but intends to use them for their usual purpose, the seller is taken to know the goods are acquired for that purpose (*Taylor*)

2. Issues if the product is not fit for purpose due to some peculiarity of the buyer. If ordinary average buyer would not have a problem with the product there is no breach.
  3. Would argue case law under s 138.
  - c. (2) the guarantees do not apply where the circumstances show that
    - i. The consumer does not rely on the supplier's skill or judgement; or
    - ii. It is unreasonable for the consumer to rely on the supplier's skill or judgement.
      1. It is usually inferred that they have relied, but depends on the facts.
  - d. This gives right to redress against the supplier.
- 5. Section 9: Guarantee that goods comply with description**
- a. Same as s 136. Would argue case law from those provisions.
  - b. Virtually all goods will be sold by description BUT matters that describe the quality of the product are not regarded as description, have to go to the nature/kind/identity of the goods (adopt *Ashington Piggeries* test)
  - c. But easier to claim under this provision because it immediately states the available remedies and gives you remedies against the seller and the manufacturer
  - d. Right to redress against the supplier and may give the consumer right to redress against the manufacturer.
- 6. Section 10: Guarantee that goods comply with sample - Two guarantees**
- a. That the goods correspond with the sample or demonstration model in quality and
  - b. That the consumer will have a reasonable opportunity to compare the goods with the sample.
    - i. If the goods are supplied by reference to a sample or demonstration model as well as by description, the guarantees from section 9 will apply.
    - ii. Right to redress against the supplier.
- 7. Section 11: Guarantee as to price - guarantee that the consumer is not liable to pay more than a reasonable price for the goods in any case where the price for the goods is not**
- a. Determined by the contract; nor
  - b. Left to be determined in a manner agreed by the contract; nor
  - c. Left to be determined by the course of dealing between the parties.
    - i. Where there is failure to comply, the consumers right of redress is to refuse to pay more than the reasonable price.
- 8. Section 12: Guarantee as to repair and spare parts-** where goods are first supplied to a consumer in NZ (whether or not that supply is the first-ever supply of the goods)
- a. there is a guarantee that the manufacturer will take reasonable action to ensure that facilities for the repair of the goods and supply of parts for the goods are reasonably available for a reasonable period after the goods are so supplied.
  - b. Right to redress against the manufacturer.
  - c. **Exception: Section 42:** Section 12 does not apply where reasonable action is taken to notify the consumer who first acquires the goods from a supplier in NZ, at or before the time the goods are supplied, that the manufacturer does not undertake that repair facilities and parts will be available for those goods.
    - i. At all times or
    - ii. After the expiration of a specified period.
- 9. Section 13: Express Guarantees - this Act applies to any express guarantees given by a manufacturer of the goods which is binding on the manufacturer in accordance with section 14.**
- a. **Section 14:**
    - i. An express guarantee given by the manufacturer in a document that is given to a consumer with the actual or apparent authority of the manufacturer in connection with the supply by a supplier of those goods = binds the manufacturer
      1. An express guarantee which is included in a document relating to goods and which appears to have been made by the manufacturer of the goods shall in the absence of proof to the contrary, be presumed to have been made by the manufacturer.
      2. If consumer is given document containing express guarantees by a manufacturer, in the absence of proof to the contrary, this will be proof the document was given to the consumer with authority of the manufacturer.
  - b. Rights of redress to the manufacturer.

## Gifts

1. **Section 24: Rights of donees:** Where a consumer acquires goods from a supplier and gives them to another person as a gift, that person may, subject to any defence which would be available to the supplier against the consumer, exercise any rights or remedies under this Part that would be available to the original consumer of the goods.
  - a. Donee has rights to redress against manufacturers
    - i. **Section 25: Circumstances where consumers have right to redress against manufacturers**
    - ii. **Section 27: Options against manufacturers where goods not not comply with guarantees**
  - b. Donee only has rights that the original donor had, so have to be consumer.

## Remedies

Note: CGA rights are in addition to other rights the consumer might have.

### **Part 2 - Right to redress against suppliers if the goods fail to comply with section 5 - 10 guarantees.**

1. Section 18 - Course of action - whether failure can be remedied?
  - a. **Section 18(2):** where the failure can be remedied,
    - i. the consumer may require the supplier to remedy the failure within a reasonable time in accordance with **s 19.**
      1. **Section 19 - Requirements to remedy**
        - a. By repairing the goods (in any case where the failure does not relate to title) or curing any defect in title (in any case where failure relates to title).
        - b. By replacing the goods with goods of an identical type.
        - c. Where the supplier cannot reasonably be expected to repair the goods, by providing a refund of any money paid or other consideration provided by the consumer in respect of the goods.
      - ii. if the defect cannot be remedied because the supplier refuses, neglects to do, or fail to do so within a reasonable time
        1. The consumer can have the failure remedied elsewhere or
        2. Subject to s 20, reject the goods according to s 22. (See what do below @1.b.ii)
    - b. **Section 18(3):** where the failure cannot be remedied or is of a substantial character
      1. **Section 21: Failure of substantial character-** where...
        - a. the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure or
        - b. The goods depart in 1 or more significant respects from the description or sample by which it was supplied or
        - c. The goods are substantially unfit for a purpose which goods of the type are commonly supplied, unfit for purpose made known to the supplier (under s 8), or represented by the supplier to be a purpose for which goods would fit and the goods could not be remedied to be made fit for those purposes.
        - d. The goods are not of acceptable quality because they are unsafe.
          - i. Is the cost of repair too high?
          - ii. Is there a similar model available that did not have that defect?
      - ii. Consumer can immediately reject the goods in accordance with section 22, subject to section 20 or
        1. **Section 22: Manner of rejecting goods -**
          - a. Consumer shall notify the supplier of the rejection and on what grounds.
          - b. Consumer shall return goods to the supplier unless because of the nature of the failure or the size/height/method of attachment the goods cannot be returned, removed or transported without significant cost to the consumer = supplier shall collect.
          - c. Ownership of goods will revert in the supplier.
        2. **Section 23:** the consumer can elect a refund or replacement of the goods (of the same type or similar value)
      - iii. Get damages from the supplier for reduction in value below what they paid for it.
        1. Compensation damages - difference between what was paid and what thing was worth.
        2. Can also claim for resulting loss that was reasonably foreseeable e.g. need to hire rental car.

