EIGHTH EDITION

CONCISE AUSTRALIAN COMMERCIAL LAW

ROGER GAMBLE • BENJAMIN HAYWARD

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Concise Australian Commercial Law

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Concise Australian Commercial Law

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ROGER GAMBLE
LLB (Melb), LLM (Mon), Dip Ed (Rus)
Affiliate
Department of Business Law and Taxation
Monash Business School, Monash University

BENJAMIN HAYWARD
BCom, LLB (Deakin), GCertHE (Deakin), PhD (Mon)
Associate Professor
Department of Business Law and Taxation
Monash Business School, Monash University

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by
Clive Turner and John Trone

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Acknowledgment

We would like to acknowledge the Wurundjeri people as the traditional owners of the Kulin Nation where we live and where our work on this edition has been done.

Dedication

To the memory of my beautiful Diane.

R.G.

For Deb and Hannah, with thanks for your love, support, and every day's new adventures!

B.H.

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Preface

As with its predecessors, this eighth edition of *Concise Australian Commercial Law* (CACL) has two principal aims. The first is to give all students the best chance of understanding the legal environment of business and to expose them to the language and perspectives of legal professionals, regulators, and others with whom they will increasingly be required to interact in their professional lives. The second is to introduce students to the main areas of commercial law – the law of contract, consumer protection law, data protection and privacy law, the law of torts, agency law, partnerships law, and corporations law (as well as business ethics) – in a way that strikes a balance between the need for clarity, accessibility and simplicity and the need for materials to be challenging, relevant and current. Now more than ever, we have been mindful in striking that balance given the challenging online environment students face amidst the rise of generative AI. In a world where "fake news" is the norm and where AI "hallucinations" are routine (even if not widely appreciated), the need for accurate and accessible content is even more pressing.

To that end, this edition's updates address many important developments in the law.

We discuss the decision of the US Supreme Court in *Trump v United States* that has raised serious concerns about the rule of law. There have been some important developments in the law of contract. These include clarification of "best endeavours" and "subject to contract" clauses and "lawful act" duress. There have been significant High Court decisions in relation to implied terms (*Realestate.com.au v Hardingham* and *Adaz Nominees Pty Ltd v Castleway Pty Ltd*), repudiation (*Dyco Hotels Pty Ltd v Laundy Hotels Pty Ltd*) and reliance damages (*Cessnock City Council v 123 259 932 Pty Ltd*). There have also been a number of developments in consumer law. The $100,000 price test for the application of the *Australian Consumer Law's* consumer guarantees – footnoted as an upcoming change to the law in the last edition – is now fully incorporated into the text. Similarly, this edition fully addresses the 2023 updates to the unfair contract terms provisions and explains their transition provisions (given that many contracts will still fall to be assessed under the old regime). Given the apparently ever-increasing need to ensure that civil penalties adequately deter contraventions of the law, our treatment of the *Australian Consumer Law* and the *Corporations Act 2001* (Cth)'s civil penalties are fully up to date. Our data protection and privacy law chapter, as well as addressing the *Privacy Act 1988* (Cth) and the Australian Privacy Principles in more detail, addresses recommendations for reform that may soon become law. And in relation to negligence law, differences in the civil liability reform legislation across the Australian jurisdictions are more comprehensively captured.

Of course, new case law has emerged across the last two years that is also addressed with a view to ensuring both currency and relatability of our text. New and interesting cases involving AirBnB, Dell, Samsung Electronics, Mazda, FitBit, and Booktopia (amongst others) are addressed in the consumer law context – all being household names. Our treatment of data protection and privacy law addresses the *Privacy Act 1988* (Cth)'s intersection with consumer law (via the *Meta Platforms* case) and with the *Spam Act 2003* (Cth) (via an administrative resolution concerning Pizza Hut). And in the *Corporations Act 2001* (Cth) context, numerous new directors' duties cases are addressed, in order to provide students with the best possible current understanding of duties they themselves may be subject to in the future.

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Returning to the issue of generative AI, our advice to students around different forms of law assessments now addresses that highly important topic. We have separated our treatment of negligence law into two chapters, in order to help students better navigate this area of the law. So far as our treatment of legislation is concerned, we now incorporate the text of key provisions into the chapters themselves (rather than having them extracted in appendices), improving the text's accuracy and accessibility. Furthermore, building upon the introduction of end-of-chapter comprehension questions in the last edition, we now also include a range of single issue questions in order to facilitate students understanding how individual parts of the law (as well as our areas of the law as a whole) work.

We extend our thanks to Vickie Ma, the product developer at Thomson Reuters, to our colleague Rebecca Neophitou for her proofreading assistance, and to our editors at Newgen. This book has been adapted from the seminal work *Australian Commercial Law* by Clive Turner and John Trone. We and Thomson Reuters offer our thanks to Clive and John for their permission to adapt their work as we welcome a new author to this new edition.

Most of all, we extend our best wishes to all students who will use CACL as a basis for understanding how the law affects the business world, and their future professional careers.

ROGER GAMBLE
Affiliate
Monash University
August 2024

BENJAMIN HAYWARD
Associate Professor
Monash University
August 2024

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Spam Act 2003: [14:120], [14.330], [14.340]

Superannuation Guarantee (Administration) Act 1992: [16.590]

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Venture Capital Act 2002: [18.800]

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Electronic Transactions Act 2001: [3.580]
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Conveyancing Act 1919
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Equal Opportunity Act 1984
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Fair Trading Act 1987
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Civil Judgments Enforcement Act 2004
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Civil Liability Act 2002: [15.50]
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Equal Opportunity Act 1984
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Fair Trading Act 2010
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Interpretation Act 1984
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Law Reform (Contributory Negligence and Tortfeasors' Contribution) Amendment Act 1947
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Law Reform (Miscellaneous Provisions) Act 1941
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Law Reform (Statute of Frauds) Act 1962
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Limited Partnerships Act 1909: [18.10], [18.780]

Magistrates Court (Civil Proceedings) Act 2004
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Property Law Act 1969
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Public Safety Act 2022
s 3: [1.720]

Sale of Goods Act 1895
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Volunteers (Protection from Liability) Act 2002: [15.50]

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Commonwealth of Australia Constitution Act 1900: [1.140], [1.150]
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Exchange Control Act 1947: [8.580]

Modern Slavery Act 2015: [20.50]

Pharmacy Poisons Act 1933: [3.100]

Protection of Birds Act 1954: [3.110]

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Table of Abbreviations

A 2d ... Atlantic Reporter, Second Series. 1947–2010.
ABC ... Australian Bankruptcy Cases. 1929–1964.
ABC (ns) ... Australian Bankruptcy Cases (New Series). 1999 onwards.
AC ... Law Reports, Appeal Cases. 1891 onwards.
ACCC ... Australian Competition and Consumer Commission.
ACCR ... Australian Consumer Credit Reports. 1994–1997.
ACLC ... Australian Company Law Cases. 1971 onwards.
ACLR ... Australian Company Law Reports. 1974–1989.
ACSR ... Australian Corporations and Securities Reports. 1990 onwards.
A Crim R ... Australian Criminal Reports. 1980 onwards.
ACTCA ... Australian Capital Territory Court of Appeal.
ACTLR ... Australian Capital Territory Law Reports. 2007 onwards.
ACTR ... Australian Capital Territory Reports. 1973–2013.
ACTSC ... Supreme Court of the Australian Capital Territory.
ACompT ... Australian Competition Tribunal.
AIPC ... Australian Intellectual Property Cases. 1982 onwards.
AIR SC ... All India Reporter, Supreme Court Section. 1950 onwards.
AJR ... Australian Jurist Reports. 1870–1874.
ALD ... Administrative Law Decisions. 1976 onwards.
ALJ ... Australian Law Journal. 1927 onwards.
ALJR ... Australian Law Journal Reports. 1958 onwards.
All ER ... All England Law Reports. 1936 onwards.
ALR ... Australian Law Reports. 1973 onwards.
ALT ... Australian Law Times. 1879–1928.
ANZ Insurance Cases ... Australian and New Zealand Insurance Cases. 1979 onwards.
App Cas ... Law Reports. Appeal Cases. 1876–1890.
APPSR ... Australian Personal Property Securities Reports. 2012 onwards.
ARLR ... Australian Resources Law Reports. 2008 onwards.
ASAL ... Australian Sales and Fair Trading Law Cases. 1998–2011.
ASC ... Australian Consumer Sales and Credit Law Cases. 1997 onwards.
ASIC ... Australian Securities and Investments Commission.
ASTLR ... Australian Succession and Trusts Law Reports. 2006 onwards.
ATPR ... Australian Trade Practices Reports. 1974–2010. Renamed Australian Competition and Consumer Law Reports. 2011 onwards.
Aust Contract Reports ... Australian Contract Reports. 1991 onwards.
Aust Torts Reports ... Australian Torts Reports. 1984 onwards.
BCL ... Building and Construction Law. 1985 onwards.
BFRA ... Banking and Finance Reports of Australia. 2003 onwards.
BGE ... Entscheidungen des Schweizerischen Bundesgerichts. 1875 onwards.
BGHZ ... Entscheidungen des Bundesgerichtshofes in Zivilsachen. 1950 onwards.
BPR ... Butterworths Property Reports. 1950 onwards.
Bus LR ... Business Law Reports. 2007 onwards.
CFR ... Code of Federal Regulations.
CLC ... Commercial Law Cases. 1994 onwards.
CLR ... Commonwealth Law Reports. 1903 onwards.
CPD ... Law Reports. Common Pleas Division. 1875–1880.
Ch ... Law Reports. Chancery Division. 1891 onwards.
Ch D ... Law Reports. Chancery Division. 1876–1890.
Ch App ... Law Reports. Chancery Appeal Cases. 1865–1875.
Cth ... Commonwealth of Australia.
DCR (NSW) ... New South Wales District Court Reports. 1963–1976.
DCLR (NSW) ... Lawbook Co's District Court Law Reports. 2001 onwards.
DLR ... Dominion Law Reports. 1912 onwards.
ER ... English Reports. 1220–1865.
Ex ... Exchequer Reports. 1848–1856.
Ex D ... Law Reports. Exchequer Division. 1875–1880.
F 3d ... Federal Reporter, Third Series. 1993 onwards.
Fam LR ... Family Law Reports. 1976 onwards.
FCA ... Federal Court of Australia.
FCAFC ... Federal Court of Australia Full Court.
FCCA ... Federal Circuit Court of Australia. 2013 onwards.
FCR ... Federal Court Reports [Australia]. 1984 onwards.
FCR ... Federal Courts Reports [Canada]. 2004 onwards.
Fed Appx ... Federal Appendix. 2001 onwards.
FLR ... Federal Law Reports. 1956 onwards.
FMCA ... Federal Magistrates Court of Australia. 2000–2013.
FRNZ ... Family Reports of New Zealand. 1983 onwards.
FSR ... Fleet Street Reports. 1975 onwards.
F Supp ... Federal Supplement. 1932 onwards.
FWC ... Fair Work Commission.
FWO ... Fair Work Ombudsman.
HCA ... High Court of Australia.
HKC ... Hong Kong Cases. 1842 onwards.

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HKCFAR ... Hong Kong Court of Final Appeal Reports. 1997 onwards.
Ill ... Illinois Reports, First Series. 1819–1953.
ILR ... International Law Reports. 1950 onwards.
ILUA ... Indigenous Land Use Agreement.
IMP ... Imperial.
IPR ... Intellectual Property Reports. 1982 onwards.
IR ... Industrial Reports. 1982 onwards.
KB ... Law Reports. King's Bench Division. 1901–1952.
LJ Ch ... Law Journal Reports. Chancery. 1831–1946.
LJ Ex ... Law Journal Reports. Exchequer. 1831–1875.
LJKB ... Law Journal Reports. King's Bench. 1831–1946.
LJPC ... Law Journal Reports. Privy Council. 1865–1946.
LJQB ... Law Journal Reports. Queen's Bench. 1831–1946.
LR (NSW) Eq ... New South Wales Law Reports. Cases in Equity. 1880–1900.
LR App Cas ... Law Reports. Appeal Cases. 1876–1890.
LR Ch App ... Law Reports. Chancery Appeal Cases. 1865–1875.
LR CP ... Law Reports. Court of Common Pleas. 1865–1875.
LR Eq ... Law Reports. Equity Cases. 1865–1875.
LR Ex ... Law Reports. Court of Exchequer. 1865–1875.
LR Ex D ... Law Reports. Exchequer Division. 1876–1880.
LR PC ... Law Reports. Privy Council Appeals. 1865–1875.
LR QB ... Law Reports. Court of Queen's Bench. 1865–1876.
LRC ... Law Reports of the Commonwealth. 1993 onwards.
LRC (Comm) ... Law Reports of the Commonwealth. Commercial Law Reports. 1980–1992.
LT ... Law Times. 1859–1947.
Mass ... Massachusetts Reports. 1804 onwards.
Md App ... Maryland Appellate Reports. 1967 onwards.
MVR ... Motor Vehicle Reports. 1984 onwards.
NE ... North Eastern Reporter, First Series. 1885–1978.
NE 2d ... North Eastern Reporter, Second Series. 1978–2014.
NJL ... New Jersey Law Reports. 1789–1948.
NJW ... Neue Juristische Wochenschrift. 1947 onwards.
NJW-RR ... Neue Juristische Wochenschrift – Rechtsprechungs-Report Zivilrecht. 1986 onwards.
NNTT ... National Native Title Tribunal.
NSWCA ... New South Wales Court of Appeal.
NSW Conv R ... New South Wales Conveyancing Reports. 1980 onwards.
NSWLR ... New South Wales Law Reports. 1800–1900, 1971 onwards.
NSWSC ... New South Wales Supreme Court.
NTCA ... Northern Territory Court of Appeal.
NTLR ... Northern Territory Law Reports. 1992 onwards.
NTR ... Northern Territory Reports. 1978–2013.
NTSC ... Northern Territory Supreme Court.
NY ... New York Reports, First Series. 1800–1956.
NZCPR ... New Zealand Conveyancing and Property Reports. 1978 onwards.
NZLR ... New Zealand Law Reports. 1883 onwards.
OJ L ... Official Journal of the European Union. Legislation. 1968 onwards.
OLR ... Ontario Law Reports. 1901–1931.
OR (2d) ... Ontario Reports. Second Series. 1973–1990.
OR (3d) ... Ontario Reports. Third Series. 1990 onwards.
P ... Law Reports. Probate Division. 1891–1971.
P 2d ... Pacific Reporter, Second Series. 1939–2000.
PD ... Law Reports. Probate Division. 1875–1890.
QB ... Queen's Bench Reports. 1841–1852.
QB ... Law Reports. Queen's Bench Division. 1891–1900, 1953 onwards.
QBD ... Law Reports. Queen's Bench Division. 1876–1890.
QCA ... Queensland Court of Appeal.
QSC ... Queensland Supreme Court.
QSR ... State Reports (Queensland). 1902–1957.
Qd R ... Queensland Reports. 1958–2019.
QR ... Queensland Reports. 2020 onwards.
RPC ... Reports of Patent Cases. 1884 onwards.
RSC ... Revised Statutes of Canada.
SALR ... South Australian Law Reports. 1865–1892, 1899–1920.
SASC ... South Australian Supreme Court.
SASCFC ... South Australian Supreme Court Full Court.
Sask R ... Saskatchewan Reports. 1980 onwards.
SASR ... South Australian State Reports. 1921 onwards.
SC ... Session Cases. 1906 onwards.
SCR ... Canada Supreme Court Reports. 1878 onwards.
SCR ... Supreme Court Reports [India]. 1950 onwards.
SCR (NSW) ... Supreme Court Reports, New South Wales. 1862–1876.
SE 2d ... South Eastern Reporter, Second Series. 1939 onwards.
SLR ... Singapore Law Reports. 1965 onwards.
SLR(R) ... Singapore Law Reports (Reissue). 1965–2009.
SLT ... Scots Law Times. 1893 onwards.
SR (NSW) ... New South Wales State Reports. 1901–1970.
SR (WA) ... State Reports (Western Australia). 1980 onwards.
Stat ... United States Statutes at Large. 1789 onwards.
SW ... South Western Reporter, First Series. 1886–1927.
Tas LR ... Tasmanian Law Reports. 1905–1940.
Tas R ... Tasmanian Reports. 1979 onwards.
TASFC ... Tasmanian Supreme Court Full Court.
TASSC ... Tasmanian Supreme Court.
Tas SR ... Tasmanian State Reports. 1941–1978.
Tex ... Texas Reports. 1846–1962.
UNTS ... United Nations Treaty Series. 1946 onwards.
US ... United States Reports. 1790 onwards.
USC ... United States Code.
VLR ... Victorian Law Reports. 1875–1956.
VR ... Victorian Reports. 1957 onwards.

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VSC ... Victorian Supreme Court.
VSCA ... Victorian Court of Appeal.
WALR ... Western Australian Law Reports. 1898–1959.
WAR ... Western Australian Reports. 1960 onwards.
WL ... Westlaw citation.
WLR ... Weekly Law Reports. 1953 onwards.
WN (NSW) ... Weekly Notes, New South Wales. 1884–1970.
WASC ... Western Australian Supreme Court.
WASCA ... Western Australian Court of Appeal.
WW & A'B ... Wyatt, Webb and A'Beckett's Reports (Victoria). 1864–1869.

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Glossary

Actual authority In agency law, it refers to the authority that an agent has been given by a principal. May be express or implied, oral or written. Compare **Apparent (ostensible) authority**.

Adversarial Often used to describe the common law procedure used in litigation. The central feature of an adversarial litigation process is that the parties are (generally) responsible for the conduct of their case with the judge ensuring the procedural rules are followed but not actively involved in the case. Compare the inquisitorial process of civil law jurisdictions.

Affirm When the innocent party elects (1) to proceed with a contract that could have been rescinded (a voidable contract) or terminated; (2) to confirm the judgment of a lower court.

Ambiguity Where a word or a phrase has more than one meaning. Often used in relation to the interpretation of a contractual term, especially an exclusion clause (where any ambiguity is interpreted against the party relying on the clause). Also used in relation to the interpretation of statutes.

Apparent (ostensible) authority In agency law, apparent authority refers to the power that an agent appears to have. There is no actual authority but merely the appearance of authority. Where a principal represents ("holds out") either by words or conduct that an agent has authority to contract on the principal's behalf, the principal will be bound by those acts of the agent that fall within that apparent authority.

Appeal Refers to a review of the decision of a lower court by a higher court.

Appellant The person who appeals against a decision. An appellant may have been the plaintiff or the defendant at trial.

Appellate Authority to hear appeals, egfor example appellate court.

Balance of probabilities The standard of proof required in a civil case – plaintiff has the onus (responsibility) to prove their story is "more likely than not" to be true.

Barrister A lawyer whose main function is to provide specialist advice and/or represent (advocate for) persons in court.

Beneficiary A person who benefits from a will or trust.

Bilateral contract A contract where each of the parties exchange promises – sometimes called an executory contract. An example is the typical contract for the sale of goods where A promises to buy and B promises to sell. Compare **Unilateral contract**.

Binding Legally enforceable. Often refers to an enforceable contract (as in "the contract is binding on X").

Bona fide In good faith.

Breach To break one or more of the terms of the contract, or not to reach the required standard of care (tort of negligence), or otherwise to not comply with a statutory requirement.

Burden of proof The obligation imposed on a party in a court case to produce sufficient evidence to prove their case to the required standard.

Capacity In contract law, the legal ability to enter into a contract. Individuals may lack capacity because, for example, of age or mental impairment.

Caveat emptor "Let the buyer beware". It was common in the pre-consumer protection era to put the onus or responsibility onto the consumer to make their own enquiries about the goods being acquired. Now there are statutory guarantees and implied terms that have shifted the onus onto the vendor or supplier. (See **Venditor emptor**.)

Civil action A legal action other than a criminal proceeding that typically involves the enforcement of an individual's (including a corporation's) rights under a contract or in tort or under certain legislation such as the *Australian Consumer Law*, the *Corporations Act* or the *Partnership Act*. A civil action differs in a number of ways from a criminal action – for example, the parties, the remedies, the procedures and the standard of proof are different.

Codify A form of legislation that involves taking accepted common law and equitable principles and putting them into a statutory form. The Queensland Criminal Code is an example. More common in the civil law countries of mainland Europe.

Collateral In contract law, an agreement entered into alongside the main agreement. May also mean security for a loan.

Committal proceedings Where serious (indictable) offences, the proceedings held to inquire whether the prosecutor can establish a *prima facie* case against the defendant. If so, the case will proceed to a jury.

Common law The part of English law that is derived from judicial precedent rather than statutes. Common law is often contrasted with civil law systems that require all laws to be written in a code.

Company See **Corporation**.

Concurrent At the same time, egfor example concurrent powers of State and Federal Parliament.

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Condition An important promise in a contract, a breach of which may allow termination and damages.

Consensus ad idem "A meeting of minds". In contract law, it indicates that the parties are in agreement.

Consideration It is the price paid or detriment suffered for the promise of the other party. The price must be something of value. Consideration may be some right, interest or benefit going to one party or some detriment or loss given or suffered by the other party. Required for every simple contract.

Contingent Dependent upon something.

Contra proferentum "Against the offeror". The *contra proferentem* rule in contract law dictates how ambiguous clauses in a contract should be interpreted.

Contract An agreement that the law will enforce.

Contributory negligence A defence that a plaintiff in a negligence claim contributed to their own losses/injuries through their own negligence.

Corporation A corporation is a separate legal entity and able to act as such. It can sue or be sued, own property, borrow money, pay tax, break the law. A corporation is established through a formal registration process.

Criminal proceedings Legal action taken, in the name of the State, to enforce the criminal law.

Damages The main civil remedy for breach of contract, tort and breach of the *Australian Consumer Law*.

Debenture A document issued by a corporation securing a loan.

Debtor A party who owes money or some form of obligation to another.

Deed A written document signed, sealed and delivered or expressed to be a deed.

Deemed Treated as, even if not, in fact.

Defendant The person against whom a civil or criminal action is brought.

Directors' duties Duties imposed upon directors, as a result of their fiduciary relationship with their company, by judge-made law and also by the *Corporations Act 2001* (Cth).

Distinguish To argue that the material facts of one case are different from another. In terms of the doctrine of precedent, if an earlier case in a higher court can be "distinguished" it is no longer binding on the later court.

Dividend A distribution of a corporation's profits to shareholders.

Duress Any unreasonable or unlawful pressure on another person or the person's property. Economic duress refers to one party's improper or illegal conduct that causes the other party's fear of economic hardship. Duress has the effect of making any contract voidable.

Duty of care In relation to the law of torts, a duty of care is a legal obligation that is imposed on an individual to avoid acts or omissions that can be reasonably foreseen as likely to cause loss or damage to another. It is the first element in a negligence claim: a duty of care must be established to proceed with an action in negligence.

Equity Legal rules, originally developed in courts of equity, based on fairness and justice, that were developed to overcome the pedantic and hard edge of the common law. Examples of equitable concepts include the concept of a mortgage, the obligations of a fiduciary, the doctrine of estoppel, and the contractual remedies of specific performance, injunction and equitable damages.

Exclusion clause A term in a contract designed to limit or exclude one party's liability for loss or damage caused by a breach of contract, negligence or breach of a statutory duty.

Exclusive Available only to one party/group. In constitutional terms, the Commonwealth has certain exclusive law-making powers.

Executed Carried out, performed. In contract, executed consideration is where one party has performed their obligations (but the other has not). Most often occurring in unilateral contracts.

Executory Yet to be carried out or performed. In contract, executory consideration is where the promises of both parties are not yet performed.

Extrinsic Outside. Extrinsic material may be used to assist interpretation of statutes (material outside the Act itself).

Fiduciary relationship A fiduciary relationship is a relationship of trust and confidence where one person (the fiduciary) promises to act for another (the principal), and in doing so, must act in good faith and must place the principal's interests ahead of their own interests. Agent–principal, solicitor–client, partner–partner and director–corporation are examples of fiduciary relationships.

First instance The trial phase of legal proceedings, where a dispute is heard before the courts for the first time. A first instance decision might later be appealed.

Formal contract A contract written in a recognised form, usually called a deed. A deed must be signed, dated and witnessed. It is different from a simple contract in that no consideration is required.

Frustration In contract law, a contract that is impossible or very difficult to perform because of the occurrence of an event, such as war or flood (and where there is no provision in the contract such as a force majeure clause) is said to be frustrated. Has the effect of automatically terminating the contract.

General protections Consumer law protections contained in Chapter 2 of the *Australian Consumer Law*.

Goods All chattels personal other than money, emblements and fixtures. Very broad definition of "goods" in the *Australian Consumer Law*: s 2.

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Goodwill The intangible value that a business has because of its clientele or location or reputation of the owner.

Gratuitous Free. In contract law, a gratuitous promise is generally not enforceable because the promisee has not provided consideration.

Guarantee A promise made by a person to meet the obligation of another if that person does not.

Guarantor The person who promises to meet the obligations of another if the other does not.

Hold out To "represent" that a person has a certain capacity, status or power. Often used in relation to agency law.

Imply To suggest. In contract, an implied term is not express. A term may be implied for a number of reasons including the prior dealings between the parties or because of a legal requirement or because it is necessary to make the contract work.

Incorporation In relation to corporations law, it is the act of registration of a corporation under the *Corporations Act*. In relation to contract law, it refers to the process of inclusion of a statement (written or oral) into the contract. Often discussed in relation to exclusion clauses.

Injunction An order by a court to someone not to do something or to cease doing something.

Insolvent trading Occurs when a director of a company allows the company to continue trading when they know or should know the company cannot pay its debts or will be unable to pay its debts if a contract is entered into.

Inter alia "Among other things".

Joint liability Where parties have joint liability, they must be sued together for the whole amount. Compare several liability where the parties may be sued separately.

Joint venture Contract between two or more parties to develop a project. The parties remain separate and distinct entities. Compare a partnership arrangement.

Judge A legal officer in charge of courts higher than local or magistrates courts in the court hierarchy.

Judgment A decision of a court.

Jurisdiction The limit of a court's powers to hear disputes.

Lawyers A general term used to describe members of the legal profession. It generally refers to solicitors and barristers.

Limited partnership Legislation allows for the formation of a partnership in which there is at least one general partner with unlimited liability and one or more partners whose liability for debts and obligations of the partnership is limited. A limited partner cannot take part in the management of the business of the firm.

Liquidated damages A fixed sum that is agreed upon in the contract as a means of compensation following a breach of a contract.

Litigation Legal proceedings in court.

Magistrate A legal officer in charge of local courts.

Mere puff A statement not to be taken seriously, of no contractual significance.

Minor A person under the age of 18 years.

Mitigate In contract law, the duty on a plaintiff to do what is reasonable to reduce the loss that they suffer as a result of the breach.

Negligence A failure to meet the standard of care expected of a reasonable person in circumstances where a duty of care is owed.

Non est factum "It is not my deed" – a form of mistake that, if proven, allows a person to escape performance of an agreement that is fundamentally different from what they intended to execute or sign (eg the person may have reasonably thought the document they were signing was a receipt when in fact it was an option contract). A claim of *non est factum* means that the signature on the contract was signed by mistake – this would make the contract void *ab initio*.

Notice The knowledge of something. A person may have actual notice (the person is actually aware of a fact) or notice may be deemed or constructive (the person is considered to have notice because they should have known it). Most commonly, if certain notification procedures have been followed (eg advertisements placed in newspapers), the law will deem the person to have received notice, even if in fact they did not.

Obiter dictum A statement by a judge that is not necessary to decide a particular case. May be persuasive but is not binding on a later court. Compare **Ratio decidendi**.

Obligation A legal duty.

Onus of proof The obligation to prove any allegations in court. In a civil action, the onus is on the plaintiff; in a criminal case, the onus is (generally) on the Crown.

Option In contract, an option contract is an enforceable agreement between a buyer and seller that gives the option-holder the right to buy or sell goods or real property at a later date at an agreed price. The option-holder is under no obligation to take up the option.

Ostensible authority See **Apparent authority**.

Parol "Other". Hence, the parol evidence rule in contract law refers to the rule that when the contract is entirely in writing no parol (other) evidence is admissible to add, vary or contradict the written contract.

Partnership Two or more persons carrying on a business in common with a view to profit.

Precedent (Judicial) precedent refers to the process whereby judges follow previously decided cases where the facts are similar. The doctrine involves an application of the principle of *stare decisis* (ie to stand by what has been decided). It is the foundation principle of common law legal systems.

Presumption An assumption. In contract law, it is often used in relation to the question of whether there was an intention to enter into a legal relationship.

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Prima facie "As it looks from the first view". On the face of it. Based on first impression.

