

Service providers and consumers – bailment relationships in the context of disasters

Resources for community lawyers on the disaster frontline

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SECTION 1:
What is this resource?

1. What is this resource?

This resource is for legal workers supporting service providers or consumers who are dealing with a legal problem arising from a bailment relationship in New South Wales (NSW). This information is relevant for:

1. Service providers whose place of business was impacted by a disaster causing their customer's property to be damaged (**acting for the service provider**); or
2. Consumer's whose property has been damaged by a disaster while in the possession of a service provider (**acting for the consumer**).

This resource will assist you in responding to requests for advice made by consumers or service providers impacted by a disaster, who may encounter legal issues associated with damaged or lost customer property.

Bailment relationships arise frequently in daily life, often without us being explicitly aware of them or understanding their legal foundations. If your client's belongings are in the care of others, then they may be subject to a bailment relationship.



If your client has goods that are subject to a bailment relationship, then the law may provide your client with a degree of protection if those goods are damaged.

If the goods are damaged when a disaster hits, such as a flood or bushfire, there are more legal complexities that may impact the condition or safety of the entrusted goods.

1.1. Purpose of this document

Justice Connect is coordinating the delivery of pro bono legal help to disaster-affected communities across Australia. We're working closely with other organisations like legal aid commissions, community legal centres and law societies to ensure that people can access legal help as quickly and seamlessly as possible.

We've seen first-hand how legal need shifts during disasters and crises. In the wake of disasters and extreme weather events people, small business owners, and not-for-profit organisations can face unexpected legal problems. If left unresolved these legal problems can have serious consequences for people's financial stability, relationships, health, and wellbeing. In these times of crises, people need ready access to legal support.

That's why we're creating resources to support community legal workers deliver place-based services to disaster affected communities. Through our Disaster Legal Support Resource Hub community lawyers can find high-quality legal information quickly, take steps to resolve their client's legal problems, and refer their clients for pro bono legal support before their problems escalate.

If you have a client that you'd like to refer for pro bono legal support, visit our website.



Refer someone to Justice Connect

If you're a professional working with communities affected by disasters, and you'd like to connect your client with pro bono legal help or seek assistance for your own organisation, please make a referral to Justice Connect.

[Make a referral to Justice Connect](#)

1.2. Disclaimers and scope of this document

This resource was last updated on 14 February 2024. This resource is designed and intended as a guide only, to provide an outline of the general principles on this topic, and does not constitute legal advice. This resource is limited to the status of the law in New South Wales.

We have included some client scenarios that are hypothetical (as well as real case law) to help you understand how the law might be applied in a disaster context. These hypothetical scenarios have not been considered or determined by a court but reflect how we think a court would apply bailment laws to that specific situation.

This resource is intended for use by legal professionals to support them in navigating the law.

Please view our full disclaimer for more information.



1.3. Executive summary

This resource will step you through each stage of managing a dispute related to damaged or lost customer goods in the possession of a service provider.

Sections 2 - 5

In sections 2-5 we explain the legal principles of bailment law, including the formation of a bailment relationship, associated duties, and the emergence of liability for breach of those duties.

We then explore how parties can potentially modify or 'contract out' of their duties and liabilities. In this section, we touch on the 'unfair contract terms' regime (**UCT Regime**) of the *Australian Consumer Law (ACL)*, as relevant.

Section 6

In section 6 we provide a brief and practical guide for legal professionals or support workers who may be approached by a service provider or a consumer seeking insight into bailment law. This guide is designed to be a quick and accessible resource, offering prompt information without all the detail. Where you require more detailed information, please consult the relevant section of the handbook.

Section 7

In section 7 we consider the possibility that a dispute has arisen between a consumer and a service provider and examine the various ADR mechanisms, including negotiation, mediation, and conciliation.

Section 8

In section 5 we explain the way you might go about bringing a claim on behalf of the consumer, outlining the relevant jurisdictions and documents to be filed.

Section 9

In section 6 we annex template letters that you can complete to assist the consumer in managing a dispute relating to bailment law.



SECTION 2:
**Bailment Law - Is there a
bailment relationship?**

2. Is there a bailment relationship?

When assessing whether a service provider may be liable for damage to their customer's property caused by a disaster, you will need to establish that a bailment relationship exists. This is because obligations of a service provider to take care of their customer's goods arise automatically out of the bailment relationship.

This section includes:

1. Elements required to establish a bailment relationship.

2.1. Is there a bailment relationship?

A bailment relationship arises when one person is given possession (but not ownership) of goods by another person temporarily and for a specific purpose. Most commonly, this purpose is the provision of a service, such as having an item repaired or cleaned. The owner of the goods is the 'bailor' and they take the goods to the 'bailee' who will temporarily possess or hold the goods to deliver the service.



Terminology in this resource

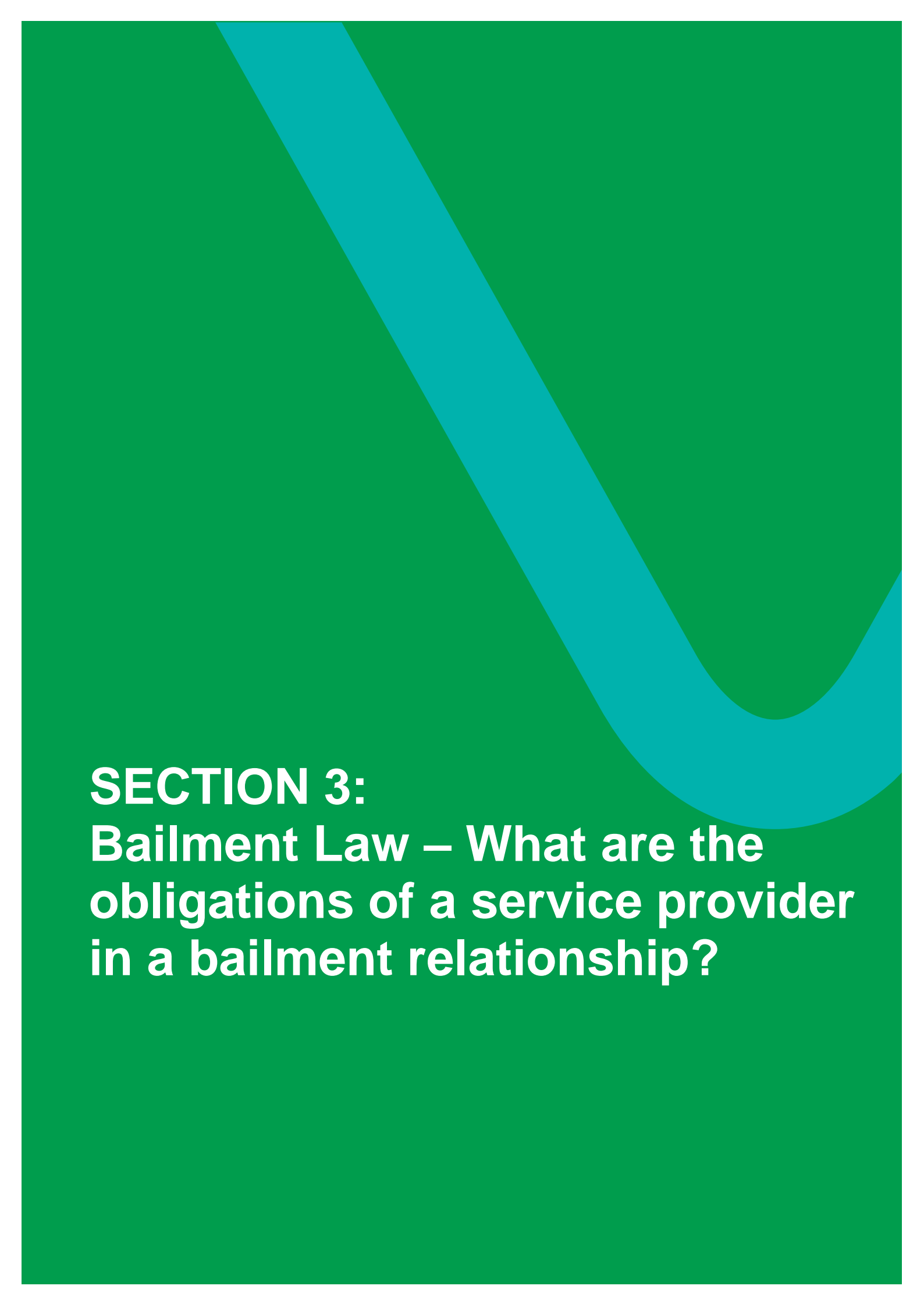
In this resource, we use the terms "consumer" to describe the owner of the goods (or the bailor) and "service provider" to describe the party in possession of the goods for commercial reasons (or the bailee).

Ordinarily, a bailment relationship will arise when the following elements are satisfied:

- 1) **Delivery:** the consumer delivers a good to the service provider, so that the service provider can provide labour or services in relation to the goods and requires possession of the goods to do so;¹
- 2) **Acceptance:** the parties enter into a contract (which can be informal, such as oral) for the provision of labour or services in connection with that good; and
- 3) **Consideration:** the consumer has agreed to pay the service provider an amount of money or some other form of reward in return for their labour or services.