### **Part 3 - Right of redress against manufacturers**

1. **Section 2:** Definition of “manufacturer” - a person that carries on the business of assembling, producing, or processing goods, and includes
  - a. Any person that holds itself out to the public and being a manufacturer
  - b. Any person that attaches a brand or mark or causes or permits a brand or mark to be attached to the goods
  - c. Where goods are manufactured outside NZ and the foreign manufacturer of the goods doesn't have an ordinary place of business in NZ, a person that imports or distributes those goods.
2. **Section 25: guarantees that have right of redress against manufacturers**
  - a. Section 6 - guarantee as to acceptable quality.
  - b. Section 9 - where failure of goods corresponding with description applied to the goods by or on behalf of the manufacturer or with the express or implied consent of the manufacturer)
  - c. Section 12 - guarantee as to repairs and parts.
  - d. Section 14 - fail to comply with any express guarantee given by the manufacturer that is binding) may give consumers the right to redress against the manufacturer.
3. **Section 27: Remedy against manufacturers**
  - a. May obtain damages from the manufacturer for any reduction in the value of the goods resulting from the failure
    - i. Below the price paid or payable by the consumer for the goods; or
    - ii. Below the average retail price of the goods at the time of supply.
      1. Whichever price is lower
        - a. Compensation damages - difference between what was paid and what thing was worth.
  - b. For any loss or damage to the consumer or that person resulting from the failure (other than loss or damage through a reduction in value of the goods) which was reasonably foreseeable as liable to result from the failure.
    - i. Ex: Costs of substitutable vehicle, taxi fares, towing fees.
    - ii. Case law: electric blanket started fire and caused damage to the house. Had to pay \$50,000 for damage and \$7,000 for stress of inconvenience.
4. **Exceptions: Section 26**
  - a. If goods fail test of acceptable quality or fail to correspond with description ONLY because of
    - i. an act or default or omission of, or any representation made by, any person other than the manufacturer or a servant or agent of the manufacturer
    - ii. A cause independent of human control, occurring after the goods have left the control of the manufacturer
    - iii. The price charged by the supplier being higher than the manufacturer’s recommended retail price or the average retail price

### Section 20: Loss of right to reject goods

The right to reject goods shall not apply if

1. the right is not exercised within a reasonable time, or
  - a. “Reasonable time” = a period from the time of supply of the goods in which it would be reasonable to expect the defect to become apparent having regard to the type of goods, the use of which consumer is likely to put them, the length of time for which it is reasonable for them to be used, the amount of use to which it is reasonable for them to be put before the defect becomes apparent.
  - b. Example: *Nisbet v Porter* - 9 months = no right to reject.
    - i. The older the goods are when they are sold the shorter the reasonable period is going to be to reject the goods.
    - ii. If goods are used less frequently it may be a longer period.
    - iii. Need to balance the interests of the consumer and the seller.
  - c. Example: *Taylor v Combined Buyers* = 3 months = no right to reject.
    - i. Period must allow buyer to be in a position to determine the defect is substantial.
    - ii. Consider also if the type of goods require regular inspections for defects by law
    - iii. Consider if seller tried to conceal the defect.
2. the goods have been disposed of by the consumer, or have been lost or destroyed while in the possession of a person other than the supplier or an agent of the supplier or
3. The goods were damaged after delivery to the consumer for reasons not related to their state or condition at the time of supply or

4. The goods have been attached to or incorporated in any real or personal property and they cannot be detached or isolated without damaging.

## Fair Trading Act

### Focus

- Applies to Services and goods.
- Focus is on the conduct of the seller, not the state of the goods e.g. on information given to buyers of goods or user of services.
- Administered by the Commerce Commission
  - The broader the claim, the more chance CC will take the claim. If just between two parties, much less likely CC will take it on. CC is unlikely to take on a small case between two people, so even if you have a claim may not get a remedy anyway.
    - This has been criticised because it means only claims that a large amount of people bring and are significantly unfair will be taken to court, since CC have limited resources.
  - For unfair K terms, in Australia you can bring a claim personally. NZ is not that much more protected than before the introduction of these provisions (also bc it is so hard to show it is an unfair term).
- S 9 can be easier than claims in K and Tort, but similar facts.
  - E.g. Directors can have liability. *Body Corporate v Taylor*
    - Leak apartment. Director of company was sued by the owners of the apartment, because builders couldn't be sued. Court held he was responsible for brochures of apartments containing statements about workmanship so was liable under s 9. Easier than finding him liable under torts.
- Unfair K terms are designed to target non-negotiable clauses in K.
  - The businesses targeted are those that supply goods or services (more commonly services) to consumers on standard form terms that are non-negotiable. Examples: airlines, telecommunications, providers, gyms and rental car companies
- Breaches backed up by civil liability imposed (damages and other remedies) and some criminal liability for some breaches.

### Purpose - s 1A (and above under CGA)

- Promote fairness 'in trade'.
- Protects consumers, allows businesses to compete effectively and allows consumers and businesses to participate confidently.
- Prohibits unfair conduct and practices in trade, and promotes fair conduct and practices in relation to trade. Promotes safety in respect of goods and services.
- Underlying issue
  - FTA helps encourage traders to self-regulate.
    - Traders have an incentive to downplay the negative features of the products they sell. Defect may be latent or trader might have monopoly on market or product may be so complex that ordinary consumer doesn't understand how it works.

### Prerequisites for FTA to apply

1. Are they "in trade"?
  - a. **S 2:** Definition "trade" = any trade, business, industry, profession, occupation, activity of commerce...
  - b. Definition "in trade" = not defined in the Act. Courts have taken a broad approach.
    - i. Don't need to make a profit or have a commercial motive.
    - ii. If person was acting in a purely personal capacity or if conduct was directed only at a small class of people they are not in trade.
    - iii. Would consider policy considerations e.g. consumer protection v individual protection to sell.
    - iv. Online situations? It is difficult to tell. **S 28B:** If the vendor of the goods or services is in trade, the person making the offer must make it clear to potential purchasers that the vendor is a person in trade.
      1. But this relies on seller knowing if they are in trade or not.
      2. Commerce Commission guideline factors:
        - a. Regularly or habitually selling goods online = in trade.
        - b. Are they GST registered?
        - c. Are there staff or is it a company?

- d. If selling goods initially purchased for private use then sell, that is not in trade - TradeMe.

2. Is the sale at issue of “goods”?

- a. **S 2:** Definition “goods” = personal property of every kind (whether tangible or intangible). Includes - ships, aircraft, and vehicles, animals including fish, minerals, trees and crops, whether on, under or attached to land or not, gas and electricity, water and computer software.

## Unfair or misleading conduct

### Application

#### Part 1 - Unfair Conduct

##### 1. **Misleading and deceptive conduct**

- a. **Section 9: Misleading and deceptive conduct generally** - No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- i. Is there a breach of s 9? Has there been “misleading or deceptive conduct”?
1. ***Red Eagle Corporation v Ellis***: Whether a reasonable person in the plaintiff's situation, with characteristics known to the defendant, or of which the defendant ought to have been aware, would likely have been misled or deceived.
- b. **Section 10: Misleading conduct in relation to goods** - No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for purpose or quantity of goods.
- i. Aimed at conduct that goes out to the world at large.
- ii. “The public” = A section of the public is sufficient
- iii. “Characteristics” = includes where goods are manufactured or the length of time they have been on the market.
- c. **Section 11: Misleading conduct in relation to services** - No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.
- d. **Section 12: Misleading conduct in relation to employment** - No person shall, in relation to employment that is, or is to be, or may be offered by that person or any other person, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive, as to the availability, nature, terms or conditions, or any other matter relating to that employment.