Privity of contract The principle that limits rights and obligations to the parties who enter into the contract. Third parties cannot (generally) enjoy the benefits or suffer the obligations of the contract.

Promissory estoppel Where a person makes a promise that is intended to be acted upon and it is acted upon in a reasonable way, the promisor cannot resile from that promise where it would be unfair on the promisee to do so. Estoppel is relied upon where the promisee has not provided consideration for the promise.

Property Property can mean something that can be owned (eg "those goods, shares etc. are my property") or it can refer to ownership (or title) itself ("I have property in those goods").

Proprietary company A proprietary company is a company that is usually limited by shares (Pty Ltd) or is an unlimited company with a share capital; it must have no more than 50 non-employee shareholders; and have at least one director. A proprietary company has the advantage of privacy – it does not have the same disclosure requirements as public companies but cannot go to the public to raise capital.

Public company The most common public company is one that is limited by shares. What distinguishes public from proprietary companies is that public companies may offer their shares and other securities to the general public. A public company may be listed on the stock exchange.

Pure economic loss Pure economic loss is financial damage suffered as the result of the negligent act or misstatement of another party that is not accompanied by any physical or property damage.

Ratify To approve or consent in retrospect.

Ratio decidendi "The reasons for a decision" – the legal principle that is the basis for the decision of a court. The ratio is binding on a later court lower in the same hierarchy where the facts are similar. Compare ***Obiter dictum***.

Rebuttable presumption A presumption that may be overturned or defeated by evidence to the contrary, egfor example the presumption of innocence in criminal law.

Representation In relation to the law of contract, a representation is a statement of fact made by one party to the other, before or at the time of making the contract that induces the other party to enter into the agreement. Compare **Term** and **Mere puff**.

Repudiate To renounce or cancel. In contract law, it refers to an action by one of the parties that indicates the party cannot or will not perform, or will not complete, the contract.

Res ipsa loquitur "The thing that speaks for itself". Often used in negligence actions when there is no direct evidence about what happened.

Rescind Terminate, revoke, cancel. Often used in contract law when the consent that is required for a contract to be formed is not genuine because of misrepresentation, mistake, duress or unconscionable conduct. The innocent party may be able to rescind the contract (put the parties back in their original, precontractual positions).

Residual "That which remains". The States have jurisdiction over those policy areas that are not exclusively given to the Commonwealth or are not concurrent powers, shared with the Commonwealth.

Respondent A party against whom an appeal is filed. A respondent may be the party that was either the plaintiff or the defendant at trial.

Restitution Generally means the act of restoring. In contract law, restitution may be required to prevent an unjust enrichment where one party has conferred a benefit on another but cannot claim the contract price (usually because the contract is not enforceable).

Right An interest or benefit recognised by law. The law of torts is based on rights – the right not to be injured by careless conduct (negligence), the right to a good reputation (defamation), the right to quiet enjoyment (trespass/nuisance).

Rule of law The legal and political ideal that is the basis of liberal democratic rule – that all citizens and institutions are accountable to the same laws, including lawmakers. It is sometimes stated simply as "no one is above the law".

Sanction A legal penalty or punishment.

Seal A formal signature.

Secret commission Receiving a secret benefit from a third party in breach of the law. Often used in principal–agent relationship.

Separation of powers Under this principle, power is distributed between the Parliament, the Executive and the Judiciary. Each group is "separated" and should work within constitutionally defined areas of responsibility.

Settlor A person who makes a settlement, especially of property, in setting up a trust to be administered by a trustee for the benefit of beneficiaries.

Simple contract Any contract that is not a formal contract. All simple contracts require consideration.

Sole trader A person carrying on a business as an individual.

Solicitor A lawyer who handles general legal matters and provides legal advice or legal services (such as conveyancing).

Sovereignty The power of a governing body (such as the parliament) to govern, without any interference or control from outside sources or bodies.

Specific performance An order compelling a party to do something. In contract law, an order for specific performance is usually reserved for contracts for the sale of land. Courts do not generally order parties to

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perform their obligations. Courts prefer to order compensation where the breach causes loss.

Standard of proof The amount or degree of proof required in a court case.

Statute An Act of Parliament.

Strict liability Where fault does not have to be proved in the party accused of wrongdoing.

Sue To commence legal action in a civil matter.

Summary offence A less serious criminal offence tried by a magistrate.

Term A promise that forms part of the contract.

Terra nullius "Land belonging to no-one". Refers to the concept that underpinned the settlement of the colony of New South Wales by the British in 1788. It was declared invalid by the High Court in *Mabo* (1992).

Third party A stranger to a transaction, legal proceeding or relationship. In a contractual sense, it means someone who is not a party to the contract.

Tort A tort is a civil wrong. The law of torts is based on protecting certain rights that people have been given by the courts – examples include the right not to be injured by careless conduct (tort of negligence), the right to a good reputation (tort of defamation) and the right to quiet enjoyment of property (torts of trespass and nuisance).

Trial judge A judge that hears legal proceedings and resolves a legal dispute at the dispute's initial trial. See **First instance.**

Trust An equitable relationship where a person holds property or income on behalf of another.

Trustee A person holding assets or receiving income on behalf of another under a trust or will.

Trust property Property that is the subject of a trust.

Ultra vires Beyond the powers (of).

Unconscionable Generally means conduct that is unfair, harsh or oppressive, taking into account the circumstances or the condition of the other person.

Unenforceable An unenforceable contract is one which is, *prima facie*, a valid contract but which by reason of some technical defect is not capable of being enforced by action by one or both of the parties, for example, a contract made orally which is required by statute to be evidenced in writing and which has not been so evidenced. Compare **valid, void** and **voidable.**

Unfair practices Practices prohibited under Chapter 3 of the *Australian Consumer Law*.

Unilateral contracts A "one-sided" contract – one side (the offeror) makes a promise to do something in exchange for an *act* by another person (the offeree). Compare **Bilateral contracts.**

v A designation that separates the names of parties in litigation. Pronounced 'and' in civil cases (eg 'Donoghue and Stevenson') and pronounced 'against' in criminal cases (eg 'Crown against Smith').

Valid In respect of a contract, valid means a contract recognised by law and enforceable in the courts. Compare **Valid, Void** and **Unenforceable.**

Valuable In contract law, it refers to the fact that the consideration provided by the promisee must be of some value to the promisor.

Venditor emptor "Let the seller beware". In consumer transactions, the change from "caveat emptor" has occurred, shifting responsibilities onto the vendor or supplier of goods and services.

Vicarious liability Liability is vicarious when a person is regarded by the law as responsible for the acts or omissions of another person. Vicarious liability arises where a particular relationship exists between the person held responsible and the wrongdoer (eg the relationship of employer and employee).

Void A void contract (or a contract that is void *ab initio* ("from the beginning")) is of no legal effect and thus does not create legal rights or obligations. Compare **Valid, Voidable** and **Unenforceable.**

Voidable A voidable contract is one that a party may rescind if that party wishes to do so. Compare **Valid, Void** and **Unenforceable.**

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Assessment Tasks in Commercial Law

In this introduction to commercial law assessment tasks, we focus on three of the most common tasks – the legal hypothetical problem, the research paper and multiple-choice questions – and we provide advice on how to approach each of these types of assessment task, offering some examples of each. We also provide comments addressing practical business assessment tasks, and the use of generative artificial intelligence (AI) in your studies and assessments.

First, a word about the cases and pieces of legislation that students confront when they begin their studies. Students will come to know very quickly that any legal conclusions reached in assessments must be based upon the law (ie cases and/or legislation) and not on personal opinion, no matter how firmly held. Therefore, students must carefully read the cases (or, more correctly, summaries and extracts from the cases) and relevant parts of the legislation; that is where the law is to be found. In this context, to "read" a case means understanding (a) what happened (the facts), (b) the decision (who won and who lost) and (c) most importantly, the reasons for that decision (the legal principle laid down by the court when deciding the case, including any interpretation of relevant pieces of legislation). And remember that the reason you are "reading" a case in this way is to enable you to solve a legal problem – including legal hypothetical problem questions – that has been put in front of you (in a lecture or in a tutorial or in an assessment task).

The legal hypothetical problem

Introduction

One of the most common forms of assessment in exams or assignments or research-based topics in commercial law is to ask students to read, analyse and then respond to hypothetical legal problems. Students are presented with a hypothetical (but ideally still realistic) set of facts and are asked to advise the parties (or one of them) or to present an argument (for one or more of them) in a way that tests students' understanding of the cases and/or the legislation upon which the hypothetical is based.

It is vital for students to be able to answer these kinds of legal problems. Not only are they a regular part of the assessment regime (and many teaching and learning activities), but they also simulate aspects of commercial practice, where it is necessary to seek advice about a business' rights and obligations based upon the particular facts of its own unique situation. Although students studying this text are not training to be lawyers, reading and responding to the legal hypothetical is also an excellent way to develop analytical and communication skills that are useful for all professionals who provide advice to clients.

Although the use of the hypothetical problem is an effective and, generally speaking, interesting assessment and educational tool, students coming to the study of a law unit for the first time are often confused and uncertain about how to proceed. This is especially so given that this form of assessment is not typically encountered in other disciplines.

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First, you must obviously prepare for your assessment task (or teaching and learning activity) by studying the relevant law. That is, you must "read" the relevant cases and/or legislation carefully, along with the relevant parts of the text or other materials. Responding to a legal problem requires knowledge of the law, and an adequate response cannot be based on your intuition or common sense alone.

The next challenge is answering the hypothetical problem itself. Please note that there is no single correct method for answering or responding to a legal hypothetical problem. Key is to appreciate what your task is, for example, to advise one or more of the parties about their legal rights and duties, or to analyse an issue, or present an argument etc. Exactly what you need to do will usually be identified in the "prompt" at the end of the question. Provided that you do what is asked, this is the most important thing: you should feel free to "find your own voice" in your answer and not slavishly follow any particular formula. Nevertheless, many generations of law students and non-law students taking law units have found the IRAC method to be a useful tool. We provide two worked examples using the IRAC method and one worked example of a more traditional, free-form or discursive response below. After reading the IRAC and discursive answers below, you should consider which approach suits you. However, remember that the essential task remains the same – understanding the material facts, and providing clear and coherent advice or analysis based on your understanding of relevant law, that answers the question asked.

Let's elaborate on the IRAC method. IRAC is an acronym. It stands for Issues, Rules, Application, and Conclusion. Before we employ the IRAC method, a brief explanation of each part of the acronym is in order:

- **Issue**: Identify the legal issues that you believe are raised in the facts. You will need to work out what area of law is involved and then see what issues are to be resolved. The question itself may provide guidance on this point (eg "advise BridgeCorp of any rights it may have under the law of contract" or "advise Dahlia whether she has breached any of her duties as a director of BuildIt Industries"), so read the question very carefully. Your assessment instructions, provided ahead of time, might also give you an indication of the overall area of law that will be assessed – instructions of this kind are essential pre-reading ahead of your assessment.
- **Rule**: What are the relevant legal rules or principles and/or statutory provisions that you need to address in dealing with the legal issues raised by the facts? This is where familiarity with the cases and legislation is vital.
- **Application**: This is where you specifically apply the legal principles to the issue raised by the facts. This is the heartbeat of your answer, and is often where most marks are allocated in this type of assessment task. You can think of this step as the "why" – it explains why the relevant legal rule leads to your conclusion. You should use relevant precedents to support your propositions and/or refer to relevant legislation. If there are several parties and/or several issues, make sure you address each one carefully (though without repeating yourself, using cross-references where necessary).
- **Conclusion**: At the end, a short conclusion is required that answers the question raised by the facts. For example, it will identify the rights that BridgeCorp has under the law of contract, or will identify whether or not Dahlia breached her directors' duties. Re-reading the "prompt" usually contained at the end of your question will provide further direction here. The conclusion you reach may be brief, but it must be consistent with your application of the law.

General writing tips

Before we look at our two worked examples prepared using the IRAC method, please note the following general advice on how to plan and write an answer:

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1. *Plan your answer*. A well-planned, well-structured answer will always do better than one that "spontaneously arises" or that is the product of a "stream of consciousness". If your answer lacks planning and structure, it is more likely to contain irrelevant or illogical material. Planning takes time, but it may be worth spending that time in order to produce a better answer. It may assist you if you are, at the outset, clear about:
   (a) Who are the parties?
   (b) Who has suffered loss or damage? What was the cause of the loss or damage? This should help you to clarify the general area(s) of law and specific issue(s) raised in the question, if not already identified in the question or in your assessment instructions.
   (c) What remedy may be (or is being) sought by the victim?
   (d) Is there any information that you need that is not provided? You can identify, in your answer, additional information that you need, and – most importantly – explain why it affects your legal analysis.
   (e) Are there any specific instructions in the question itself that might assist you? Your question "prompt" might specifically ask you to address (or equally importantly not to address) particular issues (eg "advise Shruti of her rights under the law of contract, but do not address the *Australian Consumer Law*").
2. *Canvas all the relevant issues, not simply the major one*. Marks are allocated for each relevant issue, so make sure that you give proportionate time to each one. Some issues might be more important than others, so do not assume that a question allocated X marks necessarily contains X issues – familiarity with the law is again essential here. At the same time, you should resist the "shopping list" approach to answering questions – covering every aspect of the law on a particular point because of a fear that you may leave something out. Be brave: stay relevant. Depending upon your task's assessment regime, you might not lose marks for addressing irrelevant issues, but you will lose time and/or space in your word count that could have been effectively deployed elsewhere.
3. *Don't repeat or rewrite the question*. This is a waste of time for which no marks are given, since simply restating the facts does not involve any legal analysis. Instead, a brief introduction setting the scene is a useful device – it gets you off to a good start and indicates to the examiner where you are heading. It need only be brief. For example, "I am asked to advise Daisy whether she has any rights against the partnership. In order to do this, it is necessary to (a) decide when the partnership began; (b) identify the partnership property; (c) decide when the partnership came to an end; and (d) decide whether appropriate notice of dissolution was given".
4. *Explain yourself*. Ensure that you support your propositional statements ("the conduct of Quan constitutes a breach of contract" or "Animal Inc's failure to act is a breach of its duty of care" or "the actions of Susan are a breach of her directors' duties"). To insert the conjunction "because …" is a useful strategy that ensures you explain your propositions. Thus, "there is a breach of the duty of care because Animal Inc did not do what the law requires. The law requires that a person act as a reasonable person would have acted in these circumstances. The authority for this is [insert appropriate case law] where the High Court said … On the facts of this case …".
5. *Don't include too much information*. In particular, when discussing relevant precedents, it is not usually necessary to include a summary of the facts of those cases where they are being used to support a proposition of law. A reference to the reason for the decision may be required, or a brief explanation of why the decision should or should not be followed. A brief summary of the facts may be appropriate where the facts of precedents are similar to the scenario you are required to advise upon. Similarly, when you refer to legislation, there is no need to reproduce the relevant legislation word for word.

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6. *Objective advice*. In most hypothetical problem questions, you are asked to "advise". This should be done "objectively" – you need to provide an answer that considers the relevant law and comes to a conclusion, based on precedent, even if it is not what the person you are advising would like to hear, and even if it's not your own preferred opinion. Remember, again, that you are applying the law and not personal opinion or common sense.
7. *Focus on your writing style*. Proper use of the English language will help ensure that your answer is fully explained, which is key to accurately and completely conveying your legal analysis. Be clear and concise. Do not overwrite, and do not use words just because you think they sound "lawyerly". Good lawyers (and good non-law students taking commercial law units) write and speak in plain English: they do not use words like "aforementioned" or "hereby", they do not use Latin phrases unnecessarily and they know that only the Marx Bros (now just a distant memory of even their unit assessors!) say "the party of the first part in this contract shall be known as the party of the first part …"[1] Grammar and spelling are important too, so do the very best that you can. Also keep in mind that the use of particular legal terms is important when they have legal meanings: so avoid synonyms where your choice of language actually affects your meaning, and think carefully about using translation tools (even if they are permitted by the rules of your assessment).

Worked examples

The following two worked examples, using the IRAC method, address the legal hypothetical questions set out below. In those worked examples, the headings 'introduction', 'issue', 'rule', 'application' and 'conclusion' are used. These headings are used for explanatory purposes, so that you can see what parts of an answer reflect those elements of the IRAC process. However, ideally, you would not use these headings in your answer. Instead, the IRAC process is best used in a way such that its elements represent the internal structure of your paragraph. Deploying IRAC in this way allows you to better explain your answers, without getting bogged down in matters of formality and style: it is the substance of your answer that matters most.

Worked example 1

Best Guys Pty Ltd, an electrical goods retailer, advertised a range of specials on social media including this one contained in a YouTube advertisement:

> NEVER TO BE REPEATED OFFER ON FAMOUS BRAND 65" 4K Ultra HD LED LCD Smart TV … ready to go from $3500.

On Wednesday 19 September, Ben saw the advertisement and decided to purchase the advertised TV. He immediately went down to the Best Guys store near his home and, after seeing the same advertisement on display in the shop, he walked over to Mary, the sales manager, and said that he accepted the store's offer, would pay now, and would immediately take the television home.

However, Mary told him to slow down. "Unfortunately, we are completely out of stock. The only similar television that I have left is the store's lightly used demonstration model, and you can have that for $3,000."

1 For the full and informative "interpretation of a contract" skit from the Marx Bros' film *A Night at the Opera*, see https://www.youtube.com/watch?v=JUdvNkDA8_U.

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Ben was very annoyed, believing that he already had made a contract with the store. Nevertheless, he said that he would think about her offer. Then Mary said, "Look, I'll hold it for you for two days while you think about it. Here's my business card – just ring me with your decision before Friday at 10.00 am". Ben agreed, reluctantly. On Thursday morning, Mary decided that she would sell the television to Gabriella, and rang Ben to inform him that the television had been sold. "No way. I hereby accept the offer, and will sue Best Guys for breach of contract if you don't deliver the TV that you said could be mine." He then hung up and, knowing that you have studied commercial law, contacts you for advice. Please advise Ben. Fully explain your answer, and support your advice with reference to relevant case law.

Suggested answer guide

Plan: See Point 1 of the General Tips above.

Introduction: The main issue is whether Ben and BG made a contract on Wednesday (when Ben responded to BG's advertisement) or on Friday when he "hereby accepted" Mary's offer. This requires an analysis of the law of contract in relation to agreement – has there been an offer and an acceptance of that offer? – and, to a limited extent, the requirement of consideration.

Wednesday negotiations

Issue: Has an offer been made by BG? In order for a contract to be made on the Wednesday, there must be an offer and an acceptance of that offer. Ben would argue that the advertisement is an offer.

Rule: An offer is an expression of willingness to contract on particular terms, made with the intention that it is to become binding as soon as it is accepted unconditionally by the person to whom it is addressed: see *Gibson v Manchester City Council* where the MCC's letter was not regarded as an offer despite the use of the word "offer" in the letter (as in BG's advertisement here) but was instead considered an invitation to treat. It is an objective test as to whether the person making the alleged offer intended to make a contract if the person to whom it was directed accepts. Generally speaking, advertisements and displays in shops or in shop windows are not regarded by the courts as offers but as invitations to treat. An invitation to treat is an invitation to make an offer and is not an offer in itself so it cannot be accepted: see *Partridge v Crittenden* and *Boots*. In *Boots*, the display of goods (as in this problem) was not regarded as an offer but as an invitation to treat.

There have been cases in which an advertisement has been held to be an offer, again applying the objective test: *Carlill* most notably. *Carlill*, however, involved very special circumstances (including significant monetary inducements to buy a very dodgy smokeball) that are somewhat replicated here. Generally speaking, however, the courts have regarded it as commercially unreasonable to say that a seller is obliged, as a matter of law, to sell an item to anyone who "accepts" its "offer". A customer would usually not expect, for example, an advertising retailer to be opening itself up to being bound to a potentially unlimited number of customers when a reasonable person would appreciate that it has only limited stock.

Application: Is this advertisement an offer? Probably not. The general rule applies. Although BG has used the word "offer", this is not conclusive and, in this instance, would be insufficient to tilt the balance towards regarding the advertisement as an offer. Ben, the person responding to the "invitation", is in fact the one making the offer.

Issue: What is the legal position in relation to Mary's response?

Rule: An offeree may accept, reject or make a counteroffer. A counteroffer stands as a new offer and has the effect of killing off the original offer: see *Hyde v Wrench* for a scenario that offers a clear example of an offer/counteroffer situation.

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Application: In this case, Mary's offer to sell Ben another television for $3,000 (and to give him two days to respond) is a counteroffer, reversing the roles of the parties, as in *Hyde v Wrench*. Mary is now the offeror and Ben the offeree.

Thursday exchange

Issue: The oral exchange on Thursday raises issues in relation to the right to revoke an offer and the issue of when an acceptance is effective.

Rule: There are two rules of law that are concurrently applicable. First, an offeror may revoke an offer at any time before acceptance by the offeree (unless the parties have entered into an option agreement – see later discussion of this point): see *Stevenson Jaques* as an example of a case where the right to revoke was pivotal to the decision. Second, an acceptance is only valid once it has been communicated to the offeror: again, see *Stevenson Jaques*.

Application: Looking at the exchange of communications, Mary's revocation would be effective because it was communicated before Ben communicated his acceptance. Of course, Ben's use of the word "hereby" is legally irrelevant and does not change his legal position.

Issue: The final issue is whether Ben can rely on the promise by Mary to keep her offer to sell open for two days as an enforceable option agreement. This raises the issue of consideration – the requirement that (most) promises, including Mary's promise here, be "bought" by some form of consideration in order to be enforceable. The law does not usually enforce "bare promises" that are not supported by consideration.

Rule: An option is an enforceable agreement. It consists of a promise by one party to do something – in this case, the promise is to keep an offer open for a specific period of time. Such a promise, like any promise, is valid and enforceable only if it is supported by consideration: see *Goldsbrough Mort v Quinn*. Consideration is the "price" of the promise, but it needn't be money; without such a "price", the promise is a gratuitous promise and is unenforceable. In *Goldsbrough*, the payment of a small amount of money (the consideration) secured the option.

Application: In this case, Ben has not provided any consideration for Mary's promise to keep the offer open for two days, and therefore it is unenforceable.

Conclusion: For the reasons provided above, there is no contract between Ben and Best Guys. Mary was entitled to sell the TV to the Gabriella.[2]

Worked example 2

Cranium Pty Ltd owns heavy-duty cranes that operate on a number of building sites in the Melbourne CBD. One such site is a new high rise at Riverlands, overlooking the river. There, its crane operator, Jack, was operating crane 12. At the end of the shift, he reported to Henry, Cranium's operations manager, that he felt there was an issue with the stabilisers at the base of the crane. "Just felt a bit wobbly up there. It may have just been the wind" he told Henry. Henry contacted Paolo, Cranium's engineer, and reported Jack's concerns. Paolo immediately went to the site, inspected the crane and the stabilisers thoroughly, found nothing wrong, and cleared crane 12 for work. Shortly after Jack began work the next day, the crane lurched to the right and tumbled into the river. Georgina, an Olympic rower, happened to be passing

2 It is possible, although unlikely, that Mary may be estopped from resiling from her promise not to revoke her offer. However, it is not appropriate to discuss this issue at this time in the context of this introductory worked example.

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by when the crane fell and leapt into the river to rescue Jack who was rushed to hospital in a critical condition with shocking head injuries. When his partner Juliette saw Jack at the hospital, she was shocked at what she saw and later suffered severe psychological trauma. So, too, did Georgina. Jack, Juliette and Georgina want to know whether they have any rights against Cranium in the tort of negligence. Note, as key additional information, that Workcover engineers and mechanics checked the crane once it was recovered from the river, and determined that the fault with crane 12 would *not* have been revealed unless the crane's stabilisers had been completely dismantled (a type of check that would have rendered the crane idle for two weeks at a very busy time of the year).

Suggested answer guide

Plan: See Point 1 of the General Tips above.

Introduction: The main issue in the question concerns the liability of the company in negligence for the injuries suffered by each of the parties. In order to succeed, the parties must each prove, on the balance of probabilities, that the company owed each of them a duty of care, that the company breached this duty of care, that the breach was a cause of their damage and that the damage they suffered was not too remote from breach. The first two criteria are the most relevant in this problem (as if the duty has been breached, the damage is clearly caused by the breach and is also clearly foreseeable).

Issue: Did Cranium owe a duty of care to each of the parties? It is best to deal with Jack's claim separately from Juliette's and Georgina's as these two respective groups suffered different types of injury and therefore different duty of care rules apply.

Duty of care to Jack

Rule: In *Donoghue v Stevenson*, the House of Lords laid down the basic principle that has become the touchstone of liability in negligence: you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your "neighbour". As Lord Atkin said, "Who, then, in law, is my neighbour?". And his Honour replied by saying your neighbour, in law, is "anyone you could reasonably foresee would be injured by your actions or omissions if you do not take reasonable care".

Satisfying the "reasonable foreseeability" test is relatively straightforward where the relationship between the plaintiff and the defendant is one that falls into one of the categories or relationships where the courts have previously ruled a duty of care is owed. One of those established relationships is the relationship of an employer and employee.

Application: In this particular case, the "neighbour principle" applies and is satisfied: a duty of care would be owed by Cranium to Jack because it is obviously reasonably foreseeable that if a crane company does not look after its equipment carefully its workers may be injured.

Breach of the duty of care to Jack

Rule: Once a plaintiff has established that defendant owed them a duty of care, they must then prove on the balance of probabilities that the defendant breached that duty of care; that is, that the defendant has been negligent. The defendant will have breached the duty of care if the risk of harm was foreseeable and not insignificant (or far-fetched) and they failed to do what a reasonable person would have done in the circumstances (known as the reasonable person test): *Wrongs Act 1958* (Vic), s 48(1). The factors relevant to determining what a reasonable person would have done are (a) the probability that the harm would happen if precautions were not taken (see *Dederer* where the court considered the issue around the probability of a boy diving into a (shallow) river and decided there was no breach of duty by the relevant

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authority); (b) the likely seriousness of the harm that might be caused (see *Paris v Stepney Borough Council* where the court decided the Council breached its duty to its worker with only one eye); and (c) the burden of taking precautions to avoid the risk (see *Watt v Hertfordshire City Council* where the court determined that the easier it is to eliminate a risk, the less likely a defendant's failure to take precautionary steps will be justifiable): *Wrongs Act 1958* (Vic), s 48(2). The fourth factor in the *Wrongs Act 1958* (Vic), s 48(2) – social utility – is not relevant in the present context.

Application: From Cranium's perspective, the risk of harm was foreseeable and also was not insignificant. It was, after all, alerted to a potential problem by Jack himself. The real issue is whether, in the face of the risk, Henry and, in particular, Paolo, did what a reasonable person in their position would have done (on behalf of Cranium). Henry's actions in response to Jack's comments are reasonable on the face of it: he called in the company's engineer who did a "thorough check" and cleared the crane of any issues. Paolo's inspection was apparently reasonable because the Workcover report suggests that the fault was undiscoverable unless the crane was dismantled. The question then is whether a reasonable person/company, in the face of the comment by its own employee, should have ordered that the crane be dismantled in order to do the most thorough safety check possible. At this point, the *Wrongs Act 1958* (Vic), s 48(2) factors must be considered. On the facts we have been given there would appear to be a "reasonable probability of harm" if precautions were not taken and a grave risk of "serious harm". The question is whether the burden of taking precautions to avoid the risk of harm is too great. In all likelihood, it is not: the economic loss of having the crane laying idle for two weeks is minor when set against the probability of harm and the risk of serious injury to the employee.

Conclusion: The Company has breached its duty of care to Jack (and would be liable for any reasonably foreseeable damages caused by the breach of duty, though those points are not at issue here).

Duty of care to Juliette and Georgina

Issue: Did Cranium owe a duty of care to either or both of Juliette and Georgina in respect of their psychological damages? We will discuss their positions jointly as the same duty of care rules will apply to each.

Rule: For a long time, the fear of indeterminate liability (or the old "the floodgates will open" argument) deterred the courts from recognising psychological damage (previously, and unfortunately, referred to in old case law as "nervous shock") as a kind of damage *in its own right* in respect of which a duty of care could arise. It previously had to arise as a consequence of direct *physical injury* to be compensable. However, things have now changed: the principles for recovery of damages for psychiatric illness were reconsidered recently by the High Court in *Tame* and in *Annetts*. In these two cases, which were heard together, the High Court decided that the same test of reasonable foreseeability should apply for mental injury as for physical injury or property damage. That is, we should simply ask whether a person should have had in their contemplation injury of the kind that has been suffered by another person and whether they should therefore be required to take reasonable care to guard against such injury (whether physical or mental). To determine reasonableness, the High Court said a number of factors might be considered:

- the *relationship* between the parties;
- the plaintiff's *physical and temporal proximity* to the event that causes the mental harm; and
- what the reasonable response of a person of normal fortitude might be.

