

# AUSTRALIA AND NEW ZEALAND BIOSOLIDS LEGAL REGISTER

## COMMONWEALTH

### **Introduction**

This document is intended as an introductory legal guide for persons or corporations dealing with biosolids in Australia. It provides a summary of the legal obligations and guidelines adopted by various state agencies applicable to producers, suppliers and users of biosolids. The register provides producers, suppliers and users of biosolids with the relevant common law and legislative principles that must be considered when dealing with biosolids. Relevant Commonwealth and State guidelines for the use and handling of biosolids should be consulted and considered in conjunction with this Register in order to provide a comprehensive framework. This document provides a summary of key legislation pertinent to biosolids producers, suppliers and users but does not provide comprehensive recommendations. It should not be treated as a substitute for legal advice in relation to any particular proposal involving biosolids.

#### What are biosolids?

Biosolids are treated sewage sludge. Sewage sludge are the solids collected from the wastewater treatment process but which have not undergone further treatment. Biosolids are a product of the sewage sludge once it has undergone further treatment to significantly reduce disease causing pathogens and volatile organic matter, and to remove excess water, producing a stabilised product suitable for beneficial use. Biosolids are carefully treated and monitored and they must be used in accordance with regulatory requirements.

#### Australia's legal framework

The legal framework in Australia consists of common law and statute. Common law is case law established by courts and tribunals in Australia and overseas (e.g. in English and American courts). Statute law includes acts of Commonwealth and State parliaments and subordinate legislation, which includes regulations, codes of practice, guidelines and policy approved in accordance with legislative frameworks.

#### Key biosolids legal issues

The main issues for biosolids under common law are potential nuisance and negligence claims arising from the mismanagement of some aspects of biosolids handling, for example production, transport, sale and use. Under statute, key issues include trade practices and

consumer protection (e.g. misleading and deceptive packaging and the sale of biosolids products), pollution of land and water, and environmental and planning approvals for works for the treatment or disposal of biosolids.

## Common Law

The Common law is law which has been derived from cases heard and decided in the Australian Courts. The common law decisions are binding, however, they may be subsequently modified by legislation. The two categories of common law relevant to bodies dealing with biosolids are negligence and nuisance.

### **Negligence**

Negligence requires a failure to foresee a risk of harm coupled with wrongful omissions or conduct. In relation to biosolids negligence could arise in circumstances where biosolids give rise to some injury, damage or harm which is reasonably foreseeable.

### **Nuisance**

Nuisance is the substantial and unreasonable interference with another person's use and enjoyment of land. The manufacture or use of biosolids may give rise to potential liability if it substantially and unreasonably interferes with the use and enjoyment of land of another person.

## NEGLIGENCE

The essential elements of negligence are that

- i. The producer or distributor is under a duty of care to the person suffering loss
- ii. The duty was breached
- iii. The breach has caused physical injury or damage

In determining the standard of care, a court will take into account

- i. The magnitude of the risk
- ii. The degree of probability of its occurrence

As weighed against

- iii. The expense
- iv. Difficulty and inconvenience of taking alleviating action

- v. Any other conflicting responsibilities which the defendant may have<sup>1</sup>

Producers or users of biosolids will *prima facie* be liable in negligence if their failure to take reasonable care causes or materially contributes to the damage suffered by the plaintiff.<sup>2</sup> Further the producers or users of biosolids will be liable where the plaintiff can show that they failed to take such precautions to prevent injury which a reasonable producer would have taken.

The common law in negligence deals with two main categories, namely manufacturing and marketing defects.

### 1. MANUFACTURING DEFECTS (PRODUCTION PROCESS)<sup>3</sup>

A manufacturing defect is a defect which has been introduced inadvertently into a product as a consequence of the manufacturing process. Because of this defect the product is thereby rendered different in some respect from what it was intended by the producer. A defect in manufacture is to be classified as a 'once off' defect. An example of a once off defect could be a decomposed snail being found in a bottle of ginger beer.<sup>4</sup>

A biosolid manufacturer or supplier may have defences if it can establish that

- It did not cause or contribute to the damage suffered by the plaintiff
- The biosolids were not defective at the time of supply
- The plaintiff assumed the risk in that they appreciated the risk associated with using biosolids
- The Biosolids were manufactured in compliance with applicable mandatory standards

#### Test to determine a defect in the manufacturing process

The test to determine whether a product has a defect in the manufacturing process is to establish if the allegedly defective product differs, in even an insignificant respect, from products of the same description and price. If the product does differ then it is classified as being defective. In determining whether a manufacturer has acted negligently, the manufacturer must have breached their duty of care which caused injury or damage. Manufacturers owe a duty of care to act reasonably in supplying products for use or consumption to persons who it can be reasonably foreseen may suffer loss or damage.<sup>5</sup> Supplying even a product with a defect which causes foreseeable loss or damage is considered a breach of the duty of care. This is especially pertinent where the product is supplied without the reasonable expectation that an examination by the purchaser would be carried out prior to the use of the product.