Once a bailment relationship arises, certain obligations arise to ensure the rights of all parties involved are protected. We discuss these obligations below.

¹ See, for example, *Stewart v Batson* (1948) 42 QJPR 108 at [2].



SECTION 3:
Bailment Law – What are the obligations of a service provider in a bailment relationship?

3. What are the obligations of a service provider in a bailment relationship?

When assessing whether a service provider may be liable for damage to their customer's goods caused by a disaster, the next step is determining the level of care owed by a service provider in the circumstances.

A court may consider the precautions normally taken by service providers in similar situations when deciding whether a service provider's actions were reasonable or not.² Disaster events do not change the service provider's duties, however, disaster events may affect what level of care is expected of a service provider in the circumstances.

This section includes information and scenarios relating to:

2. The obligations of a service provider – the duty to take reasonable care
3. Risk and foreseeability
4. A duty to warn

3.2. The obligations of a service provider – the duty to take reasonable care

The central duty in a relationship between a consumer and a service provider is that the service provider has a duty to take reasonable care of the consumer's goods. Determining what is 'reasonable' depends on the specific context under consideration, but generally the parties can expect the service provider to meet the standard of care that a careful and vigilant person in similar circumstances would apply if safeguarding their own goods.³

In exercising their duty to take reasonable care, the service provider is obliged to keep goods in a safe place and safeguard against foreseeable risk. Once the service provider accepts possession of the goods, they have a duty to take immediate steps to place and hold the goods in a position of safety. Ultimately, what defines a safe place will depend on the circumstances and the character of the goods being held, but it could involve:

- Having adequate security measures;
- Handling the goods with care; and
- Storing or preserving the goods according to specific conditions (e.g. temperature, moisture, or exposure to sunlight).

² *Nibali v Sweeting & Denney (WA) Pty Ltd* (1989) Aust Torts Reports 80-258.

³ *Nibali v Sweeting & Denney (WA) Pty Ltd* (1989) Aust Torts Reports 80-258; *Tottenham Investments Pty Ltd v Carburettor Services Pty Ltd* (1994) Aust Torts Rep 81-292.



Scenario: *A1 Perfect Plumbing Pty Ltd v BMW Prestige Pty Ltd (2006) 230 ALR 331*

The facts:

A consumer's motor vehicle was left with a mechanic (the service provider) for some warranty and service work to be carried out. The service provider completed the work and parked the car on their premises, ready for the consumer to collect. The service provider stored the keys in a safe, which required an electronic swipe card for access. However, a spare key for the car was stored in the car's console. As the consumer was on their way to collect the car, it was stolen by a third party.

The Court heard evidence that the carpark where the car was held was shared by 3 business units of the service provider – new car sales, second hand car sales, and service. This meant that numerous people were able to enter and exit the area in which the car was stored. In addition, the gates to the premises were left open during business hours without any form of security at the gate or in the area where the car was stored.

Court's finding:

It was uncontentious that the parties were in a bailment relationship. The service provider had possession of the car and the parties had agreed the service provider was to repair the car. The issue in dispute was whether the service provider had discharged their duty of care to take reasonable precautions for the safety of the consumer's car.

Ultimately, the Court found that the service provider had failed to take reasonable precautions to ensure the safety of the car. The service provider provided no real evidence about any other security measures it had in place to prevent the car being driven away, and it was insufficient that the service provider had only taken steps to protect the key to the car, but not the actual car.

3.2.1. Risk and foreseeability

The obligation to take reasonable care includes the duty to take all reasonable precautions to prevent risks, as well as to take all proper measures for the protection of goods when risks are imminent or have actually occurred.⁴ This does not require a service provider to take every conceivable precaution against potential loss or damage; rather, a service provider will generally be expected to safeguard against any foreseeable damage. A service provider's failure to take reasonable care in this context is also known as "negligence".

⁴ *Brabant & Co v King* [1895] AC 632 at 640.



Terminology in this resource

While the term in a bailment relationship is not precisely the same as it is (more commonly) used when referring to the “tort of negligence”, we use negligence in this resource to mean that the service provider did not take reasonable care of the goods they were supposed to be looking after.

In the context of a natural disaster event, a service provider’s duty may reasonably involve preventing damage to goods in their possession. The scope of that duty will depend on the circumstances – such as:

- the immediacy and predictability of the disaster;
- the time available for the service provider to respond;
- the nature of the goods;
- the volume of the goods held; and
- the history of natural disasters in the location where the goods are held.

For instance, where a service provider is grappling with a declared ‘state of emergency’,⁵ it may not be reasonable for them to exercise the same standard of care as they ordinarily would absent that disaster. A person compelled to act in a sudden crisis, without the luxury of calm reflection, is unlikely to be considered negligent for making an error of judgement in a state of emergency, and the courts have in the past accepted a lower standard of care when a party is acting in the ‘agony of the moment’.⁶

⁵ As an example of the type of ‘state of emergency’ events, see *State Emergency and Rescue Management Act 1989* (NSW) s 36, s 37(1); *State Emergency Service Act 1989* (NSW) s 22(1)-(2).

⁶ *Stuart v Walsh* (2012) *Aust Torts Reports* 82-113; [2012] NSWCA 186.



Scenario: *Seale v Laverick* LR 9 QB 122

The facts:

A service provider, a livery stable keeper, received a horse carriage and stored it in a shed in return for payment. Subsequently, a high wind blew down the shed where they stored the carriage, resulting in damage to the carriage.

Court's finding:

The key legal issue was whether the service provider had discharged their duty of reasonable care. The Court held that the service provider was bound to take "reasonable care", being ordinary care of the consumer's goods and care as an ordinary man would use in employing the builder of the shed. In this instance, the service provider had taken reasonable care in assessing whether the building was fit for purpose. The service provider was not responsible for the negligence of the builder who had built a shed which was not fit for purpose.

By way of example, consider a scenario where a service provider had one hour to respond to an evacuation notice compared to another where they were given four days' notice. In the first case, it may be unreasonable to expect a service provider to move a bailed good to safety in the circumstances, making it challenging for a consumer to hold them legally accountable for any resulting damage. Conversely, if the service provider had four days to comply, the immediacy of the situation would be reduced and the standard of care would, therefore, remain largely unaffected by the disaster event.

Hypothetical scenario: *Jewellery repair shop*

The facts:

A jewellery repair shop accepts a valuable necklace from a customer for intricate repair work. The shop has a well-established protocol for handling and storing such items securely, including a state-of-the-art safe and a security system that monitors the premises 24/7. Despite these precautions, an unprecedented natural disaster occurs – an earthquake of a magnitude not recorded in the area for over a century. The earthquake causes significant structural damage to the building, and in the chaos, the safe containing the necklace is breached, resulting in the necklace being damaged.

The likely outcome:

In our view, the service provider would not be liable for the damage to the consumer's necklace because the earthquake represents an "act of God" – an unforeseeable, extraordinary event beyond human control. The service provider took all reasonable precautions to protect the property, adhering to the reasonable standards of care expected under normal circumstances. The extraordinary nature of the earthquake, being an unforeseeable and unavoidable event, would absolve the service provider of liability for damage caused to the necklace.

Another relevant consideration is that of the history of a service provider's place of business with disaster events. For example, if a service provider's place of business has a history of flooding, they might reasonably be expected to be aware of the relevant risks and take precautions accordingly. The extent of the protective measures a service provider might be expected to implement would likely depend on the frequency and severity of the floods. Conversely, if the business location has no such history, it might be considered beyond a service provider's duty to safeguard against the risk of damage by flooding.

3.2.2. Duty to warn

While there is no legal authority requiring service providers to warn consumers about potential damage to goods by way of a disaster event, a duty may arise if the service provider is aware of an unusual risk. For instance, if the service provider's business is prone to seasonal flooding, that service provider would be expected to warn consumers considering leaving their goods during that risk period.



Hypothetical scenario: *Storing a neighbour's mower*

The facts:

Let's consider a situation in which Priya, the customer, has entered into an informal agreement with James, the service provider, to store her large ride-on mower in a shipping container on his rural property in NSW. James has agreed to charge Priya a weekly fee of \$20 for the storage of the mower. The shipping container is spacious, well-sealed and cleared of vegetation, showcasing James' efforts to safeguard the stored items.

Subsequently, the region experiences an exceptionally hot and dry summer. James takes several proactive measures in response to the hot and dry summer, including clearing flammable materials, sealing the containers external doors, and placing sprinklers strategically around the container. Regrettably, a bushfire erupts, and the fire engulfs the container, destroying its contents and other parts of James' property. When James learns of the fire, he is also ordered to evacuate the property immediately by the local fire brigade and is, therefore, unable to prevent the fire from spreading himself or to take any further steps to move the mower.

The likely outcome:

In our view, this situation gives rise to a bailment relationship between Priya and James. The elements of delivery, acceptance, and consideration are evident, with Priya delivering the mower, James accepting it for storage, and the agreed-upon fee serving as consideration.

In terms of liability:

James is obliged to exercise reasonable care over the mower, including to move it to safety when required. He has attempted to ensure the safety of the mower by storing it in a secure place and taking precautions against possible risks.