Application: The first two of those factors are of particular relevance here. Although she was not "on the scene" at the time of the accident, Juliette's relationship with the injured worker and the fact that she saw him shortly afterwards in an ICU environment would be sufficient. The parallel with *Annetts* is strong. The

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parents in *Annetts* were not physically or temporally present but suffered as the search for their son went for such a long time before he was found dead as a result of dehydration, exhaustion, and hypothermia.

The outcome for Georgina, however, is less certain. A case for her could be made: although there is no pre-existing relationship with Jack, she was physically and temporally very close. She witnessed the drama of the crane falling and saw, first hand, its aftermath.

Conclusion: It is likely that Cranium owed a duty of care to Juliette. It is probable that it also owed Georgina a duty of care, although this is less certain. Insofar as there is a duty, that duty has been breached – Cranium did not act as a reasonable company would have acted in the circumstances (as already described above).

Worked example 3 – using a non-IRAC approach

In this example, a less formal structure is used that has the same basic ingredients as the two IRAC responses above: issue identification, explanation of the law, application of the law to the facts, and a concluding paragraph. Some students may find this approach suits them better that the more formal IRAC method. Some students may even consider that this kind of free-flowing approach actually represents the IRAC ideal: using its ingredients as the basis for the internal structure of a paragraph-based analysis, allowing that analysis to provide a fully explained answer unhindered by artificially separated headings.

The Kit Kat Dance Club reopened after the COVID-19 lockdowns. There are more than 200 patrons out on the dance floor on a Friday evening. Don Lockwood is one of them. He entered the club the same way that everybody does – he walked in the main door, paid $20 to the cashier, and was issued a ticket. He does not notice the large sign above the entrance door, that says in very large, clear print:

> Neither the Kit Kat Club nor its owners, employees or agents will be liable for any loss or damage to patrons, or their property, howsoever caused, including by negligence and/or breach of contract.

Don is having a fantastic time – as he always does when he comes to the Club – when all of a sudden, without warning, the floorboards give way and Don falls 3 metres to the ground below. He breaks his leg and several ribs, and is severely concussed. Sally Bowles, the owner of the Club, is aware of legal regulations requiring that no more than 100 patrons be on the dance floor at any one time. She has long ignored that regulation. As a matter of fact, Sally recently noticed that the Club's floorboards were wearing dangerously thin in the central area, but decided to delay putting in a new floor until business had picked up again back to pre-COVID levels. Don sues Sally for damages. Sally seeks your advice about her liability under the law of contract.

Suggested answer guide

The main issue in this question concerns the effect of the exclusion clause. There are two main issues here – the first is whether the clause is in fact part of the contract; the second requires interpretation of the words of the exclusion clause to determine if it protects Sally. The former is an incorporation issue, and the latter is an interpretation issue. It is worth noting from the outset that the courts (and Parliament) regard exclusion or limitation clauses with a healthy scepticism, particularly when the contract, as here, is a non-commercial one (ie not the product of a genuinely negotiated agreement). In such cases, the courts will attempt to read down the words of the clause so as to limit its scope.

Has the exclusion clause been incorporated into the contract? Where a person signs a document that is known to contain contractual terms, they will normally be bound by their signature regardless of whether they read and were aware of the terms. Where, as here, the document containing the exclusion clause is

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not signed, the question is whether Sally provided Don with reasonable notice of the term. In order for the notice to be reasonable, notice of the term must be provided before or at the time the contract was made. In *Thornton* and in *Olley*, the defendants failed in their reliance on exclusion clauses because notice of the respective clauses was not provided until after the relevant contracts were made (when the ticket was issued in *Thornton*, and in the foyer of the hotel in *Olley*). In this particular problem, the exclusion clause was above the entrance door of the Club and was in large clear print and did not contain harsh, unusual or onerous terms that would have required something special by way of notice. In addition, because Don has been to the Club before, it will be easier to establish that a reasonable person would have or should been aware of the clause. For these reasons, it is likely that a court would find that notice of the exclusion clause was reasonable – meaning that the clause is incorporated into the contract.

Does the exclusion clause protect Sally? Bearing in mind the point made earlier that the courts are hostile towards exclusion clauses (at least in consumer-type transactions) and interpret ambiguities or uncertainties *contra proferentum* (against the person who drafted the clause), we need to carefully consider the words of the clause. When interpreting contractual terms, including exclusion clauses, the approach of the courts is to give effect to the objective intention of the parties and to give the words their natural and ordinary meaning, and not to twist them in order to reach a desired outcome. Here, the clause excludes liability "for any loss or damage to patrons, or their property, howsoever caused, including by negligence and/or breach of contract". In clearly excluding loss that arises as a result of breach of contract *and* negligence, the clause has the effect of protecting Sally from any breaches of contract (such as an implied term that the premises be reasonably safe) and for negligence (for breach of a duty of care owed by an occupier to guests or visitors).

However, the law has long said that exclusion clauses will not normally be construed as limiting or excluding liability for acts done that are well outside the terms or the scope or the "four corners" of the contract, in the sense that the parties would not have contemplated the act. Such actions are sometimes labelled fundamental breaches. There is no general rule that a fundamental breach cannot be protected by a well-drafted exclusion clause. However, normally such acts would not be protected because, the courts say, it would not have been consistent with the objective intention of the parties to exclude liability if such an act were to occur. The courts are particularly concerned where such actions are carried out in the context of consumer-type transactions (such as in *Sydney City Council v West*, where the act of the employee in handing the keys of West's car to a rogue was construed as being outside the "four corners" of the contract) rather than in commercial contracts (such as in *Photo Productions* where the clause protected the defendant from an act – lighting an unauthorised fire and burning down the factory – that was, on the face of it, a fundamental breach). In this particular problem, we can ask whether the actions of Sally – in breaking the building regulations (by over-crowding the dance floor) and ignoring the state of the floorboards (in what might be described as a reckless manner) – has committed an act that goes beyond the four corners of the contract and is therefore not protected by the exclusion clause. In this context, it is likely that Sally's conduct has gone beyond the four corners of the contract because it is not the type of conduct that parties in Sally and Don's position would reasonably contemplate. It is therefore unlikely that her actions are protected by the exclusion clause even if it is incorporated into the contract and otherwise would have been read as covering the events that occurred.

Approaching legal research questions

Introduction

As with any other piece of writing, a legal research paper must be logically structured and must present a coherent answer *to the question asked*. The answer must not be a simple summary of the material you have

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assembled – you must *demonstrate* an understanding of the material and answer the question asked in a confident and individual way. To do this, you must follow the steps below:

- Carefully consider and interpret the question – what is it I am expected to do?
- Research the topic and assemble relevant materials (some of which will be used but much of which will not).
- Write a coherent and well-structured paper that shows to the reader/examiner that you have understood the question and conducted your research thoroughly.

In addition, as was the case with respect to our discussion of legal hypothetical questions, it is essential that you read your assessment task instructions carefully and take note of any particular requirements that they contain. These requirements may include, amongst other things, formatting rules, word count limitations, citation style guide requirements (which in Australia often, but do not always, come from the *Australian Guide to Legal Citation*)[3] and direction, as to the areas of law that you are required to address (or perhaps not address).

Consider and interpret the question

It is obviously a vital part of any research essay to answer the question you have been asked. You need to be rigorous here – assess precisely what the question is about and answer it accordingly. Don't simply identify the general area of law (eg negligence) and summarise the relevant material. Usually, a research task requires more than a summary; it requires you to conduct research and (on the basis of that research) make an argument or form a view. Sometimes, it helps to clarify the topic if you reframe the question in your own words under the heading "what the question asks me to do", noting:

- Any statements or propositions in the question;
- Any implicit approach or angle that is expressed or implied in the question itself (eg there has been a suggestion that s 18(1) of the *Australian Consumer Law* has gone too far …);
- What the question asks you to do (eg examine, explain, analyse, interpret …) (these are instructional words that will assist you in defining your task); and
- Any restrictions on where you should conduct your research (eg "in Australian case law …").

Research

Once you have a clear idea of what the question means, your research begins. This is not an invitation to collect everything on a topic – in this era of readily available Internet resources (including legal databases and even general databases like Google Scholar), the need for relevance is even more acute. You need to:

- Find material that is on the general topic (eg from table of contents of a textbook or Internet searches of key words);
- Skim read materials identified to see whether they are relevant to the key issues (in particular, whether the materials take your argument further); and
- Filter in and out – taking brief notes only if the material is relevant.

Some material might be relevant to your research task because it provides essential general background information, and some material might be relevant because it directly goes to the specific issue you are asked

3 Information about the *Australian Guide to Legal Citation* (commonly referred to as the *AGLC*), and a copy of the *AGLC's* current version, is available at: https://law.unimelb.edu.au/mulr/aglc/about.

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to address. Different types of materials will also fulfil different functions. Keep in mind that only cases and legislation are primary sources of law, so only cases and legislation set out "the law". Other sources (including textbooks, book chapters, journal articles and other types of online resources) might describe and critique the law, but they are not themselves "the law".

Writing

Planning

Planning is critical – it will save you time because you will have a structure and direction from the start. The plan itself should break your essay into parts, usually under headings and subheadings. Once you have a "roadmap" of your essay in front of you, you can push and pull it into shape. You may find it effective to attempt a first draft of one specific section of your plan at a time, and you might not necessarily attempt those draft sections in order.

Writing

Good writing of any kind is not easy. There are many general books on the subject, and they have one thing in common: writing is best when it is direct, active, concrete and verb-filled. If you wish to do well in your legal research paper, please follow that advice.

Of course, structure is important. As with any other essay, you need a short introduction, telling the examiner what the question is about and how you are going to answer it. Then follows the main body of the essay that sets out your arguments in a logical and coherent way (using headings or paragraphs). Finally, you will have a conclusion at the end. This structure might sound familiar: it is indeed the structure that legal academics often follow when writing journal articles. You can think of a legal research paper as a scaled down (smaller) version of a journal article. And like a journal article, your research paper will not merely summarise the law, but will (as noted above) usually make an argument.

Remember your assertions or propositions should be supported by authority (eg case authority, legislation, or scholarly writing, as appropriate). Many students have trouble with this – but you must try not to make statements that are unsupported by either primary or secondary authority. One way to ensure you do this effectively is to ask, when reviewing your work: have I supported every one of my assertions of law and fact with an authority? Of course, your conclusion is your own, but it must be a logical conclusion – one that is consistent with the arguments made in the body of the essay.

Referencing is crucial: familiarise yourself with the style that is expected and follow it precisely. This will usually be addressed in your assessment instructions. In theory, it is possible to get 100% of the marks allocated for referencing style: it is simply a matter of following the instructions in your referencing style guide.

Reviewing

The review stage is a critical part of the writing task – it is the time when you edit, eliminating errors of *style* (how you have written – grammar, spelling, structure and flow) *and substance* (what you have written – weaknesses in the arguments, the analysis, etc.).

It is worth spending some time on this task because it makes a substantial and tangible difference to your essay (and therefore your marks).

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How you best balance writing and reviewing is a matter of personal choice that you might only discover after attempting several research tasks. Some prefer to carefully craft their work from the outset, leaving a lesser role (but still a critical role) for review later. Others prefer to just "get it all out onto the page" at the start, and spend significant amounts of time re-crafting their work in later review. Others still will fall somewhere in between. There is no right or wrong approach here: the right way is what is right for you.

Approaching multiple-choice questions

Introduction

A multiple-choice exam is quite different from either an assignment (research or problem-based) or a problem-based exam. In a multiple-choice exam, a student is typically asked to recognise a correct (or incorrect, or even most correct) answer from amongst a set of options that include three or four wrong answers (called *distractors*), rather than analysing a hypothetical problem or producing an argumentative essay.

Still, the distinction between multiple-choice questions and problem questions is not always so clear. With the emergence of generative AI platforms (see below), which are becoming capable of answering more routine or traditional multiple-choice questions, it is possible that multiple-choice questions drafted in a problem style will become more common. The premise remains the same, although the question itself is presented as a problem (a short scenario) and the options are legal conclusions (perhaps accompanied by explanatory rationales) related to that problem.

Students often assume that multiple-choice exams are easier than problem-based exams or research essays because the right answer is before their very eyes (somewhere) and, if the worst comes to the worst, the student can, as the joke goes, turn it into a multiple-guess exam. Furthermore, subject to our comments concerning problem style multiple-choice questions given above, the nature of the multiple-choice exam militates against detailed analysis, which is why many multiple-choice questions have consisted of basic definitions or simple comprehension questions (at least in the past). Finally, students may prefer this form of question because the stakes on each individual question are lower. Each question will be worth a fraction of the overall marks (often, but not always, a single mark), so there is always the chance of redemption with the very next question.

The truth, however, is that multiple-choice exams are difficult. With so many questions, the student must be familiar with a large range of legal issues (perhaps the entire course, depending upon your exam instructions); there is a need to be familiar with case law and statutory details; and, where multiple-choice exams are closed book exams, there is nothing to prompt the student.

A sample multiple-choice exam

Chapter 1: An Introduction to Law and the Australian Legal System

1. In *Mabo v State of Queensland*, the High Court:
   - (A) recognised a form of native title based upon continuous prior possession of the Indigenous claimant's traditional lands.
   - (B) decided that the doctrine of "*terra nullius*" had been correctly applied.
   - (C) recognised a form of native title limited to the Miriam Islands.
   - (D) decided that native title existed for all Indigenous peoples.

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2. The legislative powers listed in s 51 of the *Australian Constitution*:
   (A) may only be relied upon by the Federal Parliament.
   (B) may be relied upon by the States but are subject to appeal in the High Court.
   (C) are concurrent powers shared by the State and Federal Parliaments.
   (D) are powers that may be used by the Federal Parliament provided that there is no conflict with the States' laws.
3. Which of the following is the best definition of "*ratio decidendi*"?
   (A) It refers to that part of a court's judgment that was not strictly necessary for the decision that was reached.
   (B) It refers to that part of a court's judgment that cannot be appealed to a higher court.
   (C) It refers to that part of a court's judgment that is binding on all courts lower in the same hierarchy when the facts are similar.
   (D) It refers to the decision of the court at first instance (the trial court).

Chapter 3: Agreement: Offer and Acceptance

4. Which of the following is most likely to be regarded as an offer rather than as an invitation to treat?
   (A) Harvey Norman places an advertisement on social media advertising a flat screen television for $2,500.
   (B) Freddy bids at a charity auction run by Harvey Norman for the same flat screen television.
   (C) Harvey Norman puts the same flat screen television on its floor display with a price tag of $2,000.
   (D) The purchaser puts the same flat screen television up for sale on eBay (an online auction platform) for auction rather than at a 'buy it now' price.
5. Consider the following facts:
   - 1 April: MusicCo telephones The Music Showroom and offers to sell a piano. They swap postal addresses and email addresses for further communication.
   - 3 April: The Music Showroom sends a letter of acceptance.
   - 5 April: MusicCo sends an email revoking its offer. The Music Showroom's administrative officer is away and doesn't have access to his computer for two days.
   - 6 April: MusicCo receives The Music Showroom's letter of acceptance.
   - 7 April: The Music Showroom's administrative officer returns and reads MusicCo's email.

   Which of the following statements is correct?
   (A) A contract is made on 3 April.
   (B) A contract is made on 6 April.
   (C) No contract is made because the revocation is effective on 5 April.
   (D) No contract is made because the revocation is effective on 7 April.

Chapter 4: Intention to Create Legal Relations

6. Bob and Betty make an agreement that Betty will look after their mother who has Alzheimer's disease, and that Bob will be responsible for the expenses associated with their mother's care. If Bob subsequently refuses to honour this commitment, the courts would most likely say that the agreement:

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(A) is unenforceable because it is a private or domestic arrangement.

(B) will only be enforceable if Betty can prove that Bob and herself intended to enter into legal relations.

(C) will be enforced unless Bob can prove that no legal relations were intended.

(D) was a commercial one and would therefore be enforceable unless Bob could prove there was no intention to enter into legal relations.

7. In *Ashton v Pratt*, what was the main reason the court decided there was no intention to create a legally binding contract?

(A) The agreement was not reduced to writing.

(B) The language of the agreement lacked detail from either party and did not indicate definite obligations.

(C) Pratt lacked the necessary contractual capacity due to his age and ill health.

(D) The plaintiff had been a worker in the escort business and was therefore not morally entitled to any monies under the agreement.

Chapter 5: Consideration, Promissory Estoppel and Formalities

8. What was NOT one of the "practical benefits" that Roffey Bros received when making Williams the promise of a bonus payment in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*?

(A) Roffey Bros did not have to sue Williams for breach of contract.

(B) Roffey Bros avoided a penalty under its head contract for late completion of the project.

(C) Roffey Bros expected to receive services from Williams that were greater than what Williams was obliged to provide under the original agreement.

(D) Roffey Bros avoided having to find another subcontractor to replace Williams.

9. In *Crown Melbourne Limited v Cosmopolitan Hotel (Vic) Pty Ltd*, the main reason the High Court did not accept Cosmopolitan Hotel's argument that it was entitled to rely on the assurance from Crown that it would be "looked after at renewal time" (of the lease) was that:

(A) The statement was a promise but was not enforceable because it had not been properly incorporated into the main contract.

(B) The statement was not intended to create an enforceable legal relationship.

(C) The statement was no more than vaguely encouraging and could therefore not constitute a collateral warranty.

(D) The statement was a representation that could not affect the contractual relationship between the parties.

Chapter 6: Contractual Capacity

10. On her 17th birthday, Jenny purchases 100 shares in BHP Billiton Ltd at $50 per share. The terms of the share purchase are that she immediately pays for 50% of the value of each share and then pays the balance of the share price in six months. Jenny makes the initial payment of $2,500. Three months after the initial payment, Jenny no longer wishes to purchase the shares because the share price has plummeted to $25 a share. Jenny's contractual obligation to purchase the shares is best described as follows:

(A) The contract to purchase the shares is void and was never a valid contract because Jenny concluded the contract whilst a minor.

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(B) The contract to purchase the shares is illegal and was never a valid contract because Jenny concluded the contract whilst a minor.

(C) The contract to purchase the shares is voidable. Provided that Jenny exercises her right to rescind the contract before she turns 18 years of age or within a reasonable time of attaining 18 years of age, she will not be liable for the outstanding payment on the shares. However, she will not be entitled to recover her initial payment of $2,500.

(D) The contract to purchase the shares is voidable. If Jenny exercises her right to rescind the contract, she will not be liable for the outstanding payment and will be entitled to the recovery of the $2,500 already paid.

Chapter 7: Genuine Consent

11. Which of the following is correct? In *Leaf v International Galleries*:

(A) As the painting was a forgery, the contract was voidable at Leaf's option.

(B) The mistake that was made was a common one about a fundamental fact and therefore the contract was void.

(C) The contract could be rescinded because the misrepresentation was fraudulent.

(D) The misrepresentation was an innocent one but because too much time had elapsed, the contract could not be rescinded.

12. Which of the following is NOT true? In *Taylor v Johnson*, the High Court said:

(A) A contract affected by a unilateral mistake is void.

(B) A contract affected by a unilateral mistake is voidable only.

(C) There must be an element of unconscionable conduct before a court will declare a contract voidable because of a unilateral mistake.

(D) The purchaser had behaved unconscionably in endeavouring to ensure that the vendor remained unaware of the mistake.

Chapter 9: Contents and Interpretation of the Contract

13. Considering *Thornton v Shoe Lane Parking Co Ltd*, which one of the following is NOT true?

(A) The court decided that Shoe Lane could not rely on the exclusion clauses on the ticket/signs inside the car park because it had not done what was reasonably necessary to bring the exclusion clauses to the attention of the plaintiff.

(B) The exclusion clause on the post outside the car park entrance was incorporated into the contract but was not broad enough to protect the defendant in relation to the personal injury suffered by Thornton.

(C) In injuring Thornton so carelessly, Shoe Lane had committed a fundamental breach of the contract and no exclusion can protect against a fundamental breach.

(D) The contract was formed when Thornton "accepted" Shoe Lane's "offer" by taking the ticket from the machine and thereafter it was too late to bring the relevant exclusion clauses to Thornton's notice after that time.

Chapter 11: Termination and Breach of a Contract

14. A breach of a warranty entitles:

(A) The innocent party to sue for all damages that were caused by the breach.

(B) The innocent party to terminate where the damage is serious.

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(C) The party in breach to remedy the breach and pay damages for any loss suffered.

(D) The innocent party to sue for damages for losses that were caused by the breach and were reasonably foreseeable.

15. A contract CANNOT be terminated:

(A) unilaterally by one party as a result of a breach of condition.

(B) by the prior agreement of both parties.

(C) by the agreement of both parties after the contract is formed.

(D) unilaterally by one party as a result of a breach of a warranty.

16. Which of the following statements is correct? In *Associated Newspapers Ltd v Bancks*:

(A) The court held that the term was not a condition but a warranty, which meant that Bancks was entitled to damages only.

(B) The court decided that the contract to draw the cartoon character "Ginger Meggs" was void for uncertainty as there was no specification as to how many drawings would be produced each year.

(C) The court decided that the promise to publish the cartoon on page one of the newspaper's comics section was a condition of the contract. Bancks could therefore terminate the agreement.

(D) The court decided that the promise to publish the cartoon on page one was an innominate term which meant that the court had to assess the impact of the breach.

Chapter 12: Remedies

17. According to the rule in *Hadley v Baxendale*, for which types of loss can a plaintiff seek damages?

(A) All losses arising from and caused by the breach of contract.

(B) Losses arising from special circumstances where such circumstances were made known to the other party at the time the contract was formed.

(C) All losses arising from the breach of contract that could be considered to be in the usual or normal course of things.

(D) Those losses that were provided for in the contract provided they are not in the nature of a penalty.

(A) A

(B) C

(C) B and C

(D) B and D

18. In which case did the High Court of Australia decide that contract damages are recoverable for disappointment or distress, provided that the object of the contract itself was to provide pleasure and enjoyment?

(A) *Hadley v Baxendale* (1854).

(B) *Waltons Stores v Maher* (1983).

(C) *Baltic Shipping v Dillon* (1993).

(D) *Jarvis v Swans Tours* (1973).

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Chapter 13: Consumer Protection

19. To succeed in a claim for damages under s 18(1) of the *Australian Consumer Law*, which one of the following is NOT true?

(A) The misleading conduct must have caused the damage.

(B) There must be reliance on the misleading conduct.

(C) The damage must be pure economic loss only.

(D) The plaintiff need not show that the defendant intended to mislead.

20. Henry decides to sell his restaurant, El Bambino. It is licensed to seat 84 people at 26 tables. However, Henry, in breach of the licence, has always placed 120 chairs at 39 tables. The restaurant was sold to Colin, who did not enquire (and whose solicitor also did not enquire) about the terms of the licence. During the negotiations and then during the four-week trial period, Colin did not enquire about the licence and Henry did not disclose any information about it. After the settlement, Colin was notified by the Licensing Court that El Bambino was only licensed to seat 84 patrons. Colin sued Henry for misleading or deceptive conduct under s 18(1) of the *Australian Consumer Law*. Which of the following is correct?

(A) Henry is under no duty to disclose information unless asked by the prospective buyer.

(B) Henry is only under a duty to disclose information if he is an expert in the area and would be expected by a reasonable person to disclose any relevant information.

(C) For conduct to be misleading or deceptive, there must be some action or representation on the part of the defendant: mere silence is not "conduct" under s 18(1).

(D) Silence or failure to disclose can be misleading or deceptive if, in all the circumstances, there is a reasonable expectation that disclosure would be made.

21. Abe lives on a large cattle station in the Northern Territory. In order to take his children to school (200 km away) and to do other personal and domestic tasks, he buys a helicopter from Whirlybirds Pty Ltd. The helicopter costs $75,000. The parties sign a written contract that is drafted by the seller and is not a standard form contract. Which one of the following is incorrect?

(A) For the purposes of the consumer guarantees in the *Australian Consumer Law*, Abe would be a "consumer".

(B) Because this is not a standard form contract, the unfair contract terms provisions of the *Australian Consumer Law* would not apply.

(C) A term in the contract that said that the seller was not bound by the consumer guarantees provided in the *Australian Consumer Law* would be valid, provided that Abe had reasonable notice of the term and consented.

(D) A term in the contract that said that "any liability beyond that prescribed by law, in particular the *Australian Consumer Law*, is hereby excluded" would be valid.

22. Which of the following statements about the consumer guarantee provisions in the *Australian Consumer Law* is NOT true?

(A) The guarantees (and liability for breaching the guarantees) are usually non-excludable.

(B) The guarantee provisions only apply to "consumers" as defined in s 3.

(C) The definition of "consumers" in s 3 is limited to purchases of goods or services not over $100,000.

(D) The remedies available for breach of the guarantee as to acceptable quality depend upon whether the breach constitutes a major failure or a minor failure.

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23. Which of the following is NOT true? Where there is a "major failure" of a consumer guarantee under the *Australian Consumer Law*?

(A) The consumer cannot get a refund but must accept a replacement of the goods from the supplier.

(B) Where the failure can be fixed, the consumer can request that the supplier remedy the failure within a reasonable time.

(C) One of the definitions of "major failure" is where a reasonable consumer, fully acquainted with the facts, would not have bought the goods.

(D) The goods need not be valued at not more than $100,000 provided that the consumer definition is otherwise satisfied.

Chapter 14: Data Protection and Privacy Law

24. Which of the following scenarios describes an Australian Privacy Principles entity according to the definition contained in the *Privacy Act 1988* (Cth)?

(A) A department of a foreign government, not having any presence or operations in Australia.

(B) A business with many employees (say, over 100) having an annual turnover of $2.5 million.

(C) A business with only few employees (say, under 10) having an annual turnover of $2.5 million.

(D) A business having an annual turnover of more than $3 million, regardless of its number of employees.

Chapter 15: Introduction to Negligence, and Duty of Care

25. In which of the following relationships is a duty of care most difficult to establish?

(A) Manufacturer and consumer.

(B) Auditor and investor.

(C) Schoolteacher and student.

(D) Car driver and pedestrian.

26. Where a plaintiff sues for negligently inflicted pure psychiatric damage, which of the following is NOT relevant to whether or not a duty of care is owed?

(A) The relationship between the parties.

(B) The plaintiff's physical and temporal proximity to the event that causes the mental harm.

(C) The conduct of the defendant.

(D) What the reasonable response of a person of normal fortitude might be.

27. In determining whether or not a duty of care arises in a case of acts causing pure economic loss, which of the following is NOT one of the "salient features" referred to by the High Court of Australia in *Perre v Apand*?

(A) Whether the economic loss suffered was reasonably foreseeable.

(B) Whether imposing the duty would expose the defendant to indeterminate liability.

(C) Whether imposing the duty would unreasonably interfere with the defendant's commercial freedom.

(D) Whether the plaintiff had contributed to the loss.

28. Where a person gives advice, that advice is relied upon, and the advice is incorrect, the person giving the advice may be liable in negligence. Which of the following is NOT correct?

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(A) The "special relationship" test described in *Mutual Life & Citizens' Assurance Co Ltd v Evatt* has been accepted as the test for determining the existence of a duty of care with respect to negligent misstatements.

(B) The duty of care only arises with respect to the giving of advice in a serious commercial context. It does not arise where only information is provided.

(C) The duty of care is more difficult to establish where the adviser provides negligent advice to a client and a third person relies on that advice and as a result suffers reasonably foreseeable loss.

(D) The indeterminacy problem has historically been a concern of the courts, but is no longer considered to preclude a duty of care arising.

29. Which of the following statements is correct? In *Shaddock & Associates Pty Ltd v Parramatta City Council*, where the plaintiff property developers made inquiries of the relevant local council:

(A) The plaintiffs were not owed a duty of care by the Council as the Council did not profess to possess skill or competence in that area.

(B) The court found no distinction between the giving of advice and merely providing information.

(C) As the loss was pure economic loss, it was not recoverable by the plaintiffs without evidence of the loss being reasonably foreseeable.

(D) The Council could not have known that the plaintiffs intended to rely on the information or advice it provided.

30. Considering the High Court's decision in *Esanda v Peat Marwick Hungerfords*, which of the following is NOT correct?

(A) Auditors, like PMH, have statutory and contractual duties to act with due care and skill to the company audited.

(B) PMH owed Esanda a duty of care because it was reasonable to foresee that parties other than Excel might rely on the accounts when deciding whether to provide finance to Excel.

(C) There is a significant difference between establishing a duty of care owed to a third party and a duty of care owed to a person who requests information.

