

## How much is that sick puppy in the window?

### Using the consumer law to hold puppy farmers accountable for negligent breeding

The issue of puppy farming and negligent breeding is a hot topic across Australia, attracting increasing media attention and political scrutiny. The Australian Consumer Law (ACL) is one important avenue through which the law can be used to hold negligent breeders to account.\*

### What is the 'Australian Consumer Law'?

You can find the ACL in Schedule 2 of the *Competition and Consumer Act 2010* (Cth). It is also replicated in State and Territory legislation including the *Australian Consumer Law and Fair Trading Act 2012* (Vic).

### What is a 'puppy farm'?

'Puppy farming' is a colloquial term that is not defined in animal protection legislation in Victoria. It is generally understood to mean an intensive breeding facility whose conditions fail to meet the animals' basic needs. Conditions may include extreme confinement, inadequate veterinary care and unhygienic living conditions. Dogs may live permanently (or mostly) confined in small cages and are never (or very infrequently) allowed out for a walk, to play, or socialise with other dogs.

*\*This factsheet deals with remedies available under the Australian Consumer Law, however consumers may also be entitled to other remedies such as those under contract or tort (negligence) law.*

### What parts of the ACL do you need to know about?

When you are considering bringing a claim for negligent breeding, there are two main sections of the ACL that you should be aware of. These include the sections that deal with:

- a. The consumer guarantees
- b. Misleading and deceptive conduct

### What are the consumer guarantees?

Consumer guarantees are a set of automatic rights provided to consumers under the ACL, in relation to any goods or services they purchase in Australia.

These guarantees exist in addition to any contractual rights you may have as a consumer, and cannot be excluded, restricted or modified in a contract for the goods or services.

The consumer guarantees provide that all consumer goods (including animals) supplied in trade or commerce come with certain guarantees. These include that the goods:

- a. be of acceptable quality (acceptable quality takes into account what would normally be expected for the type of product and cost),
- b. are fit for purpose (made known to the retailer at the time of purchase); and
- c. match their description.

### What remedies are available?

If you purchase a good, in this case a pet, which fails to meet one or more of these consumer guarantees, you have the right under the ACL to receive a repair, replacement or refund, and/or compensation for damages and loss. If the failure of the consumer guarantees can be

remedied and is not a major failure, you will be entitled to a repair, replacement or refund. If the defect is a 'major failure', then you can 'reject' the good and obtain a refund. Regardless of whether the failure is major or minor, you can take legal action to obtain compensation for any reasonably foreseeable loss or damage suffered by you because of the failure to comply with the consumer guarantee.

### Can you recover vet fees?

In our test cases, we have argued that 'reasonably foreseeable loss or damages' includes vet fees that owners have incurred or are likely to incur to treat conditions caused by negligent breeding.

Consumers may be able to seek a remedy either against the supplier or the manufacturer. In the case of a pet, the manufacturer would generally be the breeder and the supplier would be the pet store or person who sold the animal. Sometimes, the supplier and the manufacturer will be the same person or company.

### What do you need to establish to obtain a remedy?

In order to be entitled to a remedy from the supplier or manufacturer under the consumer guarantees, you will need to establish the following:

- a. you are a consumer under the ACL;

*A person is a consumer if they purchased a good of a kind that is ordinarily used for 'personal, domestic or household use or consumption'; or if the good cost less than \$100,000. A pet would generally qualify as a consumer good.*

- b. the animal was supplied in trade or commerce by the supplier/manufacturer;

*Any business activity is likely to constitute trade or commerce.*

- c. the seller did not meet the consumer guarantees in relation to the animal; and

*For example, if the animal had an undisclosed medical condition at the time of sale it may not be of acceptable quality.*

- d. you suffered a reasonably foreseeable loss

*For example, if the animal had an undisclosed medical condition, it is reasonably foreseeable that the consumer would incur vet bills and other costs to treat the condition.*



### When will the consumer guarantees not apply?

Importantly, consumer guarantees do not apply if you knew of, or were made aware of, the faults before you purchased the goods. For example, if prior to purchase the supplier makes you aware of the risk the dog might have a hereditary condition, you are not entitled to a remedy for costs of caring for the dog if they do become ill with that condition.