<sup>1</sup> Malleons Stephen Jaques, *The Beneficial Use of Biosolids in Victoria: A 'legal risk' Management Manual*, July 2003.

<sup>2</sup> *Fitzgerald v Penn* (1954) 91 CLR.

<sup>3</sup> The term "manufacture" and its derivatives in this case mean the same as "produce" and its derivatives.

<sup>4</sup> *Donoghue v Stevenson* [1932] AC 562.

<sup>5</sup> *Donoghue v Stevenson* [1932] AC 562.

## NUISANCE

Nuisance is the substantial and unreasonable interference with another person's use and enjoyment of land. The tort of nuisance does not require fault to be proven and the burden of proof lies with the plaintiff.

Manufacturers and users of biosolids may face potential liability in nuisance if they substantially and unreasonably interfere with the use and enjoyment of another's land. Nuisance actions arise against the controller of land from which the nuisance emanates rather than the supplier. Instances where a manufacturer or user of biosolids may face prosecution under nuisance will be where:

- Adjoining land or groundwater is contaminated as a result of the application of biosolids
- A premises emits an offensive smell, noise, or other nuisance in the form of smoke or dust

Courts understand that the majority of human activities involve a degree of inevitable interference with another's use and enjoyment of land. Therefore, the test to determine whether a nuisance has occurred is whether the interference is substantial and unreasonable. The Court will assess its:

- Nature;
- Intensity;
- Duration;
- Frequency; and
- Cause

### Nuisance Common Law Cases

#### *Rudd v Hornsby Shire Council*<sup>6</sup>

The New South Wales Supreme Court held that a local council was liable in nuisance when, in the course of developing an area, its road and drainage system concentrated more water and run-off into a watercourse than was within the capacity of the watercourse to cope with. The plaintiff's land was subjected to flooding and consequential erosion as a result, rendering his garden unusable and receptive to a pungent sewage odour that permeated the residence.

The court held in favour of the plaintiff and awarded them \$40,000 in damages. It also granted an injunction requiring the council to prevent water discharged from its drainage system flowing on to the plaintiff's land.

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<sup>6</sup> (1975) 31 LGRA 120.

*Don Brass Foundry Pty Ltd v Stead*<sup>7</sup>

The Court stipulated that the test to determine whether an odour constitutes a nuisance is whether the emanations complained of create "an inconvenience materially interfering with the ordinary comfort physically of human existence, not according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions. The case further provides that the law does not indulge mere delicacy or fastidiousness.

*Environment Protection Authority v Shoalhaven Starches Pty Ltd*<sup>8</sup>

Shoalhaven Starches was the occupier of premises that operated six ponds used to store wastewater from their factory operations. One of the ponds became contaminated and emitted two offensive odours. The two EPA officers inspecting the site were significantly affected by the odours, which made them feel significantly ill. Shoalhaven Starches was found to be committing the tort of nuisance and was ordered to pay a penalty of \$125,000.

## Commonwealth

### Key Points

- In the **manufacturing**, using and selling of biosolids, Commonwealth legislation will be applicable and therefore needs to be strictly adhered to.
- Commonwealth legislation is applicable to all states and territories. If there is a conflict between Commonwealth and State legislation then the Commonwealth provision prevails.
- In supplying biosolids to a corporation or person, a producer or seller of Biosolids will need to ensure that it does not act unconscionably in contractual negotiations, misleadingly or deceptively and must refrain from making false representations in regards to their product.
- Biosolids which are being sold by a producer or seller of biosolids must be fit for the agreed purpose, of merchantable quality and corresponding to the supply or description in which they were purchased.
- A producer or seller of Biosolids may be liable to pay compensation or damages if the Biosolids cause injury to individuals or goods because of a defect in the product.

<sup>7</sup> (1948) 48 SR (NSW) 482.

<sup>8</sup> [2006] NSWLEC 685.

### [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#)

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act') requires that certain proposed actions be referred to the Commonwealth Minister for the Environment to consider whether the action amounts to a 'controlled action' under the EPBC Act and therefore require some form of assessment. Where a proposal will have or is likely to have a significant impact on a matter of national environmental significance, that proposal will need to undergo a Commonwealth environmental assessment. Where there is any doubt, a proposal should be referred to the Commonwealth.