(D) The High Court held that a duty was not owed by PMH to Esanda because Esanda was an unknown and unintended user and mere foreseeability that someone like Esanda might rely on the information was not enough.

Chapter 16: Breach of Duty, Damages, and Defences

31. If a chocolate manufacturer allows sawdust to contaminate its products, which of the following is NOT correct regarding breach of the duty of care owed to the manufacturer's ultimate customers?

(A) If the contamination is widespread, the probability of injury is high, suggesting breach.

(B) If the contamination can make customers very sick, the magnitude of risk is high, suggesting breach.

(C) If the contamination was the result of a single employee's simple oversight, the burden of eliminating the risk would be low, suggesting breach.

(D) Since chocolate is delicious and widely consumed in Australia, the social utility of the manufacturer's conduct is high, suggesting there is no breach.

32. In a situation involving alleged professional negligence, which of the following is correct in relation to breach of the duty of care and the peer professional opinion defence?

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(A) The peer professional opinion defence cannot apply because it applies to opinions only, and not to professional conduct.

(B) It must first be determined whether the professional was negligent according to ordinary breach of duty rules, and then the peer professional opinion defence must be considered.

(C) If the peer professional opinion defence is raised, only that defence needs to be considered, for constitutional reasons.

(D) If the peer professional opinion defence is raised, only that defence needs to be considered, as a result of statutory interpretation.

Chapter 17: Law of Agency

33. Which of the following is NOT an example of an agent's authority?

(A) Nominal.

(B) Express actual.

(C) Implied actual.

(D) Apparent.

34. Which of the following is the best description of apparent or ostensible authority?

(A) The agent has authority to do anything which is incidental to or necessary for the carrying out of acts within their actual authority.

(B) Authority is conferred by the principal on the agent in writing.

(C) Authority is conferred by the principal on the agent under seal.

(D) The principal creates the appearance of authority by words or conduct but, in fact, that authority does not exist.

35. Which of the following would NOT overcome a defect in an agent's actual authority?

(A) Implied actual authority.

(B) Apparent authority.

(C) A properly executed deed.

(D) Ratification.

Chapter 18: Law of Partnerships

36. Which of the following is NOT a requirement of a partnership?

(A) The partners aim to make a profit.

(B) There is a mutuality of obligations.

(C) They carry on a business.

(D) They each contribute equally to partnership property.

37. Which of the following statements is NOT true?

(A) Unless the partnership agreement provides otherwise, each partner has a right to participate in management.

(B) The maximum number of partners in a partnership is usually 20.

(C) Unless the partnership agreement says otherwise, a partnership of between 3 and 20 would continue on the death of a partner.

(D) Partners are both agents and principals of one another.

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38. Felicity and Julie run a chain of women's fashion clothing stores in partnership. Their agreement prohibits either partner from spending more than $10,000 of business funds without the consent of the other. The business has been experiencing financial difficulties, so Julie decided to buy a new line of exclusive cocktail dresses from Swish Manufacturing (in the hope of improving sales). Without Felicity's knowledge, Julie ordered $200,000 worth of dresses. The strategy was unsuccessful, and the business is now unable to pay the debt. Who is liable for the $200,000 debt to Swish Manufacturing? (Assume that Swish was unaware of the cap on spending contained in the partnership agreement between Felicity and Julie.)

(A) Julie is solely liable for the debt.

(B) Felicity is solely liable for the debt.

(C) Julie and Felicity are jointly liable for the debt.

(D) Julie and Felicity are jointly and severally liable for the debt.

39. Which of the following statements about the rights of partners in a partnership (subject to any agreement to the contrary) is NOT true?

(A) A majority of the partners can expel a partner.

(B) The consent of all existing partners is needed to introduce new partners.

(C) Partners may be both jointly and severally liable for the acts of a partner.

(D) Any partner may access the partnership books in order to inspect and copy them.

Chapter 19: Corporations Law

40. Which of the following is NOT correct?

(A) A company can sue and be sued in its own name.

(B) Directors, but not members/shareholders, are personally liable for the debts of the company.

(C) Directors may be personally liable for a breach of the insolvent trading provisions of the *Corporations Act 2001* (Cth).

(D) Section 184 applies where the director has breached the ss 181–183 duties recklessly or dishonestly.

41. Which of the following is NOT true? To breach the duty to prevent insolvent trading under s 588G of the *Corporations Act 2001* (Cth), it must be proven that:

(A) The defendant was a director at the time when the debt was incurred.

(B) The company was insolvent at that time or became insolvent when the debt was incurred.

(C) The director must have known that the company was insolvent or would become so when the debt was incurred.

(D) A reasonable person would have been aware that the company was insolvent when the debt was incurred or would become so following the debt being incurred.

Professional skills assessment tasks

Hypothetical legal-problem questions are an excellent way to understand the law's application in realistic business scenarios, but an assessment might also ask you to explain the law's application in an even more practical way. Professional skills assessment tasks might ask you to apply the law in the context of, for example, a memorandum directed to a corporate board, or a short video intended for internal corporate use.

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Where this is the case, regardless of your task's precise format, be sure to carefully read the requirements of your assessment task. As with any type of university assessment, take careful note of your task's parameters: word counts and time lengths, for example. Keep in mind too that although your task is a practical one, you will still need to demonstrate an understanding of the law and how it applies. Whether or not you will need to refer to sources of law should be clarified in your assessment's instructions, but you should generally expect that you will be required to in order to demonstrate the achievement of your unit's learning objectives.

If your professional skills assessment task instructions are accompanied by a rubric, also ensure that you read and understand that rubric ahead of time. Preparing your assessment with a view to ensuring that the rubric's requirements are satisfied will maximise the number of marks you are able to be awarded.

Modern legal assessment: Using (and not using) generative AI in commercial law assessments

The overall landscape for preparing commercial law assessments of any kind has changed radically since late 2022, with the now-widespread availability of relatively more reliable generative AI systems. We have all used AI in our lives for a long time: AI underpins our experience of social media feeds, to give just one example. But generative AI is different: in the context of legal assessments, it allows us to interact with systems in order for those systems to produce content similar (at least on its face) to that a human would produce. How universities respond to the challenges posed by generative AI, and to the continuing development of generative AI systems, is an ongoing topic of discussion. The requirements that you will be expected to comply with in terms of generative AI use and your commercial law assessments will differ across universities, and may even differ across assessment tasks within a single institution and unit. The key guiding principle, in all cases, is to carefully read and understand your university's generative AI rules, and follow them to the absolute letter.

Failure to follow those rules might be considered academic (or another form of) misconduct. Such misconduct may have serious consequences for your study in your current unit but may also affect your study in general. As with other assessment requirements around due dates, for example, ignorance of your university's generative AI rules is no excuse.

Your university's generative AI rules may prohibit the use of generative AI completely. Where that is the case, it is essential to respect those rules, even if (as is currently the case) generative AI detection systems are far from 100% accurate. It is hardly a good start to your professional career to engage in dishonesty in your studies. On the other hand, even where generative AI detection systems are not foolproof, it is often obvious to your assessors where generative AI is used because outputs tend to display certain characteristic red flags.

Where you are permitted to use generative AI, you shouldn't automatically do so. Instead, you should critically analyse whether generative AI's use is helpful and appropriate. There are many factors to consider, and your choice needs to be properly informed.

At a very practical level, generative AI systems may not produce outputs of sufficient quality to incorporate into an assessment response without significant amendment. Prompt engineering skills are essential here. If you are not skilled at prompting generative AI systems, it is highly unlikely that they will produce useful output. Hallucinations (where generative AI systems "make up" real-world facts or the law) are also essential to guard against. Studies have shown that generative AI systems are notorious for hallucinating legal analyses and references. There is (at present) a high chance that case law and legislation

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identified via generative AI outputs may be fictitious. Even if sources of law identified by generative AI systems are real, it may also be that they are beyond the scope of your assessment, meaning that they are not relevant anyway. Another risk of using generative AI systems include their incorporation of biases, where biased data has been used in training. On the matter of training, there are also very real ethical issues to consider where generative AI systems have been trained using intellectual property without the owners of that intellectual property being compensated. Even if such training turns out to be legal – a matter currently being litigated around the world – we need to ask ourselves whether it is still ethical to take advantage of that training.

To illustrate the limitations of using generative AI for legal analysis, at the time of writing at least, the following hypothetical legal problem question was provided to two generative AI systems (ChatGPT 3.5 and Microsoft Copilot) on 15 July 2024:

Xiao and Derya, university classmates, agree that Derya will sell Xiao a second-hand copy of *Concise Australian Commercial Law*, 8th edition. They agree on a price, and a date and time for the book and its purchase price to be exchanged. Do Xiao and Derya have a legally binding contract?

ChatGPT's response was as follows:

For Xiao and Derya to have a legally binding contract, certain elements must be present under contract law. These elements include:

Offer and Acceptance: One party makes an offer, and the other party accepts it. In this case, Derya offered to sell the book, and Xiao accepted the offer.

Consideration: Something of value must be exchanged between the parties. Here, the book and the agreed purchase price represent consideration from each party.

Intention to Create Legal Relations: Both parties must intend for their agreement to be legally binding. Given that they are negotiating the sale of a book, it is reasonable to assume they intend the agreement to be binding.

Certainty and Completeness: The terms of the contract must be clear and complete. Xiao and Derya have agreed on the book, the price, and the date and time for the exchange, fulfilling this requirement.

Assuming there are no other factors that would invalidate the contract (such as one of the parties lacking legal capacity, the contract being for an illegal purpose, or duress/undue influence), it appears that Xiao and Derya have a legally binding contract.

Without further work, this response is inadequate for a number of reasons. Firstly, it does not refer to a single source of law. It is therefore significantly limited in its capacity to demonstrate how the law applies. Secondly, it has sought to address all possibly relevant contract formation rules equally, and it has not understood that the question is actually targeting intention to create legal relations (this is suggested by the question identifying that Xiao and Derya are university classmates). Thirdly, the response has not appreciated the nuance (regarding intention to create legal relations) around Xiao and Derya having a social relationship, and has not addressed the legal implications of this. Fourthly, again regarding intention to create legal relations, the response implies that the parties' subjective intentions (rather than their intention objectively assessed) is relevant. Finally, the response has also hallucinated a fact. Nowhere in the question is it indicated that Derya made an offer, and that Xiao accepted.

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Microsoft Copilot's response was as follows:

Yes, Xiao and Derya likely have a legally binding contract. For an agreement to be legally binding under English law, it must include the following elements:

Offer: Derya's offer to sell the book to Xiao.

Acceptance: Xiao's acceptance of the offer.

Consideration: The agreed-upon price for the book.

Intention to create legal relationships: Both parties intended to create a legally binding agreement.

Certainty: The terms of the agreement are clear and definite.

Given that they agreed on the price, date, and time for the book exchange, these elements suggest a legally binding contract between Xiao and Derya. However, specific legal advice should be sought for their particular situation. ☺📚

This response is again, without further work, inadequate for the same reasons. There are no references to sources of law, the response has not identified that intention to create legal relations is the key issue, it suggests that subjective intention (rather than objective intention) is relevant, and it has hallucinated the facts that Derya made the offer and that Xiao accepted. In addition, remembering that *applying the law* is key to answering a hypothetical question, the response's treatment of intention to create legal relations and certainty (in particular) represent bare conclusions without any explanation of the reasoning that supports them. *Why* did the parties intend to create legal relations? *Why* are the terms sufficiently certain? Neither question is adequately addressed. And finally, regarding writing style, it is (we hope) obvious that emojis are completely inappropriate to include in this kind of assessment response!

Your assessment instructions may permit you to use generative AI, but only for specific purposes (such as proofreading, or idea generation). In addition, you may be required to use generative AI but only specific systems and perhaps even specific versions of systems. Again, it is important to respect those limitations. Finally, but equally importantly, is ensuring that you comply with your university's rules for acknowledging your use of generative AI. How such acknowledgement must be given, and when, will again vary, and attention to detail is important. The consequences of failing to acknowledge generative AI's use should be clearly understood. Is it treated as plagiarism, or something else? Will you be penalised via an allegation of misconduct, or will your assessment be automatically given a zero mark, or will some other consequence apply? Carefully understanding your institution's policies will ensure that you are not taken by surprise.

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PART 1: INTRODUCTION

Chapter 1: An Introduction to Law and the Australian Legal System

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Chapter 1

An Introduction to Law and the Australian Legal System

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Introduction

[1.10] The present work is primarily concerned with one particular area of law and regulation: commercial law. However, it is important to have some understanding of the broader social, political and legal context that has produced these laws and in which they operate.

We will examine the Australian political/legal system under the following headings:

1. The nature, definition and functions of law.
2. History and development of the Australian legal system.
3. The Australian constitutional system.
4. The sources of law.
5. The doctrine of precedent and the hierarchy of the courts.
6. Classification of law and legal proceedings.
7. Alternative methods of dispute resolution.

The nature, definition and functions of law

Defining law

[1.20] We begin our study of commercial law by asking the obvious question: what is a useful definition of "law"? There is no easy answer. Philosophers, jurists and academics have debated this jurisprudential question for at least 2000 years, but the truth is that there is no one definitive answer. However, for our purposes, we can define *"law" as a body of rules, made by the state – the parliaments and the courts – that is enforceable by the state*.[1] That is, a law is a "law" because it has been made by a recognised authority and is capable of enforcement within a functioning legal system. For example, commercial "laws" consist of those rules – for example, contract law, corporations law, tort law, consumer protection law, partnership law, agency law – made by the courts and parliaments that apply to the world of business and are enforceable with state-backed sanctions.

What is it that distinguishes legal rules from other non-legal rules? The key differences are the *sources* of the rules and the *enforcement* processes for each.

Sources

[1.25] Laws derive their authority from their source – parliaments and the courts. Non-legal rules (eg the rules of a game or a sport, the rules that apply in an organisation like a club or a company, ethical or religious principles or the laws of physics) are derived from non-legal sources (eg from within the organisation itself (like tennis clubs, corporations and religious organisations) or from the scientific, mathematical or natural

1 Note that the word "state" in this context refers to the government generally. If the word "State" is used, it refers to one of the "States" of the Commonwealth of Australia or the nation as a whole.

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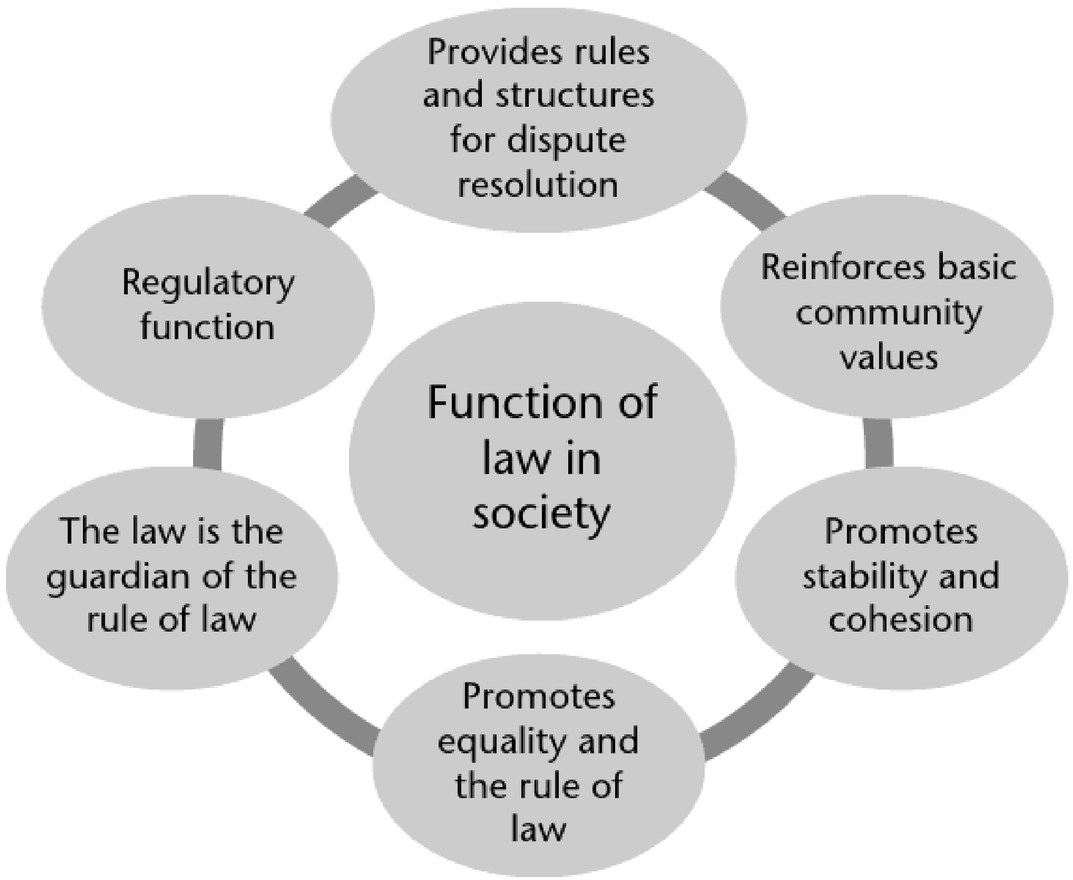
world (eg $E = mc^2$ or the laws of gravity) or from within oneself or from one's peers or mentors (moral and ethical codes)).

Enforcement processes

[1.27] Laws are enforced by government agencies, police and the courts. Breaking legal rules – civil and criminal – can result in legal sanctions, such as fines, imprisonment or awards of damages. Non-legal rules are norms that typically have no *formal* penalties or enforcement mechanisms. However, there are powerful *informal* ways of "encouraging" adherence. For instance, non-adherence to certain ethical or moral standards or the failure to observe the rules in a sporting code or those applicable in a commercial enterprise may result in exclusion or suspension from the group, reputational damage or loss of trust and friendship.

The functions of law

Figure 1.1 : The role of law in a civil society



[1.30] The next question is to ask what is the *function of law* in a liberal democratic society[2] such as Australia? Allsop CJ of the Federal Court put it well:

> Law can be seen as a system of rules and principles by which human society controls and mediates behaviour of the whole, of the part, and of the individual. Law is also situated within human society and human experience: within, to paraphrase Isaiah Berlin, the cacophony and chaos of colliding liberties, colliding rights and duties, colliding understandings of fairness, of desert, of

2 A democratic society with an emphasis on individual freedoms, constitutional government and equality of all its citizens based on the rule of law.

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> right and of wrong. Within this cacophony, law mediates and controls, through rule and principle, relationships and exercises of power.[3]

In this sense, law can be seen as a tool by which human society mediates and regulates itself. In doing so, the law acts as a mirror – reflecting the *values* of the society. The way the law deals with property rights, family law, crime, taxation, consumers and corporations, social welfare, Indigenous rights, migration and citizenship, and education (amongst other things) reflects who we are as a society. However, the law's role is not a passive one; none of these laws are naturally occurring phenomena – they are legal constructs, made by humans. And like all phenomena, they are subject to change.

[1.35] The specific functions of law in a civil society are as follows:

1. Law *regulates*, in a normative sense, the way we live. Laws inform us what we *may* do and, if we do it, *how* we should do it (eg make contracts, buy and sell property, get married or divorced, adopt children, register a company), what we *cannot* do without incurring sanctions (eg break contracts, take someone else's property without consent, kill or injure another person without lawful excuse, marry more than one person at a time, practice law or medicine or accounting without a license or certificate) and what we *must* do if we wish to avoid sanctions (eg pay our taxes, educate our children, vote in general elections, drive at or below the speed limit).
2. Law has a *dispute resolution* function. As we shall soon appreciate, commercial activity, as with any aspect of life, often involves disputes about the parties' rights and obligations. The role of the law is to provide a means for disputes to be resolved by ensuring that the laws are clear and accessible and, if the matter needs to be decided by a court, the judicial system must be seen as fair, efficient, open and accessible.[4]
3. The law *maintains stability and social cohesion*. In making laws that the community respects as being the product of a fair and proper process, untainted by corruption or improper interference, the law and the legal system ensure stability and social cohesion. This is obviously true for commercial activity: the law should provide a fair, stable and predictable base that allows commerce to flourish. Change is both possible and inevitable and the law should facilitate that change in an open, predictable and consistent manner.
4. The law *reflects community values*. The peace, order and social cohesion, referred to in the previous paragraph, are facilitated when the legal system reflects current community values but, at the same time, manages to respect the rights of minority stakeholders (to safeguard against the "tyranny of the majority"). The "same-sex marriage" debate in Australia that resulted in a change

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3 J Allsop, *Thinking about Law: The Importance of How We Attend and of Context*, 18 July 2022. See also I Berlin, 'Two Concepts of Liberty' in I Berlin (ed), *Liberty* (Oxford University Press, 2002) 192 at 207–215.

4 The High Court of Australia was recently critical ("appalling conduct") of a barrister who, when representing many of the central figures during Victoria's so-called Gangland Wars was, at the same time, a police informer, passing on information she obtained from her clients. See the following discussion in The Conversation dated 30 June 2023: https://theconversation.com/investigation-into-reprehensible-failure-of-police-ends-quietly-with-no-charges-why-we-must-learn-from-the-lawyer-x-scandal-208654.

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to the *Marriage Act 1961* (Cth) is an example. The current debate around transgender rights is another.

5. The law *promotes equality before the law*. Equality before the law is a key ideal of liberal democratic countries. Equality before the law is the idea that all citizens have the same legal rights and duties, regardless of age, sex, religion, race or socio-economic status. In a liberal democracy, equality, in this sense, is an indicator of fairness and justice in society. Of course, here we are talking more about a formal kind of equality – equality before the law – rather than substantive equality – equality of outcomes – that exists in any society.
6. The law is the *guardian of the rule of law*. The most important element in a society governed by the rule of law is that *government* should always operate within a framework of law and be accountable through law. It also requires that *citizens* respect and comply with legal norms, even when they disagree with them. In order to command and retain respect for the rule of law, the law should be the same for everyone: no one should be above the law, and everyone should have access to the law and to the protection of the law. All of this in turn requires the independence of the judiciary, the accountability of government officials, the transparency of public business and the integrity of legal procedures.

The rule of law

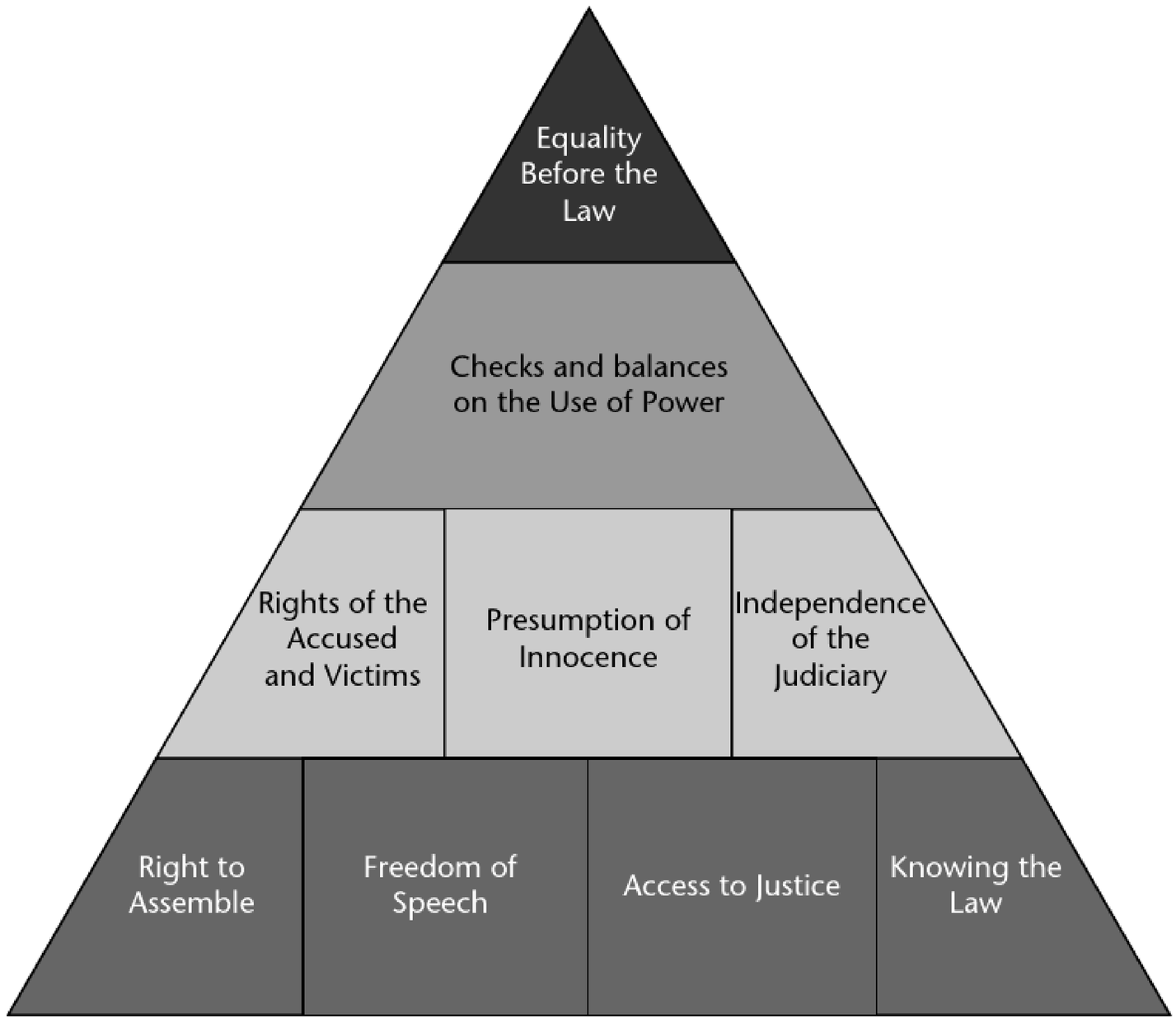
[1.40] In Australia, the *Magna Carta Institute* has developed the following rule of law principles that are concerned with procedural norms:[5]

- The separation of powers between the legislature, the executive and the judiciary;
- The law is made by representatives of the people in an open and transparent way;
- The law and its administration are subject to open and free criticism by the people who may assemble without fear;
- The law is applied equally and fairly so that no one is above the law;
- The law is capable of being known to everyone, so that everyone can comply;
- No one is subject to any action by any government agency other than in accordance with the law;
- The judicial system is independent, impartial, open and transparent and provides a fair and prompt trial;
- All people are presumed innocent until proven guilty and are entitled to remain silent and are not required to incriminate themselves;
- No one can be prosecuted for any offence not known to the law when committed; and
- No one is subject adversely to a retrospective change of the law.

5 https://www.ruleoflaw.org.au/principles/.

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Figure 1.2 : Rule of Law Pyramid



[1.60] Rule of law principles have a profound impact on the commercial life of a country. Without firm and clear adherence to the rule of law, commercial life can be rendered dysfunctional. The systemic bribery and corruption that inevitably follows a breakdown in the rule of law, particularly in the commercial sector, erodes the certainty and stability, confidence and trust that are essential for a flourishing commercial environment. Where the rule of law exists, proper processes are followed, laws and regulations are accessible and transparent, the bureaucracy implements those laws and regulations in a fair and efficient manner and, in the event of a dispute or infraction, the wheels of justice are oiled equally for all parties.

Case study 1: The rule of law and the banks

The *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (the "Banking Royal Commission") conducted hearings throughout 2018. These hearings exposed massive, shocking and systemic fraud and misconduct by banks and insurance companies. One of the matters referred to in the Interim Report of the Royal Commission (released 26 September 2018) was the lack of respect for the rule of law shown by the big banks and insurance companies. The Royal Commissioner said:

As commercial enterprises, each of the entities whose conduct was considered in the first round of hearings rightly pursues profit. Directors and other officers of the entities owe duties to shareholders to do that. But the duty to pursue profit is one that has a significant temporal dimension. The duty is to pursue the long-term advantage of the enterprise. Pursuit of long-term advantage (as distinct from short-term gain) entails preserving and enhancing the reputation

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of the enterprise as engaging in the activities it pursues efficiently, honestly and fairly. And, lest there be any doubt, *it also entails obeying the law*. But to preserve and enhance a reputation for engaging in the enterprise's activities efficiently, honestly and fairly, the enterprise must do more than not break the law. It must seek to do "the right thing".

The evidence that was led in the first round of hearings suggested that the entities examined had done, and were doing, as little as they thought they have needed to do to meet their legal obligations, offering no (or at best, next to no) encouragement to or reward for staff or third parties to pursue the interests of the consumer. Compliance appeared to have been relegated to a cost of doing business. And, the case studies undertaken in the first round of hearings showed, that there had been occasions when profit has been allowed to trump compliance with the law, and many more occasions where profit trumped doing the right thing by customers.