Further, suppliers do not have to pay for damages or losses that are not caused by their conduct or relate to their business, after the goods left their control.

Sellers cannot contract out of the consumer guarantees even if a seller asked a buyer to sign a piece of paper saying so.

### When can you bring proceedings for breach of consumer guarantees?

An action for damages under the ACL, for breach of the consumer guarantees, must be commenced within three years of becoming aware that the consumer guarantees have not been complied with.

Generally, in the case of a pet you have purchased, this is the date of diagnosis of any relevant disease, hereditary disorder or other relevant ailment.

### Misleading or deceptive conduct under the ACL

The ACL prohibits a person from engaging in conduct in trade or commerce that is misleading or deceptive or likely to mislead or deceive. In order to establish a claim for misleading or deceptive conduct, it is necessary to establish that:

- a. the seller's conduct was in 'trade or commerce';
- b. the seller's conduct was, in all the circumstances, misleading or deceptive;
- c. you relied on the conduct; and
- d. as a result of your reliance on the conduct, you suffered loss; and

- e. the loss was reasonably foreseeable.

In the case of purchasing a pet, it is more likely that the misleading or deceptive conduct, such as a misleading representation, will be made to you by the seller, for example a pet shop rather than a breeder (unless you purchased directly from the breeder).

A person can claim damages for misleading or deceptive conduct if the above points are established. However, it may be possible for suppliers to contract out of any liability for misleading or deceptive conduct (unlike with consumer guarantees discussed above).

### When can you bring proceedings for misleading or deceptive conduct?

An action for damages under the ACL, for misleading and deceptive conduct, must be commenced within six years from the date the cause of action accrued. Generally, this will be the date the representation was made.

### Where can you bring proceedings?

Most courts and tribunals in Australia have jurisdiction to hear Australian Consumer Law claims. Tribunals are often low cost litigation options meaning that the Tribunal fees are often low and they are generally no-cost jurisdictions in terms of costs orders. In Victoria, for example, the Victorian Civil and Administrative Tribunal (VCAT) has jurisdiction over the majority of disputes that are 'consumer and trader disputes', however it does not have jurisdiction to hear matters involving residents of different states. To remedy this, a new, civil federal jurisdiction is now operating in the Civil Division of the Magistrates' Court of Victoria, which will hear applications involving residents of different states. Based on this new jurisdiction, consumer guarantee claims can be initiated in the relevant tribunal or, if they involve a federal subject matter, the federal jurisdiction of the Magistrates' Court.

In Victoria, if you begin proceedings about a 'consumer and trader dispute' in the Magistrates' Court (instead of VCAT) due to, for example, the fact that the breeder or seller is interstate to you, the fee payable for your application will be the same as the relevant fee applicable to have the same matter heard in VCAT.

We recommend you seek specific legal advice if you are confused about which forum is best for you to initiate proceedings.

### Who should you sue?

You may have a legal cause of action against the breeder and/or seller (including the pet shop).

If you are confused about who to sue please seek specific legal advice.

### Can vet fees constitute reasonably foreseeable loss?

#### ***The case of Commissioner for Consumer Protection v Armstrong***

A breeder, Ms Armstrong, had given an undertaking to the Commissioner for Consumer Protection that she would not supply any animal without having the animal first tested by a suitably qualified veterinarian, wormed and vaccinated. This included being specifically tested for and vaccinated against parvovirus.

Ms Armstrong subsequently breached the undertaking, including by selling to consumers dogs which had parvovirus. The Commissioner for Consumer Protection took the breeder to court for breach of the undertaking, seeking various orders including compensation orders for the consumers affected.

One consumer had bought a puppy from Ms Armstrong for \$350. Almost immediately afterwards the puppy showed signs of being unwell. He was

ultimately diagnosed with parvovirus. The consumer had the puppy treated, which cost \$1,675. The puppy ultimately had to be put down. Justice Beech ordered that the breeder compensate the consumer for the cost of the veterinary treatment the consumer had paid to treat her puppy for parvovirus, as well as the purchase price of the puppy. In making this order, Beech J said 'the amount in question was lost as a direct and foreseeable consequence of Ms Armstrong's breach of the Enforceable Undertaking'.

