Frequently Asked Questions About Household Removals and Claims for Loss of, or Damage to Goods

Please note:

*These answers relate only to services provided where the removalist's customer is **not** operating a business, or the person receiving the goods is **not** operating a business. There is a question at the end of this document that explains why the legal position is different when the removalist's customer is a business.*

In many cases, you may have insurance cover in place that protects your removals business from claims made by customers. Before you respond to any customer claims or complaints, you should discuss the claim or complaint with your insurance broker and take their advice as to whether the claim/complaint should be notified to your insurer.

Q1. Why is a removalist responsible for loss of, or damage to a customer's goods? What are the laws that determine this?

A1. There are several sources of law which make removalists responsible for loss or damage caused to a customer's goods:

1. Negligence. The removalist has a duty to exercise reasonable care of each customer's goods, and will be liable to pay damages where the removalist fails to do so.
2. Since the removalist has possession of goods which belong to someone else (either during transportation or storage), the law of bailment imposes some legal duties on the removalist in respect of those goods.
3. The liability of a removalist arising from negligence or bailment can be modified by the contract between the parties. A contract does not need to be in writing – it could be oral or by conduct. Any written contract will usually have provisions about the removalist's liability (see clauses 8 and 9 of the AFRA Standard Conditions as an example), and these provisions may exclude liability in certain circumstances, or provide limitations (caps) on liability. A removalist can be sued for damages if they breach any contract with their customer.
4. The Australian Consumer Law ('**ACL**') guarantees (and the related state *Fair Trading Acts*). Unlike the law of negligence and bailment, the ACL consumer guarantees *cannot be modified or excluded by contract*. This means that even if a removalist's contract has a term which states that the removalist will not be liable for failing to comply with the guarantees, this term will be void (of no effect) and the removalist will still be liable under the ACL. The ACL guarantees relating to the supply of services are:
    a. that the services will be performed with *due care and skill*,
    b. that the services will be *fit for a particular purpose* (if such a purpose is made known to the removalist by the consumer), and

c. that the services will be supplied *within a reasonable time* (if no time limit is specified in the contract).

A claim for damages for failure to comply with these ACL guarantees may be brought under section 267 of the ACL.

Q2: Why does the nature of the claim brought by the customer potentially make a difference to how much a removalist may need to pay their customer?

A2. The *amount* of compensation a removalist will be liable to pay may depend on the *type* of claim made by the customer (eg, whether the claim is made for breach of contract, negligence, or under the ACL).

1. Under contract law, the measure of damages is the amount required to put the consumer in the position they would have been in had the contract been performed. So, if a removalist fails to transport and deliver the goods at all, the customer will be entitled to compensation equivalent to any benefit they would have obtained if the delivery had been performed (this is not necessarily just a refund of the amount they paid, but it can be).

2. When a claim is made based on negligence, the measure of damages is the amount required to put the consumer back into the position they would have been in had the negligent act not occurred. So, if a removalist negligently damages someone's furniture during transport, the customer will be entitled to compensation which puts them back in the position they would have been in if their furniture was not damaged (what this means exactly will be discussed further in several of the answers below).

3. Where there has been a major failure to comply with the ACL guarantees, compensation is for the reduction in value of the services below the price paid.
   Additionally, consumers may be compensated for any loss or damage suffered because of the removalist's failure to comply with any guarantee (whether that failure is major or not), if the loss or damage is reasonably foreseeable. There are several other remedies provided for under the ACL, including requiring the supplier of services to remedy any failures to comply with guarantees.

Even though a customer can make a claim for loss of, or damage to goods in various ways, in most cases the law the customer chooses to rely on will not make a difference to the compensation the removalist is found liable to pay.

Q3. If we negligently damage a customer's furniture, how much are we liable to pay? Do we need to pay the cost of repairs even if these are more than the value of the item?

A3. The starting point for determining any damages is generally to put the damaged party back in the position they would have been in had the negligence not occurred.

