Svantesson on the Law of Obligations

SVANTESSON ON THE LAW OF OBLIGATIONS

4th edition (Revised)

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Foreword by Professor Nick James

The Centre for Professional Legal Education at Bond University is a community of legal educators, researchers, practitioners and administrators who collaborate in defining, understanding and promoting best practice in the teaching of law. We facilitate, encourage and promote high quality legal education through the publication of legal education research as well as the development and provision of legal education resources, information, events and training.

We in the Centre recognize that the textbook plays a central role in the quality and rigour of a law student's educational journey. A good textbook is more than just one of a range of learning resources. In many instances the textbook forms the core of the learning experience. It provides the detail unable to be addressed in class. It provides much needed structure and coherence to the overall subject. It can engage and inspire and motivate students. And the reality is that for many students, more time is spent reading the textbook each week than is spent in class or engaging with other resources. The importance of the textbook should not be underestimated or understated.

The Centre therefore endeavours to provide its members and other academics with resources and support needed to help them create and publish high quality textbooks. We are particularly proud to publish this, the latest edition of *Svantesson on the Law of Obligations* by Professor Dan Svantesson. Dan is a highly regarded and internationally successful legal scholar, and the Centre – as well as law students generally – are fortunate that he has taken the time to draw upon his extensive knowledge of private law to carefully craft such a useful text. The book was first published by Pearson Education in 2007, and this is now the fourth edition. It is a comprehensive, up-to-date, and extensively researched resource for students engaging with an area of private law central to their education in the law and preparation for legal practice.

Dan has taken an innovative approach to the subject matter. Contract law and tort law are typically taught separately, siloed within law school curricula in a manner that is quite artificial and inconsistent with the way the law is in fact practiced, administered and enforced. By approaching the subject matter of the text via the 'Law of Obligations', Dan is able to showcase the many ways in which contract law and tort law intersect and overlap. The book is also innovative in its recurring theme: the ways in which the law seeks to balance the need to uphold party autonomy and the need to limit party autonomy due to various public policy concerns such as the protection of the weaker party or the need for contracts to be effective.

The structure of the textbook has been carefully and thoughtfully planned and is user friendly without oversimplifying the complex content. Each chapter begins with a 'Rule' representing a codification of the common law as it stands. This provides students with an accessible overview or 'map' of the relevant area of law before they are presented with the actual sources of the law, i.e. the relevant cases. The typical approach elsewhere is to move from a focus on the micro issues (principles extracted from cases) to the macro issues (a comprehensive picture). Dan's book goes from macro issues to micro issues, thereby providing the reader with an immediate appreciation of how the relevant area of law operates and of how the concepts and principles identified from the cases interrelate.

Dan is to be congratulated for creating a textbook that supports students to engage with the highly complex concepts that form the foundation for advanced legal study and legal practice, and for approaching the subject matter in a way that breaks down the traditional boundaries between doctrinal areas, thereby making the students' learning experience more authentic and more closely aligned with the realities of legal practice.

Professor Nick James
Executive Dean of the Faculty of Law at Bond University & Co-Executive Director of the Centre for Professional Legal Education

Acknowledgements

Several people have helped make this OER textbook, as well as the earlier editions of it, possible. This is my chance to thank them. First, I would like to thank Ian Edwards and Antoinette Cass who have guided me through the process and done all the heavy work involved in converting the text to the required format. I also thank Kana Nakano who provided research assistance for this – the fourth – edition, as well as the research assistants who worked on the first three editions: Alysha Bayes, Thomas Berger, Shane Cooper, William Ewing, Loren Holly, Steven Jamieson, Carly Johnston, Nitay-Yair Levi, Wilhelmina Masih, Madeline Taylor, and Weerapoln Wasuruj (Joey).

I thank Nick James – Executive Dean of the Faculty of Law at Bond University & Co-Executive Director of the Centre for Professional Legal Education – for the wonderful and insightful foreword.

Further, I thank my colleagues Jim Corkery and Brenda Marshall for their valuable feedback on earlier editions, and William Van Caenegem, Umair Ghori, and Laura-Leigh Cameron-Dow for many interesting discussions on topics covered in this book.

I want to thank the talented group of students who I have had the pleasure of working with in 'Contracts Law B' and in the 'Law of Obligations' at Bond University, for their helpful and insightful comments on early drafts of this book and its earlier edition.

Finally, I want to thank my wife, Bianca, my daughter Freja, son Felix, and my dog Fenris, for their patience and support.

In addition to these conventional acknowledgements (as in expressions of my gratitude), I also want to make another type of acknowledgement and stress something that teachers seemingly rarely tell their students; our views of the law may change. Sometimes, such change is limited to a new way of articulating the law. Not least with many of the areas of law covered in this book, one commentator may choose to express the law as involving three "steps", while another expresses the law in involving four "steps" – be wary of those who claim their way is the only way.

On other occasions, our views of the law change more fundamentally. Since writing this fourth edition, I have published two journal articles within the topic of this book. One (written with Kana Nakano and William Van Caenegem) addresses misleading or deceptive conduct, and another written in honour of my former colleague Denis Ong, on unconscionability. While the former mainly expands on themes already found in this book, the latter includes some departures from how I thought about the law when writing this edition. I encourage all students to remain open to re-examining their views from time to time not just during law school but throughout your careers.

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Neal v Ayers (1940) 63 CLR 524
Nelson v Nelson (1995) 184 CLR 538
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Tenth Cantanae Pty Ltd v Shoshana Pty Ltd (1987) 79 ALR 299
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Sale of Goods Act 1893 (UK)
Unfair Terms in Consumer Contracts Regulations 1999 (UK)
The Uniform Commercial Code (U.S.A)
United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April, 1980)
The Sherman Act 1890 (U.S.A.)

1. Introduction to the Law of Obligations

> *"In the absence of large-scale codification or substantial legislative change, and the law of obligations has seen neither, the inventing of the new is rarely combined with the discarding of the old. However inconvenient or inconsistent, centuries-old rules, principles, and doctrines can remain in place, as quaint survivals from the past or as traps for the unwary in the future, sometimes encrusted by so many exceptions that their original functions are wholly undermined. Invariably, of course, there is sufficient flexibility in the application of the law to ensure that it does not routinely produce injustice; and the use of open-ended standards of 'reasonableness' and the like allows the law to adopt continuously and painlessly to shifting social standards. The real cost is an ever-increasing, and unnecessary, complexity."*[1]

1.1 What is the Law of Obligations?

There is no, and arguably can be no, exact definition of what the "law of obligations" encompasses. Indeed, the "law of obligations" is given different interpretations in different contexts.

In some Civil Law countries, the concept is widely accepted and refers to a relatively well-defined area of law. For example, in German law, the law of obligations (*Schuldrecht*) can arguably be separated from other areas of law by reference to the fact that the German Civil Code (*Bürgerliches Gesetzbuch*) has a separate Book on the law of obligations. In other Civil Law countries, such as Sweden, the concept's definition is less certain.[2]

In Common Law countries like Australia, reference is seldom made to a "law of obligations", and unlike their European counterparts, most Australian law degrees do not include a subject on the law of obligations. Instead, Common Law countries traditionally seem to have taken the view that it is possible, and desirable, to draw a clear distinction between the various areas of law making up the law of obligations.

One legal dictionary defines the law of obligations as:

> An umbrella term for contract, tort and restitution. The phrase is sometimes used to reflect the theory that there is not a general law of contract, tort, or restitution; rather, there is a general law of obligations, which is manifested in particular forms of contracts, torts, and responses to unjust enrichment.[3]

The term the "law of obligations" is consequently imprecise and can rightfully be criticised as being no more than "a name for a bundle of rules that on the whole have little in common."[4] On the other hand, the concept is very useful in bringing attention to the existing, and indeed increasing, overlap between various areas of civil law. Despite the impression one may get from law school curricula, it is, for example, not always clear where contract law starts and torts law ends. Furthermore, with legislation such as the *Competition and Consumer Act 2010* (Cth) affecting both contract law and torts law, the boundaries are being blurred, and the necessity of viewing contract law and torts law as parts of something larger becomes both clear and indisputable. Indeed, with the significant increase in how various forms of consumer protection law affects contract law and torts law in recent years, it could be argued that the distinction between public and private law is also becoming less clear.

This book focuses on how Australian law addresses a selection of particularly interesting topics falling within the "law of obligations".[5] The topics addressed include common law rules of contract, tort and, to an extent, restitution. They also include certain principles of equity and relevant statutory rules as found in, for example, the *Competition and Consumer Act 2010* (Cth) and the various *Sale of Goods Acts*.

1. DJ Ibbetson, A Historical Introduction to the Law of Obligations (Oxford: Oxford University Press, 1999), at 294.
2. J Hellner, "The Law of Obligations and the Structure of Swedish Statute Law" Scandinavian Studies in Law Vol 40.
3. P Nygh and P Butt, Butterworths Concise Australian Legal Dictionary (Sydney: Butterworths, 1998).
4. J Hellner, The Law of Obligations and the Structure of Swedish Statute Law, Scandinavian Studies in Law Vol 40, at 336.
5. This book does not give general introductions to contract law, torts law or the law of remedies. Further, it does not discuss, for example, contract formation, as such, and the reader is presumed to have a solid understanding of the law in general and the basics of contract law, tort law and the law of remedies in particular. The law of obligations covered here could, thus, be seen as dealing with what commonly is perceived to be the law of obligations, except those areas that typically are covered in introductory subjects on contract law, tort law and the law of remedies.

1.1.1 The overriding theme

One recurring theme throughout the law of obligations is the constant balancing of the need to uphold party autonomy, on the one hand, and the need for limiting party autonomy due to various public policy concerns. In more detail, the public policy issue referred to can be divided into three separate categories:

1) the protection of the weaker party;
2) the need for contracts to be effective; and
3) other public policy considerations.

If expressed in the form of the "Rules" used in this book to summarise the law (see 1.2.3), the overriding theme of the law of obligations could be described as follows:

Rule 1

1. The parties' autonomy to determine the content, form and effect of their contract may be limited only where such a limitation is necessary in order to:

(a) provide justified protection of the weaker party to the contract;

(b) give the contract attributes needed for it to be enforceable; or to

(c) achieve other justified public policy objectives.

2. The limitation of party autonomy envisaged in Article 1 must be proportionate to the aims the limitation seeks to achieve.

As expressed in Rule 1, the parties' right to determine their respective obligations should not be lightly disturbed. In fact, at least one learned scholar has gone as far as to suggest a "human rights basis for party autonomy".[6] At the same time, as also is expressed in this Rule, there are overwhelming public policy reasons motivating the restriction of party autonomy. The Chapters below all relate to how Australian law seeks to balance those public policy reasons against party autonomy.

6. P Nygh, The Reasonable Expectation of the Parties as a Guide to the Choice of Law in Contract and in Tort, 251 Recueil des cours (1995), at 303.

1.2 About the book

In 1799, the Chancellor of Uppsala University (Sweden), Count Axel von Fersen, wrote that: "one ought to prevent that too many people choose the path of learning ... by making that path long and difficult, and thereby discouraging them, so that they remain farmers or craftsmen."[1] This book takes the completely opposite view, and is aimed at making the relevant legal principles as accessible as possible, to as wide a range of people as possible.

Where the book is used for teaching purposes, it should be noted that it is not intended to be used in isolation. The book is aimed at giving an overview of the relevant legal principles, and at constituting the point of departure for both further research and for class discussions.

1.2.1 The jurisdictional scope of the book

The book addresses the relevant Australian law on the topics covered. However, in discussing those pieces of legislation that are virtually identical amongst the Australian States and Territories (e.g., the various *Sale of Goods Acts*), it mainly refers to the relevant Queensland Acts.

1.2.2 The use of cases

While the influence of statutory law is increasing in Australia, case law is arguably still the most important source of law as far as the law of obligations is concerned. Indeed, many of the principles dealt with originate in cases decided several decades ago. Thus, one of the major challenges facing students of the law of obligations is to remember what each relevant case deals with; or perhaps more importantly, which case is relevant in relation to a particular topic.

To assist with this, care has been taken to include some central background facts about all key cases mentioned in the book.

1.2.3 The "Rules" found in this book

Students of law are constantly faced with the difficult task of developing an understanding of complex legal concepts and principles. The way such concepts and principles are presented to the students vary from teacher to teacher. However, typically, students in Common Law countries are introduced to key cases and the teacher assists them to identify the relevant legal concepts and principles flowing from those cases. After the examination of the key cases students are assumed, or assisted, to understand:

> 1) How the concepts and principles identified from the cases interrelate; and
> 2) How the concepts and principles identified from the cases create a comprehensive system of regulation.

The development of this approach is natural in, and its prevalence typical of, a country following the Common Law tradition where case law historically was the dominant source of law.

1. H Lindqvist, Axel von Fersen (Rimbo: Fisher & Co, 1991), at 200. Original text in Swedish: "man borde förhindra att alltför många går den lärda vägen [...], genom att göra denna väg lång och svår, och därigenom avskräck dem, så att de förblir jordbrukare eller hantverkare."

This book turns that process around and starts by providing a "map" of how the relevant concepts and principles within a particular area of law interrelate and create a comprehensive system of regulation. In other words, while the typical Common Law approach is to go from micro issues to macro issues, this book goes from macro issues to micro issues. This way the reader gets an immediate appreciation of the "bigger picture" of how the relevant area of law operates and of how the concepts and principles identified from the cases interrelate.

To provide that "map", each chapter/part contains a "Rule" representing, in a sense, a proposed codification (i.e., expressed as articles in a piece of legislation) of the common law as it stands. The so-called "Rules" outlined in this book are consequently nothing but a convenient expression of the relevant legal principles that flow from common law, or other sources of law.

Constructing such "Rules" can be difficult and controversial as the relevant legal principles are not always undisputed. Thus, to an extent, the author has been forced to favour one possible interpretation of present rules over another possible interpretation. While they hopefully provide a convenient summary of the relevant legal principles, the reader must consequently approach the "Rules" with some caution.

1.3 Relevant legislation - The Sale of Goods Acts

Like most other Common Law countries, Australia currently lacks a comprehensive code addressing the legal issues falling within the scope of this book. Instead, in addition to the relevant case law, the reader must take account of a patchwork of partly overlapping legislative initiatives. While there is a range of different pieces of legislation that are of relevance for the law of obligations in Australia, there are two legislative initiatives of primary importance: the *Sale of Goods* Acts, and the *Competition and Consumer Act 2010* (Cth).

In writing the book, a conscious decision was made to reproduce the relevant legislative provisions in full. This approach was taken with an aim to ensure a greater familiarity with, and deeper understanding of, the relevant provisions. Such a familiarity and understanding cannot be gained merely by reading a summary of the relevant provisions, and students must be trained in identifying the core of lengthy and complex statutory provisions. In the light of the extraordinarily complex drafting style used for parts of the *Competition and Consumer Act 2010* (Cth), few statutes are better suited for such training.

Further, the reader of a summary is likely to miss out on some aspects of the statutory provision that has been summarised. Indeed, if a statutory provision can be summarised (i.e., expressed more briefly), without any loss of content or nuances, then the original drafting of that provision is poorly done. Therefore, most of the time, it is preferable to read the original provision rather than a summary of it.

1.3.1 The Sale of Goods Acts

The Sale of Goods Acts are primarily discussed in the context of so-called implied terms (see Chapter 2 below). These are terms that, although not expressly (by the articulated choice of the parties) forming part of the contract, nevertheless form part of it by implication.

The Sale of Goods Acts found in Queensland,[1] New South Wales,[2] Victoria,[3] South Australia,[4] Western Australia,[5] the Australian Capital territory,[6] the Northern territory[7] and Tasmania,[8] are all mirrored upon the *Sale of Goods Act 1893* (UK). This UK Act is, in turn, largely based on (and indeed is, to an extent, a codification of) the so-called *lex mercatoria* – the custom and usage of merchants, which were, as a result of judicial recognition, accepted into the common law of England. The *Sale of Goods Act* of Queensland, which is the focal point below, dates back to 1896, but has been amended several times since.

The *Sale of Goods Act* (SGA) addresses a range of legal issues associated with the sale of goods. For example, it contains rules regarding formation of contracts, effect of contracts (e.g., passing of risk), performance of contracts and effect of breaches. As far as this book is concerned, however, the Act is only relevant in relation to so-called implied terms (discussed in 2.5).

The scope of the SGA could be said to be defined in its s. 4(1): "A contract of sale of goods is a contract

1. Sale of Goods Act 1896 (Qld).
2. Sale of Goods Act 1923 (NSW).
3. Sale of Goods Act 1958 (Vic).
4. Sale of Goods Act 1895 (SA).
5. Sale of Goods Act 1895 (WA).
6. Sale of Goods Act 1954 (ACT).
7. Sale of Goods Act 1972 (NT).
8. Sale of Goods Act 1896 (TAS).

whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the 'price'." This provision is discussed in more detail below (see 2.5.1). Now Chapter 2.5

1.4 The Competition and Consumer Act 2010 (Cth)

To understand the application of the comparatively recently introduced *Competition and Consumer Act 2010* (Cth), it is important to be aware of its history and origins.

1.4.1 Background

The *Competition and Consumer Act 2010* (Cth) replaced an earlier piece of legislation titled *Trade Practices Act 1974* (Cth) (TPA). In doing so, it adopted a structure similar to the TPA and indeed, many of the provisions of the *Competition and Consumer Act 2010* (Cth) are similar, or virtually identical to the corresponding provisions of the TPA. Consequently, it may be necessary to take account of case law decided under the TPA when interpreting and/or applying the provisions of the *Competition and Consumer Act 2010* (Cth). However, care must be taken to distinguish those precedents that are based on aspects of the TPA that have been altered in the *Competition and Consumer Act 2010* (Cth). This situation, typical of periods of law reform, means that lawyers practising in this field must be aware of the law as it previously stood to be able to assess the validity now, of judgments decided prior to the introduction of the *Competition and Consumer Act 2010* (Cth).

The TPA regulated several aspects of the law of obligations including: implied terms, illegality and several issues going to consent. Furthermore, the TPA was of central importance in the context of false, misleading and deceptive conduct. In other words, every area discussed in this book was affected by the TPA.

Introduced in the form it had when replaced by the *Competition and Consumer Act 2010* (Cth) in 1974, the TPA was first enacted as the *Trade Practices Act 1965* (Cth). The Act of 1965 was modelled upon the US Sherman Act and was thus primarily focused on 'horizontal' anti-competitive conduct such as cartels. The threefold objectives of the TPA were stated in s. 2: "The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection."

While the TPA proved to be a rather effective statute in several regards, its complex structure may be seen as evidence of the Act having tried to achieve too many different aims. It would perhaps have been better to introduce separate instruments addressing separate areas. However, that was clearly not the approach preferred in 1974.

Being a federal instrument limited by the Constitution, the TPA was supplemented by state-based legalisation. At their core, the *Fair Trading Acts* of the different states, such as the *Fair Trading Act 1989* (Qld) (FTA), largely mirrored the consumer protection provided in the TPA. However, some differences existed between the various *Fair Trading Acts*.

The *Fair Trading Acts* came about as a result of increasing recognition of the need for nationally uniform consumer protection legislation. The objective of the *Fair Trading Act 1989* (Qld) was outlined in s. 3: "The principal objective of this Act is to provide for an equitable, competitive, informed and safe market place."

Each state's *Fair Trading Act* was limited in its application to that state. However, as is clear in what was s. 4 of Queensland's *Fair Trading Act*, particularly through s. 4(2), the application was nevertheless rather broad:

Fair Trading Act 1989 **(Qld), s. 4**

(1) This Act applies to every person who does an act or makes an omission in Queensland that constitutes a contravention of this Act.

(2) Where acts or omissions occur that would constitute a contravention of this Act if they all occurred in Queensland and any of the acts or omissions occur in Queensland, the person who does the act or makes the omission shall be taken to have committed that contravention of this Act.

(3) Subsections (1) and (2):

(a) shall not be construed as limiting any application that this Act has apart from this section; and

(b) shall be construed subject to any provisions of this Act expressly to the contrary.

The *Competition and Consumer Act 2010* (Cth), which then replaced the TPA, introduced the Australian Consumer Law. This resulted in changes to the various state and territory Fair Trading Acts. For example, Queensland's *Fair Trading Act* now states that the Australian Consumer Law, as a law of Queensland, applies to:

(a) persons carrying on business within this jurisdiction; or
(b) bodies corporate incorporated or registered under the law of this jurisdiction; or
(c) persons ordinarily resident in this jurisdiction; or
(d) persons otherwise connected with this jurisdiction.[1]

Therefore, the introduction of the Australian Consumer Law has reformed the TPA (and various Fair Trading Acts') prohibitions. For example, many of the Australian Consumer Law provisions apply to, and regulate the behaviour of, 'a person'. In contrast, the TPA was commonly focused on regulating the behaviour of 'a corporation'. This broadening of the scope of application is significant as it means that the ACL applies to both natural persons and to legal persons: "The provisions of the ACL apply to all persons – whether they are individual persons or bodies corporate – as it will be a law both of the Commonwealth and of each State and Territory."[2]

1.4.2 The aim of the *Competition and Consumer Act 2010* (Cth)

Section 2 of the *Competition and Consumer Act 2010* (Cth) states that "The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection." Thus, its aim is the same as the aim of its predecessor. However, one important aim of the Act, not mentioned here, is the harmonisation it provides within Australia.

1.4.3 The Australian Consumer Law

The most important part of the *Competition and Consumer Act 2010* (Cth) is the so-called Australian Consumer Law ("ACL"), which is found in Schedule 2 of the Act. That Schedule contains 316 sections, many of which are virtually identical to provisions previously found in the TPA. However, it also contains important differences to the previous regulatory scheme.

The ACL will be the focal point for large parts of this book.

While, as noted, the Trade Practices Act itself has been repealed and replaced by Competition and Consumer Act, some case law stemming from the Trade Practices Act remain relevant. Consequently, it is useful to be aware of the corresponding or comparative provisions of the current ACL and the previous *Trade Practices Act 1974* (Cth). The following table illustrates this:

1. Fair Trading Act 1989 (Qld) s. 20.
2. Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010 (Cth) 37 [3.9].

Comparative provisions of the Australian Consumer Law and Trade Practices Act 1975 (Cth)

Provision Title	**Australian Consumer Law**	***Trade Practices Act 1974* (Cth)**
Related bodies corporate	6	4A(5)
Consumers	3	4B
Acquisition, supply and re-supply	11	4C
Loss or damage to include injury	13	4K
Unconscionable conduct within the meaning of the unwritten law	20	51AA
Unconscionable conduct	21	51AB
Unconscionable conduct in business transactions	22	51AC(3)
Misleading representations with respect to future matters	4	51A
Misleading or deceptive conduct	18	52
False or misleading representations about goods or services	29	53
False or misleading representations about sale etc of land	30	53A
Misleading conduct relating to employment	31	53B
Single price to be specified in certain circumstances	48	53C
Offering rebates, gifts, prizes etc	32	54
Misleading conduct as to the nature etc of goods	33	55
Misleading conduct as to the nature etc of services	34	55A
Bait advertising	35	56
Referral selling	49	57
Wrongly accepting payment	36	58
Misleading representations about certain business activities	37	59
Harassment and coercion	50	60
Unsolicited cards etc	39	63A
Assertion of right to payment for unsolicited goods or services	40	64
Liability etc of recipient for unsolicited goods	41	65
Application to information providers	19, 38	65A
Pyramid schemes	44–46	65AAA–65AAE
Provisions relating to country of origin representations	254–258	65AB–65AN
Safety warning notices	129, 130	65B, 65S
Interim bans	109–113	65C
Permanent bans	114–117	65C
Supplying etc consumer goods covered by a ban	118	65C
Safety standards	104–108	65C, 65E
Information standards	134–137A	65D, 65E
Compulsory recall of consumer goods	122–127	65F–65H
Notification requirements for a voluntary recall of consumer goods	128	65R
Liability under a contract of insurance	133	65T
Convention on Contracts for the International Sale of Goods	68	66A
Conflict of laws	67	67
Guarantees not to be excluded etc by contract	64	68
Limitation of liability for failures to comply with guarantees	64A	68A
Guarantees as to title, undisturbed possession and undisclosed securities etc	51–53	69
Guarantee relating to the supply of goods by description	56	70

Guarantees as to acceptable quality and fitness for any disclosed purpose etc	54, 55	71
Guarantees relating to the supply of goods by sample or demonstration model	57	72
Linked credit contracts; Non-linked credit contracts	278–287	73
Continuing credit contract	14	73A
Definition of 'loan contract'	2	73B
Guarantee as to due care and skill; fitness for a particular purpose etc (services)	60, 61	74
Meaning of manufacturer	7	74A
Goods affixed to land or premises	8	74A(8)
Guarantee as to repairs and spare parts	58	74F
Guarantee as to express warranties	59	74G
Indemnification of suppliers by manufacturer	274	74H
This Part not to be excluded etc by contract	276	74K
Limitation in certain circumstances of liability of manufacturer to seller	276A	74L
Actions for damages against manufacturer of goods	271-273	74A-74M
Meaning of safety defect in relation to goods	9	75AC
Actions against manufacturers for goods with safety defects	138-142	75AD-75AG, 75AK
Time for commencing defective good actions	143	75AO
Liability joint and several	144	75AM
Survival of actions	145	75AH
No defective goods actions where workers' compensation law etc applies	146	75AI
Unidentified manufacturer	147	75AJ
Commonwealth liability for goods that are defective only because of compliance with Commonwealth mandatory standard	148	75AL
Representative actions by the regulator	149	75AQ
Offences relating to unfair practices	151-168	75AZB-75AZR
Pecuniary penalties	224	76E
Pecuniary penalties and offences	225	76F
Civil action for recovery of pecuniary penalties	228	77
Indemnification of officers	229	77A
Certain indemnities not authorised and certain documents void	230	77B
Preference must be given to compensation for victims	227	79B
Injunctions	232-235	80
Actions for damages	236	82
Defences	207-211	85
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2. Implied Terms and Consumer Guarantees

"If, in order to make an agreement work, or, conversely, in order to avoid an unworkable situation, it is necessary to imply a term; if moreover implication of that term corresponds with the evident intention of the parties underlying the agreement, the law not only can but must imply the term."[1]

There are five bases upon which terms may be implied into contracts. Terms may be implied:

(1) by reference to the nature of the contract
(2) to make the contract effective
(3) by custom or trade usage
(4) as a result of previous dealings, or
(5) by statute.

This Chapter discusses all these five bases for implying terms, as well as what terms may be implied.

Furthermore, the abandonment of the TPA and the introduction of the ACL meant a change from implied terms to so-called consumer guarantees. In other words, while the TPA, like the SGA, contained implied terms, the ACL does not include any implied terms. Instead, it contains a set of consumer guarantees. However, as these consumer guarantees are very similar to the SGA's implied terms, both in scope and in function, they are discussed in this chapter.

1. Dissenting judgment of Lord Wilberforce and Lord Morris of Borth-y-Gest, BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1978) 180 CLR 266, at 292.

2.1 Terms implied by reference to the nature of the contract

The courts may imply specific terms in relation to a variety of types of contracts due to policy considerations. It is not possible to list all such contract types here. A few examples will, however, be provided.

Typically contracts for the carriage of goods by sea are associated with special implied terms. For example, a seaworthy vessel must be provided at the start of the voyage. However, contracts for the carriage of goods by sea are by no means the only type of contracts in relation to which the courts have chosen to imply particular terms. *Derbyshire Building Co Pty Ltd v Becker*[1] involved the hire of a saw used when building a fence. The saw was defective causing a hand injury to the user. The Court concluded that unless contradicted by an express term of the contract, there is an implied condition in contracts for hire that hired goods be reasonably fit for the purpose that they were hired for.

In *G.H. Myers & Co v Brent Cross Service Co*,[2] the action related to a rod with a latent defect being installed into a car. Justice du Parcq stated that: "a person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty".[3] This statement was relied upon by the Court in *Young & Marten Ltd v McManus Childs Ltd*,[4] as they fleshed out the relevant principle that a contract to do work and supply materials, in the absence of special circumstances, carries with it two implied warranties: (1) that those materials are of good quality, even to the extent that they are free from latent defects; and (2) that they are reasonably fit for their intended purpose.

In Australia, the High Court considered the matter of implied terms in contracts for work and materials in *Helicopter Sales (Aust) Pty Ltd v Rotor-Work Pty Ltd*.[5] The dispute related to a contractor who serviced a helicopter and, in doing so, installed a faulty bolt which later caused the helicopter to crash. The owners of the helicopter sought compensation, arguing that the installation of the faulty bolt breached certain implied terms of the contract of service. The Court noted that the bolt failed due to a latent manufacturing defect which, to the plaintiff's knowledge, did not lie within the defendant's competence to identify while installing it. Whilst acknowledging that the outcome arguably was unfortunate from a public policy perspective, the Court found in the defendant's favour, noting that:

A warrantor's inability to ensure compliance with quality standards will often, of itself, provide no ground for the exclusion of an implied warranty of quality; no disregard of the legitimate interests of the warrantor will thereby be involved. But the case will be different where, as here, both contracting parties know all the relevant facts, have agreed upon an exclusive source of supply and are treating a third party's certification as to quality as being critical.[6]

These are just some examples and many others can be found. Consequently, to assess the likelihood of terms being implied in a particular contract, one must always seek to get familiar with the particular area in which the contract will operate.

1. (1962) 107 CLR 633.
2. (1934) 1 KB 46.
3. GH Myers & Co v Brent Cross Service Co (1934) 1 KB 46, at 55.
4. (1969) 1 AC 454.
5. (1974) 132 CLR 1.
6. Helicopter Sales (Aust) Pty Ltd v Rotor-Work Pty Ltd (1974) 132 CLR 1, at 12.

2.2 Terms implied to make the contract effective

If codified, the common law principles regulating terms implied to make the contract effective could be expressed in the following:

Rule 2

1. A court should imply a term into a formal contract only where the term is:

(a) reasonable and equitable;

(b) necessary to give business efficacy to the contract;

(c) so obvious that its inclusion goes without saying;

(d) capable of clear expression; and

(e) not contradicting any express term of the contract.

2. Apart from situations falling within the scope of Article 1, a court should imply a term by reference to the imputed intention of the parties to an informal contract if, but only if, it can be seen that the implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case.

3. For the purpose of Rule 2, an informal contract is a contract where it is apparent that the parties have not attempted to spell out the full terms of their contract, and it is common practice for the parties to the type of contract in question not to spell out the full terms of their contracts.

4. For the purpose of Rule 2, a formal contract is a contract that is not an informal contract under the definition in Article 3.

While ordinarily reluctant to do so, courts may imply context-specific terms into a formal contract even where the contract is not of a kind discussed above (2.1). The term "formal" is here, and in Rule 2, used in its ordinary English language meaning, and not in its strict legal sense.

If it is necessary to imply a particular term in order to give "business efficacy" to the contract, the court may choose to do so, but "the term sought to be implied must be necessary to make the contract work and must be so obvious that it goes without saying".[1] In *The Moorcock*,[2] Bowen LJ stated that:

I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events

1. Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd (1986) 160 CLR 226, at 241.
2. (1889) 14 PD 64, at 68.

it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men.

Furthermore, in *Reigate v Union Manufacturing Co*,[3] Scrutton LJ expressed the view that:

> "A term can only be implied if it is necessary in the business sense to give efficacy to the contract i.e., if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case?', they would both have replied: "Of course, so and so will happen; we did not trouble to say that; it is too clear."

Finally, in *Shirlaw v Southern Foundries*,[4] MacKinnon LJ commented that:

> "Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, 'Oh, of course.'"

The case giving the clearest guidance as to when terms may be implied to give "business efficacy" to the contract is *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*.[5] Article 1 of Rule 2 is primarily based upon the Court's reasoning in that case. In that case, the appellant company had entered into an agreement with the respondent. The agreement had the effect of giving preferential rating to an oil refinery operated by the appellant. The majority judgment stated that:

> for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.[6]

The dissenting judgment delivered by Lord Wilberforce and Lord Morris of Borth-y-Gest does not dispute that terms ought to be implied in the manner outlined above. However, it clearly illustrates how even a relatively detailed rule, as the one envisaged in the majority judgment, can lead to different and contradictory conclusions. The majority judgment implied a rather far-reaching term, while the dissenting judges read the agreement to imply a much more limited term. In doing so, the dissenting judges took the better approach, as any term implied by the court ought to be as limited as possible, provided that it still gives business efficacy to the contract. In other words, if the court can imply different terms, all of which will ensure that the contract gets business efficacy. The court should choose to imply the term with the most limited implications possible, provided that the end result is still reasonable and equitable.

As is clear from Article 2 of Rule 2, the law takes a less strict approach to implying terms into informal contracts, such as the contracts associated with every-day activities like restaurant visits, the purchasing of a bus ticket etc.

In *Byrne v Australian Airlines Ltd*,[7] the High Court outlined the proper procedure for implied terms in cases involving such informal contracts: "the actual terms of the contract must first be inferred before any question of implication arises. That is to say, it is necessary to arrive at some conclusion as to the actual intention of the parties before considering any presumed or imputed intention"[8].

Further, the Court stated that the test outlined by Deane J in *Hawkins v Clayton*[9] was the test to be used for actually implying terms into informal contracts:

The most that can be said consistently with the need for some degree of flexibility is that, in a case where it is apparent that the parties have not attempted to spell out the full terms of their contract, a court should imply a term by reference to the imputed intention of the parties if, but only if, it can be seen that the implication

3. (1918) 1 KB 592, at 605.
4. (1926) Ltd (1939) 2 KB 206, at 227.
5. (1978) 180 CLR 266.
6. BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1978) 180 CLR 266, at 267.Enter your footnote content here.
7. (1995) 185 CLR 410.
8. Byrne v Australian Airlines Ltd (1995) 185 CLR 410, at 422.
9. (1988) 164 CLR 539, at 573.

of the particular term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case.[10]

10. Ibid.

2.3 Terms implied by custom or trade usage

Over time, particular contractual clauses have become typical for certain types of trade. Some of these have reached such widespread acceptance that virtually anybody in that line of trade would assume all contracts done within that line of trade to contain those particular terms. The law recognises this fact and, thus, terms may be implied based on custom or trade usage. If codified, the common law principles regulating terms implied by custom or trade usage can be expressed in the following

Rule 3

1. A term may be implied into a contract based on custom or trade usage provided that the party wishing to rely on the term demonstrates that:

    (a) it can be reasonably assumed that everybody in that trade enter into such a contract with that usage as an implied term;

    (b) the custom or trade usage is uniformly applied in relation to the particular type of contracts;

    (c) the custom or trade usage is reasonable;

    (d) the usage is capable of clear expression; and

    (e) the term is not contradicted by any express term of the contract.

2. The contractual parties are bound by a term implied in accordance with Article 1 notwithstanding the fact that they had no actual knowledge of it.

Rule 3 is mainly based on the Court's reasoning in the case of *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd*.[1] The main issue in this case was whether Norwich, an insurer, could recover outstanding premiums from Con-Stan, the assured, despite the fact that Con-Stan had already paid them to Norwich's insurance broker, who, in default, had not passed them on to Norwich. Con-Stan, seeking to avoid paying the premiums a second time, argued that there was an implied term in the insurance contract that arose from custom or usage in the industry, that a broker is alone liable to an insurer for payment of the premium, and that the implied term was necessary to give business efficacy. In order to establish the custom or trade usage of such a contract, the High Court stated that it was necessary to find a clear course of conduct under which insurers do not look to the assured for payment of a premium.

The Court could not find evidence to support such a custom, and in fact there was a number of instances where insurers seek a second payment from an assured despite the latter having already paid their brokers. Therefore, it was not possible to say that the custom relied on was so well known that everyone entering into such a contract would reasonably be presumed to have imported that term into the contract. The Court also rejected the suggestion that the implied terms were necessary to give business efficacy as they were not so

1. (1986) 160 CLR 226

obvious that both parties would have agreed to its inclusion if their minds had been directed to it at the time of bargaining. It especially cannot be so obvious if the implied term is adverse to the interests of one party.

2.4 Terms implied as a result of previous dealings

Where contractual parties have been dealing with each other over a sufficiently long period of time and have consistently incorporated certain terms into their dealings, a court may conclude that those terms are to be implied.

Henry Kendall & Sons v William Lillico & Sons Ltd[1] involved an ongoing oral contract for continuous shipments of Brazil nuts. Each shipment was confirmed in "sold notes" sent from the seller to the buyer, and these notes contained an exclusion clause. Although the buyer had never read these notes, the exclusion clause was upheld as forming part of the contract due to the fact that the buyer had accepted them over an extended period of time:

> In the present case, SAPPA [the buyer] had regularly received more than a hundred similar contract notes from Grimsdale [the seller] in the course of dealing over three years. They knew of the existence of the conditions on the back of the contract note. They never raised any query or objection [...]. The court's task is to decide what each party to an alleged contract would reasonably conclude from the utterances, writings or conduct of the other. The question, therefore, is not what SAPPA themselves thought or knew about the matter but what they should be taken as representing to Grimsdale about it or leading Grimsdale to believe. The only reasonable inference from the regular course of dealing over so long a period is that SAPPA were evincing an acceptance of, and a readiness to be bound by, the printed conditions of whose existence they were well aware although they had not troubled to read them. Thus the general conditions became part of the oral contract.[2]

This quote makes clear that whether terms will be implied based on previous dealings is largely a question of reasonableness; is the nature of the previous dealings such that it is reasonable to imply the relevant term? In assessing whether it is reasonable to imply terms based on previous dealings a court ought to consider: (1) the nature (including the number and frequency) of the previous dealings, (2) the similarity between the contractual arrangement in question and the previous contractual arrangements, (3) whether the contractual arrangement in question contains express terms that are conflicting with the terms sought to be implied, and (4) whether the terms in the past dealings were clearly identifiable.

1. [1969] 2 AC 31.
2. Henry Kendall & Sons v William Lillico & Sons Ltd [1969] 2 AC 31, at 113 per Lord Pearce.

2.5 Terms implied by statute - Sale of Goods Acts

The relevant Acts in the context of terms implied by statute are the various states' *Sale of Goods Acts*. Further, some states have introduced additional protection for consumers either through the introduction of separate legislation[1] or through amendments to existing legislation.[2] However, those state initiatives are not discussed here.

As far as the implied terms are concerned, the ACL is based on the SGA. Consequently, the terms that can be implied under the two Acts are, with few exceptions, virtually identical. Before discussing the terms that can be implied, it is necessary to first examine when terms can be implied under the two relevant Acts. In that context, there are several important differences between the SGA and the ACL.

2.5.1 When can terms be implied by the SGA?

Section 4(1) of the SGA defines the Act's scope of application:

***Sale of Goods Act 1896* (Qld), s. 4(1)**

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the 'price'.

To gain an adequate understanding of when the Act is applicable, one must look closer at the definition of some of the terms used in s. 4(1). The term "contract" bears its ordinary meaning. It is consequently necessary to refer to traditional contract law to define what constitutes a "contract". In other words, a contract can be defined as follows:

Rule 4

A legally enforceable contract is formed if the party making an offer, with the intention that it be an offer, receives the acceptance of that offer from a party intending to make an acceptance and being in a position to make an acceptance, and the following requirements are met:

1. See *Consumer Transactions Act 1972* (SA).
2. See *Fair Trading Act 1987* (NSW), *Fair Trading Act 1999* (Vic), *Fair Trading Act 1987* (WA) and *Consumer Affairs and Fair Trading Act 1990* (ACT).

(a) the contract is for consideration by both parties;

(b) both parties have capacity to enter into a legally enforceable contract of the kind entered into; and

(c) the terms of the contract are certain.

Further, it is necessary to examine what is meant by "transfer of property", "goods" and "money consideration".

2.5.1.1 Transfer of property

While it is clear from s. 4(1) that the application of the SGA is not limited to cases where property in goods is to be transferred immediately, and that agreements to transfer property in the future are also covered, the concept of transfer of property is nevertheless a complicated one.

The first thing to note is that transfer of possession is not necessary. Instead, the focus is placed on the ownership of (i.e., property in) the goods. Second, the SGA contains detailed rules regulating when property passes from seller to buyer, and these rules are obviously of relevance when discussing the passing of the risk from seller to buyer. However, a discussion of those rules falls outside the scope of this book.

2.5.1.2 Goods

The SGA states that: goods "includes all chattels personal other than things in action and money, and also includes emblements and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale" (SGA, s. 3(1)), thus giving the term a rather wide scope.

One context in which difficulties arise in defining whether the contract is for "goods", is where it could be argued that the consideration contracted for is "work and materials" rather than goods. As noted by the High Court: "The distinction between a contract for the sale of goods and a contract for the provision of work and materials is frequently a fine one and the tests for distinguishing the one from the other are unsatisfactory and imprecise".[3] The tests that are most commonly referred to are the "main substance test" of *Robinson v Graves*,[4] and the "end product test" of *Lee v Griffin*.[5] According to Blackburn J in *Lee v Griffin*:

> If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labour; but, if the result of the contract is that the party has one work and labour which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. … I do not think that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill and labour, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel.[6]

The Court in *Robinson v Graves*[7] departed from this line of reasoning. In that case, an artist had been commissioned to paint a portrait. It was held that the main substance of the agreement was the artist's skill and labour. The supply of materials was ancillary. The Court stated that:

> If you find, as they did in *Lee v Griffin*, that the substance of the contract was the production of something to be sold by the dentist to the dentist's customer, then that is a sale of goods. But if the substance of the contract, on the other hand, is that skill and labour have to be exercised for the production of the article and that it is only ancillary to that that there will pass from the artist to his client or customer some materials in addition to the skill involved in the production

3. *Hewett v Court* (1983) 149 CLR 639, at 646, per Gibbs CJ.
4. [1935] 1 KB 579.
5. (1861) 1 B & S 272.
6. (1861) 1 B & S 272, at 277 – 278, per Blackburn J.
7. [1935] 1 KB 579.

of the portrait, that does not make any difference to the result, because the substance of the contract is the skill and experience of the artist in producing the picture.[8] (internal footnote omitted)

The High Court has not yet provided any clear guidance as to which of these tests is the preferable one in Australia, or if, indeed, a third option is to be applied instead. However, a trend of favouring the "end product test" is noticeable amongst the State courts. In *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd*,[9] the Court had to decide whether the contract was for the sale of goods or for work and labour. Justice Fullagar expressly favoured the "end product test" and pointed to several weaknesses of the "substance test", describing it as "illogical and unsatisfactory".[10] More recently, the Supreme Court of New South Wales also indicated a preference for the "end product test". *Pangallo Estate Pty Ltd v Killara 10 Pty Ltd*[11] relates to a contract for the processing of grapes into wine. The plaintiffs had delivered grapes to a wine maker. The wine maker processed the grapes into wine and was to provide the wine to the plaintiffs. The question before the Court was whether this scenario meant that the plaintiffs had sold the grapes to the wine maker and subsequently bought the wine, or whether it was a contract under which the wine maker was charging a fee for the processing of the grapes into wine. Focusing on the parties' intention, Brereton J decided in the plaintiffs' favour.[12] However, in reaching this conclusion, Brereton J embraced the reasoning of the Court in *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd* and that of Blackburn J in *Lee v Griffin*. Furthermore, Brereton J followed a decision by the Full Court of the Supreme Court of South Australia in *Lamkin v RH Binder Pty Ltd,*[13] indicating that in their view also that case was consistent with the "end product test". The judgments did not analyse whether the contract was one for sale of goods or one for services. However, the differing approaches of the trial Judge and the Full Court made it clear that the trial judge treated the contract as one for the sale and resale of goods, whereas the Full Court treated the contract as one for services.

There have been disputes in several areas as to whether the product in question can properly be classed as goods. One such area is computer software.[14]

2.5.1.3 Money consideration

Whether or not property in goods is transferred for "a money consideration called the price" is not a complicated matter in most cases. It is clear that, situations where property in goods is transferred purely as a gift, or purely in barter (i.e., good exchanged for another good) fall outside the scope of the *Sale of Goods Act*. However, difficult distinctions may arise in some cases.

While not a case arising out of the SGA, *Esso Petroleum Ltd v Commissioner of Customs & Excise*,[15] provides interesting guidance as to cases involving gifts. In *Esso Petroleum Ltd*, the Court had to decide whether medals provided to purchasers of petrol were pure gifts or formed part of a contract for sale. The majority of the Court (Lord Fraser of Tullybelton dissenting) expressed the view that, where a "gift" is offered in connection with a purchase of some other goods or service, there is no money consideration in relation to the gift. Rather, the consideration relating to the gift is the entry into the contract for purchase of the other goods or service. Viscount Dilhorne and Lord Russell of Killowen went one step further and took the view that, where the "gift" is of little intrinsic value, it could not be inferred that the parties intended that there be any legally binding contract in relation to the gift. In light of this it seems that, at least "gifts" of little intrinsic value, offered as an incentive to enter into a contract, would fall outside the scope of the SGA. It is, however, unclear whether the reasoning in *Esso Petroleum* would be applicable if the "gift" was not used as an incentive. For example, if the buyer did not know that the purchase for the main product would entitle her/him to the gift. Similarly, it is not clear whether the reasoning in *Esso Petroleum* would be applicable in a scenario where the "gift" is similar in value to that of the main product.

8. Robinson v Graves [1935] 1 KB 579, at 587 – 588.
9. [1979] VR 167.
10. Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd [1979] VR 167, at 185.
11. [2007] NSWSC 1528.
12. Pangallo Estate Pty Ltd v Killara 10 Pty Ltd [2007] NSWSC 1528, at para 20.
13. (1984) ASC 55-354. That case was concerned with a contract for the manufacture of wine by a contractor from wines supplied by the grower. The grower complained that the wines were not of good saleable quality.
14. See further: D Svantesson, Amlink Technologies Pty Ltd and Australian Trade Commission [2005] AATA 359 – Software finally recognised as "goods", Trade Practices Law Journal, Vol 13 No 4 (December 2005), at 232 – 234, and Gammasonics Institute for Medical Research Pty Ltd v Comrad Medical Sysytems Pty Ltd [2010] NSWSC 267.
15. [1976] 1 All ER 117.

Further, several cases have indicated that a situation where products are advertised as "buy one, get one free" are not to be treated according to the *Esso Petroleum* approach. Instead, "buy one, get one free" is to be treated as a purchase for two products, each of which are reduced to half price.[16] In *Food Supplier and Commissioner of Taxation*,[17] the question was whether Goods and Services Tax (GST) was payable on food products supplied with "free" non-food gifts. The Court noted that, the "free" items were not provided free of charge alone. In other words, the only way to get the "free" item was to purchase the food item. Thus, leaving aside the comparative value of the "free" item, the scenario is very similar to that of the *Esso Petroleum* case. However, unlike the Court in *Esso Petroleum*, the Court in this case concluded that: "there was consideration for the supply of the packaged product as a whole, including the promotion item. The consideration for the supply of the two items was the single price paid for the two of them."[18] The Court referred to some statements made in recent English cases dealing with similar matters. Most importantly, reference was made to *Kimberley-Clark Ltd v Customs and Excise Commissioners*,[19] in which nappies were supplied in a box that could be used as a toy box. In that case, Lloyd J said: "The transaction is in economic reality one single transaction which it is not correct to divide up or dissect".[20]

In conclusion, it is possible that the *Esso Petroleum* approach now is outdated, and that courts are likely to view that type of transaction as whole, rather than identifying the individual elements of the transaction. If this is wrong and the *Esso Petroleum* approach is still good law, it is, nevertheless, necessary to distinguish between the *Esso Petroleum* situation and situations of the "buy one, get one free" nature.

The issue of trade-ins was discussed in *Dawson (Clapham) Ltd v Dutfield*.[21] In that case, the plaintiffs sold used motor lorries and were to receive payment in cash and exchange of two other lorries on the condition that the exchange occur within one month. The exchange never took place. Justice Hilbery held that a contract involving partly barter and partly money consideration, was nevertheless to be treated as a sales contract. While reasonable, such a conclusion must presumably be qualified, and focus be placed on the comparable value of the barter item and the money consideration. For example, it is unsuitable to view a contract under which two persons exchange luxury cars as money consideration simply because one party provided $1 in addition to a very valuable car.

16. Food Supplier and Commissioner of Taxation [2007] AATA 1550, at para 15.
17. [2007] AATA 1550.
18. Food Supplier and Commissioner of Taxation [2007] AATA 1550, at para 8.
19. [2004] STC 473.
20. Kimberley-Clark Ltd v Customs and Excise Commissioners [2004] STC 473, at 487.
21. [1936] 2 All ER 232.

2.5.2 What terms are implied by the SGA?

Having determined the circumstances under which the implied terms of the *Sale of Goods Act* may come into question, it is now time to examine what terms may actually be implied.

Before examining what terms may be implied by statute, these implied terms must be seen in their context. First, the various implied terms are frequently pleaded together in the alternative. Further, in making a claim, a plaintiff can, of course, rely on the express terms of the contract in addition to the terms that are implied by statute. Furthermore, it is not unusual for a plaintiff to take action based on the implied terms combined with an action in torts, such as negligence. In *Grant v Australian Knitting Mills*,[1] for example, the plaintiff sued the seller of the faulty goods based on implied terms, while he sued the manufacturer of the faulty goods based on the tort of negligence.

2.5.2.1 Implied conditions and warranties as to title

Sale of Goods Act 1896 **(Qld), s. 15**

In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is:

(a) an implied condition on the part of the seller that in the case of a sale the seller has a right to sell the goods, and that in the case of an agreement to sell the seller will have a right to sell the goods at the time when the property is to pass;
(b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;
(c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

SGA s. 15(a) states that, within its respective scope, there is an implied condition on the part of the seller that, in the case of a sale, the seller has a right to sell the goods. Further, those provisions also make clear that, in the case of an agreement to sell, there is an implied condition that the seller will have a right to sell the goods at the time when the property is to pass.

The application of the implied condition as to title is exemplified in *Rowland v Divall*.[2] Rowland, a car dealer bought a car from Divall and later re-sold it to a third party. When it became clear that the person who sold the car to Divall had in fact stolen the car, Rowland refunded the third party who had bought the car. To avoid the loss, Rowland then sought to recover the loss from Divall (based on total failure of consideration). Lord Justice Scrutton noted that:

> "No doubt the general rule is that a buyer cannot rescind a contract of sale and get back the purchase money unless he can restore the subject matter. There are a large number of cases on the subject, some of which are not very easy to reconcile with others. Some of them make it highly probable that a certain degree of deterioration of the goods is not sufficient to take away the right to recover the purchase money."[3]

1. (1936) AC 85.
2. [1923] 2 KB 500
3. Rowland v Divall [1923] 2 KB 500, at 50.

Furthermore, Atkin LJ remarked that:

> "To my mind it makes no difference at all [that the buyer has used the car before he found out that there was a breach of the condition]. The buyer accepted the car on the representation of the seller that he had a right to sell it, and inasmuch as the seller had no such right he is entitled to say that the buyer has enjoyed a benefit under the contract. In fact the buyer has not received any part of that which he contracted to receive – namely, the property and right to possession – and, that being so, there has been a total failure of consideration."[4]

From the above, and the cases referred to in *Rowland v Divall*, it seems clear that, only where the buyer got some part of what he contracted for, will he lose the right to rescind the contract. Where property in the goods has not passed, it seems highly unlikely that that would be the case.

Niblett v Confectioners' Materials Co Ltd[5] involved a slightly more complex scenario. Niblett bought tins of condensed milk from Confectioners' but was prevented from selling the tins with the labels that were on them due to trademark issues. Niblett sold the tins at a low price without the labels and sought damages for breach of the following implied terms: (a) that the milk was of merchantable quality; (b) that the defendants had a right to sell it; (c) that the plaintiffs should have and enjoy quiet possession of it; and (d) that there was an implied condition or warranty of the contract that any label on the milk would not infringe any trademark.

The Court found that the condition as to title is not limited to circumstances where the condition is hindered by an act or omission of the vendor and those acting by his or her authority. In the absence of an express agreement to the contrary, "[t]he goods tendered must … be goods which the vendor has a right to sell".[6]

Where the seller did not have title at the time title was to be transferred, title may subsequently be "fed" into the transaction if the seller acquires the title before the buyer rescinds the contract. In *Patten v Thomas Motors Pty Ltd*,[7] a woman entered into a hire-purchase agreement for a car with CGA Ltd, and, contrary to that agreement, she sold it. The car changed hands several times in good faith, and eventually Patten bought it from Thomas Motors in May 1961. In August of that year, the woman fraudulently obtained a loan from another company, using a bill of sale over the car as security, and used that money to pay the outstanding amount under the hire-purchase agreement. Patten used the car for two years until a demand to surrender the car was made by the company that had lent the woman the money. The company seized the car and Patten sued Thomas Motors for damages for breach of warranty of title of the car. The Court ruled in Thomas Motors' favour, due to the principle of "feeding the contract". Once the woman paid CGA, the title passed from them to her, and successively down the line until it vested in Patten who, thus, got legal title in August 1961, which extinguished any cause of action for breach of warranty of title. On appeal, Patten argued that feeding the title did not apply and that rescission had broken the chain of title, but the appeal was dismissed.

Thus, it is clear that so long as the seller obtains title before the buyer seeks to rescind the contract, the sale will be upheld.

SGA s. 15(b) outlines the rules regulating the implied warranty of quiet possession. As described below (Chapter 2.5.4), warranties are different from conditions, and it must thus be noted that we are here talking about a warranty rather than a condition.

The buyer's right to quiet possession has been the subject of several cases. In *Microbeads AG v Vinhursdt Road Marking Ltd*,[8] Vinhurst bought a machine for making white lines on roads from Microbeads early in 1970. In November 1970, a third company – Prismo – gained rights in respect of a patent in the relevant type of machine. Vinhurst, now being prevented from using the machine, alleged breaches of the terms of the right to sell and of quiet possession. It was held that, while Microbeads had had the right to sell the goods (and thereby did not infringe the implied condition of the right to sell), it had breached the right of quiet possession:

> "It seems to me that when the buyer has bought goods quite innocently and later on he is disturbed in his possession because the goods are found to be infringing a patent, then he can recover damages for breach of warranty against the

4. Rowland v Divall [1923] 2 KB 500, at 50.
5. [1921] 3 KB 387.
6. Niblett v Confectioners' Materials Co Ltd [1921] 3 KB 387, at 395, per Bankes LJ.
7. [1965] NSWR 1457.
8. [1975] 1 All ER 529.

seller. It may be the seller is innocent himself, but when one or other must suffer, the loss should fall on the seller; because, after all, he sold the goods and if it turns out that they infringe a patent, he should bear the loss."[9]

This case clearly illustrates the difference between the implied warranty of quiet possession and the implied condition on the part of the seller that it has a right to sell the goods.

2.5.2.2 Implied condition that the goods shall correspond with description

Sale of Goods Act 1896 **(Qld), s. 16**

When there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description; and if the sale is by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

SGA s. 16 regulates sales by description. Under this section there is an implied condition that goods shall correspond with the description, however the description was provided.

Determining under which circumstances a sale would be seen as being a sale by description is not always easy. In *Varley v Whipp*,[10] Channell J made clear that: "The term 'sale of goods by description' must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone". Specific or ascertained goods may be "bought by description" within the meaning of the Acts, as they are not limited to unascertained goods. Thus, it seems that a contract is for the sale of goods by description in all cases where the buyer is relying on description alone without having seen the goods, and also where the buyer has seen, and even examined, the goods, as long as the buyer bought them based, at least in part, in reliance on a description given or inferred from the circumstances.

The scope of what is classed as sale by description has been held to be even wider in subsequent cases. Several cases have illustrated that even where the buyer has in fact inspected or had the opportunity to inspect the goods, the sale can still be by description. In *Grant v Australian Knitting Mills*,[11] the Court held that:

> "there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, e.g., woollen under-garments, a hot-water bottle, a second-hand reaping machine, to select a few obvious illustrations."[12]

In that case, the Court also made the important observation that: "The conversation at the shop in which the appellant discussed questions of price and of the different makes did not affect the fact that he was substantially relying on the retailers to supply him with a correct article".[13]

Similarly, in *Elder Smith Goldsbrough Mort Ltd v McBride; Palmer (Third Party)*[14] the Court concluded that: "the fact that there was provided to [the buyer] an opportunity to inspect the [goods] does not prevent the sale from being one by description if the description [given] goes to [a matter that the inspection would not prove either false or correct]".[15] The dispute related to the sale of a 'stud bull' at a Sydney action for $21,000. The bull did not correspond with its description as the bull was found to be permanently infertile. The value of the bull was consequently diminished to $500 as it could be used for slaughtering purposes only when the action was brought. Justice Sheppard found there had been a breach of implied condition that the bull would correspond with the description of a 'breeding bull' by the vendors resulting in a total failure of consideration for the purchasers. The plaintiffs were entitled to recover the purchase price less its value on sale for slaughtering.

9. Microbeads AG v Vinhursdt Road Marking Ltd [1975] 1 All ER 529, 533 (per Lord Denning MR).
10. [1900] 1 QB 513, 516.
11. (1936) AC 85.
12. Grant v Australian Knitting Mills (1936) AC 85, at 100.
13. Grant v Australian Knitting Mills (1936) AC 85, at 99.
14. [1976] 2 NSWLR 631.
15. Elder Smith Goldsbrough Mort Ltd v McBride; Palmer (Third Party) [1976] 2 NSWLR 631, at 641, per Shepard J.

How the law determines whether or not a particular sale is one by description is further illustrated in *Harlingdon & Leinster Enterprises v Christopher Hull Fine Art*.[16] In that case, both parties to the dispute were art experts dealing in art. However, neither of them were experts on the particular artist in question. Christopher Hull Fine Art sold two paintings to Harlingdon & Leinster Enterprises, both of which were described as paintings by Münter. While Christopher Hull indicated that he was relying on Harlingdon & Leinster, he also referred Harlingdon & Leinster to an auction catalogue in which the paintings were offered as paintings by Münter. Harlingdon & Leinster gave no indication that they were relying on Mr Hull in determining the authenticity of the works. The paintings turned out to be a forgery and Harlingdon & Leinster claimed a breach of the implied condition of correspondence with description and merchantable quality.

Several conclusions may be drawn from this case. First, Nourse LJ stated that: "authorities show that [the implied condition of correspondence with description] may apply to a contract for the sale of specific goods which have been seen by the buyer, provided that their deviation from the description is not apparent on a reasonable examination".[17] Further, Nourse LJ also observed that: "one must look to the contract as a whole in order to identify what stated characteristics of the goods are intended to form part of the description by which they are sold".[18]

Whether or not "reliance" is an essential ingredient in a contract for the sale of goods by description was a controversial matter in the case. Nourse LJ stated that: "there cannot be a contract for the sale of goods by description where it is not within the reasonable contemplation of the parties that the buyer is relying on the description".[19] Stuart-Smith LJ took the opposite view:

> "I have great difficulty in understanding how the concept of reliance fits into a sale by description. If it is a term of the contract that the painting is by Münter the purchaser does not have to prove that he entered into the contract in reliance on this statement. This distinguishes a contractual term or condition from a mere representation."[20]

Slade LJ's reasoning could perhaps be said to represent a middle ground:

> "If there was no such reliance by the purchaser, this may be powerful evidence that the parties did not contemplate that the authenticity of the description should constitute a term of the contract. … If, on the other hand, there was such reliance … this may be equally powerful evidence that it was contemplated by both parties that the correctness of the description would be a term of the contract."[21]

Perhaps we have to conclude that, the question of whether "reliance" is an essential ingredient in a contract for the sale of goods by description is associated with a degree of uncertainty.

If it is concluded that a particular sale is by description, it is necessary to examine whether the goods sold actually correspond with the description. *Ashington Piggeries Ltd v Christopher Hill Ltd*[22] is a case related to the sale of compound mink food. Ashington Piggeries (AP), who had a mink farm, contracted with Christopher Hill (CH), who was in the business of compounding foodstuff for domestic animals to make a compound food to feed the mink. CH provided the ingredients and mixed the compound, but AP had provided the formula, which specified the ingredients. One of the ingredients obtained by CH, herring meal, contained DMNA (a substance regarded as a condition of herring meal, rather than an addition to it), which proved to be toxic for the mink as they were more sensitive to DMNA than other animals. AP did not pay for the delivered food and CH sued AP for the price of the goods. AP, in turn, sued CH for breach of contract, arguing that the goods: (a) did not correspond with the description, (b) were not reasonably fit for their purpose and (c) were not of merchantable quality.

In his dissenting judgement, Viscount Dilhorne noted that:

> "The line between a difference in quality and a difference in kind may in many instances be difficult to draw. Here, where the distinction is between poisonous and non-poisonous herring meal, there was, in my opinion, more than a difference in quality, and I … [think] that there was difference in kind[.]"[23]

16. [1991] 1 QB 564.
17. Harlingdon & Leinster Enterprises v Christopher Hull Fine Art [1991] 1 QB 564, at 572.
18. Harlingdon & Leinster Enterprises v Christopher Hull Fine Art [1991] 1 QB 564, at 574.
19. Harlingdon & Leinster Enterprises v Christopher Hull Fine Art [1991] 1 QB 564, at 574.
20. Harlingdon & Leinster Enterprises v Christopher Hull Fine Art [1991] 1 QB 564, at 579.
21. Harlingdon & Leinster Enterprises v Christopher Hull Fine Art [1991] 1 QB 564, at 584 – 585.
22. [1972] AC 441.
23. Ashington Piggeries Ltd v Christopher Hill Ltd [1972] AC 441, at 485.

Lord Wilberforce, on the other hand, took a simpler view:

> "I do not believe that the Sale of Goods Act 1893 was designed to provoke metaphysical discussions as to the nature of what is delivered, in comparison with what is sold. The test of description, at least where commodities are concerned, is intended to be a broader, more commonsense, test of a mercantile character. The question whether that is what the buyer bargained for has to be answered according to such a test as men in the market would apply, leaving more delicate questions of condition, or quality, to be determined under other clauses of the contract or sections of the Act."[24]

The Court's view is based on historical precedence which asserts harm caused by lack of clarity in the description of goods contracted leaves the buyer without a basis to argue that goods do not correspond to the goods description. Lord Wilberforce's statement mentioned above confirms this approach while Lord Diplock went further to observe that "It is open to the parties to use a description as broad or narrow as they choose".[25] In other words, as far as the implied terms of correspondence with description is concerned, the party providing the description bears the risk if the description is unclear or is open to more than one interpretation.

In addition, the somewhat unusual case of *Beale v Taylor*[26] has illustrated that it is not sufficient that parts of the goods are in accordance with the description. The dispute related to a car advertised as a "Herald, convertible, white, 1961" was in fact made up from parts of two cars, only one of which was a 1961 model. Although the plaintiff had examined the car, he had relied on the description in the advertisement as to the kind of car he was buying, and it was therefore a sale by description. In other words, examination on the part of the buyer does not necessarily prevent the sale being a sale by description, and partial correspondence with description is insufficient.

2.5.2.3 Implied condition as to quality and/or fitness for purpose

Sale of Goods Act 1896 **(Qld), s. 17**

Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(a) when the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether the seller is the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose;
(b) however, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;
(c) when goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not) there is an implied condition that the goods shall be of merchantable quality;
(d) however, if the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed;
(e) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade, if the usage is such as to bind both parties to the contract;
(f) an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

SGA s. 17(a) deals with the so-called "fitness for purpose" condition. Firstly, for an implied condition of fitness for purpose to be invoked, the buyer must make known to the seller the particular purpose for which the goods are required. While this may seem like a rather straight forward requirement at a first glance, it has been the object of dispute in numerous cases.

24. Ashington Piggeries Ltd v Christopher Hill Ltd [1972] AC 441, at 489.
25. Ashington Piggeries Ltd v Christopher Hill Ltd [1972] AC 441, at 503.
26. [1967] 1 WLR 1193.

Frost v Aylesbury Dairy Co Ltd[27] concerned the sale of milk containing typhoid germs. The buyer did not disclose to the seller that the milk was for human consumption, and therefore did not, strictly speaking, make the purpose for which he wanted the milk known to the seller. However, the Court noted that the normal use of the milk was for human consumption and held that a buyer need not make known to the seller the particular purpose for which the goods are required when such purpose is the ordinary use for which such goods are used. Similarly, in *Grant v Australian Knitting Mills*[28] it was held that a buyer need not make known to the seller the particular purpose for the goods when those goods are only for that purpose. However, should the buyer be associated with a particular condition, making the consequences of her/his use of the goods significantly different to those of a normal user, the buyer needs to bring that special condition to the seller's attention. Otherwise, it cannot be said that the buyer has made known to the seller the particular purpose for which the goods are required. For example, the Court in *Griffiths v Peter Conway Ltd*[29] held that there was no breach of the implied condition of fitness for purpose where a person suffered harm when wearing a tweed coat, and the harm was suffered due to a particular skin condition that was not brought to the seller's attention.

Furthermore, the implied term as to fitness for purpose may be included in the contract based on a prior consistent course of dealings in that type of product. In *McWilliams Wines Pty Ltd v Liaweena (NSW) Pty Ltd*,[30] the defendant had sold 500,000 wine corks to the buyer (a winery). The wine stored in bottles using that batch of corks was spoilt. The Court held that from the course of dealings and prior transactions between the buyer and the seller, it was clear that the purpose of the purchase was using the corks with bottles of wine fit for human consumption, and that the corks would not contain any agent which would cause the wine to be contaminated. Consequently, the implied term of fitness for purpose was enforced against the seller.