The EPBC Act lists six matters which are considered to be "matters of national environmental significance":

- Heritage property (section 12)
- National Heritage place (section 15B)
- Ramsar wetlands of international significance (section 16)
- Listed threatened species and ecological communities (section 18)
- Listed migratory species (section 20)
- Commonwealth marine areas (section 23)

Construction or development of a biosolids treatment plant may be a controlled action under the EPBC Act if it was found to have or be likely to have a significant impact on one or more of the listed matters of national environmental significance. In such a case, environmental assessment would need to be undertaken.

### [Trade Practices Act 1974 \(Cth\)](#)

The Trade Practices Act (TPA) is Australia's key piece of competition legislation. It regulates the trading conduct of corporations, establishes penalties and private rights of action against corporations and creates the Australian Competition and Consumer Commission. The most relevant sections of the TPA for biosolids are parts IVA, V and VA, dealing with unconscionable conduct, consumer protection and defective goods respectively.

Bringing an action under the TPA does not preclude a plaintiff from bringing an action under common law. In addition, similar consumer protection acts also exist in each State jurisdiction and the TPA does not limit the concurrent operation of those State Acts. Therefore, a biosolids producer could face actions under three sources of product liability law.

For the TPA to apply, the supplier must be a corporation, and supply must be 'in trade or commerce' or 'in the course of business'. It is highly likely that all parties dealing with biosolids are 'corporations' for the purposes of the TPA, and the catchment, treatment and retail of biosolids would be in trade or commerce, or in the course of business.

For the TPA to apply, a person must acquire biosolids goods as a 'consumer', meaning:

- The price of the goods does not exceed \$40,000 in value; or
- Where the price of the goods exceeds \$40,000 in value, they are of a kind ordinarily acquired for personal, domestic or household use or consumption.

### Parts IVA and V

Part IVA of the TPA is a codification of the equitable principle of unconscionability. It aims to ensure that agreements between parties are formed in a fair environment by defining conduct or circumstances which are 'unconscionable' or unfair. Part V of the TPA deals with consumer protection and aims to prevent the consumer, who is presumably of less bargaining power in a transaction with a corporation, being treated-unfairly.

A party producing or supplying biosolids products must ensure that:

- it acts fairly when negotiating the supply of biosolids to a consumer or prospective consumer;
- biosolids marketing information is accurate and not likely to mislead or deceive;
- biosolids products are of sufficient or 'merchantable' quality ; and
- biosolids products are fit for the purpose for which they are purchased.

<b>Legislative Provision</b>	<b>Obligation</b>	<b>Suggested Action</b>
<p><u><a href="#">s.51AB</a></u>  <b>Unconscionable conduct</b></p>	<p>(1) A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.</p> <p>(2) Without in any way limiting the matters to which the court may have regard for the purpose of determining whether a corporation</p>	<p>A supplier of biosolids must not act unconscionably as defined by section 51AB(2). A supplier of biosolids should create procedures and guidelines for its contractual negotiations to ensure its employees do not act unconscionably when creating contracts dealing with biosolids.</p>

<b>Legislative Provision</b>	<b>Obligation</b>	<b>Suggested Action</b>
	<p>has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person (in this subsection referred to as the consumer), the court may have regard to:</p> <ul style="list-style-type: none"> <li>(a) the relative strengths of the bargaining positions of the corporation and the consumer;</li> <li>(b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;</li> <li>(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;</li> <li>(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and</li> <li>(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.</li> </ul>	
<p><u>s. 51AC</u> <b>Unconscionable conduct in business transactions</b></p>	<p>(1) A corporation must not, in trade or commerce, in connection with:</p> <ul style="list-style-type: none"> <li>(a) the supply or possible supply of goods or services to a person (other than a listed public company); or</li> <li>(b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company); engage in conduct that is, in all the circumstances, unconscionable.</li> </ul>	<p>A supplier of biosolids must not act unconscionably in conducting business transactions. Section 51AC extends the operation of Part IVA to cover small business transactions, and with additional criteria in paragraphs (3)(f)-(k) creates stricter negotiating conditions.</p>