Case study 2: The rule of law and presidential immunity

On 1 July 2024, the US Supreme Court handed down its landmark decision in the presidential immunity case, *Trump v United States*.[6] The case arose out of the criminal prosecution brought against former President Trump for his conduct in relation to the insurrection on 6 January 2021 at the Capitol Building in Washington, DC. The decision split 6-3 along traditional conservative/liberal lines. In a decision with significant implications for the rule of law, the Chief Justice, John Roberts, writing for the majority, grants the Executive (the President) immunity from criminal prosecution for all "*official acts*". *Unofficial acts* are not protected.

According to the majority a President needs this immunity so that they can act boldly as president and take actions without fear of later prosecution clouding their judgment.

> Potential criminal liability, and the peculiar public opprobrium that attaches to criminal proceedings, are plainly more likely to distort Presidential decision-making than the potential payment of civil damages. The hesitation to execute the duties of his office fearlessly and fairly that might result when a President is making decisions under "a pall of potential prosecution," … raises "unique risks to the effective functioning of government."

The main dissent written by Justice Sonia Sotomayor accuses the majority of an unjustifiable grant of immunity that puts the President above the law:

> The President of the United States is the most powerful person in the country, and possibly the world. When he uses his official powers in any way, under the majority's reasoning, he now will be insulated from criminal prosecution. Orders the Navy's Seal Team 6 to assassinate a political rival? Immune. Organizes a military coup to hold onto power? Immune. Takes a bribe in exchange for a pardon? Immune. Immune, immune, immune. … Even if these nightmare scenarios never play out, and I pray they never do, the damage has been done. The relationship between the President and the people he serves has shifted irrevocably. In every use of official power, the President is now a king above the law.

6 https://www.supremecourt.gov/opinions/23pdf/23-939_e2pg.pdf.

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History and development of the Australian legal system

[1.70] Pre-European. Indigenous Australians have effectively been "on country" for 50–60,000 years. Over those 50–60,000 years, each Indigenous group occupied a recognised tract of land where sacred sites were protected, and boundaries, designed in the *Dreaming*, were crossed only by invitation. Their complex social systems and highly developed traditions reflected a deep connection with the land. They had their own "laws" – a customary system – with "laws" passed down orally from one generation to the next.[7] As Langdon and Corn put it:

> All human cultures have systems of law … over this immense stretch of time Indigenous groups … have developed complex systems of law that enabled people to live in a wide variety of natural environment … Following law in Indigenous societies is the most important and time-honoured way of living. Through law, people express their humanity, honour their ancestors, care for their homelands and environments, understand the past and present, build families and communities, grow in wisdom, and plan for the future … Beyond this, it also captures the idea of "proper practice" – the correct way of living a good life, as passed down from ancestors over many generations – and the idea of "the way": the path through life.[8]

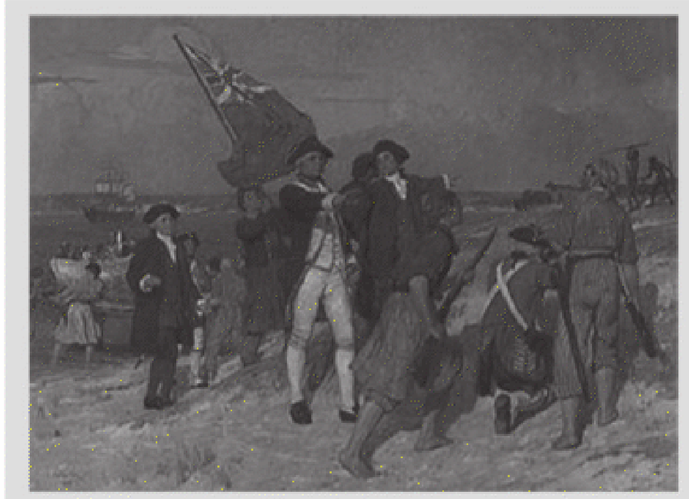
[1.80] European colonisation. Europeans, since the time of the Greeks and Romans, believed in the existence of Terra Incognita or Unknown (southern) Land. But it was Captain James Cook's first Pacific voyage that began on 27 May 1768 that had a dramatic, lasting and, for Indigenous people, devastating impact on Australia.

Cook made the first recorded landing of a European on the east coast of Australia at Point Hicks in Victoria on 20 April 1770. He sailed north along the east coast and a few weeks later anchored beside a small island a few miles off the north-west coast of Cape York, over 3,000 km from his starting point at Point Hicks. He took a party onto the island and declared possession of the east coast of Australia at Possession Island.

Captain James Cook



E. Phillips Fox, Landing of Captain Cook at Botany Bay, April 29, 1770



7 See M Langton and A Corn, "Law – The Way of the Ancestors" in M Neale (ed) *First Knowledges* (Thames & Hudson, 2023), Ch 2.

8 See M Langton and A Corn, "Law – The Way of the Ancestors" in M Neale (ed) *First Knowledges* (Thames & Hudson, 2023), pp 35–38.

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There is much debate about the significance of that ceremony. As Henry Reynolds and other historians argue, the ceremony on Possession Island did not, of itself, amount to much.[9] To mean anything, there had to be some kind of *actual possession*. For that reason, the arrival of the First Fleet in January 1788 was far more significant.

Captain Arthur Phillip received his commissions from King George III in October 1786. By January 1787, the First Fleet of 11 ships under his command set sail for Botany Bay, carrying about 1,530 people (736 convicts, 17 convicts' children, 211 marines, 27 marines' wives, 14 marines' children and about 300 officers and various animals including, very regrettably, five rabbits). They arrived at Botany Bay on 18 January 1788. A few days after arrival there, the fleet moved to a more suitable place, Sydney Cove, where a settlement was established on 26 January 1788.

[1.90] ***Terra nullius*, a "ceded" colony and the doctrine of reception.** According to International law, there were constraints on the legitimacy of the right to annex vast areas of land and to make claims of sovereignty. As Henry Reynolds says:

> The establishment of the small penal colony on Sydney Harbour gave absolutely no legitimacy to the British claim to half the continent, home to many Indigenous nations, which had occupied their homelands for hundreds of generations. The fact that the claim was drawn up in Britain before the First Fleet had set sail accentuated what can fairly be called the absurdity in the instructions handed to Phillip in October 1786 and formally read by him on the shore of Sydney Cove on February 7 1788 … the gap between law and reality, law and colonial experience grew progressively wider … The myth of the unpeopled land was too convenient to discard and abandoning it would have demanded radical changes in law and politics and the whole way the colonization of Australia was understood.[10]

Under British law, according to William Blackstone, the English jurist and Tory politician (most noted for his *Commentaries on the Laws of England*, which became the gospel on the principles of the English common law), there were two types of colonies: "ceded" (surrendered) and "conquered" (taken by force). When a territory was regarded as "conquered", treaties were "negotiated" pursuant to which Britain assumed sovereignty but recognised prior ownership and a prior legal system. New Zealand, the United States and Canada are examples of "conquered" territories. On the other hand, a colony could be "ceded" when it was "uninhabited" and, from the 17th century, *terra nullius* denoted a legal concept allowing a European colonial power to take control of "*nullius*" territory that no other European colonial powers had claimed. William Blackstone then went on to explain, in his *Commentaries*, the *doctrine of reception* that applied to *ceded* colonies:

> *… if an uninhabited country be discovered and planted by English subjects, all the English laws then in being … are immediately there in force …*

In this way, British law was "received" by the new colony to the total exclusion of Indigenous law. Of the fiction of *terra nullius* and the consequential reception of the common law of England, the High Court said in *Mabo v Queensland (No 2)* in 1992:

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9 H Reynolds, *Truth-Telling History, Sovereignty and the Uluru Statement* (NewSouth Publishing, 2021), p 17. It should be seen as similar to Abel Tasman's claim over Tasmania in 1642 for the Dutch or the French claim over Western Australia made at Shark Bay in 1772.

10 H Reynolds, *Truth-Telling History, Sovereignty and the Uluru Statement* (NewSouth Publishing, 2021), pp 25–27.

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> The facts as we know them today do not fit the absence of law or barbarian theory underpinning the colonial reception of the common law of England … It would be a curious doctrine to apply today that, when the benefit of the common law was first extended to Her Majesty's indigenous subjects … its first fruits were to strip them of their right to occupy their ancestral lands[11] … Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.[12]

Historians writing in the 1970s and 1980s identified *terra nullius* as the single most important feature of British colonisation. The narrative was about emptiness, *terra nullius*. Not until *Mabo v Queensland (No 2)* in 1992 did the High Court consign the doctrine on which dispossession was founded – the doctrine of *terra nullius* – to history's bin.

[1.100] The Mabo story. For Indigenous people, the path to justice began on 3 June 1992, when the High Court of Australia recognised the common law doctrine of native title: that Aboriginal and Torres Strait Islander people may continue to hold rights to their land and waters, which come from their traditional laws and customs. This resulted in the passage of the *Native Title Act 1993* (Cth), which recognises and protects native title (in certain circumstances).

Mabo v State of Queensland (No 2)

[1.110] *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1 (*Mabo*). In May 1982, Eddie Mabo and four other Murray Islanders, who were members of the Meriam people, instituted legal proceedings in the High Court, claiming rights to their traditional lands (the Murray Islands) in the Torres Strait off the North Queensland coast.

The Murray Islanders commenced proceedings in the High Court in 1982, in response to the *Queensland Amendment Act* of that year which established a system of land grants on trust for Aboriginals and Torres Strait Islanders, grants which the Murray Islanders refused to accept. The action was brought as a test case to determine the legal rights of the Meriam people to their traditional islands, which Queensland took over in 1879. Prior to European settlement, the Meriam people had lived on the islands in a subsistence economy. Land on the islands was not the subject of public or general community ownership but was regarded as belonging to individuals or groups.

The plaintiffs argued that, despite the Queensland state's claim to sovereignty, they retained ownership over the land. The basis of this argument is the reality that Australia was not uninhabited – was not *terra nullius* – at the time of colonisation. To maintain a law based on this outdated fiction would be unjust.

The Queensland Government argued that when the territory of a "settled" colony became part of the Crown's dominions, the law of England became the law of the colony and, by that law, the Crown acquired ownership of all land in the territory. This concept was derived from

11 Brennan J in *Mabo* (1992) 175 CLR 1 at 39.
12 Brennan J in *Mabo* (1992) 175 CLR 1 at 42.

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the idea that Australia was "*terra nullius*". Consequently, according to this argument, England could lawfully claim sovereignty over that territory.

In 1992, 10 years after the case began and, sadly, just a few months after Eddie Mabo died, the High Court held, in a 6-1 decision, that the common law of Australia recognised a form of native title.

A particular passage from the High Court's judgment is crucial:

> The lands of this continent were not terra nullius or "land belonging to no-one" when European settlement occurred … the Meriam people were "entitled" as against the whole world to possession, occupation, use and enjoyment of most of the lands of the Murray Islands … The acts and events by which that dispossession in legal theory was carried into practical effect constitute the *darkest aspect of the history* of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices.

[1.120] The then Prime Minister Keating's famous Redfern speech[13] reflected the "darkest aspects of our history" sentiment referred to by the High Court and said something very profound about the *idea* of justice:

> [Reconciliation] begins with the act of recognition. Recognition that it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the disasters. The alcohol. We committed the murders. We took the children from their mothers. We practised discrimination and exclusion.
>
> It was our ignorance and our prejudice. And our failure to imagine these things being done to us. With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds. We failed to ask – how would I feel if this were done to me?
>
> By doing away with the bizarre conceit that this continent had no owners prior to the settlement of Europeans, Mabo establishes a fundamental truth and lays the basis for justice. It will be much easier to work from that basis than has ever been the case in the past … Mabo is a historic decision – we can make it an historic turning point, the basis of a new relationship between indigenous and non-Aboriginal Australians … It seems to me that if we can imagine the injustice then we can imagine its opposite. And we can have justice.

Native title, then, is the legal recognition that some Aboriginal and Torres Strait Islander peoples have rights to, and interests in, certain land because of their *traditional laws and customs*. In other words, native title rights depend on the traditional laws and customs of the claimants. It is also the case that other people's rights and interests in or to the land are relevant, *and often take precedence over native title*. It is important to note also that native title, unlike freehold land, is inalienable, meaning it cannot be sold or transferred freely; it can only be surrendered to the Crown (or, of course, extinguished).

13 P Keating, "Redfern Speech (Year for the World's Indigenous People)" (Speech delivered at Redfern Park, 10 December 1992 at Redfern Park, Sydney), available at http://www.antar.org.au/issues_and_campaigns/self-determination/paul_keating_redfern_speech.

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[1.125] Native title legislation. The *Native Title Act 1993* (Cth) came into effect on 1 January 1994. The Act established the National Native Title Tribunal, offering a legal pathway for Aboriginal and Torres Strait Islander peoples to claim their traditional rights over lands and waters, and compensation. In particular, the Act established a mechanism for determining the existence of native title but also validated previous Commonwealth actions in making land grants that extinguished native title.

Taking its cue from the High Court in *Mabo*, to have native title recognised under the *Native Title Act 1993* (Cth), Indigenous peoples must prove that they have a *continuous and ongoing connection to the land in question, and that they have not done anything to break that connection* (such as selling or leasing the land). The types of rights that inhere in a native title determination depend upon the particular (provable) laws and customs of the native title claim group. Such rights and interests are commonly limited to 'personal, domestic or communal purposes' and may include the right (a) to live on the land or (b) to access the area for traditional purposes or to protect sacred places and sites or (c) to hunt and gather additional food or resources on the land or (d) to teach particular tribal laws and customs in relation to the land.[14] The Act also recognises that Indigenous people hold rights and interests in waters according to their traditional laws and customs.

The Australian constitutional system

[1.130] The first British colony in Australia – New South Wales – was established as a penal colony on the east coast of Australia on 26 January 1788. Over the next 50 years, other colonies were established and by the end of the 1860s, all the Australian colonies, except Western Australia, had been granted self-government by Britain with general powers to administer, make and enforce law. Each had a written constitution in the form of an Act of the British Parliament. A complex system of tariffs governed the movement of goods between the colonies. Systems of road, rail and river transport began and ended on colonial borders. And each colony maintained a small militia, totally inadequate for the defence of Australia's long coastline.

[1.140] By the 1880s, the inefficiency of this system, a growing unity among colonists and a belief that a national government was needed to deal with issues such as trade, defence and immigration (a "white Australia policy" was taking shape) saw support for Federation grow. In the last decade of the 19th century, the question of federation of the colonies became an increasingly important issue because of a recognition that a federal or central body could deal more effectively with issues such as national defence, inter-colonial trade and customs barriers and a national immigration policy. The decision was made to adopt a federal model where each colony, whilst retaining its constitution, legislature and legal system, would become a State within a Federation with a new central government that had its own legislature, executive and judicial powers.

Work began drafting a Federal Constitution. Throughout the 1890s, several conventions of representatives from each of the colonies were held to consider a Federal Constitution. The product of these conventions was the drafting of the Constitution Bill that was ultimately accepted by the majority of electors in each

14 For the Meriam people, the decision meant that they were entitled to the occupation, use and enjoyment of the lands of the Murray Islands (except for the operation of Crown leases and some land set aside for administrative purposes).

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of the colonies (with the exception of Western Australia)[15] at a referendum held in 1899. The British Parliament passed the Commonwealth of Australia Constitution Bill in July 1900 and the Bill became the *Commonwealth of Australia Constitution Act 1900* (Imp). Section 9 of this British Act contained the Constitution which stated that on and after 1 January 1901, the colonies of New South Wales, Victoria, South Australia, Queensland and Tasmania would be united and known as the Commonwealth of Australia. Finally, two weeks after the passage of the Act, Western Australia agreed to join the other colonies in a referendum held on 31 July 1900.

The Commonwealth Constitution

[1.150] Australia is a federation. It consists of a central government that has certain law-making powers, and six States and two Territories that also have law-making powers. The effect is that there are two legal systems for each citizen: the central or federal legal system (the Commonwealth); and that of the relevant State or Territory. A feature of a federal legal system is that there is usually a written constitution, that is, a document setting out the powers of the federal government and its legal relationship with the States. In Australia, this is found in the Commonwealth Constitution. The *Commonwealth of Australia Constitution Act 1900* (Imp) created a *constitutional monarchy*: the head of state is the monarch of England whose power is defined the Constitution (and also found in the undefined reserved powers).

The separation of powers

[1.160] The separation of powers refers to the division of a government into branches, each with separate, independent powers and responsibilities. The Australian constitutional system of government, based as it is on the British Westminster system, consists of three main branches of government: legislative, executive and judiciary. However, there is overlap between the executive and legislature because members of the executive must also be members of (and thereby accountable to) the legislature. The tripartite system is commonly ascribed to 18th century French Enlightenment political philosopher Montesquieu. He argued:

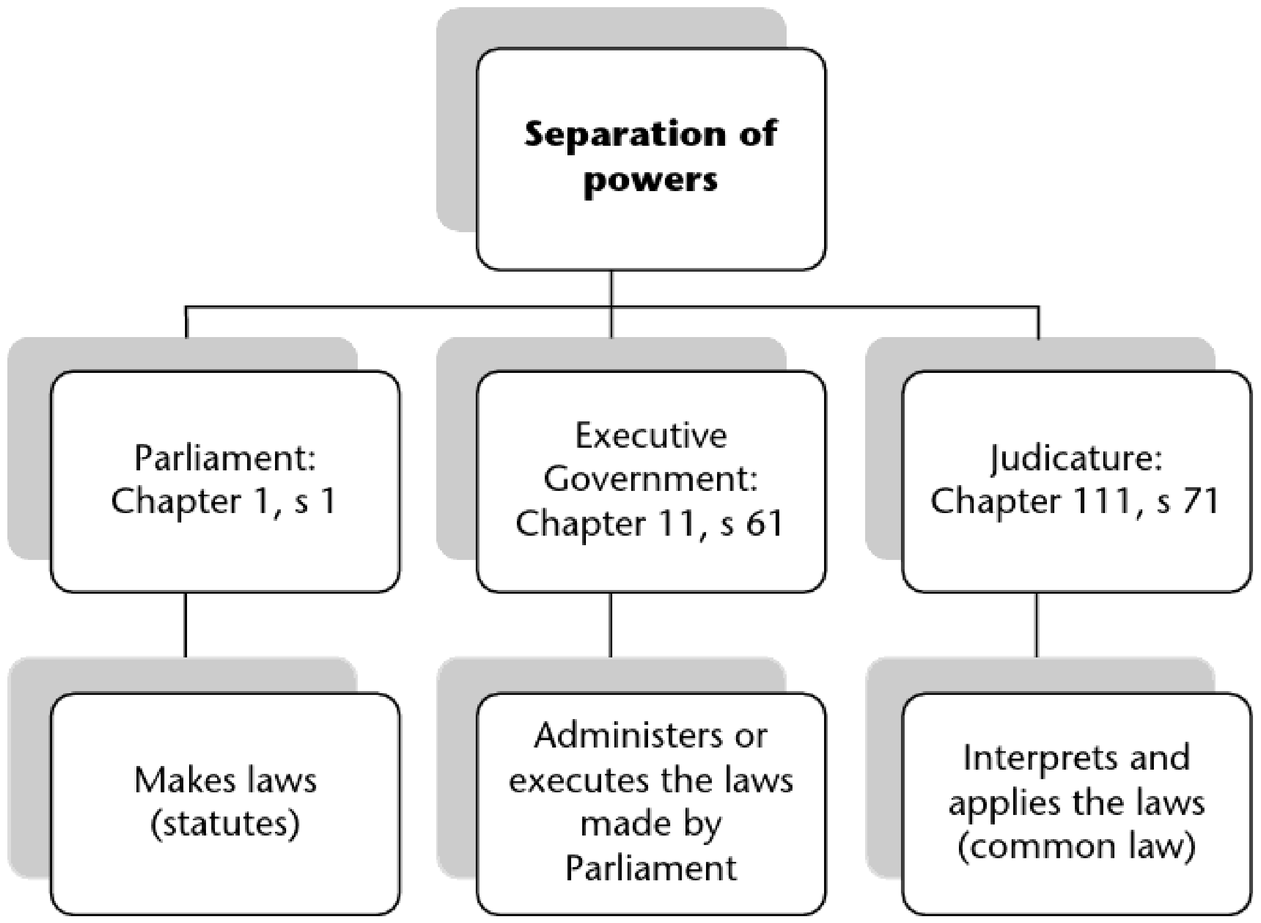
> Each Power should only exercise its own functions. When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the judiciary power is not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> There would be an end to everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, executing the public resolutions, and trying the causes of individuals.[16]

15 Western Australia became a self-governing colony in 1889.

16 Montesquieu, *The Spirit of Laws* (T Evans, London, 1777), vol 1 of 4, at pp 151–152.

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Figure 1.3 : Separation of Powers



The legislature

[1.170] The Commonwealth Constitution created a federal Parliament consisting of the King, the Senate and the House of Representatives: s 1. The Constitution gave the Commonwealth Parliament certain defined legislative powers but left the States as self-governing political units each with its own Constitution, Parliament and Courts: ss 51, 106, 107. The State governments are not regarded as subordinate to the Federal Government; rather, power is shared between the two in accordance with the Constitution.

The Commonwealth Parliament only has such power as the Constitution confers upon it and can only make laws on such matters as are expressly, or by necessary implication, mentioned in the Constitution as being within Commonwealth power. These are the **exclusive powers** of the Commonwealth parliament. Under s 90, for example, the federal parliament has exclusive power over customs, excise and bounties. Power to make laws on all other matters resides in the State Parliaments. These are called the **residual powers**. Most Commonwealth legislative powers are **concurrent powers**, that is, they can be exercised by either the Commonwealth or the States. However, if a State law is inconsistent with a law of the Commonwealth, the Commonwealth law prevails, and the State law, to the extent of the inconsistency, is invalid: s 109.

All legislation passed by the Commonwealth Parliament must be supported by one of these "heads of power", or else it will be constitutionally invalid and subject to challenge in the High Court. Following the Federal Liberal Party's announcement of a policy in favour of nuclear energy, in 2024, some have queried whether the Commonwealth Parliament actually has the power to legislate for that purpose. If implementing legislation is ever introduced, it will be up to the High Court to decide.

The executive

[1.180] The executive power of the Commonwealth is vested in the King and is exercisable by the Governor-General as the King's representative: s 61 The Governor-General is empowered to appoint Ministers to administer the Commonwealth departments of State. No person can be a Minister of State unless they are a member of the Senate or House of Representatives: s 64. In other words, a government Minister must be a Member of Parliament.

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By convention, the Governor-General invites the leader of the political party having the majority of members in the House of Representatives to form a government. The leader (or in the case of the Labor Party, its Caucus) selects the members who are to be Ministers and they are then appointed by the Governor-General. The Prime Minister allocates portfolios to the Ministers so appointed, that is, each Minister becomes responsible for one or more government departments. The Cabinet comprises those members of the ministry responsible for determining the policy and objectives of the government.

The government is made responsible to the electorate through Parliament in that:

(a) Ministers must be Members of Parliament and accordingly may be questioned in Parliament about their running of the country;
(b) where the government loses the confidence of Parliament it must resign; and
(c) an individual Minister who loses the confidence of Parliament must resign.

In some matters, the Constitution gives the Governor-General powers to act independently. These include the power to dissolve the House of Representatives and, in certain situations, both Houses. However, in other than exceptional circumstances, the Governor-General will follow the advice of a Prime Minister who retains the confidence of the House.

The powers of the Governor-General to act *without advice* are referred to as "reserve powers", and these are not clearly defined in the Constitution and there is no agreement on the nature of the exceptional circumstances in which they may be exercised. The only guide to these powers is convention or tradition. This means the exact nature and scope of these powers are arguable, but the Governor-General's reserve powers are generally agreed to include:

- the power to appoint a prime minister if a federal election has not resulted in a clear outcome;
- the power to dismiss a prime minister if they have lost the support of the majority of the House of Representatives;
- the power to refuse a request for a double dissolution (the dissolving of both Houses of Parliament);
- the power to dismiss a prime minister or minister if they break the law; and
- the power to refuse a request from a prime minister to call an election.

The use of reserve powers by Governors-General is rare. But as we see from the following case study, there has been one famous occasion in which the Governor-General relied on his reserve power to dismiss a Prime Minister.

Case study 3: the Governor-General and the dismissal of a Prime Minister

[1.190] The Governor-General Sir John Kerr's dismissal of the Whitlam Labor government on 11 November 1975 provided the biggest controversy in Australian political history. The Dismissal (as it has come to be known) focused attention on the Governor-General John Kerr's use of a reserved (unwritten) power to dismiss a duly elected Prime Minister who commanded a majority in the House of Representatives. Kerr dismissed Whitlam because he believed that a Prime Minister who could not pass Supply (the Budget) through the Senate (as Whitlam could not, at that time) was obliged to call a general election or resign. Whitlam did neither, believing that, in time, the Senate (and Malcolm Fraser, the Leader of the Opposition) would yield and pass Supply. When Kerr dismissed Whitlam, Fraser (who had been in secret contact with Kerr) agreed to be a Caretaker Prime Minister, guaranteeing to pass Supply and to call a general

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election (which he did … and won in a landslide). Whitlam remained as leader until Labor's defeat in 1977 and Fraser remained as Prime Minister until 1983. Kerr remained as Governor-General until 1977, but he was hounded and harassed wherever he went and he eventually left the country for the United Kingdom where he died in 1991. The Dismissal still causes tempers to rise today.[17] One of the most contentious parts of the Dismissal was that the Governor-General sought and obtained advice from Chief Justice of the High Court Garfield Barwick before he sacked the Prime Minister. As the head of the judicial branch of government, the Chief Justice of the High Court advised the head of the executive branch of government that he could dismiss a Prime Minister. This created a huge controversy and blurred the lines of the principle of the separation of powers. Since this affair subsequent High Court Chief Justices Brennan and French have both publicly stated that it is unlikely that it would ever again be appropriate for a Chief Justice of the High Court to advise a Governor-General.

The judiciary

[1.200] The principal functions of the High Court of Australia are to interpret the Constitution, act as an appellate court from other courts exercising federal jurisdiction, hear appeals from the Supreme Courts of the States and in certain cases act as a court of original jurisdiction: ss 73, 75–76. The High Court determines the constitutionality of legislation (ie whether a particular Commonwealth or State statute was a valid exercise of legislative power). As a result, the court is particularly concerned to safeguard the separation of judicial and non-judicial power.

The High Court is the highest court of appeal from decisions of the highest State and Territory courts and the Federal Court. The Court's judgments are authoritative statements of law which constitute binding precedents for all other Australian courts. The High Court alone decides whether one of its prior decisions is to be overruled.

The binding nature of decisions of the High Court for all other Australian courts enables the maintenance of the unity of the common law across Australia. The High Court unanimously held that there is one Australian common law rather than a common law particular to each State. The High Court has seven judges: a Chief Justice and six justices. Each justice is appointed by the Governor-General in Council (in effect, the Governor-General acting on the advice of the Attorney-General and the federal cabinet). Justices are usually (but not always) appointed from the ranks of barristers who are sitting as judges in other superior or appellate courts. There is a constitutional requirement that justices retire at the age of 70.[18]

As we shall see throughout this text, the High Court decides many important cases that affect the lives of all Australians. Because so many of the High Court's decisions have political consequences, and because the justices are appointed by the government of the day, it is not surprising that the Court is scrutinised carefully for signs of political bias or influence. However, unlike the US Supreme Court (where appointments to the Supreme Court (and other judicial appointments) are intensely ideological affairs),[19]

17 For an excellent recent addition to the mountain of material on the Dismissal, see *The Eleventh* on the ABC's "Listen" App.

18 For an insight into the life of a High Court judge, the following article by one of the finest, Michael Kirby, is revealing, available at https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_sydu.htm.