Similarly to what was said in relation to sale by description, the party providing the description of the particular purpose for which the goods are required seems to bear the risk where unfitness for purpose is caused by lacking clarity in that description:

> If mink possessed an idiosyncrasy, which made the food as supplied unsuitable for them though it was perfectly suitable for other animals, this would be the buyers' responsibility, unless … they had made this idiosyncrasy known to the sellers so as to show reliance on them to provide for it. But any general unsuitability would be the sellers' responsibility.[31]

Where it is established that the buyer made known to the seller the particular purpose for which the goods are required, the court will turn to consider whether the buyer did in fact rely on the seller's skill or judgment. In *Grant v Australian Knitting Mills*,[32] the Court discussed how such reliance is identified:

> It is clear that the reliance must be brought home to the mind of the seller, expressly or by implication. The reliance will seldom be express: it will usually arise by implication from the circumstances: thus to take a case like that in question, of a purchase from a retailer, the reliance will be in general inferred from the fact that a buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgment: the retailer need know nothing about the process of manufacture: it is immaterial whether he be manufacturer or not: the main inducement to deal with a good retail shop is the expectation that the tradesman will have bought the right goods of a good make.[33]

While it is said to be immaterial whether or not the seller is also the manufacturer in the above quote, more recent cases have indicated that a presumption of reliance is justified where the seller is in fact also the manufacturer of the goods. In *Expo Aluminium (NSW) Pty Ltd v W R Pateman Pty Ltd*[34] the buyer made known to the seller the purpose for which he required new windows. However, the windows were not suited for that purpose. Kirby P held that: "As a manufacturer it would be rare that a customer would not be relying, at least to some extent, on its skill and judgement in effecting its manufacture".

Finally, in relation to the matter of reliance, the Court in *Carpet Call Pty Ltd v Chan*[35] noted that a contractual clause stating that the buyer did not rely upon the seller may be evidence against the buyer's claim of reliance.

27. [1905] KB 608.
28. (1936) AC 85.
29. [1939] 1 All ER 685.
30. (1988) ASC 55-695.
31. Ashington Piggeries Ltd v Christopher Hill Ltd [1972] AC 441, at 490, per Lord Wilberforce.
32. (1936) AC 85.
33. Grant v Australian Knitting Mills (1936) AC 85, at 99.
34. (1990) ASC 55-978.
35. (1987) ATPR (Digest) 46-025.

However, this type of contractual clause does not necessarily in itself determine the question of whether the buyer did in fact rely on the seller's skill or judgment.

As far as the SGA is concerned, the goods must be of a description which it is in the course of the seller's business to supply. This hurdle does not seem difficult to overcome. In *Ashington Piggeries Ltd v Christopher Hill Ltd*,[36] Lord Wilberforce stated that: "I would hold that … it is in the course of the seller's business to supply goods if he agrees, either generally, or in a particular case, to supply the goods when ordered". In discussing his view further, Lord Wilberforce made clear that it does not matter whether or not the seller has previously accepted orders for goods of that description.

The only remaining issue is whether the goods were in fact fit for the purpose for which they were obtained. This is a question to be decided by reference to the individual circumstances of each case. However, *Ashington Piggeries Ltd v Christopher Hill Ltd*[37] (for background facts see above) contains several guiding principles. In that case, Lord Wilberforce stated that the buyer in question "had to show general unsuitability and not merely specific unsuitability for mink".[38] Lord Wilberforce concluded that the appellant had successfully done so:

> "Where an element in feeding stuff is shown to be (i) lethal in some quantities to one or more species (ii) damaging in other quantities to one or more species and in more than one respect and (iii) when it is not suggested that in any circumstances the chemical is beneficial; when moreover the expert evidence shows that the full implication and effects of feeding it have yet to be scientifically established, then there is every justification for describing it as toxic, and which is the relevant consideration, for placing responsibility for its exclusion firmly on the seller."[39]

A few words need to be said about the SGA s. 17(b). The provision states that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose. This severely limits the circumstances in which the condition of fitness for purpose applies. However, according to *Baldry v Marshall*[40] where a buyer makes its selection based on the seller's recommendation, the fact that the goods are ordered by reference to patent or other trade name does not, on its own, prevent the application of the implied condition of fitness for purpose.

SGA s. 17(c) deals with the so-called "merchantable quality" condition. Under this provision, there is an implied condition that the goods are of "merchantable quality". This condition is only implied where the goods are "bought by description from a seller who deals in goods of that description". The manner in which it is determined whether goods are "bought by description" is discussed above (2.5.2.2). However, a few words need to be said about the requirement that the goods be bought from a seller who deals in goods of that description. Similarly to what was discussed above in the context of fitness for purpose, this hurdle does not generally seem difficult to overcome. As noted, in *Ashington Piggeries Ltd v Christopher Hill Ltd*[41], Lord Wilberforce stated that: "I would hold that … a seller deals in goods of that description if his business is such that he is willing to accept orders for them". In discussing his view further, Lord Wilberforce made clear that, in his view, it does not matter whether or not the seller has previously accepted orders for goods of that description.

The standard against which "merchantable quality" is measured is a matter that needs to be determined on a case-by-case basis.

In addition, some general observations can be made. If the goods are bought for use as a normal consumer purchase, focus is placed on the "usability" of the goods, while in commercial sales focus is placed on "saleability". This saleability is, however, as illustrated in *Grant v Australian Knitting Mills*,[42] not completely detached from usability:

> The garments were saleable in the sense that the appellant, or any one similarly situated and who did not know of their defect, would readily buy them: but they were not merchantable in the statutory sense because their defect rendered them unfit to be worn next the skin.

36. [1972] AC 441, at 494.
37. Ibid, at 491.
38. Ibid.
39. Ashington Piggeries Ltd v Christopher Hill Ltd [1972] AC 441, at 491.
40. [1925] 1 KB 260.
41. [1972] AC 441, at 494.
42. (1936) AC 85, at 100.

Further, as noted in *Henry Kendall & Sons v William Lillico & Sons Ltd*[43]:

> If the description in the contract was so limited that goods sold under it would normally be used for only one purpose, then the goods would be unmerchantable under that description if they were of no use for that purpose. But if the description was so general that goods sold under it are normally used for several purposes, then goods are merchantable under that description if they are fit for any one of these purposes.

It must also be noted that merchantability is measured by considering the goods as a whole. In *Wilson v Rickett, Cockerell & Co*[44] the Court held that, even though a consignment of fuel was fit for burning, it was nevertheless not of merchantable quality as an explosive substance was accidentally included in the consignment.

In addition, since the statutes require goods to be merchantable in the state in which they were sold and delivered, a defect which could easily be cured is as serious as a defect that would not yield to treatment.[45]

Finally, SGA s. 17(d) makes clear that if the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed. This is a particularly important limitation in the light of *Thornett & Fehr v Beers & Son*.[46] The Court expressed the view that where the buyer has had a reasonable opportunity to examine the goods, the buyer is held to have examined the goods whether or not an examination actually occurred.

2.5.2.4 Implied conditions relating to sale by sample

***Sale of Goods Act 1896* (Qld), s. 18**

(1) A contract of sale is a contract for sale by sample when there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample:

(a) there is an implied condition that the bulk shall correspond with the sample in quality;

(b) there is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

(c) there is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

The courts have been restrictive in what they view as contracts involving sale by sample. In *LG Thorne & Co Pty Ltd v Thomas Borthwick & Sons (A/Asia) Ltd*,[47] the buyer entered into a contract for neatsfoot oil after having been provided with a sample, which it found satisfactory. When the product arrived it did not correspond with the sample. The Court held that:

> the mere fact that a sample has been shown by the intending vendor to the prospective purchaser during the course of negotiations leading up to a sale does not necessarily make the final contract a contract of sale by sample. If the contract is reduced to writing after the sample has been shown and makes no reference to this fact, then the written contract, if it be a complete contract, cannot have the added term incorporated in it.[48]

Thus, it is advisable for those buying something after having examined a satisfactory sample to make sure that reference is made to that sample in the actual contract.

43. [1969] 2 AC 31, at 77, per Lord Reid.
44. [1954] 1 QB 598.
45. Grant v Australian Knitting Mills (1936) AC 85.
46. [1919] 1 KB 486.
47. [1956] SR (NSW) 81.
48. LG Thorne & Co Pty Ltd v Thomas Borthwick & Sons (A/Asia) Ltd [1956] SR (NSW) 81, at 87, per Street CJ.

2.5.2.5 Party autonomy and the implied terms

Section 17(f) of the SGA makes it clear that no restriction exists in relation to the terms implied under that Act: "an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith". Further, s. 56 states that:

> ***Sale of Goods Act 1896* (Qld), s. 56**
>
> When any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

As noted above, the effect of this provision is to allow party autonomy to override all provisions, including those dealing with implied conditions and warranties, of the SGA.

2.5.2.6 Remedies in relation to terms implied under the SGA

Where a party has acted in breach of a contract, several remedies may be available to the "victim". In addition to the remedies available under common law and equity, the SGA provides options for an aggrieved party which contains ss. 54(1), 54(2), 54(4) and 57 dealing specifically with remedies.

The implied terms outlined in the SGA are either implied conditions, or implied warranties. The SGA does not define the term "condition". However, it does provide the definition of warranty pursuant to s. 3 as:

> an agreement with reference to goods which are the subject of a contract of sale but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

Drawing upon this definition, a condition in the context of the SGA could be described as an agreement with reference to goods, which is the main purpose of such a contract, the breach of which gives rise to a right to reject the goods and treat the contract as repudiated in combination with damages.

It must, however, be noted that s. 14 of the SGA introduces some limitations on the remedies available under the SGA:

> ***Sale of Goods Act 1896* (Qld), s. 14**
>
> (1) When a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.
>
> (2) Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated, or a warranty the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract.
>
> (2A) A stipulation may be a condition, though called a warranty in the contract.
>
> (3) When a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or when the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled

by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

(4) This section does not affect the case of any condition or warranty, the fulfilment of which is excused by law by reason of impossibility or otherwise.

2.6 Consumer Guarantees

As noted in the introduction to this Chapter, the ACL's consumer guarantees are similar to the SGA's implied terms both in scope and in function. The main difference from a theoretical perspective; is, while implied terms are viewed as forming part of the contract in question, the consumer guarantees are imposed upon the contractual parties without forming part of the contract as such.

On a practical level, the consumer guarantees are interesting for two main reasons. First, while they overlap to a great extent with the SGA's implied terms, they are somewhat different and, in some respects, broader than the implied terms. Second, while the parties, as noted above, can contract out of the SGA's implied terms, they cannot contractually avoid the application of the consumer guarantees.

2.6.1 When are the Consumer Guarantees applicable?

Consumer guarantees apply to *goods* and *services* bought on or after 1 July 2021 by a *consumer* from a *supplier* or *manufacturer* in the *course of trade* and are:

1) goods or services costing up to $100,000; or
2) goods or services exceeding $100,000 which are normally used for personal, domestic or household purposes; or a
3) vehicle or trailer acquired for use principally in the transport of goods on public roads; the cost of which is irrelevant.

Consumer guarantees also apply to *goods* and *services* acquired before 1 July 2021, but on or after 1 January 2011, if they are:

1) goods or services costing up to $40,000; or
2) goods or services exceeding $40,000 which are normally used for personal, domestic or household purposes; or a
3) vehicle or trailer acquired for use principally in the transport of goods on public roads; the cost of which is irrelevant.

Goods purchased from one-off sales by private sellers, garage sales, fetes and by way of auction are not covered by the consumer guarantees.

Upon a breach, a consumer may rely on any of the relevant guarantees, even without the guarantees being expressly included within the contract of sale. Consumer guarantees are in addition to any express guarantees given by the supplier or manufacturer to the consumer.

2.6.1.1 Consumer

Like the TPA before it, the ACL gives an extraordinarily lengthy, complex and broad meaning to the term "consumer". The definition found in s. 3 of the ACL is reproduced below:

***Australian Consumer Law*, s. 3**

Acquiring goods as a consumer

(1) A person is taken to have acquired particular goods as a *consumer* if, and only if:

(a) the amount paid or payable for the goods, as worked out under subsections (4) to (9), did not exceed:

(i) $40,000 [now $100,000]; or

(ii) if a greater amount is prescribed for the purposes of this paragraph—that greater amount; or

(b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or

(c) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.

(2) However, subsection (1) does not apply if the person acquired the goods, or held himself or herself out as acquiring the goods:

(a) for the following purpose:

(i) for goods other than gift cards—for the purpose of re-supply;

(ii) for gift cards—for the purpose of re-supply in trade or commerce; or

(b) for the purpose of using them up or transforming them, in trade or commerce:

(i) in the course of a process of production or manufacture; or

(ii) in the course of repairing or treating other goods or fixtures on land.

Acquiring services as a consumer

(3) A person is taken to have acquired particular services as a ***consumer*** if, and only if:

(a) the amount paid or payable for the services, as worked out under subsections (4) to (9), did not exceed:

(i) $40,000 [now $100,000]; or

(ii) if a greater amount is prescribed for the purposes of subsection (1)(a)—that greater amount; or

(b) the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

Amounts paid or payable for purchases

(4) For the purposes of subsection (1) or (3), the amount paid or payable for goods or services purchased by a person is taken to be the price paid or payable by the person for the goods or services, unless subsection (5) applies.

(5) For the purposes of subsection (1) or (3), if a person purchased goods or services by a mixed supply and a specified price was not allocated to the goods or services in the contract under which they were purchased, the amount paid or payable for goods or services is taken to be:

(a) if, at the time of the acquisition, the person could have

purchased from the supplier the goods or services other than by a mixed supply—the price at which they could have been purchased from the supplier; or

(b) if:

(i) paragraph (a) does not apply; but

(ii) at the time of the acquisition, goods or services of the kind acquired could have been purchased from another supplier other than by a mixed supply; the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or

(c) if, at the time of the acquisition, goods or services of the kind acquired could not have been purchased from any supplier except by a mixed supply—the value of the goods or services at that time.

Amounts paid or payable for other acquisitions

(6) For the purposes of subsection (1) or (3), the amount paid or payable for goods or services acquired by a person other than by way of purchase is taken to be the price at which, at the time of the acquisition, the person could have purchased the goods or services from the supplier, unless subsection (7) or (8) applies.

(7) For the purposes of subsection (1) or (3), if:

(a) goods or services acquired by a person other than by way of purchase could not, at the time of the acquisition, have been purchased from the supplier, or could have been purchased only by a mixed supply; but

(b) at that time, goods or services of the kind acquired could have been purchased from another supplier

other than by a mixed supply; the amount paid or payable for the goods or services is taken to be the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier.

(8) For the purposes of subsection (1) or (3), if goods or services acquired by a person other than by way of purchase could not, at the time of the acquisition, have been purchased from any supplier other than by a mixed supply, the amount paid or payable for the goods or services is taken to be the value of the goods or services at that time.

Amounts paid or payable for obtaining credit

(9) If:

(a) a person obtains credit in connection with the acquisition of goods or services by him or her; and

(b) the amount paid or payable by him or her for the goods or services is increased because he or she so obtains credit; obtaining the credit is taken for the purposes of subsection (3) to be the acquisition of a service, and the amount paid or payable by him or her for the service of being provided with the credit is taken to include the amount of the increase.

Presumption that persons are consumers

(10) If it is alleged in any proceeding under this Schedule, or in any other proceeding in respect of a matter arising under this Schedule, that a person was a consumer in relation to particular goods or services, it is presumed, unless the contrary is established, that the person was a consumer in relation to those goods or services.

Mixed supplies

(11) A purchase or other acquisition of goods or services is made by a ***mixed supply*** if the goods or services are purchased or acquired together with other property or services, or together with both other property and other services.

Supplies to consumers

(12) In this Schedule, a reference to a supply of goods or services to a consumer is a reference to a supply of goods or services to a person who is taken to have acquired them as a consumer.

As is obvious, ACL s. 3 is expressed in a manner describing when a person *is* classed as a consumer. However, the presumption in favour of persons being classed as consumers (subsection 10), means that the burden of proof will always rest on the party arguing that the other party *is not* a consumer. In practical terms, anyone arguing to be entitled to be classed as a consumers need only allege that she/he is a consumer. It is then for the other party to disprove this by reference to the criteria found in ACL s. 3.

In the light of that, it may be more suitable to approach the matter by examining what needs to be shown to conclude that a particular person is not a consumer. From that perspective, we can summarise the key features of how s. 3 defines a consumer in the following 'Rule':

Rule 5

1. A person who alleges that she/he was a consumer in relation to particular goods or services, was a consumer in relation to those particular goods or services unless it is shown either that:

(a) the goods were acquired, or she/he held herself/himself out as acquiring the goods, for re-supply, if the goods were other than gift cards, for re-supply in trade or commerce, if the goods were gift cards, or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land.; or that

(b) the goods were neither priced below the prescribed amount (currently $100,000), nor of a kind ordinarily acquired for personal, domestic or household use or consumption, or a commercial road vehicle or trailer.

From the perspective of comparative law, it is interesting to note how corporations may fall within the definition of "consumer". Such a wide definition is rare both in other jurisdictions,[1] and in international instruments.[2]

In any case, to understand the application of ACL s. 3, it is necessary to explore what is meant by "goods … of a kind ordinarily acquired for personal, domestic or household use or consumption". Case law illustrates that a wide range of goods may fit that description. As pointed out in *Peter Crago v Multiquip Pty Ltd*:[3] "goods may be of a kind ordinarily acquired for personal, domestic or household use or consumption even if goods of that same kind are in many cases, perhaps even a majority of cases, acquired for business use".[4] In that case, the applicant had purchased egg incubators from the first respondent for the purposes of incubating ostrich eggs. Due to some fault with the incubators, most of the eggs did not hatch and the applicant sought relief for their losses.

Indeed, goods may be classed as being "of a kind ordinarily acquired for personal, domestic or household use or consumption" even where they are purchased expressly for commercial purposes. In other words, the test of whether goods are regarded as being "of a kind ordinarily acquired for personal, domestic or household use or consumption" is an objective one as focus is placed on the purpose for which the goods typically are acquired. No attention is given to the acquirer's subjective intentions. In *Carpet Call Pty Ltd v Chan*,[5] the defendant had purchased a heavy-duty carpet to be used in a nightclub. The price of the carpet was over the prescribed amount, so the question for the Court to decide was whether the carpet was goods "of a kind ordinarily acquired for personal, domestic or household use or consumption". Justice Thomas noted that:

> "In my view "carpet" is a commodity, or goods, ordinarily acquired for domestic consumption, and it does not lose that description by reason of a commercial rating, or some quality which makes it last longer than other carpet normally supplied for use in a domestic setting."[6]

In contrast, in *Atkinson v Hastings Deering (Qld) Pty Ltd*,[7] a second-hand tractor purchased for $150,000 was held to plainly fall outside the definition of "goods … of a kind ordinarily acquired for personal, domestic or household use or consumption". The Court did not even discuss the purpose for which the tractor was purchased.

Furthermore, while s. 3 speaks of a consumer as one who "acquired" goods or services, and while it mentions the "amount paid or payable" as a relevant factor, it has been held that a person otherwise classed as a consumer is still a consumer where the goods or services were a gift. In *Peter Geoffrey Webber Clarke v New Concept Import Services Pty Ltd*,[8] the defendant was giving away unsafe balloon-blowing kits prohibited under the TPA, and the Court concluded that the relevant section – aimed to protect consumers – was applicable even though the balloon-kits were gifts.

Finally, while (as is expressed in ACL ss. 3(1) and (2)) in the case of goods, an intention to use the goods "in trade or commerce" excludes the acquirer from being classed as a consumer, no similar limitation is placed on an acquirer of services. Thus, for example in *ACCC v Maritime Union of Australia*,[9] the operators of commercial

1. However, some similar approach can be found, such as that of Article 1(4) lit(a) of the Greek Consumer Protection Act (Law No 2251/1994), which defined a consumer as "any natural or legal person, for whom products or services offered in the marketplace, are destined, or who makes use of such products or services, provided that she/he is the final recipient of them". See further: I Iglezakis, e-Commerce directive – The Greek response Computer Law and Security Report (2005) 21, 38-45, at 40.
2. See eg United Nations Convention on Contracts for the International Sale of Goods (CISG), Article 2(a) which aims to exclude consumers.
3. [1997] 913 FCA.
4. [1997] 913 FCA, per Lehane J.
5. (1987) ATPR (Digest) 46-025.
6. (1987) ATPR (Digest) 46-025, 53-072.
7. (1985) 6 FCR 331.
8. (1981) ATPR 40-264.
9. [2001] FCA 1549.

vessels engaged in bulk trades were "consumers" in relation to the organisers of cleaning services for the cargo holds.

This distinction between the extent to which an acquirer of goods and an acquirer of services can be classed as a consumer is based on a logical foundation. However, in some instances it lacks precision and accuracy in its application. Imagine that a person pays $5,000 and in return gets exclusive access to a jumping castle for one year. During that year, the person, having gained exclusive access to the jumping castle, invites other people to use the jumping castle at the cost of $50 per 24 hours. In such circumstances, the person acquiring exclusive access to the jumping castle would presumably not be classed as a consumer as the situation could be seen to involve re-supply.

Imagine further that the same person instead of acquiring exclusive access to the jumping castle acquires exclusive access to a news website and invites other people to use the news website at the cost of $50 per 24 hours. In this latter case, as there is no re-supply limit in relation to services, the person acquiring exclusive access to the news website would presumably be classed as a consumer, even though this is a clear case of commercial re-supply.

2.6.1.2 Supply and Supplier

ACL s. 2 defines the term ***supplier*** as anyone, including a trader or retailer, who in trade or commerce supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase and any service provider which provides a service to a consumer.

Section 5(1)(a) of the ACL makes it clear that a donation of goods or services is not treated as being issued by a supplier unless the donation is for promotional purposes.

ACL s. 2(1) defines the term supply:

> ***supply***, when used as a verb, includes:
>
> (a) in relation to goods–supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and
>
> (b) in relation to services–provide, grant or confer; and, when used as a noun, has a corresponding meaning, and ***supplied*** and ***supplier*** have corresponding meanings.
>
> Note: Section 5 deals with when a donation is a supply.

2.6.1.3 Manufacturer

> ***Australian Consumer Law*, s. 7**
>
> (1) A ***manufacturer*** includes the following:
>
> (a) a person who grows, extracts, produces, processes or assembles goods;
>
> (b) a person who holds himself or herself out to the public as the manufacturer of goods;
>
> (c) a person who causes or permits the name of the person, a name by which the person carries on business or a brand or mark of the person to be applied to goods supplied by the person;
>
> (d) a person (the ***first person***) who causes or permits another person, in connection with:
>
> (i) the supply or possible supply of goods by that other person; or

(ii) the promotion by that other person by any means of the supply or use of goods; to hold out the first person to the public as the manufacturer of the goods;

(e) a person who imports goods into Australia if:

(i) the person is not the manufacturer of the goods; and

(ii) at the time of the importation, the manufacturer of the goods does not have a place of business in Australia.

(2) For the purposes of subsection (1)(c):

(a) a name, brand or mark is taken to be applied to goods if:

(i) it is woven in, impressed on, worked into or annexed or affixed to the goods; or

(ii) it is applied to a covering, label, reel or thing in or with which the goods are supplied; and

(b) if the name of a person, a name by which a person carries on business or a brand or mark of a person is applied to goods, it is presumed, unless the contrary is established, that the person caused or permitted the name, brand or mark to be applied to the goods.

(3) If goods are imported into Australia on behalf of a person, the person is taken, for the purposes of paragraph (1)(e), to have imported the goods into Australia.

As is clear above, s. 7 of the ACL provides quite a broad definition of a ***manufacturer***. In essence, a manufacturer is a person or business that makes or puts goods together or has their name on the goods. It includes the importer, if the maker does not have an office in Australia.

2.6.1.4 Goods

The ACL does not seek to define the term "goods". It merely extends the ordinary meaning of goods to a range of matters we might not instinctively think of as goods. ACL s. 2(1) states that:

Australian Consumer Law, **s. 2(1)**

"goods" includes:

(a) ships, aircraft and other vehicles; and
(b) animals, including fish; and
(c) minerals, trees and crops, whether on, under or attached to land or not; and
(d) gas and electricity; and
(e) computer software; and
(f) second-hand goods; and
(g) any component part of, or accessory to, goods.

It could thus be said that the ACL's definition of "goods" includes all those matters we would instinctively consider as being goods, as well as those matters mentioned in s. 2(1)(a)-(g).

2.6.1.5 Services

ACL s. 2(1) defines the term "services" in the following manner:

***Australian Consumer Law*, s. 2(1)**

"services" includes:

(a) any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce; and

(b) without limiting paragraph (a), the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:

(i) a contract for or in relation to the performance of work (including work of a professional nature), whether with or without the supply of goods; or

(ii) a contract for or in relation to the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or

(iii) a contract for or in relation to the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction; or

(iv) a contract of insurance; or

(v) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or

(vi) any contract for or in relation to the lending of money; but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.

Thus, like several of the terms defined in the ACL, the term "services" is given a rather broad interpretation. Importantly, however, it excludes one common type of service – that of an employee doing services for her/his employer – from its scope.

2.6.2 What are the Consumer Guarantees?

2.6.2.1 Guarantee as to title s. 51

Australian Consumer Law, **s. 51**

(1) If a person (the supplier) supplies goods to a consumer, there is a guarantee that the supplier will have a right to dispose of the property in the goods when that property is to pass to the consumer.

(2) Subsection (1) does not apply to a supply (a supply of limited title) if an intention that the supplier of the goods should transfer only such title as the supplier, or another person, may have:

(a) appears from the contract for the supply; or

(b) is to be inferred from the circumstances of that contract.

(3) This section does not apply if the supply is a supply by way of hire or lease.

ACL s. 51 provides a statutory guarantee to consumers that the supplier has a right to sell the goods, and to pass title of the goods to the buyer. This guarantee does not apply if the supplier expressly disclosed to the consumer before the sale that the goods only had limited title and that clear title would not be passed to the consumer upon purchase.

Further, this guarantee does not apply to hired or leased goods.

2.6.2.2 Guarantee as to possession s. 52

Australian Consumer Law, **s. 52**

(1) If:

(a) a person (the***supplier***) supplies goods to a consumer; and

(b) the supply is not a supply of limited title;

there is a guarantee that the consumer has the right to undisturbed possession of the goods.

(2) Subsection (1) does not apply to the extent that the consumer's undisturbed possession of the goods may be lawfully disturbed by a person who is entitled to the benefit of any security, charge or encumbrance disclosed to the consumer before the consumer agreed to the supply.

(3) If:

(a) a person (the ***supplier***) supplies goods to a consumer; and

(b) the supply is a supply of limited title; there is a guarantee that the following persons will not disturb the consumer's possession of the goods:

(c) the supplier;

(d) if the parties to the contract for the supply intend that the supplier should transfer only such title as another person may have—that other person;

(e) anyone claiming through or under the supplier or that other person (otherwise than under a security, charge or encumbrance disclosed to the consumer before the consumer agreed to the supply).

(4) This section applies to a supply by way of hire or lease only for the period of the hire or lease.

ACL s. 52 provides a statutory guarantee that the consumer who acquires goods has a right to undisturbed possession of the goods except where prior to sale:

(1) the supplier disclosed to the consumer any security interest over the goods; or

(2) the consumer had knowledge that the supplier only had limited title in the goods.

This guarantee applies to leased and hired goods for the period of the lease or duration of the hire.

2.6.2.3 Guarantee as to undisclosed securities s. 53

***Australian Consumer Law*, s. 53**

(1) If:

(a) a person (the ***supplier***) supplies goods to a consumer; and

(b) the supply is not a supply of limited title; there is a guarantee that:

(c) the goods are free from any security, charge or encumbrance:

(i) that was not disclosed to the consumer, in writing, before the consumer agreed to the supply; or

(ii) that was not created by or with the express consent of the consumer; and

(d) the goods will remain free from such a security, charge or encumbrance until the time when the property in the goods passes to the consumer.

(2) A supplier does not fail to comply with the guarantee only because of the existence of a floating charge over the supplier's assets unless and until the charge becomes fixed and enforceable by the person to whom the charge is given.

(3) If:

(a) a person (the ***supplier***) supplies goods to a consumer; and

(b) the supply is a supply of limited title;

there is a guarantee that all securities, charges or encumbrances known to the supplier, and not known to the consumer, were disclosed to the consumer before the consumer agreed to the supply.

(4) This section does not apply if the supply is a supply by way of hire or lease.

ACL s. 53 provides a statutory guarantee that the consumer who purchases goods does so free from any hidden securities or charges, and will remain so, unless the security or charge was either:

(1) brought to the consumer's attention prior to the purchase of the goods; or

(2) placed on the goods with the consumer's permission.

This guarantee does not apply to goods hired or leased.

2.6.2.4 Guarantee as to acceptable quality s. 54

***Australian Consumer Law*, s. 54**

(1) If:

(a) a person supplies, in trade or commerce, goods to a consumer; and

(b) the supply does not occur by way of sale by auction; there is a guarantee that the goods are of acceptable quality.

(2) Goods are of ***acceptable quality*** if they are as:

(a) fit for all the purposes for which goods of that kind are commonly supplied; and

(b) acceptable in appearance and finish; and

(c) free from defects; and

(d) safe; and

(e) durable;

as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable having regard to the matters in subsection (3).

(3) The matters for the purposes of subsection (2) are:

(a) the nature of the goods; and

(b) the price of the goods (if relevant); and

(c) any statements made about the goods on any packaging or label on the goods; and

(d) any representation made about the goods by the supplier or manufacturer of the goods; and

(e) any other relevant circumstances relating to the supply of the goods.

(4) If:

(a) goods supplied to a consumer are not of acceptable quality; and

(b) the only reason or reasons why they are not of acceptable quality were specifically drawn to the consumer's attention before the consumer agreed to the supply; the goods are taken to be of acceptable quality.

(5) If:

(a) goods are displayed for sale or hire; and

(b) the goods would not be of acceptable quality if they were supplied to a consumer;

the reason or reasons why they are not of acceptable quality are taken, for the purposes of subsection (4), to have been specifically drawn to a consumer's attention if those reasons were disclosed on a written notice that was displayed with the goods and that was transparent.

(6) Goods do not fail to be of acceptable quality if:

(a) the consumer to whom they are supplied causes them to become of unacceptable quality, or fails to take reasonable steps to prevent them from becoming of unacceptable quality; and

(b) they are damaged by abnormal use.

(7) Goods do not fail to be of acceptable quality if:

(a) the consumer acquiring the goods examines them before the consumer agrees to the supply of the goods; and

(b) the examination ought reasonably to have revealed that the goods were not of acceptable quality.

ACL s. 54 provides a statutory guarantee that goods supplied to a consumer are of an "acceptable quality". The test is whether a reasonable consumer, fully aware of the goods' condition (including any defects) would find them:

- fit for the purpose for which they are commonly supplied;
- free from defects;
- of acceptable appearance and finish; and

- safe and durable.

Second-hand goods sold in trade or commerce are covered by this guarantee, but age, price and condition are be taken into account.

The guarantee does not apply to:

- goods examined by the consumer prior to accepting them and that examination ought reasonably to have revealed the position; or
- goods damaged by abnormal use; or
- contracts of insurance; or
- goods which contain hidden defects where the supplier has alerted the consumer to the defects. A consumer is assumed to be aware of defects if a written notice setting out the defects was displayed with the goods.

The ACL does not define 'abnormal use'. However, examples of abnormal use may include: a mobile phone dropped in water; a television broken by an object hitting the screen or a laptop picked up by the corner of its screen, which then cracks down the middle.

This guarantee provides a right of action against both the supplier and the manufacturer of the goods, except where the consumer was alerted to the defects prior to the sale, and those particular defects later cause problems with the goods. However, the consumer may have a right of action for a different fault in the goods, which the consumer was not previously alerted to.

2.6.2.5 Guarantee as to fitness for disclosed purpose s. 55

Section *55* of the ACL contains two guarantees that ought to be approached as separate matters. First, where a consumer has a particular purpose for which the goods will be used (a disclosed purpose), there is a guarantee that the goods are reasonably fit for that purpose. Second, where the supplier represents that the goods are reasonably fit for a particular purpose, there is a guarantee that the goods are indeed reasonably fit for that particular purpose.

Australian Consumer Law 2011 **(Cth) s. 55**

(1) If:

(a) a person (the ***supplier***) supplies, in trade or commerce, goods to a consumer; and

(b) the supply does not occur by way of sale by auction;

there is a guarantee that the goods are reasonably fit for any disclosed purpose, and for any purpose for which the supplier represents that they are reasonably fit.

(2) A disclosed purpose is a particular purpose (whether or not that purpose is a purpose for which the goods are commonly supplied) for which the goods are being acquired by the consumer and that:

(a) the consumer makes known, expressly or by implication, to:

(i) the supplier; or

(ii) a person by whom any prior negotiations or arrangements in relation to the acquisition of the goods were conducted or made; or

(b) the consumer makes known to the manufacturer of the goods either directly or through the supplier or the person referred to in paragraph (a)(ii).

(3) This section does not apply if the circumstances show that the consumer did not rely on, or that it was unreasonable for the consumer to rely on, the skill or judgment of the supplier, the person referred to in subsection (2)(a)(ii) or the manufacturer, as the case may be.

ACL s. 55 provides a statutory guarantee that goods supplied to a consumer, other than by auction, are fit for any purpose that the consumer has made known to the supplier, either expressly or by implication. Whether or not the supply occurs by way of sale by auction may potentially be a complex matter, not least in the context of some sales occurring through online platforms. A sale by way of auction was originally exempt from this consumer guarantee because traditionally, consumers were able to inspect goods prior to the sale by auction. This has become a complex question in recent years as the number of online auctions, which do not allow for prior inspection of goods, has increased. However, sales conducted through online platforms such as eBay are not considered an auction because eBay does not act as an agent on behalf of the seller.[1] Although a review of the ACL by the Consumer Affairs Australia and New Zealand (CAANZ) led to their proposal to modify the 'sale by way of auction' exemption to ensure that consumer guarantees apply to all online auctions,[2] the Australian Ministers for Consumer Affairs agreed to maintain the current framework.[3]

Unless in the circumstances, it was unreasonable for the consumer to have relied on the supplier's knowledge or expertise, the fitness for disclosed purpose guarantee will also apply if prior to buying the goods the consumer relied on the supplier's knowledge or expertise when deciding whether the goods were suitable for the intended use.

2.6.2.6 Guarantee relating to goods supplied by description s. 56

Australian Consumer Law, **s. 56**

(1) If:

(a) a person supplies, in trade or commerce, goods by description to a consumer; and

(b) the supply does not occur by way of sale by auction;

there is a guarantee that the goods correspond with the description.

(2) A supply of goods is not prevented from being a supply by description only because, having been exposed for sale or hire, they are selected by the consumer.

(3) If goods are supplied by description as well as by reference to a sample or demonstration model, the guarantees in this section and in section 57 both apply.

ACL s. 56 provides a statutory requirement that suppliers and manufacturers guarantee that the description of goods (for example, in a catalogue or television commercial) is accurate.

A supplier or manufacturer cannot argue that the consumer inspected the goods before purchase and should have picked up any errors in the description.

2.6.2.7 Guarantee for goods supplied by sample or demonstration s. 57

Australian Consumer Law, **s. 57**

(1) If:

1. See e.g., Queensland Government, 'Buying Goods at Private Sales or Auction' (Web Page, 30 October 2020) <https://www.qld.gov.au/law/your-rights/consumer-rights-complaints-and-scams/buying-products-and-services/guarantees-warranties-refunds/buying-at-private-sales-or-an-auction>.
2. Consumer Affairs Australia and New Zealand, Australia Consumer Law Review (Final Report, March 2017) 70.
3. Australian Consumer Law, Meeting of Ministers for Consumer Affairs (Meeting 10, 26 October 2018) <https://consumerlaw.gov.au/consumer-affairs-forum/communiques/meeting-10-0>.

(a) a person supplies, in trade or commerce, goods to a consumer by reference to a sample or demonstration model; and

(b) the supply does not occur by way of sale by auction; there is a guarantee that:

(c) the goods correspond with the sample or demonstration model in quality, state or condition; and

(d) if the goods are supplied by reference to a sample—the consumer will have a reasonable opportunity to compare the goods with the sample; and

(e) the goods are free from any defect that:

(i) would not be apparent on reasonable examination of the sample or demonstration model; and

(ii) would cause the goods not to be of acceptable quality.

(2) If goods are supplied by reference to a sample or demonstration model as well as by description, the guarantees in section 56 and in this section both apply.

ACL s. 57 provides a statutory guarantee that goods supplied to a consumer by reference to a demonstration model, or by sample, correspond with the sample or demonstration model in quality, state and condition and free from any defect not apparent on reasonable examination of the sample or demonstration model that would cause the goods not to be of an acceptable quality.

For example, in the event that a sample of fabric is used to sell a couch however, the couch delivered to the consumer is a different colour from the sample. The consumer has a right of action to pursue a remedy.

Where the goods are supplied by sample, there is a guarantee that the consumer will have a reasonable opportunity to compare the goods with the sample; this does not apply to demonstration models.

2.6.2.8 Guarantee as to spare parts and repairs s. 58

***Australian Consumer Law*, s. 58**

(1) If:

(a) a person supplies, in trade or commerce, goods to a consumer; and

(b) the supply does not occur by way of sale by auction;

there is a guarantee that the manufacturer of the goods will take reasonable action to ensure that facilities for the repair of the goods, and parts for the goods, are reasonably available for a reasonable period after the goods are supplied.

(2) This section does not apply if the manufacturer took reasonable action to ensure that the consumer would be given written notice, at or before the time when the consumer agrees to the supply of the goods, that:

(a) facilities for the repair of the goods would not be available or would not be available after a specified period; or

(b) parts for the goods would not be available or would not be available after a specified period.

ACL s. 58 requires manufacturers to take "reasonable action" to provide spare parts and repair facilities for goods supplied to consumers for a "reasonable period" after purchase.

The period of time that is considered reasonable will depend on the type of goods. For example: it would be reasonable to expect that tyres for a new car will be available for many years after its purchase. However, it may not be reasonable to expect that spare parts for an inexpensive children's toy are available.

Manufacturers may exclude their liability under this section by taking "reasonable action" to advise the consumer at the time of sale that either:

(1) repair facilities or spare parts would not be available; or
(2) that they would not be available after a specified period of time.

2.6.2.9 Guarantee as to express warranties s. 59

***Australian Consumer Law*, s. 59**

(1) If:

(a) a person supplies, in trade or commerce, goods to a consumer; and

(b) the supply does not occur by way of sale by auction;

there is a guarantee that the manufacturer of the goods will comply with any express warranty given or made by the manufacturer in relation to the goods.

(2) If:

(a) a person supplies, in trade or commerce, goods to a consumer; and

(b) the supply does not occur by way of sale by auction;

there is a guarantee that the supplier will comply with any express warranty given or made by the supplier in relation to the goods.

ACL s. 59 provides a statutory guarantee that any express warranties (extra promises about such things as quality, state, condition, performance etc) given by the supplier or manufacturer to the consumer are complied with.

For example, if a supplier tells the consumer that a bed will last for ten years, and the bed only lasts for six years, the consumer will be entitled to a remedy.

2.6.3 Party autonomy, remedies and the Consumer Guarantees

As mentioned above, consumer guarantees cannot be avoided, modified or limited by contract (s. 64 ACL). Furthermore, any attempt to circumvent the consumer guarantees may amount to a violation of ACL s. 29(1)(m) that focuses on the making of "a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2)". This was illustrated in *ACCC v Valve Corporation (No 3)*.[1] In this case, Valve operated an online distribution network for video games, known as Steam, which required consumers to create a subscriber account. The subscriber agreement stated that 'All Steam fees are payable in advance and are not refundable in whole or in part'. The Court held that this contractual term 'did not convey the message to a reasonable consumer that "as a matter of contract you cannot claim a refund, although you might be able to obtain a refund as a result of legislation or some other regime"'.[2] Therefore, Valve contravened ACL s. 29(1)(m) in making the 'no entitlement to refund' representation because pursuant to the ACL, consumers (subscribers) were entitled to a refund in certain circumstances.

If a provision of the contract specifies a law other than a law of Australia, that provision will not affect the operation of the guarantees. However, the Vienna Sales Convention prevails in the event of an inconsistency between the provisions of the convention and the division (ss 67 and 68 ACL).

2.6.3.1 Remedies in relation to the Consumer Guarantees

Where a supplier or manufacturer has acted in breach of a consumer guarantee, several remedies may be available to the consumer. In addition to the remedies available under common law and equity, the ACL contains sections dealing specifically with remedies.

When a consumer guarantee is breached, the consumer has a right of action to seek a remedy. The consumer may seek a remedy from only the ***supplier*** if goods do not meet guarantees as to; fitness for any disclosed purpose; matching sample or demonstration model; title; undisturbed possession or undisclosed securities.

The consumer may seek a remedy from only the ***manufacturer*** if goods do not meet the guarantees as to repairs and spare parts.

The consumer may seek a remedy from both the ***supplier*** and ***manufacturer*** if goods do not meet the guarantees as to; acceptable quality; express warranties; and matching description.

2.6.3.2 Specific remedies for breach of Consumer Guarantees

Under s. 259(2)(a) of the ACL, if the failure to comply with the guarantee is not a ***major failure*** and can be remedied, the consumer can require the supplier to remedy the failure within a reasonable time. Sections 259(2)(b) and 265 make it clear that if the supplier does not do so the consumer may either reject the goods and recover the money paid, or have the failure remedied and recover the reasonable costs of doing so from the supplier. Damages for loss or damage may also be recovered (s. 259(4) ACL).

1. [2016] FCA 196.
2. ACCC v Valve Corporation (No 3) [2016] FCA 196 [241].

Under s. 261 of the ACL, if the consumer requires the supplier to remedy the failure, the supplier may either replace the goods with identical goods, or refund the amount paid by the consumer.

If the failure cannot be remedied, or is a ***major failure***, the consumer can either recover compensation for any reduction in value or reject the goods (s. 259(4) ACL). Under s. 259(4) (ACL), damages for loss or damage may also be recovered.

A consumer is not entitled to reject goods unless the consumer does so within a reasonable period:

(1) after the failure became apparent – if the goods were damaged after the consumer took possession for reasons related to the failure; or

(2) if they have been lost, destroyed or disposed of by the consumer (s. 262 ACL).

If a consumer is entitled to reject the goods and does so, the consumer must return the goods to the supplier. Unless there is significant cost in doing so, in which case the supplier must collect the goods at its expense (s. 263(2) and (3) ACL). The consumer is entitled to either have replacement goods or a refund and the supplier must comply (s. 263(4) ACL).

2.6.3.3 Major Failure

***Australian Consumer Law*, s. 260**

A failure to comply with a guarantee is a ***major failure*** if:

(a) the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; or

(b) the goods depart in one or more significant respects:

(i) if they were supplied by description—from that description; or

(ii) if they were supplied by reference to a sample or demonstration model—from that sample or demonstration model; or

(c) the goods are substantially unfit for a purpose for which goods of the same kind are commonly supplied and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose; or

(d) the goods are unfit for a disclosed purpose that was made known to:

(i) the supplier of the goods; or

(ii) a person by whom any prior negotiations or arrangements in relation to the acquisition of the goods were conducted or made; and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose; or

(e) the goods are not of acceptable quality because they are unsafe.

A "major failure" is one where a reasonable consumer would not have acquired the goods had the consumer been fully aware of the failure as the goods are:

- unsafe; or
- substantially unfit for purpose; or
- departed significantly from the demonstration model or sample.

2.7 Comparing the SGA implied terms and the ACL's consumer guarantees

To conclude the discussion of the implied terms under the SGA and the consumer guarantees under the ACL, it is useful to summarise the differences.

Despite all these differences, the two Acts clearly overlap, and in many instances, an aggrieved party can rely on either, or both, of these two Acts for the implication of terms into the contract.

	Australian Consumer Law (ACL)	Sales of Goods Acts (SGA)
Limited to 'consumers' as buyers	NO	NO
Limited to 'corporations as sellers'	NO	NO
Covers Services	YES	NO
Exclusion of Terms	NO	Any or all of the implied terms may be expressly excluded s 56
Right of Termination	Wide (i.e., within a reasonable time)	Narrow (i.e., generally, right is lost when a buyer has accepted goods *and* the property has passed).
Sale/supply	Wide, covering many forms of supply	Narrow, only covering sale
Scope	National	State (Qld)
Remedies	• Major Failure: ◦ Reject goods; or ◦ Recover compensation. • Not a Major Failure: ◦ Remedy the failure (curing defect in title, repairing goods, replacing, or refunding); If not remedied in a reasonable time, the consumer can recover costs or reject the goods.	• Breach of Condition: repudiation • Breach of Warranty: damages Remedy dependent upon construction of contract.
Implied Terms: Title	• Guarantee	• Condition
Quiet Possession	• Guarantee • Right to undisturbed possession Must notify the consumer if any (legal) encumbrances.	• Warranty
Undisclosed Securities	• Guarantee Must notify the consumer of any securities prior to sale, or only with consumer's permission,	NO
Correspondence with Description	Guarantee • Excludes sales by auction Applies to both ***supplier*** and ***manufacturer.***	• Condition Sales by way of auction covered.

	Australian Consumer Law (ACL)	Sales of Goods Acts (SGA)
Fitness for Purpose	• Guarantee • Must rely on skill of seller and it must be *reasonable* to do so • Goods must be supplied 'in the course of business' Goods sold under patent/trade name are not excluded.	• Condition • Must rely on skill of seller • Goods must be supplied 'in the course of business' • Goods sold under patent/ trade name are excluded (s 17(b))
Acceptable Quality	• Guarantee Excludes goods damaged by unreasonable use, contracts of insurance & defects disclosed to the consumer.	• Condition
Supply by Sample/ Demonstration	• Guarantee • Excludes sales by auction Sale must be 'in the course business'.	• Condition • Sales by way of auction covered.
Express Warranties	• Guarantee Applies to any express guarantees offered by ***supplier*** or ***manufacturer***.	N/A

3. Unfair Contract Terms under ACL s. 23

This Chapter addresses the provisions of the *Competition and Consumer Act 2010* (Cth) that govern unfair contract terms.[1] These provisions are contained within Part 2-3 of the Australian Consumer Law and allow consumers, and small businesses, a right of remedy in the event that a standard form contract contains terms that are unfair or prejudicial to the consumer or the small business.

Section 23 of the Australian Consumer Law was arguably one of the most significant changes that was implemented by the ACL as compared to the TPA that preceded it.

Section 23 provides as follows:

> ***Australian Consumer Law*, s. 23**
>
> (1) A term of a consumer contract or small business contract is void if:
>
> (a) the term is unfair; and
>
> (b) the contract is a standard form contract.
>
> (2) The contract continues to bind the parties if it is capable of operating without the unfair term.
>
> (3) A consumer contract is a contract for:
>
> (a) a supply of goods or services; or
>
> (b) a sale or grant of an interest in land; to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.
>
> (4) A contract is a small business contract if:
>
> (a) the contract is for a supply of goods or services, or a sale or grant of an interest in land; and
>
> (b) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
>
> (c) either of the following applies:
>
> (i) the upfront price payable under the contract does not exceed $300,000;
>
> (ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed $1,000,000.
>
> (5) In counting the persons employed by a business for the purposes of paragraph 4(b), a casual employee is not to be counted unless he or she is employed by the business on a regular and systematic basis.

Importantly, the unfair contract provisions apply equally to contracts in all forms, including written and oral, online, over the phone and face-to-face. The provisions introduced by the ACL are generic consumer protection laws, in that they provide consumers with a right to take legal action in response to the harm they suffer as a result of the conduct of the business.

It is also worth noting that the unfair contract terms provisions contained in the ACL are also included in

1. This chapter builds upon: Dan Svantesson and Loren Holly, An Overview and Analysis of the National Unfair Contract Terms Provisions, Commercial Law Quarterly 24(3) (2010); pp. 3-14.

Part 2, Division 2, Subdivision BA of the *Australian Securities and Investment Commission Act* 2001 (Cth) ("ASIC Act"), with respect to financial products and services. As these provisions relate to financial products this will not be discussed further here. However, as the wording in the ASIC Act is substantially the same, it would be reasonable to assume that the principles and cases discussed in this chapter could apply equally in the enforcement of the ASIC Act.

The unfair contract provisions previously only applied to consumer contracts, which meant business-to-consumer transactions were captured but business-to-business transactions were not. However, both s. 23 ACL and the unfair contract provisions in the ASIC Act were amended in 2015 to extend its application to small business contracts,[2] recognising that many small businesses are provided with standard form contracts on a 'take-it-or-leave-it' basis.

2. Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 (Cth).

3.1 Introduction, Scope and Terms of s23

As s. 23 was a new introduction to the CCA, it is worth spending some time discussing how this law came to arrive in the Act. The unfair contract provisions have an interesting history and have found their way into Australian law in a somewhat unorthodox manner.

In recognition of the importance of cross-border consumer trade, and the diversity in the approaches taken by individual Member States of the European Union towards consumer protection, a Council Directive on unfair terms in consumer contracts came into force on the 11th of May 1993[1] ("the Directive"). The Directive required the Member States to implement relevant legislation before the end of 1994. The purpose of the Directive was outlined in Article 1(1) of the Directive, as follows: "The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer."

Drawing upon the *Unfair Terms in Consumer Contracts Regulations 1999* (UK), which represents the UK's implementation of the Directive,[2] the *Fair Trading Act 1999* (Vic) (referred to throughout as the "Victorian Legislation") was amended in 2003 to include Part 2B regulating unfair terms in consumer contracts. The success of the Victorian Legislation has, in turn, been a catalyst for a nationwide adoption of unfair contract provisions.

As a result, Victorian cases are likely to have a significant bearing on the interpretation of the unfair contract terms provisions of the ACL. In addition to drawing on the Victorian Legislation, further guidance may also be drawn from the application of the *Contracts Review Act* 1980 (NSW) (referred to throughout as the "*Contracts Review Act*").[3]

The *Contracts Review Act* allows New South Wales Courts power to award remedies to consumers that have been affected by procedural or substantive unfairness. The *Contracts Review Act* allows a Court to find a contract to be "unjust" and rule that the contract is void or make an order to vary the contract. Thus, it overlaps with the ACL's unfair contract provisions as both the ACL and the *Contracts Review Act* provide remedies to a consumer, where the consumer has not had a reasonable opportunity to negotiate the terms of the contract.

In addition, a Court applying the *Contracts Review Act* may take into consideration the bargaining powers of the parties in making the contract, whether the terms were able to be negotiated and whether it was practical for the party seeking relief to negotiate the alteration of or reject any of the provisions of the contract, and what the educational or economic circumstances of the parties were when making the contract, in order to determine whether a matter is unjust.[4]

3.1.1 Scope of s. 23

To properly understand the scope of s. 23 of the ACL, it is vital that we grasp several fundamental terms, or concepts, that are used in the section. These terms are discussed in turn.

1. See Council Directive 93/13/EEC of 5 April 1993.
2. The UK was a Member State of the European Union at the time.
3. Do note, however, that the ACL is not intended to replace the Contracts Review Act and thus they will continue to work together because of the differing intentions of each Act. The distinction between the ACL and the Contracts Review Act lies in that the ACL focuses more on the contents of the terms of the contract, whereas the Contracts Review Act governs the circumstances that caused the parties to enter into the contract.
4. Section 9 Contracts Review Act 1980 (NSW).

3.1.1.1 Consumer Contract

The first term that is introduced in this context is the term 'consumer contract'. In discussing the introduction of the ACL, Victorian Consumer Affairs stated that a 'consumer contract' is a 'standard-form contract' for the supply of goods or services that is wholly or predominantly for personal, domestic or household use or consumption.[5] It is therefore necessary to examine the meaning of a 'standard form contract' (see 3.1.2.3) to understand this section.

3.1.1.2 Small Business Contract

The term 'small business contract' was recently introduced, as noted above (at 3.1). Section 23(4)(b) requires at least one of the parties to a contract to be a business employing fewer than 20 persons (i.e., 19 persons or less) at the time of entering the contract to qualify as a 'small business contract'. In addition, the upfront price payable under such a contract must not exceed $300,000, or if the contract duration is longer than 12 months, the upfront price payable must not exceed $1,000,000. To be captured by this provision, a small business contract must be entered into or renewed on or after 12 November 2016 and must satisfy the meaning of a 'standard form contract'.

3.1.1.3 Standard Form Contract

The term "standard form contract" is explained in s. 27 of the ACL as follows:

> ***Australian Consumer Law*, s. 27**
>
> (1) If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.
>
> (2) In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:
>
> (a) whether one of the parties has all or most of the bargaining power relating to the transaction;
>
> (b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
>
> (c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in section 26(1)) in the form in which they were presented;
>
> (d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 26(1);
>
> (e) whether the terms of the contract (other than the terms referred to in section 26(1)) take into account the specific characteristics of another party or the particular transaction;
>
> (f) any other matter prescribed by the regulations.

As seen above, the ACL does not specifically define the term 'standard form contract', but rather lists a number of criteria that a court may take into consideration to determine whether a contract is a 'standard form contract'. In general terms, it is understood that a standard form contract is a contract that is prepared by one party to the contract (usually the business), containing a generic set of terms and conditions where the other party (the consumer) has not had an opportunity to negotiate the terms and is usually offered to the consumer on a 'take it or leave it' basis.[6]

5. A guide to the unfair contract terms law (2010) [4] Victorian Consumer Affairs <http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-Utility+Buttons-Forms+and+publications?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=17-Forms+and+publications~#unfair> at 21 July 2010, 7.
6. Australian Consumer Law – A Guide to Provisions (2010) Australian Government < http://www.treasury.gov.au/consumerlaw/content/default.asp> at 20 July 2010.

3.1.1.4 Unfair

Another fundamental term that needs to be addressed is the meaning of the term 'unfair'. As with the definition of 'standard form contract', the definition of 'unfair' has been provided in the ACL.

Section 24 of the ACL outlines the meaning of unfair as follows:

> ***Australian Consumer Law*, s. 24**
>
> (1) A term of a consumer contract is unfair if:
>
> (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
>
> (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
>
> (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.
>
> (2) In determining whether a term of a consumer contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
>
> (a) the extent to which the term is transparent;
>
> (b) the contract as a whole.
>
> (3) A term is transparent if the term is:
>
> (a) expressed in reasonably plain language; and
>
> (b) legible; and
>
> (c) presented clearly; and
>
> (d) readily available to any party affected by the term.
>
> (4) For the purposes of subsection (1)(b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

Section 24(1)(b) uses the term "legitimate interest" in reference to the inclusion of the term in the contract, in the event the business can prove the legitimate interest in including the term, it is unlikely to be found to be unfair. The interpretation of "legitimate interest" is the duty of the court to determine on a case by case basis. While courts have discussed the matter of whether a term is reasonably necessary to protect a 'legitimate interest', Justice Banks-Smith stated that '[i]t is not appropriate to attempt to define 'legitimate interest'. It will depend upon the nature of the particular business of the relevant supplier and the context of the contract as a whole.'[7] It should be noted, however, that businesses will be required to produce evidence to prove that the particular term is reasonably necessary for the efficacy of the business.[8] Commentators have suggested this may be done through the production of material relating to the business' costs and structure, the need for the mitigation of risks or particular industry practices to the extent that such material is relevant.[9]

Further to the above, s. 24(2)(a) requires the Court to consider the extent to which the term is transparent and s. 24(2)(b) requires the consideration of the contract as a whole in determining whether the term is unfair. Commentators in the field have speculated that the transparency requirement of s. 24(2)(a) will not operate to automatically find a term unfair if it does not meet the transparency requirement. In the same vein, a term that is transparent will not, in itself, disprove the unfairness of the term.[10]

The unfair contract provisions in the United Kingdom use the phrase 'plain and intelligible language' rather than 'transparent'. Notwithstanding, the practical effect of these two phrases is likely to be the same. The

7. Australian Competition and Consumer Commission v Ashley and Martin Pty Ltd [2019] FCA 1436, [48].
8. See Ferme v Kimberley Discovery Cruises Pty Ltd [2015] FCCA 2384, [77].
9. A guide to the unfair contract terms law (2010) [4] Victorian Consumer Affairs < http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-Utility+Buttons-Forms+and+publications?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=17-Forms+and+publications~#unfair> at 21 July 2010, 7, 14.
10. A guide to the unfair contract terms law (2010) [4] Victorian Consumer Affairs < http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-Utility+Buttons-Forms+and+publications?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=17-Forms+and+publications~#unfair> at 21 July 2010, 7, 15.

United Kingdom case of *Office of Fair Trading v Abbey National plc*[11] per Smith J may provide some guidance regarding how the term 'transparent' may be interpreted:

> [Transparency] requires not only the actual wording of individual clauses or conditions be comprehensible to consumers, but that the typical consumer can understand how the term affects the rights and obligations that he and the seller or supplier have under the contract.[12]

The requirement for transparency was addressed in the Victorian Civil and Administrative Tribunal ("VCAT") case of *Director of Consumer Affairs Victoria v AAPT Ltd (Civil Claims)*[13] ("the AAPT case"). In this case, the Tribunal made it clear that even where a contract contains terms that favour the consumer, the favourable term may not counterbalance the unfair term if the consumer is unaware of the unfair term. A consumer may be unaware of the unfair term where it is implied in the contract, hidden in the terms and conditions, in a schedule or another document or where the term is written in legalese.[14] The rationale behind the decision in the AAPT is that there may be in an information imbalance in the favour of the business where a consumer is unaware of the unfair term.

The AAPT case, in interpreting what constitutes an 'unfair term', found there are two distinct types of unfair terms:

1. Terms that cause such an imbalance that they are unfair even if they were individually negotiated or brought to the consumer's attention; and
2. Other terms that cause less (but still significant) imbalance. These terms are only fair if they have been individually negotiated or brought to the consumer's attention.[15]

Furthermore, when reading of section 24(2)(b), it could be understood that the requirement of the Court to consider the contract as a whole may require the Court to weigh up the benefit or detriment to the consumer under the contract. A term that is alleged to be unfair may be seen in a better context when the detriment to the consumer is viewed in conjunction with the counterbalancing terms. For example, a potentially unfair term may be included in a consumer contract but may be counterbalanced by additional benefits, such as a lower price, being offered to the other party.[16] It is also worth noting that where a particular term is decided to be unfair in one case, it will not necessarily be unfair in every contract.[17]

A case that dealt significantly with unfair contract provisions, and more specifically the requirement to view the contract as a whole, was the case of *Jetstar Airways Pty Ltd v Elizabeth Winifred Free* ("*Jetstar v Free*"). *Jetstar v Free* was the first decision of the Victorian Supreme Court to consider the effect of the equivalent Victorian unfair contract provisions. As judgments such as this provide a valuable insight into how the ACL provisions are likely to be interpreted by the courts, it is worth devoting some time to this case.

At first instance, *Jetstar v Free* was heard in VCAT.[18] Ms Free purchased two return plane tickets for herself and her sister. The tickets were purchased online from the respondent airline company, Jetstar, as part of a special introductory offer and Ms Free paid $437.39 per person for return tickets. In purchasing the tickets, Ms Free indicated she agreed to Jetstar's "Fare Rules" by clicking an 'I Agree' button. At the time of purchase, there were more expensive tickets available that permitted ticketholders to change the name of the passenger, among other particulars.

Subsequently, Ms Free sought to change the name of the passenger on the second ticket. In accordance with the "Fare Rules", Jetstar charged Ms Free a "change fee" of $75 in addition to a $600.90 fare difference

11. [2009] UKSC 6.
12. Office of Fair Trading v Abbey National plc [2009] UKSC 6.
13. [2006] VCAT 1493.
14. A guide to the unfair contract terms law (2010) [4] Victorian Consumer Affairs < http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-Utility+Buttons-Forms+and+publications?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=17-Forms+and+publications~#unfair> at 21 July 2010, 7, 15.
15. Cox, N, Five things you need to know about unfair terms (2010) Mallesons Stephen Jacques < http://www.mallesons.com/publications/2008/Feb/9323887w.htm>.
16. A guide to the unfair contract terms law (2010) [4] Victorian Consumer Affairs < http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-Utility+Buttons-Forms+and+publications?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=17-Forms+and+publications~#unfair> at 21 July 2010, 7, 16.
17. Ibid.
18. Free v Jetstar Airways Pty Ltd (Civil Claims) [2007] VCAT 1405.

between the original and the current ticket prices. Ms Free sought a refund of the fare difference on the basis that it had been imposed under an unfair contract term. Senior Member Vassie found in favour of Ms Free. In interpreting the unfair contract provisions of the Victorian Legislation, Senior Member Vassie found that the charges cause a significant imbalance in the rights and obligations of the parties, and further that Jetstar received a windfall for providing a service for which the passenger had already paid. In the light of this, it was found the term was unfair within the meaning of the Victorian Legislation.

Jetstar appealed against the VCAT decision in the Supreme Court of Victoria[19] and succeeded on the following grounds:

1. VCAT erred in finding that the imposition of the charge caused a significant imbalance in the parties' rights and obligations, by failing to take into account the benefit to Ms Free from the right to transfer the ticket to another person; and
2. VCAT erred in assessing the effect of the imposition of charges on the parties' rights and obligations independently, rather than in the context of the contract as a whole.[20]

In the appeal, Cavanough J discussed at length when a 'significant imbalance in the parties' rights and obligations' would occur.

Jetstar submitted that VCAT failed to take into consideration that the right to transfer the ticket to another person counterbalanced the additional fees. Further Jetstar argued that there were other, more expensive, fares available at the time of Ms Free's purchase which would have allowed Ms Free to cancel (with a refund), and make name and address changes without charge. Jetstar submitted that VCAT concentrated solely on the additional payment that Ms Free was required to make.

Justice Cavanough noted that the Victorian Legislation required the examination of both the rights and obligations of the parties. He found this required a consideration of the balance of the parties' rights and obligations both under the alleged implied term and *under the contract as a whole*. Accordingly, the Court considered that any detriment to a consumer from a particular term must be weighed against any countervailing benefits rather than consider it in isolation. In this regard, the position taken by Cavanough J in *Jetstar v Free* has been affirmed in the provisions under the ACL, where it has been made explicit that the contract as a whole must be taken into consideration in determining whether a term of that contract is unfair.

Justice Cavanough also found that VCAT had not given proper consideration to the rights that had accrued to Ms Free under both the alleged implied term (the ability to substitute a passenger name) and the contract (a very low ticket price), each of which acted as a counterbalance to the burden of the fare difference she had to pay.

The Jetstar decision, at both the first instance and appeal, dealt significantly with the term "contrary to the requirements of good faith", as required under the Victorian Legislation. The Court's findings regarding this requirement have not been discussed here, as this requirement has not been replicated in the ACL provisions.[21]

19. Jetstar Airways Pty Ltd v Elizabeth Winifred Free [2008] VSC 539.
20. Ibid 100 – 144.
21. Hudgson, F, Jetstar v Free Litigation Update (2009) Blake Dawson <http://www.blakedawson.com/Templates/Publications/x_publication_content_page.aspx?id=56537> at 25.

3.2 Terms that define the main subject matter of the contract

There are a number of limitations of the application of s. 23. As a general proposition, terms that govern the primary *subject matter* of the contract will be excluded from the provisions.

These limitations are set out in s. 26 as follows:

> *Australian Consumer Law, s. 26*
>
> (1) Section 23 does not apply to a term of a consumer contract or small business contract to the extent, but only to the extent, that the term:
>
> (a) defines the main subject matter of the contract; or
>
> (b) sets the upfront price payable under the contract; or
>
> (c) is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory.
>
> (2) The upfront price payable under a consumer contract is the consideration that:
>
> (a) is provided, or is to be provided, for the supply, sale or grant under the contract; and
>
> (b) is disclosed at or before the time the contract is entered into; but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.

The effect of each limitation is discussed in turn.

3.2.1 Terms that define the main subject matter of the contract

On the introduction of the ACL, commentary to the Act outlined that the main subject matter of a contract refers to the goods or services (including land, financial services or financial products) that the consumer is acquiring under the contract. The main subject matter may also include a term that is necessary to give effect to the supply under the contract that without which the supply could not occur.[1]

Terms that define the main subject matter of the contract have been excluded from the unfair contract provision terms as a result of the VCAT decision of *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates and Yoga (Pty Ltd) (Civil Claims)*.[2] The Tribunal held that the terms defining the main subject matter of a consumer contract will invariably be the subject of genuine negotiation and therefore will be excluded from unfair contract term provisions.

Member Harbison stated:

> "[T]erms of a consumer contract which have been the subject of genuine negotiation should not be lightly declared unfair. This legislation is designed to protect consumers from unfair contracts, not to allow a party to a contract who

1. A guide to the unfair contract terms law (2010) [4] Victorian Consumer Affairs < http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-Utility+Buttons-Forms+and+publications?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=17-Forms+and+publications~#unfair> at 21 July 2010, 7, 9.
2. [2008] VCAT 482.

has genuinely reflected on its terms and negotiated them, to be released from a contract term from which he or she later wishes to resile." [3]

3.2.2 Terms that set the 'upfront price' payable under the contract

Further to the above, the upfront price is the amount that the consumer agrees to pay in consideration for the contract, and challenging this term is excluded from the protection of s. 23. The upfront payment price is excluded from the unfair contract provisions, as it would be contrary to general contract law to allow parties to a contract to challenge easily understood upfront prices payable.[4]

Section 26(1)(b) does not extend, however, to fees levied as a consequence of an event occurring during the period of the contract; where these fees are not necessary for the provision of the supply or sale under the contract but are additional to the upfront price. The upfront price will not include terms that impose additional fees for a default or exit, over and above the price for the goods or services acquired.[5] As a result, these terms could be challenged under s. 23.

Regarding s. 26(1)(b), it is worthwhile remembering that s. 48 of the ACL imposes an obligation regarding businesses to provide a single price and will apply alongside the unfair contract term provisions.

3.2.3 Terms that are required or permitted by law

There are many terms expressly permitted to be included in a contract as a matter of public policy and may be necessary to ensure the validity of specific transactions. An example of such a term can be found in s. 139A of the CCA, which states that a term of a contract for the supply of recreational services will not be void by reason that the term excludes, restricts, or modifies the implied warranties in Subdivision B of Division 1 of Part 3-2 of the ACL relating to warranties in relation to the supply of services.

3. Ibid 66.
4. Australian Consumer Law – Fair Markets, Confident Consumers (2009) Australian Treasury < http://www.treasury.gov.au/consumerlaw/content/default.asp> at 22 July 2010.
5. Ibid.