<b>Legislative Provision</b>	<b>Obligation</b>	<b>Suggested Action</b>
	<p>(2) A person must not, in trade or commerce, in connection with:</p> <ul style="list-style-type: none"> <li>(a) the supply or possible supply of goods or services to a corporation (other than a listed public company); or</li> <li>(b) the acquisition or possible acquisition of goods or services from a corporation (other than a listed public company); engage in conduct that is, in all the circumstances, unconscionable.</li> </ul> <p>(3) Without in any way limiting the matters to which the court may have regard for the purpose of determining whether a corporation or a person (the supplier) has contravened subsection (1) or (2) in connection with the supply or possible supply of goods or services to a person or a corporation (the business consumer), the court may have regard to:</p> <ul style="list-style-type: none"> <li>(a) the relative strengths of the bargaining positions of the supplier and the business consumer; and</li> <li>(b) whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and</li> <li>(c) whether the business consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and</li> <li>(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the business consumer or a person acting on behalf of the business consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and</li> </ul>	<p>When negotiating a contract with a small business (i.e. not a listed public company) a biosolids supplier must ensure the negotiations proceed in accordance with the factors in 51AC(3).</p>

<b>Legislative Provision</b>	<b>Obligation</b>	<b>Suggested Action</b>
	<ul style="list-style-type: none"> <li data-bbox="495 352 1368 448">(e) the amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent goods or services from a person other than the supplier; and</li> <li data-bbox="495 472 1368 600">(f) the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers; and</li> <li data-bbox="495 624 1249 651">(g) the requirements of any applicable industry code; and</li> <li data-bbox="495 675 1368 770">(h) the requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code; and</li> <li data-bbox="495 794 1368 858">(i) the extent to which the supplier unreasonably failed to disclose to the business consumer: <ul style="list-style-type: none"> <li data-bbox="573 874 1346 938">(i) any intended conduct of the supplier that might affect the interests of the business consumer; and</li> <li data-bbox="573 962 1368 1090">(ii) any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer); and</li> </ul> </li> <li data-bbox="495 1114 1368 1209">(j) the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer; and</li> <li data-bbox="495 1217 1368 1345">(ja) whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the business consumer for the supply of the goods or services; and</li> </ul>	

<b>Legislative Provision</b>	<b>Obligation</b>	<b>Suggested Action</b>
	(k) the extent to which the supplier and the business consumer acted in good faith.	
<p><u>s.52</u></p> <p><b>Misleading or deceptive conduct</b></p>	<p>A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.</p>	<p>Producers and suppliers of biosolids must ensure that their conduct does not mislead or deceive or is not likely to mislead or deceive their customers.</p> <p>To ensure a supplier of biosolids does not mislead or deceive consumers, its conduct and representations to consumers should be clear and supported by evidence or agreed upon in full.</p> <p>'<b>Likely</b>' to mislead or deceive means 'having the capacity or tendency to mislead'. It is unnecessary for a plaintiff to prove that the conduct actually misled or deceived.</p> <p>For conduct to be classified as '<b>misleading</b>' it must do more than merely cause confusion or uncertainty; it must lead the person to whom it is directed to an erroneous conclusion as to the products. To determine if conduct is misleading or deceiving the court takes into account surrounding circumstances such as context, price, target audience and causation.</p> <p>'<b>Deception</b>' suggests a form of deliberate action that will lead to error or loss.</p> <p>Possible examples of misleading and deceptive conduct could include the concealing of possible risks and dangers to consumers</p>

<b>Legislative Provision</b>	<b>Obligation</b>	<b>Suggested Action</b>
		regarding the use of biosolids or providing misrepresenting predictions of benefits that have not been tested or proven.
<p><u>s.53</u></p> <p><b>False or misleading representations</b></p>	<p>A corporation shall not, in trade or commerce, in the connection with the supply or possible supply of goods or services, or in connection with the promotion by any means of the supply or use of goods or services:</p> <ul style="list-style-type: none"> <li>(a) falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;</li> <li>(aa) falsely represent that services are of a particular standard, quality, value or grade;</li> <li>(b) falsely represent that goods are new;</li> <li>(bb) falsely represent that a particular person has agreed to acquire goods or services;</li> <li>(c) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;</li> <li>(d) represent that the corporation has a sponsorship, approval or affiliation it does not have;</li> <li>(e) make a false or misleading representation with respect to the price of goods or services;</li> <li>(ea) make a false or misleading representation concerning the availability of facilities for the repair of goods or of spare parts for goods;</li> <li>(eb) make a false or misleading representation concerning the place of origin of goods;</li> </ul>	<p>Producers and suppliers of biosolids in the course of pre-contractual or pre-supply of biosolids must ensure they only provide accurate representations and characteristics regarding their product or service. The list in section 53 defines representations which will breach section 53. No representations should be made to consumers of biosolids that contravene the paragraphs in that list.</p> <p>Of greatest relevance to biosolids producers and suppliers is paragraph (a). To prevent contravention of this section representations made to consumers should be accompanied with certified evidence regarding the standard and quality of the product insofar as it is reasonably practical.</p>