##### 2. **False or misleading representations**

- a. **Section 13: False or misleading representations** - No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services - **make a false or misleading representation that goods/services are of a particular kind, standard....** - *Go to actual statute.*
- i. Targets specific types of misrepresentations.
- ii. There must be an actual misrepresentation.
- iii. “Representation” = about particular uses or benefits or some type of guarantee.
- iv. “False or misleading representation” = Judged with reference to the ***Red Eagle test/causation*** (1.a.i)
1. Non-disclosure of information can amount to misleading conduct, whether accidental or deliberate, because conduct includes “permitting” to act.
- a. ***Hieber v Barfoot & Thompson***: Was there a reasonable expectation that this particular matter would be disclosed? Have to look at context.
2. Mere “puffery” will not amount to misleading conduct - an exaggerated statement that people are expected to know is not the full truth.
3. Statements of opinion = misleading conduct if the speaker did not honestly hold that opinion or there was no reasonable basis for it. E.g. if you make a prediction about the future, it is treated as a representation that you had a reasonable basis for making that prediction.
- a. May often be a question of fact.

##### 3. **Unsubstantiated representations**

- a. **Section 12A: Unsubstantiated representations** - A representation is unsubstantiated if the person making the representation does not, when the representation is made, have reasonable grounds for the representation,



irrespective of whether the representation is false or misleading. This section does not apply to a representation that a reasonable person would not expect to be substantiated.

- i. “Representation” = representation made in respect of goods, services, or an interest in land and in connection with the supply or possible supply of goods or services or the sale or grant or possible sale or grant of the interest in land; or the promotion by any means of the supply or use of the goods or services for the sale or grant of the interest in land.
  1. These prohibitions (12A-12D) make it easier for the Commerce Commission to bring pressure onto retailer to justify the claims made about the product
    - a. Onus falls on the person making the claim. But these substantial representation prohibitions make it easier for CC to prove what they are asserting because retailer must show some basis for making the claim/have some evidence.

#### 4. Section 17-26: Unfair trade practice provisions.

Part 3: Product safety standards.

Part 4A: special rules for layby sales, uninvited direct sales, extended warranties and auctions.

#### Notes for application

- If the statement is either false or true depending on facts, probably will come under s 13.
  - Have to apply *Red eagle* test to work out if it is misleading if unclear.
  - But if the facts show that it is clearly false, you don't need to do this test.
- If the statement seems like they are assuming something without having reasonable grounds comes under s 12A.
  - Doesn't matter if it is false or misleading.
- If it seems hard to disprove or prove whether it is false factually, maybe it can come under s 12A.
- Not all statements will give rise, if they are just too vague or seem exaggerated.
- Don't forget to think about ACC for applying FTA?
  - It does not cover allergic reactions to food.
- If the buyer was deceived, or the person did not have intention to mislead, these will be factors but not determinative.
- It doesn't matter if the misrepresentation is made before the contract. CCLA provision allows an action to be taken for being induced into a K by a misrepresentation. So you can have concurrent actions.

### Unfair contract terms

#### Application

1. The provisions only apply to standard form consumer contracts after 17th March 2015
  - a. Is the buyer a “consumer”? (only applies to transactions with a consumer)
    - i. **S 2** Definition of “consumer”: a person who acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption; and does not acquire the goods or services, or hold himself or herself out as acquiring the goods or services, for the purpose of resupplying them in trade, or consuming them in the course of a process of production or manufacture, or in the case of goods, repairing or treating, in trade, other goods or fixtures on land.
      1. Same definition as under CGA, so same rules of interpretation as the courts have given it for CGA cases.
  - b. Is it a “consumer contract”?
    - i. **S 2:** Contract in the case of a contract relating to goods or services between at least 1 supplier supplying the goods or services in trade, and at least 1 consumer.
  - c. Is it a “standard form contract”?
    - i. **S 46(J):**
      1. A court may determine that any contract in which the terms have not been subject to effective negotiation between the parties is a standard form K.
      2. In determining whether a K is a standard form contract, the court must without limitation take into account the following
        - a. Does one party have most of the bargaining power?
        - b. Was K prepared by one of the parties before any discussion relating to the transaction occurred?
        - c. Was the K on a take it or leave it basis? E.g. Have to accept or reject terms of K in form presented.

- d. The extent to which the parties had an effective opportunity to negotiate the terms of the contract? E.g. Just tick the box but can't negotiate further.
    - e. The extent that the terms of the K take into account the specific characteristics of any party to the K?
  - 3. If party alleges that a K is a standard form K, the contract is presumed to be a standard form contract unless the other party proves otherwise.
    - d. Was it after 17th March 2015?
- 2. **Section 46K:** A court may not declare a term in a standard form consumer contract to be an unfair contract term to the extent that the term:
  - a. Defines the main subject matter of the K;
  - b. Sets the upfront price payable under the K; or
    - i. [Upfront price = consideration payable under the K, but only to the extent that the consideration is set out in a transparent term].
      - 1. [This is broad. So long as the additional amount can be classified as consideration for K, not a penalty, it comes within this term. A penalty is not part of the upfront price.]
  - c. Is a term required or expressly permitted by any enactment
- 3. **Section 46L:** A term is unfair if the court is satisfied the term:
  - a. would cause a significant imbalance in the parties' rights and obligations arising under the K; and
    - i. Is there any term that could counterbalance this term?
      - 1. Example *Spreadex c Cochrane*: “your password must be declared with your account number. You will be deemed to have authorised all trading under your account number” - This creates a significant imbalance in the parties rights and obligations, because under this clause the customer would be made liable for any trade on account not made or authorised by him.
  - b. it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
    - i. [A term in a consumer K must be presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.]
      - 1. [This provision is helpful to the consumer; the onus is on the supplier who must prove the clause is necessary to protect their legitimate interests.]
  - c. would cause detriment (whether financial or otherwise) to a party if it were applied, enforced and relied on.
  - d. The court may take into account any relevant matters, but **MUST** take into account
    - i. The extent to which the term is transparent; and
    - ii. The contract as a whole.
- 4. View **Section 46 M** for examples of terms that are likely to be considered “unfair”
  - a. (c) Penalises one party for breach or termination of the K.
    - i. Term allowing business to terminate the services for unpaid charges, and make the client pay for reconnection fees. This is unfair because the term penalises one party for the breach of K but not the other.
  - b. Permits one party (and not the other) to:
    - i. (a) Avoid or limit performance of a K.
      - 1. Where the delivery company could store goods if no one is there to pick them up, at the expense of the client. This is unfair on the basis that it provoked one party to avoid performance of the K.
    - ii. (b) Terminate the K
    - iii. (d) To vary the K
      - 1. Can vary any term at any time in writing, and will notify the other party after.
    - iv. (e) To renew or not renew a K.
      - 1. Automatically start to charge you with details after the end of the trial, unless you cancel the subscription before the end of the recurring monthly period. Unfair because one party can renew.
    - v. (f) Vary the upfront price payable under the K without the right of another party to terminate the K.
      - 1. If information supplied is incorrect, the company has discretion to vary its charges in accordance with adjustment of quantity, volume or weight.