3.3 Contracts excluded from s. 23

It is worth noting that pursuant to s. 28 of the ACL, the unfair contract term provisions do not apply to a number of types of contracts.

Section 28 is as follows:

> (1) This Part does not apply to:
>
> (a) a contract of marine salvage or towage; or
>
> (b) a charterparty of a ship; or
>
> (c) a contract for the carriage of goods by ship.
>
> (2) Without limiting subsection (1)(c), the reference in that subsection to a contract for the carriage of goods by ship includes a reference to any contract covered by a sea carriage document within the meaning of the amended Hague Rules referred to in section 7(1) of the Carriage of Goods by Sea Act 1991 .
>
> (3) This Part does not apply to a contract that is the constitution (within the meaning of section 9 of the Corporations Act 2001) of a company, managed investment scheme or other kind of body.
>
> (4) This Part does not apply to a small business contract to which a prescribed law of the Commonwealth, a State or a Territory applies.

These contracts have been excluded are they are subject to independent and overriding legislation. Shipping contracts are subject to the comprehensive legal framework (nationally and internationally) that deals with marine contracts.[1] Insurance contracts are excluded as they are governed by the *Insurance Contracts Act 1984* (Cth), that has the effect of negating the unfair contract provisions.[2]

It is worth noting, however, that private health insurance contracts, state and Commonwealth government insurance contracts and re-insurance contracts (among others) are not regulated by the *Insurance Contracts Act* and therefore will be subject to the unfair contract terms laws.[3]

1. A guide to the unfair contract terms law (2010) [4] Victorian Consumer Affairs < http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-Utility+Buttons-Forms+and+publications?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=17-Forms+and+publications~#unfair> at 21 July 2010, 7, 11.
2. Refer to Section 15 of the Insurance Contracts Act 1984 (Cth).
3. A guide to the unfair contract terms law (2010) [4] Victorian Consumer Affairs < http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-Utility+Buttons-Forms+and+publications?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=17-Forms+and+publications~#unfair> at 21 July 2010, 7, 12. See section 9 of the Insurance Contracts Act 1984 (Cth).

3.4 Terms that are likely to be unfair

Within the ACL, there is a list of terms that are *likely* to be considered unfair under the unfair contract provisions.

Section 25 provides as follows:

Australian Consumer Law, s. 25

(1) Without limiting section 24, the following are examples of the kinds of terms of a consumer contract that may be unfair:

(a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;

(b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;

(c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;

(d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;

(e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;

(f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;

(g) a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;

(h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;

(i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;

(j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;

(k) a term that limits, or has the effect of limiting, one party's right to sue another party;

(l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;

(m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;

(n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.

In introducing the legislation, the Australian Treasury stated that the examples that may constitute unfair contract provisions, have been based on relevant case precedents in other jurisdictions (such as under the Victorian Legislation and the United Kingdom legislation).[1]

1. Australian Consumer Law – Fair Markets – Confident Consumers (2009) Australian Treasury < http://www.treasury.gov.au/contentitem.asp?NavId=014&ContentID=1484>

It is worth noting that the list of terms contained within s. 25 are indicative of an unfair term only, and do not serve to act as prima facie evidence as to the unfairness of the term. Therefore, the inclusion of a term in s. 25 does not prohibit its use and serves only to provide guidance to consumers and businesses alike.[2] However, as noted by Professor Carter, the practical impact of this list of terms is that those terms will be presumed to be unfair, what else would be the point of including them?[3]

We will examine the terms listed in s. 25.

3.4.1 A term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract

On the introduction of the ACL, Victorian Consumer Affairs ("VCA") indicated that terms might be less likely to be considered unfair, if they prefaced in a way that ensures the consumer understands the effect of the term on their rights under the contract.[4]

3.4.2 A term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract

The AAPT case discussed above dealt with a clause that allowed one party a unilateral right to terminate the contract. Justice Morris found that an immediate termination clause for any breach of the contract in a mobile phone contract had the potential to be too broad in application and was thus found to be unfair.

A customer may have breached the agreement in a manner which is inconsequential, yet faces the prospect of having the service terminated. Further, if the customer changes his or her address (which will not necessarily be the address for receipt of billing information) this will also provide a ground to AAPT to terminate the Agreement. Because these provisions are so broadly drawn, and are one sided in their operation, they are unfair terms within the meaning of the FTA.[5]

Furthermore, the VCA has indicated that terms stating that the consumer cannot cancel the contract under any circumstance, or only with the business' consent, regardless of the business's actions or omissions in relation to the transaction, may also be found to be unfair.[6]

3.4.3 A term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract

The VCA has indicated that s. 25(1)(c) may be used to find that terms imposing penalties for trivial breaches of contract by a consumer are unfair.

Commentators have suggested that the presence of a clause requiring the consumer to pay an amount in order to terminate a contract, where the amount payable exceeds the actual cost to the business of dealing with the termination, is likely to be unfair.[7] This is because the general law on liquidated damages must only subject consumers to damages that are justifiable, rather than damages that are imposed as penalties. The termination fee must be a genuine pre-estimate of the supplier's loss.[8] The assessment is made prospectively at the time of contract, and as such, it is irrelevant if the termination fee is ultimately more than the actual loss suffered by the consumer.[9]

2. A guide to the unfair contract terms law (2010) [4] Victorian Consumer Affairs < http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-Utility+Buttons-Forms+and+publications?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=17-Forms+and+publications~#unfair> at 21 July 2010, 7, 17.
3. J W Carter, 'The Commercial Side of Australian Consumer Protection Law' (2010) 26 Journal of Contract Law, 221, 238.
4. A guide to the unfair contract terms law (2010) [4] Victorian Consumer Affairs < http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-Utility+Buttons-Forms+and+publications?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=17-Forms+and+publications~#unfair> at 21 July 2010, 7, 18.
5. Director of Consumer Affairs Victoria v AAPT Limited [2006] VCAT 1493, 53.
6. Victorian Consumer Affairs, above n 5, 20.
7. The new Australian Consumer Law – it has arrived (2010) Freehills http://www.freehills.com.au/5880.aspx.
8. See the High Court case of Ringrow Pty Ltd v BP Australia Pty Ltd [2005] HCA 71 at [32].
9. Australian Consumer Law – Fair Markets, Confident Consumers (2009) Australian Treasury < http://www.treasury.gov.au/consumerlaw/content/default.asp> at 22 July 2010.

3.4.4 A term that permits, or has the effect of permitting, one party (but not another) to vary the terms of the contract

An example of an unfair unilateral variation clause was identified in the VCAT case of *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* (Civil Claims) (decided under the Victorian Legislation).[10] The Tribunal found that a clause in a consumer contract allowing a health club operator to unilaterally change the location of the club within a 12km radius of the original location was unfair. The term was found to be unfair as it was not a term that the consumer's attention is specifically drawn, and which has the potential to operate in a way that disadvantages the consumer.[11]

3.4.5 A term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract

A term that allows only the business a right of renewal will unfairly disadvantage the consumer and may be found to be unfair. The consumer may suffer detriment where a contract is not renewed or is automatically renewed without the consumer's consent.

An example of an automatic renewal clause is often found in continuing contracts, such as the contract with a water or electricity provider. Where the business unilaterally decides not to renew the contract without providing notice to the consumer, the consumer is likely to suffer detriment in being without that service.

An automatic renewal clause will not be held to be unfair where the automatic renewal of the contract is reasonably necessary. Such as in the circumstance mentioned above of water and energy providers, and where the automatic renewal does not cause a significant imbalance between the parties. The VCA has stated that provided the consumer, prior to the expiration of the contract, is given the right not to have the contract renewed or is not required to pay a fee if they wish to withdraw from the agreement following the automatic renewal, the term is unlikely to be considered unfair.[12]

3.4.6 A term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract

An example of the potential operation of s. 25(1)(f) may arise where there is a term in a consumer contract allowing the business to charge a price on delivery for goods that is a higher price than quoted to the consumer at the time the order was placed.

The VCA indicated that a variation clause detailing the upfront price payable under the contract would be less likely to be considered unfair if consumers were able to end the contract if they did not agree to the variation.[13] This means the consumer should not be left worse off for having entered into the contract.

3.4.7 A term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, or the financial goods or services to be supplied under the contract

The AAPT case mentioned throughout is relevant to the operation of this provision. In the AAPT case, a term in a contract for mobile phone services allowed AAPT to 'vary a Supplier or its products, or vary [AAPT's] charges from time to time without notice to you [the consumer]'.[14] Member Morris found the term was unfair, stating:

10. [2008] VCAT 2092.
11. A guide to the unfair contract terms law (2010) [4] Victorian Consumer Affairs < http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-Utility+Buttons-Forms+and+publications?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=17-Forms+and+publications~#unfair> at 21 July 2010, 7, 19.
12. A guide to the unfair contract terms law (2010) [4] Victorian Consumer Affairs < http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-Utility+Buttons-Forms+and+publications?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=17-Forms+and+publications~#unfair> at 21 July 2010, 7, 20.
13. Ibid.
14. Ibid at 54.

This term causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. For example, it would enable AAPT to reduce the number of calls that a person could make pursuant to a prepaid mobile phone service which the person had entered into in good faith. This term was an unfair term.[15]

The VCA has stated that if the intention of a business by including a unilateral variation clause in the contract is to permit changes that are limited in scope, and the consumer understands and agrees to the changes in advances, the term is less likely to be found to be unfair.[16] In order to ensure the compliance with these requirements, the business should make clear to the consumer:

- the variation that might be made and in what circumstances;
- defining how far the variation can extend; and
- the business should provide the consumer with a right to terminate the contract without penalty if the business cannot supply the goods as agreed under the contract.[17]

3.4.8 A term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning

The VCA provided an example of the operation of this provision. Where a contract contains a term that limits any testing of a product that the consumer alleges to be faulty to testing conducted by the business, the term may be found to be unfair. A fairer term in this circumstance would be a term referring the faulty product to independent assessment.[18]

3.4.9 A term that limits, or has the effect of limiting, one party's vicarious liability for its agents

Vicarious liability is of central importance for effective consumer protection, as it will generally be the staff of the business with which the consumer engages when entering into the contract in question. Thus, the inclusion of a provision that effectively limits a company's vicarious liability for the action of its employees or sales staff may be regarded as unfair.

3.4.10 A term that permits, or has the effect of permitting, on party to assign the contract to the detriment of another party without that party's consent

In the VCAT case of *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd (Civil Claims)*,[19] Tribunal Member Harbison found that a term in a removalist contract allowing the removalist company to 'assign its rights and the rights of any persons on behalf of whom it is acting, to collect all charges and payments from Clients to the Contractor' was unfair under the Victorian Legislation.[20] It was held to be unfair as it 'had the object or effect of assigning rights in respect of the contract to an unidentified non-party' and because it 'created uncertainty for the consumer because the "Contractor" is not a party to the [...] contract'.[21]

3.4.11 A term that limits, or has the effect of limiting, one party's right to sue another party

The VCA has stated that a term that requires a consumer to bring legal proceedings in a foreign court may

15. Ibid at 54.
16. A guide to the unfair contract terms law (2010) [4] Victorian Consumer Affairs < http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-Utility+Buttons-Forms+and+publications?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=17-Forms+and+publications~#unfair> at 21 July 2010, 7, 20.
17. Ibid.
18. A guide to the unfair contract terms law (2010) [4] Victorian Consumer Affairs < http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-Utility+Buttons-Forms+and+publications?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=17-Forms+and+publications~#unfair> at 21 July 2010, 7, 23.
19. [2009] VCAT 754 at 4.
20. Ibid.
21. Ibid.

be considered unfair under this provision of the ACL.[22] This obligation would place an undue burden on the consumer when attempting to enforce the contract.

3.4.12 A term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract

A conclusive evidence term stipulates that, documents produced by one party to the contract (for example, invoices of amounts owing issued by the business) is prima facie evidence of their contents. These terms may have the effect of deterring a consumer accessing legal remedies and are therefore likely to be found to be unfair.

A term that has the effect of limiting the consumer's perception of their legal rights is also likely to be unfair under this provision. For example, a term that specifies that evidence available for presentation is limited to the contract itself and excludes any evidence on pre-contractual negotiations may have the effect of altering the consumers' understanding of their rights. While Court rules may allow the presentation of such evidence in certain circumstances, if a consumer is not aware of the rules of evidence, they may be deterred from taking action against the business or in seeking legal advice in relation to the matter because of the term.[23]

3.4.13 A term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract

The VCA has indicated that a term that requires a consumer to provide evidence of unreasonable or potentially unprovable elements of a dispute, such as the authority of a staff member of the business to make representations where such information is in the hands of the business not the consumer, may be unfair.[24]

This provision has the same effect as s. 25(1)(l) above – the term need not limit the consumer's rights, but merely limit the consumer's perception of their legal rights to constitute an unfair term.[25]

3.4.14 A term of any kind, or a term that has the effect of any kind, prescribed by the regulations

The elements to be considered by the Minister as contained in s. 25(2) must ensure that consumer, business, and public interests are all considered before a term is listed as unfair.

22. A guide to the unfair contract terms law (2010) [4] Victorian Consumer Affairs < http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-Utility+Buttons-Forms+and+publications?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=17-Forms+and+publications~#unfair> at 21 July 2010, 7, 24.
23. A guide to the unfair contract terms law (2010) [4] Victorian Consumer Affairs < http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-Utility+Buttons-Forms+and+publications?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=17-Forms+and+publications~#unfair> at 21 July 2010, 7, 25.
24. Ibid.
25. Ibid.

3.5 Other possible terms

A number of commentators in the field have discussed several other terms that may be found to be unfair under the unfair contract term provisions. The potentially unfair terms are outlined as follows.

3.5.1 Terms providing that the consumer understands the contract

Some commentators have suggested that terms under which consumers acknowledge they have read or understood the contract may be unfair.[1] These terms are quite often found in e-commerce transactions, where the consumer is required to check a box during the transaction confirming they understand the contract and have read the provisions.

Establishing whether a consumer has understood a contract is an objective matter and cannot be determined simply by requiring a consumer to acknowledge terms. Moreover, there is generally no legal advantage to this clause as the law has always regarded a person as being bound by a contract once they have executed it, regardless of whether they have read and understood the contract.

Notwithstanding the above, the clause may be unfair as it may create the perception in a consumer's mind that there are no legal remedies available to them once they have agreed to such a term. Once again, the unfairness results from the consumer's interpretation of the term, rather than the effect of the term at law.[2]

3.5.2 Terms requiring a majority deposit

It has also been suggested terms that require a deposit equal to a substantial part of the purchase price may be unfair. A deposit is an amount intended to ensure that the consumer is genuine in their intention to purchase, usually to provide 'peace of mind' to the supplier that they do not have to deal with other potential purchasers. A deposit is provided to cover costs in the supplier allocating resources to the contract and pay costs associated with the preparation of the contract. As a general rule, a supplier is allowed to retain a purchaser's deposit if the consumer terminates the contract, provided that the deposit is a reasonable amount, regardless of the loss suffered by the supplier.

In contrast, a pre-payment should be refunded to the consumer under a contract, if the consumer opts out of the contract, save for any actual and reasonable losses suffered by the other party to the contract.

Notwithstanding this, commentators have argued that a clause that requires all or substantially all of the purchase price to be paid as a deposit may be found to be unfair, as it departs too significantly from the standard right of a consumer to pay on delivery and acceptance of the goods (or performance of the service).[3]

In the same vein, terms that require consumers to pre-pay for installation of goods are likely to be found to be unfair, as pre-payment monies are generally only paid to cover the initial costs of the supplier – such as obtaining materials.

1. Australian Consumer Law – Fair Markets, Confident Consumers (2009) Australian Treasury < http://www.treasury.gov.au/consumerlaw/content/default.asp> at 22 July 2010.
2. Ibid.
3. Ibid.

These terms are likely to be found to be unfair as they reduce the consumer's bargaining power in respect of legal recourse for breach of contract or defects in goods.

3.6 Remedies in relation to section 23

A consumer may seek remedy against a term that is unfair pursuant to s. 23 in either one of two ways. Where a consumer believes that a term is unfair, they may lodge a complaint with a consumer protection agency, or they may take action in the Courts in their own capacity.

Where a consumer lodges a complaint with a consumer protection agency, they will be lodging with either ACCC or ASIC, dependant on the nature of the goods or services supplied in the contract. In the alternative, states and territories will be required to enforce the law at state level within their respective jurisdictions. Where enforcement matters involve both general issues and issues pertaining to financial products and services, provisions have been implemented to enable the delegation of functions between the enforcement agencies to ensure the most appropriate agency has the power to deal with the matter.

In bringing an action to void an unfair term, either the consumer protection agency (i.e., ACCC / ASIC) or the consumer in their own capacity initiates action under s. 250 of the ACL for a declaration that the term is unfair.

Section 250 is as follows:

Australian Consumer Law, s. 250

(1) The Court may declare that a term of a consumer contract is an unfair term, on application by:

(a) a party to the contract; or

(b) the regulator.

(2) The Court may declare that a term of a small business contract is an unfair term, on application by:

(a) a party to the contract, if the party was a business of the kind referred to in paragraph 23(4)(b) at the time the contract was entered into; or

(b) the regulator.

(3) Subsections (1) and (2) do not apply unless the contract is a standard form contract.

(4) Subsections (1) and (2) do not apply if Part 2-3 does not apply to the contract.

(5) Subsections (1) and (2) do not limit any other power of the court to make declarations.

Where a Court determines that a term is void and a party to the contract continues to rely on the term, there are a number of remedies that may be granted by the Court in the circumstances.

A party may apply for an injunction or an order prohibiting payment or transfer of money pursuant to section pursuant to s. 232 of the ACL or any other order as the Court deems appropriate under s. 237 of the ACL.

In addition to the above, the Court has the power to provide redress to *non-party consumers* under ss. 239 –

241. Both the ACCC and ASIC have power to seek orders for the benefit of persons that are not party to the proceedings in the following circumstances:

1. the respondent is a party to a consumer contract and advantaged by a term of the contract in relation to which the court has made a declaration that it is an unfair term;
2. the declared term has caused or is likely to cause a class of people to suffer loss or damage; and
3. the class includes people who have not been a party to enforcement action in relation to the declared term.[1]

The Court has been given the power to award redress to non-parties as, where a term is found to be unfair, it is likely to have implications beyond the case of an individual complainant, as standard form contracts are usually offered to a number of consumers at the same time (particularly in the case of online transactions). The power to award redress to non-parties has the potential to have large financial and reputational consequences against the business using the unfair term.[2]

Where the Court finds it is appropriate to order redress to non-party consumers, the Court has the power to provide the following remedies for the loss and damage suffered:

- declare all or part of a contract to be void (either before or after the date the order is made);
- vary a contract or arrangement as the court deems appropriate;
- refuse to enforce all or any of the terms of a contract;
- direct the respondent to refund money or return property to a non-party consumer;
- direct the respondent to repair or provide parts for a product provided under a contract a contract at the respondent's expense;
- direct the respondent to provide services to the non-party at the respondents expense; or
- direct the respondent to terminate or vary an interest in land that way created or transferred by the contract.[3]

3.6.1 Remedies only available to Regulatory Bodies

In the ACL, a number of remedies have been made available exclusive to the regulatory bodies (i.e., ACCC and ASIC) where a company has contravened Part 2-3 of the ACL.

The first of these powers is the power issued under s. 223 of the ACL, which gives regulatory bodies the power to issue a written notice containing a warning about the conduct of a person.

Section 223 is as follows:

> ***Australian Consumer Law*, s. 223**
>
> (1) The regulator may issue to the public a written notice containing a warning about the conduct of a person if:
>
> (a) the regulator has reasonable grounds to suspect that the conduct may constitute a contravention of a provision of Chapter 2, 3 or 4; and

1. A guide to the unfair contract terms law (2010) [4] Victorian Consumer Affairs < http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-Utility+Buttons-Forms+and+publications?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=17-Forms+and+publications~#unfair> at 21 July 2010, 7, 27.
2. Hudgson, F, Jetstar v Free Litigation Update (2009) Blake Dawson <http://www.blakedawson.com/Templates/Publications/x_publication_content_page.aspx?id=56537> at 25.
3. A guide to the unfair contract terms law (2010) [4] Victorian Consumer Affairs < http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-Utility+Buttons-Forms+and+publications?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=17-Forms+and+publications~#unfair> at 21 July 2010, 7, 28.

(b) the regulator is satisfied that one or more other persons has suffered, or is likely to suffer, detriment as a result of the conduct; and

(c) the regulator is satisfied that it is in the public interest to issue the notice.

(2) Without limiting subsection (1), if:

(a) a person refuses to respond to a substantiation notice given by the regulator to the person, or fails to respond to the notice before the end of the substantiation notice compliance period for the notice; and

(b) the regulator is satisfied that it is in the public interest to issue a notice under this subsection; the regulator may issue to the public a written notice containing a warning that the person has refused or failed to respond to the substantiation notice within that period, and specifying the matter to which the substantiation notice related.

Regulatory bodies have also been bestowed with the power to issue *substantiation notices*. A substantiation notice requires the business upon which it has been issued to substantiate the claims that it has made in the marketplace. Furthermore, the regulatory body also has the power to request a person to produce documents that may evidence the representation. A business issued with a substantiation notice has 21 days in which to comply or apply in writing to the regulatory body for an extension of time. The power of regulatory bodies to issue substantiation notices is contained within s. 219 of the ACL. Providing false or misleading information in response to a substantiation notice may result in a pecuniary penalty being imposed on the business. Where a business fails to comply with a substantiation notice, the regulatory body may issue a public warning notice pursuant to s. 223(2) of the ACL.

As a final point on remedies, take note that the power given to regulatory bodies in s. 247 of the ACL, being the power of regulatory bodies to apply to the Court for an adverse publicity campaign, does not apply to a breach of Part 2-3.

4. False, Misleading and Deceptive Conduct and Representations under Statute

"The search for individualised justice has led to very large changes in statute law and in common law principle. No court proceeding is now thought to be respectable unless one or other party alleges contravention of the Trade Practices Act [Competition and Consumer Act] and I await with interest the day when a charge of homicide is met by a plea of misleading or deceptive conduct."[1]

This Chapter addresses those provisions of the *Competition and Consumer Act 2010* (Cth) (CCA) Schedule 2 – i.e., the Australian Consumer Law (ACL) – that regulate the areas of false, misleading and deceptive statements and conduct.

4.1 Misleading and Deceptive Conduct under ACL s. 18

Section 18 of the Australian Consumer Law (previously s. 52 of the TPA) is the most important, and the most widely applicable, of the provisions discussed in this Chapter. Indeed, few other statutory provisions in Australian law can be as widely applied as s. 18. Section 18 reads as follows:

> ***Australian Consumer Law*, s. 18**
>
> (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> (2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection (1).

In contrast to many other sections of the ACL, s. 18 does not create a cause of action as such. Rather, the effect of s. 18(1) is to establish a norm of conduct. However, this by no means renders the section a 'toothless tiger'. Where a corporation acts contrary to the norm of conduct established by s. 18(1), other sections of the ACL (see further 4.4 below) prescribe remedies.

The purpose of s. 18(2) is to make clear that the more specific provisions of the ACL relating to unfair practices do not limit the application of s. 18(1). A practical consequence of this is that a party taking action under one of the more specific sections, such as ACL s. 29, often also relies on s. 18(1) in the alternative. Thus, in some cases the court determines that there have been contraventions of both s. 18 and s. 29. An example of this is found in *ACCC v Get Qualified Pty Ltd (in liq) (No 2)*[2] where the respondent was held to have contravened ss 18, 29(1)(m) and 29(1)(b) for making representations that consumers were entitled to receive 100% of their money back (even though they did not refund on the basis of undisclosed criteria and deducted an administration fee); that customers were eligible to receive a qualification without need for study (even though they had no reasonable basis for making that assessment on a future matter); and by employing sales representatives to undertake eligibility assessment even though they had no qualifications to do so and made eligibility representations to customers on the basis of no documents or evidence.

1. Speech by Hayne J at the Law of Obligations Conference in Melbourne, 15 July 2004.
2. [2017] FCA 709.

It is worth emphasising that causes of action for misleading and deceptive conduct that arose prior to the introduction of the ACL (i.e., prior to 1 January 2011) were litigated under s. 52 of the TPA. Yet, given the fact that TPA s. 52 used substantially the same wording as the ACL s. 18, many of the cases decided under TPA s. 52 are useful for understanding the operation of ACL s. 18.

The wording of TPA s. 52 differed from that of ACL s. 18 in that it only provided that a *corporation* must not engage in misleading in deceptive conduct, as distinct from the ACL's use of the word 'person'. Thus, the ACL's approach to misleading and deceptive conduct provides for broader application.

4.1.1 The scope of ACL s. 18

The reader will recognise some of the terms used in ACL s. 18 from the discussions in other parts of this book. The definitions of the terms "person" and "in trade or commerce" have been discussed in the context of implied terms (see Chapter 2), and were defined there. However, s. 18 is significantly different in other regards. First, s. 18 is uncharacteristically short for a provision of the CCA. Second, the language used is rather general in its nature. Perhaps it can be said that the general nature of the language used in s. 18, in part, accounts for its wide applicability.

In terms of its application, it is important to note that, while Schedule 2 to the CCA is titled "Australian Consumer Law", s. 18 can also be applied outside the strict protection of consumers. The modern position is described in the majority judgment in *Concrete Constructions (N.S.W.) Pty Ltd v Nelson*[3] (in discussing s. 52 of the TPA). In making reference to several cases,[4] Mason CJ, Deane, Dawson, and Gaudron JJ stated that:

> It suffices, for present purposes, to say that we regard it as settled by earlier decisions that an action to restrain a contravention of s. 52 [ACL s. 18] can, in appropriate circumstances, be maintained by a person who is not a consumer … and that we consider that, while the cases make plain that consumer protection lies at the heart of the legislative purpose to be discerned in s. 52 [ACL s. 18], the precise boundaries of the territory within which that section operates remain undetermined[.][5]

Thus, while the dissenting judges (e.g. McHugh J) argued convincingly for the application of s. 52 of the TPA (s. 18 ACL) to be "confined to conduct which affects or is apt to affect members of the public in their capacity as consumers, using that term in a broad and general sense [unlike how it is defined in s. 3]",[6] there is no such limitation and thus s. 18 can be invoked in a very broad range of circumstances.

The reference to "engage in conduct" is explained in ACL s. 2(2):

***Australian Consumer Law*, s. 2(2)**

(2) In this Schedule:

(a) a reference to engaging in conduct is a reference to doing or refusing to do any act, including:

(i) the making of, or the giving effect to a provision of, a contract or arrangement; or

(ii) the arriving at, or the giving effect to a provision of, an understanding; or

(iii) the requiring of the giving of, or the giving of, a covenant; and

(b) a reference to conduct, when that expression is used as a noun otherwise than as mentioned in paragraph (a), is a reference to the doing of or the refusing to do any act, including:

(i) the making of, or the giving effect to a provision of, a contract or arrangement; or

(ii) the arriving at, or the giving effect to a provision of, an understanding; or

3. (1990) 169 CLR 594. For a discussion of the facts of the case, see: 2.5.2.6.
4. Including Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd (1978) 140 CLR 216. For a discussion of the facts of that case, see: 3.1.4.4.
5. Concrete Constructions (N.S.W.) Pty Ltd v Nelson (1990) 169 CLR 594, at 601.
6. Concrete Constructions (N.S.W.) Pty Ltd v Nelson (1990) 169 CLR 594, at 621.

(iii) the requiring of the giving of, or the giving of, a covenant; and

(c) a reference to refusing to do an act includes a reference to:

(i) refraining (otherwise inadvertently) from doing that act; or

(ii) making it known that that act will not be done; and

(d) a reference to a person offering to do an act, or to do an act on a particular condition, includes a reference to the person making it known that the person will accept applications, offer or proposals for the person to do that act or to do that act on that condition, as the case may be.

In older cases, specifically in *Taco Company of Australia Inc* v *Taco Bell Pty Ltd*,[7] courts took the view that: "Irrespective of whether conduct is likely to produce confusion, it cannot be categorised as misleading for the purpose of s. 52 [s. 18 ACL] unless, in all the circumstances, it contains or conveys a misrepresentation".[8] The part of this statement expressing the view that only representations can be classed as conduct has since been rejected. The application of ACL s. 18 is not limited to representations in the stricter sense. The scope is significantly broader, and a wide range of types of conduct fall within the scope of s. 18. This was confirmed in the High Court case of *Butcher v Lachlan Elder Realty Pty Limited*[9] where the majority noted how 'conduct" in s. 52 [s. 18 ACL] extends beyond "representations". A further demonstration of the broad scope of "conduct" is found in *Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited*,[10] where French CJ and Kiefel J state at [15]: 'For conduct to be misleading or deceptive it is not necessary that it convey express or implied representations, it suffices that it leads or is likely to lead into error.'

One effect of this is that silence may be fitted within what is termed "conduct". In *Commonwealth Bank of Australia v Mehta,*[11] a bank was alleged to have engaged in deceptive and/or misleading conduct as it had failed to advise the plaintiffs of the extent of possible risks inherent in the transaction in question. The bank had also failed to advise the plaintiffs of the need for continued supervision of the borrowing. As noted by Samuels JA in that case: "Silence is not misleading only where there is a duty to disclose at common law or in equity. It may simply be the element in all the circumstances of a case which renders the conduct in question misleading or deceptive".[12] The reference to the need to consider *all the circumstances of a case* cannot be emphasised enough.

A recent case adds further to the discussion of "misleading silence". *ACCC v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)*[13] concerned the respondent's conduct, through its contracted agents and their recruiters, in promoting and selling its education services to consumers. At [267] of this decision, in relation to one individual's evidence, the Court found that the respondent had engaged in representations by silence or omission thereby contravening s. 18 because the consumer was not notified when signing documents to enrol in courses that doing so would leave her with a debt to the Commonwealth if she did not cancel by the census date. It was found to be irrelevant that the information was supplied after she was enrolled. This case is also another example where the Court found contravention of both s. 18 and s. 29 (specifically, s 29(1)(i)).

It should be noted that Elise Bant and Jeannie Paterson, the authors of the book *Misleading Silence*, highlighted a court decision which made a critical distinction between 'mere silence' and 'misleading silence'.[14] The decision by McLure P in *Owsten Nominees No 2 Pty Ltd v Clambake Pty Ltd*[15] demonstrates that if the 'conduct' in question is 'mere silence' rather than misleading silence (where silence is an element of the doing of the relevant conduct), it is necessary to prove intention because otherwise the defendant will not have engaged in 'conduct' as required by s. 18

Once it has been determined that a person has engaged in conduct, as is indicated by the fact that the section

7. (1982) ATPR 40-303.
8. Taco Company of Australia Inc v Taco Bell Pty Ltd (1982) ATPR 40-303, at 43,751.
9. (2004) 218 CLR 592, at 603.
10. (2010) 241 CLR 357.
11. (1991) 23 NSWLR 84.
12. Commonwealth Bank of Australia v Mehta (1991) 23 NSWLR 84, at 88.
13. [2019] FCA 1982.
14. See Elise Bant and Jeannie Paterson, Misleading Silence (Bloomsbury, 2020) 64-5 citing Owsten Nominees No 2 Pty Ltd v Clambake Pty Ltd [2011] WASCA 76 [59].
15. [2011] WASCA 76.

covers conduct that is "likely" to mislead or deceive, it is not even necessary that the conduct has had any actual effect on any other party at the time of the complaint.[16]

4.1.2 Limitations to the scope of s. 18

The exact scope of s. 52 TPA varied over the years it was in force. The following important limitations that applied to TPA s. 52 apply equally to ACL s. 18.

4.1.2.1 Financial services

Misleading or deceptive conduct in relation to financial services falls outside the scope of the CCA. Such conduct is instead regulated by *Australian Securities and Investments Commission Act 2001* (Cth) and the *Corporations Act 2001* (Cth).

4.1.2.2 Freedom of speech

In *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc*,[17] Hill J stated that: "There is nothing in any of the judgments of their Honours in the recent decisions of *Australian Capital Television Pty Ltd v Commonwealth of Australia (No 2)*[18] and *Nationwide News Pty Ltd v Wills*[19] which suggests for a moment that a law prohibiting misleading or deceptive conduct could infringe any constitutional protection of free speech".[20] However, in recognition of the dangers faced by the media as a consequence of s. 18 and similar provisions, s. 19 was introduced (formerly TPA s. 65A). It excludes "a publication of matter" by "an information provider" from the scope of the s. 18. Similar exclusions apply to ACL ss. 29, 30, 33, 34, 37, 151, 152, 155, 156, 159 and 219.

An information provider "is the Australian Broadcasting Corporation, the Special Broadcasting Service Corporation or the holder of a licence granted under the *Broadcasting Services Act 1992* [Cth]".[21] This protection is not afforded to the extent that an information provider uses its publication for an advertisement,[22] in connection with the supply or possible supply of goods or services or interests in land,[23] or to boost its own business[24] However, ACL s. 209 provides a defence for publishers of advertisements, where it is shown that the publisher is in the business of publishing or arranging for the publication of advertisements, and that it received the advertisement for publication in the ordinary course of business, and did not know and had no reason to suspect that its publication would amount to a contravention of a provision of Chapter 4 (ss. 151 to 206).

4.1.2.3 Intermediaries

Gardam v George Wills & Co Ltd[25] related to whether the seller of mislabelled children's bedtime garments was responsible in relation to the information stated on the labels. Justice French made clear that, where an intermediary simply passes on information, that party is not responsible under s. 52 TPA [s. 18 ACL] for that information, provided that it is made clear that it is not the source of the information, and it disclaims belief in the truth or falsity of the information. However, French J also stated that: "When, however, a representation is conveyed in circumstances in which the carrier would be regarded by the relevant section of the public as adopting it, then he makes that representation".[26]

The matter of intermediaries was also the object of dispute in the High Court case of *Butcher v Lachlan Elder Realty Pty Limited*.[27] Lachlan (a real estate agent) had produced a brochure that indirectly described the

16. Aerospatiale Societe Nationale Industrielle v Aerospatiale Helicopters Pty Ltd. [1986] ATPR 40-700.
17. (1993) ATPR 41-222.
18. (1992) 108 ALR 577.
19. (1992) 108 ALR 681.
20. Ibid at 41,073 – 41,074.
21. Australian Consumer Law s 19(1)(b).
22. Ibid s 19(2).
23. Ibid s 19(3)-(4).
24. See e.g., Seven Network Ltd v News Interactive Pty Ltd [2004] FCA 1047. For a discussion of the facts of that case, see: 3.1.3.
25. (1988) 82 ALR 415.
26. Gardam v George Wills & Co Ltd (1988) 82 ALR 415, at 427.
27. (2004) 218 CLR 592.

boundaries of a property. The brochure stated that: "all information contained herein is gathered from sources we believe to be reliable. However, we cannot guarantee its accuracy and interested persons should rely on their own inquiries." A diagram in the brochure was inaccurate and the purchaser alleged misleading and deceptive conduct on part of Lachlan. The majority of the Court held that:

> it would have been plain to a reasonable purchaser that the agent was not the source of the information which was said to be misleading. The agent did not purport to do anything more than pass on information supplied by another or others. It both expressly and implicitly disclaimed any belief in the truth or falsity of that information. It did no more than state a belief in the reliability of the sources.[28]

Justices McHugh and Kirby took a different approach. In his dissenting judgment, McHugh J outlined three types of situations in which an intermediary would not be liable for the information it passed on:

1. where the circumstances make it apparent that the corporation is not the source of the information and that it expressly or impliedly disclaims any belief in its truth or falsity and is merely passing on the information for what it is worth;
2. where the corporation, while believing the information, expressly or impliedly disclaims personal responsibility for what it conveys, for example, by disclaiming personal knowledge; and
3. where the corporation, while believing the information, ensures that its name is not used in association with the information.[29] (internal footnotes omitted)

While, as noted, McHugh J was in minority in his judgment, commentators have remarked that, in order to be 'safe', an intermediary may wish to use McHugh J's statement as guidance.[30]

The High Court in *Google Inc v ACCC*[31] provide an in-depth discussion of the principles in *Butcher*.[32] Most importantly at [114], Hayne J (who agreed with the majority) stated:

> …Both [*Yorke v Lucas* and *Butcher*] point to the importance of identifying the relevant "conduct", having regard to all of the circumstances of the case. … In both, attention was given to whether, in all of the circumstances of the case, it was clear that the defendant expressly or impliedly disclaimed belief in the truth or falsity of the information. And in both, the defendant's express or implied disclaimer of belief in the truth or falsity of the information communicated was an important element of the facts.

In this case, Google was held not to have contravened s. 18 by publishing misleading advertisements by its AdWords customers. This was held to be the case because the ordinary and reasonable members of the relevant class would not have believed that Google was adopting or endorsing the misleading advertisements (representations).

28. Butcher v Lachlan Elder Realty Pty Limited (2004) 218 CLR 592, at 609.
29. Butcher v Lachlan Elder Realty Pty Limited (2004) 218 CLR 592, at 629.
30. See eg W. Pengilley, Misleading or deceptive conduct considered by the High Court. Does Butcher's case indicate a new judicial conservatism?, (2005) 12 Competition & Consumer Law Journal, at 314 – 330.
31. (2013) 249 CLR 435.
32. See Google Inc v ACCC (2013) 249 CLR 435 [104]-[116].

4.2 Misleading or deceptive conduct and conduct likely to mislead or deceive

The majority of the High Court has noted that, as far as ACL s. 18 cases are concerned, "everything must depend on an appropriately detailed examination of the specific circumstances of the case".[1] This means that, while guiding principles can be found in previously decided cases, and in the works of commentators, one must constantly be aware that each case is likely to be unique and must be analysed as such.

The terms "misleading" and "deceptive" are not defined in the ACL. However, by drawing upon a range of cases we can form an understanding of the types of conduct that these terms are intended to cover. In the context of s. 32 of the *Consumer Protection Act 1969* (NSW), the Court in *CRW Pty Limited* v *Sneddon*[2] noted that to "mislead" is "to lead into error".[3] In that case, a newspaper advertisement was capable of leading people to think that the transaction advertised was for a hire purchase or credit sale, rather than an outright sale. This test is widely accepted and could be said to constitute the minimum requirement for conduct to be misleading. However, in further defining what type of conduct is misleading or deceptive, it is to be noted that "[i]t is not sufficient if the conduct simply causes confusion or uncertainty".[4]

The courts now also refer to the term "wonderment" as not amounting to misleading or deceptive conduct. The term was mentioned in *Google Inc v ACCC* at [8]:[5] 'Third, conduct not causing confusion and wonderment is not necessarily co-extensive with misleading or deceptive conduct'. This passage is now commonly cited in subsequent cases. For example, the term is referred to in the recent case of *ACCC v Kogan* at [13]:[6] 'The issue is not whether the impugned conduct simply causes confusion or wonderment'.

The definition of the term "deceptive" has gained an even lesser degree of judicial attention. The reason for this is illustrated in Gibbs CJ's discussion in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*[7] of the relation between misleading conduct on the one hand, and deceptive conduct on the other:

> "Those words are on any view tautologous. One meaning which the words "mislead" and "deceive" share in common is "to lead into error". If the word "deceptive" in s. 52 [ACL s. 18] stood alone, it would be a question whether it was used in a bad sense, with a connotation of craft or overreaching, but "misleading" carries no such flavour, and the use of that word appears to render "deceptive" redundant."[8]

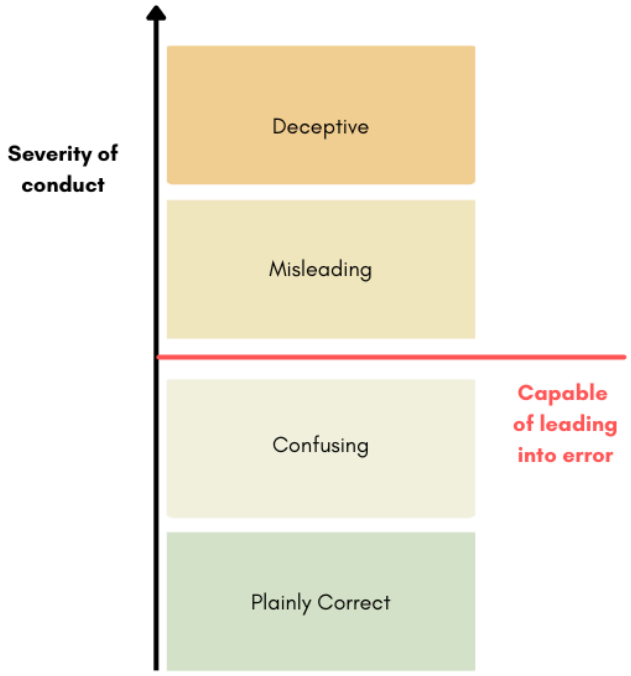
In other words, since the requirement for conduct to be regarded as "deceptive" is stricter than the requirements for conduct to be "misleading", there is no real need to examine whether the relevant conduct meets the stricter test of being "deceptive". It is, after all, sufficient that it meets the lower test of being "misleading" for ACL s. 18 to be applicable.

While the case law is not clear on this issue, it could perhaps reasonably be suggested that for conduct to be *deceptive* the offending party must have acted with intention. If so, when put in a mathematical expression

1. Butcher v Lachlan Elder Realty Pty Limited (2004) 218 CLR 592, at 615.
2. (1972) AR (NSW) 17.
3. CRW Pty Limited v Sneddon (1972) AR (NSW) 17, at 32.
4. See e.g., Seven Network Ltd v News Interactive Pty Ltd [2004] FCA 1047, at 13. For a discussion of the facts of that case, see: 3.1.3.
5. (2013) 249 CLR 435.
6. (2020) 145 ACSR 609.
7. (1982) 149 CLR 191.
8. Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191, at 198. In that case, both the plaintiff and defendant were companies manufacturing furniture. Parkdale (the original defendant) manufactured furniture that was almost identical to that of Puxu (the original plaintiff). Puxu took action against Parkdale for misleading or deceptive conduct.

it could be said that: deceptive conduct = misleading conduct + intention. There is, however, no authority to back this expression at this stage.

If presented as a diagram, the discussion above could be summarised in the following:



At the lowest end of the scale is conduct that is plainly correct (or in the case of so-called puff, plainly and obviously incorrect). Such conduct, and conduct that is merely confusing, is not capable of leading people into error. However, as soon as conduct is more severe than to merely be confusing, it is capable of leading people into error. As such, it meets the threshold test for being misleading and it may constitute a violation of ACL s. 18.

In distinguishing between confusing conduct on the one hand, and misleading conduct on the other, one could possibly point to a difference in the mind of the affected party. Put simply, a person that has been confused does not know what to think; she/he has not made up her/his mind. In contrast, a person that has been misled has formed an erroneous opinion; she/he has made up her/his mind.

As to conduct "likely to mislead or deceive", the word "likely" has been said to refer to "a real or not remote chance or possibility regardless of whether it is less or more than fifty per cent".[9] This should, however, not be seen as lowering the bar for what actually constitutes misleading or deceptive conduct. Indeed, perhaps it may be said that the words 'likely to mislead or deceive' do not add much to the section. However, the words 'likely to mislead or deceive' do emphasise that it is not necessary to prove that the conduct in question in fact deceived or misled anyone.

When assessing whether certain conduct is misleading or deceptive, it is important to have regard to the circumstances of that conduct. For example, in discussing alleged misleading or deceptive publications on a website, Tamberlin J (in *Seven Network Ltd v News Interactive Pty Ltd*) stated that:[10]

> "In assessing what is conveyed by the web pages it is not appropriate to anticipate that every person viewing the site would take the time to analyse subtle merchandising or legal overtones or connotations, and the issue is largely one

9. Global Sportsman Pty Ltd v Mirror Newspapers Ltd (1984) ATPR 40-463.
10. [2004] FCA 1047.

of transitory impression. If the material in question is continuously displayed and access to the site is frequent, as opposed to a one-off occurrence, then the impression will be reinforced."[11]

In other words, a court will take account of how the medium conveying the misleading and/or deceptive conduct normally is approached. For example, where a webpage, or social media posting, contains misleading and/or deceptive information, it may not be sufficient that there is a link to another webpage (or other online resource) disclaiming the accuracy of that information. Similar reasoning can be applied in the context of, for example, TV commercials, newspaper advertisements and tabloid headlines.

If conduct is merely "transitory or ephemeral", where any likely misleading impression is readily and swiftly dispelled, it will not constitute a contravention of s. 18.[12] For example, in the case of *Comité Interprofessionnel du Vin de Champagne v Powell*,[13] the Court held that there would be no contravention of s. 18 where there has been potentially misleading conduct at the beginning of an event, but the erroneous impression that may have been caused is dispelled by the end of that event.[14]

In *Seven Network Ltd v News Interactive Pty Ltd*,[15] Seven Network sought to restrain News Interactive from displaying on their websites a banner, and other visual representation in substantially similar form to the banner, and the use of the words "Athens Olympics", and representations of an "Olympic" torch in close proximity to the names and business-related logos of News. Seven wished to protect its investment in securing rights as the official broadcaster in Australia of the Olympic Games for which it had paid a substantial sum to secure these rights. The Court rejected Seven Network's argument.

In addition, the Federal Court case of *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd*[16] addressed whether 'sponsored links' in Google search results are misleading and deceptive under TPA s. 52 (ACL s. 18). In this case, the Trading Post signed up Google AdWords and, subsequently, a marketing agency retained by the Trading Post uploaded a number of keywords that were inserted into the headings of the Trading Post's advertisements. The keywords that were uploaded were the names of car dealerships located in the Newcastle area and were not associated with the Trading Post.

The businesses complained to the ACCC, which subsequently took action against the Trading Post and Google. With respect to the case against Google, the Court held that Google sufficiently distinguished between search results and sponsored links, and further, that Google made no representations through the advertisements. The court found that ordinary and reasonable consumers would understand the concept of a 'sponsored link', and further that the advertiser, not Google, determined the content. It is also worth noting that Nicholas J found that TPA s. 85(3) defence [ACL s. 209], with respect to the business of publication of advertisements, would apply to Google had it been held to be liable for the representations.

The above decision was overturned in part by the Full Court of the Federal Court. In the appeal, *Australian Competition and Consumer Commission v Google Inc*,[17] the Court found that Google Inc could rely on the "publisher's defence" in TPA s. 85(3) (ACL s. 209) in respect of particular AdWords and sponsored links. However, Google Inc was held to be unsuccessful in relying on the publisher's defence in 4 other instances. These involved particular advertisers, who held Google AdWords accounts, using the names of their competitors as keywords to draw customers to their own site. The Court held that because Google Inc's significant involvement in the process of selecting and approving the AdWords, and of controlling the Google search engine's response to users' searches, Google had engaged in misleading and deceptive conduct. This Full Federal Court decision has now been overturned by the High Court in *Google Inc v ACCC*.[18] The High Court did not determine whether Google Inc could have relied on the "publisher's defence" because the Court held that Google Inc had not contravened s. 18 in the first place, and it was therefore unnecessary to rely on the defence. In line with the primary judge, the High Court held that Google had not contravened s. 18 because

11. Seven Network Ltd v News Interactive Pty Ltd [2004] FCA 1047, at 14.
12. Often courts will cite Knight v Beyond Properties Pty Ltd (2007) 242 ALR 586 [58]. For example, this principle is mentioned in ACCC v Get Qualified Australia Pty Ltd (in liq) (No 2) [2017] FCA 709 [36]-[37].
13. (2015) 330 ALR 67.
14. Comité Interprofessionnel du Vin de Champagne v Powell (2015) 330 ALR 67 [179].
15. [2004] FCA 1047.
16. [2011] FCA 1086 (22 September 2011).
17. [2012] FCAFC 49.
18. (2013) 249 CLR 435.

they were not the author of the sponsored links. Google Inc. was held to have merely published or displayed them without adopting or endorsing the misleading representations that were made by the advertisers.[19]

Finally, in this context, a few more observations need to be made. As expressed by Stephen J in *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd*:[20] "nothing in these terms suggests that a statement made which is literally true … may not at the same time be misleading and deceptive".[21]

Further, as is made clear through a range of cases, the fact that the true nature of misleading or deceptive conduct could have been revealed through proper inquiries does not mean that such conduct cannot fall within the scope of ACL s. 18. However, on the other hand, CCA s. 137B (4.4.1 below) outlines how the level of damages that may be awarded to compensate the victim of misleading or deceptive conduct can be lowered where the plaintiff has failed to take reasonable care.

Somewhat similarly, in the mentioned case of *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd*,[22] Stephen J observed that: "If the consequence is deception, that suffices to make the conduct deceptive".[23] Thus, there is no requirement in s. 18 that the conduct is intended to be misleading or deceptive, "but if there is an intention to mislead[,] the court may more easily infer that the conduct was in fact misleading".[24] Put differently, if it can be proven that the defendant intended to mislead and/or deceive, it is easier to show that the conduct was misleading and/or deceptive. However, proof of intention is not an essential element in proving that conduct is misleading and/or deceptive.

19. Google Inc v ACCC (2013) 249 CLR 435, 442 [3] (per French CJ, Crennan and Kiefel JJ); 461 [75] (per Hayne J); 485 [151] (per Heydon J).
20. (1978) 140 CLR 216.
21. Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd (1978) 140 CLR 216, at 227.
22. (1978) 140 CLR 216.
23. Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd (1978) 140 CLR 216, at 228.
24. see e.g., .au Domain Administration Ltd v Domain Names Australia Pty Ltd [2004] FCA 424, at para 12.

4.3 The "Taco test"

Taco Company of Australia Inc v *Taco Bell Pty Ltd*,[1] involved an Australian company that had operated a Mexican restaurant called *Taco Bell's* in Bondi in Sydney since 1977. A chain of Mexican restaurants of the same name had existed in the US for several years. In 1981, the US Company began operating two restaurants called *Taco Bell* in other parts of Sydney. The Australian company successfully took action under TPA s. 52 and under the tort of passing off.

While aspects of this case have been superseded, the Court in *Taco Company of Australia Inc v Taco Bell Pty Ltd*,[2] outlined a widely adopted, although not always expressly cited, four-step test of central relevance for the application of TPA s. 52 and thus subsequently for ACL s. 18. We will now examine this text step-by-step.

In the Federal Court of Australia's July 2020 decision in *Australian Competition and Consumer Commission v Kogan Australia Pty Ltd*,[3] Davies J, drew upon the 'Taco test' and advanced a seven-step process for applying ACL s. 18 (the 'Kogan test'). The description below of the application of the four steps of the 'Taco test' incorporates references to the approach articulated by Davies J's 'Kogan test'.

It is noteworthy, that at least at the time of writing, the seven-step test from *Kogan* has not since been applied by the Federal Court in subsequent s. 18 decisions.[4]

4.3.1 Step One

> Step 1 – "First, it is necessary to identify the relevant section (or sections) of the public (which may be the public at large) by reference to whom the question of whether conduct is, or is likely to be, misleading or deceptive falls to be tested."[5]

In identifying the relevant section (or sections) of the public, a court will have regard to factors relating to the targeted audience (such as age, gender and special interests), as well as factors relating to the party engaging in the conduct (such as extent of reputation), and factors relating to the object of the conduct (such as price). *Handley v Snoid*[6] is illustrative in this context. The dispute arose from the fact that two pop groups used virtually identical names, and the case illustrates that the identification of the relevant section can be quite complex:

> The evidence establishes that those who are interested in the music which Popular Mechanics plays are mainly young people between the ages of 12 and 30. At least half of them would probably range from ages 12 to 18, that is, would be of school age. There was evidence from a Mr. Righi, the manager of a band booking agency, to the effect that those who attended the major venues mainly in the suburbs were business people, office workers and school students, whilst those who went to the smallest venues in the inner city were apparently more avant-garde young people. At those larger venues at which Popular Mechanics played, some of which held up to 600 and others up to 300, the crowds tended to be mixed in character. I concluded from this evidence that the larger the crowd the more conventional or conservative it was likely to be.[7]

1. (1982) ATPR 40-303.
2. (1982) ATPR 40-303.
3. [2020] FCA 1004.
4. See e.g., ACCC v Employsure Pty Ltd [2020] FCA 1409; Telstra Corporation v Singtel Optus Pty Ltd [2020] FCA 1372; TPG v ACCC (2020) 384 ALR 496; ACCC v TPG Internet Pty Ltd (2020) 381 ALR 507 (note the final two listed cases are Full Federal Court decisions.).
5. (1982) 42 ALR 177, 202.
6. (1981) ATPR 40-219.
7. Handley v Snoid (1981) ATPR 40-219, 42-975.

In that case, the Court identified a rather small group of people as the relevant section. In other cases, the courts have found it justified to focus on a much wider section of the public. For example, in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*,[8] the relevant section of the public was "potential purchasers of a suit of furniture costing about $1,500".

Step one of the 'Taco test' may be superfluous in situations where a particular individual, or small group of individuals, claim to have been misled or deceived. In such a scenario, there is no need to identify the relevant section of the public in the abstract.

This, the first step in the 'Taco test' is directly adopted in the 'Kogan test' which states: "First, it is necessary to identify the relevant section of the public at which the conduct was directed".[9]

4.3.2 Step Two

> Step 2 – "Second, once the relevant section of the public is established, the matter is to be considered by reference to all who come within it, including the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations [.]"[10]

The wide test expressed in step 2 of the *Taco Bell* test has been limited somewhat, for example, by the High Court's decision in *Campomar Sociedad, Limitada v Nike International Limited.*[11] There it was held that a court ought to focus on the "ordinary or reasonable members" of the section identified in step 1, and has the right to disregard "assumptions by persons whose reactions are extreme or fanciful" as controlling the application of TPA s. 52 (ACL s.18). The Court's reference to ordinary *or* reasonable members is unfortunate since one can imagine situation where the *ordinary* members of a group are not necessarily *reasonable*. In such a situation, the guidance provided in *Campomar Sociedad, Limitada v Nike International Limited* is thus insufficient.

Furthermore, more recent cases make clear that, the exact details of what type of person(s) within the relevant group a court will have regard to is somewhat unsettled. In *ACCC v Cadbury Schweppes Pty Ltd,*[12] Gray J focused on a "significant body of reasonable consumers". In contrast, in *Seven Network Ltd v News Interactive Pty Ltd*,[13] Tamberlin J applied the *Nike* test more stringently, holding that "The test to be applied is what is the likely reaction to the representation by ordinary or reasonable members of the class to whom the representation is directed … But such a viewer must be presumed to act reasonably".[14]

In *Flexopack SA Plastics Industry v Flexopack Australia Ltd*,[15] Beach J outlines some 'non-contentious principles' applicable to the case which includes at [261]: '[W]here the issue is the effect of conduct on a class of persons (rather than identified individuals to whom a particular misrepresentation has been made or particular conduct directed), the effect of the conduct or representation upon ordinary or reasonable members of that class must be considered.[16] This hypothetical construct avoids using the very ignorant or the very knowledgeable to assess effect or likely effect; it also avoids using those credited with habitual caution or exceptional carelessness; it also avoids considering the assumptions of persons which are extreme or fanciful. Third, the objective characteristics that one attributes to ordinary or reasonable members of the relevant class may differ depending on the medium for communication being considered. There is scope for diversity of response both within the same medium and across different media.' Justice Beach had used very similar wording to the above in *Comité Interprofessionnel du Vin de Champagne v Powell*[17] and again in *ACCC v Get Qualified Australia Pty Ltd (in liq) (No 2)*.[18]

The determination of the characteristics or knowledge attributed to 'ordinary and reasonable' members of the relevant class becomes very interesting when representations are made through different media. For example, in *Google Inc v ACCC*[19] the High Court upholds the primary judge's reasoning, undisturbed in the Full

8. (1982) 149 CLR 191, at 199.
9. Australian Competition and Consumer Commission v Kogan Australia Pty Ltd [2020] FCA 1004 [10].
10. (1982) 42 ALR 177, 202.
11. (2000) 202 CLR 45.
12. [2004] FCA 516.
13. [2004] FCA 1047.
14. Seven Network Ltd v News Interactive Pty Ltd [2004] FCA 1047, at para 13.
15. (2016) 118 IPR 239.
16. Citing Campomar Sociedad, Limitada v Nike International Limited (2000) 202 CLR 45 [102]-[103].
17. (2015) 330 ALR 67.
18. [2017] FCA 709.
19. (2013) 249 CLR 435.

Court appeal, that the relevant class consist of people who have access to a computer and have some basic knowledge and understanding of computers, the web and search engines such as Google. The primary judge stated that '[i]t is not possible to use a search engine in any meaningful way without knowing something about how it operates.'[20]

In addition, there is interesting discussion by Colvin J in *ACCC v Geowash Pty Ltd (Subject to a Deed of Co Arrangement) (No 3)*[21] at [623] where his Honour states: 'If the audience for the conduct in issue comprises the less educated, the gullible or those prone to misconceptions then a determination as to whether the conduct is misleading or deceptive is to be undertaken in that context. The legislation does not afford protection for a member of the audience who responds unreasonably, but unreasonableness is to be evaluated having regard to the characteristics of the audience members in the particular case.'

At any rate, Finkelstein J has expressed the view that, in the light of *Campomar Sociedad, Limitada v Nike International Limited*,[22] there is no need to establish that a significant number of members of the identified section would be misled or deceived, and has further stated that:

> How then is one to identify and give characteristics to *Campomar Sociedad*'s hypothetical individual? Logic demands that if one is dealing with a diverse group then, for the purpose of determining whether particular conduct has the capacity to mislead, it is necessary to select a hypothetical individual from that section of the group which is most likely to be misled. If the court is satisfied that this hypothetical individual is likely to have been misled by that conduct, that would be sufficient.[23]

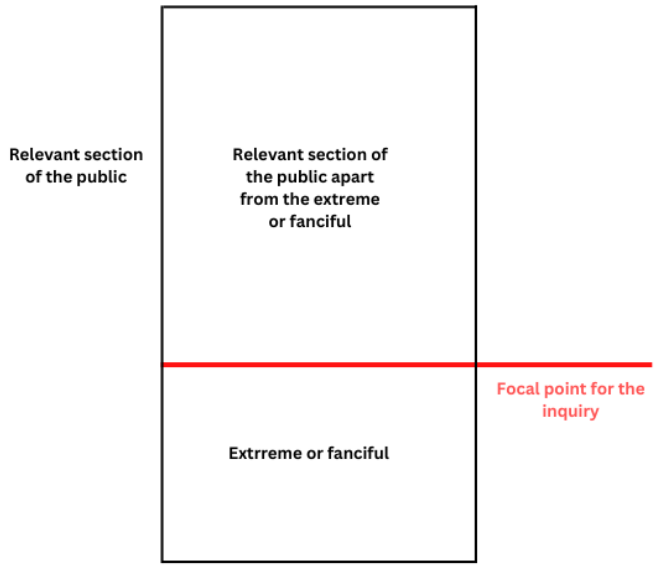
This latter approach rests on a logical foundation and represents the preferable option. At the same time, however, this should not be read as detracting from the limitations imposed by the High Court in *Campomar Sociedad, Limitada v Nike International Limited*.[24] Combining the High Court's judgment in *Campomar Sociedad, Limitada v Nike International Limited*[25] with Finkelstein J's logical reasoning in *.au Domain Administration Ltd v Domain Names Australia Pty Ltd*,[26] the following Rule can be formulated:

Rule 6

Once the court has established the relevant section of the public, the matter of whether the conduct in question is misleading or deceptive is to be considered by reference to whether a hypothetical individual from that group of the relevant section which is most likely to be misled, yet whose reactions to the relevant conduct are not extreme or fanciful, would be misled or deceived.

Expressed as a diagram, the proper focal point can be illustrated as follows:

20. See ACCC v Trading Post Australia Pty Ltd (2011) 197 FCR 498 [122].
21. (2019) 368 ALR 441.
22. (2000) 202 CLR 45.
23. .au Domain Administration Ltd v Domain Names Australia Pty Ltd [2004] FCA 424, at para 21.
24. (2000) 202 CLR 45.
25. (2000) 202 CLR 45.
26. [2004] FCA 424.



This approach is similar to that of Franki J's in *Taco Company of Australia Inc v Taco Bell Pty Ltd*: "all persons exposed to the conduct should be considered although conduct which is only likely to mislead or deceive an extraordinarily stupid person would not fall within sec 52 [ACL s. 18]".[27]

Like step one, step two of the 'Taco test' may be superfluous in situations where a particular individual, or small group of individuals, claim to have been misled or deceived. In such a scenario, a court may instead pay attention to the characteristics of the relevant individuals, such as their experience and knowledge, and familiarity with the type of subject matter of the dispute. For example, in *Green v AMP Life Limited*,[28] Mr Green was a financial planner and an agent selling insurance policies underwritten by AMP Life Ltd. He was a member of the Australasian Association of AMP Society Agents. In 1997, an arrangement was created known as the Income and Agency Protection Plan. The purpose of the plan was to provide income protection for agents in the event of disability. Pursuant to the plan, members of the Australasian Association of AMP Society Agents could, by making application to AMP Life Ltd, become entitled to receipt of benefits under the policy. In 2001, Green was diagnosed as suffering from a mental illness. AMP Life Ltd accepted his claim under the policy, however, it ceased to pay benefits to him after two years. The primary issue that arose was whether Green's entitlement to the benefit ended after two years, or was on-going. Having gone some way to emphasise the need to focus on the characteristics of the relevant individual, the Court of Appeal dismissed the appeal.

The 'Kogan test' articulated by Davies J, breaks what is step two of the 'Taco test' into five separate steps that also link into the discussion above (see discussion above at 4.1.3) as to how we define what conduct amounts to being misleading or deceptive:

> Secondly, it is necessary to consider who comes within that target audience …
>
> Thirdly, the Court considers the natural and ordinary meaning conveyed by the representations by applying an objective test of what the ordinary or reasonable consumers in the class would have understood as the meaning in light

27. (1982) ATPR 40-303, at 43-752.
28. (2005) ASAL 55-147.

> of the relevant contextual facts and circumstances … This will, or may, include consideration of the type of market, the manner in which the goods are sold, and habits and characteristics of purchasers in such a market … In advertising material, where simple phrases and notions may evoke attractive notions without precise meaning, context and the "dominant message" are important …
>
> Fourthly, whether conduct is misleading or deceptive or is likely to mislead or deceive is to be tested by whether a hypothetical ordinary or reasonable member of the target audience is likely to be misled or deceived, excluding reactions that are extreme or fanciful … The issue is not whether the impugned conduct simply causes confusion or wonderment … Conduct is misleading or deceptive or is likely to mislead or deceive if it has the tendency to lead into error, requiring a causal link between the conduct and the error on the part of the person to whom the conduct is directed. The law is not intended to protect people who fail to take reasonable care to protect their own interests … Further, there is no need to demonstrate any intention to mislead or deceive – conduct may be misleading and deceptive even where a person acts reasonably and honestly …
>
> Fifthly, whether the hypothetical member of the target audience is likely to be misled or deceived may involve questions as to the knowledge properly to be attributed to the members of the target audience … It is also necessary to isolate by some criterion a hypothetical representative member of the class …
>
> Sixthly, within the target audience, the inquiry is whether a "not insignificant" portion of the people within the class have been misled or deceived or are likely to have been misled or deceived by the relevant conduct, whether in fact or by inference …[29]

It is noteworthy that Davies J's 'Kogan test' in its step five merely concludes that "[i]t is also necessary to isolate *by some criterion* a hypothetical representative member of the class" (emphasis added) without attempting to define such as criterion. Arguably, more could also have been said about the link between the search for a hypothetical representative member of the class in step five and the conclusion in step six that the inquiry is whether a "not insignificant" portion of the people within the class have been misled or deceived or are likely to have been misled or deceived.

There seems to be quite a lot of confusion around whether it is necessary to prove a 'not insignificant' portion of persons in the relevant class had been misled or deceived or were likely to be misled or deceived. Although there is this discussion in *Kogan* (in step 6 above), a Full Federal Court decision in *ACCC v TPG Internet Pty Ltd* ('*TPG*')[30] that followed *Kogan* held the requirement to be 'at best, superfluous to the principles stated by the High Court in *Puxu*, *Campomar*, and *Google Inc* and, at worst, an erroneous gloss on the statutory provision.'[31]

The Court held that nothing in the language of the statute requires courts to determine the size of any proportion. The Court also notes that it is open for parties to seek to establish that conduct is misleading by establishing that persons were in fact misled, and in those circumstances, it may be necessary to prove that the number of such persons were significant in order to persuade the court that the conduct is in fact misleading or deceptive or likely to mislead or deceive but 'it is not a requirement inherent in the statute'.[32]

The Full Court in *TPG* outlines some history of the 'significant number' test. It had first been doubted by Finkelstein J in *ASIC v National Exchange Pty Ltd*[33] and in *.au Domain Administration v Domain Names Australia Pty Ltd*.[34] However, the Full Court in *National Exchange* concluded that the 'significant number test' was merely another way of expressing the test in *Campomar*. This view was also taken by Beach J in *Flexopack SA Plastics Industry v Flexopack Australia Pty Ltd*,[35] where his Honour stated that if the *Campomar* test is satisfied, then such a finding carries with it a finding that a significant portion of the relevant class would be likely to be misled. However, Beach J then determined in *ACCC v Get Qualified Australia Pty Ltd (in liq) (No 2)*[36] that finding that reasonable members of the class would be likely to be misled does not necessarily carry with it a finding that a significant portion of the class would be likely to be misled therefore the 'significant number' test is an additional requirement to be satisfied.

4.3.3 Step Three

> Step 3 – "Thirdly, evidence that some person has in fact formed an erroneous conclusion is admissible and may be persuasive but is not essential. Such evidence does not itself conclusively establish that conduct is misleading or deceptive or likely to mislead or deceive. The Court must determine that question for itself. The test is objective."[37]

29. Australian Competition and Consumer Commission v Kogan Australia Pty Ltd [2020] FCA 1004, [11]-[15].
30. (2020) 381 ALR 507.
31. See ACCC v TPG Internet Pty Ltd (2020) 381 ALR 507 [23].
32. See ACCC v TPG Internet (2020) 381 ALR 507 [23](g).
33. (2003) 202 ALR 24.
34. (2004) 207 ALR 521.
35. (2016) 118 IPR 239.
36. [2017] FCA 709.
37. (1982) 42 ALR 177, 202.