<b>Legislative Provision</b>	<b>Obligation</b>	<b>Suggested Action</b>
	<p>(f) make a false or misleading representation concerning the need for any goods or services; or</p> <p>(g) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.</p>	
<p><u>s.55</u></p> <p><b>Misleading conduct to which Industrial Property Convention applies</b></p>	<p>A person shall not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.</p>	<p>A biosolids producer or supplier must not for the purposes of trade or commerce engage in conduct that reaches the public at large (such as via a public advertisement campaign) that is liable to mislead the public in relation to:</p> <ul style="list-style-type: none"> <li>• The nature of biosolids;</li> <li>• The method by which biosolids are processed;</li> <li>• The characteristics of biosolids. This could include the composition of the product;</li> <li>• Biosolids effectiveness, risks and benefits in land application;</li> <li>• The quantity of biosolids available for consumption, and the percentages of certain materials within the product.</li> </ul>
<p><u>s.69</u></p> <p><b>Implied undertakings as</b></p>	<p>(1) In every contract for the supply of goods by a corporation to a consumer there is:</p> <p>(a) an implied condition that, in the case of a supply by way of sale, the supplier has a right to sell the goods, and, in the case of an agreement to sell or a hire purchase agreement, the supplier will</p>	<p>A biosolids supplier must ensure that they have the right to sell the goods before contracting to do so.</p>

<b>Legislative Provision</b>	<b>Obligation</b>	<b>Suggested Action</b>
<b>to title, encumbrances and quiet possession</b>	have a right to sell the goods at the time when the property is to pass.	
<u>s.70</u> <b>Supply by description</b>	<p>(1) Where there is a contract for the supply (otherwise than by way of sale by auction) by a corporation in the course of a business of goods to a consumer by description, there is an implied condition that the goods will correspond with the description, and, if the supply is by reference to a sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.</p> <p>(2) A supply of goods is not prevented from being a supply by description for the purposes of subsection (1) by reason only that, being exposed for sale or hire, they are selected by the consumer.</p>	<p>Where a contract of sale provides a description of the biosolids to be supplied the supplier must ensure the product corresponds with that description.</p> <p>The meaning of 'description' goes only to the essential nature of the goods and not to the quality unless that is part of the essential nature.</p> <p>Contractual liability will arise where the supplied biosolids do not meet the description provided and as a result the purchaser suffers loss or damage.</p>
<u>s.71</u> <b>Implied undertakings as to quality or fitness</b>	<p>(1) Where a corporation supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business, there is an implied condition that the goods supplied under the contract for the supply of the goods are of merchantable quality, except that there is no such condition by virtue only of this section:</p> <p>(a) as regards defects specifically drawn to the consumer's attention before the contract is made; or</p> <p>(b) if the consumer examines the goods before the contract is made, as regards defects which that examination ought to reveal.</p>	<p>A biosolids supplier must ensure that the biosolids supplied are of merchantable quality. Of '<b>merchantable quality</b>' means that biosolids must be as fit for the purpose for which they are bought as it is reasonable to expect, having regard to the surrounding circumstances including price and any descriptions.</p> <p>Contractual liability will arise where the supplied biosolids are not of merchantable quality and the consumer suffers loss or damage as a result.</p>

<b>Legislative Provision</b>	<b>Obligation</b>	<b>Suggested Action</b>
	(2) Where a corporation supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation or to the person by whom any antecedent negotiations are conducted any particular purpose for which the goods are being acquired, there is an implied condition that the goods supplied under the contract for the supply of the goods are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him or her to rely, on the skill or judgment of the corporation or of that person.	Where a biosolids supplier is informed by the consumer of a particular purpose for which the biosolids are being acquired, and the supplier has concerns about the appropriateness of biosolids for that use, the supplier should address that concern in the contract. Liability will be avoided where a biosolids supplier is aware that there is a defect in the product and informs the consumer. Alternatively, if the consumer examines the biosolids prior to the contract being made and notices a defect.
<u>s.72</u> <b>Supply by sample</b>	Where in a contract for the supply (otherwise than by way of sale by auction) by a corporation in the course of a business of goods to a consumer there is a term in the contract, expressed or implied, to the effect that the goods are supplied by reference to a sample: (a) there is an implied condition that the bulk will correspond with the sample in quality; (b) there is an implied condition that the consumer will have a reasonable opportunity of comparing the bulk with the sample; and (c) there is an implied condition that the goods will be free from any defect, rendering them unmerchantable, that would not be apparent on reasonable examination of the sample.	Where a contract for the sale of biosolids is by sample, the supplier must ensure that the bulk product supplied corresponds with the sample. The consumer must have access to bulk biosolids, which must be free of any defects that an examination of the biosolids sample would not reveal. Contractual liability will arise where bulk biosolids do not correspond with the sample provided and as a result the purchaser suffers loss or damage.
<u>s.74B</u>	Where a corporation in trade or commerce supplies goods produced by the corporation to another person who acquires the goods for re-supply, personal consumption or for a particular purpose made known to the corporation and the goods are not reasonably fit for that	Statutory liability arises where biosolids supplied to a consumer for resupply, personal consumption or a particular purpose known to the supplier are not fit for that purpose. A