19 See, for example, the appointment of Amy Coney Barrett, the last of three Trump appointments to the Supreme Court during Trump's 2017–2021 term. After a nomination, the Senate must confirm it. The Senate has a confirmation hearing at which the nominee is questioned by Senators. The Senate voted to confirm Barrett's nomination on strict party lines with 52 of 53 Republicans voting in favour, while Susan Collins (a dissident Republican) and all 47 Democrats voted against. Her

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the High Court has largely remained above the political fray. In an article written to commemorate the centenary of the High Court in 2003, Murray Gleeson, a former Chief Justice of the Court, said:

> Any appearance of (political) influence would be the subject of comment and criticism. What would surely be taken as such a sign would be a pattern of decision-making by members of the Court along the lines of the political colour of the government that appointed them. That does not happen. In my first five years on the Court, four of the Justices had been appointed by Labor governments, and three by a Coalition government. The only case that I can think of in which the Court divided along those lines was a tort case of no party political significance. It is interesting that this has gone unremarked. The fact that Australians take it for granted that the Court does not divide along such lines is, it seems to me, itself an achievement worth noting.[20]

Amending the Constitution

[1.210] There are two ways the Constitution may be amended. The first is indirect. One of the major functions of the High Court is to *interpret* the Constitution. When it does so, in the context of a dispute that has arisen concerning the Constitution, the *meaning*, but not the actual words, may be changed. In *Love v Commonwealth of Australia and Thoms v Commonwealth of Australia*, a majority of the High Court effectively amended a Constitutional power (via interpretation) and held that Indigenous Australians could not be classified as "aliens" under the s 51(xix) "head of power".

Love v Commonwealth of Australia and Thoms v Commonwealth of Australia

[1.220] *Love v Commonwealth of Australia and Thoms v Commonwealth of Australia* [2020] HCA 3. The case concerned the Commonwealth's power to rely on provisions in the *Migration Act 1958* (Cth) to deport from Australia two men who had been convicted of serious criminal assaults. Both were born outside Australia and were not Australian citizens. However, each had spent most of their lives in Australia.

The *Migration Act 1958* (Cth) is based on the Commonwealth's power to make laws with respect to "aliens" (yes, an odd label today but the Constitution was drafted in the late 1890s!) which is a "head of power" in the Constitution (s 51xix). The two Indigenous men argued that as they were Indigenous, they could not be regarded as "aliens", and therefore the *Migration Act 1958* (Cth) did not apply to them and they could not be deported.

A majority of the High Court found that Indigenous Australians (as defined according to the tripartite test in *Mabo*[21]) were not within the reach of the "aliens" power. One of the appellants, Brendan Thoms, satisfied that definition because, although he had been born in New Zealand,

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appointment meant that the Supreme Court is split 6-3 on conservative lines, sufficient to overturn *Roe v Wade* (on federal abortion rights) and deciding that Presidents have absolute immunity from criminal prosecution for official acts. The political nature of judicial appointments in the US is also obvious when over half the States have elections for their State Supreme Courts.

20 http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_3oct.html.

21 The person must be biologically descended from Indigenous people; self-identify as an Indigenous person; and be recognised as a member of an Indigenous group by its elders or those with traditional authority to determine its membership.

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> he was a descendant of the Gunggari people, self-identified as Indigenous, was recognised as such and, indeed, had already been recognised at law as a native title holder in a native title claim. As to the other appellant, David Love, the majority was not able to determine whether he was an Indigenous Australian and remitted the matter to the Federal Court to consider that question.

The second method of amendment is direct: the actual words of the Constitution may be added or deleted or changed but only by a referendum: s 128. A referendum is a complex process that involves the Parliament and the electorate. First, both Houses of Parliament must pass the proposed amendment to the Constitution. Second, there is a referendum of all eligible voters who are asked to vote "yes" or "no" on that amendment. If the proposal is approved by a majority of voters in a majority of States, the Constitution is amended.

It has proved to be very difficult to amend the Constitution in this way. Of the 45 referenda put to the people since 1901 only eight have passed. The most significant amendment to the Constitution occurred in the 1967 referendum when over 90% of Australian voters agreed to change s 51(xxvi) of the *Constitution* to give the federal Parliament the power to make laws in relation to Aboriginal and Torres Strait Islander people (previously, people of "the Aboriginal race in any State" were excluded) and to allow for Aboriginal and Torres Strait Islander people to be fully included in the census (only from 1967 were Indigenous people counted in the census and included in base figures for Commonwealth funding granted to the States and Territories on a *per capita* basis).

Case study 4: the "Voice" referendum of 2023

A unique Constitutional Convention in which over 250 Aboriginal and Torres Strait Islander leaders came together in 2017 at Uluru to discuss constitutional recognition and the form it should take. The majority signed a document entitled the "*Uluru Statement from the Heart*".[22] One of the key recommendations was that Indigenous peoples should have a "Voice" to Parliament. It would be an advisory body of Indigenous people to express views to Parliament on policy and legislation that would affect their communities. To enshrine a "Voice" for Aboriginal and Torres Strait Islander peoples in the *Constitution* required a referendum. The referendum was held on 14 October 2023.

The referendum question:

A Proposed Law: to alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice. Do you approve this proposed alteration?

The new chapter and section to be added to the Constitution are:

Chapter IX Recognition of Aboriginal and Torres Strait Islander Peoples

S 129 Aboriginal and Torres Strait Islander Voice

22 See S Morris, *Statements from the Soul: The Moral Case for the Uluru Statement from the Heart* in (S Morris and D Freemen (eds) (La Trobe University Press, 2022) pp 1–16.

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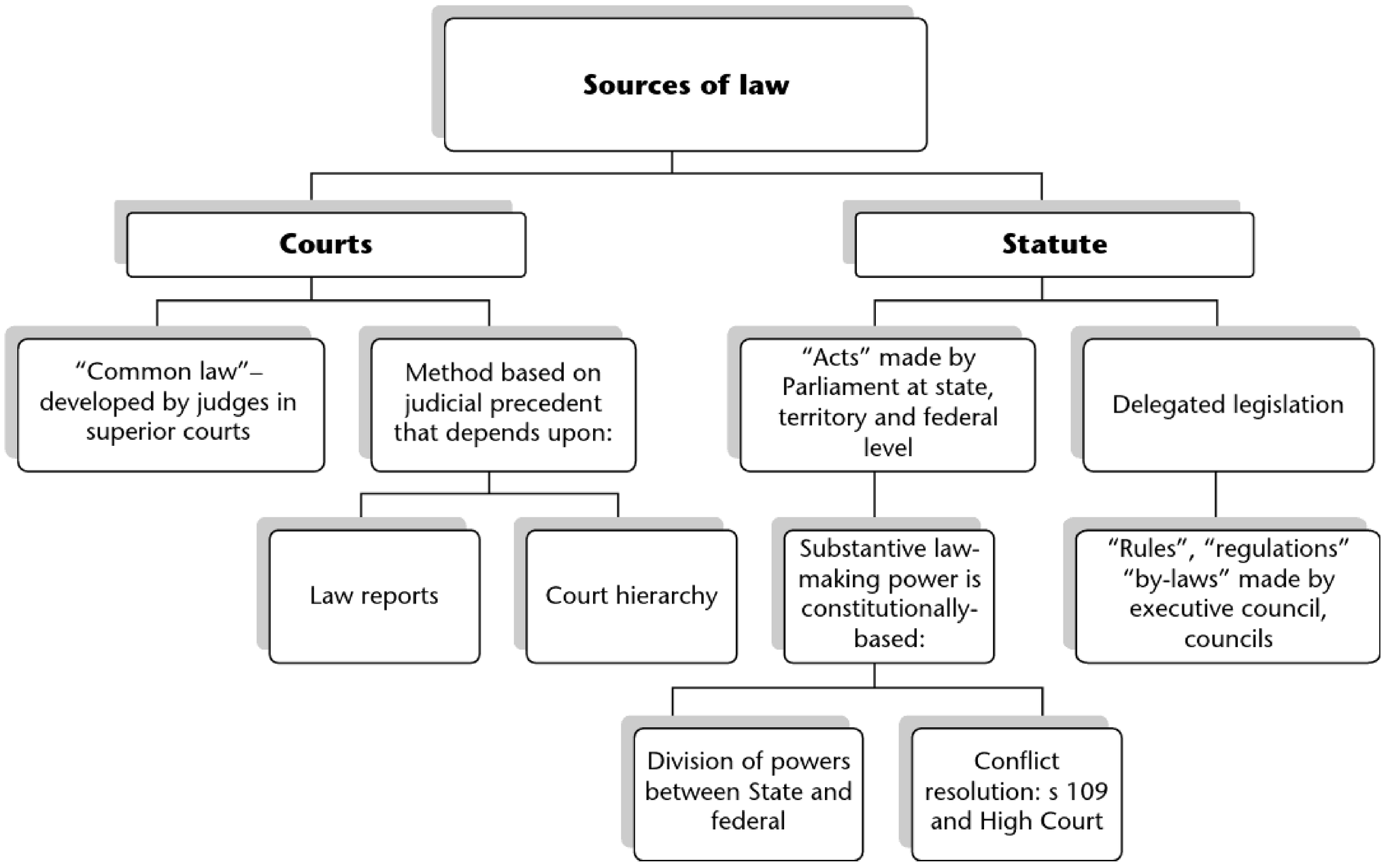
In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

1. There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
2. The Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;
3. The Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

After an extensive and divisive campaign, the referendum failed. As we saw above, for a referendum proposal to pass there must be two majorities: a majority of voters across the nation and a majority of voters in a majority of States must vote "Yes". The referendum on the Voice achieved neither. The referendum failed for the reason most referenda have failed in Australia: a lack of bi-partisan support for a referendum proposal. The Voice referendum was not supported by the federal Opposition and, significantly, Indigenous leaders were also divided on the issue.

Sources of law

Figure 1.4 : Sources of law



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[1.230] Having defined "law" and examined its various functions, we now ask where is the "law" to be found? In Australia and other common law legal systems, there are two primary sources of law: legislation and case law.[23] Legislation is the law made by parliaments (also referred to as statute law or Acts of Parliament). Case law is the law made by the courts. It is also known as common law, precedent or judge-made law. Legislation is the dominant source of law for two reasons. First, parliament is the sovereign law-maker and, as such, legislation overrides the common law if there is inconsistency between the two. If parliament disapproves of a precedent made by the courts, then it can amend or abolish the precedent by simply passing legislation to that effect. Second, the sheer volume of legislation, regulating every aspect of our lives, makes legislation far more significant than law made by the courts. Some areas of law that, in the past, consisted almost entirely of case law are now a mix of the two or, in some cases, areas of law are made up almost entirely of statute law.

One of the main functions of the courts is to interpret legislation – give meaning and scope to the parliament's words – and, in so doing, the courts create a body of case law (precedent) that sits alongside the statute. So while parliament may be the dominant law-maker, it is the courts that decide (in the context of a dispute) how the statute works in practice and, in the event there is a question about whether a parliament had constitutional power to pass the legislation, it is the court that settles the matter.

Statute law

Parliamentary sovereignty

[1.240] Until the assertion of power by the Parliament over the monarch in Britain (a process which began in 1688), judges were the principal law-makers. However, as we have noted, over the past 350 years, the Parliament (in Britain and later Australia) has become the sovereign law-maker.[24] In this context, the classic definition of sovereignty is that "the parliament can make or unmake any law and further, that no person is recognized by the law as having a right to override or set aside the legislation of the Parliament".[25]

In fact, in the Australian context (a federal system of government, where powers are shared between the Commonwealth and the States), neither the Commonwealth nor the States have true unfettered "sovereignty" (as defined by Dicey). The federal Parliament is a creation of the Constitution and has enumerated (exclusive and concurrent) powers only. Each State's legislative power is inherent or residual but limited by the federal Constitution, the relevant State constitution and Commonwealth powers (including s 109 that gives Commonwealth laws precedence over State laws). So, in Australia, it is important to understand that sovereignty does mean that parliament can make and unmake any law but only *as long as a parliament has the constitutional power to do so*. If it does (and that is ultimately a matter for the High Court in federal matters and also the State Supreme Courts in state matters to decide), the exercise of that power cannot be challenged or reviewed by the judiciary. In other words, the judiciary can only review the constitutional validity – not the merits – of the legislation.

23 A primary source of law is a document that contains the law itself. A secondary source of law is a resource that explains or analyses the primary source or is prepared for law reform purposes. Secondary sources include scholarly texts, articles in academic journals, law reform commission reports and other commentary, both national and international.

24 For an excellent introduction to the Parliament and its role as a source of law, see https://www.youtube.com/watch?v=NhYpkVclXbA.

25 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1959).

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The making of statutes

[1.250] Where it is intended to make a new law on a particular matter or amend an existing law, a Bill will be drafted, usually by parliamentary counsel. Bills may be introduced in either House but will normally be introduced into the particular House of Parliament in which the Minister in charge of the Bill sits. Most Bills tend to be introduced in the Lower House, that is, the House of Representatives of the Commonwealth Parliament, or the Legislative Assembly in the case of the State Parliaments.

After introduction of a Bill to the House, it will have to pass what are called three *readings*. The first reading is generally a formality involving stating the name of the Bill and moving that it be read a first time. If this is agreed to, the Bill will be printed and distributed to members of the House.

The second reading of the Bill involves the Minister moving that the Bill be read a second time and the members will then debate the broad principles of the Bill. On the passing of the motion for a second reading, the Bill then moves on to the next stage, known as the committee stage. The committee may be a select or standing committee of the House or the whole House sitting as a committee.

At this point, each clause of the Bill may be debated and amendments made; in practice, only the controversial parts of the Bill will be objected to and debated. Once all the clauses of the Bill have been considered, the Bill, if approved, is reported to the House as having passed the committee stage. A motion is then proposed that the Bill be read a third time. The third reading simply involves the House voting on the Bill as it stands after the committee stage.

Once passed, the Bill is then sent to the other House, usually the Upper House (ie the Senate of the Commonwealth Parliament or the Legislative Council in the States other than Queensland), and the same process is repeated. If the Bill is passed by the Upper House unamended, it is sent to the Governor-General of the Commonwealth, or the Governor of the State, for assent. If the Upper House amends the Bill, those amendments are considered by the Lower House before assent. After assent, the Bill becomes an Act of Parliament.

The Act will commence from the date specified, or it may provide that it is to operate from a date to be proclaimed by the Governor-General or Governor and published in the *Government Gazette*. Where a Commonwealth Act is silent as to its commencement, it commences 28 days after the Governor-General's assent was given.[26]

The interpretation of statutes

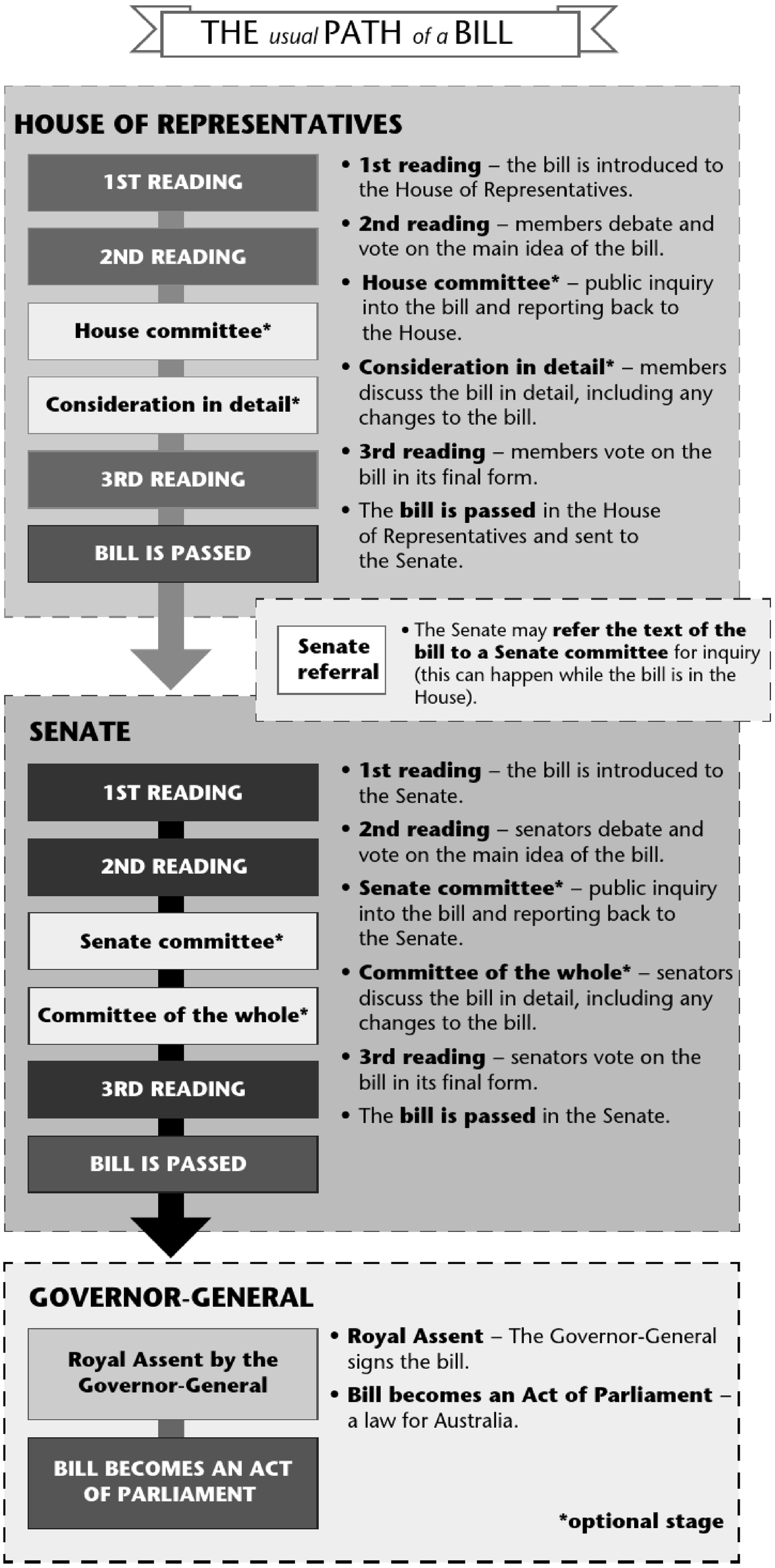
[1.260] The role of the courts is to apply and interpret Acts of parliament in the resolution of disputes. Whatever the reason for the dispute, the basic judicial task is (a) to determine what the statute means and then (b) to apply that meaning to the facts. However, this is not as simple as it sounds. It is a complex task which "involves an art, not a science".[27]As Kenny J of the Federal Court has said:

> A statute is not said to have the meaning that the reader gives it but that which the legislature is taken to have intended it to have … A statute is not to be read as one would another document. Rather, a statute is read according to its own rules. Giving meaning to a statutory provision is therefore a highly controlled task. When the judge says that the goal of statutory interpretation is to ascertain what the legislature intended, the judge is acknowledging her constitutional relationship

26 *Acts Interpretation Act 1901* (Cth), s 3A(2).
27 M Kirby, "Statutory Interpretation: The Meaning of Meaning" (2011) 35 *Melbourne University Law Review* 113 at 132.

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Figure 1.5 : The making of statutes in the Federal Parliament



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> with the legislature (ie the parliament, not the judge, is the sovereign lawmaker) … The common law provides that legislative intent can only be arrived at by the application of these rules.[28]

The various principles or rules of statutory interpretation that we will discuss in this part have been developed by the courts and parliaments to provide guidance to those who come before the courts. *But what must be clear at the outset is that the fundamental method of statutory interpretation in Australia is settled: the task begins and ends with the words of the statute in their context.*[29]

The High Court has endorsed a two-step "modern approach" to statutory interpretation: (a) examine *the words, their context and the purpose of the legislation* and then (b) apply the results of that examination to *produce a result that is both fair and workable* bearing in mind the principles of precedent, in particular *stare decisis* (ie the possible application of the reasons for your decision to other cases).

Example

Assume that s 2 of the *Parks and Public Spaces Act 2004* (Vic) bans "vehicles" in all Parks and Gardens in the Melbourne Central Business District. The penalty for a first offence is $200. "Vehicles" are defined in s 3 as "cars, including all utilities and SUVs, trucks, motorbikes and the like". Assume Jack rides his e-scooter through a park and is issued with a $200 fine. The fine is affirmed in the Magistrates Court and Jack appeals directly to the County Court. His lawyer argues that the scooters are not included in the definition of "vehicles", and it would not have been the intention of the legislature to ban these kinds of vehicles. He points to the Minister's Explanatory Memorandum in which she did not refer to e-scooters at all.

The Court, in deciding whether an e-scooter is a "vehicle", is engaged in statutory interpretation. The judge does this by looking to the words themselves and then, if necessary, among other things, the second reading speech of the relevant Minister in Parliament and the Explanatory Memorandum in order to determine the purpose of the provision. If the meaning remains unclear, the judge will also consider the common law and secondary resources, such as academic research, to determine whether an e-scooter is a "vehicle". The Court might decide that the meaning of the word in the Act (bearing in mind the context and legal precedent) is clear: e-scooters are prohibited "vehicles" for the purpose of the legislation. Alternatively, the Court might decide that an e-scooter is not a "vehicle" because precedents and/or common sense would suggest that Parliament was concerned with public safety on a grand scale and e-scooters do not pose the same significant threat to safety as cars or motor bikes or trucks, etc. (In any event, it must be remembered that if the parliament is unhappy with the decision, it, as the sovereign law maker, may amend the legislation.)

When a judge (in a superior court) decides that a statute (or a word or section of the statute) should be interpreted in a particular way, that interpretation sets a precedent that is binding on all courts lower in the hierarchy. So, for example, the High Court of Australia recently decided that Indigenous people (who satisfy the three-part test in *Mabo*) are not "aliens" under s 51(xix) of the *Constitution* and cannot be deported using that power, even though they are not, in fact, Australian citizens. This interpretation of the word "alien" is now an important precedent (part of the common law) and has clarified the meaning of the statute.[30]

28 Justice S Kenny, "Current Issues in the Interpretation of Federal Legislation" (Speech delivered at the National Commercial Law Seminar Series, Melbourne, 3 September 2013).
29 *R v A2* [2019] HCA 35; 277.
30 *Love v Commonwealth of Australia and Thoms v Commonwealth of Australia* [2020] HCA 3.

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Frequently the drafters of legislation (and thereafter the legislators themselves) are content to use general words or phrases knowing (and expecting) that judges will, over time, give meaning to those words or phrases. An excellent example is the general prohibition of "misleading or deceptive conduct" contained in s 18(1) of the *Australian Consumer Law*. Since it first appeared in 1974, in the old *Trade Practices 1974* (Cth), s 52(1), courts have given meaning to that (famous) phrase in literally hundreds of cases so that we now have a much clearer and more comprehensive view of what conduct is (and what is not) likely to be regarded as "misleading or deceptive".

Common law rules of statutory interpretation

[1.270] Because of the significance of statute law and the frequent need for its interpretation, it is important to know how judges approach the task of interpreting the words that the parliaments have used. A number of common law and statutory approaches, rules and presumptions have developed over the years that guide judges when they interpret the words used in a statute. While described as "rules", they are essentially guidelines to be used while keeping the fundamental approach to statutory interpretation in mind: *the task of interpreting a statute begins and ends with the words of the statute in their context.*

The literal rule

[1.280] The "literal" approach to statutory interpretation (optimistically) assumed the Parliament must mean what it says: if the meaning of the words is clear, then the courts apply that meaning regardless of the result. The modern view is to look at the words used by the Parliament and *give the words their natural, ordinary and grammatical meaning*. If the words are clear, it is not necessary to look further for their meaning. From our understanding of language, we can see that ascertaining the literal meaning of a word or phrase is not always easy. A humorous example can be seen when searching for the phrase "bill posters will be prosecuted" in Google Images, a phrase commonly used on signs on buildings. Does this mean that people putting up posters will be prosecuted, or – as other humorous signs stating "Bill Posters is innocent" suggest – is Bill Posters actually a person?

The golden rule and mischief rule

[1.290] The golden rule and the mischief rule both emerged over time, but courts would only use these rules when the ordinary meaning created an absurdity or repugnancy. The golden rule could only modify the words of a statute to the minimum extent necessary to address drafting errors, and the mischief rule allowed consideration of the mischief that was intended to be remedied but only where that mischief was evident from reading the Act as a whole. The scope of the common law mischief rule has been superseded by statutory provisions giving precedence to the purposive approach to which we now turn.

The modern approach to statutory interpretation: text, context and purpose

[1.300] The approaches to statutory interpretation to which we have just referred were creatures of the common law; the purposive approach is a statutory creation. All parliaments – both state and federal – have enacted an *Interpretation Act* that is intended to guide the courts when they interpret legislation. The *Acts Interpretation Act 1901* (Cth)[31] directs a court to have regard to the *objects and purposes* of an Act in interpreting its provisions. Thus, s 15AA provides:

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31 There are purposive construction provisions in all of the State and Territory *Acts Interpretation Acts*: *Interpretation Act 1987* (NSW), s 33; *Interpretation of Legislation Act 1984* (Vic), s 35; *Acts Interpretation Act 1954* (Qld), s 15AA; *Acts Interpretation Act 1915* (SA), s 22; *Interpretation Act 1984* (WA), s 18; *Acts Interpretation Act 1931* (Tas), s 8A; *Legislation Act 2001* (ACT), s 139; *Interpretation Act 1978* (NT), s 62A.

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> In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

It is important to note that when the text is clear and unambiguous the courts should still give effect to those words (otherwise the court is, in effect, legislating). When the text is not clear on its face, a "purposive interpretation" is required, but, even then, it must be an interpretation that is consistent with the wording otherwise used in the statute. In other words, the interpretation legislation is *an instruction to judges to interpret the text in a way that "promotes the parliament's purpose" and is not an invitation for a judicial rewrite of legislation.*

In the following case, *EHT18 v Melbourne IVF*, the Court said that other considerations (such as considering the purpose or context) "could not displace the clear meaning of the text". This was not because it was inappropriate to adopt a purposive construction of s 10(1)(a) but because *the relevant text was clear and unambiguous* and the applicant did not draw the Court's attention to any significant factor which supported *her* preferred interpretation. As the final part of the extract indicates, it is for the Parliament to act if it considers the legislation (as clearly written) operates unfairly or inappropriately.

EHT18 v Melbourne IVF

[1.310] *EHT18 v Melbourne IVF* [2018] FCA 1421. The critical question concerned the interpretation of s 10(1)(a) of the *Assisted Reproductive Treatment Act 2008* (Vic). It provided that a woman may undergo an assisted reproductive treatment procedure only if the woman and her partner (if any) have given written consent. In s 3, "partner" was defined to include the person's spouse. The applicant, a married woman, separated from her husband for months but not divorced, sought IVF treatment from the respondent IVF clinic using donor sperm. She proposed to divorce her husband as soon as the requisite 12-month period for living separately elapsed and he would have no role or responsibility in raising the child.

The applicant argued (a) that s 10(1)(a) should be interpreted to mean that consent of a woman's partner is *only required if that partner is also involved with the woman in seeking treatment;* or (b) that the term "spouse" in s 3 *should be read as if it referred to spouses who were living together.* In other words, the applicant wanted the Court to "add a few words" to clarify or modify a text that was obviously incomplete and at odds with the purpose of the parliament.

The Court denied the applicant's claim. It held that, as a matter of statutory interpretation, s 10(1)(a) requires the applicant to obtain her estranged husband's consent. To accept her arguments in relation to statutory interpretation would involve the Court rewriting the legislation, which was clear and unambiguous in its terms. It is a matter for the Parliament, and not the Court, to amend the Act if it considers that the current provisions operate unfairly. (Note: the applicant was successful on other grounds.)

Maxims of interpretation

[1.320] Courts also apply a number of principles or "maxims" of statutory interpretation. However, these principles – always, unfortunately, expressed in Latin – are *aids* to construction, rather than inflexible rules.

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Under the **ejusdem generis** maxim, where particular words are followed by a general word, the general word may be interpreted as restricted to the same class as the particular words. For example, in the absence of some contrary intention, in the phrase "dogs, cats, guinea pigs and other animals", the general words "other animals" might be construed as restricted to domestic animals and would not be interpreted as including elephants or whales.

This maxim generally does not apply where apparently general words are followed by narrower words suggesting a genus more limited than the initial general words, if taken by themselves, would indicate. The maxim also does not apply where the particular words do not constitute a class. In that case, the general word will not be subject to that restrictive interpretation.

According to the **expressio unius est exclusio alterius** maxim, express mention of one matter suggests that other matters are excluded. For example, the exclusive mention of licensing for "dogs and cats" in a local council by-law precludes the law's application to other animals. This maxim will not apply unless the provision concerned is intended as an exhaustive statement of some matter. The courts have often emphasised that this maxim must be applied with caution.

The **noscitur a sociis** maxim means a thing is known by its companions. When a provision contains words with similar meanings, each individual word should be understood in the context of the surrounding words. For example, if an act banning weapons that "cut, stab, lance or otherwise wound", the word "wound" might be read down to the kind of injury a knife or similar weapon would cause. So, a gun, for instance, would be excluded.

Under the maxim **generalia specialbus non derogant,** where there is a conflict between a specific provision and a general provision in a statute, the specific provision will usually be applied in preference to the general provision.