The types of conduct that may constitute "misleading or deceptive" conduct have been discussed above (4.1.3). It should, however, be stressed that one important consequence of the court applying an objective test is that there is no requirement that somebody was in fact misled or deceived. Further, there is no need to show that actual damages are suffered from the misleading or deceptive conduct.

As Step 3 makes clear, the fact that the test is an objective one also means that evidence that someone has in fact been misled does not in itself establish that the conduct in question was misleading or deceptive, or likely to mislead or deceive.

Finally, a court may evaluate the relevant conduct from several angles. For example, in *Seven Network Ltd v News Interactive Pty Ltd*,[38] Tamberlin J first evaluated whether each component of the defendant's conduct could be regarded as misleading or deceptive. The learned judge examined whether "when taken together … the cumulative impact of all these elements creates the impression in the mind of a reasonable visitor of a kind that can be said to be one of the types of association covered by [TPA] s. 52 [ACL s. 18] and [TPA] s. 53(c) and (d) [ACL s. 29 (g) and (h)] of the Act".

The 'Kogan test' articulated by Davies J adopts the same approach outlined here:

> Seventhly, evidence that someone was actually misled or deceived by an advertisement is not required … In circumstances where the advertisements were directed to the public at large the absence of such evidence is not of great significance … Correlatively, evidence that a person has been misled by an advertisement is not conclusive that its publication constitutes misleading or deceptive conduct.[39]

4.3.4 Step Four

> Step 4 – "Finally, it is necessary to inquire why proven misconception has arisen … The fundamental importance of this principle is that it is only by this investigation that the evidence of those who are shown to have been led into error can be evaluated and it can be determined whether they are confused because of misleading or deceptive conduct on the part of the respondent."[40]

This, the fourth and last step, originates in *Hornsby Building Information Centre v Sydney Building Information Centre*,[41] and is only of relevance in relation to situations where it has been proven that somebody has, in fact, been misled or deceived. It involves the evaluation of whether persons misled or deceived were misled or deceived due to the defendant's conduct, or due to other factors. To use the words of Finkelstein J in *.au Domain Administration Ltd v Domain Names Australia Pty Ltd*:[42] "there must be a 'sufficient nexus' between the conduct and the error or misconception".

In *Hornsby Building Information Centre v Sydney Building Information Centre*,[43] Hornsby Building Information Centre was appealing an injunction granted against them precluding them from using their name, as doing so was said to constitute a breach of TPA s. 52 (ACL s. 18). The High Court held that no such breach had taken place, as any confusion in the minds of the public was due to the fact that Sydney Building Information Centre had operated as the only Building Information Centre in the area for such a long time:

> Any deception which does arise stems not so much from the Hornsby Centre's use of the descriptive words as from the fact that the Sydney Centre initially chose descriptive words as its title and for many years thereafter was the only centre in Sydney which answered the description which those words provide. In consequence members of the public have come to associate its particular business with that type of activity. Evidence of confusion in the minds of members of the public is not evidence that the use of the Hornsby Centre's name is itself misleading or deceptive but rather that its intrusion into the field originally occupied exclusively by the Sydney Centre has, naturally enough, caused a degree of confusion in the public mind. This is not, however, anything at which [TPA] s. 52 (1) [ACL s. 18] is directed.[44]

Consequently, in that case, the errors people made did not stem from misleading or deceptive conduct. This again highlights how the fact that people have been led into error is not conclusive evidence of the conduct in question being misleading or deceptive.

38. [2004] FCA 1047, at 31.
39. Australian Competition and Consumer Commission v Kogan Australia Pty Ltd [2020] FCA 1004, [16].
40. (1982) 42 ALR 177, 203.
41. (1978) 140 CLR 216.
42. [2004] FCA 424, at 12.
43. (1978) 140 CLR 216.
44. Hornsby Building Information Centre v Sydney Building Information Centre (1978) 140 CLR 216, at 230.

A fictional example may provide further illustration of the operation of step four. Imagine that you visit a shop you have visited many times before. Without looking carefully, you purchase a jumper assuming it to be of a particular brand as the shop, as you know it, sells only products of that brand. Imagine further that it turns out that the jumper is not of the brand you thought it would be as the shop has changed ownership and therefore also changed the type of products it stocks.

In such a case you may have been misled into buying the 'wrong' brand of jumper. However, your error in the example would typically be due to your own preconceptions, not due to any particular conduct of the seller. In such a case, step four is likely to protect the seller.

Finally, as noted above, *Kogan* states that '[t]he law is not intended to protect people who fail to take reasonable care to protect their own interests …' This principle was recently applied in *ACCC v Employsure Pty Ltd*[45] however referencing *Puxu*. Based on this reasoning, the Court found that ordinary and reasonable members of the class would not have been misled or deceived or likely to have been misled or deceived because if they were wanting to contact the Fair Work Ombudsman or Fair Work Commission, they would have verified that they were calling the correct number and taken more reasonable care in doing so.

45. [2020] FCA 1409.

4.4 Section 18 - Common areas of use

Due to its wide scope, s. 18 is frequently relied upon in a range of circumstances. However, two broad categories of application can be identified. The first involves instances where s. 18 is being relied upon in relation to conduct that has misled or deceived, or may mislead or deceive, a section of the public or other identifiable group. This category can loosely be described as relating to "consumer protection". The second broad category consists of instances where s. 18 is being relied upon by one party arguing to have been specifically misled or deceived by another party, for example, in contractual negotiations. This category can loosely be described as relating to the protection of a private party's own interests. These two categories are discussed below.

4.4.1 Section 18 as consumer protection

Where s. 18 is used to protect consumers, actions would commonly be brought either by individual consumers or by the Australian Competition & Consumer Commission (ACCC), or both at the same time. Such actions seem to be the most common type of action taken by reference s. 18.

It is also worth noting the role ACL s. 18 may play in turning certain unenforceable undertakings into enforceable rights. Imagine. for example. that a company falsely asserts that it complies with a specific industry code of conduct issued by a trade organisation. The relevant code of conduct may or may not include mechanisms to deal with such false claims. For example, some such codes may cater for the company in question to be excluded from the trade organisation that issued the code of conduct. But even in such cases, the false claim, in itself, would rarely provide any enforceable rights to consumers that may have relied upon the claim.

In a scenario such as this, s. 18 may create an enforceable right in that the conduct of the company may be seen to be misleading and/or deceptive. With a potential increase in the use of codes of conduct and similar 'soft' instruments, this may become an increasing important role for ACL s. 18.

Further, there are instances where one corporation will bring an action against another competing corporation for violating s. 18. Such an approach is commonly taken as an alternative to, or in conjunction with, actions for passing off (discussed in Chapter 5). While the corporation bringing the action most likely does so to protect its own interests, the issue is still whether consumers are misled, or likely to be misled.

4.4.2 An alternative to passing off

There are several cases in which s. 18 has been relied upon as an alternative cause of action in disputes relating to passing off (see Chapter 5). In *Sydney Markets Limited v Sydney Flower Market Pty Limited*,[1] the Court held that, in light of the fact that the two businesses had co-existed for four years with adjacent entries in the telephone book with very little evidence of confusion and bearing in mind that the businesses were of different nature and size, and were not closely located, neither party had established contravention by the other. However, to counter any confusion caused by the similarity of the domain names used by the two parties, the Court also ordered both parties to place a disclaimer on their respective websites, directing visitors to the other business. Justice Hely stated that: "Whilst disclaimers (particularly on labels for products) are often regarded

1. [2002] FCA 124.

as insufficient to avoid the public being misled, the same considerations are not applicable in the case of the website".[2]

4.4.3 Section 18 as protection of a private party's interests

In a situation where one party alleges that it has been misled or deceived by another party, the *Taco* test, outlined above, can be significantly simplified. In such a situation, there is obviously no need to seek to establish what section of the public was the targeted group. Similarly, there is obviously no need to seek to identify the relevant "reasonable person" within any section of the public. Instead, the courts look at what effect the defendant's conduct had on the plaintiff. In *.au Domain Administration Ltd v Domain Names Australia Pty Ltd*, Finkelstein J noted that:

> In this type of case the plaintiff has the burden of proving that the impugned conduct was misleading and that he altered his position (that is, was induced) as a result. In most cases it will not be difficult to determine whether the defendant's conduct amounts to misleading conduct. Nor will it be difficult to determine whether the conduct induced the plaintiff to act to his detriment.[3]

This can be contrasted to situations where the defendant's conduct was directed at a group:

> There can be no doubt that when the impeached conduct is directed towards an indeterminate group or to a group defined by general or collective criteria the case should be treated as one involving a representation to the public at large or to a section or class of consumer. It seems that the same approach should be followed when the case involves a representation to an identifiable group and the plaintiff is alleging not that he was misled but that members of the group (whether great or small in number) were misled by the conduct.[4]

As was also noted by Finkelstein J in *.au Domain Administration Ltd v Domain Names Australia Pty Ltd*, the difference in approach between this type of actions and actions falling under the wide heading of "consumer protection" raises problems:

> I appreciate that on one view the approach might be criticised for applying too fine a distinction. There will be cases where a person other than the representee brings the action and the group to whom the allegedly misleading representation was made is so small that it cannot sensibly be described as a class or a section of the public. In that circumstance it may be neither possible nor necessary to identify a hypothetical member of the group for the purpose of deciding the likely effect of the impugned conduct. If no hypothetical individual is identified the court must determine the likely effect of the conduct on the actual members of the group. There will also be cases on the margin where it will not be clear whether they should be treated as 'representation to the public' cases. But the difficult cases are likely to be few and far between.
>
> I also appreciate that the approach I am required to adopt has the potential of producing anomalous results, at least at the theoretical level. Let it be assumed that the proprietor of a business brings an action against a competitor complaining that one of the competitor's advertisements, sent only to a handful of customers, contained allegedly false statements about the origin of the competitor's products. In order to succeed the plaintiff would have to establish that a hypothetical member of the group of customers would have been misled by the advertisement. On the other hand, if a member of the group were to bring an action complaining that he personally had been misled by the advertisement, he would need to prove that only he had been misled. The anomaly is that by virtue of the different tests it is possible that the individual complainant might lose his action but the proprietor of the business may succeed, or vice versa. This would be a very strange result.[5]

The complications highlighted by Finkelstein J show that, despite the extensive reliance on s. 18 in litigation, aspects of the application of s. 18 are still to be settled.

4.4.4 In the context of promises and predictions

Section 18 of the ACL is commonly relied upon in actions relating to promises and predictions that are not met. Toohey J outlined in *James v ANZ Banking Group Ltd*[6] that a representation as to future conduct is not misleading or deceptive just because the event or action does not come to pass. However, the statement may

2. [2002] FCA 124, at 152.
3. [2004] FCA 424, at 13.
4. *Sydney Markets Limited v Sydney Flower Market Pty Limited* [2002] FCA 124, at 18.
5. [2004] FCA 424, at 19 – 20.
6. (1985) 64 ALR 347, at 372.

imply that a promisor has a present intention to make good the promise later on. A prediction can also be misleading or deceptive if the person making it knows that it is false or makes it with a reckless disregard for its truth.[7]

In this context, attention must also be given to ACL s. 4, which deals more specifically with promises and predictions:

> ***Australian Consumer Law*, s. 4**
>
> (1) If:
>
> (a) a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act); and
>
> (b) the person does not have reasonable grounds for making the representation;
>
> the representation is taken, for the purposes of this Schedule, to be misleading.
>
> (2) For the purposes of applying subsection (1) in relation to a proceeding concerning a representation made with respect to a future matter by:
>
> (a) a party to the proceeding; or
>
> (b) any other person;
>
> the party or other person is taken not to have had reasonable grounds for making the representation, unless evidence is adduced to the contrary.
>
> (3) To avoid doubt, subsection (2) does not:
>
> (a) have the effect that, merely because such evidence to the contrary is adduced, the person who made the representation is taken to have had reasonable grounds for making the representation; or
>
> (b) have the effect of placing on any person an onus of proving that the person who made the representation had reasonable grounds for making the representation.
>
> (4) Subsection (1) does not limit by implication the meaning of a reference in this Schedule to:
>
> (a) a misleading representation; or
>
> (b) a representation that is misleading in a material particular; or
>
> (c) conduct that is misleading or is likely or liable to mislead;
>
> and, in particular, does not imply that a representation that a person makes with respect to any future matter is not misleading merely because the person has reasonable grounds for making the representation.

The significance of this provision was illustrated in *Ting v Blanche*,[8] where Hill J stated that the comparable TPA s. 51A served primarily "to cast the burden of proof upon the respondent corporation who has made a representation about a future matter to show that in making that representation it had reasonable grounds for doing so".[9]

The ACL has made amendments in furtherance of the position advanced by *Ting v Blanche* by clarifying the burden of proof thereunder. Previous Court decisions, such as the case of *Australian Competition & Consumer Commission v IMB Group Pty Ltd*[10] interpreted TPA s. 51A as requiring a respondent to prove that it had reasonable grounds for making the representation. Section 4(2) now provides that a respondent is only required to adduce evidence of reasonable grounds. Thus, clarifying that the burden of proof placed on the respondent is evidentiary in nature, and does not place a legal burden on the respondent to prove that their representations were not misleading.[11]

It can be noted that s. 4 has also made clear that the section can operate against accessories to contraventions as well as primary contraveners (s. 4(2)(a) and (b)). Further, that satisfying the burden of proof under this section does not constitute a defence for a breach of any other section of the ACL, changes which are contrary to the occasional interpretation of TPA s. 51A.[12]

7. *Thompson v Mastertouch TV Service Pty Ltd (No 3)* (1977) 29 FLR 270.
8. (1993) 118 ALR 543.
9. *Ting v Blanche* (1993) 118 ALR 543, at 522.
10. [1999] FCA 819.
11. Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) Explanatory Memorandum at 2.22.
12. Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) Explanatory Memorandum at 2.24 – 2.25.

4.4.5 In the context of contractual negotiations

The courts have allowed parties to receive remedies for conduct made during the course of negotiations which amounted to a misrepresentation that was misleading or deceptive. In *Bevanere Pty Ltd v Lubidineuse*,[13] TPA s. 52 was held to have been breached when the purchaser of a beauty clinic was told during negotiations that its head employee would continue on after the sale, when the vendor knew that this was not true and that, in fact, the employee had plans to open her own clinic nearby.

Similarly, in *Chiarabagli v Westpac Banking Corp*,[14] an action was brought under s. 52 by a married couple, who held interest in property and a nightclub in Brisbane, against their bank. Mr Chiarabagli had been seeking a loan and was told by the bank that they should borrow the money offshore in foreign currency, and that there was "no significant risk" of doing this. However, Mr Chiarabagli became more indebted to the bank after the Australian dollar fell, and it was held that there was no reasonable basis for the bank officer's statement regarding the issue of risk. Also, Mr Chiarabagli had trusted statements made regarding the Australian dollar's recovery, which led him to not pay off the loan at an earlier date. The bank was held liable for damages.

4.4.6 As an alternative to defamations actions

As has already been seen, s. 18 is an extraordinarily versatile statutory provision with application in a multitude of areas. In *Global Sportsman Pty Ltd v Mirror Newspapers Ltd*,[15] the Court noted the following as to TPA s. 52's application in the context of defamatory publications:

> There is no definable boundary between conduct which is misleading or deceptive or likely to mislead or deceive and material which is defamatory. Material which is defamatory does not fall outside the operation of subsec. 52(1) of the Act merely for that reason any more than it is brought within the operation of subsec. 52(1) by reason only that it is defamatory.

Consequently, there is an overlap between s. 18 and the tort of defamation.

4.4.7 Remedies in relation to s. 18

Where a party has acted in breach of ACL s. 18, several remedies may come into question. A court may order damages, grant injunctions, or give so-called ancillary orders. These remedies are all discussed below (4.4).

13. (1985) 7 FCR 325.
14. (1989) ATPR 40-971.
15. (1984) ATPR 40-463, at 45-343.

4.5 False or misleading representations under ACL s. 29 (TPA s. 53)

Section 29 of the Australian Consumer Law (s. 53 of the *Trade Practices Act)* deals with false or misleading representations and states that:

Australian Consumer Law, s. 29

(1) A person must not, in trade or commerce, in 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:

(a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or

(b) make a false or misleading representation that services are of a particular standard, quality, value or grade; or

(c) make a false or misleading representation that goods are new; or

(d) make a false or misleading representation that a particular person has agreed to acquire goods or services; or

(e) make a false or misleading representation that purports to be a testimonial by any person relating to goods or services; or

(f) make a false or misleading representation concerning:

(i) a testimonial by any person; or

(ii) a representation that purports to be such a testimonial; relating to goods or services; or

(g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits; or

(h) make a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation; or

(i) make a false or misleading representation with respect to the price of goods or services; or

(j) make a false or misleading representation concerning the availability of facilities for the repair of goods or of spare parts for goods; or

(k) make a false or misleading representation concerning the place of origin of goods; or

(l) make a false or misleading representation concerning the need for any goods or services; or

(m) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2); or

(n) make a false or misleading representation concerning a requirement to pay for a contractual right that:

(i) is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2); and

(ii) a person has under a law of the Commonwealth, a State or a Territory (other than an unwritten law).

(2) For the purposes of applying subsection (1) in relation to a proceeding concerning a representation of a kind referred to in subsection (1)(e) or (f), the representation is taken to be misleading unless evidence is adduced to the contrary.

(3) To avoid doubt, subsection (2) does not:

(a) have the effect that, merely because such evidence to the contrary is adduced, the representation is not misleading; or

(b) have the effect of placing on any person an onus of proving that the representation is not misleading.

While s. 18 of the ACL (TPA s. 52) is very general, s. 29 of the ACL (TPA s. 53), dealing with false or misleading representations, is comparatively specific. It outlines specific types of behaviour which, if breached by a person engaged in trade or commerce in the supply of goods or services, can amount to an offence under Chapter 4 of the ACL (TPA Pt VC). Further, a breach of ACL s. 29 can result in an injunction under ACL s. 232 (TPA s. 80), damages under ACL s. 236 (TPA s. 82), as well as other orders under ACL s. 237 (TPA s. 87). These remedies are discussed in detail below.

Importantly, ss. 29(1)(e) and (f), concerning testimonials, and 29(1)(n), concerning requirements to pay for certain contractual rights, are new provisions. They add to the list of representations that were expressly prohibited in the former TPA s. 53. Further, s. 29(2) provides that, "in… a proceeding concerning a representation of a kind referred to in ss. 29(1)(e) or (f), the representation is taken to be misleading unless evidence is adduced to the contrary."

Another point to note is that the terms of the ACL imply a wider application by substituting "person" for "corporation," which was the term used in the TPA provisions.

4.5.1 False representations as to standard, quality, value, grade, composition, style or model, history or particular previous use

Sections 29(1)(a) and (b) regulate representations relating to issues such as the standard, quality, value and grade of goods and services respectively. The application of these sections is illustrated in *Australian Competition & Consumer Commission v Nissan Motor Co (Australia) Pty Ltd*.[1] The case involved a car manufacturer who had advertised a car of a particular model in a newspaper. The advertisement contained a picture of a car, however, it turned out that the car in the picture was not of the model being described in the advertisement. The car manufacturer pleaded guilty of falsely representing that the goods were of a particular style and model in contravention of s. 53(a) (ACL s. 29(1)(a).

4.5.2 Falsely represent that goods are new

There are instances where a seller falsely claims that the goods being sold are new. Cases involving such behaviour typically relate to car sales. Section 29(1)(c) makes such conduct unlawful. In *Henderson v Bowden Ford Pty Ltd*,[2] a car dealer sold what he claimed to be a new car, when in fact it was a superseded model with a 20 month-old compliance plate.

4.5.3 False or misleading representation that purports to be a testimonial relating to goods or services; or that concerns a testimonial, or representation purporting to be a testimonial, relating to goods or services

Subsections 29(1)(e) and (f) of the ACL apply to all testimonials, irrespective of whether the representations made were genuine. These provisions conveniently capture material published via social media, such as Facebook or Twitter, even if the testimonial was posted by a person other than the person who controls the website or page. One such example is the recent case of *Australian Competition and Consumer Commission (ACCC) v Allergy Pathway Pty Ltd (No 2)*.[3] In that case the respondent had published client testimonials on its company website, on its Facebook and Twitter pages and on its Facebook "wall." In an earlier proceeding,[4] Allergen Pathway was found to have contravened the TPA by making false, misleading and deceptive representations in

1. [1998] 1048 FCA.
2. (1979) ATPR 40-129.
3. (2011) 192 FCR 34.
4. Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd [2009] FCA 960.

relation to its ability to test for, identify and treat allergies. Allergen Pathway was ordered to publish corrective advertising and gave undertakings to the court, including that it would remove its client testimonials, which added "an air of legitimacy to Allergy Pathway's misleading claims…" Having failed to remove the testimonials, the company and its sole director were found guilty of contempt and were ordered to pay fines and to publish further corrective advertising.

In another proceeding, the ACCC accepted an undertaking from a company, Citymove Pty Ltd,[5] who was found to be in contravention of ss. 29(1)(e) and (f). In its undertaking, Citymove admitted to having copied genuine consumer testimonials from an unrelated customer review website, modifying them and then pasting the modified testimonials on a website which was being constructed for Citymove and purported to contain authentic removal company reviews.

4.5.4 Falsely represent that a particular person has agreed to acquire goods or services, or that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have

A seller may seek to put goods or services in favourable light by claiming that they have some form of association with, sponsorship from, or approval by, a particular individual or organisation. Similarly, and for the same reasons, claims may be made to the effect that goods or services have certain performance characteristics, accessories, uses or benefits. If such statements are untrue, s. 29(1)(d) and/or s. 29(1)(g) may have been violated. Furthermore, the first described type of behaviour may violate passing off laws (see Chapter 5).

In *Seven Network Ltd v News Interactive Pty Ltd*, Tamberlin J noted that:

> In considering whether and what associations are conveyed by a representation it must be kept in mind that even vague suggestions are capable of evoking or conveying an association … the association need not be indicated in a manner which is very obvious but can consist of a subtle or pervasive suggestion.[6]

An example of such a subtle suggestion can be found in *Twentieth Century Fox v South Australian Brewery Co Ltd*.[7] The Court held that the use of the words "Duff Beer" on a beer can label gave rise to an association between the beer and the well-known television series 'The Simpsons' ("Duff" is the fictional beer brand preferred by the main characters).

An example of a benefit that a product was claimed to have, but did in fact not have, occurred in *Ferro Corp (Aust) Pty Ltd v International Pools (Aust) Pty Ltd*.[8] The product in question was used as a tie layer in fibreglass swimming pools. Ferro's employees represented that it had certain qualities and was a superior product, thus inducing International Pools to enter into a supply contract. However, the product was later found to be defective, and Ferro was held liable for breach of contract and of s. 52, s. 53(a) and s. 53(c) of the TPA (respectively, s 18 and ss 29(1)(a) and (g) of the ACL).

Another example of a breach of s. 29(1)(g) (former TPA s. 53(c)) involved false representations about the benefits of oral contraceptives in *ACCC v Hughes*.[9] The case involved product sold over the Internet and falsely claimed to have "nil side effects", amongst other things. Similarly, in *ACCC v Danoz Direct Pty Ltd*,[10] an advertisement in which a company claimed its machine would cause weight loss and improve muscle tone was held to have breached s. 53(c).

4.5.5 Person claiming to have a sponsorship, approval or affiliation it does not have

A person may seek to put themselves in favourable light by claiming some form of affiliation with, sponsorship from, or approval by, a particular individual or organisation. If such statements are untrue, s. 29(1)(h) of the ACL (former TPA s. 53(d)) may have been violated. The close connection between a corporation (or "person"

5. Undertaking dated 27th September 2011; see http://www.accc.gov.au/content/index.phtml/itemId/1018610.
6. [2004] FCA 1047, at 17.
7. (1996) 66 FCR 451.
8. (1994) ATPR 46-136.
9. (2002) ATPR 41-863.
10. (2003) ATPR 46-241.

in s 29(h)) and the goods or services that it supplies means that actions taken in relation to s. 29(1)(g) (TPA s. 53(c)) often also involve a claim under s. 29(1)(h) (TPA s. 53(d)), and vice versa. Furthermore, such behaviour may violate passing off laws (see Chapter 5).

In *ACCC v Chen*,[11] an individual located in the US had placed a website on the World Wide Web. The website was very similar to, and had a domain name confusingly similar to, the official website for the Sydney Opera House. The operator of the website was found to have represented an association with the Sydney Opera House. An injunction was granted against the respondent, but on more limited terms than what the ACCC sought, as the respondent had ceased his misleading activities. However, the Court was concerned he could resume such activity. Also, for policy reasons, an injunction granted in Australia would aid the ACCC in convincing its American counterpart to take the same, or a similar, action there.

4.5.6 False or misleading representation with respect to the price of goods or services, concerning the availability of facilities for the repair of goods or of spare parts for goods or concerning the place of origin of goods

Subsections 29(1)(i), 29(1)(j) and 29(1)(k) of the ACL (formerly TPA ss. 53(e), 53(ea) and 53(eb), respectively) regulate false or misleading representations with respect to the price of goods or services, concerning the availability of facilities for the repair of goods or of spare parts for goods, or concerning the place of origin of goods.

In *ACCC v Allans Music Group Pty Ltd*,[12] the gist of the false and misleading representations was that there was an opportunity in the pre-Christmas period where substantial bargains could be obtained. This was false because the items in question had not been sold in the pre-Christmas period at the listed "WAS" price in the catalogue but at prices that were significantly below the claimed "WAS" price. The false or misleading representations with respect to the price of the goods were in regard to the "WAS" price, which misrepresented the savings to be had.

The most commonly disputed representations within this category are doubtlessly misrepresentations relating to the place of origin of goods. In *ACCC v 4WD Systems Pty Ltd*,[13] for example, 4WD Systems Pty Ltd made false or misleading representations concerning the place of origin of goods. It failed to inform the franchisees that the product had changed before the orders were filled. It advertised in various magazines that the product supplied was the US-made diff lock. It expressly made representations that the product was the same and had not changed.

The issue of place of origin has been so controversial that Division 1AA was introduced in the TPA to outline the types of country of origin representations that did not contravene s 52, s. 53(a) or s 53(eb) (or s 75AZC(1)(a) or (i)). The corresponding sections in the ACL are found in Part 5-3 – Country of origins representations. The part provides that certain country of origin representations made about goods do not contravene s. 18 (which deals with misleading or deceptive conduct); or ss. 29(1)(a) or (k) or 151(1)(a) or (k) (which deal with false or misleading representations). The requirements to be met for a certain representation *not* to contravene those sections are set out in a table in s. 255:

Australian Consumer Law, s. 255(1)

A person does not contravene section 18, 29(1)(a) or (k) or 151(1)(a) or (k) only by making a representation of a kind referred to in an item in the first column of this table, if the requirements of the corresponding item in the second column are met.

11. [2003] FCA 897.
12. [2002] FCA 1552.
13. [2003] FCA 0850.

For a representation as to the country of origin of goods, the requirements to be met are:

> ***Australian Consumer Law, s. 255(1) – Item 1***
>
> (a) the goods have been substantially transformed in that country; and
>
> (b) 50% or more of the total cost of producing or manufacturing the goods as worked out under section 256 is attributable to production or manufacturing processes that occurred in that country; and
>
> (c) the representation is not a representation to which item 2 or 3 of this table applies.

The term "substantially transformed" is discussed further in s. 255 (3) (formerly TPA s. 65AE(1)):

> ***Australian Consumer Law, s. 255(3)***
>
> Goods are *substantially transformed* in a country if they undergo a fundamental change in that country in form, appearance or nature such that the goods existing after the change are new and different goods from those existing before the change.

For a representation that goods are the produce of a particular country, formerly the subject of s. 65AC of the TPA, the requirements to be met for the representation *not* to contravene the ACL, ss. 18, 29(1)(a) or (k) or 151(1)(a) or (k) are:

> ***Australian Consumer Law, s. 255(1) – Item 2***
>
> (a) the country was the country of origin of each significant ingredient or significant component of the goods; and
>
> (b) all, or virtually all, processes involved in the production or manufacture happened in that country.

Somewhat similarly, item 3 in the table in s. 255(1) (formerly TPA s. 65AD) puts in place some limitations on persons making representations as to the country of origin of goods by means of a logo specified in the regulations.

Section 255 then goes on to expand the range of country or origin representations that were formerly covered by Division 1AA of the TPA. For a representation that goods were grown in a particular country, the requirements to be met are:

Australian Consumer Law, s. 255(1) – Item 4

(a) the country is the country that could, but for subsection (2), be represented, in accordance with this Part, as the country of origin of the goods, or the country of which the goods are the produce; and

(b) each significant ingredient or significant component of the goods was grown in that country; and

(c) all, or virtually all, processes involved in the production or manufacture happened in that country.

Item 5 in the table in s. 255 provides slightly more restrictive requirements for a representation that ingredients or components of goods were grown in a particular country, including:

Australian Consumer Law, s. 255(1) – Item 5

(b) each ingredient or component that is claimed to be grown in that country was grown only in that country; and

(c) each ingredient or component that is claimed to be grown in that country was processed only in that country; and

(d) 50% or more of the total weight of the goods is comprised of ingredients or components that were grown and processed only in that country.

4.5.7 False or misleading representation concerning the need for any goods or services

Actions in relation to ACL s. 29(1)(l) (formerly TPA s. 53(f)) are commonly set in the context of car repairers claiming that more work is necessary than actually is the case. For example, in *Peter James Dawson v Motor Tyre Service Pty Ltd*,[14] a car owner was told that certain work was necessary to address a vibrations problem. Independent tests showed that no such work was in fact necessary. However, Fisher J noted that:

> In the context of such conflicting views from so many experienced technicians it is as well to reiterate the issue before me as I see it, namely whether I can be satisfied beyond reasonable doubt that the quoted work or some part thereof was not needed. It is axiomatic and indeed accepted by both parties that there is no obligation upon the defendant to establish that any of that work was necessary. The need for the work was a matter of judgment and in the circumstances of this case not capable of positive proof one way or the other. The prosecutor must discharge the onus of establishing to the relevant degree of certainty that the fact that the work was not needed was the only judgment or opinion which reasonably could be held. Any reasonable doubt must be resolved in favour of the defendant. Furthermore I accept the submission of counsel for the defendant that work which is desirable or preferable is "needed".[15]

In light of this, the charges were dismissed.

4.5.8 False or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy

Violations of s. 29(1)(l) (formerly TPA s. 53(g)) frequently occur in the context of businesses' return policies. For example, in *Miller v Fiona's Clothes Horse of Centrepoint Pty Ltd*,[16] the defendant had a "No refund" policy expressed through signs placed in the stores. Further, the policy was expressed on the sales dockets printed by the defendant, as well as orally by the defendant's staff. The Court found this to be a violation of s. 53(g) as the representation did not accurately reflect the buyers' legal rights: "The signs [and the other modes of

14. (1981) ATPR 40-223.
15. Peter James Dawson v Motor Tyre Service Pty Ltd (1981) ATPR 40-223, at 43-024.
16. (1989) ATPR 40-963.

communicating the misrepresentations] would certainly be likely to mislead many customers about their rights, and deter some from seeking a refund where a refund was an appropriate remedy".[17]

17. Miller v Fiona's Clothes Horse of Centrepoint Pty Ltd (1989) ATPR 40-963, at 50-520.

4.6 Other specific false, misleading or deceptive representations or conduct (ss. 30 – 50)

Apart from s. 18 and s. 29 of the ACL (TPA s. 52 and s. 53), Chapter 3 Part 3-1 of the ACL contains several other provisions dealing with specific types of false, misleading or deceptive representations or conduct.

4.6.1 False or misleading representations about sale etc. of land

False or misleading representations in relation to land are dealt with in section 30 (formerly TPA s. 53A):

> ***Australian Consumer Law*, s. 30**
>
> (1) A corporation shall not, in trade or commerce, in connection with the sale or grant, or the possible sale or grant, of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land:
>
> (a) make a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation; or
>
> (b) make a false or misleading representation concerning the nature of the interest in the land; or
>
> (c) make a false or misleading representation concerning the price payable for the land; or
>
> (d) make a false or misleading representation concerning the location of the land; or
>
> (e) make a false or misleading representation concerning the characteristics of the land; or
>
> (f) make a false or misleading representation concerning the use to which the land is capable of being put or may lawfully be put; or
>
> (g) make a false or misleading representation concerning the existence or availability of facilities associated with the land.
>
> Note: A pecuniary penalty may be imposed for a contravention of this subsection.
>
> (2) This section does not affect the application of any other provision of Part 2-1 or this Part in relation to the supply or acquisition, or the possible supply or acquisition, of interests in land.

Only a few observations will be made in relation to s. 30. First, many of the terms used in this provision, such as "person" and "in trade or commerce", have been dealt with elsewhere (Chapter 2). Second, large parts of s. 30(1) are very similar to what was discussed in relation to s. 53.

4.6.2 Misleading conduct in relation to employment

Section 31 (formerly TPA s. 53B) regulates misleading conduct in relation to employment:

Australian Consumer Law, **s. 31**

A person must not, in relation to employment that is to be, or may be, offered by the person or by another person, engage in conduct that is liable to mislead persons seeking the employment as to:

(a) the availability, nature, terms or conditions of the employment; or

(b) any other matter relating to the employment.

Note: A pecuniary penalty may be imposed for a contravention of this section.

In *Darmody v National Centre Automotive*,[1] the respondent was ordered to pay damages for acting in breach of TPA ss. 52 and 53B (ACL ss. 18 and 31) by falsely representing to the applicants that they would be employed by the respondent's car dealership if they resigned their employment with another car dealership.

4.6.3 Offering rebates, gifts, prizes etc.

Australian Consumer Law, **s. 32**

(1) A person must not, in trade or commerce, offer any rebate, gift, prize or other free item with the intention of not providing it, or of not providing it as offered, in connection with:

(a) the supply or possible supply of goods or services; or

(b) the promotion by any means of the supply or use of goods or services; or

(c) the sale or grant, or the possible sale or grant, of an interest in land; or

(d) the promotion by any means of the sale or grant of an interest in land.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(2) If a person offers any rebate, gift, prize or other free item in connection with:

(a) the supply or possible supply of goods or services; or

(b) the promotion by any means of the supply or use of goods or services; or

(c) the sale or grant, or the possible sale or grant, of an interest in land; or

(d) the promotion by any means of the sale or grant of an interest in land; the person must, within the time specified in the offer or (if no such time is specified) within a reasonable time after making the offer, provide the rebate, gift, prize or other free item in accordance with the offer.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(3) Subsection (2) does not apply if:

(a) the person's failure to provide the rebate, gift, prize or other free item in accordance with the offer was due to the act or omission of another person, or to some other cause beyond the person's control; and

(b) the person took reasonable precautions and exercised due diligence to avoid the failure.

(4) Subsection (2) does not apply to an offer that the person makes to another person if:

(a) the person offers to the other person a different rebate, gift, prize or other free item as a replacement; and

(b) the other person agrees to receive the different rebate, gift, prize or other free item.

(5) This section does not affect the application of any other provision of Part 2-1 or this Part in relation to the supply or acquisition, or the possible supply or acquisition, of interests in land.

The use of s. 32 (formerly TPA s. 54) is exemplified in *Trade Practices Commission v Calderton Corporation Pty Ltd*,[2] where the defendant conducted a "prize contest" in which customers earned points by purchasing the

1. [2003] FMCA 358.
2. (1994) ATPR 41-306.

defendant's products and by engaging in various other activities nominated by the defendant. At the end of the contest, the people with the 10 highest scores would be awarded certain specified prizes.

However, at the time the contest was to end, the defendant concluded that the contest had not been a commercial success. In order to avoid providing the prizes as stated at the outset of the contest, the defendant extended the contest for one extra month. Further, during that month, the defendant introduced fictitious names amongst the names of the genuine contestants. At the end of the extended contest period, the 10 winners were all fictitious contestants, and the defendant did not have to give away any prices at all. Justice Neaves noted that:

> [The defendants] have pleaded guilty to the charges against them but it would not be proper, in my opinion, to treat the defendants' conduct as amounting to anything less than serious breaches of the Act. The prosecution accepts that, at the time the competition was begun, there was no intention on the part of the [defendants] that the prizes advertised would not be provided. This position no longer obtained, however, when the results of the operation of the competition during July and August were assessed and found to be less favourable than had been expected. The conduct then engaged in by the [defendants] cannot be justified or excused. It shows a lack of integrity. To continue to operate the competition and to advertise and promote it knowing that steps were to be taken to ensure that no prizes were to be awarded was reprehensible conduct. It not only amounted to a fraud upon those who were induced to enter into the competition upon the understanding that the prizes advertised were to be awarded to those who accumulated the most "prize dollars" but it demonstrated a complete lack of business morality. Those circumstances alone call for substantial fines to be imposed.[3]

4.6.4 Misleading conduct as to the nature etc. of goods

***Australian Consumer Law*, s. 33**

A person must 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.

Note: A pecuniary penalty may be imposed for a contravention of this section.

Section 33 (formerly TPA s. *55*) may be relied upon in conjunction with argued breaches of e.g., ss. 18 and 29 (formerly TPA ss. *52* and *53*. Its application is illustrated in *ACCC v Cadbury Schweppes Pty Ltd*,[4] where the respondent, who had sold fruit-flavoured cordial which in fact did not contain any elements derived from the fruit in question, was found to have acted in breach of, amongst other provisions, s. *55*.

4.6.5 Misleading conduct as to the nature etc. of services

***Australian Consumer Law*, s. 34**

A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.

Note: A pecuniary penalty may be imposed for a contravention of this section.

The first thing to note when examining this provision is that, while many other sections of Part V Division

3. Trade Practices Commission v Calderton Corporation Pty Ltd (1994) ATPR 41-306, at 42-116.
4. (2004) ATPR 42-001.

1 refer to conduct that is "likely to mislead", it refers to conduct that is "liable to mislead". As noted in *Westpac Banking Corporation v Northern Metals Pty Ltd*,[5] the words "liable to mislead" are narrower in scope than the words "likely to mislead". Thus, s. 34 (formerly TPA s. 55A) is more limited in its scope than those provisions that focus on the likelihood of people being misled. Further, as was also observed in the same case, the section is applicable only in relation to the types of conduct specified; in contrast, s. 18, (TPA s. 52) for example, is open to all types of "conduct". This again limits the scope of s. 34.

4.6.6 Bait advertising

Australian Consumer Law, **s. 35**

(1) A person must not, in trade or commerce, advertise goods or services for supply at a specified price if:

(a) there are reasonable grounds for believing that the person will not be able to offer for supply those goods or services at that price for a period that is, and in quantities that are, reasonable, having regard to:

(i) the nature of the market in which the person carries on business; and

(ii) the nature of the advertisement; and

(b) the person is aware or ought reasonably to be aware of those grounds.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(2) A person who, in trade or commerce, advertises goods or services for supply at a specified price must offer such goods or services for supply at that price for a period that is, and in quantities that are, reasonable having regard to:

(a) the nature of the market in which the person carries on business; and

(b) the nature of the advertisement.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

The fact that the law draws a distinction between an offer and an invitation to treat means that businesses are not legally bound to sell, or even have available for sale, the products they advertise. In other words, if a business advertises a particular product, but does not have that product available for sale, a person wanting to buy the advertised product cannot sue for breach of contract, as the advertisement typically constitutes an invitation to treat rather than an offer. Section 35 (formerly TPA s. 56) is aimed to address the concerns that this situation gives rise to; it simply would not be fair for businesses to be allowed to attract potential buyers by advertising products at prices they will not sell the products at.

As has been the case in relation to many of the sections discussed above, the former TPA s. 56 was applied, on several occasions, in relation to car dealers. For example, in *Michael Joseph Reardon v Morley Ford Pty Ltd*,[6] the defendant had advertised a particular model of Ford Falcon at a special discount price but had taken no steps to secure an adequate supply of such cars. Indeed, potential customers were informed that only one such Ford Falcon was for sale at the discounted price.

4.6.7 Wrongly accepting payment

Australian Consumer Law, **s. 36**

(1) A person must not, in trade or commerce, accept payment or other consideration for goods or services if, at the

5. (1989) ATPR 40-953.
6. (1980) ATPR 40-190.

time of the acceptance, the person intends not to supply the goods or services.
Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(2) A person must not, in trade or commerce, accept payment or other consideration for goods or services if, at the time of the acceptance, the person intends to supply goods or services materially different from the goods or services in respect of which the payment or other consideration is accepted.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(3) A person must not, in trade or commerce, accept payment or other consideration for goods or services if, at the time of the acceptance:

(a) there are reasonable grounds for believing that the person will not be able to supply the goods or services:

(i) within the period specified by or on behalf of the person at or before the time the payment or other consideration was accepted; or

(ii) if no period is specified at or before that time—within a reasonable time; and

(b) the person is aware or ought reasonably to be aware of those grounds.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(4) A person who, in trade or commerce, accepts payment or other consideration for goods or services must supply all the goods or services:

(a) within the period specified by or on behalf of the person at or before the time the payment or other consideration was accepted; or

(b) if no period is specified at or before that time—within a reasonable time.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(5) Subsection (4) does not apply if:

(a) the person's failure to supply all the goods or services within the period, or within a reasonable time, was due to the act or omission of another person, or to some other cause beyond the person's control; and

(b) the person took reasonable precautions and exercised due diligence to avoid the failure.

(6) Subsection (4) does not apply if:

(a) the person offers to supply different goods or services as a replacement to the person (the customer) to whom the original supply was to be made; and

(b) the customer agrees to receive the different goods or services.

(7) Subsections (1), (2), (3) and (4) apply whether or not the payment or other consideration that the person accepted represents the whole or a part of the payment or other consideration for the supply of the goods or services.

Looking only at the language used in s. 36 (formerly TPA s. 58), the first part of this section (i.e., subsections (1)-(2)) seems associated with severe difficulties. To be successful, it seems necessary to prove that the alleged offender had no *subjective intention* to supply the goods or services, or *subjectively intended* to supply goods or services materially different from the goods or services in respect of which the payment or other consideration is accepted. However, case law suggests that focus ought to be placed on the *objective intention* of the offender. In *Barton v Westpac Banking Corporation*,[7] a tour operator (better known for banking activities) accepted payment for a 15-day tour, despite knowing that the duration of some of those 15-day tours had in fact been changed to 13 days due to flight changes. Sheppard J noted how:

> In order that a corporation may be shown to have had the requisite intention, those acting for it must be shown to have been in a position to apply their minds to the question of whether what was to be supplied would be something materially different from that for which the customer's money was accepted.[8]

As it could not be proven that the agent accepting payment was aware that the buyer thought the payment related to a trip of 15 days duration, the action failed.

Looking at subsection (3), on the other hand, it is clear already from the language used that it focuses on

7. (1983) ATPR 40-388.
8. Barton v Westpac Banking Corporation (1983) ATPR 40-388, at 44-564.

objective considerations. In *ACCC v Chubb Security Australia Pty Ltd*,[9] a company providing security services was found to have contravened TPA s. 58(b) (now ACL s. 36(3)) in contracting to provide services when it was aware that it would not be able to provide such services.

Section 36 is an expanded version of the former TPA s. 58. Firstly, the addition of subsection (4) imposes a mandatory obligation on the supplier of goods or service to supply them within the time specified, or within a reasonable time, with possible pecuniary penalties for contravention of the subsection. Secondly, the use of the words "by or on behalf of" in subsections (3) and (4), which relate to time periods specified for the supply of goods or services, expand the range of instances when a person may be in breach of these subsections, i.e., a person may be in breach if an agent had specified the time periods for supply. Subsections (5) and (6) serve to limit a person's liability arising out of subsection (4); and subsection (7) has been added to clarify that s. 36 applies in relation to whole or part payments (or other consideration) for the supply of goods or services.

4.6.8 Misleading representations about certain business activities

***Australian Consumer Law*, s. 37**

(1) A person must not, in trade or commerce, make a representation that:

(a) is false or misleading in a material particular; and

(b) concerns the profitability, risk or any other material aspect of any business activity that the person has represented as one that can be, or can be to a considerable extent, carried on at or from a person's place of residence.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(2) A person must not, in trade or commerce, make a representation that:

(a) is false or misleading in a material particular; and

(b) concerns the profitability, risk or any other material aspect of any business activity:

(i) that the person invites (whether by advertisement or otherwise) other persons to engage or participate in, or to offer or apply to engage or participate in; and

(ii) that requires the performance of work by other persons, or the investment of money by other persons and the performance by them of work associated with the investment.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

The use of s. 37 (formerly TPA s. 59) is illustrated in *Jones v Glen Houn Holdings Pty Ltd (in liq.)*.[10] In that case, a business offering video franchises was found to have contravened the former TPA s. 59(2) (ACL s. 37(2)) when making statements such as "You WILL double your investment in 8 weeks", when in fact there was no guarantee that that would happen.

4.6.9 Application of provisions of this division to information providers

Section 38 of the ACL limits the ability of ss. 29, 30, 33, 34 and 37 be applied to information providers. This section mirrors s. 19, discussed earlier under 4.1.2.2 in the context of misleading or deceptive conduct.

9. (2004) ATPR 42-041.
10. (1985) ATPR 40-604.

4.6.10 Single price to be stated in certain circumstances

***Australian Consumer Law*, s. 48**

(1) A person must not, in trade or commerce, in connection with:

(a) the supply, or possible supply, to another person of goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption; or

(b) the promotion by any means of the supply to another person, or of the use by another person, of goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption; make a representation with respect to an amount that, if paid, would constitute a part of the consideration for the supply of the goods or services unless the person also specifies, in a prominent way and as a single figure, the single price for the goods or services.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(2) A person is not required to include, in the single price for goods, a charge that is payable in relation to sending the goods from the supplier to the other person.

(3) However, if:

(a) the person does not include in the single price a charge that is payable in relation to sending the goods from the supplier to the other person; and

(b) the person knows, at the time of the representation, the minimum amount of a charge in relation to sending the goods from the supplier to the other person that must be paid by the other person; the person must not make the representation referred to in subsection (1) unless the person also specifies that minimum amount.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(4) Subsection

(1) does not apply if the representation is made exclusively to a body corporate.

(5) For the purposes of subsection (1), the person is taken not to have specified a single price for the goods or services in a prominent way unless the single price is at least as prominent as the most prominent of the parts of the consideration for the supply.

(6) Subsection (5) does not apply in relation to services to be supplied under a contract if:

(a) the contract provides for the supply of the services for the term of the contract; and

(b) the contract provides for periodic payments for the services to be made during the term of the contract; and (c) if the contract also provides for the supply of goods—the goods are directly related to the supply of the services.

(7) The ***single price*** is the minimum quantifiable consideration for the supply of the goods or services at the time of the representation, including each of the following amounts (if any) that is quantifiable at that time:

(a) a charge of any description payable to the person making the representation by another person (other than a charge that is payable at the option of the other person);

(b) the amount which reflects any tax, duty, fee, levy or charge imposed on the person making the representation in relation to the supply;

(c) any amount paid or payable by the person making the representation in relation to the supply with respect to any tax, duty, fee, levy or charge if:

(i) the amount is paid or payable under an agreement or arrangement made under a law of the Commonwealth, a State or a Territory; and

(ii) the tax, duty, fee, levy or charge would have otherwise been payable by another person in relation to the supply.

Example 1: A person advertises lounge suites for sale. Persons have the option of paying for fabric protection. The fabric protection charge does not form part of the single price because of the exception in paragraph (a).

Example 2: The GST may be an example of an amount covered by paragraph (b).

Example 3: The passenger movement charge imposed under the *Passenger Movement Charge Act 1978* may be an example of an amount covered by paragraph (c). Under an arrangement under section 10 of the *Passenger Movement Charge Collection Act 1978*, airlines may pay an amount equal to the charge that would otherwise be payable by passengers departing Australia.

Section 48 (formerly TPA s. 53C) was introduced through the *Trade Practices Revision Act 1986* (Cth). Paragraph 93 of the Explanatory memorandum to the Trade Practices Revision Bill (1986) outlines the aim of its inclusion:

> The new s 53C (now ACL s. 48) prohibits a corporation (now "person") advertising part only of the consideration payable for goods or services without disclosing the total consideration for which the goods or services may be purchased outright. This provision is directed at a trader advertising that a consumer may buy a product for a low deposit without disclosing the total price payable.

In *ACCC v Virgin Mobile Australia Pty Ltd* (No. 2),[11] action was taken against a business in the mobile phone industry for conduct that was said to be in breach of TPA s. 52, s. 53 and s. 53C (respectively, ACL ss. 18, 29 and 48). The violation of s. 53C (ACL s. 48) stemmed from the defendant's failure "to state, in its advertisements, the cash price of the relevant mobile phone and/or the cash price, alternatively the minimum cost, of the Telephone and Service Package [in question] ."[12]

The Court in *ACCC v Dell Computers Pty Ltd*[13] gave s. 53C (ACL s. 48) an extraordinarily limited application. The dispute related to the defendant's practice of not including a compulsory delivery charge in the price specified in its advertisement. Jacobson J concluded that the delivery charge was "a fee for services rather than a part of the consideration [i.e., the cash price] for the purchase of the goods", and, thus, it fell outside the scope of s. 53C (ACL s. 48). While some comfort may be found in the fact that the ACCC was successful in relation to the claims based on the former TPA s. 52 (ACL s. 18), this is a very unfortunate decision, as buyers of the defendant's computers could not reasonably avoid the delivery charge. The defendant's computers were only sold by delivery, and one person phoning the defendant was informed that the delivery fee "could not be avoided unless he travelled to Malaysia to collect the computer". Thus, from the buyers' perspective it makes little sense to distinguish between the cost for the actual computer and the cost for obtaining it – both elements are essential for the buyer taking possession of the computer.

4.6.11 Referral selling

***Australian Consumer Law*, s. 49**

A person must not, in trade or commerce, induce a consumer to acquire goods or services by representing that the consumer will, after the contract for the acquisition of the goods or services is made, receive a rebate, commission or other benefit in return for:

(a) giving the person the names of prospective customers; or

(b) otherwise assisting the person to supply goods or services to other consumers; if receipt of the rebate, commission or other benefit is contingent on an event occurring after that contract is made.

Note: A pecuniary penalty may be imposed for a contravention of this section.

ACCC v Giraffe World Australia Pty Ltd[14] is a classic case of referral selling in breach of ACL s. 49 (formerly TPA s. 57). In that case, people buying the respondent's products had the option of joining a club through which the buyer would earn commissions by introducing others to the respondent's products. Giraffe World conducted information seminars, called "Happiness Circles", which promoted an "Ion Mat" as a health product. Persons could become members of the Giraffe Club only after attending a Happiness Circle seminar and buying an Ion Mat at a cost of $2900, plus a membership fee of $300 and a $50 registration fee. Persons attending the seminars were informed that only if they become members of the Giraffe Club could they apply to become members of the Grow Rich System.

11. [2002] FCA 1548.
12. ACCC v Virgin Mobile Australia Pty Ltd (No. 2) [2002] FCA 1548, at para 16.
13. (2002) ATPR 41-878.
14. (1999) ATPR 41-718.

Pyramid schemes, which share many characteristics with referral selling, are regulated separately in Division 3 of Chapter 3, Part 3-1 of the ACL.

4.7 Remedies in relation to breaches of Chapter 2 and Chapter 3 of the ACL

Where a party has acted in breach of the ACL provisions discussed above, several civil remedies may come into question. Those are discussed below. Furthermore, where a party acts in breach of any of the sections discussed above, apart from s. 18 (formerly TPA s. 52), an offence is committed, and the penalty provisions of Chapter 4 (formerly TPA Part VC) are relevant. Those provisions are, however, not discussed here.

4.7.1 Damages

A court may order damages pursuant to s. 236 (formerly TPA s. 82(1)):

> ***Australian Consumer Law*, s. 236**
>
> (1) If:
>
> (a) a person (the ***claimant***) suffers loss or damage because of the conduct of another person; and
>
> (b) the conduct contravened a provision of Chapter 2 or 3; the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.
>
> (2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

Thus, to be successful under s. 236 (TPA s. 82), the claimant must be able to point to loss or damage having been suffered as a result of identifiable conduct. The matter of what constitutes "identifiable conduct" was discussed in *HIH Insurance Limited (in liquidation) v Rodney Stephen Adler*.[1] That case related to alleged misleading information provided in contravention of the former TPA s. 52 (now ACL s. 18). The Court stated that: "Sometimes that conduct will be one distinct and confined representation. At other times, the relevant conduct will encompass a broader set of acts or omissions over a period of time."[2] In other words, while the relevant conduct must be identifiable, it need not be one specific act or omission.

Section 236(2) makes clear that actions taken under s. 236(1) must be commenced within 6 years after the day on which the cause of action accrued.

It should also be noted that the CCA s. 137B limits the amount of damages that a court may order, if a person contravened s. 18 ACL and the loss or damage suffered by the claimant was partly due to the claimant's failure to take reasonable care.[3] If the claimant is partly responsible for failing to take reasonable care, and the other person 'did not intend to cause the loss or damage and did not fraudulently cause the loss or damage' then the court must reduce the damages recoverable pursuant to s. 236(1) ACL 'to the extent to which the court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage'.[4]

1. [2007] NSWSC 633.
2. HIH Insurance Limited (in liquidation) v Rodney Stephen Adler [2007] NSWSC 633, at para 28.
3. Competition and Consumer Act 2010 (Cth) s 137B.
4. Competition and Consumer Act 2010 (Cth) s 137B.

4.7.2 Injunctions

Where appropriate, injunctions can be granted. Section 232 of the ACL (formerly TPA s. 80) contains the provisions regulating injunctions. The core provisions are found in subsections 1, 4 and 7:

***Australian Consumer Law*, s. 232**

(1) A court may grant an injunction, in such terms as the court considers appropriate, if the court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:

(a) a contravention of a provision of Chapter 2, 3 or 4; or

(b) attempting to contravene such a provision; or

(c) aiding, abetting, counselling or procuring a person to contravene such a provision; or

(d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision; or

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

(f) conspiring with others to contravene such a provision.

(2) The court may grant the injunction on application by the regulator[5] or any other person.

(3) Subsection (1) applies in relation to conduct constituted by applying or relying on, or purporting to apply or rely on, a term of a consumer contract that has been declared under section 250 to be an unfair term as if the conduct were a contravention of a provision of Chapter 2.

(4) The power of the court to grant an injunction under subsection (1) restraining a person from engaging in conduct may be exercised:

(a) whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of a kind referred to in that subsection; and

(b) whether or not the person has previously engaged in conduct of that kind; and

(c) whether or not there is an imminent danger of substantial damage to any other person if the person engages in conduct of that kind.

(5) Without limiting subsection (1), the court may grant an injunction under that subsection restraining a person from carrying on a business or supplying goods or services (whether or not as part of, or incidental to, the carrying on of another business):

(a) for a specified period; or

(b) except on specified terms and conditions.

(6) Without limiting subsection (1), the court may grant an injunction under that subsection requiring a person to do any of the following:

(a) refund money;

(b) transfer property;

(c) honour a promise;

(d) destroy or dispose of goods.

(7) The power of the court to grant an injunction under subsection (1) requiring a person to do an act or thing may be exercised:

(a) whether or not it appears to the court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; and

(b) whether or not the person has previously refused or failed to do that act or thing; and

(c) whether or not there is an imminent danger of substantial damage to any other person if the person refuses or fails to do that act or thing.

5. "Regulator" is defined in s. 2 of the ACL as being, for the purposes of the application of the ACL as a law of the Commonwealth, the Commission; and for the purposes of the application of the ACL as a law of a State or Territory, the meaning given by the application law of that State or Territory.

4.7.3 Compensation orders on application by an injured person or the regulator

In addition to injunctions and damages, the court has the power to give so-called ancillary orders:

***Australian Consumer Law*, s. 237**

(1) A court may:

(a) on application of a person (the injured person) who has suffered, or is likely to suffer, loss or damage because of the conduct of another person that:

(i) was engaged in a contravention of a provision of Chapter 2, 3 or 4; or

(ii) constitutes applying or relying on, or purporting to apply or rely on, a term of a consumer contract that has been declared under section 250 to be an unfair term; or

(b) on the application of the regulator made on behalf of one or more such injured persons; make such order or orders as the court thinks appropriate against the person who engaged in the conduct, or a person involved in that conduct.

Note 1: For applications for an order or orders under this subsection, see section 242.

Note 2: The orders that the court may make include all or any of the orders set out in section 243.

(2) The order must be an order that the court considers will:

(a) compensate the injured person, or any such injured persons, in whole or in part for the loss or damage; or

(b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the injured person or any such injured persons.

(3) An application under subsection (1) may be made at any time within 6 years after the day on which:

(a) if subsection (1)(a)(i) applies—the cause of action that relates to the conduct referred to in that subsection accrued; or

(b) if subsection (1)(a)(ii) applies—the declaration referred to in that subsection is made.

4.8 Defences in relation to alleged breaches of Chapter 4 of the ACL

As noted above, breaches of the unfair practice provisions outlined above, apart from breaches of s. 18 (formerly TPA s. 52), may incur penalties. In cases where such breaches are alleged, the party accused of having committed the breach may rely upon the defences established through ss. 207-211 of the ACL (formerly TPA s. 85). we will here focus on the other relevant defences:

***Australian Consumer Law*, s. 207**

(1) In a prosecution for a contravention of a provision of this Chapter, it is a defence if the defendant proves that the contravention was caused by a reasonable mistake of fact, including a mistake of fact caused by reasonable reliance on information supplied by another person.

(2) However, subsection (1) does not apply in relation to information relied upon by the defendant that was supplied to the defendant by another person who was, at the time when the contravention occurred:

(a) an employee or agent of the defendant; or

(b) if the defendant is a body corporate—a director, employee or agent of the defendant.

(3) If a defence provided by subsection (1) involves an allegation that a contravention was due to reliance on information supplied by another person, the defendant is not entitled to rely on that defence unless:

(a) the court gives leave; or

(b) the defendant has, not later than 7 days before the day on which the hearing of the proceeding commences, served on the person who instituted the proceeding a written notice giving such information as the defendant then had that would identify or assist in identifying the other person.

***Australian Consumer Law*, s. 208**

(1) In a prosecution for a contravention of a provision of this Chapter, it is a defence if the defendant proves that:

(a) the contravention was due to the act or default of another person, to an accident or to some other cause beyond the defendant's control; and

(b) the defendant took reasonable precautions and exercised due diligence to avoid the contravention.

(2) However, subsection (1) does not apply in relation to the act or default of another person who was, at the time when the contravention occurred:

(a) an employee or agent of the defendant; or

(b) if the defendant is a body corporate—a director, employee or agent of the defendant.

(3) If a defence provided by subsection (1) involves an allegation that a contravention was due to the act or default of another person, the defendant is not entitled to rely on that defence unless:

(a) the court gives leave; or

(b) the defendant has, not later than 7 days before the day on which the hearing of the proceeding commences, served on the person who instituted the proceeding a written notice giving such information as the defendant then had that would identify or assist in identifying the other person.

***Australian Consumer Law*, s. 209**

In a prosecution for a contravention of a provision of this Chapter that was committed by publication of an advertisement, it is a defence if the defendant proves that:

(a) the defendant is a person whose business it is to publish or arrange for the publication of advertisements; and

(b) the defendant received the advertisement for publication in the ordinary course of business; and

(c) the defendant did not know, and had no reason to suspect, that its publication would amount to a contravention of such a provision.

***Australian Consumer Law*, s. 210**

(1) In a prosecution for a contravention of a provision of this Chapter that was committed by supplying goods in contravention of section 194 or 203, it is a defence if the defendant proves that:

(a) the goods were acquired by the defendant for the purpose of re-supply; and

(b) the goods were so acquired from a person who carried on in Australia a business of supplying such goods otherwise than as the agent of a person outside Australia; and

(c) in the case of a contravention of section 194—the defendant:

(i) did not know, and could not with reasonable diligence have ascertained, that the goods did not comply with the safety standard to which the contravention relates; or

(ii) relied in good faith on a representation by the person from whom the defendant acquired the goods that there was no safety standard for such goods; and

(d) in the case of a contravention of section 203—the defendant:

(i) did not know, and could not with reasonable diligence have ascertained, that the defendant had not complied with the information standard to which the contravention relates; or

(ii) relied in good faith on a representation by the person from whom the defendant acquired the goods that there was no information standard for such goods.

Note: Section 194 is about supply of consumer goods that do not comply with safety standards, and section 203 is about supply of goods that do not comply with information standards.

(2) A defendant is not entitled to rely on the defence provided by subsection (1) unless:

(a) the court gives leave; or

(b) the defendant has, not later than 7 days before the day on which the hearing of the proceeding commences, served on the person who instituted the proceeding a written notice identifying the person from whom the defendant acquired the goods.

Section 211, a new provision in the ACL, mirrors the wording of s. 210 (formerly TPA s. 85(4)) in relation to the supply of services that were acquired for the purpose of resupply.

5. The Tort of Passing Off

"Attempts to produce a definition of the tort [of passing off] which is both succinct and comprehensive have had mixed success."[1]

The tort of passing off is similar to, and often pleaded alongside, claims of misleading and deceptive conduct under s. 18 of the ACL (previously section 52 of the TPA), and/or claims of misrepresentations as to sponsorship, approval or affiliation under s. 29 of the ACL (previously s. 53 of the TPA) (see above 4.1.5.1.1 and 4.2.4). Further, one frequently finds this tort being pleaded in cases of alleged trade mark infringements. Indeed, to a degree, the importance of the tort of passing off has declined in the light of the possibility of taking action under the extremely broad scope of s. 18 of the ACL. However, the tort of passing off should nevertheless not be ignored.

Essentially, the tort of passing off is committed where the defendant seeks to falsely represent that she/he, or her/his products, has some association with the plaintiff. Different commentators have taken different approaches in outlining the requirements of the tort. Courts have, in several cases, focused exclusively on the three elements of reputation, misrepresentation and damage. One such example is *Vieright Pty Ltd v Myer Stores Ltd*,[2] where the Full Federal Court outlined and applied the three-step test established by Lord Oliver in *Reckitt and Colman Products Ltd v Borden Inc*:[3]

> In establishing that a trader has passed off goods as those of another ... three elements have to be demonstrated:
>
> (1) that the trader's get-up, including any brand name, is recognised by the public as distinctive specifically of the plaintiff's goods;
>
> (2) that there has been a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that the goods offered by the defendant are the plaintiff's goods (whether the public is aware of the plaintiff's identity as the manufacturer or supplier of the goods is immaterial, provided they are identified with a particular source, eg by means of a brand name which is in fact the plaintiff's);
>
> (3) that the plaintiff suffers or, in a quia timet action is likely to suffer, damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods is the same as the source of those offered by the plaintiff.

However, the most often cited case dealing with passing off is *Erven Warnink v Townend & Sons (Hull) Ltd*,[4] in which Lord Diplock identified five characteristics which must be present in order to create a valid cause of action for passing off. These are:

> (1) a misrepresentation; (2) made by a trader in the course of trade; (3) to prospective customers of his or ultimate consumers of goods or services supplied by him; (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence); and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so.

These five requirements are frequently cited in textbooks and, as is clear from *Ward Group Ltd v Brodie & Stone*,[5] they have been adopted as law in Australia.[6]

1. Congra Inc v McCain Foods (Aust) Pty Ltd (1992) 33 FCR 302, at 355 per Gummow J.
2. (1995) AIPC 91-134.
3. (1990) 17 IPR 1, at 7.
4. [1979] AC 731, at 742.
5. [2005] FCA 471, at para 30.
6. The facts of this case are outlined below, see: 4.2.3.

Importantly, in his judgment in *Erven Warnink v Townend & Sons (Hull) Ltd*,[7] Lord Diplock noted that: "It does not follow that because all passing off actions can be shown to present these characteristics [i.e., the five requirements referred to above], all factual situations which present these characteristics give rise to a cause of action for passing off". This observation makes clear that even where all these characteristics are present in a particular case, the situation does not necessarily justify an action in passing off; something more is required. However, Lord Diplock does not mention any other requirement. This seems to indicate that, rather than there being some additional characteristic being required, one or more of the mentioned characteristics must be of a certain degree of severity to justify the action being brought.

Thus, it is necessary to examine which of these characteristics need to be of a certain degree of severity to justify the action being brought. The first three characteristics (i.e. (1) a misrepresentation; (2) in the course of trade; and (3) to the plaintiff's customers are essentially of a yes/no nature). In other words, either it is a misrepresentation, or it is not; either the misrepresentation is made in the course of trade, or it is not; and either the representation is made to the plaintiff's customers, or it is not – these are simply not matters of degree. In contrast, the question of whether the plaintiff suffered or risked suffering damage is certainly a matter of degree. The same is true about the question of whether such damage was reasonably foreseeable.

In conclusion, it seems that under Lord Diplock's test as expressed in *Erven Warnink v Townend & Sons (Hull) Ltd*,[8] a claim in passing off will, even where all the five characteristics mentioned are present, only succeed if the plaintiff suffered or risked suffering sufficiently serious damage, and such damage was, to some degree, reasonably foreseeable.

Based on the above and subsequent court decisions, the following rule describing the tort of passing off can be formulated:

Rule 7

1. For the purpose of this rule, the following terms and phrases bear the meanings noted here:

    (a) "representation" means any form of expression, such as spoken or written words or conduct, whether expressed or implied.

    (b) "misrepresentation" refers to any untrue representation, whether the representor knew, or did not know, of the falsity of the representation.

    (c) "the plaintiff's customers" include both prospective and actual customers, and refers to both customers engaging with the plaintiff directly and ultimate consumers of the plaintiff's products, as well as any actor in between.