<b>Legislative Provision</b>	<b>Obligation</b>	<b>Suggested Action</b>
<b>Actions in respect of unsuitable goods</b>	purpose then the corporation is liable to compensate the consumer.	biosolids supplier who breaches this obligation is liable to compensate the consumer. A biosolids supplier should ensure that a list of purposes for which biosolids are known to be suitable, be available to contract negotiators.
<u>s.74C</u> <b>Actions in respect of false descriptions</b>	<p>(1) Where:</p> <ul style="list-style-type: none"> <li>(a) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply;</li> <li>(b) a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer by description;</li> <li>(c) the goods do not correspond with the description; and</li> <li>(d) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods do not correspond with the description;</li> </ul> <p>the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the corporation in a court of competent jurisdiction.</p> <p>(2) Subsection (1) does not apply if the goods do not correspond with the description referred to in that subsection by reason of:</p> <ul style="list-style-type: none"> <li>(a) an act or default of any person (not being the corporation or a servant or agent of the corporation); or</li> </ul>	<p>Statutory liability arises where biosolids have been supplied to a consumer by description. Where the product does not correspond to the description given resulting in loss to the consumer, the biosolids supplier is liable to compensate.</p> <p>Liability is excluded where the circumstances in section 74C(2) are met.</p> <p>The meaning of the 'description' goes only to the essential nature of the goods and not to the quality unless that is part of the essential nature.</p> <p>To avoid liability, a supplier of biosolids should disseminate relevant information to its contract negotiators to ensure accurate descriptions of biosolids are provided to consumers.</p>



<b>Legislative Provision</b>	<b>Obligation</b>	<b>Suggested Action</b>
	(b) a cause independent of human control; occurring after the goods have left the control of the corporation.	
<b>s.74D:</b>  <b>Actions in respect of goods of unmerchantable quality</b>	<p>(1) Where:</p> <p>(a) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply;</p> <p>(b) a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer;</p> <p>(c) the goods are not of merchantable quality; and</p> <p>(d) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods are not of merchantable quality;</p> <p>the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the corporation in a court of competent jurisdiction.</p> <p>(2) Subsection (1) does not apply:</p> <p>(a) if the goods are not of merchantable quality by reason of:</p> <p>(i) an act or default of any person (not being the corporation or a servant or agent of the corporation); or</p> <p>(ii) a cause independent of human control;</p>	<p>Statutory liability arises where biosolids are not of merchantable quality.</p> <p>'Of merchantable quality is defined in section 74D(3).</p> <p>Liability will be excluded if the circumstances in section 74D(2) are met.</p> <p>Biosolids suppliers must ensure that their product fulfils the purpose for which it is commonly bought. Presuming land application to improve soil quality is a purpose for which biosolids are commonly purchased, then the product must improve soil quality.</p>

<b>Legislative Provision</b>	<b>Obligation</b>	<b>Suggested Action</b>
	<p>occurring after the goods have left the control of the corporation;</p> <p>(b) as regards defects specifically drawn to the consumer's attention before the making of the contract for the supply of the goods to the consumer; or</p> <p>(c) if the consumer examines the goods before that contract is made, as regards defects that the examination ought to reveal.</p> <p>(3) Goods of any kind are of merchantable quality within the meaning of this section if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to:</p> <p>(a) any description applied to the goods by the corporation;</p> <p>(b) the price received by the corporation for the goods (if relevant); and</p> <p>(c) all the other relevant circumstances.</p>	
<p><u>s.74E</u></p> <p><b>Actions in respect of non-correspondence with samples etc.</b></p>	<p>(1) Where:</p> <p>(a) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for resupply;</p> <p>(b) a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer;</p> <p>(c) the goods are supplied to the consumer by reference to a sample;</p> <p>(d) the bulk of the goods does not correspond with the sample in</p>	<p>Statutory liability arises where biosolids are supplied to consumers by sample, but the bulk of the product does not correspond with the sample provided to the consumer. The supplier will be liable to compensate the consumer for any loss or damage suffered. Liability may be excluded if the circumstances in s 74E(2) are met. Biosolids suppliers must ensure that samples provided to potential customers correspond with the bulk product to be supplied.</p>