- vi. (g) Unilaterally vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted.
  - 1. Company has discretion to decide the method, route and time of carriage of goods.
- vii. (h) Unilaterally determine whether a K has been breached or to interpret its meaning
  - 1. If information supplied is incorrect, the company has discretion to vary its charges in accordance with adjustment of quantity, volume or weight.
- viii. (j) One party to assign the K to the detriment of another party without that other party's consent.
  - 1. The company assign its rights and the rights of any person on behalf of whom it is acting to collect charges from clients to the contractor.
- c. Limits one parties:
  - i. (i) Vicarious liability for its agents
    - 1. If you use any of the clubs equipment is at your own risk, and the club nor any agents will be responsible for any damage caused by you failing to follow rules or directions.
  - ii. (k) right to sue another party.
    - 1. The agreement shall be governed by australian capital territory laws. This is unfair as it limits one parties right to sue if they ae non-australian capital territory consumers, or deters them from enforcing the K. This creates a significant imbalance in the parties rights and obligations to the detriment of the consumer.
  - iii. (l) Evidence they can adduce in proceedings.
    - 1. Membership agreement constitutes the entire arrangement, and cancels any previous agreement or understanding whether written or oral.
- d. (m) A term that imposes an evidential burden on one party.
  - i. Company has no liability for any delay in delivery orr loss or damage of goods unless customer can provide proof the goods were given to the company for the delivery and have not been delivered.

### **Breach?**

- **Section 26A:** If a clause is found to be unfair then it is unenforceable, however the rest of the K remains unaffected.
- Only the commerce commission can apply to the court for a declaration that the term is unfair.

### **Persons overseas**

1. **Section 3:** This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in NZ to the extent that such conduct relates to the supply of goods or services, or the granting of interests in land, within NZ.
  - a. Carrying on business in NZ = a presence in NZ by some agent e.g. a distributor carrying on business.
  - b. Can't sue the agent themselves, but can sue the principal (company).

### **Contracting out**

1. **Section 5C:** General rule - No contracting out
2. **Section 5D:** Exceptions to the rule
  - a. If both parties are acting in trade AND it is fair and reasonable that the parties be bound by the contracting out clause it is possible.
    - i. Fair and reasonable = were both parties experienced? Was the clause hidden away? Did both parties get an opportunity to look, alter the K?
  - b. If the requirements of 5D are met.
  - c. Can only contract out of ss 9, 12A, 13 and 14(1)
    - i. Might sound like: parties have no relied on misrepresentations in making this K or X party is responsible for ensuring accuracy of any representations.
    - ii. If there were representations made outside the contract, a contracting out clause would not protect them from the act, unless the clause specifies contracting out of representations made outside the K.
3. Unfair contract terms
  - a. Sellers still have the freedom to limit their liability to consumers in contract, especially in relation to services.

### **Extended Warranties**

1. Time period for granting a normal warranty under CGA

- a. **What is reasonable in the circumstances**
    - i. E.g. What the product is camera v food will change the length of a warranty.
  - b. Used to be a common extra feature offered by retailers but the warranty sometimes gave you no more than you were already entitled to under the CGA
2. **Section 36T-36W: Selling extended warranties**
- a. Circumstances:
    - i. Warrantor, in relation to the purchase of goods or services by a consumer
    - ii. At or around the same time goods are purchased
    - iii. Where a consumer pays a price above cost of goods.
  - b. Requirements
    - i. Must be in writing, plain English, printed clearly, copy given to customer etc.
    - ii. Extension of warranty required to set out a comparison of warranty already entitled to under FTA or CGA compared to extended warranty offered.
    - iii. Also must state right to cancel extended warranty within 5 working days by writing for a refund of cost of warranty.
  - c. Breach?
    - i. Seller can be liable for a fine and/or prosecution

## Remedies

- Most claims under the FTA will go to the disputes tribunal rather than the court. (Up to \$15,000)
1. **Section 40:** Some breaches of the FTA can amount to an offence, with fine penalty.
  2. **Section 40B:** Some breaches of the FTA give the CC the ability to issue an infringement notice.
    - a. Ex: failing to disclose you're a trader or comply with extended warranty requirements. Infringement fee is no more than 2k.
  3. **Section 43:** Menu of remedies
    - a. Injunctions restraining conduct, corrective statement, disclose something or damages
    - b. These remedies come into play when some has suffered or is likely to suffer loss "by" the conduct of another.
      - i. **Red Eagle Corporation v Ellis:** Is there causation? Is there loss?
        1. Was the plaintiff actually misled by the defendant's conduct? AND
        2. Was the defendant's conduct an operating cause of the plaintiff's loss? AND
          - a. Have to show that they suffered loss. Monetary loss? But also consider whether the goods still function fine?
        3. Was the defendant's breach the effective cause or an effective cause of the plaintiff's loss?
          - a. Doesn't need to be the sole cause of the loss. There could be more than one contributing factor to the loss including from the plaintiff themselves (e.g. if they were careless).
          - b. Plaintiff's own actions could affect the amount of compensation the court awards. However, the plaintiff's conduct will only automatically preclude claims for damages if it was the sole cause of the loss.
        4. [Note: if not enough people have an issue, CC may not take on a case, which would bar getting a remedy anyway].
  4. Remedy without loss?
    - a. You have to establish loss if you want damages.
    - b. **Ss 9 and 13** have alternative remedies to damages if there is no loss. E.g. a rival business can bring an action
      - i. **S 41:** injunction
      - ii. **S 42:** disclose information
  5. **Section 43A:** Short limitation period
    - a. Have to make your claim three years after the date on which the loss or damage or likelihood of loss or damage was discovered, or ought reasonably to have been discovered.
      - i. Knowledge requirement - need actual knowledge of the facts that would indicate loss, without need for significant further investigation e.g. if you just discovered likelihood of loss that is enough. Or it is reasonable to discover given knowledge of facts. A mere suspicion is not sufficient.
    - b. Contract and torts have longer limitation periods e.g. 6 years after the date of offending action.
  6. Defences

- a. **Section 44:** Defences available for criminal actions
    - i. If D can prove contravention was due to a reasonable mistake, reliance supplied by another person.
  - b. **Section 15:** There are limited defences for news media to protect the freedom of the press.
7. **Section 45:** Liability extends to secondary parties
- a. A corporate entity is liable for the acts of employees, acting within the scope of their authority.