The legal cases about this topic make it clear that there is 'a degree of flexibility' in determining the amount that will most fairly compensate the customer.

This generally means the cost of repairing the damaged item. However, where there is a reasonable replacement item which is far cheaper to purchase than the cost of repairing the damaged item, the cost of the replacement item will be the amount of compensation. For instance, if repairs to a damaged wooden table will cost $2,000, but there is a similar wooden table available for $1,000, the removalist will (generally) be liable to pay only $1,000.

Q4. What if, in repairing or replacing the furniture, it is greatly improved, or the new furniture is much higher in quality than the old furniture? Can we reduce the amount of compensation for any benefit or improvement that the customer gets?

A4. Sometimes, repairing or replacing damaged goods will *unavoidably* give the customer a benefit. Courts are hesitant to force vulnerable consumers to pay for any improvement or increase in value where they may not have wanted that improvement in the first place (eg, where they did not have the money to pay for it or where the improvement may have been inconvenient to them), as this can be likened to forcing the person to invest their own money in the improvement of their goods.

However, if there is some evidence that the person was going to improve/upgrade the goods anyway (prior to damage occurring), compensation may be reduced to account for this. It will be up to the removalist to prove this, which is likely to be difficult.

Additionally, if the customer chooses to acquire a more valuable piece of furniture than the one damaged, and a suitable alternative to the damaged furniture could have been acquired at a lower cost, the removalist may be entitled to a reduction in compensation to account for that (although, again, the burden is on the removalist to prove this). For example, if a 40” screen TV is damaged, and the customer purchases an 80” screen TV and surround sound system to replace it when a similar model TV to the one damaged was available for half the price, the removalist will likely only be required to compensate the customer for the amount of the cheaper TV. A court or tribunal may also reduce the damages payable because of a quantifiable benefit the customer has received, but courts are hesitant to do this, and this doesn’t occur very often in practice.

Q5. Is the customer entitled to claim the cost of a new replacement item if all the removalist did was damage a second hand item?

A5. In some circumstances, yes. However, if you can establish that there is a market for a reasonable substitute, and that the cost of the substitute is less than the cost of a new item, then the customer will only be entitled to compensation for that substitute item. Again, the onus is on the removalist to prove this. An example of a suitable market for second-hand replacement items would be the second-hand car market. As discussed in A6 below, courts are reluctant to rely on listings on Gumtree or Facebook Marketplace to determine the amount of compensation, and these are not usually considered suitable second-hand markets.

Also, a court or tribunal is unlikely to find that there is a suitable second-hand market for items of a personal nature (eg beds, clothes) or items where there are potential safety issues when purchasing those goods second-hand (eg electrical items).

Q6. If we can find evidence that the customer can purchase a similar replacement second hand item on Gumtree or Facebook Marketplace, is the price from one of those sites all we need to pay the customer for their claim?

A6. Even where furniture is not brand new and has been used, courts are reluctant to reduce compensation to the cost of replacing the furniture with a second-hand item from Facebook Marketplace or Gumtree. Although compensation is not determined on a 'new for old' basis, this is often what occurs in reality. This is because for some types of goods, it would not be reasonable to expect a customer to replace a used item with a second-hand replacement. For example, replacing a 10 year old suit (originally purchased for $1,000) with a $10 suit from an op shop; replacing a relatively new (but used) mattress with a second-hand mattress; replacing a used TV or washing machine with second-hand items (as it is difficult to guarantee to quality of second-hand electrical items); and replacing a matching set of furniture with second-hand items (as it would be difficult to find a good match that is undamaged).

Sometimes, courts will reduce compensation where items have depreciated in value since they were purchased: clothes, shoes, small kitchen appliances, and older items with evidence of wear and tear. However, even in these cases it is not always considered appropriate to replace used items with second-hand items. Additionally, even if replacement with a second hand item *is* appropriate, Gumtree, eBay and Facebook Marketplace quotations will not be considered if the location of the items is far away and freight would be incurred, or if the quality of the items is difficult to determine from the photo (which is often the case with these websites).