<b>Legislative Provision</b>	<b>Obligation</b>	<b>Suggested Action</b>
	<p>quality or the goods have a defect, rendering them unmerchantable, that is not, or would not be, apparent on reasonable examination of the sample; and</p> <p>(e) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the bulk does not correspond with the sample in quality or by reason that the goods have that defect;</p> <p>the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the loss or damage by action against the corporation in a court of competent jurisdiction.</p> <p>(2) Subsection (1) does not apply where:</p> <p>(a) the failure of the bulk of the goods to correspond with the sample in quality or the existence of the defect is due to:</p> <p>(i) an act or default of any person (not being the corporation or a servant or agent of the corporation), or a cause independent of human control, occurring after the goods have left the control of the corporation; or</p> <p>(ii) other circumstances that were beyond the control of the corporation and that it could not reasonably be expected to have foreseen.</p>	
<p><u>s.74G</u></p> <p><b>Actions in</b></p>	<p>(1) Where:</p> <p>(a) a corporation, in trade or commerce, supplies goods (otherwise than by way of sale by auction) manufactured by the corporation to a consumer; or</p>	<p>Statutory liability arises where a biosolids supplier fails to comply with an express warranty provided with their product. 'Express warranty' is defined in section 74A to include an assertion or representation made in</p>

<b>Legislative Provision</b>	<b>Obligation</b>	<b>Suggested Action</b>
<b>respect of non-compliance with express warranty</b>	<p>(b) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply and a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer; and:</p> <p>(c) the corporation fails to comply with an express warranty given or made by the corporation in relation to the goods; and</p> <p>(d) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason of the failure;</p> <p>The corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the corporation in a court of competent jurisdiction.</p> <p>(2) For the purposes of any action instituted by a person against a corporation under this section, where:</p> <p>(a) an undertaking, assertion or representation was given or made in connection with the supply of goods or in connection with the promotion by any means of the supply or use of goods; and</p> <p>(b) the undertaking, assertion or representation would, if it had been given or made by the corporation or a person acting on its behalf, have constituted an express warranty in relation to the goods;</p> <p>it shall be presumed that the undertaking, assertion or representation was given or made by the corporation or a person acting on its behalf</p>	<p>the supply or promotion of goods in relation the quality, performance or characteristics of the goods.</p> <p>Liability may be excluded where a biosolids supplier can prove that the undertaking, assertion or representation made to the consumer was not made or not permitted to be made by the supplier.</p> <p>A biosolids supplier should ensure that where a warranty is provided to a consumer, where required, the warranty is fulfilled.</p>

<b>Legislative Provision</b>	<b>Obligation</b>	<b>Suggested Action</b>
	unless the corporation proves that it did not give or make, and did not cause or permit the giving or making of, the undertaking, assertion or representation.	

**Trade Practices Act 1974 (Cth)**

**Part VA**

Part VA of the TPA deals with the liability of producers for product defects causing loss, injury or death. In cases where a biosolids product defect caused such consequences, the producer will be liable to compensate the victim. The section also establishes defences and the role of product safety standards in relation to product liability.

<b>Legislative Provision</b>	<b>Obligation</b>	<b>Suggested Action</b>
<p><u>s.75AD</u></p> <p><b>Liability for defective goods causing injuries - loss by injured individual</b></p>	<p>If:</p> <ul style="list-style-type: none"> <li>(a) a corporation in trade or commerce, supplies goods manufactured by it; and</li> <li>(b) they have a defect; and</li> <li>(c) because of the defect, an individual suffers injuries.</li> </ul> <p>Then:</p> <ul style="list-style-type: none"> <li>(a) the corporation is liable to compensate the individual for the amount of the individual's loss suffered as a result of the injuries; and</li> <li>(b) the individual may recover that amount by action against the corporation; and</li> <li>(c) if the individual dies because of the injuries - then a law of a State or Territory about liability in respect of the death of individuals applies as if:</li> </ul>	<p>Statutory liability will arise where produced biosolids cause an individual to suffer injury. Biosolids producers must ensure their produced product contains no defects which could cause injury or death.</p>