However, while James has conscientiously sought to protect the stored goods, the fire itself was **arguably** foreseeable, given the climate in rural NSW and the location of James' property. Priya might argue that James could and should have taken additional precautions to avert the damage to the goods.

While discussing the duty to warn, we also note that the consumer has the duty to warn the service provider of any dangers associated with the relevant goods.⁷ For instance, if the goods being delivered to the service provider have any particular safety features or instructions for proper use, these should be disclosed to the service provider by the consumer. If these dangers are not disclosed, and the goods are damaged as a result, the consumer may not be able to seek compensation from the service provider.

⁷ *Pivovarov v Cherbabaeff* (1978) 21 SASR 1.

Hypothetical scenario: *A mechanic*

The facts:

Rex, a mechanic who has a workshop in an industrial precinct in NSW that backs onto a creek, accepts a customer's car for a standard service. During periods of high rainfall, some of the other businesses in the industrial precinct have put in measures to prevent any unnecessary damage due to flooding. Despite speaking to some of the surrounding business owners about the creek flooding, Rex decides that since cars in his workshop are generally elevated off the ground, he does not require any additional protection from flooding.

Rebecca takes her car in for a service with Rex. One day after a particularly bad rainfall, the creek bank bursts and the industrial precinct is flooded. The surrounding businesses suffer only minimal damage due to the safety measures they have in place, but Rex's workshop is badly flooded. As a result, Rebecca's car suffers damage caused by the flooding.

The likely outcome:

In our view, there is a bailment relationship where Rex is obligated to reasonably safeguard Rebecca's car from reasonable risks, including natural disasters, by keeping the car secure and informing her of potential dangers. Rex failed to take reasonable precautions to protect the car, despite being aware of the risk of creek bank flooding that was acknowledged by nearby businesses. Rex would be held responsible for the cost of repairing the car to its pre-damaged state, the expense of providing a hire car during repairs, and any legal fees Rebecca might incur in pursuing compensation.



SECTION 4:
**Bailment Law – Establishing
liability for damage**

4. Establishing liability for damage

A service provider will not be liable merely because they failed to take appropriate care of the service provider's goods. It must be also demonstrated that the service provider's actions (or inactions) caused the damage to the consumer's goods.

Once you have established the level of care owed by the service provider in the circumstances and established that the service provider did not discharge their obligations to the consumer according to that level of care, it must be shown that there is a clear connection between what the service provider did (or did not do) and the harm to the goods.

This section includes information and scenarios relating to:

1. General liability and onus of proof
2. Contributory negligence
3. Failure to mitigate loss
4. Relief

4.1. General liability and onus of proof

Where goods are damaged or lost while in a service provider's possession and a consumer is seeking compensation from that service provider, **significantly** the service provider carries the onus of proving either that:

1. they took appropriate care of the consumer's goods; or
2. their failure to take appropriate care did not contribute to the loss of, or damage to, the goods.⁸

As discussed in the previous section, when assessing liability, the first step is to determine the level of care owed by a service provider in the circumstances. A court may consider the precautions normally taken by service providers in similar situations when deciding whether a service provider's actions were reasonable or not.⁹ Disaster events, whether formally recognised by evacuation orders or not, do not change the service provider's duty to look after goods or to prove that they have done so to the relevant standard of care. However, as we have outlined, disaster events may affect what level of care is expected of a service provider in the circumstances.

Importantly, a service provider will not be liable merely because they failed to take appropriate care of the service provider's goods. It must be proven that the service

⁸ *A1 Perfect Plumbing Pty Ltd v BMW Prestige Pty Ltd t/as Alto BMW* (2006) 230 ALR 331 at [6].

⁹ *Nibali v Sweeting & Denney (WA) Pty Ltd* (1989) Aust Torts Reports 80-258.

provider's actions (or inactions) caused the damage to the consumer's goods. In other words, there needs to be a clear connection between what the service provider did (or did not do) and the harm to the goods. Ultimately, the adequacy or the reasonableness of the precautions taken (or not taken) by the service provider will not matter if the service provider's failure to take appropriate care did not contribute to the loss or damage. For example, a car left with a mechanic could be destroyed regardless of any reasonable steps the mechanic took to prevent the loss. It follows that the more serious the disaster or natural event, the easier it will be for a service provider to prove that their failure to take appropriate care did not contribute to the consumer's loss.

4.2. Contributory negligence

Contributory negligence refers to the concept that a person could, by their action, have contributed to a loss that they suffered (or, in other words, have caused or contributed to their own problems). The position on whether contributory negligence is a partial or full defence (if a defence at all) to a claim in bailment remains uncertain. The NSW Supreme Court has recently raised the possibility but expressed no view on whether contributory negligence can be a defence (partial or full) to a breach of a service provider's duty.¹⁰ On other occasions, courts have observed (without reaching any final view) a potential argument for contributory negligence because the consumer had left car keys in the ignition of a car that was subsequently stolen when under the charge of the service provider.¹¹

While recent decisions do not directly address the defence of contributory negligence, there are older cases that do refer to the consumer's negligence as being a full defence for the service provider. It has been said that the consumer cannot recover from the service provider damages that are the consequence of the consumer's act.¹² In one case, the Court held that since the service provider used the consumer's appliances to secure the consumer's goods (which later failed), it was the consumer who was responsible for their own appliances being insufficient.¹³

¹⁰ *Aerolink Air Services Pty Ltd v Bankstown Airport Ltd* [2019] NSWSC 1283 at [171]; *A1 Perfect Plumbing Pty Ltd v BMW Prestige Pty Ltd t/as Alto BMW* (2006) 230 ALR 331.

¹¹ *A1 Perfect Plumbing Pty Ltd v BMW Prestige Pty Ltd t/as Alto BMW* (2006) 230 ALR 331; *Edelson v Musty's Service Station & Garage* [1956] OWN 848.

¹² *Harper v Jones* (1879) 4 VLR (L) 536.

¹³ Case on page 6 of *Harper v Jones* (1879) 4 VLR (L) 536.



Hypothetical scenario: *A mechanic*

The facts:

Sarah provides her car to a mechanic for servicing. The mechanic is fixing 20 cars. One day, the mechanic is put on notice that a flood is coming imminently. The mechanic is aware that he will only have the opportunity to move 10 cars to a safe place, with the other 10 cars being at risk due to the mechanic's inadequate safety precautions. The mechanic calls all the consumers who own these 10 cars, including Sarah, and says "*Please pick up your car because I can't move it to safety in time.*" Sarah, being only a 5 minute walk away from her car, forms the view that her car will be safe and takes no further action to pick up her car. Shortly afterwards, the flood arrives at the mechanic's shop, destroying her car. All other consumers had picked up their cars from the mechanic after receiving the call.

The likely outcome:

In our view, Sarah helped cause the damage to her own car by not acting on the mechanic's warning. Any damages awarded for the mechanic's negligence (in failing to take adequate security precautions) may be reduced because the car owner had a chance to prevent the damages being suffered but did not take it.

It may be that any contributory negligence is instead relevant evidence that can be adduced by the service provider to prove that the service provider's failure to provide care to the appropriate standard did not cause the relevant loss or damage.

4.3. Failure to mitigate loss

The service provider has the onus of proving that the consumer should have mitigated their loss or damage. A court will consider the steps that the consumer ought reasonably to have taken to minimise the loss or, damage to, their goods.¹⁴ For example, if a consumer's laptop is damaged while in a service provider's possession, that consumer may have failed to take steps to repair the laptop before that damage became significantly worse. On the other hand, in the context of a disaster event, it is unlikely a consumer would be able to mitigate their loss.

4.4. Relief

If a service provider fails to exercise reasonable care with respect to a consumer's goods, and the breach of that duty caused the relevant loss of, or damage to, the goods, the consumer would usually be entitled to some form of payment. The extent of the service provider's liability would typically be determined by factors such as:

- the terms of the parties' bailment agreement;
- the type of bailment; and
- the level of care expected.

¹⁴ *Miller v Pickeriti Investments Pty Ltd (Civil Claims)* [2020] VCAT 358 at [179].



Generally, the service provider will be required to ‘make good’ the consumer’s loss or damage, which consists of restoring the consumer to the position they would have been in “but for” the breach of duty by the service provider (which may include interest).¹⁵

The various forms of relief that a consumer might be entitled to include:

1. **Compensation for loss or damage:** a service provider may be required to compensate the consumer for the cost of repairs or the diminished value of the goods. If the goods are lost, the service provider may be liable to reimburse the consumer for the value of the lost goods;
2. **Reimbursement for consequential loss:** a consumer might be able to recover consequential losses that were foreseeable to the service provider. For example, if a mechanic was fixing a van that had signage indicating the van belonged to a plumber, the plumber’s loss of business would likely be reasonably foreseeable to the mechanic if the van suffered damage; and
3. **Legal costs:** this remedy would be granted in addition to one or more of the other forms of relief listed above. This form of relief is intended to compensate a consumer for any legal costs incurred in pursuing a claim for damages against a service provider.