### Extra issues surrounding sale of goods law

#### Rules in online transactions (CGA/FTA/CCLA)

- FTA applies if the seller is acting 'in trade'.
- CGA applies to online transactions, if there is a 'consumer'.
- Electronic Transactions Act 2002 (now in Part 4 of the CCLA) is also relevant.
  - This Act includes provisions that recognise the legal effect of electronic forms of writing, communication and signatures. Gives rules for when communications are sent or received.
  - No specific legislative protections for consumers who enter into transactions on-line (except s 28B FTA - requires the supplier that is in trade to make clear to the purchaser that they are a person acting in trade).
- Problems
  - Issues with standard of goods (damaged/not delivered/poor condition/misleading advertising and don't perform as expected)
  - Security issues around online payments.
  - Sellers sending unwanted material over the internet (spam) and/or stealing personal information.
    - Privacy Act, Unsolicited Electronic Messages Act.
  - Issue with getting redress if seller is off shore.
- What about sale by auction?
  - Just usual rules.
  - If CGA doesn't apply, there may still be a remedy under breach of sale of goods law - CCLA.
  - Auctions conducted by a registered auctioneer are covered by different rules (in FTA ss 36X - 36ZF).
    - They don't apply to your standard online auction that you would enter into.
  - Example: Sale of something online via Trademe
    - FTA applies if it is in trade.
      - Seller has to disclose that if they are.
    - CGA applies if the purchaser is a consumer.
      - If seller is not in trade, neither act applies.
    - If not either of these, can use sale of goods law in s 131-142 in CCLA (when title passes, giving good title, expression of the nemo dat rule)
      - But these provisions can be contracted out of.

#### Pre-contractual misrepresentations

- CCLA, Part 2, Subpart 3
- 1. **Section 35:** Where a person has been induced to enter into a contract by a misrepresentation made by the other party to the contract, then the statutory right to claim damages arises.
  - a. It is enough if it was just one of the reasons why they entered into it.
  - b. Could be fraudulent misrepresentation or it could be a negligent misrepresentation.
    - i. Is there a reasonableness requirement?
  - c. **Section 34:** Damages are subject to this provision. If K itself provides a remedy for misrepresentation, and it is in conflict with s 35, this overrides right to claim for damages.
- 2. **Section 37:** allows a person who has been induced to enter into a K by a misrepresentation to cancel a K.
  - Only applies if the parties have expressly or impliedly agreed that truth of misrepresentation was essential to the K the parties are seeking to cancel.

#### Disputes

- Disputes normally go to the disputes tribunal, but there a number of other specialist disputes tribunals.
- 1. Motor vehicle disputes tribunal

- a. Sale of motor vehicle by motor vehicle dealers
- b. Quicker and cheaper process to go through
2. Telecommunications disputes tribunal
  - a. Hear disputes of up to \$50,000
  - b. Have to be a consumer or a small business.
3. Electricity industry tribunal
  - a. Can hear complaints up to \$50,000.

### **Credit Contracts and Consumer Finance Act 2003**

- Key part of consumer protection legislation for borrowers. In particular, disclosure obligations are imposed.
  - Rules around credit contracts e.g. finance companies. Often people borrow money to buy big items or to pay bills.
- Credit Contracts Act 1981 - purpose was to regulate the finance industry in relation to the provision of credit
  - Power to reopen contract in the case of oppression.
  - Information imbalance. Requires disclosure.
  - Target fees, must be reasonable.
  - In relation to high cost lending, it has to have specific rules.
- Since 2015 NZ law has included responsible lending obligations in relation to consumer credit contracts.
  - Follows AUS and UK.
  - Impose responsible lending obligations on lenders, to require the lender to assess:
    - suitability
    - affordability (borrower can pay back without suffering substantial hardship)
      - prior to making the loan.
  - Lender has to ensure that before the loan is taken out it is going to meet the borrowers objectives.
  - Targeted at third tier lenders (Banks, finance companies, third tier lenders who offers short term loans)
  - MBIE review revealed widespread non compliance with the principles in particular in the high cost lending market.
    - Compliance with the code is non mandatory but non compliance attracts more remedies?.
    - High cost lending is normalised in some communities.
    - Issue of direct selling by mobile traders, no fixed price for which you can sell a phone. Sale, not a credit K but purchase price.
    - After pay - layby is another issue.
  - Note: all consumer credit contracts are subject to the Principles and also to disclosure/right to cancel/restrictions on fees.

## PPSA

### Definition

Insolvency = unable to pay your debts when due.

Balance sheet insolvency = entity has more liabilities than assets, but can still meet debts as they fall due because they have cash flow coming in.

Cash flow insolvency = what is coming in is not enough to pay debts.

Receivership = when a secured party has a right under a security agreement that it has with the debtor to appoint a receiver and let the debtor default. If the debtor fails to pay debt when due or it breaches some financial covenant in the agreement, the bank has a contractual right to put in receiver.

Receiver = third party who will step in and take control of the affairs of the company. Normally a receiver in property (take control of machinery).

- Role: They need to generate sufficient cash to repay creditor that appointed them. They will do this by carrying on business, selling property or selling the whole business. They will want the right to take and sell all the assets the company has, so they have to work out who has priority to items if they are charged to other people.
- Position: They are legally the agent of the company, but they also owe duties to the appointing creditor.

Liquidation = when a company is wound up (not always in an insolvency situation). Normally after receivership, whatever is left is dealt with by the liquidator.

Liquidator = creditor (often IRD) applies under s 241 of the companies act to court for a liquidator to be appointed. (Liquidator may be appointed straight away and can recover from the receiver personally if they breach their obligations.)

- Ground for appointment: company is unable to pay its debt. Statutory demand to company to pay debt. If this demand is not met = evidence that they cannot meet their debts that gives court grounds to appoint a liquidator. This can be disputed.
- Role: Liquidator has to work out what are the assets of the company and if they are secured to other parties.
  - What is stock available?
  - What are the debts owing to the company?
  - Unpaid wages/GST/various other payments may have to be paid first.
  - Any security agreements with priority over the banks e.g. PMSI.