2. Where the plaintiff and the defendant are in a common field of activity, the defendant may have committed the tort of passing off where the plaintiff shows that:

    (a) the defendant has made a misrepresentation;

    (b) the misrepresentation was made in the course of trade;

    (c) the misrepresentation was likely to mislead the plaintiff's customers;

    (d) the plaintiff, or its goods or services, has some reputation or goodwill;

    (e) it was reasonably foreseeable to the defendant that its conduct could injure the business or goodwill of another trader; and

    (f) the defendant's conduct caused actual damage to a business or goodwill of the plaintiff or it is probable that this would occur as a result of the conduct.

3. A defendant may have committed the tort of passing off where the plaintiff shows that:

    (a) the defendant has made a misrepresentation as to an association between, on the one hand, it, or any aspect of its activity, and, on the other hand, the plaintiff, or its goods or services;

7. [1979] AC 731, at 742.
8. [1979] AC 731.

(b) the plaintiff, or its goods or services, has some reputation or goodwill;

(c) it was reasonably foreseeable to the defendant that its conduct could injure the business or goodwill of the plaintiff; and

(d) the defendant's conduct caused actual damage to business or goodwill of the plaintiff or it is probable that this would occur as a result of the conduct.

4. Where the defendant has committed the tort of passing off, as outlined in Articles 2 and/or 3, the court may award any, or a combination, of the following remedies:

(a) injunction;

(b) damages; and

(c) account of profits.

5. Where the defendant has committed the tort of passing off, as outlined in Articles 2 and/or 3, and the court finds that in doing so, the defendant has acted maliciously, the court may award substantial damages.

The scenario envisaged in Article 2 could be said to be the traditional, or classic, form of passing off; that is, where one business seeks to attract a competing business's customers by the use of deception. This is a typical tort situation. The scenario envisaged in Article 3, on the other hand, represents an extension of the tort of passing off. In this form, it is quite different and is more like a violation of a proprietary right. There, the defendant is seeking to give added value to its products by falsely representing some association between them and the plaintiff. The following two cases are illustrative:

In *Erven Warnink BV v Townend & Son (Hull) (The Advocaat Case)*,[9] the plaintiff Dutch firm had been manufacturing and importing into England an alcoholic spirit (*Advocaat*) made from eggs and a Dutch brandy for several years, enjoying a 75% market share. The defendant manufactured a local egg liquor in England, named "Keeling's Old English Advocaat", which was made with lower quality ingredients, such as dried egg powder and sherry, due to the lack of stringent regulations which applied to production of the "genuine article" in the Netherlands. The House of Lords, restoring the judgment at first instance which the Court of Appeal had overturned, held that, although the name 'Advocaat' was descriptive only and not inherently distinctive to the Dutch plaintiff (consequently being shared by several such companies), the English defendant had made a misrepresentation in the branding of its product and had caused a wrongful diversion of custom away from the plaintiff. This was sufficient to establish that passing off had occurred. Lord Diplock held that, as 'Advocaat' signified a particular species of beverage that was most commonly associated with the plaintiff, and the Keeling product had no natural association with real 'Advocaat', the defendant should not be allowed to pass off its product under that term.

Hogan v Koala Dundee Pty Ltd,[10] on the other hand, involved quite a different type of passing off action. In this case, shops in Surfers Paradise and Brisbane were found to be selling "Dundee Country" merchandise, which featured a koala in the get-up normally associated with Paul Hogan's iconic character from the film *Crocodile Dundee*. Justice Pincus held that, as the purpose of the get-up was to initiate a connection in the minds of customers between Paul Hogan's character and the goods being sold, and such a connection did not in fact exist, this amounted to a misappropriation of the image by the retailers. The mere association was enough to enable customers to readily infer a connection between the film and merchandise.

Thus, the tort of passing off exists in two different versions: the classic version (i.e., Article 2), as illustrated in the *Advocaat Case*; and the extended version (i.e., Article 3), as illustrated in the *Koala Dundee Case*.

Under the structure used in Rule 7, there are seven elements for the plaintiff to prove in the classic version of the tort of passing off, while there are five elements for the plaintiff to prove if relying on the extended version of the tort. Below, the elements relevant for both the classic and the extended versions of the tort of passing

9. [1979] AC 731.
10. (1988) 12 IPR 508.

off are discussed first. Then follows a discussion of the elements of relevance only to the classic version, and finally the elements of relevance only to the extended version of the tort are discussed.

5.1 Elements relevant for both the classic and the extended versions

5.1.1 Misrepresentation

The first thing to note in relation to the element of "misrepresentation" is that it is not necessarily connected to the rules of misrepresentation discussed elsewhere in this book. On the other hand, there does not seem to be any reason to suspect that the wide definition of what constitutes a "representation" is not also applicable in this context. Thus, as far as the tort of passing off is concerned, misrepresentations may be expressed or implied and can take a multitude of shapes such as the placing of a particular product on the market (*Advocaat*); using symbols, packaging ("get-up") or trading names similar to those used by the plaintiff;[11] statements made in advertisements;[12] or even where the same or a similar fictitious character appears in television advertisements for separate products.[13]

Furthermore, a representation is a misrepresentation where it is untrue, whether or not the party making the representation is aware of its falsity. Consequently, intention is not a necessary requirement in an action for passing off.

5.1.2 Reputation or goodwill

The term "goodwill" was discussed in detail by Lord Macnaghten in IRC v Muller & Co's Margarine Limited:[14]

What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there.

Whether an action is taken in a scenario involving the classic version (outlined in Article 2) or the extended version (outlined in Article 3), it is necessary that the plaintiff has an established reputation or goodwill in the jurisdiction where the action is brought.[15] While it is clear that this requirement may often cause difficulties for a party taking action in a jurisdiction different to its primary market, the exact details of the requirement have been disputed. On the one hand, it is argued that the plaintiff must actually be trading with the relevant market, and on the other hand, it is argued that it is sufficient that the plaintiff has an established business reputation or goodwill within the jurisdiction. Following the Federal Court of Australia's decision in *Taco Company of Australia Inc v Taco Bell Pty Ltd*,[16] it seemed that the Australian approach is to require actual trading, but leading textbook authors have identified strong arguments in favour of the latter approach.[17] However, the Full Federal Court in *Conagra Inc v McCain Foods (Aust) Pty Ltd*[18] clarified that the requirement does not necessitate the plaintiff to have established a business in the jurisdiction or have sold goods or services in the jurisdiction. This was in the light of the realities of modern advertising and the ability for businesses to establish goodwill or reputation in other jurisdictions. It is still necessary for a plaintiff to establish sufficient reputation with respect to the plaintiff's goods or services within the relevant jurisdictions, however, it can be proven by a variety of means (e.g., proof of advertisements in the relevant jurisdiction, number of travellers).

11. Miller v Britt Allcroft (Thomas) LLC [2000] FCA 1724.
12. McWilliams Wines Pty Ltd v McDonalds System of Australia Pty Ltd (1980) 33 ALR 394.
13. Telstra Corporation Ltd v Royal & Sun Alliance Insurance Australia Ltd [2003] FCA 786.
14. [1901] A.C. 217, at 223 – 224.
15. ConAgra v McCain Foods (Aust) Pty Ltd (1992) 23 IPR 193, 235 per Lockhart J.
16. (1982) ATPR 40-303.
17. D Baker et al., Torts Law in principle Revised 3rd ed (Sydney: Lawbook Co, 2002), at 19.70; and A Fitzgerald and B Fitzgerald, Intellectual Property in principle (Sydney: Lawbook Co, 2004) at 390.
18. Conagra v McCain Foods (Aust) Pty Ltd (1992) 23 IPR 193.

5.1.3 Reasonably foreseeable

The requirement that damages or potential damages were reasonably foreseeable is related to the requirement that the misrepresentation be likely to deceive the plaintiff's customers. While that requirement is objective, the reasonably foreseeable requirement is, to an extent, subjective. However, that is not to suggest that the defendant can easily raise a defence of ignorance. Instead, whether or not the damages or potential damages were reasonably foreseeable ought to be judged by reference to the standard of a reasonable man.

5.1.4 Actual or potential damage

Whether or not actual or potential damage is suffered depends on whether the relevant misrepresentation is capable of being misleading. The test for this was outlined in *Australian Woollen Mills Limited v F. S. Walton and Company Limited*:[19]

> An attempt should be made to estimate the effect or impression produced on the mind of potential customers by the mark or device for which the protection … is sought. The impression or recollection which is carried away and retained is necessarily the basis of any mistaken belief that the challenged mark or device is the same. … The usual manner in which ordinary people behave must be the test of what confusion or deception may be expected. Potential buyers of goods are not to be credited with any high perception or habitual caution. On the other hand, exceptional carelessness or stupidity may be disregarded. The course of business and the way in which the particular class of goods are sold gives, it may be said, the setting, and the habits and observation of men considered in the mass affords the standard. Evidence of actual cases of deception, if forthcoming, is of great weight.

It should be noted that Lord Diplock's statement in *Erven Warnink v Townend & Sons (Hull) Ltd*,[20] as quoted above, makes clear that an action in passing off can be taken in relation to potential damage being suffered. Further, the very fact that injunctions can be awarded in relation to the tort of passing off, makes clear that an action can be taken prior to actual damage being suffered.

As far as the requirement of damage is concerned, it is interesting to note the Court's observation in *Pacific Publications Pty Limited v Next Publishing Pty Limited*:[21] "Damage is an essential part of an action for passing off, although, in many cases, damage will be presumed to have occurred where there has been a misrepresentation or deceitful conduct in relation to the appropriation of the applicant's reputation".

5.2 Elements relevant for the classic version only

5.2.1 Common field of activity

The Court in *Campomar Sociedad, Limitada v Nike International Limited* noted that:[22]

> The decision of the New South Wales Full Court in *Henderson* [*Angelides v James Stedman Hendersons Sweets Ltd*][23] marked the rejection in Australia nearly 40 years ago of the requirement apparent in some English decisions … that there be a "common field of activity" between the commercial activities of the parties. In deciding whether purchasers are likely to believe that the goods or services of the defendant have an endorsement by, or other association with, the plaintiff, the courts in Australia have not applied any "erroneous assumption" doctrine [*10th Cantanae Pty Ltd v Shoshana Pty Ltd*;[24] *Hogan v Pacific Dunlop Ltd*].[25] (footnotes omitted)

However, this should not be read as a complete departure from the focus on whether the parties are in a "common field of activity". When read carefully, it is clear that this passage only relates to the extended version of the tort of passing off and does not mean that no such requirement exists in relation to the classic version. Indeed, in its context, the very fact that another requirement of the classic version is that the

19. (1937) 58 CLR 641, at 658, per Dixon and McTiernan JJ.
20. [1979] AC 731.
21. [2005] FCA 625, at para 25.
22. (2000) 202 CLR 45, at 89.
23. (1927) 40 CLR 43 at 60.
24. (1987) 79 ALR 299 at 324-325.
25. (1988) 83 ALR 403 at 426.

defendant's conduct is likely to deceive the plaintiff's customers highlights that the two parties must be in a "common field of activity" as far as the classic version is concerned.

5.2.2 In the course of trade

Article 2 makes clear that, where the allegations of passing off relates to a situation where the plaintiff and the defendant are in business competition with each other, it is essential that the relevant misrepresentation is made in the course of the defendant's trade.

Determining whether the defendant has acted in the course of trade should ordinarily not be difficult. For example, the advertisement or other promotion of a product to potential buyers ought to, typically, constitute clear evidence of the action being in the course of trade.

5.2.3 Likely to mislead the plaintiff's customers

As to whether the defendant's conduct is likely to mislead the plaintiff's customers, Lord Diplock's statement, referred to above, makes clear that the court would not only take account of the plaintiff's immediate consumers, but would also account for the end consumers of the plaintiff's goods or services. Presumably, the court would also take account of any party acting between the plaintiff and the end consumers of the plaintiff's goods or services.

While it ordinarily is rather easy to establish whether the defendant's misrepresentation is likely to mislead any of the plaintiff's customers, difficulties may arise in relation to cross-border misrepresentations. In *Ward Group Ltd v Brodie & Stone*,[26] products of a UK-based company had been made available online and an Australian company argued that this constituted the tort of passing off since it was already selling a product of the same name and type in Australia. The Court concluded that the marketing of a product on a website accessible in Australia did not necessarily mean that the defendant had aimed its representation at the plaintiff's consumers in Australia:

If Australian consumers had been targeted by the website proprietors for the marketing and sale of the UK Restoria products under the Restoria name, the fact that the representation, when made *in* the United Kingdom, was accurate would probably not save it from becoming a misrepresentation when the representation was made and received *in* Australia.[27]

Furthermore, similarly to the courts' approach to actions under ACL s. 18, the likelihood of the plaintiff's customers being deceived is, as is discussed above (see Chapter 4.1.4), measured by reference to the target group.

5.3 Elements relevant for the extended version only

There is only one element that is of relevance to an action brought under the extended version of the tort of passing off and that is not also of relevance to an action brought under the classic version of the tort – association.

5.3.1 Association

The existence of the extended version of the tort of passing off was acknowledged by Deane J in *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No. 2)*,[28] when he referred to:

> the adaptation of the traditional doctrine of passing off to meet new circumstances involving the deceptive or confusing use of names, descriptive terms or other indicia to persuade purchasers or customers to believe that goods or services have an association, quality or endorsement which belongs or would belong to goods or services of, or associated with, another or others…

This quote is important in that it helps define the scope of what type of association the misrepresentation

26. [2005] FCA 471.
27. Ward Group Ltd v Brodie & Stone [2005] FCA 471, at para 32.
28. (1984) 156 CLR 414, at 445.

must relate to in the case of an action brought under the extended version of the tort. The case of *Stone & Wood Group Pty Ltd v Intellectual Property Development Corp Pty Ltd*[29] recently considered the issue of association in the context of two ale products that used the words 'Pacific Ale' and 'Pacific' in its packaging and labelling. In this case, Stone & Wood not only failed to prove that they the terms 'Pacific Ale' and 'Pacific' were distinctive of their products, the Court also found that the respondent had sufficiently distinguished their product in colouring and get-up. Thus, this case illustrates that the determination of the element of association is also closely tied to a consideration of the plaintiff's reputation.

5.4 Remedies

Where a party is found to have committed the tort of passing off, the court may award damages or an account of profits or grant an injunction.

29. (2018) 357 ALR 15.

6. Issues going to "consent"

"This kindness will I show. Go with me to a notary, seal me there Your single bond; and, in a merry sport, If you repay me not on such a day, In such a place, such sum or sums as are Express'd in the condition, let the forfeit Be nominated for an equal pound Of your fair flesh, to be cut off and taken In what part of your body pleaseth me."[1]

For a contract to be valid, both of the parties must have consented to its terms. Where at least one of the parties has not given valid consent, there is no valid contract. Thus, a party may raise lack of valid consent as a ground for not being bound by a contract. In doing so, the party will argue either that no consent was given, or that the consent that was in fact given is invalid for some reason. In the former case, the question as to whether consent was in fact given is a matter of evidence. This Chapter deals with situations where it is argued that the consent that was given is invalid for some reason. Thus, it covers the common law and equity on contractual issues, including:

1. a) Duress;
2. b) Undue influence;
3. c) Unconscionability;
4. d) Mistake; and
5. e) Misrepresentation

This Chapter also examines those actions in tort that may be relevant in the context of consent, including negligent misrepresentation and intimidation. In addition, the ACL's application in relation to unconscionability and its rules on so-called "undue harassment" are examined.

Finally, this Chapter addresses issues going to a third party's influence over given consent. This means, for example, that the tort of intimidation is discussed both in relation to two-party situations and three-party situations, and that torts such as the tort of interference with contractual relations are considered. Further, this also means that the special rules relating to so-called "surety wives" are considered. All aspects of third party influence are considered at the end of this Chapter.

1. W Shakespeare, The Merchant of Venice, Act I, Scene III (http://www.shakespeare-online.com/plays/merchant_1_3.html) at 13 September 2006.

6.1 What is “consent”?

Various attempts have been made to define what “consent” is, and the law has given the term different meanings in different contexts. For the purpose of this discussion, it can be said that there are three elements necessary to create a proper consent. To be valid, consent must be:

- 1) identifiable;
- 2) informed; and
- 3) given freely.

Consent is identifiable when it is expressed or implied. While consent ordinarily becomes identifiable through some positive act, consent can be implied from passivity under certain circumstances.

There are different degrees of informed consent. In some contexts, consent is only said to be informed if the person giving the consent has been given all relevant information regarding the possible consequences of giving that consent, and all relevant information concerning what they are consenting to. While such a strict requirement certainly is fitting, for example, in the context of a patient having to give her/his informed consent to having a leg amputated, it seems to be an excessively harsh requirement in the context of most ordinary commercial transactions. While genuine consent requires the person giving the consent to be informed about what the consent relates to and as to the implications of giving the consent, it cannot be the case that the person giving the consent must know all the details of the consent in a normal commercial transaction.

Consent must be given freely for it to be valid. Although there can be little controversy regarding the sensibility of this requirement, the degree of freedom to choose has been the source of numerous disputes. In literature, a distinction has been drawn between situations where the person giving the consent has a real choice in doing so, and situations where the person giving the consent has no other options. A somewhat bizarre example used in several textbooks, is the situation where an employee consents to the employer hitting her/him with a cane, because of the promise of a promotion. As well as the situation where an employee consents to the same amount of strokes by the same cane, but in order not to get fired. In the former situation, consent would appear to have been given freely, while in the latter context, that does not appear to be the case.

As will be clear from the discussion below, all the causes of action discussed relate to the quality of the consent (i.e., was consent given freely, and was it sufficiently informed), rather than to the existence of the consent (i.e., is there an identifiable consent).

6.2 Misrepresentation

Misrepresentations have already been discussed above, both in the context of the ACL (see Chapter 4.1), and in the context of the tort of passing off (see Chapter 5). Further, while not discussed here, misrepresentations are regulated through the *Civil Law (Wrongs) Act 2002* (ACT) and the *Misrepresentations Act 1972* (SA). However, misrepresentations are also regulated by common law and equity, which is the context in which misrepresentations are discussed below.

Where a party to a contract makes a representation during the negotiations of the contract, and that representation, either expressly or impliedly, forms part of a contract, it may be treated as a breach of contract where the representation turns out to be untrue. A discussion of how such breaches are dealt with falls outside the scope of this book. However, regardless of whether such an untrue representation forms part of the contract, it may also constitute a misrepresentation.

The law identifies three different forms of misrepresentation: fraudulent misrepresentation, innocent misrepresentation, and negligent misrepresentation. While all three share certain characteristics, negligent misrepresentation is different to such a degree that it is best discussed separately.

6.2.1 Elements shared by fraudulent misrepresentation and innocent misrepresentation

It is commonly recognised that, for there to be a fraudulent misrepresentation or an innocent misrepresentation the following four elements must be present:

1. A representation of fact or law;
2. Which is untrue;
3. Which was intended for the other party to rely upon (induce the contract); and
4. Which was in fact relied upon by the other party.

In addition, it seems beyond intelligent dispute that the misrepresentation must have been made by, or directly on behalf of, the contracting party seeking to induce the contract. Without this limitation, the other contracting party (party B) could be allowed to rescind a contract based on a misrepresentation made by a third party over whom the contracting party (party A) had no control – an obviously unjust situation.

6.2.1.1 A representation of fact or law

The first element, 'a representation of fact or law', could suitably be divided into two sub-elements: (1) has a representation been made, and (2) was that representation of fact/law? In the context in which it is discussed here, the term "representation" is given a very specific meaning by the law. A representation is a statement of fact or law, constituting an inducement to make a contract. While most commonly expressed either verbally or in writing, the manner in which it is expressed is irrelevant. Further, it may, but need not, be a term of a contract. Whether or not a representation has been made is a matter for the alleging party to prove. In this context, a few words must be said about how silence is dealt with.

Except for in four specific circumstances, silence does not constitute a misrepresentation. Those four circumstances are:

1. Where the parties are in a fiduciary relationship;
2. Where the contract is one requiring utmost good faith (*uberrimae fidei*);
3. Where silence would distort a positive representation; and
4. Where a statement was true, or thought to be true, at the time it was made, but subsequently becomes, or turns out to be, untrue.

The first two exceptions involve a duty to disclose. The application of the first exception was illustrated in *Lowther v Lord Lowther*.[1] The matter before the Court involved the plaintiff instructing an art dealer to sell a painting belonging to the plaintiff. The art dealer was aware that the painting was worth considerably more than what the plaintiff was asking for and bought the painting at the low price. The plaintiff subsequently discovered the true value and sued to rescind the contract. The Court held that the art dealer, acting as an agent for a plaintiff, could not himself purchase the painting in question without having given the seller "the benefit of all the information possessed by the agent".[2] In other words, the art dealer (i.e., the agent) was required to inform the plaintiff (i.e., the principal) of the true value, before he could offer to purchase the painting. Consequently, the art dealer's silence constituted a misrepresentation.

The second exception refers to contracts requiring utmost good faith. *London General Omnibus Co v Holloway*[3] involved a contract of surety, and the Court noted that in certain peculiar types of contracts, such as insurance contracts, the law implies a condition that all material facts shall be disclosed. The reasoning behind this approach is clear when one considers the following:

The person seeking to insure may fairly be presumed to know all the circumstances which materially affect the risk, and, generally, is, as to some of them,; the only person who has the knowledge; the underwriter, whom he asks to take the risk, cannot, as a rule, know, and but rarely has either the time or the opportunity to learn by inquiry, circumstances which are, or may be, most material to the formation of his judgment as to the acceptance or rejection of the risk, and as to the premium which he ought to require.[4]

In other words, the distribution of knowledge between the parties may be said to necessitate utmost good faith.

Krakowski v Eurolynx Properties Ltd[5] illustrates the application of the third exception. The appellants had bought a shop premises from the respondent. Put simply, the seller had provided information about how much the tenant of the relevant shops paid. However, the seller failed to mention that the tenant had been, amongst other things, granted a three-month rent-free period. In such a situation, the silence as to the rent-free period distorted the positive representation as to how much the tenant paid.

Finally, the application of the fourth exception is illustrated in *With v O'Flanagan*.[6] The defendant sold a medical practice to the plaintiff. At the time of negotiations, a representation was made as to the profit levels of the practice. That representation was true at the time it was made, but due to a series of events the profit levels were considerably lower by the time the contract was signed. The Court held that the representation was to be treated as continuing up until the contract was concluded. Thus, the seller had a duty to communicate the changed circumstances to the buyer.

Ordinarily, it is not difficult to ascertain whether a representation is one of fact/law or not. Difficulties may, however, arise in the context of statements of intention. Generally, statements of intention are not "facts"; they are merely hopeful projections of what might happen in the future. For example, in *Bissett v Wilkinson*[7] a seller of a farm had stated that the farm could carry 2000 sheep, which turned out to be incorrect. However, as both parties were aware that the seller was estimating the figure as he had never run sheep on the property, the

1. (1806) 33 ER 230.
2. Lowther v Lord Lowther (1806) 33 ER 230, at 231.
3. [1912] 2 KB 72.
4. London General Omnibus Co v Holloway [1912] 2 KB 72, at 86.
5. (1995) 183 CLR 563.
6. [1936] 1 Ch 575.
7. [1927] AC 177.

Court held that the statement was one of honest opinion and this should have been apparent to the purchaser. Consequently, there was no representation of fact/law and thus, no grounds for rescission.

In contrast, in *Edgington v Fitzmaurice,*[8] a company that borrowed money to repay debts, but claimed that they were borrowing the money to improve their buildings, was held to have made a misrepresentation as to fact. The Court noted that: "It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is therefore a misstatement of fact".[9]

A case decided a year earlier is also of interest in this context, as it clearly explains the rational for this approach. In *Smith v Land and House Property Corp,*[10] the plaintiffs sold an investment property to the defendant. In doing so, the plaintiffs had stated that the property was let to "a most desirable tenant", but in fact the tenant was in arrears with the rent at the time of the sale. Bowen LJ noted that:

if the facts are not equally known to both sides, then a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion. … The vendor state that the property is let to a most desirable tenant, what does that mean? I agree that it is not a guarantee that the tenant will go on paying his rent, but it is to my mind a guarantee of a different sort, and amounts at least to an assertion that nothing has occurred in the relations between the landlords and the tenant which can be considered to make the tenant an unsatisfactory one. That is an assertion of a specific fact.[11]

6.2.1.2 Untrue

Whether a representation is untrue or not may, in many cases, be determined by reference to objective facts. However, some guidance can be found in the majority judgment in *Krakowski v Eurolynx Properties Ltd*[12]: "The sense in which a representation would be understood by a reasonable person in the position of the representee is prima facie the sense relevant to the question whether the representation is false".[13]

6.2.1.3 Intended for the other party to rely on

Due to the presumption in favour of reliance where the representation results in a contract (discussed below (6.2.1.4)), the matter of reliance has mainly been in dispute in the context of whether the party being induced into a contract actually relied upon the misrepresentation.

6.2.1.4 In fact relied upon by the other party

The first thing to note is that there is a presumption in favour of reliance where the representation actually results in a contract.[14] Thus, it is for the party that made the representation to show that the other party did not rely on the representation in entering into the contract.

In *Holmes v Jones,*[15] the seller of a property knowingly made a misrepresentation as to the number of cattle which came with the property. Having rejected the first offer, the buyer appointed an agent to provide a report on the property. That report included the correct number of cattle and advised the buyer to purchase the property at the original price. The buyer later claimed that he was not aware of the lower numbers of cattle and sought damages. While the Court recognised that the seller had made a misrepresentation, it held that, in the light of the agent's report, it could not be said that the buyer relied on the figures mentioned in the misrepresentation.

8. (1885) LR 29 Ch D 459.
9. Edgington v Fitzmaurice (1885) L.R. 29 Ch D 459, at 483.
10. (1884) 28 Ch D 7.
11. Smith v Land and House Property Corp (1884) 28 Ch D 7, at 15.
12. (1995) 183 CLR 563. See 5.2.1.1 for a discussion of the facts.
13. Krakowski v Eurolynx Properties Ltd (1995) 183 CLR 563, at 576-577.
14. See eg Gould v Vaggelas (1984) 157 CLR 215, at 236. See 5.2.1.4 for a discussion of the facts.
15. (1907) CLR 1699.

Redgrave v Hurd[16] involved a solicitor selling his practice and the adjoining premises. The Court held that, even though the falsity of the representation made as to the yearly profit gained from the practice could have been discovered if the buyer had studied the documentation provided by the seller, the buyer was entitled to rely on the misrepresentation:

> The mere fact that a party has the opportunity of investigating and ascertaining whether a representation is true is not sufficient to deprive him of his right to rely on a misrepresentation as a defence to an action for specific performance ... The representation once made relieves the party from an investigation, even if the opportunity is afforded. I do not mean to say that there may not be certain circumstances of suspicion, which might put a person upon inquiry, and make it his duty to inquire, but under ordinary circumstances, the mere fact that he does not avail himself of the opportunity of testing the accuracy of the representation made to him will not enable the opposing party to succeed on that ground.[17]

Finally, it is not necessary that the misrepresentation be the sole reason for the party entering into the contract. In *Gould v Vaggelas,*[18] the plaintiff purchased a resort from the defendant on the basis of the defendant's representations regarding the profitability, occupancy rates and the financial return of the resort. The resort was subsequently unsuccessful, and the plaintiff sought damages on the grounds that the statements amounted to fraudulent misrepresentations. The Court concluded that the statements were sufficiently factual in nature even though they contained an element of opinion. Further, the Court held that: "The representation need not be the sole inducement. It is sufficient so long as it plays some part even if only a minor part in contributing to the formation of the contract".[19]

6.2.2 Fraudulent misrepresentation (the tort of deceit)

Rule 8

1. Where a party enters into a contract, wholly or in part, as a result of being induced to do so by (i.e. relying on) an untrue representation of fact or law, that party may seek an order under Articles 2, 3 and/or 4, provided that it is shown that:

    (a) the party who made the representation was the other party to the contract, or a person acting on behalf of the other party to the contract;

    (b) the party who made the representation intended for the innocent party to rely upon the representation (note the presumption in favour of such an intention); and

    (c) the party who made the representation:

        (i) knew the representation to be untrue;

        (ii) had no belief in the representation being true; or

        (iii) was reckless as to whether the representation was true.

2. A party that has entered into a contract as a result of being induced to do so by an untrue representation of fact or law in accordance with Article 1, may seek an order for rescission.

3. A party that has entered into a contract as a result of being induced to do so by an untrue representation of fact or law in accordance with Article 1, may seek an order that the contract may not be enforced against it.

4. Where the innocent party has suffered damages as a consequence of the other party's fraudulent misrepresentation as outlined in Article 1, the court may award damages.

In addition to the elements outlined above (6.2.2), fraudulent misrepresentation requires that the party making the misrepresentation knows the misrepresentation to be untrue, has no belief in the representation being

16. (1881) 20 Ch D 1.
17. Redgrave v Hurd (1881) 20 Ch D 1, at 22-23, per Baggallay LJ.
18. (1984) 157 CLR 215.
19. Gould v Vaggelas (1984) 157 CLR 215, at 236, per Wilson J.

true, or is reckless as to whether the representation is true.[20] In *Krakowski v Eurolynx Properties Ltd,*[21] the High Court noted that: "In order to succeed in fraud, a representee must prove, inter alia, that the representor had no honest belief in the truth of the representation in the sense in which the representor intended it to be understood".[22] In this context, it may also be noted that attempts by the representor to disclaim responsibility for the misrepresentation will generally not be effective.[23]

Another difference between innocent and fraudulent misrepresentations is that a court can award damages for fraudulent misrepresentation to the extent that the innocent party has suffered damages as a consequence of relying on the misrepresentation.

6.2.3 Innocent misrepresentation

Rule 9

1. Where a party enters into a contract, wholly or in part, as a result of being induced to do so (i.e. relying on) by an untrue representation of fact or law by the other party to the contract, the first mentioned party may seek an order under Articles 2 or 3, provided that it is shown that the party who made the representation intended the other party to act upon the representation (note the presumption in favour of such an intention).

2. A party that has entered into a contract as a result of being induced to do so by an untrue representation of fact or law in accordance with Article 1, may seek an order for rescission.

3. A party that has entered into a contract as a result of being induced to do so by an untrue representation of fact or law in accordance with Article 1, may seek an order that the contract may not be enforced against it.

An innocent misrepresentation is a statement made in the honest but mistaken belief that it is correct. While fraudulent misrepresentation is based on both common law and equity, remedies in cases involving innocent misrepresentation stem only from equity. Further, in contrast to fraudulent misrepresentation, to succeed in an action based on an innocent misrepresentation it is not necessary to prove that actual damage has been suffered, or that the party making the representation had knowledge of, or was reckless as to, its falsity.

In *Whittington v Seale-Hayne,*[24] an innocent misrepresentation was made as to the sanitary condition of premises being leased. The Court ordered that the contract be rescinded, and that the plaintiff obtain an indemnity in relation to certain expenses associated with the lease. However, the expenses recovered were less than what could have been recovered in damages had it been found that the misrepresentation had been fraudulent rather than innocent.

20. Derry v Peek (1889) 14 App Cas 337, at 374. In that case, a company prospectus suggested that the company had certain parliamentary powers which it did not in fact have. Shares into the company were purchased on the faith of the statement made to the shareholders. The shareholders subsequently sued when the company went into liquidation. The Court concluded that the directors could not be held liable because they had honestly believed the statement were true and therefore were not guilty of fraud.
21. (1995) 183 CLR 563. See 5.2.1.1 for a discussion of the facts.
22. Krakowski v Eurolynx Properties Ltd (1995) 183 CLR 563, at 578.
23. See e.g.: Commercial Banking Co of Sydney Ltd v RH Brown & Co (1972) 126 CLR 337.
24. (1900) 82 LT 49.

6.2.4 Negligent misrepresentation

Rule 10

1. Where a party enters into a contract, wholly or in part, as a result of being induced to do so by an untrue representation in the form of information or advice, that party may seek an order under Article 2, provided that it is shown that:

(a) the party who made the representation realised, or ought to have realised, that the first mentioned party placed trust in the provider providing the best information or advice it could; and

(b) it was reasonable in the circumstances for the first mentioned party to act upon the information or advice that was given.

2. Subject to the loss being reasonably foreseeable, a party that has entered into a contract as a result of being induced to do so by an untrue representation in accordance with Article 1, may seek an order for damages to the extent necessary to restore it to the position it was in before the representation was made.

A negligent misrepresentation is a careless statement made in circumstances where the representor owes a duty of care to the representee. In contrast to fraudulent and innocent misrepresentations discussed above, the tortuous act of negligent misrepresentation typically refers to situations where the person giving the representation is not a party to the resulting contract. However, negligent misrepresentations may also occur in pre-contractual negotiations between the parties to a contract.

In *Hedley Byrne & Co v Heller & Partners Ltd,*[25] an advertising company had approached a bank to provide a credit report regarding a potential client. The credit report was favourable which prompted the advertising company to invest in an advertisement campaign on behalf of the client. It later turned out that the client's financial situation was not as good as outlined in the credit report, and the advertising company took action against the bank in relation to damages it suffered from its investments. The Court found that such an action *could* succeed, but did not succeed in the case at hand due to a disclaimer included on the credit report stating that the report was provided "Without Responsibility On The Part Of This Bank Or Its Officials".

The approach taken by the House of Lords in *Hedley Byrne & Co v Heller & Partners Ltd*[26] was, in large parts, adopted into Australian law through the High Court's decision in *Mutual Life & Citizens' Assurance Co Ltd v Evatt.*[27] In that case, the appellant (an assurance company) and the respondent were involved in a dispute regarding a statement made by the appellant. The respondent claims that the appellants jointly and severally gave him incorrect information and advice as to the security of his investments, actual and projected, in a company H G Palmer (Consolidated) Ltd (H G Palmer) and that in doing so, the appellants were in breach of a duty to be careful in giving such information and advice which they jointly and severally owed to him in the circumstances. It was held that the appellant did not hold itself out as having special skill as a financial adviser and therefore there was no liability. Thus, no liability was incurred for merely supplying a report on the affairs of a subsidiary to a policy holder at his request. The Court concluded that a special relationship arises only where the party giving the advice carries on the business of giving advice and lets it be known that she or he claims to have skill and competence in the field in question and is thereby prepared to exercise the usual degree of skill and competence exercised by persons carrying on that profession.

Shaddock & Associates Pty Ltd v Parramatta City Council[28] involved the purchase of land. Solicitors acting on behalf of the buyer contacted the local council, both by telephone and in a letter, enquiring whether there were any planned road widening projects that would affect the relevant land. Put simply, the solicitors were informed that no such proposals existed, and the sale went ahead. Having signed the contract, the buyer

25. [1965] AC 465.
26. [1965] AC 465.
27. (1968) 122 CLR 556.
28. (1981) 150 CLR 225.

discovered that there was in fact such a proposal which would have severe implications for the purchased land. The Court held that the local council was to compensate the buyer, noting that "the person giving the information to another whom he knows will rely upon it in circumstances in which it is reasonable for him to do so, is under a duty to exercise reasonable care that the information given is correct".[29]

6.2.5 Remedies in relation to misrepresentation

As is seen in Rules 8, 9 and 10, the remedies available depend on the type of misrepresentation that has been committed. For fraudulent misrepresentation and innocent misrepresentation, the courts can grant rescission or an order that the contract may not be enforced against the party to whom the misrepresentation was made. Further, in cases involving fraudulent misrepresentation, the courts may award damages.

In cases of negligent misrepresentation, the courts may grant an order for damages to the extent necessary to restore the party to whom the misrepresentation was made to the position it was in before the representation was made.

29. Shaddock & Associates Pty Ltd v Parramatta City Council (1981) 150 CLR 225, at 235, per Gibbs CJ.

6.3 Mistake

The parties to a contract can ordinarily not get out of the contract by reference to having made a 'mistake' in entering into the contract – mistakes in the general sense of the word are not enough to void a contract. However, the law recognises certain specific categories of mistakes, and a mistake falling into one of those categories may affect the validity of a contract in various ways. It is therefore necessary to draw several distinctions.

First, as alluded to, we must distinguish between those types of mistake that have legal consequences and those that do not. Second, a distinction must be drawn between a mistake of law and a mistake of fact. Third, a distinction must be drawn between three different forms of mistakes of fact; that is, 'common mistake', 'mutual mistake' and 'unilateral mistake'.[1] [Missing Footnote in original]

6.3.1 Mistake of fact

6.3.1.1 Common mistake

Rule 11

1. Where the parties to a contract share a common mistaken belief, at the time of entering into a contract, a common mistake occurs.
2. If the common mistake relates to a fundamental term of the contract, the contract will be void ab initio.
3. If the common mistake does not relate to a fundamental term of the contract, the contract will be enforceable, unless the contract is held voidable under equity.
4. Where one party's mistake is induced by another party, no common mistake occurs.

Where the parties to a contract are mistaken about the one and same fact – so as to share a common mistaken belief – a common mistake occurs. Where that mistake relates to a fundamental term of the contract, the contract will be void *ab initio* (i.e., from the beginning) under common law. What amounts to a fundamental term may vary from one contract to another, but may, for example, include the subject matter of the contract.

The most typical situation in which a common mistake occurs is where the parties to a contract mistakenly believe that a certain subject-matter exists. For example, in *Scott v Coulson,*[2] a contract was entered into under which a life insurance policy was issued. Neither of the parties knew that the assured was in fact already deceased at the time of contracting. Here, the common mistake clearly related to a fundamental term of the contract. However, a rather strict interpretation has been applied in relation to what constitutes a "fundamental term".

1. [Missing Footnote in original]
2. [1903] 2 Ch 29.

In *Leaf v International Galleries,*[3] the mistake was not said to relate to a fundamental term. The matter before the Court involved the plaintiff purchasing a painting of Salisbury Cathedral that both he and the seller thought to have been painted by a particular well-known artist (Constable). Years later, when the plaintiff sought to sell the painting, it was discovered that in fact it was not a painting by Constable. The Court noted that:

There was a mistake about the quality of the subject-matter, because both parties believed the picture to be a Constable; and that mistake was in one sense essential or fundamental. But such a mistake does not avoid the contract: there was no mistake at all about the subject-matter of the sale. It was a specific picture, 'Salisbury Cathedral'. The parties were agreed in the same terms on the same subject-matter, and that is sufficient to make a contract.[4]

In the light of this decision, great care must be taken in evaluating whether a common mistake truly relates to a fundamental term or not.

The effect of equity in this area of law is well illustrated in *Solle v Butcher.*[5] The case related to a seven-year lease of an apartment. At the time of the contract, both parties were under the impression that the relevant *Rent Restriction Act* did not affect the apartment. However, it turned out that the apartment was subject to rent restrictions, and the lessee sought to rely on the restrictions to pay a substantially lower rent than agreed upon. It was held that there was no common mistake as to a fundamental term:

The parties agreed in the same terms on the same subject matter. It is true that the landlord was under a mistake which was to him fundamental … but, whether it was his own mistake or a mistake common to both him and the tenant, it is not a ground for saying that the lease was from the beginning a nullity.[6]

At the same time, however, Denning LJ also noted that, where a contract was good, or at least not void, at common law, "the court of equity would often relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties".[7] The order given by the Court illustrates the flexibility of equity, and can best be described as holding the contract conditionally voidable; that is, the lease was to be interrupted and then continued at the higher rent originally agreed upon.

The application of Article 4 of Rule 11 is illustrated in *McRae v Commonwealth Disposal Commission.*[8], In that case, the plaintiff had purchased a wrecked tanker said to be positioned at a specific reef. In actual fact, there was no tanker stranded at the specified position. The Court held that, as the plaintiff's belief as to the tanker's existence was induced by the defendant, there was no common mistake, and the case was therefore distinguishable from *Scott v Coulson*.

A party relying on a common mistake must have reasonable grounds for its mistaken belief.[9] In *Associated Japanese Bank (International) Ltd v Credit du Nord SA,*[10] B had sold 4 machines to the plaintiff bank ("AJB"), who then leased them back to B. The defendant bank ("CDN") contracted with AJB in terms under which CDN guaranteed B's lease payments on the machines. The machines in fact did not exist. So, when B defaulted and AJB brought action against CDN for the lease payments, CDN successfully claimed, in its defence, that it had entered the contract of guarantee under a mistake as to the subject matter of the contract. The existence of the machines was fundamental to the contract, since they constituted the prime security for CDN as guarantor. This meant that the subject matter of the contract actually entered into between the two banks was essentially different from that which they reasonably believed it to be. Therefore, the contract was void *ab initio* for common mistake.

The law relating to common mistake was further clarified in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd.*[11] The defendants offered salvage services to a vessel which had suffered serious structural damage. Negotiations between the defendants and the claimants resulted in a hire contract for a minimum of

3. [1950] 2 KB 86.
4. Leaf v International Galleries [1950] 2 KB 86, at 89 per Denning LJ.
5. [1950] 1 KB 671.
6. Solle v Butcher [1950] 1 KB 671, at footnotes 45 and 50 on p 691.
7. Solle v Butcher [1950] 1 KB 671, at footnote 50 on p 692.
8. (1951) 84 CLR 377.
9. Associated Japanese Bank (International) Ltd v Credit du Nord SA [1989] 1 W.L.R. 255, per curiam decision at 255.
10. [1989] 1 W.L.R. 255.
11. [2003] QB 679.

five days to escort and stand by the damaged vessel for the purpose of saving life. The agreement contained a cancellation clause giving a right to cancel on payment of five days' hire. It was subsequently discovered that the vessels were in fact 410 miles apart, not 35 miles as previously understood. The defendants cancelled the contract with the claimants and refused to make any payment for the hire of their vessel. The claimants brought an action for breach of contract. The defendants disputed the claim on the ground that the purported contract had been concluded by reason of a fundamental mistake of fact.

In dismissing the appeal, the Court concluded that, the issue in relation to common mistake turned on whether the mistake as to the distance between the two vessels had the effect that the services that the claimants' vessel was in a position to provide were essentially different from what the parties had agreed. The fact that the defendants did not cancel the agreement with the claimants until they knew whether they could get a nearer vessel to assist indicated that the mistake did not have that effect. Performance of the contract had not been impossible and, having entered into a binding contract, which they were expressly entitled to cancel subject to the obligation to pay the agreed fee, the defendants were liable to pay the cancellation fee. The Court also noted that:

Mistakes have relevance in the law of contract in a number of different circumstances. They may prevent the mutuality of agreement that is necessary for the formation of a contract … Whether two parties have entered into a contract in this way must be judged objectively, having regard to all the material facts.[12]

This is a useful reminder of the link between the law's approach to mistakes and the need for a genuine 'meeting of the minds' and certainty for a contract to be formed.

In addition to the rules of common law and equity discussed so far, one statutory provision should also be noted in the context of common mistake. *Sale of Goods Act 1896* (Qld), s. 9 states that: "When there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void", thereby giving statutory expression for a part of the common law principles outlined above.

6.3.1.2 Mutual mistake

Rule 12

1. Where the parties to a contract are mistaken as to each other's intentions, thereby creating a situation where there is no meeting of the minds, a mutual mistake occurs and the contract is void ab initio.
2. Whether the contract was entered into under a mutual mistake is judged objectively, having regard to all the material facts.
3. Where the test outlined in Article 2 shows that the contract was not entered into under a mutual mistake, the contract is valid and is to be viewed as having the form and content identified through that objective test, having regard to all the material facts.

A mutual mistake is different to a common mistake in that, in the former, the parties do not share a common mistaken belief as they do in the latter. In the case of a mutual mistake, while the parties are mistaken as to the same fact, they are of different views.

A situation of mutual mistake arose in *Raffles v Wichelhaus*.[13] The parties had contracted for certain goods to be delivered in England on a ship called 'Peerless', sailing from Bombay. However, it turned out that there

12. Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd [2003] Q.B. 679, at 690, per Lord Phillips of Worth Matravers MR, May and Laws LJJ.
13. (1864) 159 ER 375.

were two ships called 'Peerless' sailing from Bombay to England but arriving at different times. The buyer had believed that the goods would be delivered by one ship, and the seller had believed that the goods were to be delivered by the other ship. Therefore, there was no meeting of the minds, and as both possibilities were equally likely under the circumstances, it could not be said that a reasonable person would have recognised a contract to have been formed.

In *Raffles v Wichelhaus*,[14] the Court noted that "It would be a question for the jury whether both parties meant the same ship called the 'Peerless'",[15] thereby hinting at the objectiveness of the test establishing whether a mutual mistake has occurred or not.

The application of this objective test is exemplified in *W. & J. Sharp v Thomson*,[16] where the parties had contracted for a quantity of crockery, which was described as "50 crates Wedgwood Seconds in Pearl White and C. C. as per list", to be delivered in instalments of 5 crates each. It turned out that there were two possible manufacturers of "Wedgwood Seconds" and Griffith C.J. noted that:

If it appeared that the plaintiff W. Sharp thought that he was buying goods of some value, and corresponding in kind to the specimens shown to him, while the defendants intended to sell to the plaintiffs crates of such assorted rubbish as was tendered, then the parties would not have been ad idem. But the defendants' manager himself says that that was not his intention. What, then, did he mean? I cannot find any ground for holding that their agent, by whom the order was obtained, meant anything else than what the plaintiff W. Sharp says he himself understood by the written order—that is, goods of the same kind as the specimens shown to him. The defendants ratified their agent's action by finally accepting the order. In my opinion there was a valid contract, and a breach of it, and the ordinary consequences must follow.[17]

Therefore, in some cases, where the description of the item within a contract creates ambiguity in relation to that item, the item contracted for may be identified by extrinsic evidence and the mentioned objective test so as to reach the conclusion that no mutual mistake occurred.

Relatedly, the High Court, in *Slee v Warke*,[18] found that where there was a mutual mistake between parties to a contract, that contract could be rectified, providing that a common intention of both parties to provide a term in the contract, which was omitted, could be established by reference to prior dealings.

In *Pukallus v Cameron*,[19] the High Court of Australia considered the terms of a contract whereby a parcel of land had been sold by Mr. Cameron to Mr. and Mrs. Pukallus. Both parties to the contract had mistakenly believed that the land subject to the sale agreement included within it a bore and a 27-acre plot of cultivated land. The High Court did not dispute the trial judge's finding of mutual mistake, contributed to by innocent misrepresentation of the respondent. However, it held that the trial judge's order for rectification of the contract, to include the bore and the cultivated area, could not be upheld because there was no clear intention common to both parties that the bore and cultivated land were to be included in the sale. The subject of the mistake related to where the boundary of the land should lie, not the nature of the land to be sold; and the terms of the contract clearly indicated the number of acres to be sold, which was not in dispute.

A distinction between the concept of mutual mistake and the doctrine of frustration was drawn in *Codelfa Construction Pty Ltd v State Rail Authority*.[20] Mutual mistake occurs where a common contractual assumption is of present fact; where the assumption is of future fact, it is a case of frustration. The distinction between the two is that, in the former, the contract is void *ab initio*; in the latter, the contract is binding until falsified.

6.3.1.3 Unilateral mistake

14. (1864) 159 ER 375.
15. Raffles v Wichelhaus (1864) 159 ER 375, at 375.
16. (1915) 20 CLR 137.
17. W. & J. Sharp v Thomson (1915) 20 CLR 137, at 141 – 142, per Griffith CJ.
18. (1949) 86 CLR 271.
19. (1982) 180 CLR 447.
20. (1982) 149 CLR 337.

Rule 13

1. Subject to Article 2, where one party (the mistaken party) to a contract shows that it was mistaken as to a fundamental term of the contract, the contract is void provided that it also is shown that the other party had actual or constructive knowledge of the mistaken party's mistake.

2. Where the type of mistake described in Article 1 relates to the actual terms of a written contract, and it also is shown that the other party had actual or constructive knowledge of the mistaken party's mistake, the contract is voidable in accordance with the principles of equity.

Unilateral mistakes are similar to mutual mistakes in that the parties do not share a common mistaken belief. However, in situations of unilateral mistakes, only one party is mistaken, while the other party is not. For example, while one party, A, is mistaken as to what the other party, B, intends to contract for, party B is well aware of what party A intends to contract for.

Situations of unilateral mistake ordinarily arise either in relation to the content of the contract, or in relation to the identity of the other contractual party. These two situations are discussed separately below, but Rule 13 is equally applicable to both types of unilateral mistake.

While *Taylor v Johnson*[21] (see below) arguably makes its application uncertain, *Smith v Hughes*[22] is an example of a unilateral mistake relating to the content of the contract. In that case, the buyer thought that he was purchasing old oats, while the seller intended to sell new oats. The buyer refused to accept delivery of the oats and the Court discussed the case as a matter of unilateral mistake. It was held that, in order for the contract to be held void, the buyer had to show that:

1) he intended to buy old oats;
2) he thought that the seller intended to sell old oats;
3) the seller knew that he thought that the seller was offering old oats for sale; and
4) the seller knew that he wanted to buy old oats.

Obviously, satisfying such an evidentiary burden will often be difficult.

Article 2 of Rule 13 stems from the High Court's decision in *Taylor v Johnson.*[23] The matter before the Court involved a contract for sale of land at the price of $15,000. The buyer argued that the amount $15,000 was the total price, while the seller had thought of that as the price per acre (making the total purchase price approximately $150,000). The buyer claimed specific performance and the seller sought an order setting aside the contract. In the majority opinion, the Court was careful to limit the scope of its conclusion:

The particular proposition of law which we see as appropriate and adequate for disposing of the present appeal may be narrowly stated. It is that a party who has entered into a written contract under a serious mistake about its contents in relation to a fundamental term will be entitled in equity to an order rescinding the contract if the other party is aware that circumstances exist which indicate that the first party is entering the contract under some serious mistake or misapprehension about either the content or subject matter of that term and deliberately sets out to ensure that the first party does not become aware of the existence of his mistake or misapprehension.[24]

21. (1983) 151 CLR 422.
22. (1871) LR 6 QB 597.
23. (1983) 151 CLR 422.
24. Taylor v Johnson (1983) 151 CLR 422, at 432, per Mason A.C.J., Murphy and Deane JJ.

Identifying the subject matter of a contract claimed to be void at law, or voidable in equity, may raise difficult questions.[25] *Bell v Lever Brothers*[26] was a case in which the defendant company ("Levers") had contracted with B and S to serve as chairman and vice-chairman, respectively, on the board of another company ("Niger"), of which Levers held more than 99 per cent share. B and S were successful in turning around Niger's previously flagging performance but, in the course of so doing, B and S also indulged in a number of breaches of their respective fiduciary duties to both Levers and Niger. Due to unforeseen circumstances, Levers had to cut short B's and S's contracts. By way of compensation for such early termination, Levers paid out 30,000l and 20,000l to B and S respectively. Levers then sought to recover these payments after their respective breaches were discovered, some two months later, arguing that the money was paid under a mistake of fact.

Unfortunately, Levers' ground was unilateral mistake, requiring them to establish fraudulent misrepresentations on the part of B and S in relation to their breaches. The jury in fact found no fraud but, rather, that B and S had concealed or innocently misrepresented their position in respect of the breaches. This may have allowed the respondent company to make a claim based on mutual mistake. However, such amendment to their pleading was held not to be allowed; and, in any case, were mutual mistake pleaded, the mistake would have related not to the subject matter of the termination agreement, but to the quality of B's and S's respective service contracts, which was not a fundamental term in the termination agreement.

In those situations where the unilateral mistake relates to the identity of the other party to the contract, the question of whether the mistake relates to "a fundamental term of the contract" is determined by reference to whether the mistaken party entered into the contract with an intention to contract only with the person it mistakenly believed it was contracting with. If that is the case, the contract is void. If not, the contract is unaffected by the rules of mistake (but can, of course, still fall within the scope of e.g., misrepresentation and/or fraud).

In *Lewis v Averay,*[27] the plaintiff advertised a car for sale, and sold it to a person claiming to be a well-known actor. The facts indicate that the only reason why the buyer's identity was an issue was that the payment was by cheque and that the buyer wanted to take immediate possession of the car. In other words, the identity of the buyer does not appear to have been of relevance for the seller's decision as to whom the car was to be sold, but only in the context of securing payment. The Court noted that:

When a dealing is had between a seller … and a person who is actually there present before him, then the presumption in law is that there is a contract, even though there is a fraudulent impersonation by the buyer representing himself as a different man than he is. There is a contract made with the very person there, who is present in person. It is liable no doubt to be avoided for fraud, but it is still a good contract under which title will pass unless and until it is avoided.[28]

Boulton v Jones[29] is an interesting contrast to *Lewis v Averay,*[30] though the case is different in that the parties did not meet in person, and thereby no presumption arose that the contract was concluded between the parties present. In *Boulton v Jones,*[31] a party was allowed to get out of its contractual obligations due to the fact that he did not intend to contract with the other party. The facts were as follows: unknown to Jones, Boulton had taken over a business previously run by Brocklehurst. Jones was used to dealing with Brocklehurst and had a set-off against Brocklehurst. Jones entered into a contract with the mentioned business. Boulton, who knew that Jones intended to contract with Brocklehurst, supplied the goods without notifying Jones of the change to ownership.

6.3.1.4 ***Non est factum***

25. Bell v Lever Brothers [1932] A.C. 161, at 218, per Lord Atkin.
26. [1932] A.C. 161.
27. [1972] 1 QB 198.
28. Lewis v Averay [1972] 1 QB 198, at 207, per Lord Denning MR.
29. (1857) 157 ER 232.
30. [1972] 1 QB 198.
31. (1857) 157 ER 232.

Rule 14

1. Where a person shows that it signed a written document fundamentally, radically or totally different in character to what it thought it would be, such a document is, subject to Article 2, not binding on that person.

2. The class of persons who can avail themselves of the defence outlined in Article 1 is limited. It is available to:

(a) those who are unable to read owing to blindness or illiteracy and who must rely on others for advice as to what they are signing; and

(b) to those who through no fault of their own are unable to have any understanding of the purport of a particular document.

3. In relation to an innocent third party, Article 1 is only applicable where the person seeking to rely on it shows that there was no failure on its part to take reasonable precautions in ascertaining the character of the document before signing it.

In *Petelin v Cullen,*[32] Petelin, who could not read English, signed a document thinking that it was a receipt for money received, when in fact it was an extension of an option to purchase land. He later refused to sell the land under the extended option and met an action for specific performance with the defence of *non est factum* ('it is not my deed'). In outlining to whom the defence extends, the Court noted that:

The class of persons who can avail themselves of the defence is limited. It is available to those who are unable to read owing to blindness or illiteracy and who must rely on others for advice as to what they are signing; it is also available to those who through no fault of their own are unable to have any understanding of the purport of a particular document. To make out the defence a defendant must show that he signed the document in the belief that it was radically different from what it was in fact and that, at least as against innocent persons, his failure to read and understand it was not due to carelessness on his part. Finally, it is accepted that there is a heavy onus on a defendant who seeks to establish the defence.[33]

Further, the Court stated that the "carelessness" discussed referred to "a mere failure to take reasonable precautions in ascertaining the character of a document before signing it".[34] This illustrates how Australian courts will apply the maxim of *non est factum*. However, the requirement that the signed document be "fundamentally, radically or totally different in character" is to be strongly emphasised.

In *Saunders v Anglia Building Society,*[35] an elderly lady, Saunders, who at the relevant time had broken her glasses, was informed that she was signing her house over to her nephew. However, she was in fact signing it over to her nephew's business associate (Lee) who was the person in front of her, who told her to what the contract related.

As Lee later defaulted, a third party sought to take possession of the house. Saunders sought an order that the deed of gift of the house to Lee was void. However, the House of Lords concluded that whether the gift of the house was made to her nephew or Lee did not make the deed she signed fundamentally different to the deed she thought she was signing. The Court's conclusion that, the deed was a deed regardless of whom it was made in favour of, may be factually correct. However, the judgment nevertheless seems harsh when one considers that the plaintiff in the matter ended up transferring ownership of her house (what typically is a person's most valuable asset) to the wrong person.

6.3.1.5 Rectification

32. (1975) 132 CLR 355.
33. Petelin v Cullen (1975) 132 CLR 355, at 359 – 360.
34. Petelin v Cullen (1975) 132 CLR 355, at 360 per Barwick CJ, McTiernan, Gibbs, Stephen and Mason JJ.
35. [1971] AC 1004.

Rectification is an equitable remedy that may be ordered where the parties make a mistake in reducing a contract to writing. There are two situations in which rectification may be of relevance: common mistake and unilateral mistake. Rule 15 outlines the principles of rectification governing common mistake.

Rule 15

1. Where the parties to a contract have reached agreement, but due to a common mistake this agreement is not accurately reflected in a written contract drafted to embody the agreement, the written contract is to be given the meaning first agreed to by the parties.

2. A party seeking to rely on Article 1 must show:

(a) that the written contract does not embody the parties' final intentions; and

(b) in clear and precise terms, what were the parties' actual final intentions.

The rules regulating rectification in relation to common mistake can be illustrated by reference to *Commerce Consolidated Pty Ltd v Johnstone*.[36] In that case, the parties had agreed that interest was to be paid from 1 May 1974. However, when the agreement was written down, a mistake was made, and the written contract stated that interest was to be paid from 1 May 1975. The Court held that the contract was to be rectified to indicate the date agreed by the parties.

While these rules are rather straightforward, difficulties arise in the context of satisfying the burden of proof. As is made clear in Article 2 of Rule 15, the party seeking rectification must show, in clear and precise terms, what were the parties' actual final intentions, as well as that the written contract does not embody the parties' final intentions.

As far as rectification of unilateral mistakes is concerned, the relevant principles can be described as follows:

Rule 16

1. Where one contractual party knows that a written contract contains a mistake made by the other party (the mistaken party), the court may give an order in accordance with Article 2, provided that it is shown that:

(a) the mistaken party had no knowledge of the mistake;

(b) the first mentioned party omits to draw the mistaken party's attention to the mistake; and

(c) the mistake is beneficial to the first mentioned party.

2. Where the requirements of Article 1 are satisfied, the court may give an order to the effect that the first mentioned party has to choose either to accept the contract being rectified, or rescinded.

3. In rectifying the contract under Article 2, the court shall give effect to the common intention of the parties.

4. Where the parties' common intention cannot be achieved, the court shall not order rectification.

36. [1976] VR 724.

The Australian approach to rectification of unilateral mistakes is outlined in *Leibler v Air New Zealand*.[37] In that case, Isi Leibler was the Managing Director and majority shareholder of a large travel agency, Jetset Travel and Technology Pty Ltd ("Jetset"), who had traded for many years with Air New Zealand ("A.N.Z"). A.N.Z. entered into an agreement to purchase one-half of the shares in Jetset and the agreement was subject a clause that, if Leibler or A.N.Z. later sold their shares, they would offer the shares to the other holder first. More specifically, the shares were not to be offered for sale to a competitor of the other holder. This clause was omitted from the final contract, in error, without A.N.Z.'s knowledge; and A.N.Z. sought rectification of the contract on the basis that Leibler knew about the deletion and deliberately refrained from drawing the mistake to A.N.Z.'s attention. In upholding the rectification order by the trial judge, the Court observed that:

If (1) one party, A, makes an agreement under a misapprehension that the agreement contains a particular provision which the agreement does not in fact contain; and (2) the other party, B, knows of the omission and that it is due to a mistake on A's part; and (3) lets A remain under the misapprehension and concludes the agreement on the mistaken basis in circumstances where equity would require B to take some step or steps … to bring the mistake to A's attention; then (4) B will be precluded from relying upon A's execution of the agreement to resist A's claim for rectification to give effect to A's intention.[38]

While Rule 16 is similar to Rule 13, outlining the common law rules of unilateral mistake, several differences should be observed. First, while the unilateral mistake rules of common law make the contract void, the rules of rectification are far more flexible; the court can order that the contract be rectified or rescinded. Second, while the unilateral mistake rules of common law focus on mistakes as to fundamental terms only, the situations covered by rectification of unilateral mistakes appears to expand on what the mistake may relate to (i.e., not only conditions).

Finally, *Club Cape Schanck Resort Company Ltd v Cape Country Club Pty Ltd*[39] discussed situations where the parties' common intention cannot be ascertained or achieved. The dispute related to an agreement between the Resort and Country Club was made whereby the Country Club would maintain and operate a self-contained "sewage treatment plant" and reticulation system. The Resort entered into a "Supply Service Agreement" with the Country Club and agreed to pay fees to the Country Club to cover the costs of providing a "sewage treatment service". The current case arose when the Resort claimed the Country Club had charged excessive fees in breach of the agreement. The Court noted that:

since the equitable doctrine of rectification exists for the purpose, in effect, of ordering actually or notionally the textual amendment of a document, it will not be available to achieve the amendment of a particular document just because the document is shown not to conform with a common intention of the parties to it. It must be shown further that words or expressions or other text inserted into or deleted from the document would give effect to the common intention … So much I take to be axiomatic: it has never been the office of a decree of rectification to offer, as a kind of simulacrum, the nearest alternative to the thing to which the parties actually agreed.[40]

6.3.2 Mistake of law

37. [1999] 1 VR 1.
38. Leibler v Air New Zealand [1999] 1 VR 1, at 14.
39. [2001] VSCA 2.
40. Cape Schanck Resort Company Ltd v Cape Country Club Pty Ltd [2001] VSCA 2, at para 14, per Tadgell JA.

Rule 17

1. Where a person has paid money to another person, under the mistaken belief that it was legally obligated to do so, or under the mistaken belief that the payee was legally entitled to the payment of money, the money paid is recoverable unless:

(a) the payment was made voluntarily, even though the payer knew, suspected, or should have known or suspected, that there was no such legal obligation or entitlement;

(b) the payment was made for good consideration; or

(c) the payee received the payment in good faith and adjusted its situation to the conditions created by the payment, before the payer sought to recover the payment.

Money paid under a mistake of law is prima facie recoverable much the same as money paid under a mistake of facts. In *David Securities Pty Ltd v Commonwealth Bank of Australia,*[41] the appellants entered into a foreign currency loan agreement with the Commonwealth Bank and suffered financial losses due to adverse fluctuations in exchange rates. Thus, they claimed damages against the bank and the accountants who gave the advice concerning the loan. The bank counter-claimed for recovery of moneys due under the loan. The Court held that the money was recoverable when the payer mistakenly believed that she/he was under a legal obligation to pay or that the payee was legally entitled to the payment.

Further, mistake caused by ignorance or erroneous belief may also suffice. However, the claim for restitution may be defeated if the payee can point to that the payment was made for good consideration, or that the payee has acted to her/his detriment upon receipt of the payment, or that the payment was made in compromise of an honest claim.

The Court applied these principles in *Co-Buchong v Citigroup Pty Ltd* ("Co-Buchong"),[42] where the defence of change of position was argued by second defendant bank (NAB) against cross-claim of restitution by first respondent bank (Citibank). Both banks had acted on fraudulent instructions in transferring sums of money in respect of the Applicant's accounts. Citibank had first transferred US$500,000 to NAB and NAB had subsequently transferred US$465,090 to accounts at another bank.

In *State Bank of New South Wales v Swiss Bank Corporation* ("State Bank"),[43] the Court of Appeal relied on *David Securities* in considering the defence of change of position, saying that the person claiming the defence (State Bank) would need to show that it paid away the money "on the faith of receipt." The defence failed in that case because State Bank did not satisfy the criteria laid down to show "faith of receipt." In the somewhat more recent decision of *Perpetual Trustees Australia Ltd v Heperu Pty Ltd* ("Herperu"),[44] the Court of Appeal explained that a defendant may be shown to have acted on the faith of receipt if there is a "foundation of information obtained in connection with the receipt to justify acting on the basis of the receipt." *Herperu* was accordingly applied in *Co-Buchong* because, in *Co-Buchong*, NAB paid out money from the applicant's account on the basis of information in a SWIFT communication from Citibank, which NAB recognised as a valid receipt of funds available for disbursement at the behest of the applicant.

An example of an unsuccessful claim for restitution of monies paid under mistake of law is found in the High Court decision in *Roxborough v Rothmans of Pall Mall Australia Ltd.*[45] *David Securities* was applied, and distinguished; in that case, monies paid under terms of a contract between the parties were not recoverable, merely because the contract had referenced invalid tobacco licensing legislation in calculating the amounts to

41. (1992) 175 CLR 353.
42. [2011] NSWSC 1199.
43. (1995) 39 NSWLR 350.
44. (2009) 76 NSWLR 195.
45. (2001) 208 CLR 516.

be paid. That the legislation had been rendered invalid did not make the parties' contract, or any part of it, invalid because of any mistake as to the constitutional validity of the legislation.

6.4 Duress

Rule 18

1. Where consent is given, solely or in part, as a result of duress, the contract so formed is voidable at the option of the party that gave the consent, unless it is proven that the duress made no contribution to that party's decision to consent, or it is proven that an unreasonable amount of time has elapsed since the duress ceased.

2. Consent given by a contractual party is given as a result of *duress* where another contractual party, or someone acting on its behalf, engages in an *act of coercion*, as defined in Article 3.

3. For the purpose of Article 2, an act of coercion means:

(a) actual or threatened exercise of violence against the consenting contractual party, or his or her immediate family or near relatives;

(b) actual or threatened deprivation of liberty of the consenting contractual party, or his or her immediate family or near relatives;(c) actual or threatened detention, seizure or damaging of the consenting contractual party's property;

(d) illegitimate pressure asserted against the consenting contractual party's economic interests.

Duress occurs where a dominant party applies illegitimate pressure to another (weaker) party, and that pressure induces the (weaker) party to enter into a transaction. In *Crescendo Management Pty Ltd v Westpac Banking Corporation*[1] McHugh J stated that: "A person who is the subject of duress knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than take an alternative course of action".[2] This highlights that consent given under duress is nevertheless consent; it is the quality of the consent that is in question. More specifically, the consent is not given freely. Further, as consent given under duress is nevertheless consent, it is only natural that a contract to which one party gave its consent under duress is not automatically void. Rather, it is voidable at the option of the party that entered into it under duress.