In limited circumstances, the most appropriate remedy might involve something other than the payment of money, such as an order that the service provider must properly perform the subject contract (by fixing and returning the goods to the consumer). A court would consider it more appropriate to grant specific performance when:

1. the goods are unique or rare such that the compensation for the goods cannot be valued;
2. the goods are custom or tailor made and cannot be replaced/compensated;
3. the goods are sentimental and the value of the goods cannot be calculated;
4. the goods are used for a specific purpose and cannot be easily replaced; or
5. the service provider possesses a specific skillset/expertise for the proper use/repair of the goods, and seeking a replacement for those goods is difficult.

The consumer may also wish to seek to have the contract with the service provider cancelled. A court would consider cancelling the contract when:

1. the service provider used the goods illegally; or
2. the service provider attempts to claim ownership of the goods for their own use.

¹⁵ *Westrac Equipment Pty Ltd v Owners of the “Assets Venture”* [2002] FCA 440; *Tottenham Investments Pty Limited v Carburettor Services Pty Ltd* (1994) Aust Torts Reports 81-292; *Encyclopaedic Australian Legal Dictionary*, “Bailor’s Remedies”.



Hypothetical scenario: “*Rain, hail or shine*”

The facts:

Bridget, preparing for her wedding, commissions a grand cake from a baker located three hours away from the wedding venue. This wedding cake necessitates precise temperature control to manage its mixture of creams. To ensure its safe delivery, Bridget engages CBM Food, a specialty food delivery company with a commitment encapsulated in both a contractual term and advertising slogan to deliver temperature-controlled goods “rain, hail, or shine”. Convinced by this assurance, Bridget entrusts CBM Food to transport her wedding cake.

Two days before the wedding day, CBM Foods collects the cake, but there is an unexpected hailstorm. Medium sized hailstones pelted down, and the wedding cake melts. Bridget, upon hearing of what happened to her cake, is distraught and takes no steps to get a new cake. Without the cake, she cancels her wedding.

The likely outcome:

In our view, the parties are in a bailment relationship. The bakery, acting on Bridget’s behalf, delivered the cake to CBM Food, who accepted possession of it, with consideration exchanged through Bridget’s payment for its services.

CBM Food, as the service provider, bore the duty to safeguard the goods against foreseeable risks. While the refrigeration unit initially functioned properly, the hailstorm disrupted its operation. Although the hailstorm itself might not have been predictable, the potential for intervening events affecting a refrigeration unit should have been considered. A well-devised contingency plan, including standby vehicles, portable coolers, and emergency ice supplies, could have mitigated the impact on perishables goods. There was, in addition, nothing exceptional about the size of the hailstones which hit the van.

The “rain, hail, or shine” clause in CBM Food’s commitment implied preparedness for any weather event, suggesting that adverse conditions were in fact foreseeable. Bridget, relying on this clause, chose CBM Food, and its failure to meet these standards means it will be liable in bailment or for breach of contract.

Bridget could potentially seek compensation for the cost of the ruined wedding cake and the expenses related to obtaining an alternate cake. However, the subsequent decisions to call off the wedding may not be seen as reasonably connected to CBM’s failure to discharge their duties. CBM Food would therefore not be liable to compensate Bridget for these additional damages related to the cancellation of the wedding.



SECTION 5:
Has the common law bailment relationship been modified by contract?

5. Has the common law bailment relationship been modified by contract?

So far, we have considered obligations and liabilities that arise in the context of a common law bailment relationship. However, there can also be a contract between the parties that amends the common law bailment relationship by, for example, modifying a service provider's precise duties and scope of liability.

Commonly, a contract will exist between the consumer and service provider relating to the services that the service provider was engaged to provide. This contract might have additional written clauses that alter the obligations that exist between the two parties (including under the law of bailment). Such a contract may purport to narrow or broaden the service provider's duties concerning the consumer's goods or might otherwise seek to limit the service provider's liability.

This section includes information and scenarios relating to:

1. Contractual modifications on liability
2. Unfair contract terms
3. Contracting out of disaster events

5.1. Contractual modifications on liability

A service provider will be able to contract out of liability for the consumer's loss by way of a contractual liability clause if:

1. the clause is sufficiently clear in stating the particular circumstances and the nature of the liability for which the service provider intends to exclude liability;¹⁶ and
2. the service provider has clearly brought the exclusionary term in the relevant contract to the attention of the consumer at the time of contracting.

An example of a clause that successfully excluded liability for a failure to take reasonable care in bailment occurred when the owner of a garage (the bailee) was not held liable for the theft of the bailor's car from its premises.¹⁷ This was due to the operation of a warning displayed on the parking ticket that read,¹⁸

¹⁶ *Pegler v Wang (UK) Limited (2000) BLR 218.*

¹⁷ *Davis v Pearce Parking Station Pty Ltd (1954) 91 CLR 642.*

¹⁸ *Davis v Pearce Parking Station Pty Ltd (1954) 91 CLR 642, 647.*

“Conditions – The motor vehicle mentioned on the other side hereof is garaged at the owner’s risk, and Gough’s Auto Parking Station will not be responsible for loss or damage of any description”.

While a prima facie case for negligence on the part of the garage owner had been established, the words on the ticket were clear enough to exclude liability on that occasion (noting that this clause was upheld and applied before the UCT regime came into operation).

A clause limiting liability will not be enforceable against the consumer unless the service provider also took reasonable steps to bring it to the consumer’s attention at the time that the contract was entered into.¹⁹ For example, the Court has held that it was not reasonably sufficient to give notice of an exclusion clause by stating in invoices that conditions of the contract would be made available upon request.²⁰ Further, merely “proffering or displaying the document is not sufficient to satisfy the reasonable notice test” if the document is one in which a party would not usually expect special conditions.²¹ The service provider may need to take positive action by drawing the consumer’s attention to the relevant clause of the contract.²²

5.2. Unfair contract terms

Unfair contract terms law is defined under the *Australian Consumer Law (ACL)* and ASIC Act and may be relevant in the context of contractual terms that seek to limit or restrict liability. If a clause of a relevant standard form contract purports to limit or exclude liability in a way that is ‘unfair’, then it will be void and unenforceable against the consumer under the Unfair Contract Terms regime (UCT Regime).

The UCT Regime applies to:

1. **standard-form ‘consumer contracts’**: contracts for the supply of goods or services, or for the purchase of an interest in land, to individuals predominantly acquiring the good, service, or interest in land for personal, domestic or household use);²³ and
2. **standard-form ‘small business contracts’**: of businesses with less than 100 employees or with less than \$10 million annual revenue.²⁴

Generally, a standard form contract is one that:

1. is prepared by the business;
2. contains a set of generic terms and conditions;
3. is not negotiated between parties and
4. is presented on a ‘take it or leave it’ basis.

¹⁹ *Tottenham Investments Pty Ltd v Carburettor Services Pty Ltd* (1994) Aust Torts Rep 81-292.

²⁰ *Remath Investments No 6 Pty Ltd v Chanel (Australia) Pty Ltd* [1992] NSWCA 208.

²¹ Contract: General Principles — *The Laws of Australia* (Thomson, 2006), 414.

²² *Carnival PLC and Another v Karpik* [2022] FCAFC 149.

²³ ACL s 23(3).

²⁴ ACL s 23(4); see also the amending Act which recently changed the definition of a ‘small business contract’ in *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth) s 47.

Under these definitions, it is clear that the ACL is likely to apply to many of the most common bailment relationships discussed throughout this guide. For example, a contract between a mechanic and a consumer to repair a car would be classified as a consumer contract (as the customer is presumably acquiring the car repair for personal, domestic or household use) or a small business contract (if the mechanic falls under the definition of ‘small business’). Therefore, if the contract between those parties contains a clause purporting to limit or exclude liability for damage caused to the car, that clause would likely be subject to the UCT Regime.

Under the UCT Regime a term is unfair if:

1. it would cause a significant imbalance in the parties’ rights and obligations arising under the contract;
2. it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
3. it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.²⁵

A court can take into account any matter that it believes to be relevant but, generally speaking, its analysis would look at the level of transparency in the term and the contract as a whole.²⁶ A term is transparent if it is expressed in reasonably plain language, legible, presented clearly and available to any party affected by the term.²⁷ The more transparent and easier to understand that the contract is, the less likely it is to be considered unfair. Having said that, terms that are clear can still be unfair if they go too far in protecting one contractual party.

The ACL provides some helpful examples of unfair contract terms.²⁸ A limitation of liability clause in such a standard-form contract can potentially constitute an unfair term if:

1. it limits, or has the effect of limiting, one party’s right to sue another party;²⁹ or
2. it permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract.³⁰

In a case brought by the Australian Competition and Consumer Commission in 2018, the Federal Court considered a series of terms excluding an employer’s liability for loss, damage or theft of goods left in the office ‘howsoever caused’, apart from the circumstances of ‘gross negligence or wilful misconduct’. The Court found these were unfair terms on the basis they created a significant imbalance in the parties’ rights, gave no corresponding right to the consumer, and would cause detriment if relied on by the employer.³¹

When attempting to limit or exclude liability via contractual modification, service providers should ensure that the clause seeking to limit liability is:

1. clearly expressed;
2. only as broad as it needs to be; and
3. brought to the attention of the consumer prior to them entering the contract.

²⁵ ACL s 24(1).

²⁶ ACL s 24(2).

²⁷ ACL s 24(3).