### Purpose

- Create a set of uniform rules - applies for all security interests that in substance secure payment and performance of an obligation.
- A creditor would have a means of perfecting their security interest
  - This usually means registering a financing statement.
- The law provides a clear set of priority rules.
- Minimise transaction costs

### Requirements for a security interest (enforceable against the goods)

1. Does the agreement create a security interest within s 17?
  - a. **Section 17(1): Interest in personal property** created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to (i) the form of the transaction; and (ii) the identity of the person who has title to the collateral.
  - b. **Section 17(3):** “for the avoidance of doubt” - act applies to fixed charge, floating charge, chattel mortgage, conditional sale agreement (including an agreement to sell subject to retention of title), hire purchase agreement, pledge, security trust deed, trust receipt, consignment, lease, an assignment, or a flawed asset arrangements, that secures payment or performance of an obligation.
  - c. **Section 24:** Title being in the secured party rather than the debtor DOES NOT AFFECT the application of the Act.
2. Has there been attachment?
  - a. **Section 40:** A security interest attaches when:
    - i. Value is given by a secured party
      1. **S 16:** value = consideration sufficient to support a simple K.
      2. [This could just be providing a loan to the debtor, but handing over possession can also be value].
    - ii. The debtor must have rights in the collateral/goods

1. (3) Debtor has rights to the goods that are leased to the debtor, consigned to the debtor or sold to the debtor under a conditional sale agreement not later than when the debtor obtains possession of the goods. [possession is enough, don't need title].
- iii. Except for the purpose of enforcing rights between the parties to the security agreement, the security interest must be enforceable against third parties within the meaning of **section 36**. (Only relevant for enforcing against third parties)

### **Requirements for perfection (enforceable against third parties and to determine the priority of interests)**

1. **Section 41(1)**: A security interest is perfected when:
  - a. A security interest is attached (as per s 40); and
    - i. **Section 36**: Must sign a written security agreement containing an adequate description of goods being secured.
  - b. Either:
    - i. A financing statement has been registered on the personal property securities register, or
    - ii. The secured party, or another person on the secured party's behalf, has taken possession of goods that is continuous (but not as a result of seizing them because they did not make a payment).
      1. EX: a financing company taking security over a hire purchase agreement. If they are given the physical hire purchase agreement, this constitutes possession that = perfection.
2. **Section 66**: Priority Rules
  - a. A perfected security interest has priority over an unperfected security interest.
  - b. A perfected security interest that was perfected (by registration of a financing statement or taking possession of the collateral or temporary perfection) first has priority over another perfected security interest perfected later.
    - i. [Temporary perfection: For a period of 10-15 days. If goods are moved to NZ from somewhere else and were subject to a perfected security interest in that other jurisdiction. Gives party time to take steps to maintain perfection by registering a finance statement.]
  - c. An unperfected security interest that was attached first has priority over another unperfected security interest attached later.
3. **Exceptions: PMSI**
  - a. **Section 16**: Purchase Money Security Interest =
    - i. a security interest taken in collateral by a seller to the extent that it secures an obligation to pay all or part of the collateral's purchase price; or
      1. (often retention of title agreements will come under this)
    - ii. a security interest taken in collateral by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights; or
    - iii. The interest of a consignor who delivers goods to a consignee under a commercial consignment
    - iv. Does not include a transaction sale and leaseback to the seller.
      1. [Purpose - encourages a seller or finance company to lend cash or goods under a SI, because they can get a priority over the banks GSA in all after-acquired property if PMSI rules are complied with].
  - b. Rules for PMSI to take priority
    - i. **Section 73**: Collateral
      1. A PMSI in collateral or its proceeds, other than inventory or intangibles, takes priority over an earlier registered security interest if the PMSI is perfected no later than 10 working days after the day on which the debtor, or another person at the request of the debtor, obtained possession of the collateral.
      2. If the PMSI is registered in the time limit
    - ii. **Section 74**: Inventory
      1. A PMSI in inventory or its proceeds has priority over a non-purchase money security interest if the PMSI is perfected at the time the debtor, or another person at the request of the debtor, obtains possession of the collateral (same day).
        - a. **Section 16**: Definition of Inventory =
          - i. goods that are held by a person for sale or lease, or that have been leased by that person as lessor; or



- ii. to be provided or have been provided under a contract for services; or
- iii. raw materials or work in progress; or
- iv. materials used or consumed in a business.

iii. **Section 75: Intangibles**

1. A PMSI in intangible or its proceeds has priority over a non-purchase money security interest if the PMSI is perfected no later than 10 working days after the day on which the security interest in the intangible attached.

c. Limitations on a PMSI

- i. As soon as purchase price has passed to the seller, that PMSI collapses. PMSI is only relevant to the amount payable in relation to those goods.
- ii. Security from a PMSI does not extend to the proceeds of the sale of goods e.g. if buyer on-sells them.

4. **Exception: Section 70:** A secured party may subordinate the secured party's security interest to any other interest. (look at provision)
5. **Exception: Section 47 - Temporary perfection of a security interest in proceeds in other cases.**
  - a. If the amount is paid for by another piece of property e.g. a car is swapped for a boat, they get a temporary perfected security interest for 10 working days. In this time, they must amend the statement on the PPS register to clarify that the security extends to the boat.
6. **Exception: Section 88:** Special rules apply if a secured party has knowledge that the debtor has transferred the goods to someone else.
  - a. The secured party has 5 days to register a financing statement.
7. **Exception: Priority of security interests in accessions**
  - a. **Section 78:** If good becomes an accession, the security interest continues in the accession.
    - i. **Section 16:** Definition of Accession = goods that are installed in, or affixed to, other goods.
  - b. **Section 79: Priority of a security interest in goods before they become accessions** - So long as person's security interest in the accession is attached at the time the goods become an accession that person will have priority over a claim to the goods made by a person with an interest in the whole.
  - c. **Section 80: Certain interests in whole have priority over security interests in goods before they become accessions** - Security interests of the following persons may have priority over a security interest in goods that is attached at the time when the goods became an accession:
    - i. A person who acquires for value an interest in the whole after the goods become an accession, but before the security interest in the accession is perfected. (Look at provision for others)
8. **Exception: Priority of security interests in processed or commingled goods**
  - a. **Section 82: General rule** - A security interest in goods that subsequently becomes part of a product or mass continues in the product or mass if the goods are manufactured, processed, assembled or commingled that their identity is lost in the product or mass.
    - i. *Swindle v Matakana* - VA/VB's security interest continued in the winestock that was commingled with the other wine.
    - ii. *StockCo v Gibson* - s 82 could be applied if the cows were commingled with the large group of cows.
  - b. **Section 84:** Any priority that a security interest continuing in the product or mass has over another security interest in the product or mass is limited to the value of the goods on the day on which they became part of the product or mass.
  - c. **Section 85: Priority when there is more than one security interest in the goods** -
    - i. A perfected security interest continuing in the product has priority over an unperfected security interest continuing in the same product.
    - ii. If they are both perfected security interests, or both unperfected, they are entitled to share in the product according to the ratio that obligation secured by the perfected security interest bears to the sum of the obligation secured by all perfected/unperfected security interests in the product.
      1. E.g if A is owed \$1,000, and B is owed \$9,000, but the value of goods are \$1,000, A will get \$100 (1/10 of the debt) and B will get \$900 (9/10 of the debt).
    - iii. Obligation secured by a security interest does not exceed the value of the goods on the day the goods became part of the product.

- d. **Section 86: Exception if a secured party has a PMSI** - Despite s 85, a perfected security interest in goods that continues in the product or mass has priority over a non-PMSI in the goods that continues in the product or mass AND a non-PMSI in the product or mass given by the same debtor.
- i. If one party has a PMSI, they can satisfy their whole debt, and don't need to split it with another perfected security interest.
- e. What if there are two stages to the commingling, e.g. the flour is commingled with other flour, and then the flour is commingled by baking it into bread. Does the security interest still continue?
- i. The legislation does not clarify this.
  - ii. **Section 83:** For the purposes of s 66, perfection of a security interest in goods that subsequently become part of a product or mass is to be treated as perfection of a security interest in the product or the mass.
    1. We could interpret this liberally, so that the perfected security interest follows each time it is commingled.
    2. Value of goods would be on the day that last thing was commingled.