There are three different kinds of duress:

- duress to person;
- duress to goods; and
- economic duress.

These categories may overlap, but regardless of which category of duress an action relates to, it is for the party seeking to rely on duress to prove the existence of illegitimate pressure amounting to duress. However, it is not necessary to establish that consent was given solely as a result of duress. In *Barton v Armstrong*,[3] the majority held that:

1. (1988) 19 NSWLR 40.
2. Crescendo Management Pty Ltd v Westpac Banking Corporation (1988) 19 NSWLR 40, at 45.
3. [1973] 2 NSWLR 598.

Though it may be that [the plaintiff] would have executed the documents even if [the defendant] had made no threats and exerted no unlawful pressure to induce him to do so, the threats and unlawful pressure in fact contributed to his decision to sign the documents.[4]

If it is established that such pressure was present, it is for the defendant to prove that the duress had no bearing on the consenting party's decision. This would ordinarily be a rather heavy burden. Furthermore, as far as threats are concerned, it is to be noted that these need not be expressed in words but may be implied: "If circumstances for which the appellant was responsible conveyed the threat to the respondent, then the threat of duress would operate as forcefully as if it were put into words".[5]

The circumstances outlined in Article 3(a – b) are commonly referred to as duress to person and were originally the only forms of duress recognised by the courts. An often-cited example of duress to person is the previously mentioned *Barton* case, where the defendant had threatened to have the plaintiff murdered, if the latter did not execute a deed relating to the sale of certain companies. The Court found there to be duress to person, and noted that:

No man, it may be said, is a free agent who is subject to any pressure, economic, commercial, emotional or otherwise but the law makes a distinction. Duress to the person to that extent which amounts to duress at common law is such a constraining force that it takes away the freedom of will, of agency, in a way which other forms of coercion do not.[6]

Scolio Pty Ltd v Cote[7] is another example of alleged duress to person. Cote (the respondent) was employed by Scolio Pty Ltd (the appellant). An audit revealed that the respondent had misappropriated funds belonging to the appellant. The respondent entered into a deed under which he undertook to repay an agreed sum, but later claimed that he did so under duress as, if he had not done so, the audit results would have been handed over to the police. The Court was not satisfied that the appellant's representative had made a promise as to whether the police would still be informed even if payment was made, and Ipp J stated that:

some other element of impropriety is needed, apart from the threat of prosecution, before there could be said to be duress resulting in the respondent becoming entitled to avoid the deed. The element that is normally sought to be established in cases of this kind is an agreement not to proceed with the prosecution. Such an agreement is illegal and is therefore void … Further, the existence of such an agreement introduced a quality of impropriety into a transaction induced thereby so as to render it voidable for duress …[8]

This case clearly highlights an overlap between the concept of duress and the concept of illegality discussed in Chapter 7.

Duress to goods (Article 3(c)) is exemplified in *Hawker Pacific v Helicopter Charter*.[9] In that case, the defendant had agreed to paint the plaintiff's helicopter. More than one paintjob was done but the plaintiff was not satisfied with the defendant's work. When arriving to pick up the helicopter, the plaintiff was asked to agree to pay a certain amount and release the defendant from any further liability. The plaintiff signed the agreement, but never paid the money. Instead, it took action in court arguing that the reason it signed the final agreement was that it feared that the defendant, who knew the helicopter was needed urgently, would otherwise not release it. The Court found this to be a case of threatened duress to goods.

As indicated by the vague nature of Article 3(d), economic duress is the most difficult type of duress to define. The most typical situation in which the courts have been prepared to find economic duress to have been exercised is where one contractual party, knowing that the other party faces financial devastation if the contract is not properly performed, threatens not to meet its existing contractual obligations unless it is given further benefits, for which it will not give any additional consideration in return. In *T A Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Pty Ltd*,[10] the defendant had agreed to supply galvanised iron to the plaintiff at £109 per ton. The iron was to be imported from France, and the defendant knew that the plaintiff needed the

4. Barton v Armstrong [1973] 2 NSWLR 598, at 633.
5. Hawker Pacific v Helicopter Charter (1991) 22 NSWLR 298, at 303.
6. Barton v Armstrong [1973] 2 NSWLR 598, at 612.
7. (1992) 6 WAR 475.
8. Scolio Pty Ltd v Cote (1992) 6 WAR 475, at 485.
9. (1991) 22 NSWLR 298.
10. [1949] VLR 269.

iron to meet its commitments to other parties. Prior to delivery, the defendant informed the plaintiff that the iron would cost an extra £27 per ton due to a sharp rise in the world price. Having paid the higher price, the plaintiff successfully recovered the extra amount paid due to economic duress.

Similarly, in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)*,[11] the defendant, knowing that the plaintiff relied on it fulfilling its contractual obligations to meet commitments to third parties, demanded a 10 per cent increase in price without having any contractual entitlement to do so. The Court held that, in paying the higher price, the plaintiff had acted under economic duress. However, the amount paid could not be recovered since the plaintiff had affirmed the varied contract by their failure to protest and by their eight-month delay in bringing the action.

The Australian law's present position on economic duress is somewhat unclear. However, a useful starting point is found in the statements made by McHugh JA in *Crescendo Management Pty Ltd v Westpac Banking Corporation*.[12] The appellant argued that its consent to a mortgage in favour of the respondent was given under economic duress. McHugh JA stated that:

The proper approach … is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress.[13]

In clarifying when pressure is to be regarded as illegitimate, Lord Scarman, in *Universe Tankships Inc of Monrovia v International Transport Workers Federation*,[14] stated that:

In determining what is legitimate two matters may have to be considered. The first is as to the nature of the pressure. In many cases this will be decisive, though not in every case, and so the second question may have to be considered, namely, the nature of the demand which the pressure is applied to support.[15]

In that case, the ship, the Universal Sentinel, was blacklisted unless the owner agreed to pay the defendants a large sum of money. It was held the contract was voidable for duress.

It is also necessary to clarify the term "unconscionable conduct", as used by McHugh JA in *Crescendo Management Pty Ltd v Westpac Banking Corporation*.[16] The Court in *Parras Holdings Pty Ltd v Commonwealth Bank of Australia*[17] makes clear that "unconscionable conduct", in the context of duress, is not the same as the equitable doctrine of unconscionable conduct:

In the equitable principle, the term "unconscionable" refers to the nature of the advantage taken of a person in a position of disability or special disadvantage. For the purposes of economic duress, the term "unconscionable" looks rather to the nature of the duress or compulsion exercised, to its legitimacy or illegitimacy.[18]

A case decided relatively recently may arguably have changed the state of the Australian law on economic duress. *ANZ Banking Group Ltd v Karam*[19] involved a dispute between the directors of a company and the company's bank. Put simply, it was not entirely clear from the initial contract between the parties whether the directors of the company were personally liable for the company's debts. At a point in time when the company was experiencing severe financial problems, the bank sought to condition further loans on the directors being personally liable for the company's debts. The Court noted that:

It is of importance that the absence of practical choice is only one of two elements in establishing economic duress. The critical issue is whether the pressure placed on the Karams by the Bank was "illegitimate". The Bank emphasised in argument that all it was proposing was an offer to extend the credit available to

11. [1979] 1 QB 705.
12. (1988) 19 NSWLR 40.
13. Crescendo Management Pty Ltd v Westpac Banking Corporation (1988) 19 NSWLR 40, at 46.
14. [1983] 1 AC 366.
15. Universe Tankships Inc of Monrovia v International Transport Workers Federation [1983] 1 AC 366, at 401 para A.
16. (1988) 19 NSWLR 40.
17. [1999] FCA 391.
18. Parras Holdings Pty Ltd v Commonwealth Bank of Australia [1999] FCA 391, at 66.
19. [2005] NSWCA 344.

the Company on condition that the acknowledgment was signed by the Karams personally. No doubt the Company had a commercial expectation that the credit available to it would be maintained, but it had no realistic expectation of additional credit nor that the existing facilities would be allowed to continue, were it to default. Accordingly, on the Bank's case, it was offering an indulgence in return for improved security … The Bank was under no obligation to extend the credit facilities already granted, nor to do so without securing its own position. Nor was the Bank reacting over hastily to some sudden and unexpected downturn in the affairs of the Company.[20]

Furthermore, it is significant to note that the Court opted for a narrower definition of what constitutes "illegitimate pressure" than what was decided in the cases discussed above. Indeed, the Court held that where the "illegitimate pressure" is not unlawful, one cannot rely on economic duress and should instead examine the matter in the context of the equitable doctrines of undue influence, unconscionability, or the relevant statutory provisions. The rationale expressed for this is that:

The vagueness inherent in the terms "economic duress" and "illegitimate pressure" can be avoided by treating the concept of "duress" as limited to threatened or actual unlawful conduct. The threat or conduct in question need not be directed to the person or property of the victim, narrowly identified, but can be to the legitimate commercial and financial interests of the party. Secondly, if the conduct or threat is not unlawful, the resulting agreement may nevertheless be set aside where the weaker party establishes undue influence (actual or presumptive) or unconscionable conduct based on an unconscientious taking advantage of his or her special disability or special disadvantage, in the sense identified in [*Commercial Bank of Australia Ltd v Amadio*[21]. Thirdly, where the power to grant relief is engaged because of a contravention of a statutory provision such as s 51AA, s 51AB or s 51AC of the Trade Practices Act [see ss. 20-22 of the ACL], the Court may be entitled to take into account a broader range of circumstances than those considered relevant under the general law. Pursuant to both Trade Practices Act [now ACL] provisions and the Contracts Review Act [NSW only], the relative strengths of the bargaining positions of the parties, and their ability to negotiate terms, will be relevant. However, it does not follow that because, for the purposes of s 9(2)(a) of the Contracts Review Act, there was a material inequality of bargaining power, a contract between such parties will necessarily be set aside. Most "contracts of adhesion" will fall into that category, but most will be valid.[22]

To conclude, it is to be noted that the doctrine of economic duress still appears to be evolving, and the Court in *ANZ Banking Group Ltd v Karam*[23] noted that:

How the doctrine of economic duress fits with the equitable doctrines is unclear. The reference to "unlawful" conduct, read in context of the earlier authorities, was originally a reference to unlawful detention of goods. Concepts of "illegitimate pressure" and "unconscionable conduct", if they do not refer to equitable principles, lack clear meaning, outside, possibly, concepts of illegitimate pressure in the field of industrial relations.[24]

Since *Karam*, the approach to economic duress suggested by McHugh JA in *Crescendo*, in the above quote, has been applied in the Queensland Court of Appeal[25] and in the Supreme Court of Victoria,[26] and has also been considered in the Supreme Court of Western Australia.[27] The High Court has not thus far had the opportunity to decide a case on the issue of economic duress. However, in *Australian Competition and Consumer Commission (ACCC) v CG Berbatis Holdings Pty Ltd*,[28] the High Court also cited, with approval, McHugh JA's words in *Crescendo*. The New South Wales Supreme Court, by contrast, has continued to apply the principle in *Karam*,[29] preferring the notion of 'unconscientious taking of advantage'[30] [of another party's disadvantage] to the term 'economic duress,' which, it said, "should be limited to situations where there is threatened or actual unlawful conduct."[31] (It should be noted that the appellant's pleading in *Maher v Honeysett*

20. ANZ Banking Group Ltd v Karam [2005] NSWCA 344, at paras 94 – 95.
21. (1983) 151 CLR 447.
22. ANZ Banking Group Ltd v Karam [2005] NSWCA 344, at para 66.
23. [2005] NSWCA 344.
24. ANZ Banking Group Ltd v Karam [2005] NSWCA 344, at para 61.
25. Mitchell v Pacific Dawn Pty Ltd [2011] QCA 98.
26. Cassar v Pendergast [2010] VSC 559.
27. Retravision (WA) Ltd v Starrs [2010] WASC 373.
28. (2003) 214 CLR 51.
29. Maher v Honeysett & Maher Electrical Contractors Pty Ltd (2007) Aust Contract R 90-249, [129].
30. A Little Company Limited v Gregory Raymond Peters [2007] NSWSC 833.
31. Ibid, [44].

& Maher Electrical Contractors Pty Ltd[32] was that certain agreements were procured by "duress *or* unconscionable conduct" [emphasis added], as opposed to "economic duress").[33]

32. (2007) Aust Contract R 90-249.
33. Ibid, [6] and [8].

6.5 The tort of (two-party) intimidation

Rule 19

1. Where the defendant expresses a threat of an unlawful act, coupled with a demand, against the plaintiff, and the plaintiff suffers economic loss, either by actually complying with the demand, or by not complying with the demand, the court can award remedies against the defendant under Article 4, provided that the defendant's objective was to harm the plaintiff.

2. If causing harm to the plaintiff was not the defendant's predominant and ultimate objective, and the court finds that the defendant's predominant and ultimate objective justifies its actions, no action can succeed under Article 1.

3. For the purpose of Article 1, the term "threat of an unlawful act" refers to threats to commit a crime, threats to commit a tortuous act and threats to break a contract.

4. Where the plaintiff has shown the presence of the elements outlined in Article 1, the court may award damages.

The legal principles of a tort of two-party intimidation do not appear entirely settled in Australian law. The tort of intimidation originated from the House of Lords decision in *Rookes v Barnard*,[1] in which the plaintiff was a draftsman employed by the BOAC (later British Airways). The plaintiff resigned his membership in the union, and, in turn, the union members threatened the BOAC with a strike if the plaintiff was not removed from the office within a certain time. The threat of a strike was held to be an unlawful act, and resulted in the BOAC dismissing the plaintiff, who, in turn, suffered loss. Thus, the Court held that all the elements of the tort of intimidation were satisfied, and that the plaintiff was entitled to damages. As is clear, this was a case of three-party intimidation.

The tort of intimidation has been applied in Australia in relatively recent decisions such as *Bracher v Club Marconi*,[2] which also is a case involving a labour dispute. In that case, a former employee was taking action against his former employer due to having suffered a personal injury allegedly stemming from the employer's conduct. The Court noted, with apparent approval, how one text on torts law described the tort of intimidation as involving three elements:

(1) that the defendant has made a demand, coupled with a threat to either the plaintiff or a third party; (2) that the threat is to commit an unlawful act; and (3) that the person threatened complied with the demand, thereby causing loss to the plaintiff.[3]

Further, the Court went on to quote Lord Denning's statement in *Stratford & Son Ltd v Lindley*:[4]

[The tort of intimidation] has long been known in cases of threats of violence. If one man says to another,

1. (1964) AC 1129.
2. [2000] NSWSC 1007.
3. Bracher v Club Marconi [2000] NSWSC 1007, at para 57.
4. (1964) 2 All ER 209, at 215.

'I will hit you unless you give me five pounds' [two-party intimidation], or 'unless you give the cook notice' [three-party intimidation], or 'unless you stop dealing with your butcher' [three-party intimidation], and the party so threatened submits to the threat by paying over the five pounds or by giving notice to the cook, or by ceasing to deal with the butcher, then the party damnified by the threat – the payer of the five pounds, or the cook or the butcher, as the case may be – has a cause of action for intimidation against the person who made the threat. But it is essential to the cause of action that the person threatened should comply with the demand. If he has the courage to resist it, and replies saying, 'you can do your worst. I am not going to pay you five pounds', or 'I am not going to give notice to the cook', or 'I am not going to stop dealing with the butcher', then the party threatened has no cause of action for intimidation. Nor has the cook. Nor the butcher. For they have suffered no damage by the threat.[5]

Having concluded that the "gist of the third element of the tort of intimidation is the suffering of damage",[6] the Court went on to state that:

In the present case where the plaintiff's damage lies in suffering a personal injury it seems to me at least arguable that the tort of intimidation was perfected when the plaintiff suffered the psychiatric and psychological injury he claims to have experienced and that, at that stage, the tort is perfected.[7]

When adding up the above, it becomes clear that it is a requirement that the plaintiff has suffered damages for the tort of intimidation to have been committed. However, as was made clear in *Australian Wool Innovation Ltd v Newkirk (No 2)*,[8] while that damage may stem from the plaintiff having complied with the threat, it may also stem from direct suffering in not complying with the threat. That case involved intimidation of retailers in Europe and the US with a view to procuring an agreement from the retailers to not purchase products containing Australian wool because of the controversial procedure of 'mulesing'. The Court stated that, "the tort of intimidation requires that the threatened unlawful act must be effective."[9]

Damages, the possible defence of "justification" and other aspects of the tort of intimidation are discussed in detail below at 5.13 in the context of the tort of three-party intimidation.

A recent case of relevance in this area is *IceTV Pty Ltd v Ross*,[10] which mainly supports Articles 1 and 3 of Rule 19. In that case, the defendant brought a cross-claim of intimidation against the plaintiff, who had brought action for damages against Ross and another defendant for breaches of their respective contracts. In respect of the intimidation claim, per Brereton J at [27], while this case involved a threat by the plaintiff to withdraw services supplied to the defendants, with the intention of causing harm to the defendants, "it is an essential element of the tort of intimidation that the threat be of an unlawful or illegal act… [and]… that act must be unlawful, independently of the demand." Since there is nothing inherently unlawful about a services supplier declining to provide those services to a particular potential customer, the defendants' cross-claim could not succeed.

5. Bracher v Club Marconi [2000] NSWSC 1007, at para 60.
6. Bracher v Club Marconi [2000] NSWSC 1007, at para 61.
7. Bracher v Club Marconi [2000] NSWSC 1007, at para 61.
8. [2005] FCA 1307.
9. Australian Wool Innovation Ltd v Newkirk (No 2) [2005] FCA 1307, at para 66.
10. [2008] NSWSC 1321.

6.6 Harassment and coercion under relevant statutes

In addition to what has been said above, some situations involving duress can successfully be dealt with under s. 50 of the Australian Consumer Law (formerly TPA s. 60):

> ***Australian Consumer Law*, s. 50**
>
> (1) A person must not use physical force, or undue harassment or coercion, in connection with:
>
> (a) the supply or possible supply of goods or services; or
>
> (b) the payment for goods or services; or
>
> (c) the sale or grant, or the possible sale or grant, of an interest in land; or
>
> (d) the payment for an interest in land.
>
> Note: A pecuniary penalty may be imposed for a contravention of this subsection.
>
> (2) Subsections (1)(c) and (d) do not affect the application of any other provision of Part 2-1 or this Part in relation to the supply or acquisition, or the possible supply or acquisition, of interests in land.

It could be argued that this provision is underutilised. It does not require the threat of, or the actual commission of, an illegal act (however, such acts certainly would be likely to fall within the scope of the sections). Instead, as far as harassment is concerned, it is sufficient that it is undue. In the light of this, where applicable, the ACL is significantly wider in its scope than the common law contractual action of duress and the common law tort action of intimidation.

A few points must be made about the interpretation of "harassment". In *ACCC v Maritime Union of Australia*,[1] Hill J stated that:

> The word "harassment" in my view connotes conduct which can be less serious than conduct which amounts to coercion. The word "harassment" means in the present context persistent disturbance or torment. In the case of a person employed to recover money owing to others, as was the first Respondent in *McCaskey*, it can extend to cases where there are frequent unwelcome approaches requesting payment of a debt. However, such unwelcome approaches would not constitute undue harassment, at least where the demands made are legitimate and reasonably made. On the other hand where the frequency, nature or content of such communications is such that they are calculated to intimidate or demoralise, tire out or exhaust a debtor, rather than merely to convey the demand for recovery, the conduct will constitute undue harassment … Generally it can be said that a person will be harassed by another when the former is troubled repeatedly by the latter. The reasonableness of the conduct will be relevant to whether what is harassment constitutes undue harassment.[2]

The term "undue" has been said to ensure "that conduct which amounts to harassment will only amount to a contravention of the section where what is done goes beyond the normal limits which, in the circumstances, society would regard as acceptable or reasonable and not excessive or disproportionate".[3] However, it seems

1. [2001] FCA 1549.
2. ACCC v Maritime Union of Australia [2001] FCA 1549, at 60.
3. ACCC v Maritime Union of Australia [2001] FCA 1549, at 62.

that a higher level of harassment is accepted as not being "undue" where the conduct relates to a consumer's payment for goods or services, as compared to the supply of goods or services. In *ACCC v McCaskey*,[4] it was stated that:

Repeated unwelcome approaches to a potential acquirer of goods or services could qualify as harassment and, so qualified, require very little additional evidence, if any, to attract the characterisation of "undue harassment". On the other hand a consumer who owes money to a supplier can expect repeated unwelcome approaches requesting payment of the debt if he or she does not pay. No doubt such approaches might also qualify as harassment. If legitimate demands are reasonably made, on more than one occasion, for the purpose of reminding the debtor of his or her obligation and drawing the debtor's attention to the likelihood of legal proceedings if payment is not made, then that conduct, if it be harassment, is not undue harassment. If, however, the frequency, nature or content of the approaches and communications associated with them is such that they are calculated to intimidate or demoralise, tire out or exhaust a debtor rather than convey the demand and an associated legitimate threat of proceedings, the harassment will be undue.[5]

To summarise, it seems that in assessing whether conduct amounts to harassment, one looks to the type of the conduct (i.e., what is the relevant conduct?). If it is concluded that the conduct amounts to harassment, one must then assess whether the harassment was undue. In doing so, one examines the characteristics of that conduct in the particular case at hand (i.e., how was the conduct carried out in the case at hand?). For this second step of the test, one typically takes account of factors such as the frequency, severity, and nature of the conduct.

It has been held that the "undue" requirement is only associated with harassment. In actions relating to physical force or coercion, the physical force or coercion need, thus, not be "undue". In explaining the term "coercion", Hill J stated, in *ACCC v Maritime Union of Australia*,[6] that:

"Coercion" … carries with it the connotation of force or compulsion or threats of force or compulsion negating choice or freedom to act … A person may be coerced by another to do something or refrain from doing something, that is to say the former is constrained or restrained from doing something or made to do something by force or threat of force or other compulsion. Whether or not repetition is involved in the concept of harassment, and it usually will be, it is not in the concept of coercion.[7]

Having given the term "coercion" this meaning, the Court in *ACCC v Maritime Union of Australia*,[8] had no difficulty in finding that the formation of a picket line to prevent a vessel from departing constituted coercion, as the picket line was capable of engendering fear in the mind of those in the mooring gang employed to release the vessel for departure.

In *ACCC v McCaskey*,[9] a debt collector, acting in a manner described as "very abrupt, authoritative, forceful and demanding", was held to have used undue harassment and coercion in connection with the payment for goods or services by a consumer contrary to what is now s. 50 of the ACL (formerly s. 60 of the TPA). The Court noted that, for example, threats of criminal proceedings may constitute coercion for the purpose of s. 50. In contrast, in *Campbell v Metway Leasing Ltd*,[10] which utilised the then mirror provision (s. 55) of the *Fair Trading Act (NSW)*, McInerney J concluded that legal proceedings which are not themselves vexatious, frivolous or an abuse of process cannot constitute undue harassment or coercion for the purposes of s. 55.

Finally, as far as "physical force" is concerned, in *ACCC v Davis*[11] it was held that the holding down and restraining of a consumer while his motor vehicle was being repossessed represented a breach of s. 50.

4. [2000] FCA 1037.
5. ACCC v McCaskey [2000] FCA 1037, at 48.
6. [2001] FCA 1549.
7. ACCC v Maritime Union of Australia [2001] FCA 1549, at 61.
8. [2001] FCA 1549.
9. [2000] FCA 1037.
10. (1998) ATPR 41-630.
11. [2003] FCA 1227.

6.7 Undue influence

In certain circumstances, one party may, due to trust and confidence vested in them, be in a position to influence another party to such an extent that the latter's actions cannot be said to be truly free and voluntary. Such situations need not necessarily amount to placing the victim under duress but may nevertheless severely undermine the quality of the consent given. In recognition of this, the law has adopted equitable principles seeking to correct the abuse of such influence. These principles are referred to as the equitable doctrine of undue influence.

Rule 20

1. Where consent is given, solely or in part, as a result of undue influence, the contract so formed is voidable at the option of the party that gave the consent, unless it is proven that the undue influence made no contribution to that party's decision to consent, or it is proven that an unreasonable amount of time has elapsed since the time the undue influence ceased.

Where the transaction, resulting from the consenting party's consent, is manifestly disadvantageous to the consenting party, undue influence is presumed in the following types of relationships:

(a) parent and child;

(b) guardian and warden;

(c) religious advisor and disciple;

(d) solicitor and client;

(e) trustee and beneficiary; and

(f) doctor and patient.

2. Where the transaction resulting from the consenting party's consent is manifestly disadvantageous to the consenting party, undue influence is presumed where the consenting party establishes that a sufficiently special relationship of trust and confidence existed between the parties, at the time of contract formation.

Except where undue influence is presumed, as outlined in Articles 2 and 3, it is for the party claiming to have been unduly influenced to prove:

(a) that the other party to the transaction, or other party who induced the transaction for her/his own benefit, had the capacity to influence the consenting party;

(b) that the other party in fact took advantage of its capacity to influence the consenting party;

(c) that the influence that was exercised was undue;

(d) that the undue influence that was exercised, solely or in part, brought about the transaction; and

(e) that either:

(i) there had been an abuse of confidence by the other party; or

(ii) the transaction was manifestly disadvantageous to the consenting party.

The law distinguishes between different forms of undue influence. First, a distinction is drawn between actual undue influence (see Rule 20, Article 4) and presumed undue influence (see Rule 20, Articles 2 and 3). There

are certain types of relationships in which undue influence is presumed. In the context of such relationships, it is for the party seeking to rely upon the undue influence (the "weaker" party) to prove the existence of a relationship giving rise to a presumption of undue influence. Where that is done, it is then for the other party (the "stronger" party) to rebut the presumption by proving that the "weaker" party's actions were purely voluntary and well understood. In contrast, in cases of actual undue influence, the party arguing that a particular contract is voidable due to undue influence must prove the existence of undue influence.

Second, the law distinguishes between two types of situations giving rise to a presumption of undue influence. A manifestly disadvantageous transaction between:

(a) a parent and child;[1] or
(b) a guardian and warden;[2] or
(c) a religious advisor and disciple;[3] or
(d) a solicitor and client;[4] or
(e) an express trustee and beneficiary;[5] or
(f) a doctor or a medical assistant and patient.[6]

is presumed to involve undue influence. Further, a presumption of undue influence also arises where there is a sufficiently special relationship of trust and confidence between the parties, at the time of contract formation.

6.7.1 Presumed undue influence

Situations involving presumed undue influence, based on the type of relationship between the parties, is exemplified in *Allcard v Skinner*.[7] In that case, the plaintiff sought to recover property given to a religious order to which she had been a member at the time the property was donated. The Court found that, while the donation was made under undue influence, the plaintiff was unable to recover the gift as six years had lapsed since the undue influence ceased:

It was urged that the Plaintiff did not know her rights until shortly before she asked for her money back. But, in the first place, I am not satisfied that the Plaintiff did not know that it was at least questionable whether the Defendant could retain the Plaintiff's money if she insisted on having it back. In the next place, if the Plaintiff did not know her rights, her ignorance was simply the result of her own resolution not to inquire into them. She knew all the facts; she was in communication with her present solicitor in 1880, his remark that "it was too large a sum to leave behind without asking for it back", was a clear intimation to her that she ought to ask for her money back, and was a distinct invitation to her to consider her rights. She declined to do so; she preferred not to trouble about it. Under these circumstances it would, in my opinion, be wrong and contrary to sound principle to give her relief on the ground that she did not know what her rights were. Ignorance which is the result of deliberate choice is no ground for equitable relief; nor is it an answer to an equitable defence based on laches and acquiescence.[8]

Another case of undue influence in a religious context is *McCulloch v Fern*.[9] The dispute related to the plaintiff's wife who had, on a number of occasions, been told that her paying the mortgage for a property owned by the defendants, who were leaders of a sect to which the plaintiff's wife was a devoted member, was part of a divine plan. The plaintiff's wife followed the instructions, and later died. After her death, the plaintiff sought to recover the money. The evidence showed that, at the time of the payment, the plaintiff's wife was isolated, frail, in poor health and undergoing a physically taxing "initiation" procedure. The Court had no problem finding a presumption of undue influence, and the defendants failed to rebut that presumption.

As is made clear above (and through Article 3), the presumption of undue influence is by no means limited to the type of relationships listed in Article 2. However, where the relationship does not fall within one of the

1. See eg Lancashire Loans Ltd v Black [1934] 1 KB 380.
2. See eg Webber v New South Wales (2004) 31 Fam LR 425.
3. See eg Allcard v Skinner (1887) 36 Ch D 145.
4. See eg Westmelton (Vic) Pty Ltd v Archer and Schulman [1982] VR 305.
5. See e.g., Bank of New South Wales v Rogers (1941) 65 CLR 42 at 51.
6. See e.g., Breen v Williams (1996) 186 CLR 71, at 92.
7. (1887) 36 Ch D 145.
8. Allcard v Skinner (1887) 36 Ch D 145, at 188, per Lindley LJ.
9. [2001] NSWSC 406.

categories of Article 2, the claimant needs to establish that the relationship was such that she/he reposed such a degree of trust and confidence in the other person that the presumption of undue influence is motivated. Thus, for example, it has been held in some cases that the relationship between spouses was a sufficiently special relationship of trust and confidence for undue influence to be presumed.

In *Johnson v Buttress*,[10] the plaintiff/respondent sought to have a document, transferring ownership in a piece of land to the defendant/appellant, set aside. Mr Buttress was described by the Court as being of "less than average intelligence" and having "little or no experience or capacity for business". The defendant, Johnson, was a friend of Buttress's wife, and, after Mr Buttress's wife died, Mr Buttress relied upon the defendant for advice and support in financial and emotional matters. Before his death, Mr Buttress transferred ownership in a piece of land to the defendant. Mr Buttress's son sought to have the transfer set aside, and the Court found that the relationship between Mr Buttress and the defendant was of the kind motivating the presumption of undue influence, and that the defendant had not managed to rebut the presumption.

Further, in *Lloyds Bank v Bundy*,[11] it was held that, while there is no general automatic fiduciary relationship between a banker and its clients, such a relationship existed in the special circumstances of the case. In that case, the plaintiff and defendant had a relationship of trust and confidence due in part to the length of the relationship. The plaintiff agreed to guarantee the debts of his son without being advised of his son's financial difficulties by the defendant. The Bank was unable to rebut the presumption of undue influence.

It may not be possible to make an exhaustive list of the factors to be taken into account in evaluating whether a particular case involves the type of special relationship that justifies the presumption of undue influence. However, based on *Union Fidelity Trustee Co of Australia Ltd v Gibson*,[12] it seems clear that factors such as emotional dependence, level of education, intelligence and business sense, character, personality, gender, age, presence of independent advice, and the general nature of the relationship ought to be considered.

As is clear from Article 1 of Rule 20, where the consenting party did not, solely or in part, make its decisions based on undue influence, the resulting agreement is not voidable. Thus, the fact that the relationship between the parties is of a kind that gives rise to a presumption of undue influence is no absolute guarantee that the consenting party successfully can argue that it acted under undue influence.

In *Westmelton (Vic) Pty Ltd v Archer and Schulman*,[13] the plaintiff had acted as the defendant's solicitor for some time. He continued doing the company's legal work after being appointed as a director and chairman of the company's board. At the time, the company was to pay for his legal services, the plaintiff suggested that instead of paying the full amount, the company should give him a share of the company's profit. This proposal was discussed and agreed to by the company in the plaintiff's absence. The company paid a reduced amount for the legal services but refused to give the plaintiff any share of the profits. The Court held that:

The extent and weight of the burden cast upon the person in whom the confidence was reposed, and the matter (where the presumption applies) of which the court will be required to be satisfied before it will regard the presumption as having been negatived, must vary enormously with all the circumstances of the case.[14]

Having made this observation and having noted that the company had more expertise in commerce and finance than most solicitors, the Court was satisfied that the company had not relied upon any confidence or trust in the plaintiff. Thus, there was no undue influence.

The House of Lords have held that, for undue influence to be presumed, the weaker party must show that the transaction resulting from the consenting party's consent is manifestly disadvantageous to the consenting party (or alternatively, in the case of actual undue influence, that there had been an abuse of confidence by the other party).[15] In Australia, this approach was followed in *Farmers' Co-Op Executors & Trustees v Perks*,[16] but in *Barburin v Barburin*[17] Kelly S.P.J. stated that:

10. (1936) 56 CLR 113.
11. [1975] 1 QB 326.
12. [1971] VR 573, at 577 per Gillard J.
13. [1982] VR 305.
14. Westmelton (Vic) Pty Ltd v Archer and Schulman [1982] VR 305, at 313 as per Starke, Kaye and Fullagar, JJ.
15. National Westminister Bank Plc v Morgan [1985] AC 686.
16. (1989) 52 SASR 399.
17. [1990] 2 Qd R 101.

The Australian authorities do not go this far and I would not think that the proposition as there expressed [in *Midland Bank plc v Shephard*,[18] referring to *National Westminister Bank Plc v Morgan*[19]] represents the law of this country.[20]

It is clear that Kelly S.P.J. took the view that there is no need for the resulting transaction to be manifestly disadvantageous to the consenting party. However, his Honour could not point to any case law supporting this view and relied exclusively on the unsupported views expressed in a leading textbook. Furthermore, as Kelly S.P.J. did not find that the case at hand involved any actual undue influence, and any potential presumed undue influence had been rebutted, it was not necessary to address the issue of whether the resulting transaction had been manifestly disadvantageous to the consenting party. Thus, the views expressed on that issue are *obiter dicta* leaving the exact requirements under Australian law somewhat unclear.

Nevertheless, requiring the resulting transaction to be manifestly disadvantageous to the consenting party rests on a sound and logical foundation, particularly when bearing in mind that a claimant may still prove actual undue influence where a presumption of undue influence is not fully justified.

6.7.2 Actual undue influence

A situation of actual undue influence arose in *Bank of Credit and Commerce International SA v Aboody*.[21] That case involved a husband and wife who were directors and shareholders of a company. In reality, it was the husband who ran the company and the wife signed documents without asking questions. On the husband's initiative, the wife signed several guarantees and charges in favour of the plaintiff bank. The wife argued that these were signed under actual undue influence. While the Court found that the documents were in fact signed under undue influence, the wife had not established that the transaction was manifestly disadvantageous to her. Importantly, the Court outlined what must be proven in a case of actual undue influence:

Leaving aside proof of manifest disadvantage, we think that a person relying on a plea of actual undue influence must show that (a) the other party to the transaction (or someone who induced the transaction for his own benefit) had the capacity to influence the complainant; (b) the influence was exercised; (c) its exercise was undue; (d) its exercise brought about the transaction.[22]

In *Farmers' Co-Op Executors & Trustees v Perks*,[23] the evidence showed a long history of violence perpetrated by a husband against his wife, ending in him murdering her. The Court held that the wife's transfer of her interest in a farming property to her husband was a result of actual undue influence. The plaintiff argued that the transfer was also result of duress, however the Court found that the circumstances could be subsumed as an extreme example of actual undue influence and therefore a matter that was unnecessary to determine.

Public Service Employees Credit Union Co-op Ltd v Campion[24] is another case where the plaintiff argued both duress and undue influence. In that case, a father had executed a guarantee of repayment in relation to a loan agreement between his son and the plaintiff. The loan was to cover the repayment of moneys illegally obtained by the son from the plaintiff, and the plaintiff had informed the father that if he was unwilling to execute the guarantee of repayment, the police would be notified. Justice Kelly noted that: "It is clear that the defendant entered into the agreement under threat that if he did not his son would be prosecuted. That, in my opinion, constituted undue influence but not duress".[25] This case has obvious similarities with *Scolio Pty Ltd v Cote*,[26] discussed above (6.4). In that case, Ipp J made some illustrative observations as to the differences between the *Scolio* case and the *Campion* case:

In the particular circumstances of [the *Campion* case] … the defendant, to the plaintiff's knowledge, gained very little benefit from undertaking the liability to pay for his son's debt. That is to be contrasted with the

18. [1988] 3 All ER 17.
19. [1985] AC 686.
20. Barburin v Barburin [1990] 2 Qd R 101, at 109.
21. [1990] 1 QB 923, Followed in Dunbar Bank plc v Nadeem [1998] 3 All ER 876
22. Bank of Credit and Commerce International SA v Aboody [1990] 1 QB 923, at 967.
23. (1989) 52 SASR 399.
24. (1984) 75 FLR 131.
25. Public Service Employees Credit Union Co-op Ltd v Campion (1984) 75 FLR 131, 138.
26. (1992) 6 WAR 475.

present case where the deed must be taken to record liability for an existing debt and further to provide to the respondent time to pay which he would otherwise not have had. Moreover, the defendant in [the *Campion* case] … believed that, if he did enter into the agreement to pay, the prosecution would be stifled.[27]

6.7.2 Appeals in cases of undue influence

Finally, it is interesting to note that, both in relation to undue influence and unconscionability (discussed directly below), appeal courts may be reluctant to interfere with the assessment made by the trial judge:

In a case such as this the assessment by the learned trial judge of the character of the principal players is of vital importance, and here a very experienced trial judge had the opportunity over some days of assessing those persons. In particular the trial judge's assessment of the appellant was of critical importance … Judges concerned with allegations of undue influence or unconscionable dealing frequently speak in terms of "the weaker party", "the stronger party", and persons under a disability … The trial judge is in a peculiarly advantageous position in making such a comparison between the disputing parties, and in such cases the advantage of seeing and hearing the witnesses assumes even greater significance.[28]

27. Scolio Pty Ltd v Cote (1992) 6 WAR 475, at 488.
28. Baburin v Baburin (No 2) [1991] 2 Qd R 240, at 252, per Williams J.

6.8 Unconscionability

As discussed, duress and undue influence relate specifically to the requirement for consent being given freely, and misrepresentations and mistakes relate specifically to the requirement for consent to be informed. In contrast, unconscionability could be said to relate to both of those aspects of consent; that is, under the right circumstances, unconscionability can be argued if the given consent was not informed and/or if it was not given freely.

Unconscionability is addressed both under equity and under statutes.

6.8.1 Unconscionability under equity

Rule 21

1. Where a contract is entered into as a result of unconscionable conduct, it is voidable at the innocent party's application, unless it is proven that the contract was fair, just and reasonable, or it is proven that an unreasonable amount of time has lapsed since the time the unconscionability ceased.

2. For the purpose of Article 1, conduct is unconscionable where:

(a) the innocent party acts under some special disadvantage;

(b) the other party has actual or constructive awareness of the innocent party's special disadvantage; and

(c) the other party exploits the innocent party's special disadvantage.

3. In determining whether a party acts under special disadvantage, attention shall be given to that party's circumstances, as far as they are of relevance for the contract in question, including, but not limited to:

(a) age;

(b) sex;

(c) health;

(d) intoxication;

(e) infirmity of body or mind;

(f) poverty;

(g) needs of any kind;

(h) emotional dependence;

(i) illiteracy;

(j) level of education;

(k) level of experience;

(l) ignorance; and

(m) access to assistance, advice and explanations.

The application of the equitable doctrine of unconscionable dealings is well illustrated in *Commercial Bank of Australia Ltd v Amadio*.[1] There, the matter before the Court involved Mr and Mrs Amadio, an elderly couple with Italian origins, who had agreed to act as guarantors for a building business owned by their son.

The couple had little business experience, little formal training and limited grasp of written English. Further, they had no reason to believe that their son's company was in financial trouble. However, the bank was well aware of the company's financial difficulties. Indeed, it was in response to the bank's demands for security that the son approached Mr and Mrs Amadio to give a guarantee of approximately $50,000 for six months (the son had not discussed any such limitations to the guarantee with the bank). When the bank manager, Mr Virgo, visited Mr and Mrs Amadio to obtain their signatures, the couple did not read the agreement, and apart from discussing that the guarantee was in fact not limited in time, Mr Virgo did not explain the content of the agreement.

The agreement that was signed was not at all in line with what the son had told Mr and Mrs Amadio. Instead, under the agreement, Mr and Mrs Amadio undertook to pay to the bank, on demand, all money owing, or that thereafter became owing, by the company, together with interest. Less than a year after the agreement was signed, the company went into liquidation and the bank sought to exercise the rights under the contract. It was held that the whole transaction was to be set aside, and Deane J expressed the following rule:

The jurisdiction [of courts of equity to relieve against unconscionable dealing] is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or "unconscientious" that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable.[2]

Furthermore, Mason J stated that:

> [I]f A having actual knowledge that B occupies a situation of special disadvantage in relation to an intended transaction, so that B cannot make a judgment as to what is in his own interests, takes unfair advantage of his (A's) superior bargaining power or position by entering into that transaction, his conduct in so doing is unconscionable. And if, instead of having actual knowledge of that situation, A is aware of the possibility that that situation may exist or is aware of facts that would raise that possibility in the mind of any reasonable person, the result will be the same.[3]

This passage makes clear that there is no need for actual knowledge of the innocent party's special disadvantage; constructive knowledge is sufficient. However, it is equally clear that, where the party that is said to have acted unconscionably had neither actual nor constructive knowledge of the innocent party's special disadvantage, as was the case in *Lisciandro v Official Trustee in Bankruptcy*,[4] the doctrine of unconscionability cannot intervene.

In the *Lisciandro* case, the appellant (Mr Lisciandro) had entered into guarantees in respect of the obligations of a company (TAG Industries). When the company to which the guarantees were granted (Alminco) sought to exercise its rights under these guarantees, Lisciandro argued that the guarantees were unenforceable against him due to misrepresentations made by the person procuring the guarantees (Mr Radford) on behalf of TAG Industries. Lisciandro argued that Radford was an agent of Alminco and procured the guarantee from Lisciandro on behalf of TAG and Radford's misrepresentations could be imputed to Alminco. One of the matters in focus was whether Alminco had knowledge of Mr Lisciandro's special disadvantage in relation to Mr Radford. The Court adopted the reasoning of the trial judge, Kiefel J:

In the present case Alminco could not be said to have known of any financial difficulties experienced by Mr Radford or that he was unlikely to be able to meet payments on the account. It knew little of his background. It knew nothing of Mr Lisciandro's personal circumstances, save that he was a director of the company TAG Industries, as in fact he was, and that he had in that sense an interest in the company. It knew nothing of the

1. (1983) 151 CLR 447.
2. Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447 at 474.
3. Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447 at 467.
4. (1996) 69 FCR 180.

trust he placed in Mr Radford nor indeed of any relationship between Mr Radford and Mr Lisciandro save for the business relationship appearing from the information provided. It made no inquiry, but there was in my view nothing apparent from the circumstances to raise a question as to Mr Lisciandro's circumstances or understanding of the transaction. Whilst it would obviously be desirable if creditors made inquiries as a matter of course I do not understand the law to have proceeded to the point where it is required in all cases before a security document obtained can be enforced.[5]

The impossibility of exhaustively listing the circumstances under which a party is acting under special disadvantage is widely recognised. However, in *Amadio*, the High Court referred to Fullagar J's statement in *Blomley v Ryan*:[6]

The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other.[7]

The last sentence of Fullagar J's statement is not to be understood to imply that inequality of bargaining power always indicates unconscionability. In fact, the respective strength of contractual parties is rarely, if ever, exactly equal.

In *Blomley v Ryan*,[8] the plaintiff had entered into a contract with the defendant by which the latter sold a grazing property to the former for £25,000. Having noted that the defendant was heavily intoxicated at the time of negotiations and at the time of signing the contract and bearing in mind that the property was worth £8,000 – 9,000 more than the agreed price, the Court found that the contract should be rescinded. The majority of the factors listed above in Article 3, are mentioned in Fullagar J's statement in this case (see above). Others, such as "emotional dependence", have been recognised as relevant in other cases.[9] While a few cases have already been discussed, it is useful to examine a few more to properly illustrate the application of the equitable doctrine of unconscionability.

In *Louth v Diprose*,[10] the respondent (Diprose) was a solicitor who was "completely in love" with the appellant (Louth). While his feelings were not shared by Louth, their friendship lasted for approximately seven years. Having known each other for about three years, Diprose bought a house for Louth in 1984. Louth was already living in the house in question and had told Diprose that she would commit suicide if she was forced to move out. Louth continued living in the house, but in mid-1988 the relationship between the two parties deteriorated, and Diprose sought ownership of the house. The High Court held in Diprose's favour, and Deane J noted that:

On the findings of the learned trial judge in the present case, the relationship between the respondent and the appellant at the time of the impugned gift was plainly such that the respondent was under a special disability in dealing with the appellant. That special disability arose not merely from the respondent's infatuation. It extended to the extraordinary vulnerability of the respondent in the false "atmosphere of crisis" in which he believed that the woman with whom he was "completely in love" and upon whom he was emotionally dependent was facing eviction from her home and suicide unless he provided the money for the purchase of the house. The appellant was aware of that special disability. Indeed, to a significant extent, she had deliberately created it. She manipulated it to her advantage to influence the respondent to make the gift of the money to purchase the house.[11]

In discussing this case, some commentators have made important observations as to the potential impact that societal presumptions regarding gender and class may have on a court's reasoning.[12] This is extremely

5. Lisciandro v Official Trustee in Bankruptcy (1996) 69 FCR 180, at 185 – 186.
6. (1956) 99 CLR 405.
7. Blomley v Ryan (1956) 99 CLR 405, at 475.
8. (1956) 99 CLR 405.
9. See eg Louth v Diprose (1992) 175 CLR 621, at 638.
10. (1992) 175 CLR 621.
11. Louth v Diprose (1992) 175 CLR 621, at 638.
12. See further: Paterson 6th at 802-803 referring to Sarmas, Storytelling and the Law: A Case Study of Louth v Diprose (1994) 19 Melbourne University Law Review 701 .

important. At the minimum, it is ma reminder that (1) societal values and perceptions evolve, (2) the law ought to reflect those changes, and (3) older precedents must be evaluated by reference to modern societal standards rather than being blindly accepted.

A more recent case is perhaps hinting at the mentioned change. In *Mackintosh v Johnson*,[13] a man in his mid-70s – Mr Johnson – was infatuated with a considerably younger woman, Ms Mackintosh. Their relationship began with a sexual encounter in August 2008 and by February 2009, Mr Johnson had: (1) paid Ms Mackintosh about $175,000 to support her business, and (2) provided $480,000 to buy a house in her name as sole proprietor. While the relationship did not end until April 2010, all sexual relations ceased after 17 January 2009, the day on which Mr Johnson gave Ms Mackintosh the deposit on the house.

Once the relationship ended, Mr Johnson pleaded, amongst other things unconscionability, pointing to special disadvantage constituted by his age, the fact that he was lonely and vulnerable, the fact that he was retired and desirous of a companion, as well as that he was 'infatuated' with Ms Mackintosh, and that in February 2009 he was recovering in hospital from heart surgery.

Examining the facts of the case, the Court pointed out that Mr Johnson was a successful and wealthy businessman who was well able to afford his dispositions in favour of Ms Mackintosh. This was placed in contrast to *Louth v Diprose* where the man in question gave away nearly all of his assets to the woman, in circumstances where he simply could not afford it and he had three dependent children. The Court also emphasised the absence of an atmosphere of crisis in this case, which may be most important distinguishing factor to *Louth v Diprose*.

Further, the Court disagreed with the trial judge who had found in favour of Mr Johnson by pointing to the impact of the infatuation and the other argued factors pointing to a special disadvantage:

Taken together, his reasons amount to no more than findings that Mr Johnson became infatuated with Ms Mackintosh and that he set out to win her continued affections by lavishing large sums of money upon her in the hope of establishing a lasting relationship. That state of affairs was not sufficient to establish a special disability within the meaning of the authorities. Something more than mere infatuation and consequent foolish action based on clouded judgment was required to establish that Mr Johnson's ability to make decisions in his own best interests was so seriously affected as to amount to a special disability or disadvantage.[14]

Against this background, the Court concluded that:

Mr Johnson was not affected by a special disability at the time he made the payments to Ms Mackintosh. It is accordingly unnecessary to decide whether Ms Mackintosh exploited him and thus acted unconscionably. The judge found that Ms Mackintosh acted deceitfully, by concealing the true nature of her feelings for Mr Johnson from him. In our opinion, conduct of that kind would not, on its own, be sufficient to amount to exploitation of the kind required to establish a case based on unconscionable conduct. It is the stuff of ordinary human relationships.[15]

Another illustrative case is *Bridgewater v Leahy*.[16] There the respondent (Neil) had had a close business and personal relationship with a man named Bill York. Put simply, Mr York had agreed to sell land to the respondent at a very favourable price. When Mr York died, his four daughters (jointly the appellants) sought the sale to be set aside, arguing that the transaction was unconscionable. Even though a medical practitioner had found Mr York fit to make his own decisions, and despite the fact that Mr York was perfectly happy with the disputed transaction, the majority of the High Court found the contract unconscionable. This decision may be thought of as surprising considering that Mr York had non-financial reasons for selling the land to the respondent. Mr York wanted to retain the land as "an integrated farming enterprise under reliable and experienced management".[17] Instead of taking this into account in determining whether the contract was fair, just and reasonable, the majority of the High Court viewed this goal as an indication of emotional dependence: "Bill's goal to preserve his rural interest intact and his perception that [the respondent] was the candidate to

13. Mackintosh v Johnson [2013] VSCA 10.
14. Mackintosh v Johnson [2013] VSCA 10, para 77.
15. Mackintosh v Johnson [2013] VSCA 10, para 84.
16. (1998) 194 CLR 457.
17. Bridgewater v Leahy (1998) 194 CLR 457, at 121.

provide reliable and experienced management thereof were significant elements in his emotional attachment and dependency upon Neil".[18]

Furthermore, it is interesting to note that, in the majority's view, the fact that Mr York had had access to legal advice was negated by the fact that Mr York's solicitor also did work for the respondent. Evidence suggesting that the transaction would have been carried through even if another solicitor had been involved was held to be irrelevant: "[The] denial of the opportunity to have 'the assistance of a disinterested legal adviser' … rather than speculations as to what might have followed had it been pursued, is an element in the unconscientious conduct in respect of which equity intervenes".[19]

The 'weaker party' to a contract entered into as a result of unconscionable conduct is entitled to the same remedies as is the weaker party to a contract entered into under duress or undue influence. Thus, the contract is voidable at the weaker party's option. However, where the other party proves that the contract was, in fact, fair, just and reasonable, the weaker party loses her/his right to have the contract declared void. As far as the fairness, justness and reasonableness of the contract are concerned, the statement made in *Blomley v Ryan*[20] is illustrative:

It does not appear to be essential in all cases that the party at a disadvantage should suffer loss or detriment by the bargain …But inadequacy of consideration, while never of itself a ground for resisting enforcement, will often be a specially important element in cases of this type. It may be important in either or both of two ways – firstly as supporting the inference that a position of disadvantage existed, and secondly as tending to show that an unfair use was made of the occasion.[21]

Thus, the contract being unfair, unjust and/or unreasonable is not a necessary requirement for establishing unconscionability. Instead, the contract being fair, just and reasonable is a defence against the defendant's unconscionable conduct making the contract voidable.

Finally, just as in relation to duress and undue influence, a party having entered into a contract as a result of unconscionable conduct must bring its action as soon as possible after that the unconscionability has ceased. In *Barburin v Barburin*,[22] the plaintiff had sold shares to her sons. Nineteen years later she sought damages and to have the transaction set aside. The trial judge found that, while the case did not involve undue influence, the sons had engaged in unconscionable conduct. However, the trial judge also found that the plaintiff's delay disentitled her to relief:

In my view there was unreasonable delay in commencing these proceedings and in view of what has occurred in the period, which has elapsed since the transfer of the shares, the consequences of that delay are such that it would be unjust to grant the relief sought by the plaintiff.[23]

The trial judge's approach was upheld on appeal.[24]

6.8.2 Unconscionability under statute law

There are several pieces of legislation that regulate unconscionability. Doubtlessly, the most important of these is the *Competition and Consumer Act 2010* (Cth) (formally the *Trade Practices Act 1974* (Cth)), and more precisely the Australian Consumer Law making up Schedule 2 of that Act. In addition, as far as New South Wales is concerned, attention must also be given to the *Contracts Review Act 1980* (NSW).

Further, while the statutory provisions dealt with in this part are discussed in the context of their effect on the formation of a contract (i.e., issues going to consent), several of the relevant provisions may also regulate the substance of a contract, and thereby have an effect, strictly speaking, going beyond the issues going to consent.

18. Bridgewater v Leahy (1998) 194 CLR 457, at 493.
19. Bridgewater v Leahy (1998) 194 CLR 457, at 486.
20. (1956) 99 CLR 405.
21. Blomley v Ryan (1956) 99 CLR 405, at 405.
22. [1990] 2 Qd R 101.
23. Barburin v Barburin [1990] 2 Qd R 101, at 113, per Kelly S.P.J.
24. Baburin v Baburin (No 2) [1991] 2 Qd R 240.

6.8.2.1 The relevant rules of the *Australian Consumer Law*

There are three provisions in the ACL of relevance in relation to unconscionability, all of which are found in Part 2-2.

Section 20 (TPA s. 51AA) merely provides for the application of the common law and equity discussed above:

> ***Australian Consumer Law*, s.20**
>
> (1) A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.
>
> Note: A pecuniary penalty may be imposed for a contravention of this subsection.
>
> (2) This section does not apply to conduct that is prohibited by section 21.

The definition of "in trade or commerce" has been discussed above (see Chapter 2). The effect of ACL s. 20 is to extend the remedies available under the ACL to situations involving unconscionable conduct, as defined under Australian common law. Importantly, one exception is made: s. 20 is not applicable where the more specific rules of the ACL, as found in s. 21 are applicable.

In *Australian Competition & Consumer Commission v CG Berbatis Holdings Pty Ltd*,[25] a legal dispute was ongoing between the owner of a shopping complex and several of its lessees. In order to be able to sell its business, one lessee needed to have the lease renewed. The owner of the shopping complex was aware of the business operators desire to sell and would only agree to renew the lease if a clause was included in the lease agreement (cl 14). By which the lessee agreed to discharge the owner from all claims made in the ongoing legal dispute. The ACCC brought an action arguing that this conduct amounted to a breach of the TPA's s. 51AA (ACL s. 20). The Court made the following observation:

> There were three apparent resolutions to the impasse between the parties. First, the lease might be renewed without the inclusion of cl 14. This was unacceptable to the owners; they were not obliged to grant any renewal at all and so were at liberty to prevent that outcome and thereby deprive the [lessee] of their sale proceeds. The second and third possibilities were both acceptable to the owners but … the second probably was preferable. The second was renewal of the lease and inclusion of cl 14; the third was no renewal and no release of the owners by cl 14. To the [lessee], the renewal of the lease (albeit giving up the other claim later shown to be worth apparently only some $3,000) was vital to the sale of the business, making the second outcome preferable to the third. Against that background, it may not be surprising that the bargain struck reflected the second outcome.[26]

In the light of this, the Court held that there was no special disadvantage.

A somewhat similar dispute arose in *ACCC v Samton Holdings Pty Ltd*.[27] In that case, Patricia and Giuseppe Farruggio were operating a lunch bar at premises leased from the respondent. The lease was to expire on 2 June but could be renewed up until 2 March. The Farruggios' company, New York Fries Pty Ltd, executed an agreement to sell the lunch bar to a company called Executive Bloodstock Services Pty Ltd. The sale was conditioned upon the respondent agreeing to transfer the lease from the Farruggios to Executive Bloodstock. The respondent agreed, and the sale was completed on 26 of February. On 18 March, Executive Bloodstock gave notice to the respondent of their intention to renew the lease but were advised that they acted too late and that the lease would expire on 2 June. Following negotiations, it was agreed that Executive Bloodstock would be allowed to lease the premises. Although the conditions of the new lease were unfavourable, Executive Bloodstock considered they had no alternative, as their newly purchased business would have been "quite worthless" without the lease. The ACCC commenced proceedings against the respondent, alleging

25. (2003) 214 CLR 51.
26. Australian Competition & Consumer Commission v CG Berbatis Holdings Pty Ltd (2003) 214 CLR 51, at 44.
27. (2002) 117 FCR 301.

unconscionable conduct in breach of the TPA's s. 51AA (ACL s. 20). The Court held in favour of the Respondent.

In commenting on the proper scope of the TPA's s. 51AA (ACL s. 20), the Court noted that: "Section 51AA [ACL s. 20], in referring to the unwritten law from time to time of the States and Territories, refers to the common law of Australia." It also observed that:

[T]he words of the section and the extrinsic material indicate that it was not intended to extend the categories of unconscionable conduct in respect of which relief could be granted. Its object is to attract, to cases of unconscionable conduct to which it applies, the remedies available under the Trade Practices Act and to allow for those remedies to be pursued by the Commission.[28]

And that:

Almost by definition the conduct which attracts equitable relief as unconscionable can be viewed as "towards the extreme end" of the scale of unreasonable behaviour by one person towards another. What his Honour did was to make plain that it is not enough to demonstrate that one person has acted unreasonably towards another in the circumstances of a particular case.[29]

The Court also entered into a detailed discussion as to when a person can be said to be under a special disability:

[T]he fact that somebody is in a position of special weakness because they have lost through their own fault rights necessary to the operation of their business does not provide a basis upon which a claim for unconscionable conduct can be built because another party puts a premium on the acquisition of those rights … The disadvantage under which the Farruggios and Executive Bloodstock laboured had arisen from a combination of considered commercial judgment (the decision to borrow heavily in order to purchase the business) and the Farruggios oversight in neglecting to exercise the option in good time. These factors did not impair the Farruggios ability to make a decision about the best course of action in the circumstances. At least in the case of an experienced business person there must, in our opinion, be something more than commercial vulnerability (however extreme) to elevate disadvantage into special disadvantage … The Farruggios situation could not be characterised as one of special disadvantage only because the respondents failed to make an offer that they had no obligation to make.[30]

In other words, a weaker party cannot rely upon a self-imposed special disadvantage in arguing unconscionability.

Section 21 (TPA s. 51AB) provides rules regulating unconscionability in the context of a person supplying goods or services to consumers:

***Australian Consumer Law*, s.21**

(1) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a person; or

(b) the acquisition or possible acquisition of goods or services from a person;

engage in conduct that is, in all the circumstances, unconscionable.

(2) This section does not apply to conduct that is engaged in only because the person engaging in the conduct:

(a) institutes legal proceedings in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition; or

(b) refers to arbitration a dispute or claim in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition.

(3) For the purpose of determining whether a person has contravened subsection (1):

28. ACCC v Samton Holdings Pty Ltd (2002) 117 FCR 301, 44.
29. ACCC v Samton Holdings Pty Ltd (2002) 117 FCR 301, 52.
30. ACCC v Samton Holdings Pty Ltd (2002) 117 FCR 301, 62.

(a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(4) It is the intention of the Parliament that:

(a) this section is not limited by the unwritten law relating to unconscionable conduct; and

(b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and

(c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:

(i) the terms of the contract; and

(ii) the manner in which and the extent to which the contract is carried out;

and is not limited to co

Consideration of the circumstances relating to formation of the contract.

The definition of the terms "supply", "engage in conduct", "goods", "services" and "consumer" are all of relevance to an understanding of the scope of s. 21. Those terms have been discussed in detail above (see 2.6 and 4.1.1), and that discussion will not be repeated here. The prohibition of unconscionable conduct in s. 21 broadens the equitable concept of unconscionability by including consideration of matters beyond the circumstances relating to contract formation (see ACL s. 22). For example, the court may have regard to the terms and conditions of the contract. Previously, the scope of s. 21 was limited to persons other than a listed public company, however, this was recently amended. Section 21 is now available for publicly listed companies.

Although s. 21 expressly makes clear that 'this section is not limited by the unwritten law relating to unconscionable conduct', this has not prevented courts from mixing in notions from equity when applying s. 21 (and more specifically its sister-provision in ASIC s. 12CB). In the High Court's 2019 decision in *Australian Securities and Investments Commission v Kobelt*, Kiefel CJ and Bell J. stated that:

It is the application of the last-mentioned value with which the appeal is concerned. In *Kakavas v Crown Melbourne Ltd* and *Thorne v Kennedy* it was said that a conclusion of unconscionable conduct requires not only that the innocent party be subject to special disadvantage, but that the other party must also unconscientiously take advantage of that special disadvantage.[31] (internal footnotes omitted)

In contrast, in the same case, Edelman J stated:

[S]tatutory unconscionability permits consideration of, but no longer requires, (i) special disadvantage, or (ii) any taking advantage of that special disadvantage. Like other open-textured criteria, such as "unfair" or "unjust", there is no clear baseline moral standard for what constitutes "unconscionable" conduct within s 12CB of the ASIC Act.[32]

This important matter remained unsettled until the FCAFC decision in *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd*:[33]

Whilst some form of exploitation of or predation upon some vulnerability or disadvantage of people will often be a feature of conduct which satisfies the characterisation of unconscionable conduct under s

31. Australian Securities and Investments Commission v Kobelt [2019] HCA 18, [12].
32. Australian Securities and Investments Commission v Kobelt [2019] HCA 18, [295].
33. [2021] FCAFC 40.

21, such is not a necessary feature of the conception or a necessary essence in the embodied meaning of the statutory phrase. The circumstances of this case reveal why this must be so. Here the facts that were agreed for the penalty hearing are such as to permit the conclusions (substantially drawn by the primary judge) that the respondents engaged in deliberate systematic conduct of misusing their superior bargaining position by dishonestly misleading commercial counterparties (referred to as the **investors** of no proven particular vulnerability other than from their place in the relevant commercial circumstances) and pressuring the investors by imposing entirely unjustified and unnecessary requirements upon the investors as their contractual counterparties, thereby clearly exhibiting a dishonest lack of good faith, all in order to extract for at least one of them financial benefits which were surreptitious and undisclosed to the investors.[34]

More generally, it may be seen as unhelpful that courts have sought to proclaim a diverse range of threshold tests for what amounts to unconscionable conduct under s. 21. After all, on their own, phrases such as 'unfair', 'exploitation' and 'dishonest lack of good faith' are hardly more enlightening than is the phrase 'unconscionable conduct'. However, taken together, perhaps these phrases add somewhat to our understanding. In the end, however, it is the text of the legislation that must be our main focus. Courts have acknowledged this.[35]

Bearing in mind the factors set out in s. 21(1), it is now expressly provided by s. 21(4) that "this section is not limited by the unwritten law relating to unconscionable conduct." This confirms previous commentary suggestions that the scope of s. 21(4) is broad. *Australian Competition & Consumer Commission v Lux Pty Ltd*[36] concerned the sale of a vacuum cleaner by Lux to Mrs Standing. Mrs Standing had an intellectual disability and was illiterate. Mr Podger, a Lux representative, went to her house. There, after inspecting her old vacuum cleaner, he showed Mrs Standing a new vacuum cleaner. He stated that he offered Mrs Standing a trade-in deal in which he will credit her $50 for her old vacuum cleaner. She agreed because she needed the money. Mrs Standing filled in a credit application. She could not spell or write very well, so Mr Podger took over filling in the form, which he stated was common practice. He also noted that he considered whether she needed independent advice, and because he thought it was just a matter of her not be able to spell, he dismissed that thought. Mrs Standing stated that Mr Podger scared her by standing next to her and shouting at her, and that she wanted him to leave. She admitted that she had not communicated her wish for him to leave, or that she did not want to buy the new vacuum cleaner. She argued that her signing the contract was the only means by which she could make Mr Podger leave. She further argued that her illiteracy contributed to her not understanding the contract.

The applicant suggested that Mr Podger's conduct was unconscionable on a number of grounds:

1. The relative bargaining strengths between an intellectually disabled person and Mr Podger (the TPA s. 51AB(2)(a) now, ACL s. 21(2)(a));
2. Mrs Standing's capacity to understand (the TPA s. 51AB(2)(c)), now ACL s. 21(2)(c)); and
3. Mr Podger's conduct constituted undue influence, pressure and/or unfair tactics (TPA s. 51AB(2)(d), now ACL s. 21(2)(d)).

In his judgment, R D Nicholson J stated that:

[T]he features of the meeting between Mrs Standing and Mr Podger … make apparent that the meeting was "clearly unfair or unreasonable" … [and] "irreconcilable with what is right or reasonable". Mr Podger came close to realising this when he thought of the question whether Mrs Standing should receive independent advice. He veered away from that course because he considered she had told him that she could read. However, even if that was the case he was on notice that Mrs Standing was illiterate and unable to understand commercial matters in any depth … While it is clear she was not deprived of an independent and voluntary will, it must have been apparent to him that she was not able to make a worthwhile judgment as to what was in her best interests in the circumstances. I consider that it is established that in all the relevant circumstances (and particularly his decision not to give Mrs Standing the opportunity to take independent advice) he acted without regard to conscience and so acted unconscionably.[37]

34. Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd [2021] FCAFC 40, [4].
35. See e.g.: Ipstar Australia Pty Ltd v APS Satellite Pty Ltd [2018] NSWCA 15.
36. [2004] FCA 926.
37. Australian Competition & Consumer Commission v Lux Pty Ltd [2004] FCA 926, 112.

In the light of this, the Court ruled that Mr. Podger had acted unconscionably.

The application of s. 21 is further illustrated in *Australian Competition & Consumer Commission v Keshow*.[38] That case involved the sale of children's education materials to persons in closed gate indigenous communities. It was argued that the respondent took advantage of the lack of education and commercial experience of the indigenous communities. The goods sold were in many instances not needed or not useful when regarding the age of the consumer. In many instances, the product was not even supplied entirely, or at all.

Payments were open-ended periodic payments, which were received when the appellants received Centrelink benefits. In a number of instances, the respondent continued to receive payments well beyond the value of the goods.

The respondent argued that he did not have control over "stopping the payments" and doing so was solely the responsibility of the complainants. Further, the respondent argued that, in some cases, the buyers had moved to unknown places and could not be contacted.

In considering the educational and commercial literacy of the complainants, the Court held that the respondent was in breach of TPA s. 51AB (ACL s. 21). The Court noted that the respondent was a 63-year-old teacher. Further, the Court observed that the complainants did not ask for documentations or enquire as to when and where the goods will arrive or what would happen if the goods did not arrive. The only document that was signed was the direct debit payment forms. This led the Court to the conclusion that the nature of the transactions was not understood by the complainants. Therefore, the Court held that the respondent was in breach of s. 51AB(2)(a), (b) and (c) (ACL s. 21(2)) in particular and reached the conclusion that the respondent engaged in unconscionable conduct.