²⁸ ACL s 25.

²⁹ ACL s 25(k).

³⁰ ACL s 25(a).

³¹ *Australian Competition and Consumer Commission v Servcorp Ltd* [2018] FCA 1044 at [41], [53].

Hypothetical scenario: *Unfair Contract Terms*

The facts:

Anil engages a self-storage centre in North Queensland to safeguard excess furniture while renovating his house. Upon signing the contract, Anil notes a clause stating that the storage centre “will not be responsible for any loss or damage caused by “acts of God” outside of the reasonable control of the storage centre”. Anil proceeds with the agreement on this basis.

The likely outcome:


In our view, a bailment relationship was created between Anil and the self-storage centre. The storage centre has a responsibility to ensure the goods are kept in a secure location. During emergencies or natural disasters, a court may be more lenient when considering decisions made in the “agony of the moment”. The enforceability of an exclusion clause in the contract, absolving the storage centre from liability, hinges on its clarity, the absence of ambiguity, and the explicit communication to the customer. In this case, the contract explicitly stated that the storage centre would not be responsible for damage caused by events outside its control. This clause is not an unfair contract term as it is not overly broad and is reasonable in protecting the rights of the storage centre.

5.3. Excluding liability for disaster events

Would it be an unfair contract term if a service provider specifically contracted out of liability from natural disasters in a consumer contract?

At the date of this resource, no cases have contemplated this specific point. A contractual term seeking to exclude or limit the service provider’s liability to the consumer in specific circumstances (such as force majeure events or natural disasters) is likely to be ‘fair’ in most circumstances provided that it is clearly and specifically expressed, is reasonably necessary for the protection of the service provider’s interest and is not overly broad. The more specific a clause, the less likely it is to constitute an unfair contract term.

It is commonplace in commercial contracts for a party to contract out of liability arising out of ‘force majeure’ events or other ‘acts of God’. Such events are outside of the parties’ control and therefore, it would be considered reasonably necessary for a clause to limit liability for such events to protect a party’s interests.



SECTION 6:
Practical considerations
for service providers and
consumers

6. Practical considerations for service providers and consumers

This section provides practical considerations for legal workers who are acting for a service provider and/or for a consumer, in circumstances including before a dispute has arisen and after.

This section is designed to be a quick and accessible guide, offering prompt information without all the detail. Where you require more detailed information, please consult the relevant section of the handbook.

This section includes:

1. Acting for the service provider
 - The scope and extent of a service provider's obligations – limits on liability
 - Compensation and other relief – limits on liability
 - disputes
2. Acting for the consumer
 - The nature of bailment
 - Duty of care
 - Relief
 - Safeguarding your interests
 - Disputes

6.1. Acting for the service provider

6.1.1. Scope and extent of a service provider's obligations – limits on liability

As outlined in section 3, once a bailment relationship is established, a service provider has a duty to take reasonable care of a consumer's goods, and to return them to the consumer in the state agreed by the parties. Of course, in the context of a dispute, what is considered 'reasonable' can be unpredictable and contentious. Consequently, a service provider would benefit from having greater certainty and clarity as to their obligations. This can be achieved in the form of a contract.

There will usually already be a contract between a service provider and a consumer relating to the provision of services in connection with the relevant goods. In these circumstances, the service provider could amend the contract to insert sections to limit their duty of care over the consumer's goods. In scenarios where there might not be a formal, written contract, you should look for any emails or order forms that the service provider exchanged with the consumer (usually, at the time of entry to the contract) containing details of the services to be provided. These documents record the contractual

terms between the parties and could be amended to clarify (or limit) the service provider's obligations to the consumer concerning their goods.

Having a contract that deals with the bailment relationship allows the service provider to modify or alter the duty of care owed to a customer. Examples of such modifications include:

1. allocating specific responsibilities between the service provider and the consumer regarding the care and maintenance of the goods;
2. providing specific instructions as to how the goods are to be handled, stored, used, or maintained during the bailment period;
3. limiting the service provider's liability for force majeure events or 'acts of God' – specifically, bushfire and/or flooding; and
4. specifying which of the parties must arrange and pay for insurance for the goods and, further, limit liability for loss or damage not covered by that insurance.

6.1.2. Compensation and other relief – limits on liability

As discussed above, a service provider will be liable to the consumer if they are unable to prove that they exercised reasonable care over the consumer's goods, and if the breach of that duty is found to have caused the relevant loss or damage. Generally, the service provider will be required to 'make good' the consumer's loss or damage, and the extent of this liability would typically be determined by factors such as the terms of the bailment agreement, the type of bailment, and the level of care expected. See section 4 for a discussion of the types of relief granted on breach of the law of bailment.

A service provider may be able to contract out of liability for the consumer's loss in some limited circumstances by way of a limitation of liability clause, as long as such a clause does not fall foul of the ACL's UCT Regime. We have provided an outline of the UCT Regime and discuss the key considerations relevant to disaster events at section 5.

6.1.3. Disputes

If a dispute arises over lost or damaged goods, it is important to remember that it will almost always be beneficial for a service provider to try to resolve such disputes outside of a court setting. Prior to engaging in litigation, both parties should try to engage in alternative dispute resolution methods like mediation or private negotiation to reach a settlement outside of court. Please see section 7 for a detailed explanation of alternative dispute resolution options and processes.

6.2. Acting for the customer

6.2.1. The nature of bailment

The fundamental consideration for consumers entering into a bailment relationship with a service provider is understanding the nature of the specific arrangement between them. Where there is no contract, the arrangement will be governed by common law as explained in sections 2 and 3 of this resource. In essence, a service provider who takes possession of a consumer's goods has a duty to take reasonable care of those goods and not contribute to damage or loss of the goods.

Where there is a contract, consumers should take care to closely examine the terms of that contract, paying particular attention to any modifications on the service provider's obligations and any attempts to limit their liability. Service providers may seek to enter



into contracts with consumers that modify their obligations to the consumer, including those that apply to the law of bailment.

6.2.2. Duty of care

As per section 3, a consumer can expect a service provider to exercise reasonable care in safeguarding their goods. The service provider is expected to safely handle and store the bailed goods, and to take appropriate measures to prevent loss, damage, or theft of the goods.

6.2.3. Relief

As per section 4, if a consumer's goods are damaged, lost or mishandled due to (or in other words, caused by) the service provider's failure to take reasonable care, the consumer may be entitled to various forms of relief. The specific relief available can depend on the circumstances of the case, the terms of the bailment agreement, and applicable laws.

Generally, a consumer will be entitled to having their loss or damage 'made good'. This may take the form of:

1. compensation for damages, where the service provider would be required to compensate the consumer for the cost of repairs or the diminished value of the goods;
2. reimbursement for loss, such that the service provider is liable to reimburse the consumer for the value of the lost goods;
3. specific performance, where a court orders the service provider to take particular actions to remedy the damage, or to return the goods in a specific condition;
4. cancellation of the relevant contract; and/or
5. legal costs, which would occur in addition to one or more of the other forms of relief listed above. This form of relief is intended to compensate a consumer for any legal costs incurred in pursuing a claim for damages against a service provider.

6.2.3. Safeguarding your interests

When entering into a bailment relationship, and prior to a dispute, there are a number of things consumers can do to get informed and protect themselves.

1. **Review terms:** A consumer should always review the terms of any bailment agreement thoroughly before entrusting their goods to a service provider. This will give the consumer an idea of the service provider's responsibilities, the consumer's responsibilities, any limitations of liability, and any specific instructions or conditions outlined in the agreement.
2. **Record-keeping:** It is good practice to maintain detailed documentation of the transaction. This includes keeping all receipts, contracts, emails exchanged with the service provider regarding the handling or storage of the goods, the condition of the goods, or the terms of the agreement. Any conversation that the consumer has with the service provider over the phone or in person, should be recorded in a file note of the matters discussed immediately after the conversation takes place. The consumer should note down the date and time of the conversation and keep the file note together with the rest of their documentation.
3. **Create an inventory:** Before giving their goods to the service provider, the consumer should create a list of the goods to be provided. This includes noting down the



descriptions of any goods, taking photographs, or being aware of any distinguishing features of the goods and its condition prior to bailment.

4. **Clarify your expectations:** The consumer should be upfront and communicate clearly with the service provider about expectations surrounding the care, handling, and return of the goods. Likewise, the consumer should listen to any comments by the service providing about what is expected of the consumer. Clear lines of communication and of the parties' expectations will reduce the potential for disagreements and disputes later.

6.2.4. Disputes

In the event that a dispute between the service provider and the consumer arises about lost or damaged goods, it is important to remember that it will almost certainly be cheaper, faster, and less stressful to resolve the dispute outside of a court setting.

Prior to engaging in litigation, both parties should engage in alternative dispute resolution methods like mediation or private negotiation to reach a settlement outside of court. Please see section 7 for a detailed explanation of alternative dispute resolution options and processes.



**SECTION 7:
Alternative Dispute Resolution**

7. Alternative Dispute Resolution

Alternative dispute resolution (ADR) describes a range of processes for resolving a matter outside of court.

This section will assist in identifying what ADR processes may be appropriate for resolving a matter outside of court and your role as a legal representative. There are different types of ADR. This section describes the most commonly used types: negotiation, mediation, and conciliation.