Presumptions of interpretation

[1.330] The courts also make certain presumptions in construing legislation. Courts will adhere to **principles of natural justice** when interpreting legislation unless the statute expressly or by necessary implication waives or limits the application of the rules. Such rules of natural justice include the right of every defendant to a fair trial, to be heard in an open court in front of an unbiased judge, having been given full details of any offences (if a criminal matter) and a reasonable opportunity to respond.

New law is presumed to **operate prospectively**, from the date of commencement only, and not retrospectively. Great uncertainty would result if actions or conduct (such as taxation arrangements) that were lawful when performed could be made unlawful retrospectively. Legislation can have retrospective effect, but that effect would need to be provided for expressly or by necessary implication.

Penal provisions or statutes that criminalise will be construed narrowly against the Crown. It is also the case, via the **principle of legality**, that legislation will not be read as affecting fundamental common law rights unless that effect is made clear.

Extrinsic materials

[1.340] The *Acts Interpretation Act 1901* (Cth), s 15AB allows a court to refer to extrinsic materials in interpreting a statute. It provides, in part, that:

> [I]n the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

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(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when –

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

The material which may be referred to includes:

- relevant Law Reform Commission reports;
- relevant Parliamentary Committee reports;
- the Explanatory Memorandum;
- the Second Reading speech of the Minister; and
- relevant material in parliamentary debates: *Acts Interpretation Act 1901* (Cth), s 15AB(2).

The section is essentially a further aid to interpretation of statutory provisions. It is *the words of the statute rather than the extrinsic materials that have primary importance* for statutory interpretation. The High Court has said in *Catlow v Accident Compensation Commission* (1989) 167 CLR 543:

> It is only when the meaning of the text is doubtful … that consideration of extrinsic material might be of assistance. It follows that it would be erroneous to look to the extrinsic material before exhausting the application of the ordinary rules of statutory construction. If, when that is done, the meaning of the statutory text is not doubtful, there is no occasion to look to the extrinsic material.

Delegated legislation

[1.350] Delegated legislation is legislation made under the authority of an Act of Parliament. It is not uncommon for an Act to set out the law on a particular matter in general terms and go on to delegate (or empower) a person or body to make the detailed *rules* or *regulations* necessary to give effect to the legislation. Examples of the persons and bodies to whom such power is commonly given include the Governor-General in Council (Federal) or Governor in Council (State), government Ministers and local councils.

The reasons for conferring power on others to make delegated legislation are:

1. parliament does not have the time to deal in detail with the many matters that claim its attention; and
2. much of the delegated legislation that is passed is of a highly technical, specialised or essentially local nature so that the details are better left to experts or local bodies.

The power given by the particular Act may be quite specific as to the regulations or rules or by-laws that may be made under it or it may confer a broad power to make delegated legislation. An example of the latter is the power given to local governments by s 28(1) of the *Local Government Act 2009* (Qld): "A local government may make … any local law that is necessary or convenient for the good rule and local government of its local government area".

This situation has the appearance of a considerable violation of the principle of the separation of powers, the principle that laws should be made by the elected representatives of the people in Parliament and

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not by the executive government. The principle has been largely preserved, however, by a system for the *parliamentary control of executive law-making*. Parliament maintains some control over delegated legislation through the requirement that regulations or rules be tabled or laid before the Parliament[32] and by retaining the option of disallowing such regulations or rules within specified periods after their tabling.[33] In both the Commonwealth and State Parliaments, committees have been established to examine delegated legislation tabled before the Parliament with a view to maintaining some general supervisory control over its content.

There are thousands of legislative instruments (as delegated legislation is called) currently in force in Australia, covering a wide range of subject matters, including laws about food standards, fisheries, civil aviation, corporations, superannuation, taxation and migration, to name only a few subjects. Of particular interest and significance in recent years are the regulations made under a variety of Acts to deal with the COVID-19 crisis. For example, a Direction and Detention Notice made by the Chief Health Officer under the *Public Health and Wellbeing Act 2008* (Vic) authorised the extraordinary detention of arrivals in Victoria after 28 March 2020.

The common law or case law

[1.360] The second source of law is common law or judge-made law or case law. The phrase "common law" is, in fact, used in a number of different ways. It may refer to:

- the law made by judges *as distinct from* statutory law which are laws made by Parliament;
- the body of law historically made by the common law courts *as distinct from* equity law that was made in courts of equity; and
- the system of law practised in Britain and those countries which inherited the British system (eg Australia) *as distinct from* a civil law system as practised in many European, Asian and African countries or Sharia law systems as practised in some Muslim countries.

The defining characteristic of the common law is that it arises as precedent. Common law courts look to past decisions of courts in the same hierarchy to synthesise the legal principles of past cases. The principle of *stare decisis*, the principle that similar cases should be decided in a similar way, according to consistent rules, lies at the heart of all common law systems.[34]

Briefly, the common law is an English creation. Prior to the Norman Conquest of England in 1066, the law in England consisted of local or customary law that varied from place to place. In the 12th century, King Henry II sent judges around the kingdom to administer so-called Royal justice. At first, decisions were based on local customary law. Gradually, however, judges sought to achieve a level of consistency across the realm so that, by the 14th century, a more or less common set of laws had begun to emerge, administered by Royal or Common Law Courts. It was in these courts that a law common to all of England – the common law – gradually evolved.

The common law is a system of law in which legal principles are created and maintained and updated through the decisions made by judges when resolving actual disputes. For many hundreds of years, decisions of judges in higher appellate courts have been written down and published in law reports. These reports include the reasons that the judges used to decide the case. Consistent with the *doctrine of precedent*, these decisions must be followed, in later cases, by courts lower in the same hierarchy where the material facts are similar.

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32 *Legislation Act 2003* (Cth), s 38.
33 *Legislation Act 2003* (Cth), s 42.
34 For an excellent introduction to the role of the Courts as a source of law, see https://www.youtube.com/watch?v=Vb9Jjncnq3k.

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Development of equity

[1.370] The newly emerging common law legal system suffered from a number of serious deficiencies. Only certain types of writs were available and if the wrong complained of could not be framed to fit within one of the existing writs, then the complainant had no cause of action and therefore no remedy. Furthermore, the procedure involved in proving a case became increasingly complex and very strict. A case could be lost for non-compliance with slight technicalities. For this reason, equity emerged as a different branch of judge-made law to soften the harshness of the common law.

[1.380] To sum up the nature of equity in a common law legal system, the judge in a 1705 English case famously said:

> Equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness and edge of the law, and is a universal truth. It does also assist the law, where it is defective and weak in the constitution (which is the life of the law), and defends the law from crafty evasions, delusions and mere subtleties, invented and contrived to evade and elude the common law, whereby such as have undoubted right are made remediless. And thus is the office of equity to protect and support the common law from shifts and contrivances against the justice of the law. Equity, therefore, does not destroy the law, nor create it, but assists it.[35]

The birth of equity came about when the rigidity of the common law system of writs in the 12th and the 13th centuries failed to satisfy litigants who began petitioning the King, as the "fountain of all justice", to deliver justice in their particular case. As the petitions increased, the King delegated the duty to hear the petitions to his Chancellor, his most senior official, as the "keeper of the King's conscience". On receiving the petitions, the Chancellor would adjudicate them, according to principles of fairness and justice, rather than by application of strict rules of procedure or confined by judicial precedents. In other words, he (it was always a "he" at those times) would decide petitions according to what was equitable. The Chancellor's jurisdiction was exercised through the Court of Chancery rather than in common law courts.

The increasing popularity of the Court of Chancery soon led to conflict with the common law courts. Usually the conflict would concern the inadequacy of common law remedies or concepts such as trusts. When there was a conflict between the two, it was decided that equity would prevail. The conflict was finally put to rest with the passing of the *Judicature Acts* in 1873–1875 which gave the Supreme Court the power to administer both rules of common law and equity. Australian courts likewise apply common law and equity rules concurrently today.

Equity supplemented the common law by introducing many new remedies. Some of the most important are those of specific performance, injunction, rescission and rectification. A decree of specific performance compels the defendant to perform his side of the bargain in a contract while an injunction prevents someone from performing a certain act. The remedies developed by equity are, unlike the common law remedy of damages, subject to the discretion of the judge. In this sense, for example, for claimants to be granted equitable remedies they must come to court with "clean hands". That is, they must have behaved properly and not opportunistically. If damages are an adequate remedy, then there is no need to seek an equitable remedy. Another difference between common law and equitable rights is the concept of the trust, whereby property is held by one for the benefit of another. Equity recognised the trust when the common law had refused to do so. It acknowledged the rights of a beneficiary under a trust and provided remedies for breach of trust when a trustee failed to perform its duties.

35 Write LJ in *Lord Dudley and Ward v Lady Dudley* (1705) 24 ER 118.

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Although equity was free of the rigidity of the common law, as with any system, there developed rules of equity. Where once equitable rights were entirely within the discretion of the judge, judges applying equitable rules must now follow precedent in the time-honoured way of the common law.

The doctrine of precedent

Introduction

[1.390] The doctrine of precedent, also known as *stare decisis* – to stand by things decided – is a fundamental principle of common law jurisdictions. It has been referred to as "the hallmark of the common law"[36] and "the cornerstone of a common law judicial system",[37] that is, "woven into the essential fabric of each common law country's constitutional ethos".[38]

It was developed as the "hallmark" or "cornerstone" of the common law tradition to promote consistency in decision-making by judges, on the basis that, as a matter of principle, like cases should be determined in a like manner (*stare decisis*).

Binding and persuasive precedents

[1.400] A **binding precedent** is a legal rule or principle, articulated by a superior court, that must be followed by lower courts within its jurisdiction. Essentially, once a superior court decides a case, it will deliver a written judgment. This judgment will include, among other things, a summary of the material (important, decisive) facts, the court's decision and its reasoning (*ratio decidendi*). The *ratio decidendi*, or the court's reasons for deciding, is what is binding on all lower courts within the jurisdiction, when presented with similar material facts. For example, decisions of the High Court are binding on all other courts in Australia, but a decision of the Supreme Court is not binding on the High Court, and a decision of the District or County Court is not binding on the Supreme Court.

One of the difficulties with the application of the doctrine of precedent is that the binding principle is often not clear at the time of the judgment. For example, in *Amann Aviation* [1991] HCA 54, a significant High Court decision dealing with reliance loss for breach of contract, it is difficult to say what the *ratio decidendi* of the case was because there were *six different but concurring* judgments. This is not unusual, and it is often the case that the ratio is not clear until future courts say what *they believe* the ratio of a case to be.

A precedent is **persuasive** if the previous decision can be distinguished – that is, the material facts are not similar to the earlier decision – or if the case was not decided by a higher court in the same hierarchy as the one hearing the new case. This means that the precedent may be considered but is not required to be followed. For example, a precedent established by the Supreme Court of New South Wales is persuasive but not binding on the Supreme Court of Victoria, since these courts are not in the same hierarchy and are of equal authority. Decisions of superior overseas courts, particularly the superior courts of other common law jurisdictions like the United Kingdom, are persuasive precedents in Australia.

[1.410] A further question arising in relation to binding and persuasive precedent is whether an appellate court is bound by its own prior decisions. It is a question often asked in the context of a discussion about

36 The Hon. Sir Anthony Mason, "The Use and Abuse of Precedent" (1988) 4 *Australian Bar Review* 93, at 93.
37 BV Harris, "Final Appellate Courts Overruling Their Own "Wrong" Precedents: The Ongoing Search for Principle" (2002) 118 *Law Quarterly Review* 408, at 412.
38 Harris, n 37 at 412.

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how the law can evolve if a court is bound by its own decisions. The answer is that appellate courts are not bound by their own decisions in Australia. Importantly, the High Court is not bound by its own decisions. It has said:

> [w]hile stare decisis is a sound policy because it promotes predictability of judicial decision and facilitates the giving of advice, it should not always trump the need for desirable change in the law especially … if the change is necessary to maintain a better connection with more fundamental doctrines and principles.
>
> *Imbree v McNeilly* (2008) 236 CLR 510

The High Court has identified considerations that are relevant when it reconsiders its prior cases: a decision is more likely to be overturned (a) where it did not rest upon a principle carefully worked out in a significant succession of cases (ie it was a wrong decision) or (b) where it had achieved no useful result but had led to considerable inconvenience (ie with the benefit of hindsight, it was a wrong decision).

Other Australian appellate courts have adopted a similar view. The Full Court of the Federal Court will depart from its own previous decision if convinced that it is "plainly wrong". A State or Territory Court of Appeal will normally follow its own previous decisions, and the circumstances in which it determines not to do that will be comparatively rare. A single judge of a lower court is not bound by an earlier decision of another judge of the same court. However, in practice, a trial judge will usually follow the decision of another trial judge unless convinced that the earlier judgment was wrong.

Distinguishing and overruling

[1.420] If a court finds that the material facts of a case are sufficiently different from those of an earlier case, it may *distinguish* the case on its facts and decide not to follow that particular precedent (usually arguing that the court is bound to follow a different precedent). A higher court may also *overrule* a previous decision made by a lower court (or a court on the same level) if it believes the earlier decision was incorrect. This, in turn, creates a new precedent.

The following famous negligence case provides a useful example of the way in which the doctrine of precedent works in practice.

Example 1

[1.430] *Donoghue v Stevenson* [1932] AC 562. May Donoghue's friend bought May an "ice cream drink" (ginger beer and ice cream) in a café in Scotland. Unfortunately, a decomposing snail was in the opaque bottle and May consumed part of it. She fell ill with gastro and suffered nervous shock. She sued the ginger beer manufacturer, Stevenson. The House of Lords decided in her favour. Why? Lord Atkin's *ratio decidendi* (or reason for deciding the case) was as follows:

> [A] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him … and (knowing) that the absence of reasonable care in the preparation of (its) products will result in an injury to the consumer's life or property, owes a duty to the consumer to take reasonable care.

This is the part that is *binding* on courts lower in the same hierarchy where the facts are similar. Lord Atkin, in addition, outlined a much *broad ratio*, which was that "people must take reasonable care not to injure others who could foreseeably be injured by their action or inaction".

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After the decision in *Donoghue*, it was left to courts in future cases to work out the extent of this new duty of care. In other words, the ratio of *Donoghue* could have been "confined to its facts" (if courts felt that the broader ratio achieved "no useful result but had led to considerable inconvenience"). Or, as happened, courts since *Donoghue* embraced the broader ratio when deciding whether and where a duty of care was owed. For example, courts have, in appropriate cases, decided that, if the Atkin criteria were met, all manufacturers owe a duty of care to their customers, that advisers owe a duty of care to their clients, and that the duty could be owed to a plaintiff who suffered psychological harm or pure economic or property loss. In this way, from humble beginnings in a café near Glasgow, the modern law of negligence has developed … (with a little help from parliaments).[39]

The following High Court decision provides an excellent example of the way in which superior courts (especially the High Court of Australia) make law. The High Court, in its decision, reversed the decisions of both the Supreme Court of Victoria and Victorian Court of Appeal and created a precedent that must be followed by all courts in all jurisdictions (where the facts are similar). As a bonus, Gageler J provides us with an example of an *obiter dictum*, which is a statement made "by the way" – a statement that is not part of the court's *ratio decidendi* (reason for deciding) and therefore can only ever constitute persuasive (and not binding) precedent.

Example 2

[1.440] *Google LLC v Defteros* [2022] HCA 27 (17 August 2022). Google has been in litigation with Melbourne criminal lawyer George Defteros for the past six years. In 2004, Defteros was charged with the conspiracy to murder and incitement to murder underworld figures, including Carl Williams. This information was published in an article by The Age in 2004. The charges were eventually dropped in 2005.

Google was notified of the defamatory article in February 2016 but did not take it down until December that year. During this period, it had already been accessed many times. In 2020, Defteros successfully sued Google for $40,000 in the Supreme Court of Victoria. The Supreme Court held that Google had defamed Defteros by publishing the article and refusing to take down its hyperlink. The Court of Appeal upheld the decision.

Google appealed to the High Court. The High Court decided, by a majority, that Google was not the "publisher" of the defamatory material. The reason (*ratio*) for this decision is that, in the view of the Court, Google's role is to make information accessible, and it does so by directing (through hyperlinks) readers to other webpages. In the view of the Court, Google was not involved in the process of actually *communicating* the contents of articles to readers. Google had in no way approved, encouraged or participated in the article being published on The Age's website. This decision sets a clear precedent that must be followed by all the courts in the land: Internet companies like Google are not publishers. They are "reference providers" and are not legally responsible (at least under defamation law) for any material readers may click on.

39 We examine *Donoghue v Stevenson* and this area of law in detail in Chapter 15.

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In circumstances where the facts can be *distinguished*, the result may be different. Gageler J, in fact, flagged such a scenario. His Honour said that although Google should not be considered a publisher for the purpose of regular search results, its liability may be different in the case of *sponsored results*. This is because sponsored results may involve a degree of "enticement or encouragement to click on the hyperlink". As it was not necessary to decide on this point, this view is an *obiter dictum*. But it is a very persuasive one, given the status of the court; it would be a foolish lower court that ignored it without having good reason.

Assessing the doctrine of precedent

[1.450] One of Australia's finest Justices of the High Court has offered this view of the doctrine of precedent:

> Advocates of a strict view of precedent claim that the consistency, continuity and predictability resulting from adherence to precedent is essential to the maintenance of public confidence in the rule of law and the work of the judiciary … The doctrine of precedent continues to play an important role in the Australian legal system. In the vast majority of cases, particularly those decided in trial and intermediate courts, the application of precedent or of statute will ordinarily be decisive … However, for those raised in this tradition, the principles work well, taken as a whole. They give a measure of stability and predictability to the law, without inflexibility. They mean that the broad contours of legal doctrine are known or knowable. And if there is uncertainty, dissent and debate at the edges, that is so because law is an attribute of the system of government in a generally free and democratic society and therefore always in a process of evolution. It is in the nature of that form of society that the content of law should be transparent – exposed to debate and criticism, including amongst the citizens governed by it.[40]

The hierarchy of courts and law reporting

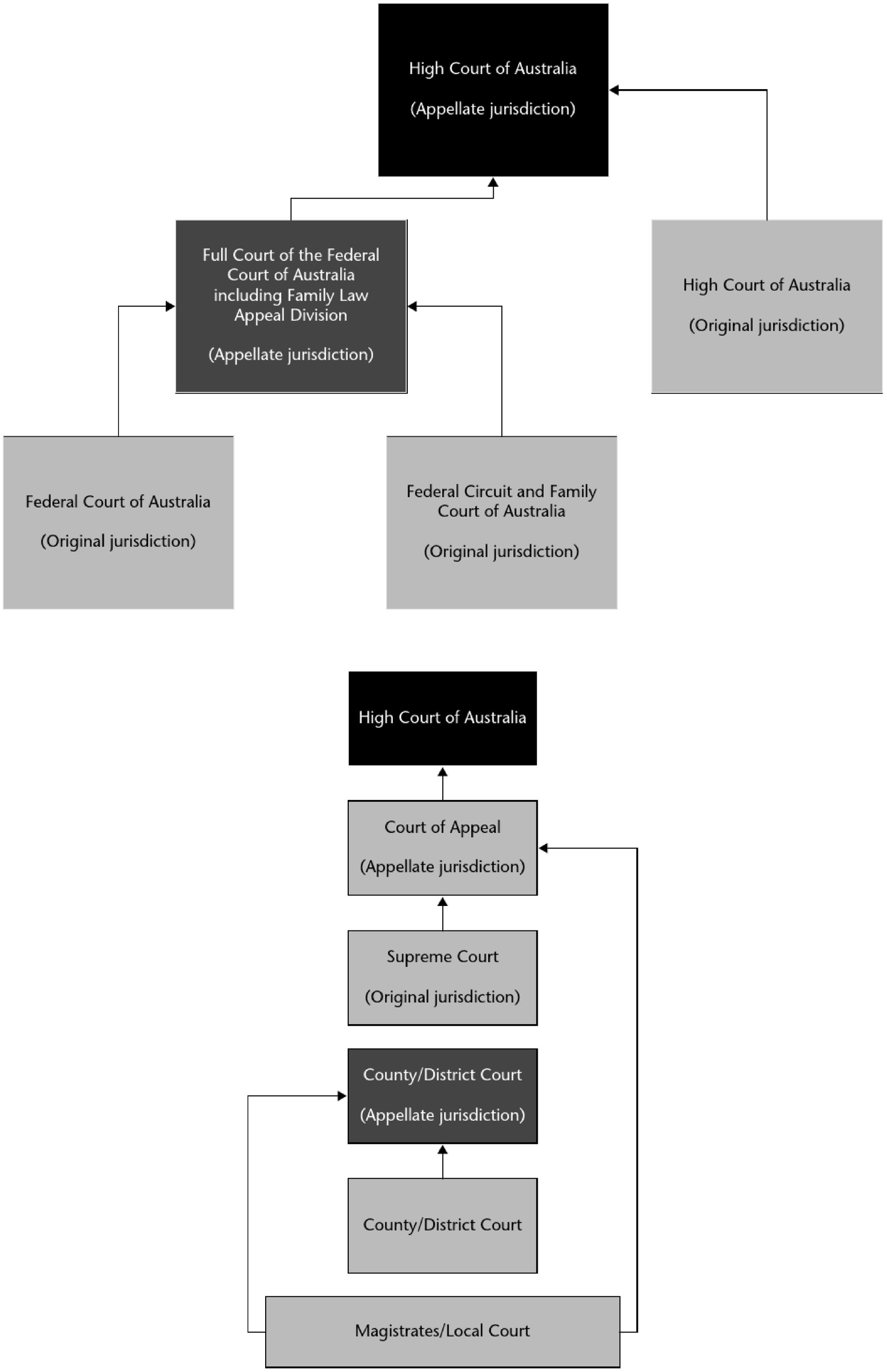
[1.460] As we have seen, the doctrine of precedent depends, in part, on the hierarchy of the court system and a system of authoritative law reports. No system of law-making through precedent is possible without an acceptance that one court is superior or inferior to another and a reliable system of law reporting is essential for courts to be able to examine the reasons that a court previously had for making its decisions.

To appreciate how case law is made in Australia, it is important to understand the federal structure of the system – there is a Federal court system and each State and Territory has its own court system covering its own jurisdiction. Each of the nine court systems has a court hierarchy. Such a hierarchy is required in order to (a) ensure an appeal process is available, (b) allow courts to specialise (eg according to the seriousness of a criminal offence or the value of a civil claim or the type of action) and (c) facilitate the operation of the doctrine of precedent (that requires lower courts to follow the reasoning of courts higher in the hierarchy where the facts are similar).

40 M Kirby, *Precedent in Australia* (Paper presented at the International Academy of Comparative Law Conference, Utrecht, The Netherlands, 2006).

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Figure 1.6 : Hierarchy of the Australian courts



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Federal courts

High Court of Australia

[1.470] Under s 71 of the *Constitution*, the judicial power of the Commonwealth is vested in the High Court. It has been the highest court in the Australian court hierarchy since the passing of the *Australia Act 1986* (Cth).[41] The Court has seven justices: the Chief Justice and six other (puisne) justices. There have been 42 justices and 13 Chief Justices who have served as justices of the High Court since its formation in 1903. Of the seven current justices, three are women. The current Chief Justice of Australia is Stephen John Gageler.

How are judges appointed to the High Court (and, indeed, all federal courts)? Section 72 provides that the Governor-General in Council must appoint the judges of federal courts, the appointee being younger than 70 years of age. In practice this is done on the advice of the Federal Cabinet. In practice the Commonwealth Attorney-General considers who might be a suitable appointment. The Attorney-General then writes to the Prime Minister (usually after asking the person whether he or she would accept appointment), seeking the approval of the Prime Minister and the Cabinet. If approved, the Attorney-General makes a recommendation to the Governor-General who considers the appointment through the Federal Executive Council process.

The High Court has both an *original* and an *appellate* jurisdiction. Under s 75, the court has original jurisdiction in matters (a) arising under any treaty; (b) affecting consuls or other representatives of other countries; (c) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party; and (d) between states, between residents of different states or between a state and a resident of another state. The Parliament may make laws conferring original jurisdiction on the High Court in a range of matters (a) arising under the Constitution, or involving its interpretation; and (b) arising under any laws made by the Parliament: s 76. One justice can hear cases before the court in its original jurisdiction.

The High Court is the final appeal court in Australia. Its appellate jurisdiction stems from s 73 which provides that the court can hear and determine appeals from:

1. any justice/s exercising the original jurisdiction of the court;
2. any federal court or court exercising federal jurisdiction; and
3. the Supreme Court of any state.

Litigants generally need to obtain *special leave* to appeal to the High Court. What this means is that the High Court will hear an *application* to appeal and decide whether or not to hear the appeal. Special leave to appeal will normally only be granted where the case involves some important question of law, or in a criminal case, a possible serious miscarriage of justice.

Federal Court of Australia

[1.480] The Federal Court has both an original and appellate jurisdiction. The court enforces federal legislation such as the *Competition and Consumer Act 2010* (Cth), which includes the *Australian Consumer Law* that we cover in Chapter 13. It has concurrent jurisdiction over bankruptcy and intellectual property matters. In its appellate jurisdiction, where the court sits as a Full Court comprised of three judges, the Federal Court hears appeals from:

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41 The *Australia Act*, amongst other things, eliminated the remaining (slight) possibility of an appeal from any Australian court to the *Judicial Committee of the Privy Council* (the court of last resort for the entire British Commonwealth, other than for the United Kingdom itself).

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1. a single judge of the court; and
2. a single judge of a State Supreme Court which is exercising federal jurisdiction in regard to intellectual property matters (ie patents, trademarks, copyright and designs).

Applications for special leave to appeal may be made to the High Court from a decision of the Full Court of the Federal Court.

Federal Circuit and Family Court of Australia

[1.490] The newest federal court is the FCFCA. It has two divisions: Division 1 (a continuation of the Family Court of Australia) deals only with family law matters and Division 2 (a continuation of the Federal Circuit Court of Australia) deals with family law, migration and other general federal law matters. The Court provides Australian families the opportunity to resolve their family disputes faster through simplified procedures and is now a single point of entry for all family law matters.

State courts

[1.500] Each of the Australian States and Territories has its own separate hierarchy of courts. The basic structure in most of the states comprises:

1. Supreme Court;
2. County or District Courts; and
3. Local or Magistrates Courts.

Supreme Court

[1.510] The highest court in each State and Territory is the Supreme Court, which exercises both civil and criminal jurisdiction. The Supreme Court has unlimited civil jurisdiction in all matters not expressly excluded by statute. In addition, so-called *cross-vesting legislation*[42] vests the federal jurisdiction of the federal courts in state Supreme Courts, and, reciprocally, it vests the non-federal jurisdiction of the state courts to the federal courts.

The original jurisdiction of the Supreme Court is exercised by a single judge. A decision of a single judge may be appealed to the Court of Appeal (in *New South Wales*, *Victoria*, *Queensland*, *Western Australia*, *Australian Capital Territory* and *Northern Territory*) or Full Court of the State (in *South Australia* and *Tasmania*).

County or District Courts

[1.515] Most States have established intermediate courts called District Courts or County Courts which have a statutory jurisdiction. This jurisdiction is limited with respect to subject matter and value of money or property in dispute. Where higher amounts are involved, proceedings must be taken in the Supreme Court.

Magistrates or Local Courts

[1.520] The lowest courts in the hierarchy of State courts are those presided over by magistrates. These courts are variously known as Local Courts, Magistrates Courts and Courts of Petty Sessions (when

42 *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth). Under the general cross-vesting scheme the state Supreme Courts and the federal courts have reciprocal jurisdiction giving to each court the power of the other. So, for example, under the scheme, the Victorian Parliament gave the Federal Court jurisdiction to hear all matters in respect of which the Victorian Supreme Court has jurisdiction.

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exercising criminal jurisdiction). In civil cases, the jurisdiction of the courts is generally limited to claims up to a certain monetary value (usually, approximately $100,000).

Other courts and tribunals

[1.530] In addition to the principal courts discussed from [1.470], there are a number of other courts and tribunals in Australia both at the federal and state levels.

Federal tribunals and commissions

[1.540] A number of quasi-judicial bodies,[43] tribunals and commissions have been established under federal legislation, the most significant of which for our purposes is the Australian Competition and Consumer Commission (ACCC). The ACCC is a regulator that has general responsibility for initiating proceedings for contravention of the *Competition and Consumer Act 2010* (Cth) in anti-competitive conduct cases and for instituting legal action concerning breaches of the consumer protection provisions of the Act.