### Exceptions which mean SI does not follow the goods

1. **Section 45: General Rule**
  - a. Except otherwise provided in this act, a security interest in collateral that is dealt with or otherwise gives rise to proceeds
    - i. Continues in the collateral, unless the secured party expressly or impliedly authorised the dealing; and
    - ii. Extends to the proceeds
      1. **Section 16:** Definition of proceeds = identifiable or traceable personal property that is derived directly or indirectly from a dealing with collateral or the proceeds of collateral and in which the debtor acquires an interest... (Look at provision).
        - a. Usually cash but it could be an account receivable, a negotiable instrument, goods or a debt from a third party purchaser.
        - b. Identifiable = particular property can be pointed at as property obtained by the debtor as a result of proceeds
        - c. traceable = property acquired by the debtor has been commingled with other property.
          - i. [Secured party does have a right to trace, but more limited than in equity.]
      2. Security interest can attach to the proceeds whether or not the security agreement contains a description of the proceeds
        - a. [The bank will be more likely to take proceeds to satisfy the debt, easier than trying to sell goods].
        - b. [If there was damage to the goods because of a fire, the banks security interest would attach to the insurance payout].
  - b. The amount secured by a security interest in collateral and the proceeds is limited to the value of the collateral at the date of the dealing that gave rise to the proceeds, if the secured party enforces the security interest against both the collateral and the proceeds.
    - i. [Security interest attaches to both but party can only enforce both if that is required to satisfy the debt. Can only take as much as they are owed.]
  - c. **Section 46:** if sold for cash or for a negotiable instrument (cheque) or an intangible, investment security or chattel paper etc. the security interest immediately attaches to the cash.
  - d. **Section 47:** If the amount is paid for by another piece of property e.g. a car is swapped for a boat, they get a temporary perfected security interest for 10 working days. In this time, they must amend the statement on the PPS register to clarify that the security extends to the boat.
  - e. **Exception:** Was the sale expressly or impliedly authorised by the creditor through the agreement?
    - i. Implied = if secured party has previously permitted the debtor to onsell secured stock/pattern of past conduct.
    - ii. Does the agreement allow the debtor to onsell in any circumstances?
      1. [Can use definition section of PPSA to help define certain terms]
      2. [If the agreement mentions sale in the OCB, if it is not defined in the K, can use *StockCo* test].
    - iii. Do those circumstances apply in this situation?

1. [Bare in mind that if under the K the security interest follows the sale, if s 53 of the PPSA applies e.g. the sale was in the OCB, the security interest would not follow the sale].
- f. **Exception: Section 54:** A buyer of goods that are acquired as consumer goods takes the consumer goods free of any security interest, if
  - i. the value of the consumer goods did not exceed \$2,000 at the time the security interest in the goods attached, or, if there is more than 1 security interest in those goods, at the time the security interest with priority over all the security interests attached; and
  - ii. the buyer gave new value for the interest acquired and bought the goods without knowledge of the security interest.
    1. Consumer goods = goods that are used or acquired for use primarily for personal, domestic or household purposes.
2. **Section 53:** A buyer of goods sold in the OCB of the seller takes the goods free of a security interest that is given by the seller unless the buyer knows that the sale constitutes a breach of the security agreement.
  - a. [Although the goods are free of a security interest, the security interest still attaches to the proceeds of sale].
  - b. This is an exception to the general **section 45** rule.
  - c. Test from ***Stockco v Gibson*** on OCB
    - i. What is the ordinary course of business of the seller?
    - ii. Was the sale made in the OCB? (Factors are just a guide)
      1. Where was the sale agreement made? E.g. ordinary business premises = OCB
      2. Who was the purchaser? E.g. Consumer = OCB.
      3. What was the quantity of goods sold? E.g. smaller amount = OCB.
      4. What was the price? E.g. Discounted price = Not OCB
      5. Was it conducted by manager or senior staff? E.g. Done by higher ups = OCB
      6. What was the reason for the transaction? E.g. Suspicious circumstances or in response to financial difficulties = not OCB.
      7. What was the frequency of the transaction? E.g. If routine sale v one-off = OCB
      8. Are the parties at arms length or related? E.g. Arms length = OCB.
  - d. Does the buyer actually know it was a breach of the security agreement?
    - i. Needs to be material awareness of breach, not sufficient that they were aware that a security agreement could be in place.

### **Why do we have section 53?**

**S 53 Purpose:** Balancing the rights of innocent purchasers and lenders.

- We don't want unsuspecting buyers to be concerned about prior security interests, to encourage the flow of trade. Put the risk on the lenders that the company may onsell to a third party in the OCB, so in this way it benefits the buyers interests, unless the buyer actually knows the purchase was in breach of the security agreement.
- On the other hand, we don't want to discourage lenders from lending, they should not be unfairly deprived of their security. Limiting it to the OCB means that sales the lender would likely want the company to make (in order to make profits to pay off debts) can be made free of following security interests. However, when sales are made outside the OCB, this is of concern to lenders because the company may be trying to divest assets for cash when close to insolvency. This could risk the lenders losing out. So in this situation lenders will be protected as the security interest will continue to attach.
- "We must interpret s 53 in a way that meets the commercial objective of facilitating commerce, without undermining the equally important commercial objective of ensuring those who provide creditor on the security of goods are not unfairly deprived of the benefit of that security." - COA *Stockco v Gibson*

### **How does the PPSA modify the *nemo dat* principle?**

- Section 17 rules: This creates a statutory interest that over rules *nemo dat* because it allows a security interest to be granted over goods that someone does not have title to. They can give more than what they have. However, *nemo dat* still continues to apply where it is not inconsistent with the PPSA.
  - Possessory title of a lease is enough of a right to allow someone to grant a security interest over the goods, they don't need to have title to goods to grant a security interest (can give more than they have).

- Section 24 applies: Title is subordinated to the operation of the PPSA, meaning a party with title can lose out to a prior registered security interest, if the title holder's interest can come under s 17 as a security interest. - They are subject to the priority rules.
- What is the rationale for this approach?
  - The substance of the transaction (with NZB) was to secure payment or performance of an obligation (so it should be subject to the act and it's priority rules, whether or not they have title) Or
  - The overriding concern is to protect innocent third parties who may be deceived by the appearance that the lessee has good title. (therefore, the bank should be able to take security over the horse because G had the appearance of having good title to the horse, unfair for them to miss out).
- *Nemo dat* is still relevant in the context of a two party dispute (see relevance of title in retention of title clauses below)
- Section 45 expresses *nemo dat* - person can't give better title than they have, can't pass title without security interest coming with it. Has to attach to the proceeds of sale or follow through sales.
  - But s 53 protection of sales in the OCB is another exception to *nemo dat* because can sellers can pass on a better deal than they have.