It is most time and cost effective to attempt resolution via ADR before commencing proceedings. However, ADR can be used at any time during a dispute, including before you start a legal case, while a case is going on or even after a court or tribunal has made a decision.

This section includes:

1. Letters of demand
2. Negotiation
3. Mediation
4. Conciliation



ADR service providers

ADR service providers can be located through the NSW Communities and Justice page at the following link: <https://courts.nsw.gov.au/alternative-dispute-resolution/alternative-dispute-resolution-service-providers.html>

7.1. Letter of Demand

If a dispute arises, and it cannot be resolved by the consumer and the service provider through negotiations, a consumer may seek to escalate the dispute by issuing letter of demand to the service provider. The letter may be prepared and sent by the consumer or with the assistance of a legal professional or other advisor.

A letter of demand is written communication sent by one party to another requesting payment or some other specific action to be taken to remedy a situation. Its primary purpose is to formally communicate the claim or grievance to the other party and provide them with an opportunity to address the issue before resorting to legal proceedings.



We have included a template letter of demand in Section 9 of the resource. This can be used by the consumer (or their legal representative or other advisor) to communicate to the service provider the consumer's concerns and demands to resolve those concerns. The template includes guidance notes and tips to enable the consumer to adjust the letter as needed and on a case-by-case basis.

Whether the service provider complies with the letter of demand at first instance or not, the letter of demand can serve as a first step for the parties to engage in negotiations or settlement discussions (or if those processes are unsuccessful – court or tribunal proceedings).

7.2. Negotiation

Negotiation is a voluntary and informal process where parties involved in a dispute communicate directly with each other to reach a mutually acceptable resolution. It is often the first step in resolving a conflict.

Negotiation can occur:

- informally between parties themselves;
- formally, with parties' legal representatives or other advisors present; or
- between only the parties' legal representatives or advisors.

To prepare for a negotiation, you should:

1. Familiarise yourself with the facts of the matter and identify the various legal and non-legal issues that arise. You should be completely across the background of the matter and the events leading up to the parties' dispute, so that there are no surprises in the negotiation;
2. Understand what each party wants. It can be easy to be swept up in the process and rhetoric of a negotiation, but never not lose sight of why the negotiation is happening in the first place. Having the client's preferred outcome front of mind when engaging in any negotiation will keep them focussed and ensure arguments are coherent.
3. Seek the client's instructions and make sure to understand their expectations and boundaries. The client should be able to clearly identify not only on their preferred outcome, but also any matters on which they are unwilling to compromise. Conversely, they should also identify any matter on which they might be prepared to compromise, in the interest of resolving the dispute.
4. You should ensure that you understand the risk appetite of the client and have a formulated BATNA (Best Alternative To Negotiated Agreement) and WATNA (Worst Alternative To Negotiated Agreement) in place. Having a BATNA and WATNA is important and will prove to be effective in any of the ADR processes outlined in this Handbook.
5. Some examples of the questions that the client can be asked prior to the negotiations are as follows:
 - What is your preferred or ideal outcome?
 - Are you willing to compromise on any aspect of that preferred outcome?
 - Can you accept something less than your preferred outcome as a back-up/alternative outcome?
 - What is the least amount of compensation you would be willing to accept (if the client's preferred outcome involves monetary compensation)?



- How important is the length of time it takes to reach a resolution to you? For instance, is it more important for you to secure your preferred outcome, regardless of how long it takes, or is it more important to resolve the dispute, even if that means compromising on the outcome?
- Do you have any other non-negotiables?

Remember that all discussions and offers should be made ‘without prejudice’ to protect the client should the matter go to court at a later date. A ‘without prejudice’ communication cannot later be used as evidence against the client in any court or tribunal proceedings.

During the negotiation, focus on the dispute and not the individuals themselves (or their personalities). It may be beneficial to start with determining any common ground the parties have, and then moving to the issues in dispute and how to resolve them.

Take detailed notes of the negotiation. If an agreement is reached, it is essential to make a written record and enter into a binding agreement as soon as practicable following the negotiation. If you wait too long, you risk either party changing their mind or otherwise backing out of the agreement.

If the parties are unable to reach an agreement at the negotiation or soon afterwards, you can attempt another form of ADR, as described below, or proceed to commencing court proceedings.

7.3. Mediation

Mediation involves an independent third party, the mediator, assisting the parties to identify the issues in dispute, come up with options and alternatives for resolution, and ultimately try to reach agreement. The mediation will almost certainly be conducted on a confidential and without prejudice basis.

Before entering into the mediation process, you should advise the client on their rights and responsibilities and present them with their options in the event an agreement cannot be reached.

Mediation is an appropriate ADR mechanism where the parties:

- feel comfortable and safe having a conversation with each other;
- want a third person to assist the discussion;
- want to be in control of the outcome and make the decision themselves (as opposed to having the decision made by an independent third party);
- want to maintain the best possible ongoing relationship with the other participants;
- want to keep discussions confidential; and/or
- want to find innovative solutions to a problem.

The role of lawyers (or advisors) in a mediation will usually depend on the type of case. For example, in disputes between individuals with a personal relationship, there may be several issues requiring resolution that are not just about legal rights. In these types of cases, a more informal mediation process between only the parties and the mediator, or with the lawyers (or advisors) in attendance but taking a passive role, is generally more effective. For large or complicated disputes that involve mainly legal issues, it is more common to have lawyers (or advisors) present and actively involved in the mediation process.



You should discuss with the client beforehand how you intend to approach the mediation, including how they should communicate information to you during the mediation and what role they should play. Take the time to ensure the client fully understands what to expect at mediation—while you might attend several mediations as a lawyer (or advisor), this may be the first and only mediation the client attends.

Once again, you should ensure that you understand the risk appetite of the client and have a formulated BATNA (Best Alternative To Negotiated Agreement) and WATNA (Worst Alternative To Negotiated Agreement) in place. Having a BATNA and WATNA is important and will prove to be effective in any of the ADR processes outlined in this Handbook.

When selecting a mediator, it is worth considering engaging a mediator with past experience dealing with bailment law or with disputes with similar factual circumstances. This is because bailment law is a discrete area of the law, and it may assist to have a mediator who understands all the nuances that may be present.

You may also need to consider whether a pre-mediation conference is appropriate and/or necessary. A pre-mediation conference is a preliminary meeting that occurs before the actual mediation process begins. It gives the parties an idea of what to expect at the mediation and provides the mediator with a snapshot of the dispute, which may assist them in preparing for the mediation.

Ensure you tailor your mediation approach to the particular circumstances of the dispute before you. Your mediation approach relates to any number of the following:

- The number of people from the client's side that will be attending the mediation: For example, if the other side is self-represented, it may be inappropriate to have numerous lawyers (or advisors) in attendance. If the dispute is particularly large or complex, and especially if the other party is anticipated to have multiple representatives, it could be a strategic choice to also bring in several attendees from your side.
- Your negotiation style. For example, if the other side is self-represented, you may be better placed speaking in plain, simple terms and avoiding any legal-ese. Any mediation is unlikely to be successful if the other side cannot understand your position.
- Location: the location of the mediation can also affect peoples' attitudes. Usually, a neutral outcome is preferable, so that all of the parties attending the mediation are at ease.

7.4. Conciliation

Conciliation is where an independent third party, the conciliator, helps parties in a dispute to identify the disputed issues, develop options, consider alternatives, and try to reach an agreement.

Conciliation may be voluntary, court ordered or required as part of a contract. It is often part of a court or government agency process.

The role of conciliators is similar to that of mediators except that the conciliator may also:

- have specialist knowledge and give the participants some legal information;
- suggest or give the participants expert advice on the possible options for sorting out the issues in their dispute; and



- actively encourage the participants to reach an agreement.

Conciliation is likely suitable for the client if they:

- want to reach an agreement on technical or legal issues;
- want assistance with the process;
- want to make the decision with the other participants involved; and/or
- want advice on the facts in their dispute.

Conciliation may also be suitable if the parties have tried mediation and still cannot reach agreement with the other party. This is because the conciliator may take a more active role in suggesting solutions and proposals to bridge the gap between the parties.

The legal representatives can usually be present during conciliation, though some conciliation processes do not require lawyers (or advisors) to participate. In some cases, experts may also be present. Whatever the arrangement may be, this should be discussed with the conciliator before the process begins.

7.5. Next steps

If the above ADR mechanisms are unsuccessful, you may consider making a claim in court.

The steps and processes for commencing court proceedings are described below in Section 8.



SECTION 8: Making a claim

8. Making a claim

This section provides a general overview of the relevant jurisdictions for a bailment dispute when commencing a claim as a consumer, or defending a claim as a service provider.

Your client or the other party can take formal legal action if either side does not wish to participate in ADR, or if the parties have been unable to reach an agreement via ADR.

This resource does not contain extensive information on how to prepare the claims.

This section includes:

1. Commencing a claim as a consumer
2. Defending a claim as a service provider
3. Tribunals

8.1. Commencing a claim as a consumer

A consumer can bring a claim in court relying on the laws of bailment against a service provider seeking orders from the court to put the consumer in the position it would have been in if the service provider had provided the appropriate standard of care. This will ordinarily be the replacement cost or market value of the damaged goods of an equivalent quality or age.