Q7. What if the customer has delayed in making a claim or had their goods repaired before making a claim? Can we say that no claims can be made once a certain period has expired?

A7. The limitation period for bringing actions for these sorts of claims if the action is in contract or negligence is 6 years (except in the Northern Territory, where it is 3 years). Claims for failure to comply with the consumer guarantees in relation to the supply of services (under s 267 of the ACL) do not have a limitation period. A removalist can't exclude, restrict or modify their liability for a failure to comply with the ACL consumer guarantees, so any clause of your contract that specifies that claims must be commenced within a certain period of time will be void (ie the removalist will not be able to rely on it). In some circumstances, there may still be a limitation period for ACL consumer claims depending on where the proceedings are instituted and the basis on which they are brought. For instance, there may be shorter limitation periods if an ACL claim is brought under a state tribunal (eg, the limitation period for consumer claims in the NSW Civil and Administrative Tribunal is 3 years).

However, from a practical perspective, if there is a significant delay in making a claim, or the customer can't provide evidence of the damage as at the date the removal was completed, it may be difficult for them to satisfy a court or tribunal that the removalist caused the alleged damage.

Q8. The customer has gone ahead and got their furniture repaired without consulting the removalist first. I think the price they were charged was too expensive. Can we deny the claim?

A8. This will depend on the specific circumstances. As discussed in A3 above, if the replacement cost would have been much cheaper than the cost of repairs, then the replacement cost will be the amount of compensation the removalist will be ordered to pay. Additionally, if the furniture was

greatly improved by the repairs (and the furniture could have been sufficiently repaired for a much cheaper cost), the compensation may be reduced to account for this improvement (see A4 above).

However, if the improvements were undertaken quickly to avoid or reduce losses (including the physical inconvenience of not having the particular piece of furniture for a certain amount of time), these costs will usually be recoverable, as long as they are not unreasonable (see A13 below). On the other hand, if the customer does *not* repair the furniture in a timely manner and as a result this causes further damage (and makes the repairs more expensive), then the amount of compensation that the removalist will be required to pay may be reduced.

As a result of these considerations, it is important to make several enquiries in this situation: how much replacement of the furniture would have cost, could the furniture have been sufficiently repaired at a much cheaper cost, were the repairs undertaken to reduce losses/inconvenience, and was there any delay in repairing the furniture which increased the cost of repairs?

Here is an example to illustrate these competing considerations. The wooden leg of a customer's couch has been damaged in transport. The customer repairs the couch, but instead of paying for just the couch leg to be repaired/replaced (which would have cost $200), the customer purchases a full couch restoration, which includes reupholstery (which costs over $2,000). Prior to transporting the couch, the fabric was old, faded and had some tears, and no damage was caused to the fabric of the couch in transportation. Given that the customer could have remedied the damage caused by the removalist at a much cheaper cost, the customer's compensation may be reduced to account for the benefit of having the couch reupholstered and fully restored. The cost of replacing that couch with a similar couch may also be relevant (especially if it would be cheaper to replace the couch rather than repair it).

Now consider a modified scenario. The wooden leg of a customer's couch has been damaged in transport. However, this time, the customer does not repair the couch for several months. The damage caused to the wooden leg in transport would have cost $200 to repair, but because the customer continued to sit on the couch for several months, this caused the damage to gradually worsen and resulted in greater structural damage to the couch. The cost of making these repairs is now $500. In these circumstances the removalist will likely only be liable for $200, as the customer has failed to mitigate (or reduce) their losses.

Q9. The customer has obtained quotes for repairs, but hasn't actually had the repairs completed. I think they just plan to keep the money and not repair the furniture. Can we say we won't pay damages until the furniture has actually been repaired?

A9. No, the customer is still entitled to damages even where the repairs have not yet been made (or where the repairs *will never be made*). The right to recover for damage to property accrues when that property is damaged.