Australian Competition & Consumer Commission v Radio Rentals Limited[39] involved Mr Groth, a person with an intellectual disability and a schizophrenic illness. His sole income was his disability pension. He entered into a number of agreements with Radio Rentals, to the sum of approximately $20,700. The ACCC took proceedings against the company as there was concern about Mr Groth's ability to adequately manage his own affairs, and Radio Rentals choice to enter into dealings with such a customer.

The ACCC suggested that the company knew that Mr Groth had a disability and thus could not read the agreements. Further, it was suggested that the agreements were not in his favour, as he paid nearly 40% of his income under them. In the alternative, it was argued that, if Radio Rentals did not know of Mr Groth's special disability, it should have been apparent in the circumstances.

Radio Rentals argued that the agreements used by them in dealing with Mr Groth were the same as for all their other customers, and that the persons who dealt with Mr Groth did not recognise his disability, as he was pointing toward appliances and describing what he needed and for what use.

The Court held that no unfair pressure existed under TPA s. 51AB (ACL s. 21) Mr Groth's disability was borderline (relying on expert evidence to determine his disability), and, although the events in this case were unfortunate, there was no exercise of unfair tactics or pressure exercised when Radio Rentals dealt with Mr Groth. Thus, the appeal was dismissed. A comparison between this case and the *Keshow* case[40] (discussed above), shows that there is a fine line between conduct that is unconscionable and conduct that is not unconscionable.

In *Australian Competition & Consumer Commission v Black on White Pty Ltd*,[41] the organiser of a course had stated that the course in question had certain accreditation, which it in fact did not have. Upon becoming aware of this, some students sought to withdraw from the course. In doing so, it was brought to their attention that the contract contained clauses to the effect of rendering a student liable for the full tuition fee, whether the student commenced the course. Those clauses were held to contravene TPA s. 51AB (ACL s. 21), as they were

38. [2005] FCA 558.
39. [2005] FCA 1133.
40. Australian Competition & Consumer Commission v Keshow [2005] FCA 558.
41. [2001] FCA 372.

"not reasonably necessary for the protection of [the course organisers'] legitimate interests",[42] and were not properly brought to the students' attention at the time the parties entered into the contract.

QANTAS Airways Ltd v Cameron[43] is interesting in that it highlights the enormous diversity of actions being brought under the three sections of the TPA that deal with unconscionability. In that case, passengers who had booked non-smoking seats were seated adjacent to smoking seats and were affected by the smoke. The Court agreed with the trial judge who found that the conduct of Qantas was not unconscionable in allowing smoking on the flights. Further the Court noted that Qantas had taken some steps, albeit inadequate, to diminish the problem which arose from having smokers sitting in close proximity to non-smokers. Further, having noted that the case at hand was not "an appropriate case in which to enunciate all possible denotations of the term 'unconscionable' as it is used in ss. 51AA [ACL s. 20] and 51AB [ACL s. 21] of the Trade Practices Act",[44] the Court stated that:

It is sufficient for present purposes that the term carries the meaning given by the Shorter Oxford English Dictionary, '2. Of actions, etc: Showing no regard for conscience; irreconcilable with what is right or reasonable … The conduct of Qantas was not of this character. Qantas did not act in blatant disregard of the medical problems which environmental tobacco smoke might cause. It acted to diminish the risks but unfortunately it failed to take all those steps which, as a reasonable carrier having regard to the health of its passengers, it could and should have done.[45]

Thus, the Court concluded that Qantas had not acted in breach of the relevant sections of the TPA (now ACL).

In *George T Collings (Aust) Pty Ltd v H F Stevenson (Aust) Pty Ltd*,[46] the plaintiff, George T Collings (Aust) P/L sought to rely upon a clause of a standard contract. That clause was particularly onerous to the defendant. The Court ruled that, even though neither party was aware of the onerous clause at the time of signing the contract, it was nevertheless unconscionable to include that clause in the contract at hand and, in finding for the defendant, Nathan J stated:

These matters contained in the RESI form are wholly inconsistent with the creation of a general agency agreement. It is unconscionable to embed in a pro forma contract, a term inconsistent with its stated purpose … In my view the indefinite nature of the obligation is an ingredient of the unconscionability. The imposition of limitless contingent liability is onerous and unfair. It places upon a vendor a contingent liability which may only expire with him or her. … Should an unconscionable term find its way into a contract merely by the accidental behaviour or omissions of the parties, it does not lose that characteristic of because if it.[47]

The last sentence of this quote seems to make clear that intention is not a necessary component of unconscionability.

Finally, in *Hurley v McDonalds*,[48] McDonalds was relying on certain conditions of a competition it had initiated, in refusing to give prizes to an unexpectedly large number of winners. A class action was taken, alleging, amongst other things, breach of TPA s. 51AB (ACL s. 21). However, the Court noted that: "Before sections 51AA [ACL s. 20], 51AB [ACL s. 21] or 51AC will be applicable, there must be some circumstance other than the mere terms of the contract itself that would render reliance on the terms of the contract '*unfair*' or '*unreasonable*' or '*immoral*' or '*wrong*'".[49] The Court concluded in dismissing the appeal that, "while the true meaning of s 51AB [ACL s. 21] and its relationship with s 51AA [ACL s. 20] would be a matter of substance, the proposed pleading does not make any allegation of circumstance that could on any view fall within s 51AB [ACL s. 21]".[50]

The lengthy and complex s. 22 of the ACL provides guidance for the application of ACL s. 21.

42. Australian Competition & Consumer Commission v Black on White Pty Ltd [2001] FCA 372, at para 10, per Spender J.
43. (1996) FCR 246.
44. QANTAS Airways Ltd v Cameron (1996) FCR 246, at para 71.
45. QANTAS Airways Ltd v Cameron (1996) FCR 246, at paras 71-72.
46. (1991) ATPR 41-104.
47. George T Collings (Aust) Pty Ltd v H F Stevenson (Aust) Pty Ltd (1991) ATPR 41-104, at 52,622-23.
48. [1999] FCA 1728.
49. Hurley v McDonalds [1999] FCA 1728, at para 31, per Heerey, Drummond and Emmett JJ.
50. Hurley v McDonalds [1999] FCA 1728, at para 36.

***Australian Consumer Law*, s. 22**

(1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the supplier) has contravened section 21 in connection with the supply or possible supply of goods or services to a person (the customer), the court may have regard to:

(a) the relative strengths of the bargaining positions of the supplier and the customer; and

(b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

(c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer 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

(e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and

(f) the extent to which the supplier's conduct towards the customer was consistent with the supplier's conduct in similar transactions between the supplier and other like customers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the customer:

(i) any intended conduct of the supplier that might affect the interests of the customer; and

(ii) any risks to the customer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer); and

(j) if there is a contract between the supplier and the customer for the supply of the goods or services:

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and

(ii)the terms and conditions of the contract; and

(iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and

(iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; and

(l) the extent to which the supplier and the customer acted in good faith.

(2) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the acquirer) has contravened section 21 in connection with the acquisition or possible acquisition of goods or services from a person (the supplier), the court may have regard to:

(a) the relative strengths of the bargaining positions of the acquirer and the supplier; and

(b) whether, as a result of conduct engaged in by the acquirer, the supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer; and

(c) whether the supplier was able to understand any documents relating to the acquisition or possible acquisition of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the supplier or a person acting on behalf of the supplier by the acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the goods or services; and

(e) the amount for which, and the circumstances in which, the supplier could have supplied identical or equivalent goods or services to a person other than the acquirer; and

(f) the extent to which the acquirer's conduct towards the supplier was consistent with the acquirer's conduct in similar transactions between the acquirer and other like suppliers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the supplier acted on the reasonable belief that the acquirer would comply with that code; and

(i) the extent to which the acquirer unreasonably failed to disclose to the supplier:

(i) any intended conduct of the acquirer that might affect the interests of the supplier; and

(ii) any risks to the supplier arising from the acquirer's intended conduct (being risks that the acquirer should have foreseen would not be apparent to the supplier); and

(j) if there is a contract between the acquirer and the supplier for the acquisition of the goods or services:

(i) the extent to which the acquirer was willing to negotiate the terms and conditions of the contract with the supplier; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the acquirer and the supplier in complying with the terms and conditions of the contract; and

(iv) any conduct that the acquirer or the supplier engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the acquirer has a contractual right to vary unilaterally a term or condition of a contract between the acquirer and the supplier for the acquisition of the goods or services; and

(l) the extent

to which the acquirer and the supplier acted in good faith.

While the previous TPA s. 51AC (incorporated in ACL s. 21) expressly covered dealings that involved a corporation, ACL s. 21 is still broad enough in its application to cover such dealings. In *CBA v McArthur*,[51] Mr McArthur wanted to buy a music supply retailing business, and his mother agreed to help him. Mrs McArthur consulted her accountant, who drew attention to the excessive price ($300,000) and the particular reasons for the business owner selling the business. Despite being cautioned, she decided to go ahead with the purchase and obtained a $320,000 loan from a bank, with a mortgage over her home as security. The business did not perform well, and the subsequent financial difficulties resulted in the McArthurs wanting to refinance their loan.

CBA agreed to lend them money to pay off the first loan and provide working capital, on the condition that a satisfactory valuation of the business was obtained. This was put in a letter sent to the mother. The son arranged a valuation, but that valuation was not satisfactory to the bank, which then conducted a second valuation. The second valuation was lower, meaning that the bank would only lend the McArthurs a lower amount, with more onerous repayment obligations. This was stated in a second letter sent to Mr McArthur. The loan money was granted, but later the son defaulted on the repayments. He had never signed or returned the second letter, and claimed his mother was unaware of it.

The McArthurs claimed that their mortgage should be rescinded because CBA had breached s. 51AC by altering the principal contract, and because the mother was merely a passive investor with limited experience. They also argued that the bank knew that repayment would be too difficult for them, and the mother was unaware of the second letter until it was too late for her to make a different financial arrangement.

These arguments failed. The Court, ruling in favour of the bank, allowed it to enforce its rights under the mortgage. It was held that Mrs McArthur understood the relevant documents, there was no misrepresentation by the bank, and the bank did believe that the McArthurs could repay.

As is illustrated in a recent case, it is common for a plaintiff to rely on both the previous TPA and the FTA. In *Miller v Gunther*,[52] the defendants had been engaged in a scheme under which properties were sold at inflated prices to commercially naïve recent immigrants with little knowledge of English and little education. Several of the buyers were also adherents to a Church with which one of the defendants was associated. Referring to

51. [2003] VSC 31.
52. [2005] QSC 090.

both the TPA and the FTA, as well as to the common law principles expressed in *Commercial Bank of Australia Ltd v Amadio*, the Court had no hesitation in finding that "the conduct engaged in by [the defendants] was, in all the circumstances, unconscionable".[53]

The courts have also commented on the difference between s. 51AA (ACL s. 20) on the one hand, and ss. 51AB (ACL s. 21) and 51AC on the other. In *Australian Competition & Consumer Commission v Simply No-Knead (Franchising) Pty Ltd*, a franchiser, Simply No-Knead, had engaged in conduct with several franchisees that was described as "unreasonable, unfair, bullying and thuggish behaviour".[54] In ruling against the franchiser, the Court noted that:

Whatever might be the position with s 51AB [ACL s. 21], in my view "unconscionable" in s 51AC is not limited to the cases of equitable or unwritten law unconscionability the subject of s 51AA [ACL s. 20]. The principal pointer to an enlarged notion of unconscionability in s 51AC lies in the factors to which sub-s (3) permits the Court to have regard.[55]

Thereby the Court made clear that the "unconscionability" referred to in s. 51AC of the TPA is not limited by the common law doctrine of unconscionability. Indeed, the Court went on to suggest that the same is true about s. 51AB (ACL s. 21):

The s 51AB(2) [ACL s. 21(2)] factors do not so clearly suggest, as do the s 51AC(3) factors, that unconscionability in s 51AB [ACL s. 21] is a more ample concept than the unwritten law's unconscionability. Nevertheless, as with s 51AC(3), s 51AB(2) [ACL s. 21(2)] does not limit the factors the Court may consider. It would be curious if "unconscionable" in the two provisions had different meanings – in s 51AB [ACL s. 21] the same as in s 51AA [ACL s. 20] and in s 51AC a wider meaning.[56]

However, it is important to note that the *Franchising Code of Conduct* now regulates the relationship between franchisor and franchisee. The Code mandates a good faith obligation on the part of the franchisor in all aspects of the franchising relationship. This obligation attracts a civil penalty of up to 300 penalty units if contravened. While franchisees might have recourse to the *Franchising Code of Conduct*, small businesses can still rely on ACL s. 21 in dealings with bigger businesses. Furthermore, as discussed above (6.8.2.1) the Full Federal Court has held that there is no need to prove that the victim has a vulnerability, disability or special disadvantage which clearly broadens the scope of its application (ACL s. 21) to dealings between businesses. In *ACCC v Quantum Housing Group Pty Ltd*,[57] the Court held that if there is a sufficient departure from the norms of acceptable commercial behaviour it may be enough to find a contravention of unconscionable conduct pursuant to ACL s. 21.

Before concluding the discussion of ss. 21 and 22, mention must be made of s. 22A which includes an important reference as to presumptions relating to whether representations are misleading.

***Australian Consumer Law*, s. 22A**

Section 4 applies for the purposes of sections 21 and 22 in the same way as it applies for the purposes of Division 1 of Part 3-1.

Finally, a few words need to be said about the relevant remedies available in cases where s. 20 (TPA s. 51AA), and s. 21 (TPA s. 51AB) of the ACL have been breached. Where a party has acted in breach of one of the sections of the ACL that deal with unconscionability, remedies may be sought under ss. 232 (injunctions), 236 (damages) and/or 237 (ancillary orders) of the same Act. As those provisions have been dealt with in

53. (1983) 151 CLR 447, 131.
54. (2000) 104 FCR 253, 270, per Sundberg J.
55. Australian Competition & Consumer Commission v Simply No-Knead (Franchising) Pty Ltd (2000) 104 FCR 253, 270, 265, per Sundberg J.
56. Australian Competition & Consumer Commission v Simply No-Knead (Franchising) Pty Ltd (2000) 104 FCR 253, 270, 265 – 266, per Sundberg J.
57. (2021) 388 ALR 577.

detail above (Chapter 4.4), no further discussion is necessary here. What should be noted, however, is that, by bringing unconscionability within the scope of the ACL, it is made possible for the ACCC to take action against unconscionable conduct.

6.8.2.2 The relevant rules of the *Contracts Review Act 1980* (NSW)

The *Contracts Review Act 1980* (NSW) aims at regulating unjust (including unconscionable, harsh or oppressive) contracts, and its scope is rather wide. First, the Act applies to unjust contracts, whether or not they have been fully executed, and whether or not they form part of an arrangement consisting of an inter-related combination or series of contracts. Second, the Act is not only applicable to fully formed unjust contracts but may also extend to situations where a person has embarked, or is likely to embark, on a course of conduct leading to the formation of an unjust contract.

However, certain limitations to the scope of the Act are in place. First, the *Contract Review Act* is obviously only applicable where NSW law is applicable. Thus, it would typically not be of any relevance in a dispute, for example, between two parties based in Queensland. Second, the Crown, public or local authorities, and corporations (excluding Strata title corporate bodies and the like, under certain circumstances) cannot seek relief under this Act. Similarly, where a person enters into a contract for the purpose of trade, business or profession (other than farming), she/he cannot be granted relief under the *Contracts Review Act 1980* (NSW). In addition, certain time limitations are in place:

> ***Contracts Review Act 1980* (NSW), s. 16**
>
> An application for relief under this Act in relation to a contract may be made only during any of the following periods:
>
> (a) the period of 2 years after the date on which the contract was made;
>
> (b) the period of 3 months before or 2 years after the time for the exercise or performance of any power or obligation under, or the occurrence of any activity contemplated by, the contract; and
>
> (c) the period of the pendency of maintainable proceedings arising out of or in relation to the contract, being proceedings (including cross-claims, whether in the nature of set-off, cross-action or otherwise) that are pending against the party seeking relief under this Act.

Furthermore, the Act does not apply to a contract of service to the extent that it includes provisions that are in conformity with a State industrial instrument, or an award or agreement (whatever called) that is in effect under a law of the Commonwealth and deals with matters relating to conditions of employment, that is applicable in the circumstances.

Finally, s. 22 states that: "Nothing in this Act limits or restricts the operation of any other law providing for relief against unjust contracts or unfair contract terms, but the operation of any other such law in relation to a contract shall not be taken to limit or restrict the application of this Act to the contract."

Having examined the scope of the Act, it is time to look at its substance. Section 7 contains the most central provisions of the Act:

> ***Contracts Review Act 1980* (NSW), s. 7**
>
> (1) Where the Court finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result, do any one or more of the following:
>
> (a) it may decide to refuse to enforce any or all of the provisions of the contract,

(b) it may make an order declaring the contract void, in whole or in part,

(c) it may make an order varying, in whole or in part, any provision of the contract,

(d) it may, in relation to a land instrument, make an order for or with respect to requiring the execution of an instrument that:

(i) varies, or has the effect of varying, the provisions of the land instrument, or

(ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the land instrument.

(2) Where the Court makes an order under subsection (1) (b) or (c), the declaration or variation shall have effect as from the time when the contract was made or (as to the whole or any part or parts of the contract) from some other time or times as specified in the order.

(3) The operation of this section is subject to the provisions of section 19.

In addition, where the court makes a decision or order under s. 7, it may also make such ancillary orders as may be just in the circumstances. The types of orders that can be made are set out in Schedule 1 of the Act, and include orders such as:

Contract Reviews Act 1980 **(NSW), Schedule 1**

(a) the making of any disposition of property,

(b) the payment of money (whether or not by way of compensation) to a party to the contract,

(c) the compensation of a person who is not a party to the contract and whose interest might otherwise be prejudiced by a decision or order under this Act,

(d) the supply or repair of goods,

(e) the supply of services,

(f) the sale or other realisation of property,

(g) the disposal of the proceeds of sale or other realisation of property,

(h) the creation of a charge on property in favour of any person,

(i) the enforcement of a charge so created,

(j) the appointment and regulation of the proceedings of a receiver of property, and

(k) the rescission or variation of any order of the Court under this clause,

and any such order in connection with the proceedings as may be just in the circumstances.

Thus, the types of orders that a court can make under the *Contract Reviews Act 1980* (NSW) are extraordinarily wide.

In clarifying what the court should take into consideration when determining whether a particular contract is unjust, the somewhat lengthy s. 9 sets out the following:

Contracts Review Act 1980 **(NSW), s. 9**

(1) In determining whether a contract or a provision of a contract is unjust in the circumstances relating to the

contract at the time it was made, the Court shall have regard to the public interest and to all the circumstances of the case, including such consequences or results as those arising in the event of:

(a) compliance with any or all of the provisions of the contract, or

(b) non-compliance with, or contravention of, any or all of the provisions of the contract.

(2) Without in any way affecting the generality of subsection (1), the matters to which the Court shall have regard shall, to the extent that they are relevant to the circumstances, include the following:

(a) whether or not there was any material inequality in bargaining power between the parties to the contract,

(b) whether or not prior to or at the time the contract was made its provisions were the subject of negotiation,

(c) whether or not it was reasonably practicable for the party seeking relief under this Act to negotiate for the alteration of or to reject any of the provisions of the contract,

(d) whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party to the contract,

(e) whether or not:

(i) any party to the contract (other than a corporation) was not reasonably able to protect his or her interests, or

(ii) any person who represented any of the parties to the contract was not reasonably able to protect the interests of any party whom he or she represented,

because of his or her age or the state of his or her physical or mental capacity,

(f) the relative economic circumstances, educational background and literacy of:

(i) the parties to the contract (other than a corporation), and

(ii) any person who represented any of the parties to the contract,

(g) where the contract is wholly or partly in writing, the physical form of the contract, and the intelligibility of the language in which it is expressed,

(h) whether or not and when independent legal or other expert advice was obtained by the party seeking relief under this Act,

(i) the extent (if any) to which the provisions of the contract and their legal and practical effect were accurately explained by any person to the party seeking relief under this Act, and whether or not that party understood the provisions and their effect,

(j) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act:

(i) by any other party to the contract,

(ii) by any person acting or appearing or purporting to act for or on behalf of any other party to the contract, or

(iii) by any person to the knowledge (at the time the contract was made) of any other party to the contract or of any person acting or appearing or purporting to act for or on behalf of any other party to the contract,

(k) the conduct of the parties to the proceedings in relation to similar contracts or courses of dealing to which any of them has been a party, and

(l) the commercial or other setting, purpose and effect of the contract.

(3) For the purposes of subsection (2), a person shall be deemed to have represented a party to a contract if the person represented the party, or assisted the party to a significant degree, in negotiations prior to or at the time the contract was made.

(4) In determining whether a contract or a provision of a contract is unjust, the Court shall not have regard to any injustice arising from circumstances that were not reasonably foreseeable at the time the contract was made.

(5) In determining whether it is just to grant relief in respect of a contract or a provision of a contract that is found to be unjust, the Court may have regard to the conduct of the parties to the proceedings in relation to the performance of the contract since it was made.

Finally, it is to be noted that the Act contains rules (s. 17) aimed at ensuring that the Act is not simply contracted aside:

> ***Contracts Review Act 1980* (NSW), s. 17**
>
> (1) A person is not competent to waive his or her rights under this Act, and any provision of a contract is void to the extent that:
>
> (a) it purports to exclude, restrict or modify the application of this Act to the contract, or
>
> (b) it would, but for this subsection, have the effect of excluding, restricting or modifying the application of this Act to the contract.
>
> (2) A person is not prevented from seeking relief under this Act by:
>
> (a) any acknowledgment, statement or representation, or
>
> (b) any affirmation of the contract or any action taken with a view to performing any obligation arising under the contract.
>
> (3) This Act applies to and in relation to a contract only if:
>
> (a) the law of the State is the proper law of the contract,
>
> (b) the proper law of the contract would, but for a term that it should be the law of some other place or a term to the like effect, be the law of the State, or
>
> (c) the proper law of the contract would, but for a term that purports to substitute, or has the effect of substituting, provisions of the law of some other place for all or any of the provisions of this Act, be the law of the State.
>
> (4) This Act does not apply to a contract under which a person agrees to withdraw, or not to prosecute, a claim for relief under this Act if:
>
> (a) the contract is a genuine compromise of the claim, and
>
> (b) the claim was asserted before the making of the contract.
>
> (5) Without affecting the generality of subsection (1), the Court may exercise its powers under this Act in relation to a contract notwithstanding that the contract itself provides:
>
> (a) that disputes or claims arising out of, or in relation to, the contract are to be referred to arbitration, or
>
> (b) that legal proceedings arising out of, or in relation to, the contract are justiciable only by the courts of some other place.

Indeed, the Act goes as far as to make an offence of attempts to contract out of the application of the Act, with a penalty not exceeding 20 penalty units (s. 18).

Several cases have been decided under the *Contracts Review Act 1980* (NSW). In *Baltic Shipping Co v Dillion*,[58] the plaintiff, Dillon, was a 52-year-old widow who purchased a ticket for a cruise. On the tenth day of the cruise, the ship sank near New Zealand. The plaintiff suffered physical injury, nervous shock, and the loss of all her belongings. Dillon was especially concerned about her loss of belongings, some of which were irreplaceable memories of her late husband. Her action was brought under s. 7 of the *Contracts Review Act 1980* (NSW). That section provides that, where the court finds a contract, or a provision of a contract, to have been unjust at the time it was made, the court can avoid or refuse to enforce any or all of the provisions of the contract. Dillon sought relief under the section in regard to a release and indemnity that she had signed, under which she received only $4,876. Given that Dillon had limited financial resources, with no legal aid, the Court felt that "she was overwhelmed by the situation. She had…neither the emotional nor the financial resources to challenge the defendant's insistence that she execute the release before she obtains any compensation, other than the unused portion of her ticket".[59] The defendant used Dillon's desire to resolve the issue of her lost personal property as a lever to get her to surrender the right to sue for damages as a result of her personal injuries. The whole release and indemnity signed by Dillon was held to be void *ab initio*.

58. (1991) 22 NSWLR 1.
59. Baltic Shipping Co v Dillion (1991) 22 NSWLR 1, 656.

In contrast, in *West v AGC (Advances) Ltd*,[60] the appellant's action failed. The facts of the case were as follows: Mrs West owed $23,000 for a home loan. She defaulted on interest, and the mortgagee threatened to exercise its power of sale. Her husband, Mr West, suggested using her home as security for an $85,000 loan to Quiche, a company in need of further finance. In return, Quiche would discharge the existing mortgage. The relevant arrangements were made and AGC granted the loan to Quiche. Quiche defaulted on the loan to AGC. AGC, in return, applied for Quiche to wind-up. Mrs West opposed and argued that Quiche owed her money. Quiche wound up shortly thereafter.

The issue raised was whether the contract between AGC and Mrs West, or any of its provisions when it was made, were unjust in the circumstances. In dismissing Mrs West's arguments, McHugh JA suggested that the s. 9(1) of the Act makes it clear that in determining whether a contract was unjust, the circumstances need to be examined and consideration to public interest needs to be given. Among other circumstances, McHugh JA considered the fact that it was reasonably foreseeable to AGC that Quiche might not be able to meet the payments which were owed by Mrs West to AGC. Second, Mrs West rejected her accountant son's advice not to go forward with the transaction. Secondly, she also discharged advice given to her by a barrister to obtain more substantial guarantees from Quiche directors. Thirdly, she knew that the wives of Quiche directors refused to go through with the same transaction. Lastly, although Mrs West was not a business woman, she had some commercial expertise and her eight years' experience distinguished her from an 'ordinary home owner' or 'suburban housewife'. Therefore, she acted independently, considering the discharge of her first mortgage to enter into the new agreement. On those circumstances, McHugh J held that the deed of loan was not unjust.

60. (1986) 5 NSWLR 610.

6.9 Third party influence over consent

As far as third party influence over consent is concerned, there are six possible causes of action that need to be considered. One of these – negligent misrepresentation – has already been discussed above, in the context of two-party situations. Others, such as the special rules relating to so-called "surety wives" are closely connected to, yet separate from, some of the other causes of actions discussed above.

The scenarios discussed in this part (i.e., 6.9 – 6.14) can suitably be divided into two types. First, are those situations where one party enters into a contract with another party, and does so due to a third party's actions. For example, A may enter into a contract with C, due to the fact that B has advised, or in some other way influenced, A to do so. Second, are those situations where one party breaks a contract with, or avoids entering into a contract with, another party, and does so due to a third party's actions. For example, A may breach its contract with C, due to the fact that B has persuaded, or in some other way influenced, A to do so.

6.10 'Surety wives'

Rule 22

1. A contract under which one partner in a recognised relationship undertakes to act as a surety for the other partner, or a company under the other partner's control, may be set aside on the first mentioned partner's application, where it is proven that:

(a) the creditor was aware of the recognised relationship between the partners;

(b) the first mentioned partner obtains no real benefit from the contract;

(c) the creditor did not deal with the first mentioned partner in person, or otherwise made sure that she/he had received competent, independent and disinterested advice; and

(d) the first mentioned partner did not understand the contract's effect in essential respects.

2. A contract under which one partner in a recognised relationship undertakes to act as a surety for the other partner, or a company under the other partner's control, may also be set aside on the first mentioned partner's application, where she/he understood the contract's effect in essential respects, if it is proven that:

(a) the creditor was aware of the recognised relationship between the partners;

(b) the first mentioned partner obtains no real benefit from the contract;

(c) the creditor did not deal with the first mentioned partner in person, or otherwise made sure that she had received competent, independent and disinterested advice; and

(d) the first mentioned partner entered into the contract under the other partner's undue influence.

3. For the purpose of Articles 1 and 2, the term "recognised relationship" refers to a relationship based on trust and confidence between marriage partners, or other long term and publicly declared relationships, short of marriage, between members of the same or of opposite sex, where that relationship is based on trust and confidence.

In *Yerkey v Jones*,[1] Mr Jones purchased a property and obtained a loan to do so. He got his wife to give a guarantee to the creditors in the form of a mortgage over land she owned. Upon Mr Jones defaulting, the creditors sought to exercise the guarantee. Justice Dixon stated that:

> [I]f a married woman's consent to become a surety for her husband's debt is procured by the husband and without understanding its effect in essential respects she executes an instrument of suretyship which the creditor accepts without dealing directly with her personally, she has a prima-facie right to have it set aside.[2]

This principle is obviously extraordinarily far-reaching. The husband in this case does not need to be guilty of any wrong towards the wife. However, where it is the case that the wife understood the effect, in essential

1. (1939) 63 CLR 649.
2. Yerkey v Jones (1939) 63 CLR 649, at 683.

respects, of the instrument of suretyship, it would be necessary for her to have acted under the husband's undue influence in order to have a contract set aside.

The modern Australian approach to "surety wives" was made clear in *Garcia v National Australia Bank Limited*.[3] In that case, the appellant and her husband entered into several guarantees, secured by their matrimonial home, for the husband's company. Throughout the marriage, the husband had repeatedly told the appellant that she had no business sense, while he was an expert. The guarantee in dispute was, according to the appellant, entered into at a time when she was concerned for the future of the marriage, and took less than a minute to execute. While the husband had explained that the transaction involved no danger, the wife was given no independent advice or explanation of the transaction by the bank or any third-party. The Court found that, while the appellant was aware that she was signing a guarantee, she did not understand the nature of the guarantee in question. Having noted that the *Yerkey v Jones* test did not depend on the wife being under the husband's undue influence, or on the husband acting as agent for the creditor, the Court concluded that:

Rather, it depends upon the surety being a volunteer and mistaken about the purport and effect of the transaction, and the creditor being taken to have appreciated that because of the trust and confidence between surety and debtor the surety may well receive from the debtor no sufficient explanation of the transaction's purport and effect. To enforce the transaction against a mistaken volunteer when the creditor, the party that seeks to take the benefit of the transaction, has not itself explained the transaction, and does not know that a third party has done so, would be unconscionable.[4]

There are some important limitations to this far-reaching principle. First, where the wife benefits directly from the transaction, she cannot be seen as a "volunteer", and can thus not rely on the *Yerkey v Jones* principle. In *Garcia v National Australia Bank Limited*, the trial judge, with whom the majority of the High Court agreed, held that the appellant was not directly involved in her husband's company, despite that she was both a director and a shareholder of the company. This was due to the fact that the company was in the husband's complete control, and even though it was clear that benefits flowed from the company to the family from time to time, it was concluded that:

Taken as a whole, those findings demonstrate that the appellant in fact obtained no real benefit from her entering the transaction; she was a volunteer. The fact that she was a director of the company is nothing to the point if, as the trial judge's findings show, she had no financial interest in the fortunes of the company.[5]

However, in the more recent case of *Chandran v Narayan*,[6] the Court noted that: "whilst each case must be dealt with on its own facts, where the wife has a more active interest in the conduct and fortunes of the husband's business she is not considered to be a volunteer for the purpose of the rule". In that case, the surety wife argued that her involvement in her husband's business was limited to acting as a dispatcher and a payroll clerk. However, based on the facts before him, Young CJ concluded that her role was greater than that, and that:

[S]he was not merely a person who was standing by, ignorant of all the affairs of the business, who was convinced by her husband that she had to become more deeply involved. She at the very least accepted that it was necessary for the good of the family that she put her interest in the family properties on the line as security for the debts.[7]

Second, the creditor may quite easily protect itself by dealing directly with the wife, or otherwise making sure that she had received competent, independent and disinterested advice:

If the creditor takes adequate steps to inform her and reasonably supposes that she has an adequate comprehension of the obligations she is undertaking and an understanding of the effect of the transaction, the fact that she has failed to grasp some material part of the document, or, indeed, the significance of what she is doing, cannot, I think, in itself give her an equity to set it aside[.][8]

3. [1998] HCA 48.
4. Garcia v National Australia Bank Limited [1998] HCA 48, at para 33.
5. Garcia v National Australia Bank Limited [1998] HCA 48, at para 43.
6. [2006] NSWSC 104, at para 54, per Young CJ.
7. Chandran v Narayan [2006] NSWSC 104, at para 40.
8. Yerkey v Jones (1939) 63 CLR 649, at 685, per Dixon J.

In deciding *Garcia v National Australia Bank Limited*, the majority of the Court left open the question of the exact scope of this rule: "It may be that the principles applied in *Yerkey v Jones* will find application to other relationships more common now than was the case in 1939".[9] Justice Kirby, on the other hand, noted that:

The stereotype underlying *Yerkey* may hold true for some, perhaps even a significant number of, wives. But this Court should, where possible, refuse to "classify unnecessarily and overbroadly by gender when more accurate and impartial" principles can be stated … When an opportunity is presented legitimately to refashion an equitable principle so that it is not expressed, irrelevantly, in discriminatory terms, this Court should accept that opportunity.[10]

It is reasonable to read this as an indication that the High Court may be willing to extend the "surety wife" rules to other relationships, such as same-sex marriages and *de facto* relationships. Indeed, while there is no authority yet to support this assertion, in today's society, the "surety wife" rules can reasonably be viewed as gender neutral. Therefore, the principle may be invoked by a husband entering into a contract as a guarantor for his wife's loan.

9. Garcia v National Australia Bank Limited [1998] HCA 48, at para 22.
10. Garcia v National Australia Bank Limited [1998] HCA 48, at para 66.

6.11 Third party as agent

In certain situations, a contractual party may be bound against the other contractual party by the actions of a third person. That would be the case where it is held that the third person acted as an agent. For example, if B, upon A's instructions, talks C into undertaking to be a guarantor for a loan granted by A in favour of B, it could be argued that B acted as A's agent, and A would thereby be bound by B's conduct. This is uncontroversial but does not appear to be a very common scenario.

In *Barclays Bank plc v O'Brien*,[1] a husband deceived his wife into signing documents which purported to make her guarantor for liabilities up to £154,000. The wife mistakenly thought that her liability was limited to £60,000, and for three weeks only. This guarantee was to secure an overdraft extended to a company in which the husband was involved. The bank executed the documents without having properly informed the wife of the nature of them, despite the instructions of a bank manager. When liability arose, the wife argued that, due to her husband's misrepresentations, the bank was not entitled to enforce the mortgage. The House of Lords held that the bank had constructive notice of the situation; given that the wife had agreed to a mortgage not in her interest, it should have taken steps to ensure there was no wrong committed by the husband.[2] The appeal was allowed and the mortgage set aside.

The principle in *Barclays Bank Plc v O'Brien*[3] was followed where a wife is unduly influenced, by her husband, into entering a transaction with a third party that is manifestly disadvantageous to her, the wife has an equity as against the husband to set aside the transaction. Further, that right is transferrable to the third party if the party had constructive knowledge of the undue influence, as discussed below in *Barclays Bank v O'Brien*.[4] The third party may enforce the transaction if it was not aware of, or put on notice of, the undue influence, and providing the husband was not acting as agent for the other party to the transaction. In *CIBC Mortgages v Pitt*,[5] the plaintiff company loaned £150,000 jointly to a husband and wife, secured against the matrimonial home. The wife had not read the documents; the husband bought shares with the money and was later unable to pay the installments, after the 1987 stock market crash. In dismissing an appeal by the wife, the House of Lords held that the plaintiff was able to enforce the charge against the home.

A similar result was obtained in the case of *Barclays Bank Plc v Thomson*.[6] In that case, the wife contended that Barclays Bank in fact had constructive knowledge of her husband's misrepresentations and undue influence, which had led to her signing over a charge to the matrimonial home in favour of the bank. T also submitted that the solicitor giving advice about the nature of the charge was acting as agent for the bank and not for her. The Court of Appeal, however, found in favour of the bank, who were able to produce a certificate manifesting that the wife had been given independent advice by the solicitor. Further, what was fatal to the wife's application was that she had failed to challenge the original judgment [a possession order against the matrimonial home] within a reasonable time.

1. [1994] 1 AC 180.
2. Barclays Bank plc v O'Brien [1994] 1 AC 180, at 191, 198 – 199 per Lord Browne-Wilkinson.
3. [1994] 1 AC 180.
4. [1994] 1 AC 180
5. [1994] 1 AC 200
6. [1997] 4 All ER 816

6.12 The tort of interference with contractual relations

Rule 23 outlines the law regulating the tort of interference with contractual relations. Such a tort can be committed in several different manners, which means that Rule 23 is somewhat repetitive. In an attempt to highlight the type of interference with contractual relations that each Article of the Rule addresses, certain key words within each Article have been written in italic.

Rule 23

1. For the purpose of this Rule, the term "contract-breaking party" refers to a legal, natural or other person who breaks an existing contract with the plaintiff, or opts not to continue an ongoing relation of regular dealings with the plaintiff.

2. For the purpose of this Rule, the term "unlawful means" refers to acts that constitute a crime and/or a tort, that amount to a breach of statute, or that would constitute a breach of contract.

3. Where the defendant has actual or constructive knowledge of the fact that the contract-breaking party has *contractual obligations* to the plaintiff, and by *pressure, persuasion, procurement or inducement* makes the contract-breaking party break that contract, the defendant has committed the tort of interference with contractual relations provided that:

(a) the plaintiff suffers damage due to the interference; and

(b) the defendant cannot justify its actions by reference to:

(i) its statutory authority to interfere with the contract;

(ii) its moral obligations towards the contract-breaking party;

(iii) the public interest of such interference;

(iv) it having acted reasonably to protect its own rights that are equal or superior to those of the plaintiff; or

(v) it having acted to protect its contractual rights, where the contract interfered with is inconsistent with those rights.

4. Where the defendant has actual or constructive knowledge of the fact that the contract-breaking party has an *ongoing relation of regular dealings* with the plaintiff, and by *pressure, persuasion, procurement or inducement* makes the contract-breaking party opt not to continue that ongoing relation of regular dealings, the defendant has committed the tort of interference with contractual relations provided that:

(a) the plaintiff suffers damage due to the interference; and

(b) the defendant cannot justify its actions by reference to:

(i) its statutory authority to interfere with the contract;

(ii) its moral obligations towards the contract-breaking party;

(iii) the public interest of such interference;

(iv) it having acted reasonably to protect its own rights that are equal or superior to those of the plaintiff; or

(v) it having acted to protect its contractual rights, where the contract interfered with is inconsistent with those rights.

5. Where the defendant has actual or constructive knowledge of the fact that the contract-breaking party has *contractual obligations* to the plaintiff, and the defendant applies *unlawful means* to *directly* prevent the contract-breaking party from

meeting its contractual relations with the plaintiff, the defendant has committed the tort of interference with contractual relations provided that:

(a) the plaintiff suffers damage due to the interference; and

(b) the defendant cannot justify its actions by reference to:

(i) its statutory authority to interfere with the contract;

(ii) its moral obligations towards the contract-breaking party;

(iii) the public interest of such interference;

(iv) it having acted reasonably to protect its own rights that are equal or superior to those of the plaintiff; or

(v) it having acted to protect its contractual rights, where the contract interfered with is inconsistent with those rights.

6. Where the defendant has actual or constructive knowledge of the fact that the contract-breaking party has an *ongoing relation of regular dealings* with the plaintiff, and the defendant applies *unlawful means* to *directly* prevent the contract-breaking party from continuing its ongoing relation of regular dealings with the plaintiff, the defendant has committed the tort of interference with contractual relations provided that:

(a) the plaintiff suffers damage due to the interference; and

(b) the defendant cannot justify its actions by reference to:

(i) its statutory authority to interfere with the contract;

(ii) its moral obligations towards the contract-breaking party;

(iii) the public interest of such interference;

(iv) it having acted reasonably to protect its own rights that are equal or superior to those of the plaintiff; or

(v) it having acted to protect its contractual rights, where the contract interfered with is inconsistent with those rights.

7. Where the defendant has actual or constructive knowledge of the fact that the contract-breaking party has *contractual obligations* to the plaintiff, and the defendant applies *unlawful means* to *indirectly* prevent the contract-breaking party from meeting its contractual relations with the plaintiff, the defendant has committed the tort of interference with contractual relations provided that:

(a) the breach the plaintiff is complaining about was a necessary consequence of the defendant's interference;

(b) the plaintiff suffers damage due to the interference; and(c) the defendant cannot justify its actions by reference to:

(i) its statutory authority to interfere with the contract;

(ii) its moral obligations towards the contract-breaking party;

(iii) the public interest of such interference;

(iv) it having acted reasonably to protect its own rights that are equal or superior to those of the plaintiff; or

(v) it having acted to protect its contractual rights, where the contract interfered with is inconsistent with those rights.

8. Where the defendant has actual or constructive knowledge of the fact that the contract-breaking party has an *ongoing relation of regular dealings* with the plaintiff, and the defendant applies *unlawful means* to *indirectly* prevent the contract-breaking party from continuing its ongoing relation of regular dealings with the plaintiff, the defendant has committed the tort of interference with contractual relations provided that:

(a) the breach the plaintiff is complaining about was a necessary consequence of the defendant's interference;

(b) the plaintiff suffers damage due to the interference; and

(c) the defendant cannot justify its actions by reference to:

(i) its statutory authority to interfere with the contract;

(ii) its moral obligations towards the contract-breaking party;

(iii) the public interest of such interference;

(iv) it having acted reasonably to protect its own rights that are equal or superior to those of the plaintiff; or

(v) it having acted to protect its contractual rights, where the contract interfered with is inconsistent with those rights.

9. Where the tort of interference with contractual relations is established, the court may award damages (including aggravated and/or exemplary damages), order account of profits and/or grant an injunction against the defendant.

Rule 23 makes clear that there are three categories of conduct that may constitute the tort of interference with contractual relations (i.e., factors relating to the defendant), and that there are two types of situations in which a plaintiff may successfully argue such a tort (i.e. factors relating to the plaintiff). The three types of conduct that may constitute the tort of interference with contractual relations are:

1. where the defendant uses pressure, persuasion, procurement or inducement towards the contract-breaking party;
2. where the defendant applies unlawful means directly towards the contract-breaking party; and
3. where the defendant applies unlawful means indirectly towards the contract-breaking party.

In relation to the first category mentioned above, it may be difficult to determine whether the defendant's conduct amounts to "pressure, persuasion, procurement or inducement", or merely constitutes advice. If the plaintiff cannot show that the defendant's conduct goes beyond merely providing advice, her/his action will fail. This is only logical as otherwise anybody providing advice in relation to another person's contractual arrangements may be accused of committing the tort of interference with contractual relations.

Further, in the first of these categories, there is no need for the defendant's conduct to be unlawful. However, in actions based on either the second or the third category of conduct, it is necessary that the defendant has applied unlawful means, in the sense of acts that constitute a crime and/or a tort, that amount to a breach of statute, or that would constitute a breach of contract.

It is not always immediately clear whether the defendant has applied unlawful means directly towards the contract-breaking party, or has done so indirectly. However, it is clear that in the latter case the plaintiff must show that the breach was a necessary consequence of the defendant's interference.

For the plaintiff to successfully argue the tort of interference with contractual relations, it must have been in one of the following two situations:

1. the third party affected by the defendant had an existing contractual obligation to the plaintiff; or
2. the third party affected by the defendant was in an ongoing relation of regular dealings with the plaintiff.

The tort of interference with contractual relations originates in *Lumley v Gye*.[1] This case involved the plaintiff (a theatre operator) who had entered into an exclusive contract with Miss Wagner (a singer). The defendant persuaded Miss Wagner to break her contract with the plaintiff and instead perform at the defendant's theatre. The Court held that this constituted an interference with a contractual relation, and ruled in the plaintiff's favour.

Over the years, the details of the tort have been clarified. For example, while the Court in *Lumley v Gye*[2] focused on the defendant's malicious intention, it is now clear that the courts should be focusing on whether the defendant had knowledge of the contract so as to act deliberately in bringing about its breach. While it has been suggested that the defendant must have acted knowingly and intentionally, Lindgren J has stated that:

Linguistic confusion can arise in respect of the alleged tortfeasor's state of mind with respect to breach of the contract. Both "intention" and "knowledge" have been used in this context. But a person's "knowledge" that what he is inducing will constitute a breach of contract and his "intention" to induce a breach of contract

1. (1853) 2 E & B 216.
2. (1853) 2 E & B 216.

by what he is doing refer to one and the same thing. After all, ex hypothesi, the alleged tortfeasor's acts are intentional, a breach of contract occurs, and the acts induce the breach. Against that background, "knowledge" and "intention" that the breach will result from the acts do not signify any relevant distinction.[3]

Indeed, the courts have gone even further, and it seems that actual knowledge is not required. Rather, it is suggested that reckless indifference as to whether a relevant contract exists,[4] or constructive knowledge of the existence of such a contract,[5] is sufficient.

Furthermore, it appears that an action in the tort of interference with contractual relations can succeed even where the contract-breaking party was more than willing to break the contract.[6]

As hinted at above, decided cases have helped clarify the details of the tort. However, there is still uncertainty in some respects. For example, whether or not justification is a defence in relation to situations where the defendant has acted unlawfully in interfering with a contractual relation is a matter associated with considerable uncertainty. It is submitted that the preferable approach is to allow justification as a defence in situations where the defendant has acted unlawfully. However, it may very well be appropriate to apply a stricter test as to the required level of justification necessary to justify the defendant's acts where those acts were unlawful. In addition, the contract-breaking party may obviously still have a right to take an action against the defendant (for example under duress, ACL s. 50, or two-party intimidation). Even in the case where the plaintiff would be unsuccessful in relation to the tort of interference with contractual relations due to the defendant's defence of justification.

More generally, it seems there are five grounds upon which the tort of interference with contractual relations may be justified:

1. the defendant's statutory authority to interfere with the contract;[7]
2. the defendant's moral obligations towards the contract-breaking party;[8]
3. the public interest of such interference;[9]
4. the defendant acted reasonably to protect her/his own rights that are equal or superior to those of the plaintiff;[10] or
5. the defendant acted to protect her/his contractual rights, where the contract interfered with is inconsistent with those rights.[11]

While it has been stated that no general rule can be laid down as a general guide in relation to what may constitute justification,[12] it would seem reasonably certain that justification may be based on any of the five grounds outlined above, in the appropriate circumstances.

If the tort of interference with contractual relations is established, the plaintiff can be awarded damages. Once the court has established that the plaintiff has suffered some actual financial loss, such damages may cover loss of income or profits, costs associated with dealing with the effects of the defendant's conduct, and possibly account of profits. Furthermore, the court may grant aggravated and/or exemplary damages. Finally, where appropriate, an injunction preventing the defendant from interference with the relevant contractual relations may be granted.

3. Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (1995) 130 ALR 469, at 479.
4. Emerald Construction Co Ltd v Lowthian [1966] 1 WLR 691, 700.
5. D.C. Thomson & Co Ltd v Deakin [1952] 1 Ch 646.
6. Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots [No 2] [1991] 1 VR 637, at 659.
7. Stott v Gamble [1916] 2 KB 504.
8. Crofter Hand Woven Harris Tweed Co v Veitch [1942] AC 435, at 442-443 per Viscount Simon LC.
9. Brimelow v Casson [1924] 1 Ch 302.
10. Edwin Hill & Partners v First National Finance Corporation [1989] 1 WLR 225.
11. Smithies v National Association of Operative Plasterers [1909] 1 KB 310.
12. Brimelow v Casson [1924] 1 Ch 302, at 313 per Russell LJ.

6.13 The tort of (three-party) intimidation

Rule 24

1. Where the defendant expresses a threat of an unlawful act, coupled with a demand, against a third party, and the plaintiff suffers economic loss due to the third party actually complying with the demand, or by not complying with the demand, and the defendant's objective was to harm the plaintiff, the court can award remedies against the defendant under Article 4.

2. If causing harm to the plaintiff was not the defendant's predominant and ultimate objective, and the court finds that the defendant's predominant and ultimate objective justifies its actions, no action can succeed under Article 1.

3. For the purpose of Article 1, the term "threat of an unlawful act" refers to threats to commit a crime, threats to commit a tortuous act, threats to act in contravention of a statutory provision and threats to act in breach of a contract.

4. Where the plaintiff has shown the presence of the elements outlined in Article 1, the court may award damages.

While, as noted above, the tort of two-party intimidation is not firmly established in Australian law, there is no doubt about the existence of the tort of three-party intimidation. Originating in the English case of *Rookes v Bernard*,[1] it has since been applied in several Australian cases. Perhaps the most illustrative Australian authority on three-party intimidation is *Latham v Singleton*.[2] That case involved a rather complicated fact pattern. Put simply, the plaintiff, an employee of the Broken Hill City Council, took action against several defendants (described by their own counsel as men of no great intelligence but with a deep sense of loyalty towards their workmates).[3] It was alleged a conspiracy existed to intimidate the plaintiff's employer in order to have the plaintiff fired. The plaintiff was in fact fired as a response to the other workers refusing to work with him. The Court discussed whether a threatened or actual industrial strike could constitute a threatened or actual breach of contract and held that it could. However, in this case, the Court concluded that, while an inference could be drawn from the defendants' actions that they wished for the plaintiff to be removed from his position, such a demand was never spelled out. For that, and other reasons, the Court considered that the defendants' action could not be seen as an industrial strike, and thus "their actions must be judged within the ambit of the normal law of contract".[4]

In the light of this, the Court concluded that:

> [I]n the case of most of the defendants they walked off the job when the plaintiff Latham appeared at the depot, rostered for day shift as the result of an agreement which would present a threat to the city council, in order that it would act to the detriment of the plaintiff. These defendants' actions could not properly be described as the furtherance of a trade dispute and even if they could be so described there was not any, or sufficient, notice given of any

1. [1964] AC 1129.
2. [1981] 2 NSWLR 843.
3. Latham v Singleton [1981] 2 NSWLR 843, at 872.
4. Latham v Singleton [1981] 2 NSWLR 843, at 865.

proposed strike. As a result the actions of these defendants were a threat of an "unlawful" or "illegal" breach of contract and against them, subject to a possible defence of "justification", the plaintiff's cause of action based on intimidation should succeed.[5]

As far as the requirement that there be "intent to harm the plaintiff", the Court noted that:

In considering the proof or absence of this element, it is not to be confused with any inquiry about what secondary objects were hoped to be attained. Certainly the element must be the predominant object of the actor. A certain result foreseen but not aimed at is not enough. Nevertheless it is no wit less the ingredient of the tort if the harm sought is but a stepping stone to an ultimate objective. But the ultimate objective could be of importance in considering the defence of justification.[6]

Chief Justice Nagle went on to discuss the possible defence of "justification", hinted at in the quotes above, and expressed the view that:

To permit a plea of justification would mitigate some of the harsher effects [that] could flow from the decision of *Rookes v Barnard* [1964] AC 1129 … Although in principle it may sound odd that an "illegal" act can ever be justified, such an approach would appear to be oversimplistic and the better view seems that … defendants should be able to avoid a verdict if they can establish a defence of justification.[7]

Thus, it seems possible that there is a defence of "justification" in relation to the tort of intimidation. This might not be as strange as it first seems. Indeed, while it may not be completely in line with Nagle CJ's approach in the *Latham* case, it could be argued that the defence of justification merely is the flip side of the requirement that harm to the plaintiff is the defendant's predominant objective. In other words, as soon as the defendant can show other, justified and stronger, motives for its actions, it can no longer be said that the harm to the plaintiff was the defendant's predominant objective, and the action has been justified. In this context, Nagle CJ's discussions of the individual defendants' pleas of justification, in *Latham v Singleton*,[8] are illustrative.

The first thing to note is that Nagle CJ made clear that the burden of proof rests on the defendant seeking to justify its actions.[9] This means that, in interpreting Rule 26, one must be alert to the fact that the plaintiff need not prove that the defendant's predominant objective was to harm the plaintiff. Rather, the defendant needs to prove that, while its actions harmed the plaintiff, they were nevertheless justified for some reason.

Second, Nagle CJ made clear that, even where the defendant has an unfavourable opinion of the plaintiff, a plea of justification may still succeed provided that the actions were predominantly motivated not by that opinion, but by some other purpose, such as, for example, proper union purposes, which was the case in Latham.

Finally, Nagle CJ's discussion of the conduct of two different defendants is illustrative. In relation to one defendant, he noted:

After a perusal of the whole of his evidence … the Court has concluded that this defendant's predominant purpose – albeit perhaps mistaken – was to serve the purpose of his union. In his case this circumstance outweighs any other and establishes his defence [of justification].[10]

However, in relation to another defendant, Nagle CJ noted that: "Maybe it is arguable that his actions were, albeit mistakenly, directed to a union purpose. However, a mere tenuous connection with union purposes of itself would in general not amount to 'justification'".[11] This clearly highlights the fine distinction that needs to be drawn in evaluating the possible defence of justification.

In addition to what was said above (at 6.5) about damages, it is to be noted that once the court has established that the plaintiff has suffered some actual financial loss, it may award damages for "past, present and future

5. Latham v Singleton [1981] 2 NSWLR 843, at 867.
6. Latham v Singleton [1981] 2 NSWLR 843, at 872.
7. Latham v Singleton [1981] 2 NSWLR 843, at 869.
8. [1981] 2 NSWLR 843.
9. Latham v Singleton [1981] 2 NSWLR 843, at 872.
10. Latham v Singleton [1981] 2 NSWLR 843, at 874.
11. Latham v Singleton [1981] 2 NSWLR 843, at 874.

economic loss, the pain, suffering and distress caused to the plaintiff by the defendants' actions".[12] Further, the court may award "exemplary and aggravated damages".[13]

12. Latham v Singleton [1981] 2 NSWLR 843, at 875.
13. Latham v Singleton [1981] 2 NSWLR 843, at 875.

6.14 The tort of conspiracy

Rule 25

1. Where two or more people combine to cause the plaintiff economic loss, the tort of conspiracy is committed, provided that the plaintiff shows that:

(a) the conspirators had an actual or constructive intention to cause the plaintiff economic loss;

(b) actual economic loss was suffered by the plaintiff as a result of the conspiracy; and

(c) that either:

i) the conspiracy was carried out using unlawful means; or

ii) the conspiracy was carried out using lawful means, but the predominant purpose of the conspiracy was to cause the plaintiff economic loss.

2. For the purpose of Article 1, the term "unlawful means" refers to acts that constitute a crime and/or a tort, that amount to a breach of statute, or that would constitute a breach of contract, independently of the conspiracy.

3. For the purpose of Article 1, the term "lawful means" refers to means that are not unlawful under Article 2.

4. Where the existence of a conspiracy is established, the court may award damages (including aggravated and/or exemplary damages), and/or grant an injunction against the defendants.

The tort of conspiracy can suitably be divided into two subcategories: conspiracy by lawful means and conspiracy by unlawful means. Both these types of conspiracy involve two or more people combining to cause the plaintiff economic loss. Before discussing these two types of conspiracy further, it is first necessary to observe the difference between the tort of conspiracy and the crime of conspiracy. As explained by Fox LJ in *Midland Bank Trust Co Ltd v Green (No. 3)*:[1] "The essence of the crime is agreement – execution of the agreement is not necessary. The position is quite different in the law of tort. In tort … although the agreement is necessary, intention to injure and actual injury are also both necessary". Thus, Fox LJ makes clear that, for an action in the tort of conspiracy to be successful, the plaintiff must show that the parties to the conspiracy intended to cause the plaintiff economic loss. As far as intention is concerned, it is to be noted that the plaintiff bears the burden of proving that the defendants intended to cause the plaintiff economic loss. Further, Fox LJ's statement makes clear that the plaintiff must also demonstrate that actual economic loss was in fact suffered as a result of the conspiracy.

In *R & The Attorney-General of the Commonwealth v Associated Northern Collieries*,[2] Isaacs J discussed how one can identify a case involving conspiracy:

Community of purpose may be proved by independent facts, but it need not be. If the other defendant

1. [1982] 1 Ch 529, at 541.
2. (1911) 14 CLR 387.

is shown to be committing other acts, tending to the same end, then though primarily each set of acts is attributable to the person whose acts they are, and to him alone, there may be such a concurrence of time, character, direction and result as naturally to lead to the inference that these separate acts were the outcome of pre-concerted, or some mutual contemporaneous engagement, or that they were themselves the manifestations of mutual consent to carry out a common purpose, thus forming as well as evidencing a combination to effect the one object towards which the separate acts are found to converge.[3]

If the tort of conspiracy is established, the plaintiff can be awarded damages. Once the court has established that the plaintiff has suffered some actual financial loss, such damages may cover loss of income or profits, costs associated with identifying the parties to the conspiracy, expenses associated with salvaging business affected relations etc. Furthermore, the court may grant aggravated and/or exemplary damages.

Where appropriate, an injunction can be granted against the behaviour constituting the tort of conspiracy. Perhaps the most obvious advantage for the plaintiff in taking an action in conspiracy (whether it is an action in conspiracy by lawful means or an action in conspiracy by unlawful means) is that, if the tort of conspiracy is established, all parties to the conspiracy are viewed as joint tortfeasors.

Finally, before examining the two types of conspiracy in more detail, it is to be noted that it now seems established that a wide range of types of parties, combining to cause the plaintiff economic loss, can be the parties to a conspiracy, including: spouses conspiring together,[4] a trade union and its members conspiring together;[5] and a board of directors conspiring against their company.[6] In a logical (though curious) extension of the well-known corporate veil principle in *Salomon v Salomon & Co*,[7] even a one-man company and the person running the company may conspire together.[8]

6.14.1 Conspiracy by lawful means

In *Crofter Hand Woven Harris Tweed Co Ltd v Veitch*,[9] the defendants were union officials. These union officials had instructed some of their members, who worked in the docks, not to handle imported yarn. The dock workers were able to follow the instructions without breaking their contracts. The plaintiffs in the case were manufacturers of a particular type of cloth and relied upon the import of yarn. The Court held that the plaintiffs could not succeed in their action for conspiracy even though they clearly were suffering economic loss. The reason for this decision was that the predominant purpose of the conspiracy was the lawful protection or promotion of the conspirators' lawful interest – in this case, the union officials' action was motivated by the desire to obtain higher wages for the employees of the mills competing with those mills that relied on imported yarn. In negotiating with the mill owners who used locally produced yarn, they had been told that increased wages were impossible in the light of the competitors' import of cheap yarn.

This case highlights the difficulty in succeeding in an action for conspiracy by lawful means – as long as the defendants can point to some non-neglectable lawful interest, it will always be difficult to convince the court that the tort of conspiracy by lawful means has been committed. In other words, as far as the tort of conspiracy by lawful means is concerned, justification is an effective defence.

6.14.2 Conspiracy by unlawful means

Where the acts carried out as part of the conspiracy are crimes, torts, violations of statutes, or acts in breach of a contract, when looked at in isolation (i.e., independently from the tort of conspiracy), the conspiracy is one by unlawful means.

Essentially, the difference between conspiracy by lawful means and conspiracy by unlawful means is that

3. R & The Attorney-General of the Commonwealth v Associated Northern Collieries (1911) 14 CLR 387, at 400.
4. Midland Bank Trust Co v Green (No 3) [1979] 2 All ER 193.
5. See eg Crofter Hand Woven Harris Tweed Co Ltd v Veitch [1942] AC 435; Ansett (Operations) Pty Ltd v Australian Federation of Airline Pilots [1991] 1 VR 637; Rookes v Barnard & Latham above)
6. Beach Petroleum NL v Johnson (1991) 105 ALR 456.
7. [1897] AC 22.
8. R v McDonnell [1966] 1 QB 233.
9. [1942] AC 435.

justification is not an effective defence in relation to the tort of conspiracy by unlawful means. As pointed out by Lord Bridge:

> when conspirators intentionally injure the plaintiff *and use unlawful means to do so*, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortuous that the means used were unlawful.[10]

10. Lonrho plc v Fayed [1991] 3 WLR 188, at 195.

7. Prohibited (illegal) contracts

"The manner of the transaction was to gild over and conceal the truth; and whenever Courts of Law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish, and shew the transactions in their true light"[1]

A contract meeting all necessary requirements for being valid and binding upon the parties, may nevertheless be void and unenforceable where it is prohibited, or, as it is commonly known, "illegal". Illegality may stem from either statutory provisions or from common law. These different sources of illegality are dealt with separately below. The Chapter ends with an examination of the consequences of a contract being held to be prohibited or "illegal".

7.1 Some initial observations

The area of law discussed in this Chapter is commonly referred to as "illegality" or "legality of object". As noted in *Electric Acceptance Pty Ltd v Doug Thorley Caravans (Aust.) Pty Ltd*:[2]

> contracts that are broadly termed "illegal" fall into two groups: those which are so mischievous as to be viewed as illegal in the narrow sense, like contracts to commit a crime, and those which are less reprehensible and are in consequence nugatory rather than illegal in the narrow sense [such as contracts in restraint of trade].[3]

The use of the term "illegal" in the reports and in textbooks is problematic as it is often used indiscriminately to refer to either illegality in the strictly "illegal" sense (e.g., a contract to commit a crime) or the broader "nugatory" sense (e.g., a contract in restraint of trade). To avoid confusion in this book, the term "prohibited" is used when referring to the broader sense of the term. Thus, when a contract is talked of as being illegal, reference is made to illegality in the narrow sense (e.g., a contract to commit a crime) outlined above.

Furthermore, many textbooks make a double use of the term "void", in that the term is used both to describe the category of contracts referred to as "nugatory" in the quote above, and also when referring to the consequences of illegality. Here, however, the term nugatory is preferred when reference is made to the class of contracts that are prohibited, but not illegal in the narrow sense. Thus, the term "void" is reserved for the discussion of the consequences of a contract being prohibited, due to it being either illegal or nugatory.

Perhaps the conflicting use of terminology could be said to be illustrative of the general complexity of the law regulating prohibited contracts. Indeed, looking at textbooks dealing with this area of law, one finds that there is a great variation in how different commentators approach it. This may be seen to signal that the law is unsettled. It has even been suggested that approaching prohibited contracts from the perspective of distinguishing between "illegal" contracts on the one hand, and "void"/"nugatory" contracts on the other hand, is misguided:

> The words used do not matter if the actual legal result they are used to express be not in doubt or debate. But it has

1. Collins v Blantern (1767), 2 Wils. K.B. 341, at 349, per Wilmot CJ.
2. [1981] VR 799.
3. Electric Acceptance Pty Ltd v Doug Thorley Caravans (Aust.) Pty Ltd [1981] VR 799, 812, per Brooking J. In this case, an oral agreement was made, whereby hire purchase agreements were written at a flat rate of commission and mis-described interest rate concealing contraventions of the Hire-Purchase Act 1959 (VIC). Essentially, Electric Acceptance was indemnified from any losses incurred from hire purchase agreement with Doug Thorley.

> always seemed to me likely to lead to error, in matters such as this, to adopt first one of the familiar legal adjectives – "illegal", "void", "unenforceable", "ineffectual", "nugatory" – and then having given an act a label, to deduce from that its results in law. That is to invert the order of inquiry, and by so doing to beg the question, and allow linguistics to determine legal rights.[4]

To summarise the above, a contract may be prohibited under statute and/or common law, and all prohibited contracts are either illegal or nugatory:

However, as is made clear below, this neat distinction is rather artificial and there are several instances of overlap.

Another initial observation that needs to be made is that, while a contract being prohibited is ordinarily a matter pleaded as a defence, this is not always the case. In *Knowles v Fuller*,[5] Fuller was a builder, building a hotel for Knowles. Fuller sued Knowles to recover the balance of the contract. Knowles pleaded payment. The jury found for Fuller and awarded him payment for the balance of the contract. Jordan CJ outlined when a contract being prohibited can be relied upon, where the defendant has not actually pleaded it:

> A court will not entertain a defence of illegality [in its broad sense, referred to as prohibited contracts in this book] which has not been pleaded, unless (1) the transaction sued upon is *ex facie* illegal, or (2) the plaintiff cannot prove his case without proving also that he is pleading under an illegal transaction, or (3) exceptionally, where a fact comes to light in the course of the trial which of itself shows that the transaction sued on is illegal on grounds which nothing could cure.[6]

Consequently, while the issue of a contract being prohibited typically arises due to it being pleaded as a defence by one of the parties to a contractual dispute, a court may, on its own initiative, find a disputed contract to be prohibited in certain limited circumstances.

7.2 Contracts prohibited by statute

In examining whether a contract is prohibited by statute, the courts often find themselves having to strike a balance between two fundamental legal principles. On the one hand is the desire to hold the parties to their bargaining, and on the other hand is the principle that the court must not condone or assist a breach of statute. As always when two fundamental legal principles are in conflict, the law is less than straightforward.

7.2.1 Contracts illegal by statute law

In *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd*[7] (discussed in detail below), Gibbs ACJ noted that there are four ways in which the enforceability of a contract may be affected by a statutory provision which renders a particular contract unlawful:

> (1) The contract may be to do something which the statute forbids;
> (2) The contract may be [of a kind] which the statute expressly or impliedly prohibits;
> (3) The contract, although lawful on its face, may be made in order to effect a purpose which the statute renders unlawful; or
> (4) The contract, although lawful according to its own terms, may be performed in a manner which the statute prohibits.[8]

4. Brooks v Burns Philip Trustee Co Ltd (1969) 121 CLR 432, 458.
5. (1947) 48 SR (NSW) 243.
6. Knowles v Fuller (1947) 48 SR (NSW) 243, 245
7. (1978) 139 CLR 410.
8. Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410, 413.

In this context, we may usefully recall the observation in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* – a matter relating to the proper understanding of certain sections of the TPA – that:

> [W]hen a statute contains a unilateral prohibition on entry into a contract, it does not follow that the contract is void. Whether or not the statute has this effect depends upon the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences for the innocent party, and any other relevant considerations. Ultimately, the question is one of statutory construction.[9]

Nelson v Nelson[10] involved a dispute over a trust fund. The trust was set up for the benefit of the mother from the sale of property for which she had provided funds. The adult children held ownership of the property as joint tenants. This was done so that the mother could obtain a benefit from the purchase of another house, which required her to not be the owner of any other property. Her daughter contested that she had a beneficial interest in the property and was owed funds from the trust as a result.