Claims of less than \$20,000 are brought and heard in the Small Claims Division of the Local Court. Small claims proceedings are conducted with far less formality than most other civil proceedings and the costs involved in commencing proceedings and litigating a dispute are much smaller.

Claims greater than \$20,000 can be brought in the Local, District or Supreme Courts, as determined by the monetary value of the claim.

You should make sure that a consumer's claim is brought forward promptly. A claim under the laws of bailment and the ACL can be made within six years of the damage being suffered. If there is a contract, it may seek to reduce this period of time to less than 6 years (noting that this type of clause may not be enforceable under the unfair contracts regime, which we discuss in section 7 of this resource).



Local, District and Supreme Court Jurisdiction	
Small Claims Division of the Local Court	Small claims proceedings are to be commenced by filing a Statement of Claim at the Small Claims Division of the Local Court where the claim is less than \$10,000.
Local Court	Civil proceedings in the local court are to be commenced by filing a Statement of Claim at any local court office where the claim is less than \$100,000.
District Court	Civil proceedings in the district court are to be commenced by filing a Statement of Claim at any district court office where the claim is less than \$1,250,000
Supreme Court	Civil proceedings in the Supreme Court are to be commenced by filing a summons or statement of claim at the Supreme Court where the claim is above \$1,250,000.

A consumer who wishes to initiate court proceedings will need to prepare a statement of claim. A statement of claim is a written statement that sets out the facts of the case and what it is that the client is seeking. The relevant statement of claim form is Form 3A (if legally represented) / Form 3B (if not legally represented), both of which are available on the [UCPR Forms website](#).

The best way to draft a statement of claim is to write a series of numbered short paragraphs, each containing a separate fact that is central to the claim. If the statement of claim does not accurately outline the claim, or if parts of the claim are inadequate or do not comply with the relevant court rules, the court may decide to throw out part of the claim or the whole claim in its entirety.

Please see Annexure B for a sample statement of claim (using Form 3A). Please double-check before using this sample that it is suitable for the client's specific circumstances.

A statement of claim will (and any other court documents that initiate the court process, such as an application, Summons or Writ of Summons – often called 'originating process') need to be provided to the service provider. This process is frequently called "serving" or "the service of" the court documents. The methods of service are summarised below.

Party	Method of Service
Individual	Personally (usually) by handing a copy of the document to the individual personally.
Company	Posting the documents to the registered office of the company or leaving it with a person over the age of 16 years at the registered office or place of business of the Company. Personal service on a director of the company who resides in Australia.



The person serving the statement of claim and other originating process, should prepare an affidavit of service to confirm that the service provider has been validly served with those documents. A template affidavit of service is Form 41, available on the [UCPR Forms website](#).

8.2. Defending a claim as a service provider

It is unlikely that a service provider will have a claim against a consumer. A service provider will usually be the defendant to any court proceedings.

In these cases, a service provider will have to file a defence to the statement of claim. The defence will need to explain why the service provider disagrees with the claim and reply to each specific paragraph in the Statement of Claim. A copy of the defence form is Form 7B available on the [UCPR Forms website](#).

A defence will generally need to be prepared within 28 days of being served with the statement of claim. However, the service provider should check the specific rules of the court in which the claim has been brought to determine the time that they have to respond to the statement of claim and other court documents.

8.3. Tribunals

A tribunal can also hear a bailment dispute. Tribunals are less formal than courts and are designed to provide a more accessible, efficient, and less intimidating environment. For example, the NSW Civil & Administrative Tribunal (**NCAT**) has the jurisdiction to hear claims in NSW up to the value of \$100,000. The NCAT may make orders including the payment of money or the fixing/replacement of faulty goods. More information about the NCAT process can be found on the [NCAT website](#).

We set out below the key differences between the court and tribunal processes.

	Court	Tribunal
Procedure and formality	More formal rules of evidence and procedure. Processes can be more complex and formal, often requiring a more in-depth understanding of legal principles.	Simplified procedures and rules of evidence. Tribunals encourage and often require parties to speak on their own behalf.
Types of cases	More complex and higher value cases.	Smaller, less complex disputes. This would be more suited to disputes, for example, that do not have a limitation of liability clause that could be categorised as an unfair contract term under the ACL.
Decision making	Made by a judge.	Usually made by a tribunal member who is an expert in the specific area of law.
Costs	The losing party generally pays a portion of the winning party's legal costs.	Each party generally pays their own costs, however there are some exceptions.

8.4. How to make a referral for pro bono assistance

Justice Connect connects eligible individuals, small business owners and primary producers and community organisations affected by disasters like floods, bushfires, cyclones, and other extreme weather events, with free legal help.

We may be able to match your client with one of our pro bono lawyers for assistance with a dispute regarding bailment.



Refer someone to Justice Connect

[I need to refer someone – Refer to Justice Connect](#)

LawAccess NSW

LawAccess is a free government service that provides legal information and referrals, including to Legal Aid NSW, for people with a legal problem in NSW. See [their website](#) for more information on how they can help.



SECTION 9:
Template letters



Annex 1: Letter of Demand

[Insert your name and address]

[insert date here]

[insert other party name/business name]

[insert other party address]

[insert other party address]

By post [and by email]: [insert email address if applicable]

Dear [insert other party name/business name]

Letter of Demand

Claim for Damaged Goods

We act for [insert the client's name].

We are instructed by our client that:

1. Background

##NOTES: Letter of demand regarding goods damaged in a disaster (bailment)

This is a precedent letter of demand regarding goods damaged in a disaster from conduct alleged to be in breach of a contract/agreement. It is used to demand that the other party:

- return the goods in the condition that it was agreed to be returned in the first instance;
- compensate the client for the damaged goods and/or loss of future opportunities; and/or
- raise the prospect of a claim for damages.

##Set out the background to the demand being made by the client

Example 1: include details of the contract/agreement and all relevant terms:

We refer to the ##contract/agreement between ##parties dated ##date (Agreement).

The terms of this Agreement require you to ##set out each of the relevant terms of the Agreement in relation to the bailment (including a description of the goods and the obligation to keep them safe or store them):

1.1 ##(clause ##); and

1.2 ##(clause ##).



Pursuant to the Agreement, a bailment relationship arose between the parties, specifically a relationship of “bailee for reward”.

Example 2: include details of the client’s goods that the conduct complained of affects; set out the nature of the bailment relationship:

We refer to our client’s **##product/goods**. We are instructed that:

- on or about **##date**, our client delivered **##product/goods** to **##other party name** such that **##other party name** had possession of the **##product/goods**;
- the **##product/goods** was in **##other party name’s** possession for the purposes of carrying out **##[include why the client left the items with the other party]**;
- our client was to pay **##other party name** **##amount** in return for carrying out the above services;
- as part of this arrangement, our client agreed for **##other party name** to take possession of the **##product/goods**; and
- importantly, a condition of this relationship was that the **##product/goods** would be returned to our client in **##the same condition/or some other condition (ie repaired)**.

2. Breach

##NOTE: Set out the precise details of the alleged conduct that caused the damage to the goods or the fact that your client discovered that the goods had been damaged. In doing so, describe the nature and extent of the damage.

By engaging in the conduct referred to above, **##other party name** has breached the parties’ agreement and, in particular, the obligation to **##list any breaches of bailment duties which are applicable (such as duty to take care of the goods, duty to retain the goods for the specific purpose of the bailment, duty to return the bailed goods upon the request of the bailor on the terms of the bailment)**.

3. Consequences of your breach

Our client has suffered loss or damage as a result of the breach. Our client is entitled to recover from **##other party name** damages to put our client back in the position they would have been in had this breach not occurred. **##Further, our client has suffered loss of future profits and opportunities due to the breach and the inability to access the goods and is entitled to recover damages as above**. Our client calculates this loss and damage as **##amount** made up of:

• ##Cost of replacement	##
• ##Cost of repair	##
• ##Loss of profits	##.
• ##Cost of rental of a replacement (until the goods are repaired or replaced)	##

Additionally, our client is entitled to the following rights arising from the breach. **##Set out clearly the Client’s rights arising from the breach or breaches, which may include specific performance (requiring performance of the contract), right to recover damages or rescission of contract (if the property should be returned to the consumer):**

As a consequence of your conduct as outlined above, our client is entitled to commence legal proceedings against **##other party name** to **##details of proceedings (in effect to put our client back**



in the position it was prior to the breach of the bailment duties). Our client reserves all its rights in this regard.

4. Our client's demand

##NOTE: For demands in relation to breach of contract/agreement, ensure you have reviewed the relevant breach or termination clauses. You must be prepared to issue any required breach notice and follow the prescribed procedure for breach or termination if the letter of demand is not met but **before** commencing any proceedings.

##NOTE: Set out the demand being made by the client.

Our client demands that **##other party name** immediately take steps to **##details of what the other party is required to do or refrain from doing (eg compensate the client for the value of the damaged goods, compensate the client for the loss of future opportunities)**.

Our client requires that **##other party name** to meet the above demands by **5pm on ##date**.