<b>Legislative Provision</b>	<b>Obligation</b>	<b>Suggested Action</b>
	<ul style="list-style-type: none"> <li>(i) the action were an action under the law of the State or Territory for damages in respect of the injuries;</li> <li>(ii) the defect were the corporations wrongful act, neglect or default.</li> </ul>	
<p><u>s.75AE</u></p> <p><b>Liability for defective goods causing injuries - loss by person other than injured individual</b></p>	<p>If:</p> <ul style="list-style-type: none"> <li>(a) a corporation in trade or commerce, supplies goods manufactured by it;</li> <li>(b) they have a defect;</li> <li>(c) because of the defect, an individual suffers injuries;</li> <li>(d) a person, other than the individual, suffers loss because of: <ul style="list-style-type: none"> <li>(i) the injuries; or</li> <li>(ii) if the individual dies because of the injuries - the individual's death; and</li> </ul> </li> <li>(e) the loss does not come about because of a business relationship between the person and the individual.</li> </ul> <p>Then:</p> <ul style="list-style-type: none"> <li>(a) the corporation is liable to compensate the person for the amount of the person's loss;</li> <li>(b) the person may recover that amount by action against the corporation.</li> </ul>	<p>Statutory liability will arise where produced biosolids cause an individual to suffer injury or death and that causes another to suffer loss other than in a business relationship. Biosolids producers must ensure their produced product contains no defects which could cause injury or death.</p>

<b>Legislative Provision</b>	<b>Obligation</b>	<b>Suggested Action</b>
<p><u>s.75AN</u></p> <p><b>Contributory acts or omissions to reduce compensation</b></p>	<p>If the loss in a liability action under section 75AD or 75AE was caused by both</p> <p>(a) an act or omission of the individual who suffers the injuries concerned; and</p> <p>(b) a defect of the action goods.</p> <p>The amount of the loss is to be reduced to such extent as the court thinks fit having regard to that individual's share in causing the loss.</p>	<p>If a biosolids producer is facing a liability action under section 75AD or 75AE, legal advice should be sought to determine whether the plaintiff or another party contributed to the loss.</p>
<p><u>s.75AK</u></p> <p><b>Defences</b></p>	<p>(1) In a liability action, it is a defence if it is established that:</p> <p>(a) the defect in the action goods that is alleged to have caused the loss did not exist at the supply time; or</p> <p>(b) they had that defect only because there was compliance with a mandatory standard for them; or</p> <p>(c) the state of scientific or technical knowledge at the time when they were supplied by their actual manufacturer was not such as to enable that defect to be discovered; or</p> <p>(d) if they were comprised in other goods ( finished goods )--that defect is attributable only to:</p> <p>(i) the design of the finished goods;</p> <p>(ii) the markings on or accompanying the finished goods; or</p> <p>(iii) the instructions or warnings given by the manufacturer of the finished goods.</p>	<p>If a biosolids producer is facing a liability action under the <i>Trade Practices Act 1974</i>, legal advice should be sought to determine whether any defences can be established.</p>
<p><u>s.75AZS</u></p>	<p>(1) If:</p> <p>(a) a corporation, in trade or commerce, supplies goods; and</p>	<p>The criminal offence of section 75AZS is one of strict liability, meaning the only defence available is that of 'honest and reasonable</p>

<b>Legislative Provision</b>	<b>Obligation</b>	<b>Suggested Action</b>
<b>Product safety standards and unsafe goods</b>	<p>(b) the goods are intended to be used, or are of a kind likely to be used, by a consumer; and</p> <p>(c) the goods are of a kind:</p> <p>(i) in respect of which there is a consumer product safety standard prescribed by regulations made for the purposes of section 65C and which do not comply with that standard; or</p> <p>(ii) in respect of which there is in force a notice under section 65C declaring the goods to be unsafe goods; or</p> <p>(iii) in respect of which there is in force a notice under section 65C imposing a permanent ban on the goods;</p> <p>The corporation is guilty of an offence punishable on conviction by a fine not exceeding 10,000 penalty units.</p> <p>(2) Subsection (1) is an offence of strict liability.</p> <p>(3) A corporation must not export goods whose supply in Australia would constitute an offence against subsection (1). Penalty: 10,000 penalty units.</p> <p>(4) Subsection (3) does not apply if the Minister has, by written notice given to the corporation, approved the export of the goods under subsection 65C(3).</p> <p>(5) Subsection (3) is an offence of strict liability.</p>	<p>mistake of fact'. Doing an act which falls within the circumstances of subsection (1) unintentionally or accidentally is no defence. A biosolids producer breaching section 75AZS must prove that it held an honest and reasonable belief in a state of affairs which, had it existed, would render the supplier's act innocent.</p> <p>A biosolids producer should consistently monitor product safety standards and ACCC notices on unsafe and banned goods.</p>