### **How does PPSA apply to retention of title clauses?**

#### Before PPSA

- Previously, retention of title clauses would protect sellers from the buyer granting security over their goods, because the buyer would not have title to the goods.

#### Under PPSA

- You do not need title to grant a security interest over goods. The more important question is whether there is a security interest under s 17. So it is possible a retention of title agreement would not protect the seller.
  - Either by stopping the buyer granting a security agreement over the goods; or
  - By giving the seller priority to the goods since they have title to it.
- A retention of title agreement would come under s 17 as a security agreement.
- PPSA has allowed an exception to *nemo dat*: buyer in possession can pass good title to a third party if the third party registers a financing statement as between competing creditors, because possession itself gives them enough rights/ a statutory right to grant a security interest
  - So seller with a retention of title agreement could lose their goods, despite having title to it, to a perfected security interest, because their agreement constitutes a security interest that is subject to the priority rules of the Act.
- However, Seller with retention of title agreement is still protected so long as they register a financing statement, so that seller's financing statement registers ahead of other security interest.
- Often retention of title agreements will fall under the definition of a PMSI, so seller's can get priority over a banks previously registered GSA.

#### Does sale of goods law still apply?

- Yes because the PPSA is only important if there are competing security interests. If the only parties involved in the dispute are the buyer and the seller, it doesn't matter if the seller has registered the retention of title arrangements, property will pass when they intend it to pass. Sale of goods law still applies.
- Retention of title agreements aren't irrelevant, can still be good between two parties (and therefore *nemo dat* is not totally extinguished).
  - But they don't protect sellers from others taking the goods or give them a priority to the goods over others because the buyer can grant a security interest over the goods without having title to them, and the retention of title clause (as a security agreement under 2 17) is subject to PPSA priority rules.

#### Romalpa clauses

- This is a type of retention of title clause.
- Pre-PPSA they made it clear under K terms that a borrower in possession could not pass title to goods to another lender.
- Such clauses have no special status now but are just a form of a retention title clause
- So long as an agreement evidence retention of title or states that it is a conditional sale, it will be subject to PPSA as a SI under s 17(3).
- Variations of Romalpa clauses, and not all would be a PMSI.
  - No title could pass until all indebtedness was paid including that, that went beyond the debt owing for the price of the goods.

- This could not be a PMSI because a PMSI is only relevant to the amount payable in relation to those goods.
- As soon as purchase price has passed to the seller, that PMSI collapses.
- If the seller advances more money they will lose out priority to that extent.
- Extend the security to the proceeds of sale of the goods. If buyer on-sells them, security attaches to the proceeds.
  - This is not a PMSI situation, but PPSA does extend the security interest that the creditor has to the proceeds arising from the sale of goods as per **section 45 - 47**.
- The seller retains title to the goods even if they have been processed into some other goods.
  - The PPSA addresses this scenario through **s 78 - 82 - commingled goods rules**.

### Higher Purchase Agreements

- Where the purchaser gets possession of the goods immediately but pays off the purchase price over time.
- Facilitates the sale of goods, incorporates an element of credit and creates security for the outstanding price.
- A hire purchase agreement usually involves three parties: the seller, the purchaser and the financier.
  - Usually the credit aspect is going to be by a third party financier.
- The purchaser may or may not deal directly with the financier.

Two types of hire purchase agreements:

1. True hire purchase agreements, where the buyer has an option to purchase the goods, but has a right to terminate the K before paying all the installments.
2. Conditional purchase agreement, where the buyer has no right to terminate the agreement
  - a. In both types, the buyer takes possession immediately and pays a series of instalments over the course of the agreement. Both types also give rise to a registrable security interest under the PPSA (but it can be important to work out the difference, s 154 CCLA)

Different arrangements between three parties

1. Conditional sale between retailer and purchaser
  - a. Retailer agrees to sell goods to purchaser. Purchaser agrees to purchase goods by paying a series of instalments.
  - b. Purchaser has no right to terminate the agreement.
  - c. Retailer retains title until last payment made and has the right to repossess if purchaser defaults.
  - d. Retailer might assign its rights to a financier for a one-off price or it might grant security over its rights as security for advance from a financier.
  - e. Purchaser has no dealings with the financier.
2. True hire purchase agreement between retailer and purchaser
  - a. This is the same as a conditional sale agreement between retailer and purchaser but the purchaser can terminate at any time and give the goods back.
3. Conditional sale between purchaser and financier
  - a. Purchaser wants to buy goods offered by retailer and indicated an intention to purchase.
  - b. Retailer assigns the goods to financier for a one-off amount.
  - c. Financier and purchaser enter into an agreement under which the purchaser agrees to pay off the price over two years in a series of instalments.
  - d. Purchaser has no option to terminate.
  - e. Financier retains title until last payment made and has the right to repossess if purchaser defaults.
  - f. Retailer might agree to repurchase the goods off the financier if they are repossessed.
4. True hire purchase agreement between purchaser and financier.
  - a. Same as conditional sale agreement between purchaser and financier, but the purchaser can terminate the agreement at any time and give the goods back.

Relevant Acts to Hire Purchase Agreements

1. CCLA - relevant for all agreements.
2. CGA - apply if the purchaser is a consumer.
3. FTA - because lenders and sellers are in trade.
4. Credit Contracts and Consumer Finance Act
  - a. HP agreement is a credit sale and a credit contract and might be a consumer credit contract, triggering a number of obligations under the Act.

- b. Act regulates relationship between lenders and borrowers. E.g. what the seller or fiancée has to tell the consumer about, reasonableness of fees, allowing hardship relief, prohibiting oppressive conduct etc.
  - c. Aim: protect consumers who borrow money.
  - d. **Section 11:** Definition of “consumer credit contract” (look at provision).
    - i. Nature of the borrower - needs to be natural person
    - ii. What is the credit intended to be used for? - for personal use and there must be a security element (e.g. credit fees, interest charges)
    - iii. What is the nature of the lender’s business? - must be in the business of providing credit.
- 5. PPSA - Most common issue that will arise is whether retailer or financier has priority for its claim over the goods?**
- a. HPA could be create a security interest, or a PMSI. So it is important to register a financing statement. But a HPA could also be a chattel paper which in itself is something that security can be given over e.g. in financing car sales
    - i. **Section 16 PPSA:** Definition of Chattel paper: 1 or more writings that evidence both a monetary obligation and a security interest in, or a lease of, specific goods or specific goods and accession.
  - b. In arrangement 1 and 2
    - i. A HPA would create a security interest in goods, so a retailer should register this on the register.
    - ii. A financier may have a security interest over the HPA itself, the chattel paper.
  - c. In arrangement 3 and 4
    - i. The financier has a security interest over the goods
    - ii. The retailer has no security interest.