Our observations about this case:

- The judge recognised the consumer was entitled to compensation for the costs she incurred in veterinary treatment for her puppy.
- The judge awarded the consumer the full costs of attempting to treat the puppy for parvovirus, even though treatment of parvovirus is rarely successful, even though the treatment was not successful in this case, and even though the cost of the treatment far exceeded the cost of the puppy.
- This case relates to a breach of an undertaking rather than failure to comply with the consumer guarantees. But we think it demonstrates that, in principle, if a consumer unknowingly purchases a sick pet and spends money on veterinary treatment, the expenditure is a reasonably foreseeable loss for which the consumer is entitled to be compensated.

### What expert evidence do you need?

Most cases will require expert evidence from a veterinarian (usually the treating veterinarian) in order to win.

This should be in the form of a written report/letter.

We recommend writing a letter to the veterinarian which sets out the questions to which you need answers. You will also need to ensure that

your letter explains any formalities that the expert report/letter needs to comply with (this will be dictated by the rules of the Court and/or Tribunal that your case is heard in).

The questions that you need the veterinarian to answer will vary based on the law in your State and/or Territory, and what issues arise in your case.

You should seek specific legal advice on this and any letter/report must include a certain paragraph that the expert signs (in VCAT this is outlined in a practice note).

Here are some general suggestions of the things that you may wish to ask the veterinarian to include in the written report/letter:

- Full name and address
- Qualifications, experience and area of expertise including how long you have been practicing
- Factual history of how long you have been treating the dog including dates of any attendances and results of any investigations and/or tests
- Animal's state of health when they first presented to you including whether they were suffering any medical conditions and the likely time of onset of any such condition or disorder (your questions might conclude – Did you diagnose the animal? What was your diagnosis? Why did you reach this diagnosis? How common is this condition in animals of my animal's age?)
- What is the cause of the animal's condition or disorder
- Current state of animal's health and/or medical condition
- What if any future medical costs and/or expenses will likely be required to treat the animal's medical condition – please provide an estimated cost over the animal's estimated life span
- Any steps and the breeder could have or should have taken to eliminate or mitigate the risk of the animal developing the medical condition

- What have you spent on treating the animal's condition to date (please attach invoices to your letter)
- Please include any relevant photographs

Your veterinarian might ask you to pay for a report as an up-front cost. If you lose your case, this cost will not be recoverable and you will likely be out-of-pocket.

### What can you do to avoid Court?

You should try to resolve any dispute that you have prior to commencing proceedings.

Generally, lawyers do this by sending a letter of demand. This is a cost-effective solution. The letter should be headed 'Letter of Demand'. The letter should be addressed to the person who you intend to sue (generally the breeder and/or pet store – if you are unsure who to sue, please seek specific legal advice).

Your letter of demand should also set out what you say are the 'facts' of your case including:

- Type of animal you purchased, date purchased, breed and sex
- Details of any advertisement including a copy if you have it
- How and when you responded to the advertisements
- Details of interactions between you and seller in chronological order
- Microchip number if known
- Date purchased and money exchanged including how money was exchanged
- Any statements made in writing or verbally about the quality of type of animal
- Problems with the animal

- Treatment and treatment costs (please include copies of invoices) and why you say these were reasonable – this should be itemised
- Any future veterinary costs, again itemised, based on evidence from your treating veterinarian.

You should state what laws you say have been breached. You should demand payment of the amount you say is owing by a certain time and date and provide information about how these monies should be paid. You may wish to include your phone number or email (or a way in which the seller can contact you). You may wish to ask them for their lawyer's details and you should state that if payment is not made, you may initiate proceedings without further notice.

Any correspondence that you send should be tracked (for example by Registered Post) so that you can provide in Court or in the Tribunal that you have sent the letter and the breeder has received it.