The Court held that while the transaction was not illegal per se, it was entered into for an illegal purpose. It was also held that the Act in question, the *Defence Services Home Act 1908* (Cth), which made the actions of the mother illegal, was not relevant to the claim by the parties. The illegality of the mother's actions played no role in her right to the trust fund. It was ordered that she obtain the trust fund monies as she was duly entitled. As is made clear by McHugh J in that case, the respective consequences of illegality based on the four grounds outlined in *Yango* must not all be the same: "It would be surprising if sound legal policy required each of these forms of illegality to be treated in the same way".[11]

The first two of these four situations are examined directly below. However, the consequences of the third and fourth situations are determined by reference to "public policy", and are, thus, more appropriately dealt with in the context of contracts rendered illegal under common law (see 7.3 below).

7.2.1.1 Contracts to do something which the statute forbids

Illegality based on a contract to do something forbidden by statute is ordinarily not difficult to identify. A contract under which a person undertakes to commit an act prescribed as a crime would be an example of a contract to do something forbidden by the relevant statute. For example, the object of a contract to carry out a "hit" against a person's life would clearly be forbidden by Chapter 28 of the Queensland *Criminal Code 1899* and its equivalent provisions elsewhere. A less extreme example of conduct prohibited by statute is found in *Re Mahmoud & Ispahani*,[12] discussed below, although in that case the contract was also specifically prohibited. Thus, that case is also illustrative of the fact that there often is an overlap between contracts to do something which the statute forbids and contracts of a kind which the statute expressly prohibits.

7.2.1.2 Contracts of a kind which the statute expressly or impliedly prohibits

A statute may either expressly or impliedly hold a particular type, or kind, of contract illegal, either as formed or as performed. This is different to illegality based on a contract to do something forbidden by statute in that, in the case of illegality based on a contract to do something forbidden by statute, focus is placed on the action to be carried out under the contract, rather than on the type, or kind, of contract. However, as already signalled, there is clearly an overlap.

In *St John Shipping Corp v Joseph Rank Ltd*[13] due to overloading of a ship, the plaintiff was entitled to an extra £2,295 in freight. The plaintiff sued to recover the withheld freight and the defendant argued that because the contract was performed in an illegal manner, the plaintiff was not entitled to recover any part of the freight. It was held that the plaintiff was entitled to recover the extra freight from the defendants. Devlin J stated that: "the court will not enforce a contract which is expressly or impliedly prohibited by statute".[14] However, Devlin J also raised a warning in relation to inferring a prohibition:

> If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear

9. Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd (2007) 232 CLR 1, 29.
10. (1995) 184 CLR 538.
11. Nelson v Nelson (1995) 184 CLR 538, at 611.
12. [1921] 2 KB 716.
13. [1957] 1 QB 267.
14. St John Shipping Corp v Joseph Rank Ltd [1957] 1 QB 267, at 283.

> implication. But unless you get a clear implication of that sort, I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. Caution in this respect is, I think, especially necessary in these times when so much of commercial life is governed by regulations of one sort or another, which may easily be broken without wicked intent. Persons who deliberately set out to break the law cannot expect to be aided in a court of justice, but it is a different matter when the law is unwittingly broken. To nullify a bargain in such circumstances frequently means that in a case – perhaps of such triviality that no authority would have felt it worthwhile to prosecute – a seller, because he cannot enforce his civil rights, may forfeit a sum vastly in excess of any penalty that a criminal court would impose; and the sum forfeited will not go into the public purse but into the pockets of someone who is lucky enough to pick up the windfall or astute enough to have contrived to get it.[15]

The first thing to note when examining whether a contract falls within the scope of the second category, as defined in *Yango*, is that focus is placed on *the kind* of contract in question rather than the particular contract at hand. The difference is illustrated in *Colin John Fitzgerald v F J Leonhardt Pty Ltd*[16] (see 7.3.1.2 below for the background facts), where the Court noted that: "the drilling contract was not one which the statute expressly or impliedly prohibited. A permit [which was lacking in the case] was required if the drilling was not to constitute an offence on the part of the owner, but a contract for the drilling of bores was plainly envisaged by the Act".[17]

While it is usually necessary to carefully examine the relevant statute to determine whether a prohibition is implied, it is sometimes the case that a particular type of contract is expressly prohibited. For example, when combined, s. 5 of the *Surrogacy Act 2010* (Qld) make clear, amongst other things, that a person shall not enter into, or offer to enter into, a contract, whether formally or informally, and whether or not for payment or reward, under which it is agreed that a person shall become, or shall seek or attempt to become, the bearer of a child, and that a child delivered as the result thereof shall become and be treated, whether by adoption, agreement, or otherwise, as the child of any person or persons other than the person first mentioned. However, s. 5(b) makes provision for a surrogacy arrangement as a result of court-sanctioned transfer of parentage permissible provided the following principles are adhered by according to s. 6:

> ***The Surrogacy Act 2010* (Qld), s. 6 (2)**
>
> (a) a child born as a result of a surrogacy arrangement should be cared for in a way that—
>
> (i) ensures a safe, stable and nurturing family and home life; and
>
> (ii) promotes openness and honesty about the child's birth parentage; and
>
> (iii) promotes the development of the child's emotional, mental, physical and social wellbeing;
>
> (b) the same status, protection and support should be available to a child born as a result of a surrogacy arrangement regardless of—
>
> (i) how the child was conceived under the arrangement; or
>
> (ii) whether there is a genetic relationship between the child and any of the parties to the arrangement; or
>
> (iii) the relationship status of the persons who become the child's parents as a result of a transfer of parentage;
>
> (c) the long-term health and wellbeing of parties to a surrogacy arrangement and their families should be promoted;
>
> (d) the autonomy of consenting adults in their private lives should be respected.

The manner in which the courts deal with contracts expressly prohibited by statute is demonstrated, for example, in *Re Mahmoud & Ispahani*.[18] The matter before the Court involved a statute which proscribed the buying or selling of a variety of seeds, oils and fats in the period immediately after World War I, unless the buyer and seller were both licensed. The plaintiff seller's licence only allowed him to sell oil for delivery in the United Kingdom to a licensed buyer. The plaintiff was induced to sell linseed oil to the defendant buyer, who was not licensed, as the buyer deliberately deceived the seller by saying that he had a buyer's license, when he did not. The buyer subsequently refused to take delivery of the oil, claiming the contract was void for illegality.

15. St John Shipping Corp v Joseph Rank Ltd [1957] 1 QB 267, at 288.
16. (1997) 189 CLR 215.
17. Colin John Fitzgerald v F J Leonhardt Pty Ltd (1997) 189 CLR 215, at 219, per Dawson & Toohey JJ.
18. [1921] 2 KB 716.

Lord Justice Scrutton noted that: "The contract [in question] was absolutely prohibited; and in my view, if an act is prohibited by statute for the public benefit, the Court must enforce the prohibition, even though the person breaking the law relies upon his own illegality".[19]

In contrast to the *Surrogate Parenthood Act 1988* (Qld), most statutes do not make clear whether a contract entered into in contravention of the statute is to be viewed as illegal. For example, the relevant Act in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd*[20] – the *Banking Act 1959* (Cth) – stated at the time of the dispute that: "Subject to this Act, a body corporate shall not carry on any banking business in Australia unless the body corporate is in possession of an authority under the next succeeding section to carry on banking business" (s. 8). Furthermore, the same section prescribed a penalty of $10,000 for each day during which a contravention of s. 8 continued. While the Act made it blatantly clear that a corporation engaging in banking business without the appropriate authority would be acting in contravention of the Act, it did not make it clear whether or not a contract entered into by such a corporation was illegal.

Having noted that the section makes no reference to contracts or transactions, Mason J had no difficulty in finding that the section did not contain any express prohibition against the type of contract in dispute. Thus, the question with which the High Court in *Yango* was faced was whether it was implied in the Act that such a contract was illegal. In other words, the Court needed to examine whether the Act merely prohibited the conduct in question, or whether it went further to also prohibit, by inference, any contract involving that conduct.

The answer to such a question has huge policy implications. If the contract is held to be enforceable, corporations may find it profitable to act in breach of the statute, thus undermining it. On the other hand, if all contracts entered into in a situation such as in *Yango* are held as unenforceable, the results may be highly unfair as a party may rely upon the illegality of its own acts to put itself in a better position. In *Yango*, however, the party seeking to rely on the illegality was not the same as the party having breached the statute. Had that been the case, the Court's decision might have been different:

> [I]n the present case Parliament has provided a penalty which is a measure of the deterrent which it intends to operate in respect of non-compliance with s. 8. In this case it is not for the court to hold that further consequences should flow, consequences which in financial terms could well far exceed the prescribed penalty and could even conceivably lead the plaintiff to insolvency with resultant loss to innocent lenders or investors. In saying this I am mindful that there could be a case where the facts disclose that the plaintiff stands to gain by enforcement of rights gained through an illegal activity far more than the prescribed penalty. This circumstance might provide a sufficient foundation for attributing a different intention to the legislature. It may be that the true basis of the principle is that the court will refuse to enforce a transaction with a fraudulent or immoral purpose: *Beresford v Royal Insurance Co Ltd*.[21] On this basis the common law principle of *ex turpi causa* can be given an operation consistent with, though subordinate to, the statutory intention, denying relief in those cases where a plaintiff may otherwise evade the real consequences of a breach of a statutory prohibition.[22]

Having taken into account: "the scope and purpose of the statute from which inferences may be drawn as to the legislative intention regarding the extent and the effect of the prohibition which the statute contains";[23] and the fact that the statute in question already provided for a penalty; and having examined the respective consequences of holding the contract enforceable or unenforceable, the Court found the contract enforceable.

7.2.2 Contracts nugatory by statute law

Certain types of contracts are nugatory under statutes, without being regarded as "illegal" in the strict sense. For example, s. 56(1) of the *Unlawful Gambling Act 1998* (NSW) states that:

19. Re Mahmoud & Ispahani [1921] 2 KB 716, at 729.
20. (1978) 139 CLR 410.
21. (1937) 2 KB 197, at p 220.
22. Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410, at 429 – 430, per Mason J.
23. Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410, at 423, per Mason J.

Unlawful Gambling Act 1998 **(NSW), s. 56(1)**

Any agreement, whether oral or in writing, that relates to any form of gambling that is prohibited under this Act has no effect, and no action may be brought or maintained in any court to recover any money alleged to have been won from, or any money paid in connection with, any such form of gambling.

Here, the legislators clearly intend for the type of contracts discussed to be nugatory, but it is equally clear that there is no intention to make such contracts illegal. In other words, neither party to a prohibited gambling agreement can legally enforce that agreement against the other party. However, entering into such an agreement is not illegal, and performing such a contract is not illegal.

7.3 Contracts prohibited under common law

There are rather well-defined categories of contracts that are prohibited by reason of the public interest. Whether they are actually "illegal", or merely nugatory, contracts prohibited under common law are prohibited with reference to the elusive concept of "public policy". In determining what the relevant public policy considerations are, it is interesting to note that in *A v Hayden* (No. 2),[24] the High Court approved the following passage from *Wilkinson v Osborne*:[25]

> In my opinion the "public policy" which a Court is entitled to apply as a test of validity to a contract is in relation to some definite and governing principle which the community as a whole has already adopted either formally by law or tacitly by its general course of corporate life, and which the Courts of the country can therefore recognise and enforce. The Court is not a legislator: it cannot initiate the principle; it can only state or formulate it if it already exists … The Courts refuse to give effect to such a bargain, not for the sake of the defendant, not to protect any interest of his – indeed, they do not fail to notice that his failure to abide by his agreement sometimes adds dishonesty to illegality – but they refuse to enforce the bargain for the sake of the community, who would be prejudiced if such a bargain were countenanced.[26]

7.3.1 Contracts illegal under common law

Rule 26

1. A contract is illegal under common law where it is:
   - (a) entered into with the intent to commit crime;
   - (b) entered into with the intent to commit tort;
   - (c) entered into with the intent to commit fraud;
   - (d) a contract breaching a statute;

24. (1984) 156 CLR 532. The facts of the case are outlined at 6.3.1.4.
25. (1915) 21 CLR 89.
26. Wilkinson v Osborne (1915) 21 CLR 89, 97 – 98, per Isaacs J. This case involved the sale of a piece of property to the Government. Wilkinson was hired by the owners of the property to negotiate the sale and his commission was dependent upon success of the transaction. When negotiations stalled, Wilkinson bribed Osborne, a member of the Legislative Assembly, to push vote in favour of the purchase. This was a clear case of a man trying to serve two masters. Osborne owed to the employer, Wilkinson, the duty to press forward the contract regardless of the interests of the public, and as members of the Legislature it was their duty to consider the matter impartially before voting upon it.

(e) a contract promoting sexual immorality;

(f) a contract prejudicial to the administration of justice;

(g) a contract tending to promote corruption in public life;

(h) a contract prejudicial to public safety;

(i) a contract infringing the laws of a friendly foreign country;

(j) a contract imposing servitude; or

(k) a contract to defraud the revenue.

There are several types of contracts that are recognised as illegal under Australian common law. These are outlined in Rule 26 and are discussed below.

7.3.1.1 Contracts entered into with the intent to commit a crime, tort or fraud

Where a contract is not expressly or impliedly prohibited by statute, it may nevertheless be held illegal if it is contrary to public policy. The rationale for holding contracts that are entered into with the intent to commit crime, tort or fraud against a third party, or with the intent of breaching a statute, unenforceable, is found in the maxim *ex turpi causa non oritur actio* (i.e., no action arises out of dishonourable cause).

It is not difficult to imagine situations where a contract would be held to be illegal under Article 1(a), 1(b) or 1(c) of Rule 26. For example, a person may enter into a contract to kill, defame or defraud a third party. However, actual cases where the principles expressed in these rules have been applied are relatively rare.

One such case is *Allen v Rescous*;[27] the plaintiff agreed to pay the respondent to beat up a third party. The plaintiff sued the respondent for failing to beat up the third party after payment was provided. The Court held that the whole contract was void as the purpose was illegal.

7.3.1.2 Contracts breaching a statute

The principle expressed in Rule 26, Article 1(d) is, in a sense, connected to what was discussed in relation to contracts rendered illegal by legislation, and has been the object of much litigation.

While it would appear that any contract falling within the two first categories stated in *Yango* (see 7.2.1 above) would not only be illegal under statute but also under common law, this section will focus on contracts falling within the third and fourth category of *Yango;* that is: contracts that, although lawful on their face, are made in order to effect a purpose which the statute renders unlawful; and contracts, although lawful according to their own terms, that are performed in a manner which the statute prohibits. In *Colin John Fitzgerald v F J Leonhardt Pty Ltd*,[28] Kirby J made an attempt to clarify the approach to be taken when examining a contract alleged to be illegal by statute:

> The questions therefore to be asked are whether the Act invoked to taint the contract with illegality expressly prohibits the contract as formed or because of the way it was performed? If not, the subordinate question is whether the Act, by necessary inference, prohibits the contract as formed or because of the way it was performed? These are the construction questions. Only if the answers to those questions are in the negative does the further question arise whether, as a matter of public policy, the Court will allow the plaintiff to invoke its process to enforce the contract. Even if, as here, it is accepted that there was nothing illegal in the contract as formed, it remains for a court to consider whether, as performed, the contract is so in breach of a legislative provision as, by implication, to attract the operation of the Act, rendering the contract as performed to that extent unlawful and therefore void. Obviously, the issues posed by this question overlap with those relevant to the resolution of the question whether the contract is unenforceable on

27. (1675) 2 Lev. 174.
28. (1997) 189 CLR 215.

> public policy grounds. But the two questions are not the same. Part of the confusion which has attended many of the authorities in these cases derives from a failure to make clear the distinction between the two issues.[29]

With regard to contracts that, although lawful on their face, are made in order to effect a purpose which the statute renders unlawful, it is to be noted that the unlawful intention must go to the substance of the contract. Thus, in *Neal v Ayers*,[30] a contract under which property in a hotel was transferred with the understanding that the buyer would engage in illegal after-hours trade, was nevertheless held to be enforceable:

> The substantial purpose of the contract was to transfer the property on which a business was carried on. That the purchaser intended for a time to [un]lawfully trade could not invalidate the whole transaction, notwithstanding the vendor's knowledge. [The buyer's] intention does not go to the substance of the transaction.[31]

In relation to contracts that, although lawful according to their own terms, are performed in a manner which the statute prohibits, it is interesting to note the statements by Devlin LJ in *Archbolds (Freightage) Ltd v S Spanglett Ltd*:[32]

> It is a familiar principle of law that if a contract can be performed in one of two ways, that is, legally or illegally, it is not an illegal contract, though it may be unenforceable at the suit of a party who chooses to perform it illegally. That statement of the law is meaningful if the contract is one which is by its terms open to two modes of performance; otherwise it is meaningless.[33]

In that case, Archbolds employed Spanglett Ltd, to carry a shipment of whisky. Spanglett used a van with improper licensing. This fact was unknown to Archbolds. The whisky was stolen because of negligent driving and Archbold claimed damages. Spanglett counterclaimed that the contract was illegal due to the fact that the van had improper licensing. Lord Justice Devlin held that if there was an intent to perform the contract in an unlawful manner, it will be unenforceable by the party having the intent to perform it in an illegal manner. Since Archbolds had no knowledge of the intention to perform the contract in an illegal way, they were entitled to enforce it, but Spanglett Ltd was not entitled to do so.

In *Colin John Fitzgerald v F J Leonhardt Pty Ltd*,[34] the plaintiff, a driller, had performed work for the defendant, but was not paid for the work. The performed work required both parties to hold particular licenses. The defendant sought to rely upon its own illegal conduct to avoid paying for the service, as it did not hold the appropriate licence. The High Court held in the plaintiff's favour, noting that:

> The action by the driller to recover moneys owing to it by the owner was not an action by a party to a contract who had chosen to perform it illegally. The penalty imposed by [the statute] was directed at a party in the position of the owner rather than the driller. Further, it has not been suggested that the driller acted otherwise than in good faith or that the driller had aided and abetted the owner in any offence committed by him … The question then becomes whether, as a matter of public policy, the court should decline to enforce the contract because of its association with the illegal activity of the owner … The refusal of the courts in such a case to regard the contract as enforceable stems not from express or implied legislative prohibition but from the policy of the law, commonly called public policy. Regard is to be had primarily to the scope and purpose of the statute to consider whether the legislative purpose will be fulfilled without regarding the contract as void and unenforceable.[35]

It is to be noted that, just as in determining whether or not a contract is impliedly prohibited by a statute, the existence of a penalty is of relevance in determining the consequences of a contract breaching a statute under common law:

> [The statute] prescribes a penalty. In such a case, the role of the common law in determining the legal consequences of commission of the offence may thereby be diminished because the purpose of the statute is sufficiently served by the penalty. Here, the imposition of an additional sanction, namely inability of the driller to recover moneys otherwise

29. Colin John Fitzgerald v F J Leonhardt Pty Ltd (1997) 189 CLR 215, at 245.
30. (1940) 63 CLR 524.
31. Neal v Ayers (1940) 63 CLR 524, at 531 – 532, per Dixon and Evatt JJ.
32. [1961] 1 QB 374.
33. Archbolds (Freightage) Ltd v S Spanglett Ltd [1961] 1 QB 374, at 391.
34. (1997) 189 CLR 215.
35. Colin John Fitzgerald v F J Leonhardt Pty Ltd (1997) 189 CLR 215, at 226 – 227, per McHugh and Gummow JJ.

> owing by the owner, would be an inappropriate adjunct to the scheme for which the Act provides. The contrary decision would cause prejudice to an innocent party without furthering the objects of the legislation.[36]

7.3.1.3 Contracts promoting sexual immorality

As far as contracts promoting sexual immorality (Rule 26, Article 1(e)) are concerned, the law recognises that community standards of immorality are ever-changing. Early cases, such as *Pearce v Brooks*,[37] where the court held that a coach builder could not recover the price for a brougham (a small carriage) built for a prostitute in order for her to "make a display favourable to her immoral purposes",[38] arguably no longer represent the community standards of immorality. Thus, great care must be taken in drawing upon older cases. For example, in *Barac (t/s Exotic Studios) v Farnell*,[39] a receptionist employed by a brothel was held to be entitled to workers' compensation, and it is submitted that had this case been decided 100 years earlier, the Court may well have reached a different conclusion.

More recently, in the case of *Ashton v Pratt (No 2)*,[40] the Court held that contracts promoting sexual immorality will still be considered illegal and therefore void if the contractual agreement does not go beyond the provision of 'meretricious sexual services'. While changes in social norms have resulted in more liberal attitudes by the courts in cases such as these, Brereton J stated at [50], '[s]o far as I can tell, no case stands contrary to the proposition that it is still the law that a contract to provide meretricious sexual services is contrary to public policy and illegal'.[41] However, the Court does note that in recent cases there have been two features which have saved contracts promoting sexual immorality from being deemed illegal: (1) the contract did not bring about a state of extramarital cohabitation, it merely made provision in respect of one that already existed; and (2) the contract did not involve meretricious sexual services, but a sexual relationship as part of a wider relationship which included cohabitation and aspects of mutual support.[42]

7.3.1.4 Contracts prejudicial to the administration of justice

An example of a contract prejudicial to the administration of justice (Rule 26, Article 1(f)) is *A. v Hayden* (No. 2).[43] In that case, members of the Australian Secret Intelligence Service (ASIS) performed a training exercise at a hotel without the knowledge of the hotel operators. In the course of the training, they committed a crime. The matter related to whether the Commonwealth Government could reveal the identity of the ASIS members involved in the incident despite the fact that the contract of employment contained a clause binding the Commonwealth to confidentiality. The Court noted that:

> Whether enforcement or observance of a term of a particular promise of confidentiality would obstruct [the administration of the criminal law] is a question which must be determined in the context of the circumstances of the particular case. Plainly enough, the enforcement of such a promise by an order forbidding a threatened voluntary disclosure to the Commissioner of a State Police Force of the identity of the participants in joint activity which involved actual or reasonably apprehended offences against the criminal law of that State would involve obstruction of the due administration of that criminal law.[44]

The most significant aspect of the statement is that it highlights the need for a context-specific assessment in any given case, at least where the matter in question is confidentiality as was the case here.

7.3.1.5 Contracts tending to promote corruption in public life

While somewhat dated, *Parkinson v College of Ambulance Ltd*[45] is a rather amusing example of a contract tending to promote corruption in public life (Rule 26, Article 1(g)). In that case, the plaintiff – Colonel Parkinson – had been approached by Mr Harrison, the secretary for the College of Ambulance. Mr Harrison had fraudulently represented to Colonel Parkinson that if a large donation were made to the College, the Colonel would receive a knighthood. When he did not receive the knighthood, Colonel Parkinson brought action against the College to recover his money.

36. Colin John Fitzgerald v F J Leonhardt Pty Ltd (1997) 189 CLR 215, at 227, per McHugh and Gummow JJ.
37. (1866) LR 1 Ex 213.
38. Pearce v Brooks (1866) LR 1 Ex 213, 218, per Pollock C.B.
39. (1994) 53 FCR 193.
40. [2012] NSWSC 3.
41. Ashton v Pratt (No 2) [2012] NSWSC 3 [50].
42. Ibid [49].
43. (1984) 156 CLR 532.
44. A. v Hayden (No. 2) (1984) 156 CLR 532, at 595 – 596, per Deane J.
45. [1925] 2 KB 1.

The Court held that, where a contract, regarded as illegal due to it being contrary to public policy, has any element of turpitude[46] in it, the parties to the contract are *in pari delicto* (equally at fault). Thus, if one of the parties to the contract has been defrauded, no action for damages can be maintained by the defrauded party, even though the contract is not of a criminal nature.

7.3.1.6 Contracts prejudicial to the public safety

Contracts held to be prejudicial to the public safety are relatively rare. However, examples can be found; a contract entered into with a person residing in a country with which Australia is at war, particularly where such a contract has the effect of hindering the war efforts, is *prima facie* illegal unless made with governmental approval. *Donohoe v Schroeder*[47] is an example of such a case.

That case involved a contract for the sale of assets during World War I which was signed under power of attorney and approved by a *de facto* officer of the Crown. The contract was allegedly one constituting "trading with the enemy". It was held that as the contract was approved by a *de facto* officer of the Crown, the contract was valid and not contrary to any laws regardless of whether the transaction constituted trading with the enemy.

7.3.1.7 Contracts infringing the laws of a friendly foreign country

A n example of a contract infringing the laws of a friendly foreign country can be found in *Ragazzoni v K C Sethia (1944) Ltd*.[48] There he parties to the dispute had contracted for the sale of jute bags. Both parties were aware of the fact that Indian law prohibited the export of jute bags to South Africa, and both parties were aware of the fact that the buyer intended to export the jute bags to South Africa. The seller failed to deliver the jute bags. While no payment had been made, the appellant claimed damages for loss of profit on anticipated resale.

Viscount Simonds noted that: "Just as public policy avoids contracts which offend against our own law, so it will avoid at least some contracts which violate the laws of a foreign State and it will do so because public policy demands that deference to international comity".[49] Further, Viscount Simonds explained that, as public policy is relied upon in avoiding contracts that violate law, public policy must also be the focal point in determining when it is motivated not to do so.

7.3.1.8 Contracts imposing servitude

In these times, situations where the matter of contracts imposing servitude may be applicable are rare. However, the principle is nevertheless still in force.

In *Horwood v Millar's Timber and Trading Company Ltd*,[50] a person had entered into a money lending contract, and in doing so had undertaken never to change his residence or employment and never to incur any legal or moral obligations without the moneylender's consent. The Court found the contract to be illegal as it went far beyond what was necessary to protect the moneylender's interest, and practically had the effect of rendering the person in question a virtual slave.

7.3.1.9 Contracts to defraud the revenue

In *Alexander v Rayson*,[51] the defendant had contracted with the plaintiff to rent a flat. In order to conceal the true rateable value of the flat, the plaintiff lessee had divided the contract in two where the contract for the rent was for £450 while a separate contract for services was for £750, making the total yearly cost £1200.

When the defendant lessor attempted to recover an instalment from the lessee, the Court held that the contract was illegal as it was an attempt to defraud the revenue. As such, the lessor was refused relief.

46. Turpitude meaning conduct which is considered evil or has an element of moral depravity: Felix v General Dental Council [1960] AC 704.
47. (1916) 22 CLR 362, at 365.
48. [1958] AC 301.
49. Ragazzoni v K C Sethia (1944) Ltd [1958] AC 301, at 319.
50. [1917] 1 KB 305.
51. [1936] 1 KB 169.

7.3.2 Contracts nugatory under common law

Rule 27

1. A contract is nugatory under common law where it is:
    (a) a contract to oust the jurisdiction of the courts;
    (b) a contract prejudicial to the status of marriage; or
    (c) a contract in restraint of trade.

In relation to contracts to oust the jurisdiction of the courts, it is interesting to note the findings of the Court in *Dobbs v National Bank of Australia Ltd*:[52]

> A clear distinction has always been maintained between negative restrictions upon the right to invoke the jurisdiction of the Courts and positive provisions giving efficacy to the award of an arbitrator when made or to some analogous definition or ascertainment of private rights upon which otherwise the Courts might have been required to adjudicate. It has never been the policy of the law to discourage the latter. The former have always been invalid. No contractual provision which attempts to disable a party from resorting to the Courts of law was ever recognised as valid. It is not possible for a contract to create rights and at the same time to deny to the other party in whom they vest the right to invoke the jurisdiction of the Courts to enforce them.[53]

In that case, the appellant contended that a clause of a certificate of indebtedness was void because it attempted to oust the jurisdiction of the courts. The clause purported to be conclusive evidence of the appellant's indebtedness to the respondents. The appellant contended that the clause attempted to oust the jurisdiction of the court upon an issue essential to the guarantor's liability and to substitute for the judgment of the court the determination or opinion of an officer of the bank.

These days, contracts prejudicial to the status of marriage would appear to be rare in Australia. Indeed, it could be questioned whether this head of public policy is indeed extinct. Nevertheless, older cases such as *Hermann v Charlesworth*[54] may be used to illustrate the application of the relevant principle.

In that case, Mrs Hermann had entered into a contract under which she paid £52 (as a "special client's fee") in order to be "introduced to or put in correspondence with a gentleman" through the influence of the defendant and was to pay a further £250 in the event of the occurrence of a marriage. While Mrs Hermann was introduced to several gentlemen, no marriage (or, indeed, even engagement) took place. Mrs Hermann sought to recover the money she had paid.

The Court held the contract to be a marriage brokerage contract and as such it was nugatory. Mrs Hermann was allowed to recover her money despite the fact that the defendant had, indeed, taken some steps to help Mrs Hermann find a husband.

Contracts in restraint of trade are discussed separately below, as they are associated with particular considerations, as well as particular statutory regulation.

7.4 Contract in restraint of trade

A detailed examination of the law regulating restraint of trade goes beyond the scope of this book. However, a few observations need to be made in relation to this very particular form of nugatory contracts.

Contracts having the effect of restraining trade are regulated by both statute and common law. As far as

52. (1935) 53 CLR 643.
53. Dobbs v National Bank of Australia Ltd (1935) 53 CLR 643, at 652, per Rich, Dixon, Evatt and McTiernan JJ.
54. [1905] 2 KB 123.

statutes are concerned, the most relevant provisions are found in Part IV of *the Competition and Consumer Act 2010* (Qld). However, as far as New South Wales is concerned, we must also examine the *Restraints of Trade Act 1976* (NSW).

7.4.1 Part IV of the *Competition and Consumer Act 2010* (Cth)

The provisions in Part IV regulating contracts in restraint of trade or commerce which restrict competition, as with the entirety of the *Competition and Consumer Act 2010* (Cth), are limited by the *Commonwealth Constitution*. Thus, Part IV is ordinarily limited to corporations, but may be extended to individuals under certain circumstances. Importantly, s. 51(2) makes it clear that the relevant rules of the CCA do not affect the common law rules relating to sale of business contracts and employment contracts, discussed below.

Part IV of the CCA contains several specialised provisions, such as s. 45DB dealing with boycotts affecting trade or commerce. However, as the aim of this part of the book is to simply provide an introduction to what Part IV of the CCA covers, focus is placed on s. 45(1), which is the provision of most general importance:

***Competition and Consumer Act 2010* (Cth), s. 45(1)**

(1) A corporation must not:

(a) make a contract or arrangement, or arrive at an understanding, if a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or

(b) give effect to a provision of a contract, arrangement or understanding, if that provision has the purpose, or has or is likely to have the effect, of substantially lessening competition; or

(c) engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition.

It is noteworthy that this regulation focuses on whether individual "provisions" have the effect of substantially lessening competition. The term "provision" is given the following definition in s. 4(1) of the CCA: "'provision', in relation to an understanding, means any matter forming part of the understanding." This emphasises that a contract may be upheld in part, even where individual provisions are held unlawful under s. 45.

In relation to the effect of substantially lessening competition, two phenomena deserve particular attention: so-called "market-sharing" and "horizontal" price-fixing. *Rural Press Ltd v ACCC*[55] involved market-sharing. In that case, two rural newspapers agreed not to publish within each other's circulation areas. Having noted that the affected market need not be substantial, the High Court saw this as a breach of TPA s. 45.

"Horizontal" price-fixing occurs when two or more entities, acting on the same level of the market, agree, for example, to charge the same price for a particular product. In *Trade Practices Commission v Nicholas Enterprises Pty Ltd (No 2)*,[56] the former Trade Practices Commission alleged that agreements amongst eight hoteliers in metropolitan Adelaide to reduce the number of bottles of beer sold at the price of a dozen from 15 to 14, was effectively a price-fixing agreement. Two of the defendants were held liable, as they were bound by admissions pertaining to their conduct only; however, the evidence tending to prove an agreement binding all the hoteliers was not sufficiently proved so as to make the remaining six hoteliers liable. By way of comparison, in *Trade Practices Commission v Email* (1980),[57] two companies were at the time the only manufacturers of electricity meters in Australia, selling approximately 98% of their stock in trade to government providers. The companies had identical pricing arrangements and price variation clauses and sent one another their pricing lists. The TPC argued that this was a price-fixing agreement and that the sending of price lists itself amounted to a breach of s. 45. In the circumstances, there was no evidence to prove any communications relating to price-fixing, let alone an agreement. The Court accepted the explanation offered by Email as negating the inferences raised by the Trade Practices Commission. Thus, it was held that there was no agreement to fix the prices of electricity meters.

55. (2003) 203 ALR 217.
56. (1979) 26 ALR 609.
57. 43 FLR 383.

Finally, it is to be noted that the application of s. 45(1) is extended through s. 45(4):

> ***Competition and Consumer Act 2010* (Cth), s. 45(4)**
>
> (4) For the purposes of the application of this section in relation to a particular corporation, a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition if that provision and any one or more of the following provisions, namely:
>
> (a) the other provisions of that contract, arrangement or understanding or proposed contract, arrangement or understanding; and
>
> (b) the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the corporation or a body corporate related to the corporation is or would be a party;

together have or are likely to have that effect.

7.4.2 *Restraints of Trade Act 1976* (NSW)

New South Wales is the only Australian state to have enacted specific restraint of trade legislation. The key provision of the *Restraints of Trade Act 1976* (NSW) is s. 4:

> ***Restraints of Trade Act 1976* (NSW), s. 4**
>
> (1) A restraint of trade is valid to the extent to which it is not against public policy, whether it is in severable terms or not.
>
> (2) Subsection (1) does not affect the invalidity of a restraint of trade by reason of any matter other than public policy.
>
> (3) Where, on application by a person subject to the restraint, it appears to the Supreme Court that a restraint of trade is, as regards its application to the applicant, against public policy to any extent by reason of, or partly by reason of, a manifest failure by a person who created or joined in creating the restraint to attempt to make the restraint a reasonable restraint, the Court, having regard to the circumstances in which the restraint was created, may, on such terms as the Court thinks fit, order that the restraint be, as regards its application to the applicant, altogether invalid or valid to such extent only (not exceeding the extent to which the restraint is not against public policy) as the Court thinks fit and any such order shall, notwithstanding Subsection (1), have effect on and from such date (not being a date earlier than the date on which the order was made) as is specified in the order.
>
> (4) Where, under the rules of an association, a person who is a member of the association is subject to a restraint of trade, the association shall, for the purposes of subsection (3), be deemed to have created or joined in creating the restraint.
>
> (5) An order under subsection (3) does not affect any right (including any right to damages) accrued before the date the order takes effect.

7.4.3 Common law

While one is likely to look at the rules of the provisions found in Part IV of the CCA first, the common law rules regulating restraint of trade are nevertheless of great importance, as, in some instances, an agreement may fall outside the scope of the Part IV of the CCA but be nugatory under the common law rules.

Rule 28

1. Whether or not a contract, or part thereof, constitutes a restraint of trade is determined at the time the contract was concluded.

2. A contract, or part thereof, is *prima facie* contrary to public policy and thereby void where it constitutes a restraint of trade.

3. A contract, or part thereof, is not contrary to public policy and thereby not void where the court is satisfied that the contract, or the relevant part thereof, is reasonable in the circumstances.

4. In determining whether the contract, or the relevant part thereof, is reasonable for the purpose of Article 3, the court should particularly consider:

(a) whether the duration of the restraint is reasonable as between the parties;

(b) whether the extent of the area of the restraint is reasonable as between the parties;

(c) whether the type of the activity being restrained is reasonable as between the parties;

(d) whether the duration of the restrain is reasonable in the interest of the public;

(e) whether the extent of the area of the restraint is reasonable in the interest of the public; and

(f) whether the type of the activity being restrained is reasonable in the interest of the public.

5. Where the party that benefits from the restraint shows that the contract, or the relevant part thereof, is reasonable as between the parties, it is for the party that is restrained to show that the contract, or the relevant part thereof, is not reasonably in the interest of the public.

6. Where there is an inequality of bargaining power between the parties, the court may also take the fairness of the bargaining into account in determining whether the contract, or the relevant part thereof, is reasonable, for the purpose of Article 3.

The meaning of restraint of trade was clarified by Diplock LJ in *Petrofina (Great Britain) Ltd v Martin*:[58] "A contract in restraint of trade is one in which a party agrees with any other party to restrict his liberty in future to carry on trade with other persons not parties to the contract in such manner as he chooses".[59] However, not all contracts fitting this description will be viewed as nugatory under common law.

The general principle is that a contract in restraint of trade will be void unless it is regarded as reasonable by reference to the interests of the parties and the public.[60] Thus, even contracts that clearly constitute a restraint of trade are subject to a test of "reasonableness". This "reasonableness test" takes account of whether the restraint is reasonable as between the parties, and whether the restraint is reasonable in the interest of the public.[61] For both considerations, the court evaluates the duration as well as the geographical extent of the restraint.[62] The courts also consider the type of activity being restrained.[63] Thus, a court may conclude that a contract restraining a person from selling, for example, milk is enforceable. While a contract restraining a person from selling any type of food products at all is too far reaching and thereby nugatory.

Finally, *A Schroeder Music Publishing Co Ltd v Macaulay*[64] illustrates that the court may take account of the parties' bargaining power. There a songwriter had entered into a rather onerous contract with a music

58. [1966] 1 Ch 146. The facts of the case were as follows: Martin purchased a petrol station and signed an agreement to use only Petrofina petrol. After a short period, he began purchasing fuel from another supplier. The Court held that the clause was a restraint of trade and Petrofina did not satisfy the Court that the restraint was reasonable. The period was for 12 years and it would be Martin's responsibility, if he sold the station, to ensure the purchaser signed the same agreement, which could render the station unsaleable.
59. Petrofina (Great Britain) Ltd v Martin [1966] 1 Ch 146, at 180.
60. See e.g., Nordenfelt v Maxim Nordenfelt Guns & Ammunition [1894] AC 535; See also eg Cactus Imaging Pty Ltd v Peters [2006] NSW SC 717.
61. See e.g., Nordenfelt v Maxim Nordenfelt Guns & Ammunition [1894] AC 535.
62. Austress-Freyssinet Pty Ltd v Kowalski [2007] NSWSC 399, at para 18. This case involved a director of Austress-Freyssinet, Kowalski, who purchased shares in another company that was in direct competition with Austress. This was contrary to a restraint of trade clause in Kowalski's contract. The clause had no limitation on the geographical area in which it would apply, which the court found to be unreasonable.
63. See e.g., Foster v Galea [2008] VSC 317. In this case, the defendant was prohibited from "undertak[ing] any accounting or taxation work for any client of PM Foster & Co or any contacts made therefrom". The Court held that this clause was too wide and therefore unenforceable.
64. [1974] 1 WLR 1308.

publisher. The Court stated that: "The test of fairness is, no doubt, whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promise and commensurate with the benefits secured to the promisor under the contract".[65]

Case law has further illustrated that "the law does not readily allow a person to contract out of their means of livelihood",[66] and the principle expressed in Article 3 of Rule 28 has, thus, been given a particularly strict interpretation in the context of contracts of employment. In *Lindner v Murdock's Garage*[67] an employment contract purported to prevent the plaintiff from being employed by any person or company in any business similar to that of the respondents within five miles from the respondents' premises within one year of ceasing employment.

The appellant employee left Murdock's Garage and began working immediately for another garage within a few hundred yards of Murdock's. It was held that the clause was invalid due to exceeding what was reasonably necessary. It seems clear that provisions forming part of such contracts, which have the effect of restraining the particular trade of the employee, will only be upheld where they:

> (a) have the effect of restraining the employee from applying special skills, acquired with access to their employer's secrets, in working for a competitor in their spare time; or
> (b) have the effect of preventing the employee from using trade secrets, confidential information or trade connections of their past employer, in competing in the same business as their employer (whether they still work for that employer or not).[68]

In *Herbert Morris Ltd v Saxelby*,[69] it was held that a contract, under which a former employee undertook not to carry on a business dealing in hoisting and lifting machinery similar to that of his former employer, was invalid. The contract must be seen as rather extreme as this restriction was to be effective all over the United Kingdom and Ireland for no less than seven years. By way of contrast, in *Littlewoods Organisation Ltd v Harris*,[70] a contract under which a former senior employee, who had had access to confidential information, undertook not to work for a directly competing business for a year, was upheld.

7.5 Consequences of a contract being prohibited

As has been made clear throughout this Chapter, contracts may be held to be illegal or nugatory for a number of reasons. The question obviously arises of what actually happens when a contract is illegal or nugatory.

The first thing to note in this context, is that one of the reasons it is important to discuss illegal and nugatory contracts separately, is that the consequences of a contract being illegal are more severe than the consequences of a contract being nugatory.

Whether the illegality stems from statute or common law, where a contract is illegal, the applicable law can be summarised in the following:

65. A Schroeder Music Publishing Co Ltd v Macaulay [1974] 1 WLR 1308, at 1315 – 1316, per Lord Diplock.
66. Lindner v Murdock's Garage (1950) 83 CLR 628.
67. (1950) 83 CLR 628.
68. See e.g., Wright v Gasweld Pty Ltd (1991) 22 NSWLR 317. This case involved the respondent company, which was in the business of selling tools imported from Taiwan. The respondent had gone to great trouble to identify four reliable suppliers of quality tools. The appellant went to Taiwan to meet with the suppliers and under an agreement, the appellant was prohibited from using any confidential information he acquired during his employment. The court noted that law will protect trade secrets and confidential information, and will intervene to prevent their misuse.
69. [1916] 1 AC 688.
70. [1977] 1 WLR 1472.

Rule 29

1. Where a contract is illegal due to provisions of a statute, the consequences of the contract being illegal are determined by reference to the provisions of the statute rendering the contract illegal, to the extent that the statute contains such provisions.

2. Where an illegal contract can be severed so as to remove the illegal aspects of the contract, the court may enforce the remainder of the contract provided that:

(a) the severance does not alter the nature of the contract; and

(b) it is reasonable in the circumstances to enforce the remainder of the contract.

3. Except as outlined in this Rule, an illegal contract is void and neither party may seek to enforce it against the other.

4. Where a contract is illegal, money paid, compensation for benefits conferred and/or property transferred, under that contract, can only be recovered where:

(a) the party seeking to recover money paid and/or property transferred is less blameworthy of the contract's illegality than the other party;

(b) the party seeking to recover money paid and/or property transferred repents of the illegal purpose before any substantial performance of the illegal contract takes place;

(c) the illegality of the contract stems from a statute and the party seeking to recover money paid and/or property transferred is of the class that the statute seeks to protect; or

(d) the illegality of the contract stems from a statute and the statute expressly allows for such recovery.

5. Where the contract is not illegal as such, but is tainted by illegality either due to the fact that it was made in order to effect a purpose which a statute renders unlawful or due to it being performed in a manner which a statute prohibits, money paid and/or property transferred under the illegal contract, can only be recovered as outlined in Article 4.

6. In relation to a contract falling within Article 5, a court shall not refuse to enforce legal or equitable rights simply because they arose out of, or were associated with, an unlawful purpose, unless:

(a) the statute discloses an intention that those rights should be unenforceable in all circumstances; or

(b) it is shown that:

(i) the sanction of refusing to enforce those rights is not disproportionate to the seriousness of the unlawful conduct;

(ii) the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policies; and

(iii) the statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of a breach of the statute or the frustration of its policies.

The most frequently quoted statement of the relevant principles relating to severance is found in *McFarlane v Daniell*:[71]

> When valid promises supported by legal consideration are associated with, but separate in form from, invalid promises, the test of whether they are severable is whether they are in substance so connected with the others as to form an indivisible whole which cannot be taken to pieces without altering its nature ... If the elimination of the invalid promises changes the extent only but not the kind of the contract, the valid promises are severable.[72]

In that case, McFarlane and Daniell entered into a contract for employment whereby Daniell was to supply acting services to McFarlane. Daniell brought an action against McFarlane for the balance of his salary payable under the contract. McFarlane argued that the salary was not owed because Daniell had done no acting during the period for which the salary was claimed. McFarlane also argued that Daniell could not recover the money because part of the consideration for McFarlane to pay the salary was a promise by Daniell to adhere to

71. (1938) 38 SR (NSW) 337.
72. McFarlane v Daniell (1938) 38 SR (NSW) 337, at 345, per Jordan CJ.

a number of clauses in the employment contract, which McFarlane alleged Daniell had breached. Leave to appeal to the High Court was refused and the trial judge's decision allowing Daniell to recover was upheld.

Severance was also discussed in *Thomas Brown & Sons Ltd v Fazal Deen*.[73] In that case, the plaintiff had placed gold and jewels in the custody of the defendant. The defendant, who had lost the items, argued that the plaintiff's claim for damages was founded on an illegal contract. The Court held that, as the gold had been placed in the defendant's custody in contravention of the *National Security (Exchange Control) Regulations*, no claim could be made in relation to the gold. Noting that the elimination of the invalid promises changed only the extent of the contract, not the kind of contract, the Court held that the illegality relating to the gold could be severed and the claim could succeed in relation to the lost jewels.

Finally, as far as severance is concerned, courts may very well be unwilling to allow severance in relation to contracts involving serious criminal conduct.[74]

Article 4(a), which gives expression to the legal maxim of *in pari delicto potior est condition defendentis* (where the parties are equally at fault, the court will favour the defendant), covers a range of situations. Including where the party seeking to recover money paid and/or property transferred was ignorant or mistaken about the contract's illegality, and where such a party was induced to enter into the contract by the other party's fraud, oppression or undue influence, or was the victim of abuse of a fiduciary relationship. One example of the application of Article 4(a) is *Shelley v Paddock*.[75] The defendants were hire-purchasers by instalments of a house in Spain and represented to an English woman that they were authorised to sell it. This sale occurred fraudulently and led to an action by the plaintiff buyer to recover damages for fraud. The defendants were clearly guilty, but the plaintiff had also breached statutory provisions relating to exchange control. As the plaintiff's breach was innocent, it was held that public policy did not prevent the Court from assisting her in recovering damages; the parties were clearly not *in pari delicto* (that is, the defendants were plainly more culpable).

Furthermore, in *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd,*[76] McPherson J noted that the court would assist a claim for damages in relation to a building contract where the claimant was less guilty than the respondent, though it would not assist a claim for a fee or *quantum meruit* (i.e., "so much money as the plaintiff reasonably deserves to have"[77]). The statute prohibiting the recovery of agreed fees under illegal contracts was not to be given wider scope than intended by applying it to liabilities arising under a contract, notwithstanding that it is prohibited.

In contrast, in *Parkinson v College of Ambulance Ltd*,[78] the Court held that, as both parties knew the contract to be illegal, it is no excuse to say that the person said to be defrauding the other party under the contract was more blameworthy. This highlights the fact that focus is not on whether both parties were equally blameworthy in general terms, but rather whether both parties were equally blameworthy of the contract's illegality.

Article 4(b) may be of relevance in situations where a party to an illegal contract chooses not to carry out a substantial part of the illegal part of the contract or repudiates the contract before a substantial part of the illegal part of the contract is carried out. In *Clegg v Wilson*,[79] the plaintiff was seeking to ensure that the defendant did not give evidence in a criminal prosecution against the plaintiff's son. In order to achieve this aim, the plaintiff transferred land to the defendant. As discussed above (7.3.1.4), such a contract is illegal, and the Court noted that:

> [W]hile the illegal purpose remains wholly executory, this court should grant equitable relief by ordering the repayment of money paid, goods delivered, or property transferred to the defendant pursuant to the contract, notwithstanding that there is an element of turpitude in the contract, and that both parties are *in pari delicto*.[80]

73. (1962) 108 CLR 391.
74. Electric Acceptance Pty Ltd v Doug Thorley Caravans (Aus) Pty Ltd [1981] VR, at 813 – 819. For the facts of the case, see 6.1
75. [1980] QB 348.
76. [1984] 2 Qd R 413, at 424 – 425.
77. P Nygh and P Butt, Butterworths Concise Australian Legal Dictionary (Sydney: Butterworths, 1998).
78. [1925] 2 KB 1. For the facts of the case, see 6.3.1.5.
79. (1932) 32 SR (NSW) 109.
80. Clegg v Wilson (1932) 32 SR (NSW) 109, at 125, per Long Innes J.

Further, the Court in *Clegg v Wilson* took the view that such an equitable action would not necessarily have succeeded if the illegality in question stemmed from the contract being a contract to do something which the statute forbids, or of a kind which the statute expressly or impliedly prohibits, as in those circumstances, it is the very contract itself, not its performance, that is illegal.

Article 4(c) addresses situations where the illegality of the contract stems from a statute, and the party seeking to recover money paid and/or property transferred is of the class that the statute seeks to protect. In *Kiriri Cotton Co Ltd v Dewani*,[81] a contract was concluded under which the respondent (the plaintiff in the case at first instance) paid a sum of money to the appellant (the defendant in the case at first instance) in consideration for the latter agreeing to sublease an apartment to the respondent for seven years and one day, for residential use. Unknown to both parties, such an agreement was illegal under the relevant statute, the Uganda Rent Restriction Ordinance of 1949, which stated that:

> Any person whether the owner of the property or not who in consideration of the letting or subletting of a dwelling-house … to a person asks for, solicits or receives any sum of money other than rent … shall be guilty of an offence and liable to a fine not exceeding Shs. 10,000 or imprisonment for a period not exceeding six months or to both such fine and imprisonment (s. 3(2))

While this provision cannot easily be misunderstood, the statute provided for an exception where the lease of premises was for seven years or more. However, the lawyers involved in drafting the contract between the appellant and the respondent failed to note that when the provision outlining the exception referred to "premises", it only referred to business premises and not premises for residential use, which meant that the contract fell outside the exception and was indeed illegal.

In the judgment, Lord Denning stated that:

> It is not correct to say that everyone is presumed to know the law. The true proposition is that no marl [sic] can excuse himself from doing his duty by saying that he did not know the law on the matter … Nor is it correct to say that money paid under a mistake of law can never be recovered back … Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other – it being imposed on him specially for the protection of the other then they are not in pari delicto and the money can be recovered back … Likewise, if the responsibility for the mistake lies more on the one than the other – because he has misled the other when he ought to know better – then again they are not in pari delicto and the money can be recovered back[.][82]

In relation to the second part of the quote above, it is interesting to note the clear overlap with the Court's reasoning in the context of mistake in *McRae v Commonwealth Disposal Commission*[83] (see 6.3.1.1). As to the case at hand, Lord Denning continued:

> In applying these principles to the present case, the most important thing to observe is that the Rent Restriction Ordinance was intended to protect tenants from being exploited by landlords in days of housing shortage … This is apparent from the fact that the penalty is imposed only on the landlord or his agent and not upon the tenant. It is imposed on the person who "asks for, solicits or receives any sum of money", but not on the person who submits to the demand and pays the money. It may be that the tenant who pays money is an accomplice or an aider and abettor … but he can hardly be said to be in pari delicto with the landlord. The duty of observing the law is firmly placed by the Ordinance on the shoulders of the landlord for the protection of the tenant: and if the law is broken, the landlord must take the primary responsibility.[84]

This led to the conclusion that:

> Seeing then that the parties are not in pari delicto, the tenant is entitled to recover the premium by the common law: and it is not necessary to find a remedy given by the Ordinance, either expressly or by implication. The omission of a statutory remedy does not, in cases of this kind, exclude the remedy by money had and received.[85]

Interestingly, Lord Denning commenced his reasoning by defining the question to be answered in very broad terms:

81. [1960] AC 192.
82. Kiriri Cotton Co Ltd v Dewani [1960] AC 192.
83. (1951) 84 CLR 377.
84. Kiriri Cotton Co Ltd v Dewani [1960] AC 192.
85. Kiriri Cotton Co Ltd v Dewani [1960] AC 192.

> Nevertheless, no matter whether the mistake was excusable or inexcusable, or the premium fair or extortionate, the fact remains that the landlord received a premium contrary to the provisions of the Ordinance: and the question is whether the tenant can recover it back – remembering always that there is nothing in the Uganda Ordinance, comparable to the English Acts, enabling a premium to be recovered back.[86]

This suggests that the principles laid down above would be applicable whether the party in the position of the appellant in this case had acted innocently or not, and whether the sum of money asked for was unreasonable or not, which means that the principles have very wide application indeed.

While it may be relatively rare, it seems beyond intelligent dispute that, where a statute specifically and expressly outlines rules for how the parties may recover money paid, compensation for benefits conferred and/or property transferred under an illegal contract, the court must take account of those rules. This thinking is the base for Article 4(d).

What has been said above about illegal contracts is, as is emphasised in Article 5, also applicable in relation to situations where the contract is not illegal as such but is tainted by illegality either due to the fact that it was made in order to effect a purpose which the statute renders unlawful, or due to it being performed in a manner which the statute prohibits.

Whether nugatory due to statute or due to common law, where a contract is nugatory, but not illegal, we can look at Rule 30:

Rule 30

1. Where a contract is nugatory due to provisions of a statute, the consequences of the contract being nugatory are determined by reference to the provisions of the statute rendering the contract nugatory, to the extent that the statute contains such provisions.

2. Where a nugatory contract can be severed so as to remove the nugatory aspects of the contract, the court must enforce the remainder of the contract provided that:

   (a) the severance does not alter the nature of the contract; and

   (b) it is reasonable in the circumstances to enforce the remainder of the contract.

3. Except as outlined in this Rule, a nugatory contract is void and neither party may seek to enforce it against the other.

4. Where a contract is nugatory, the court should ordinarily allow the recovery of money paid, compensation for benefits conferred and/or property transferred, under that contract.

The above discussion of the consequences of a contract being illegal is in large parts of relevance also in relation to the principles outlined in Rule 30, discussing the consequences of a contract being nugatory. However, two additional points must be made. First, all other things being equal, a court is more likely to be willing to allow severance in relation to a nugatory part of a contract, than in relation to an illegal part of a contract.[87] Second, while recovery of money paid, compensation for benefits conferred and/or property transferred, under an illegal contract is (as outlined in Rule 31) limited to a few exceptions, a court will ordinarily allow such recovery in relation to nugatory contracts.[88]

86. Kiriri Cotton Co Ltd v Dewani [1960] AC 192.
87. See eg test applied in Thomas Brown & Sons v Fazal Deen (1962) 108 CLR391 from McFarlane v Daniell (1938) 38 SR (NSW) 337, "If the elimination of the invalid promises changes the extent only but not the kind of contract, the valid promises are severable" (at 345).
88. Ethnic Earth Pty Ltd v Quoin Technoogy Pty Ltd (Receivers and Managers Appointed) (in liq) (No 3) [2006] SASC 7.

8. Final Remarks

"Foreign law can play an important role for law students ... in order to give them a better understanding of their own legal system. ... The students begin to see their own legal system from a new point of view and with a certain distance; they realize there is nothing God-given about its rules. For this purpose, substantive foreign law should be taught within the framework of all regular courses, even if only by way of a few well-chosen examples rather than in a consistent and comprehensive way."[1]

This Chapter makes a few concluding observations about the topics examined within this book. The aim is to place the discussed area of law in some form of context, with particular emphasis on the international dimensions of the subject matter.

It is of the outmost importance that the reader is aware of the fact that the Australian rules, studied in previous Chapters, are not necessarily the only plausible approach to addressing the constant balancing of the need to uphold party autonomy on the one hand, and the need for limiting party autonomy due to public policy, on the other hand. By examining foreign legal systems, the one gains an appreciation for the fact that more often than not, foreign law is rather similar to Australian law. This is only natural as the legal systems of different states typically are faced with the same task of balancing competing interest.

Looking at the relevant law in the United States of America, for example, one finds that the Uniform Commercial Code could, in many ways, be said to be the US equivalent of the other Common Law countries' *Sale of Goods Acts*. For instance, Article 2 of the Uniform Commercial Code deals with many of the areas covered by the *Sale of Goods Acts* but goes beyond those Acts. For example, § 2-302 deals with unconscionable contracts or clauses:

> ***Uniform Commercial Code*, § 2-302**
>
> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

This provision has been applied in numerous cases, and courts have generally preferred it to traditional common law actions such as undue influence, duress and misrepresentation.[2] This highlights the overlap that exists, both in US law and Australian law, between the various causes of action that may be taken to avoid a contract. The provisions popularity may arguably be attributable to the drafting style. In contrast to the unconscionability provisions of the ACL, this provision is short and general in its scope of application.

1. M Bogdan, "Is there a curricular core for the trans-national lawyer?" (2004) http://www.aals.org/international2004/Papers/Bogdan.pdf#search=%22%2Bbogdan%20%2Bcomparative%20%2Bcurriculum%20%2Blund%22.
2. K Zweigert and H Kötz, An Introduction to Comparative Law 3rd Ed (Oxford University Press, Oxford, 1998), at 343.

As far as the implied terms are concerned, the following provisions are of interest:

Uniform Commercial Code, **§ 2-312.**

(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that:

(a) the title conveyed shall be good, and its transfer rightful; and

(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

Uniform Commercial Code, **§ 2-313**

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Uniform Commercial Code, **§ 2-314**

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as:

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labelled as the agreement may require; and

(f) conform to the promise or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

Uniform Commercial Code, **§ 2-315**

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Uniform Commercial Code, **§ 2-316**

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'

(3) Notwithstanding subsection (2):

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

These provisions bear obvious similarities to the terms that may be implied under the SGA and the ACL in Australia.

Finally, it is interesting to note the similarity between how the term "goods" is defined in the *Sale of Goods Acts* and in the Uniform Commercial Code:

Uniform Commercial Code, **§ 2-105**

"Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

These brief examples have illustrated some similarities and some differences between Australian law and the laws of foreign countries. While the picture painted is necessarily incomplete, it should hopefully illustrate that, only when having the benefit of materials of a comparative nature can we fully appreciate and evaluate the rules studied so far. it should be clear that while Australian law is different to that of other countries in some respects, both the Australian system, and the systems of other countries, work. All legal systems can

be criticised, but the above has highlighted that different solutions may be adopted to deal with the same problem, and all of those different solutions may more or less effectively address that problem.

Having made these observations, a few words must be noted as a very brief introduction of the scope and functions of public international law and private international law. Then the so-called Vienna Sales Convention is analysed briefly.

8.1 International law and the law of obligations

This Chapter will not deal with public international law or private international law (frequently referred to as conflict of laws in Common Law countries) in detail. Public international law is an enormously diverse discipline. In its strictest, and now arguably outdated, sense, it could be said to be concerned with legally binding rules and principles regulating the relationships between sovereign States. Areas ordinarily dealt with within the scope of public international law include, for example, the law of treaties, issues relating to territory, statehood and State responsibility, international dispute settlement and international use of force; none of which are of any direct relevance for the law of obligations. Private international law, on the other hand, is of direct relevance to the law of obligations, but will nevertheless only be discussed briefly.

While they may very well originate in international instruments, rules of private international law are domestic. They are rules, in one way or another, decided by each State, and are in place to regulate essentially four questions:

(1) when a court may exercise jurisdiction over a dispute;
(2) when a court may decline to exercise jurisdiction over a dispute falling within its jurisdiction;
(3) which country's law the court should apply in a dispute falling within its jurisdiction; and
(4) under what circumstances a court may recognise and/or enforce a foreign judgment.

The connection between private international law and the law of obligations is obvious. In fact, the rules of obligation, outlined in the Chapters above, will only ever be of relevance if the court hearing the matter decides that Australian law is applicable.

Imagine, for example, that you bought a book from a website of a corporation based in New Zealand. Imagine further that the New Zealand-based web company delivered a book that did not match the description on the website, and that they refused to exchange it. In such a situation you might immediately start thinking of implied terms, consumer guarantees, ACL s. 18 and common law misrepresentation. However, the first thing you should consider is where you can sue if you want to take the matter to court.

Suing in New Zealand has the advantage of giving you an easy path to having a favourable judgment enforced – after all, the company most likely has assets in New Zealand, and the courts of New Zealand will obviously assist in the enforcement of a New Zealand judgment. On the other hand, taking legal action overseas is typically more complicated than taking action at home, which speaks in favour of suing the company in Australia. Furthermore, if you sue in Australia, it may be more likely that the choice of law rules will point to Australian law being applied.

If you sue in New Zealand, it may be more likely that New Zealand law will be applied, which would mean that you cannot rely on, for example, the ACL. In addition, if you sue, and win, in Australia, you will have to take the judgment to New Zealand and ask the courts there to enforce it, unless the company has assets in Australia. Even without discussing the complications that arise from the courts' discretion to decline to exercise jurisdiction over a dispute falling within its jurisdiction, the above highlights the complexities of cross-border litigation.

Finally, while the intricacies of choice of law rules go beyond the scope of this Chapter, it is to be noted that particular issues may arise in the context of the law of obligations. For example, one of the areas discussed above is illegality. Determining against which country's law the illegality of an international contract is to be measured is not always easy and close attention must be given to the relevant choice of law rules.

8.2 United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention)

As far as Australia is concerned, the *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, 11 April, 1980), as implemented through the various *Sale of Goods (Vienna Convention) Act*s, is arguably the most relevant international instrument to be considered in the context of the law of obligations.

This convention, ordinarily referred to as CISG or the Vienna Sales Convention, has been widely adopted. At the time of writing 94 countries are parties to the CISG, with the noted exceptions being the United Kingdom and India.[3] The convention sets out several rules overlapping with what has been discussed above.

Article 1 of the *Sale of Goods (Vienna Convention) Act 1986* (Qld) makes clear that the convention only regulates contracts of sale of goods between parties whose places of business are in different (Nation) States, and only where the parties are aware that their respective places of business are in different (Nation) States. The application of the convention is further restricted to situations where the States that the parties have their respective places of business in are Contracting States. Or where the rules of private international law led to the application of the law of a Contracting State. In other words, the convention is applicable when:

1. the parties are aware that their places of business are located in different (Nation) States, both of which are Contracting States; or
2. the parties, who are aware that their places of business are located in different (Nation) States, have their dispute heard in a jurisdiction, under which rules of private international law the applicable law is that of a Contracting State.

However, as is made clear in Article 2, the Convention is not applicable to all types of contracts:

> *United Nations Convention on Contracts for the International Sale of Goods,* **Article 2**
>
> This Convention does not apply to sales:
>
> (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
>
> (b) by auction;
>
> (c) on execution or otherwise by authority of law;
>
> (d) of stocks, shares, investment securities, negotiable instruments or money;
>
> (e) of ships, vessels, hovercraft or aircraft;
>
> (f) of electricity.

Thus, what ordinarily is referred to as consumer contracts fall outside the scope of the Convention, provided that the seller had actual or constructive knowledge of the fact that it was contracting with a consumer. In this context, it is to be noted that s. 68 of the ACL states that: "The provisions of the United Nations Convention on Contracts for the International Sale of Goods, done at Vienna on 11 April 1980, as amended and in force for Australia from time to time, prevail over the provisions of this Division to the extent of any inconsistency." Consequently, where an Australian consumer enters a contract with a foreign corporation located in another Contracting State, it is essential for the consumer to make sure that the seller has knowledge of the fact that the consumer is buying the goods "for personal, family or household use". Failure to do so means that the consumer loses the right to rely on the favourable provisions of Part V Division 2 and must instead rely upon the rules of the convention. Similarly, where the proper law of the contract is that of a Contracting State other than Australia, and that is not due to any term of the contract,[4] it is essential for the consumer to make sure that the seller has knowledge of the fact that the consumer is buying the goods "for personal, family or household use".

3. United Nations Commissions on International Trade Law, https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status.
4. See s. 67 Trade Practices Act 1974 (Cth).

Before discussing CISG further, it is interesting to contrast the brief definition of consumer contracts found in Article 2 with that of s. 3 of the ACL (see 2.6.1.1).

Further limitations to the scope of the convention are found in Articles 3, 4 and 5. Most importantly for our purposes, "[c]ontracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production."[5] And, the convention "does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services."[6] These provisions help distinguish between contracts for service, contracts of sale and contracts for work and materials.

Subject to some limitations, Article 6 gives the parties the right to exclude the application of the Convention or derogate from or vary the effect of any of its provisions. In that sense, the convention is similar to the SGA, and different to the ACL.

The Convention regulates a range of areas of contract law including the formation of the contract and the passing of risk. The area of interest for the law of obligation is found in Chapter II, Section II, of the Convention.

Articles 35 contains rules relating to several of the implied terms that have been discussed above (see Chapter 2):

United Nations Convention on Contracts for the International Sale of Goods,

Article 35

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

The buyer must "examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances" (Article 38(1)). Further:

United Nations Convention on Contracts for the International Sale of Goods,

Article 39

5. Article 3(1).
6. Article 3(2).

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

United Nations Convention on Contracts for the International Sale of Goods,

Article 40

The seller is not entitled to rely on the provisions of Articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

Articles 41 and 42 regulate the buyer's right to title:

United Nations Convention on Contracts for the International Sale of Goods,

Article 41

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by Article 42.

United Nations Convention on Contracts for the International Sale of Goods,

Article 42

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) in any other case, under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

Similarly to what was said in Articles 39 and 40, the buyer loses the right to rely on Articles 41 and 42 if "he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim" (Article 43(1)). However, "[t]he seller is not entitled to rely on the provisions of the preceding paragraph [i.e. Article 43(1)] if he knew of the right or claim of the third party and the nature of it" (Article 43(2)).

As is clear from the above, the Vienna Sales Convention, as implemented through the various *Sale of Goods (Vienna Convention) Act*s, contains rules overlapping the terms implied under the SGA and the consumer guarantees of the ACL, as well as common law. It is also clear that, while differences exist, the rules of the Vienna Sales Convention are rather familiar to those who have studied the provisions of the SGA and the ACL regulating implied terms/consumer guarantees. Furthermore, similarities can also be found in relation to the provisions regulating remedies.[7] However, the provisions relating to remedies will not be discussed here.

7. See eg Sale of Goods Act (Qld) 1896, ss 50 – 55; Trade Practices Act (Cth) 1974, Part VI; United Nations Convention on Contracts for the International Sale of Goods 1980, Chapter II, Section III; Chapter III, Section III.

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