Q10. The customer obtained quotes for repairs, but then got a family member to fix the items and presumably didn't pay for this. Can I tell them we have no liability because they didn't actually pay for the repairs?

A10. No, the removalist will still be liable for the damage caused to the items. When goods are damaged by negligence, the owner of the goods suffers an immediate loss. As discussed in A9, it is at this time (the time the goods are damaged) that right to recover accrues, not when repairs

occur. If the customer has benefited from the kindness of others, such a benefit should be ignored when assessing damages. This means that the removalist will likely still be liable for repair costs, even if the repairs are completed for free by volunteers. The amount of compensation that the removalist is liable for is the value of the work done if it were to be purchased commercially.

Q11. The customer is maintaining that a damaged item was a family heirloom and had special value. Should we have to pay extra because of this?

A11. Where damaged goods have sentimental value attached (eg, family heirlooms), it is generally appropriate to increase the amount of compensation. Compensation is not necessarily confined to the economic loss or change in market value, and non-pecuniary losses can also be included. However, there must be sufficient evidence that the items do actually have sentimental value, and it must have been "reasonably foreseeable" that any damage to the item would include additional loss due to the item's sentimental value (ie, the removalist must have been told that items have special value, or this must have been otherwise apparent). Additionally, compensation for sentimental value must be modest.

Where an action for compensation for this type of loss is brought under s 267(4) of the ACL (for a failure to comply with the ACL consumer guarantees), similar considerations apply, and the loss must have been *reasonably foreseeable*.

Q12. The customer says that one of the chairs that formed part of a lounge suite was destroyed and as a result we should pay for a whole new suite. They also say that we need to replace a whole set of crockery where only a few plates went missing. Is this reasonable?

A12. The answer to this question depends on a number of factors. Firstly, it must have been reasonably foreseeable that the destruction of one chair would mean the customer would be required to replace the entire lounge suite. Similarly, if a customer has two plates in an eight plate dinner service damaged, it needs to foreseeable that this will mean that the dinner service is no longer as useful (it can't be used for hosting dinner parties with eight guests).

Many insurance policies exclude the insurer's liability for any extra loss associated with parts of a set, or one of a pair of items being damaged. The policy wording usually says something like:

> *Where any item is part of a pair or set, the insurer will only pay for the part of the pair or set that is lost or damaged, even if it is unable to be replaced with a matching item.*

Insurance policies comprise a contract between the customer and the insurer, and the insurer is free to exclude its liability in these sorts of circumstances. In the case of domestic furniture removals, as set out in A1, removalists are not permitted to exclude their liability for losses that are reasonably foreseeable.

Further, customers have a duty to mitigate (minimise) their losses (see A13 below), so if it is possible to get a matching replacement of the chair, this will be the measure of compensation (rather than cost of a whole new suite). However, the loss of value which occurs due to not having a matching set is often taken into account by courts and tribunals. For instance, in one case, it was considered inappropriate to replace a used ottoman with a second-hand one due to the difficulties in matching fabrics. In another case, the cost of colour matching new nesting tables to other

furniture was included in the compensation (as their old nesting tables had matched their coffee and dining tables). The answer here will always depend on the specific circumstances.

Q13. As a result of damage to their property (eg fridge, personal computer) the customer hired an alternative item while theirs was being repaired. Are we liable to pay for any hire charges?

A13. In general, yes, as long as the amount claimed is "reasonable and proportionate". This is part of the plaintiff's duty to mitigate their losses. "Losses" include physical inconvenience (eg, of being unable to use a computer or having to travel to a library to access a computer; of being unable to store certain foods), and avoiding this inconvenience is usually not considered to be unreasonable. Even if these mitigation costs (the cost of hiring an alternative item) are greater than the loss that was attempted to be mitigated, these costs will be recoverable unless they were unreasonable.