5. Consequences of failure to meet the demand

If you do not comply with the demands set out above by the time and date specified, **##we are instructed to or ##will seek instructions to** commence legal proceedings against **##other party name** without further notice. Our client will rely on this letter in relation to the costs of any legal proceedings.

Our client reserves all of their rights.

##NOTE: Do not claim legal costs of proceedings as a matter of right. Costs are always a matter for the Court and it can constitute misleading or deceptive conduct in breach of s 18 of the *Australian Consumer Law* to demand payment of costs or to indicate that costs will necessarily be incurred before any such court order has been made.

Do not overstate the client's intentions regarding legal proceedings. Do not say that legal proceedings will necessarily follow unless you already have instructions from the client that it will bring proceedings if the debt is not paid. If the client has not unequivocally already made that decision, then always qualify the threat of legal proceedings to reflect that.

Yours faithfully

[insert your name]

[insert your role]



Annex 2: Statement of Claim

Form 3A (version 7)

UCPR 6.2

STATEMENT OF CLAIM

COURT DETAILS

Court	##insert court]
Division	##insert division]
List	##if in the supreme court, include the list otherwise delete]
Registry	##insert court registry]
Case number	##leave blank as no case number has been allocated yet]

TITLE OF PROCEEDINGS

[First] plaintiff	[name]
#Second plaintiff #Number of plaintiffs (if more than two)	[#name #number Refer to Party Details at rear for full list of parties]
[First] defendant	[name]
#Second defendant #Number of defendants (if more than two)	[#name #number Refer to Party Details at rear for full list of parties]

FILING DETAILS

Filed for	[name] plaintiff[s]
Legal representative	[solicitor on record] [firm]
#Legal representative reference	[reference number]
Contact name and telephone	[name] [telephone]
Contact email	[email address]

TYPE OF CLAIM

[Select type of claim from the list provided in section 6 of the guide to preparing documents, available on the UCPR website at www.ucprforms.justice.nsw.gov.au or at any NSW court registry]

Note: If the claim is commenced in the District Court, the type of claim will be "Mercantile Law – Bailment"]



[on separate page]

[Note: If the completed RELIEF CLAIMED will fit in the available space appearing after TYPE OF CLAIM on the first page of this form, you may delete the page break, include the RELIEF CLAIMED on the first page and start this page with PLEADINGS AND PARTICULARS.]

RELIEF CLAIMED

1 Damages of \$[##insert value of goods].

[Note: consider whether any other heads of damage (such as loss of opportunity damages) are applicable to the client's circumstances]

2 Interest.

3 Costs.

[If you are making a liquidated claim (ie claiming a specific amount of money), include the following information:]

Amount of claim	\$[##insert value of goods]
Interest	As at date of judgment
Filing fees	\$[##check filing fee for relevant court]
Service fees	\$[##check fees for engaging a process server, if relevant]
Solicitors fees	As at date of judgment
TOTAL	\$, plus interest and solicitors fees

PLEADINGS AND PARTICULARS

Background

[Note: These two paragraphs establish that the consumer (plaintiff) and the service provider (defendant) have the capacity to be part of court proceedings. We have drafted this section on the basis the consumer is an individual and the defendant is a company. If you are acting for the consumer and are commencing proceedings against the company, please ensure that the client includes the correct company (ie the company that has entered into any contract with the consumer)]

1 At all material times, the plaintiff is and was a natural person capable of suing.

2 At all material times, the defendant is and was:

- a company incorporated in [##state], Australia;
- operating a business of [##insert details of business, for example, repairing cars]; and
- capable of being sued in its corporate name and style.

Agreement

3 On or about [##date], the plaintiff and defendant entered into an agreement (**Agreement**), pursuant to which the defendant agreed to:

- take possession of the plaintiff's [##describe goods] (**Goods**);
- [##describe work to be performed, for example, repair the car] (**Works**) in exchange for the plaintiff making a payment of [##amount]; and
- return the Goods to the plaintiff upon completion of the Works.



Particulars

The Agreement was in writing and contained in the document titled [##title] and dated [##date]

[Note: Consider whether the agreement was oral or partly oral. For example, if there is no written agreement, the agreement would be contained orally by conversations between the consumer and service provider]

4 Pursuant to the Agreement, the defendant was a bailee for work and labour.

Particulars

a. The Agreement was a contract pursuant to which the Works were to be performed in connection with the Goods.

b. The plaintiff was to provide a reward in return for the Works, being the payment of [##amount].

c. The Goods was delivered to the defendant such that the defendant had possession of the Goods for the purpose of carrying out the Works.

5 The defendant, as a bailee for work and labour, had at all material times a duty to take reasonable care of the Goods.

Damage to Goods

6 **[Note: Insert the context of the natural event which has caused damage to the goods, if possible. For example, if the goods were damaged by a flood, the statement of claim can set out the provision of any flood warnings, and the dates in which the floods impacted the service provider's area]**

7 On or about [##date], the defendant notified the Plaintiff that the Goods was [##insert details of damage].

Particulars

[Note: Include details of how the consumer came to be aware that the goods were damaged i.e. was it through a telephone call?]

8 The defendant breached its duty owed to the plaintiff by reason of the matters in paragraph 7 above.

[Note: there is no need to state that the service provider did not take reasonable care. The service provider has the responsibility to show that the loss is not the result of any negligence on its part]

9 The plaintiff has suffered loss and damage by reason of the matters above.

Particulars

The value of the Goods was [##value]

[##include any other damages claimed, including the particular amounts claimed if known]

10 The plaintiff claims the relief sought in this statement of claim.

[Note: Please also note that the sample statement of claim does not include any pleadings regarding unfair contract terms or limitation of liability. Those issues will be raised, if relevant, by the service provider. The consumer will be able to respond to those allegations by way of a reply, which is a court document prepared by the consumer that responds to new matters raised in a defence to a statement of claim prepared by the service provider].



SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the [Legal Profession Uniform Law Application Act 2014](#) that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiff that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature

Capacity

Solicitor on record

Date of signature

##date]

NOTICE TO DEFENDANT

If you do not file a defence within 28 days of being served with this statement of claim:

- **You will be in default in these proceedings.**
- **The court may enter judgment against you without any further notice to you.**

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

HOW TO RESPOND

Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 If you intend to dispute the claim or part of the claim**, by filing a defence and/or making a cross-claim.
- 2 If money is claimed, and you believe you owe the money claimed**, by:
 - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
 - Filing an acknowledgement of the claim.
 - Applying to the court for further time to pay the claim.
- 3 If money is claimed, and you believe you owe part of the money claimed**, by:
 - Paying the plaintiff that part of the money that is claimed.
 - Filing a defence in relation to the part that you do not believe is owed.



Court forms are available on the UCPR website at www.ucprforms.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

Street address

Postal address

Telephone



[on separate page]

[Do not include the affidavit verifying in Local Court proceedings. See Guide to preparing documents for other circumstances where affidavit not required.]

#AFFIDAVIT VERIFYING

Name

Address

Occupation

Date

I [#say on oath #affirm]:

1 #I am the [first] plaintiff.

#I am [give details of the capacity of the person making the affidavit and the facts that qualify the person to make the affidavit].

2 I believe that the allegations of fact in the statement of claim are true.

#SWORN #AFFIRMED at

Signature of deponent

Name of witness

Address of witness

Capacity of witness

[#Justice of the peace #Solicitor #Barrister #Commissioner for affidavits #Notary public]

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

1 #I saw the face of the deponent. [OR, delete whichever option is inapplicable]

#I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.*

2 #I have known the deponent for at least 12 months. [OR, delete whichever option is inapplicable]

#I have confirmed the deponent's identity using the following identification document:

Identification document relied on (may be original or certified copy) †

Signature of witness

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

[* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[† "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]



[on separate page]

#PARTY DETAILS

[Include only if more than two plaintiffs and/or more than two defendants.]

PARTIES TO THE PROCEEDINGS

Plaintiff[s]

[name] [role of party eg first plaintiff]

[repeat as required for each additional plaintiff]

Defendant[s]

[name] [role of party eg first defendant]

[repeat as required for each additional defendant]

FURTHER DETAILS ABOUT PLAINTIFF[s]

[First] plaintiff

Name

Address

[The filing party must give the party's address.]

#[unit/level number] #[building name]

[street number] [street name] [street type]

[suburb/city] [state/territory] [postcode]

#[country (if not Australia)]

#Frequent user identifier

[include if the plaintiff is a registered frequent user]

[repeat the above information as required for the second and each additional plaintiff]

Legal representative for plaintiff[s]

Name

[name of solicitor on record]

Practising certificate number

Firm

[name of firm]

#Contact solicitor

[include name of contact solicitor if different to solicitor on record]

Address

#[unit/level number] #[building name]

[street number] [street name] [street type]

[suburb/city] [state/territory] [postcode]

DX address

Telephone

Fax

Email

Electronic service address

#[email address for electronic service eg service@emailaddress.com.au #Not applicable]

**DETAILS ABOUT DEFENDANT[S]****[First] defendant**

Name

Address

#[unit/level number] #[building name]

[street number] [street name] [street type]

[suburb/city] [state/territory] [postcode]

#[country (if not Australia)]

[repeat the above information as required for the second and each additional defendant]