Your contract may seek to exclude your liability for *consequential* or *indirect* losses (which would ordinarily mean you would **not** be required to pay for these extra hire costs). However, as set out in A1, the ACL provides that you cannot exclude, restrict or modify your liability for a failure to comply with the consumer guarantees, so these clauses would be void (of no effect) when dealing with consumers. The AFRA Standard Conditions exclude liability for consequential loss in respect of commercial removals, but there is no such exclusion where the consignor or consignee is a consumer.

Q14. A customer's stored goods were damaged during a rain event/flood, when the goods were stored in our warehouse. Can we say that we are not liable because this was an 'act of God'?

A14. Usually, contracts are drafted so that neither party will be liable for damage caused by a 'force majeure event' (ie, an event outside the control of the parties). This typically includes floods and weather events. This will depend on the terms of your contract – you should check if your T&Cs exclude your liability for force majeure events. Clause 2.3 of the AFRA Standard Conditions excludes liability for loss, damage or delay which results from a force majeure event.

However, it is often the case that damage by weather events is foreseeable, and the removalist has a duty to take reasonable steps to keep its customers' goods safe. This is because a bailee of goods (the removalist) needs to take the same care of the customers' goods as they would of their own goods, and bears the burden of proving that they have done so. This does not mean a removalist must take every possible precaution to prevent loss of or damage to customer goods. However, the reasonable steps the removalist must take will depend on circumstances such as the value of the goods, and whether the removalist is aware of any unusual risk or danger to which the goods will be exposed.

An example would be if a removalist has a warehouse that, according to Council records, floods at least once every ten years. In such a scenario, a court or tribunal is likely to find that the removalist needs to take extra care. This may include having documented contingency plans, so that goods can be quickly and safely removed to alternative premises if there is a significant rain event.

Q15. We don't provide our customers with any conditions when we quote their jobs. However, the AFRA Standard Conditions are on our website. Is that sufficient to allow us to rely on the conditions?

A15. Simply putting standard conditions on your website is likely **not sufficient** for you to be able to rely on them. However, including a link to these conditions on the quote document, combined with a statement that the services are provided subject to the conditions, is usually sufficient to incorporate these terms into your contracts with customers. However, particularly unusual or onerous terms may require a greater level of warning (for instance broad exclusions of liability). These sorts of terms should be specifically referred to (and drawn attention to) in your quote documents. The AFRA Standard Conditions contain a warning at the beginning of the document which draws the customers' attention to such terms.

Q16. Do I have to tell a customer if their stored goods are lost or have gone missing?

A16. Yes, where there is possibility that goods have been lost or stolen (even if there was no fault on the warehouse operator's part), the owner of the goods should be notified as soon as possible. The bailee of goods (the removalist/warehouse operator) has a duty to exercise reasonable care over those goods, including to take reasonable care to safeguard those goods against theft. As soon as the removalist becomes aware that property has been stolen, the removalist must notify to their customer or the police, so that immediate steps can be taken to recover the goods.

Q17. Why is the legal position different when the removalist's customer is operating a business in relation to the goods being transported?

A17. The ACL consumer guarantees **only** apply to transport and storage contracts where either the consignor or the consignee is **not** carrying on or engaging in a business, trade, profession or occupation in relation to the goods. The guarantees therefore apply to domestic household furniture removal jobs. The guarantees don't apply to 'business to business' jobs. Examples of this would be where you are moving someone's professional office furniture or factory fit out from one suburb to another, or where you are storing photocopiers belonging to a business.

As a result, if you are transporting goods from a business consignor to a business consignee, your contract *can* exclude or modify your liability (and the provision will not be void). However such contracts will still be subject to the laws about unfair contract terms. If you are transporting goods from a business to a consumer, or from a consumer to a business (or, of course, from consumer to consumer), the guarantees under the ACL *cannot* be excluded, restricted or modified by your contract.

Please note that this publication is for information of AFRA members only and is not legal advice. You should always obtain advice that is specific to your circumstances and not rely upon this publication as legal advice.

GB:20251100:130228