Specialist State courts and tribunals

[1.550] There are a considerable number of specialist State courts and tribunals. One of the more important of these is the Small Claims Tribunals (in Victoria, the Victorian Civil and Administrative Appeals Tribunal) which provides a cheaper, speedier and more informal method of resolving disputes, particularly between consumers and traders, involving comparatively small sums of money.[44] The parties normally present their own cases, and the dispute is heard before a referee.

Law reports

[1.560] As we have discussed, the common law is made up of the decisions of judges in deciding particular cases (in superior courts and often at the appellate level). Those decisions are published in law reports, which were historically hard copy bound volumes containing decisions of particular courts in chronological order, and which are now available online. For the High Court, the authorised law reports are the *Commonwealth Law Reports* (published since 1903) and for the Federal Court, the *Federal Court Reports* (since 1984). Each of the States and Territories has its own authorised law reports. In addition, there are many specialist series of reports containing decisions on particular aspects of the law such as intellectual property, trade practices, torts, insurance, consumer credit, industrial law, trusts and so on.

Classification of law and legal proceedings

Public law and private law

[1.570] Law can be classified as either public law or private law. *Public law* is concerned with the organisation of government and with the relationship between the government and the people. It includes

43 Bodies that have a partly judicial character – they can hold hearings and make enforceable decisions in the general manner of courts – but they are not properly constituted courts that are bound by precedent and established rules of evidence and procedure. The Arbitration Commission and the Court of Arbitration for Sport are examples.

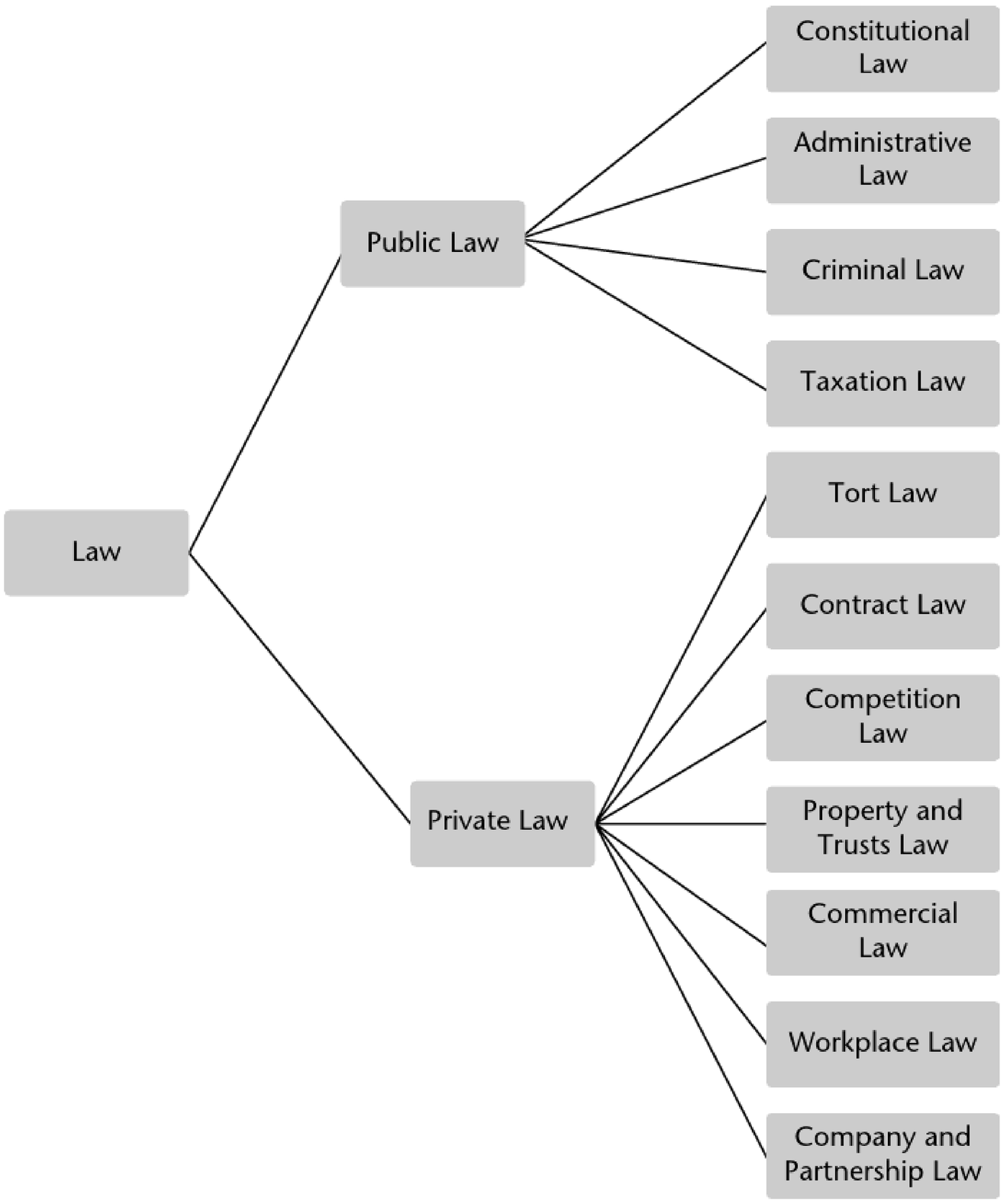
44 *Local Court Act 2007* (NSW), s 29 (in Local Court); *Fair Trading Act 1987* (NSW), Pt 6A, s 79S(7) (in Civil and Administrative Tribunal); *Australian Consumer Law and Fair Trading Act 2012* (Vic), ss 182–192; *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 11, Sch 3; *Magistrates Court Act 1991* (SA), ss 3, 38; *Magistrates Court (Civil Proceedings) Act 2004* (WA), ss 3, 26; *Magistrates Court (Civil Division) Act 1992* (Tas), ss 3, 7(2); *ACT Civil and Administrative Tribunal Act 2008* (ACT), s 18; *Small Claims Act 2016* (NT), s 5.

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constitutional law, administrative law and criminal law. Constitutional law defines the structure of government and the rights of individuals under that government. Administrative law regulates the exercise of powers and duties by government administrative officers and authorities. Criminal law defines offences against the State and provides punishment for their commission.

Private law is concerned with the relationships between private persons or organisations such as the law of contract, the law of torts, the law of property and corporations law. The government's actions can also fall within the scope of private law – for example, where a government department purchases a fleet of cars or a new suite of IT equipment, this is a contract law (private law) matter.

Figure 1.7 : Public law and private law



Substantive law and procedural law

[1.580] A distinction is made between substantive law and procedural law. Substantive law refers to actual rights and duties under the law. Procedural law refers to the formal steps that must be followed in the enforcement of those rights and duties, in particular, the rules of procedure and evidence. Thus, we have procedural rules that regulate civil litigation (such as contractual disputes or negligence actions) and criminal trials (such as for murder and theft). Every civil and criminal matter is tried under these rules of procedure – again, we might say that no one is above (or below) the law (of procedure).

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Civil law and criminal law

[1.590] The civil law – also known as private law – is that law under which a person (a plaintiff) may sue another person including the government or government agencies (a defendant) to obtain redress for a civil wrong (one of the areas of private law referred to in Figure 1.7) committed by the defendant. The usual purpose of a civil action is to obtain monetary compensation (damages) for the loss suffered by the plaintiff or complainant because of the defendant's alleged wrongful act; for example, for loss suffered as a result of a breach of contract or a tortious act such as negligence or defamation or a breach of the consumer or corporations law.

In civil proceedings, the plaintiff or claimant has the burden of proof. They must prove their case *on the balance of probabilities* (ie plaintiffs must prove that their allegation is *more likely than not* to be true). For obvious reasons, this is a lesser standard than the criminal standard of proof where the prosecution must prove its case *beyond a reasonable doubt* (ie there can be no reasonable doubt about the defendant's guilt).[45] Civil cases are almost always decided by a judge alone.

The criminal law defines offences against the State and provides punishment for their commission. Crimes are defined by statute, delegated legislation or the common law and are prosecuted in the name of the Crown on behalf of the State. Criminal offences are of two types, namely, *summary offences* and *indictable offences*. Summary offences are criminal offences triable summarily, that is, offences which are heard and determined by a magistrate without a jury; they usually comprise minor offences. Indictable offences are criminal offences triable before a judge and jury; they are generally the more serious offences. In the case of indictable offences, there is (usually) a preliminary or committal hearing before a magistrate who conducts an inquiry to see if there is sufficient evidence to send the defendant to trial in a higher court. The magistrate must determine whether a *prima facie* case has been made out (a case which seems like it would succeed on first impressions), and if they so decide, the defendant is committed for trial before a judge and jury of 12. In criminal cases, the prosecution has the *burden of proof*. In other words, it is for the prosecution to establish that the defendant is guilty (not for the defendant to establish their innocence), and it must do so *beyond reasonable doubt*. That is, the jury (or, unusually, a judge sitting alone) must have no reasonable doubt the defendant is guilty as charged. The jury decision (as to guilt or innocence) must (usually) be unanimous. If convicted, the judge decides the penalty.

Domestic and international law

[1.600] Another way of categorising law is according to whether it is domestic or international. Domestic law applies within a particular legal jurisdiction (eg corporations law or the law of contract is domestic law). International law has both private and public dimensions.

Public international law regulates relationships between nation states and is found in customs, treaties and conventions that, generally speaking, apply only when ratified (adopted) by a nation state. Australia has ratified many hundreds of such conventions and treaties.

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45 In a recent (very) well-publicised case, Bruce Lehrmann, a former Liberal Party staffer, lost a defamation action he brought against Network 10 and Lisa Wilkinson with Lee J finding that *on the balance of probabilities* Lehrmann raped a colleague in Parliament House in 2019. This finding in the civil trial does not affect in any way the outcome in his earlier criminal trial, which was aborted because of juror misconduct. Note that the case illustrates the risks associated with civil actions: Lehrmann faces an indemnity costs award of around $10 million for costs incurred by the defendants in the action (he is not liable for his own legal costs as his lawyers were acting on a 'no win-no fee' basis). At the time of writing, steps had been taken to appeal this judgment.

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Private international law is a way of determining how to resolve disputes between individuals (including corporations) in different states (eg rules to resolve a contractual dispute between a Chinese buyer and an Australian supplier).

Some treaties, when adopted, have public international law and private international law dimensions. The *United Nations Convention on Contracts for the International Sale of Goods*, for example, sets out private international law rules that determine how cross-border sales of goods occur (as in the Chinese buyer and Australian supplier example given above). However, adopting that convention also binds states to properly implement it, as a matter of public international law.

Commercial law – an example of public and private law

[1.610] The present work is primarily concerned with particular areas of domestic commercial or business law. These include the law of contract, consumer law, commercial aspects of the law of torts, agency law, partnership law and corporations law.

We will focus on a mix of common law and statute. The law of contract, for example, is primarily a creature of the courts (common law), but, in recent times, there has been a considerable body of statute law enacted to regulate particular aspects of commercial contract law. These statutes include the *Competition and Consumer Act 2010* (Cth) and the *Corporations Act 2001* (Cth).

The legal profession

[1.620] The main actors in the legal profession are solicitors, barristers and judges.

Solicitors

[1.630] A solicitor is a general practitioner of the law. Where a member of the public has a dispute which has legal implications, requires legal documents to be drawn up in respect of a particular transaction or needs advice on some aspect of the law, then they will generally consult a solicitor. The work of a solicitor includes, for example, drawing up contracts regarding commercial dealings, following through the legal technicalities of forming a company and advising on taxation matters. In relation to litigation, that is, cases to be heard before the court, the solicitor's function is to ascertain the facts and procure the necessary documents and other evidence required by the barrister who has been briefed to conduct the case.

Barristers

[1.640] Barristers are generally responsible for the conducting of cases in court. They also provide solicitors with legal opinions on difficult points of law. Barristers tend to be sole practitioners and, after a period of apprenticeship, they tend to specialise in a particular branch of the law. Unlike solicitors they do not engage directly with clients but first receive a brief from a solicitor. That is to say, the client will have gone to a solicitor with their problem and, if the problem involves litigation or the need for specialist advice, the solicitor will instruct a barrister in the matter. Leading barristers in each State may apply to "take silk", that is, be appointed as a Senior Counsel (SC) or King's Counsel (KC). Senior commercial counsel do not come cheaply. Counsel in the case referred to in footnote 45 were paid around $10,000 per day for their work. Hence, the amount of costs referred to in that footnote.

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Judges

[1.650] In Australia, judges play a pivotal role in the administration of justice. It is their duty to ensure the fair and impartial resolution of disputes and uphold the rule of law. Judges interpret and apply the law, both common law and statute, preside over court proceedings, and, in the case of appellate judges, deliver reasoned judgments. Trial judges have the responsibility of sentencing those convicted in criminal cases and determining appropriate remedies in civil disputes. Judges are appointed by government. They are generally, but not only, appointed from the ranks of barristers.

Law academics

[1.660] Academics at Australian Law Schools also make a very important contribution to the legal profession and society more generally in two main ways: teaching and research. All Australian lawyers, whether solicitors, barristers or judges, have graduated in law from one of the 38 law schools in Australia. It is the role of the law academic to teach their students the law, according to a standard curriculum approved by the Council of Legal Education. In addition to teaching, the law academic also conducts legal and/or interdisciplinary research, publishes their work in journals, presents papers at conferences or makes submissions to law reform bodies or parliamentary committees and so forth; in this way, they influence the direction of the law and society generally.

Alternative methods of dispute resolution

[1.670] The delay and ever-increasing cost of litigation has led in recent years to a growing emphasis on alternative methods of settling disputes outside formal court proceedings. Federal legislation now allows the Federal Court and the FCFCA to impose a penalty in costs where a party does not take "genuine steps" to resolve a dispute before civil proceedings are brought.

Commercial arbitration

[1.680] Arbitration is the reference of a dispute to an independent third party (or perhaps three independent third parties) selected by the parties or by their nominee instead of litigating the matter in the courts. Parties to a commercial dispute may agree to submit it to arbitration either by an arbitration clause in an agreement or at the time that a dispute arises. The advantages of arbitration are the avoidance of publicity (since the proceedings are in private and are often confidential); avoidance of delay in having the dispute resolved; a simpler and less formal procedure than that used in a court of law; reduction of expense; and, should the matter be of a technical nature such as a building dispute or involve a complex accounting or commercial matter, the possibility of appointing as arbitrator a person with the required technical qualifications and expertise.

Arbitration does not always live up to its ideals: it is often criticised as being time-consuming and costly just like litigation. However, the absence of appeals in arbitration does provide parties with certainty that they might not otherwise enjoy in regular court proceedings. Commercial arbitrations between Australian parties are regulated by uniform state and territory *Commercial Arbitration Acts*, whilst international commercial arbitrations are regulated by the *International Arbitration Act 1974* (Cth).

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Other methods of alternative dispute resolution

[1.690] The expression "alternative dispute resolution" (or ADR) refers to methods of dispute management that offer an alternative to litigation. Aside from commercial arbitration, which is a determinative form of dispute resolution, methods of ADR can be classified as facilitative or advisory. Facilitative processes include negotiation or mediation. Advisory processes include conciliation and independent expert appraisal. A range of these ADR processes are described in the next section. The processes appear in order of the level of third-party neutral intervention in the particular process.

Negotiation

[1.700] Negotiation between the parties with a view to seeking a mutually acceptable outcome through discussion, either with or without the assistance of a third party, is the most commonly used method of resolving disputes. The majority of commercial disputes are resolved by negotiation between the parties.

Mediation

[1.710] Where the parties are unable to negotiate a settlement between themselves, they may seek mediation of the dispute. Mediation is a voluntary negotiation process in which a neutral third party, the mediator, assists disputing parties to find their own solution to their dispute by helping them to isolate the issues in dispute, to develop options for their resolution and to reach an agreement that accommodates the interests and needs of all the parties.

Mediation has a statistically high success rate in resolving commercial disputes. Even where the parties do not completely resolve their dispute via mediation, the mediation process may help them agree on some matters and narrow down the scope of what remains in dispute. This can reduce the time and cost involved in further dispute resolution proceedings, for example, in litigation before the courts.

Conciliation

[1.720] In conciliation, a neutral third person assists the parties to negotiate as in mediation but exercises greater influence over the outcome than is the case with mediation. The conciliator may suggest options and possible solutions and is generally much more directive than a mediator. In Australia, conciliations often take place within a statutory framework, for example, complaints of discrimination under federal and State anti-discrimination legislation.[46]

Further reading

Australian Legal Development

R Hinchy, *The Australian Legal System: History, Institutions and Method* (2nd ed, Thomson Reuters, Sydney, 2015).

46 *Australian Human Rights Commission Act 1986* (Cth), ss 46P–46PN; *Anti-Discrimination Act 1977* (NSW), s 91A; *Equal Opportunity Act 2010* (Vic), s 112; *Anti-Discrimination Act 1991* (Qld), ss 158–164AA; *Equal Opportunity Act 1984* (SA), ss 27, 95; *Equal Opportunity Act 1984* (WA), ss 91–92; *Anti-Discrimination Act 1998* (Tas), ss 75–77; *Human Rights Commission Act 2005* (ACT), ss 54–67; *Anti-Discrimination Act 1992* (NT), ss 78–81.

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Australian Constitutional System

R Ananian-Welsh et al, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (8th ed, Federation Press, Sydney, 2024).

J Trone, *Lumb, Moens and Trone, the Constitution of the Commonwealth of Australia Annotated* (10th ed, LexisNexis Butterworths, Sydney, 2021).

Sources of Law

K Hall and C Macken, *Legislation and Statutory Interpretation* (5th ed, LexisNexis Butterworths, Sydney, 2020).

P Herzfeld, T Prince and S Tully, *Statutory Interpretation Principles* (Thomson Reuters, Sydney, 2014).

Doctrine of Precedent and Hierarchy of the Courts

J Carvan, *Understanding the Australian Legal System* (8th ed, Thomson Reuters, Sydney, 2022).

Legislation and Case Law

Australasian Legal Information Institute (AustLII): http://www.austlii.edu.au (decisions of Federal, State and Territory courts and tribunals; Commonwealth, State and Territory consolidated statutes).

Tutorial activities

1. What is a basic definition of "law"? See [1.20]. What distinguishes a "law" from a non-legal rule? Is it true to say that only "laws" have sanctions?
2. What are the six main functions of "law" in a liberal democratic society? Provide an example of each function. Rank in order of the importance that you attach to each function.
3. Examine the main principles underpinning a "rule of law" society (see [1.40], and the rule of law pyramid). Of the blocks in the pyramid, which would you "go to the barricades" to defend?
4. The *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* hearings exposed systemic fraud and misconduct by banks and insurance companies. One of the matters referred to in the Interim Report of the Royal Commission (released 26 September 2018) was "the lack of respect for the rule of law". Read the extract from the interim report (see [1.60]) and comment on what you think the Commissioner meant.
5. In what sense is a strong "rule of law" culture beneficial to commercial activity in a liberal democratic society?
6. What is the meaning of *terra nullius*? What factors led to the conclusion that the land in Australia was "nullius"? What was the consequence (under the common law) of that characterisation on the application of British law to the colony, particularly property law?
7. Read the *Mabo* extract (see [1.110]) carefully. What was the effect of the High Court's decision?

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8. The *Commonwealth of Australia Constitution Act 1900* (Imp) created both a "federation" and a "constitutional monarchy". Explain the basic structure of the federation and the concept of a constitutional monarchy.

10. Explain, with reference to the first three chapters of the Constitution, the doctrine of the separation of powers (see Figure 1.3). Of the three powers referred to in the Constitution, which must be clearly separate? Why?

11. Of the legislative powers, the Commonwealth has both exclusive powers (eg s 90) and concurrent or shared powers (s 51). What powers do the States have?

12. Section 51 of the *Constitution* lists the *concurrent* powers that are shared between the States and the Commonwealth. What happens if there is an inconsistency between a law made by the State Parliament and a law made by the Commonwealth Parliament?

13. How can the actual *words* of the Constitution be amended? See s 128. Provide an example. In what way can the *meaning* of the words be amended? Use *Love* and *Thoms* [1.220] as an example.

14. What is the executive? What is its more common name and who heads the Executive branch (in practice)?

15. What is the role of the Governor-General under the Constitution? What was the controversial decision taken by the Governor-General in 1975 that triggered the most serious constitutional crisis in Australia's history? If you would like to listen to a podcast detailing the events of 11 November 1975, go to https://www.abc.net.au/radio/programs/the-eleventh/.

16. Where does the Constitution place the judicial power? What is the highest court in the land and what is its dual role? Read the comments by Murray Gleeson, a former Chief Justice of the High Court, about the High Court remaining above the political fray (see [1.200]). Compare the appointment of High Court judges in Australia – see for example: https://www.abc.net.au/news/2020-10-28/new-high-court-judges-announced-ahead-of-justices-retirement/12789596 – with the nomination and confirmation of Amy Coney Barrett to the US Supreme Court – see for example: https://www.youtube.com/watch?v=ijqLfLr6gAs and https://www.axios.com/schumer-coney-barrett-senate-darkest-days-ea9baed0-0c81-4fab-8fd3-162a443d6556.html.

17. What are the two *primary* sources of law in Australia? Of the two, which is the "sovereign" or "supreme" law-maker? Can you suggest a reason for this?

18. How is a statute passed? Follow the path in Figure 1.5.

19. Why does a statute require interpretation? In your answer, refer to s 18(1) of the *Australian Consumer Law* (see Chapter 13) and identify three words or phrases that you believe may require interpretation by the courts.

20. What are the three approaches or rules used by the courts when interpreting a statute? What is the so-called modern approach? What is the main objective of the court when it interprets a statute? In your answer, refer to s 15AA of the *Acts Interpretation Act 1901* (Cth).

21. What are extrinsic materials and when can they be used to assist in the interpretation of a statute?

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22. What is delegated legislation? Why is it used? From where do delegated authorities get their power? What oversight, if any, does Parliament exercise over the laws passed by delegated authorities?

23. What are the three definitions of the phrase "common law"? Of the three, which is of most relevance in the context of this course?

24. What is equity law? Why did it emerge? Are there separate equity courts applying equitable principles today?

25. What is the doctrine of precedent? What are its main features? How does it work? Why are authorised law reports and a hierarchy of courts required for a common law system based on the doctrine of precedent to work properly?

26. What is the difference between a binding and a persuasive precedent? Provide an example of each.

27. Distinguish public and private law, substantive and procedural law, civil and criminal law and domestic and international law. Provide an example of each.

28. What is the standard of proof in a civil trial? How does it differ from the standard of proof in a criminal trial? What is the main reason for the difference?

29. Uber is an app-based on-demand car hire service. It uses a smartphone app to receive ride requests and then sends these trip requests to their drivers. It is a controversial service that has been involved in hundreds of separate court actions. Taxi drivers argue that Uber is really a taxi service and should have to comply with the same regulations as they do. Uber argues it is just providing a mechanism that connects people who would like to travel with people who are prepared to take them where they wish to go, for a fee. In Australia, at the time of writing, a settlement is being progressed with respect to Uber and the taxi industry: see https://www.mauriceblackburn.com.au/media-centre/media-statements/2024/uber-class-action-settlement-agreed-subject-to-approval.

    Assume that, in Victoria, Transport Victoria, the transport regulator, has prosecuted Uber under s 11 of the *Private Hire Vehicles Act 1998*.

    Private Hire Vehicles Act 1998

    11 Prohibition of taximeters

    (1) No vehicle to which a Private Hire Vehicle licence relates shall be equipped with a taximeter.

    (2) If such a vehicle is equipped with a taximeter, the owner of that vehicle is guilty of an offence and liable on summary conviction to a fine.

    (3) In this section "taximeter" means a device for calculating the fare to be charged in respect of any journey by reference to the distance travelled or time elapsed since the start of the journey (or a combination of both).

    Assume that the transport regulator claims that the Uber app is being used as a taximeter. The taximeter is a privilege afforded only to taxi drivers.

    Uber argues that while the smartphone using the driver's app may be essential to enable the calculation of fares, that does not make it a device "for" calculating fares and therefore does not breach the s 11 prohibition on taximeters.

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By applying the principles of statutory interpretation, how would you interpret s 11?

30. Consider s 9 from the *Voluntary Assisted Dying Act 2017* (Vic):

> 9 Eligibility criteria for access to voluntary assisted dying
>
> (1) For a person to be eligible for access to voluntary assisted dying –
>
> (a) the person must be aged 18 years or more; and
>
> (b) the person must –
>
> (i) be an Australian citizen or permanent resident; and
>
> (ii) be ordinarily resident in Victoria; and
>
> (iii) at the time of making a first request, have been ordinarily resident in Victoria for at least 12 months; and
>
> (c) the person must have decision-making capacity in relation to voluntary assisted dying; and
>
> (d) the person must be diagnosed with a disease, illness or medical condition that –
>
> (i) is incurable; and
>
> (ii) is advanced, progressive and will cause death; and
>
> (iii) is expected to cause death within weeks or months, not exceeding 6 months; and
>
> (iv) is causing suffering to the person that cannot be relieved in a manner that the person considers tolerable.

Consider the circumstances of Tony Nicholson in *Nicholson v DPP* (2012). In the words of the judge: "Tony Nicholson is now aged 58. He suffered a catastrophic stroke in June 2005. He is paralysed below the neck and unable to speak. He cannot move anything except for his head and eyes. ... In these circumstances Tony wants to be able to choose to end his life by voluntary euthanasia ... he wants to establish the right to die with dignity at a time of his choosing. Tony's circumstances are deeply moving...."

(a) Would Tony Nicholson be eligible for access to voluntary assisted dying under the Victorian legislation (assuming he qualified under s 9 (1)(b))? Explain.

(b) Would a person suffering from Alzheimer's disease be eligible for access to voluntary assisted dying under the Victorian legislation? What about a person with terminal cancer who is not expected to live more than a few weeks?

(c) In what sense, if any, does this legislation raise both ethical and legal issues?

31. Section 5 of the *Civic Spaces Act 2018* (Vic) provides,

"It is an offence to deface any public space in Victoria". The maximum penalty is $5,000.

In the Second Reading speech, the Minister for the Environment said "the reason why this legislation is important is because society is sick of idiots defacing our public places, especially our trains and buildings, with their foul pictures and meaningless and ugly graffiti. We want families to be able to come to the city and not be confronted by this rubbish". The Long Title says, "An Act to Promote Clean Public Places".

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Rosie, an artist with a social conscience, draws a large picture, using chalk, on the pavement outside Parliament depicting a homeless person under a bridge. She does the same drawing, using paint, on the toilet door of a public library. The caption on both, in her finest print, says "Make Homelessness History".

She is arrested and charged on summons with two breaches of s 5 of the Act. Please advise her of the likely outcome drawing on your understanding of the common law and statutory guides to statutory interpretation.

32. Section 314 of the *Road Offences Act 2018* (Vic) provides that "the use of a mobile phone whilst driving is an offence". In s 4 (the definition section), "use" is defined as "communicating with an electronic device such as a mobile phone, laptop computer or tablet in any way whatsoever". "Driving" is defined as "being in control of a vehicle whilst on the road". The Minister in her Second Reading speech said that the purpose of the legislation was to reduce the rate of motor accidents caused by the use of mobile phones: "They are potentially lethal in the hands of car drivers and this legislation is intended to do something about it".

In the following two cases, the defendants are prosecuted under s 314 in the Magistrates Court in Melbourne, Victoria.

- Anna had her phone in a cradle on the dashboard of her car and was checking Google Maps as she was driving.
- Charlie pulled over to the side of the road and was talking on his mobile phone with the engine off.

(a) What is the strongest argument you can make on behalf of Anna and Charlie? And what is the strongest argument you can make on behalf of the prosecutor in each case?

(b) Referring to the concepts of binding and persuasive precedents, what would be the effect on the Magistrate of earlier decisions on a similar set of facts in (i) the Supreme Court of Victoria and (ii) the Supreme Court of Queensland?

33. The Victorian Parliament passed the following *Public Order Act 2020* (Vic):

An Act to prohibit the wearing of uniforms that have political objectives or connotations and for the maintenance of public order in relation to public meetings, processions or marches:

Be it enacted

1. ...

2. Any person who shall wear any military or like uniform for a political purpose or who shall carry (whilst wearing a military uniform in a public place) any rifle, revolver, sword, knife or any other weapon whatsoever shall be guilty of an offence.

A group of well-groomed school cadets from Scots College are on their way to assemble for the annual March of Cadets through the CBD. They are all carrying unloaded guns. On their way, they are met by a large anti-war group of protesters, dressed in bizarre dove-like outfits (including white feathers).

The leading "doves" carry poles with flags on which are painted anti-war slogans. They form a barrier with the poles to prevent the cadets from passing. A fight breaks out and the

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police are called. Both sides are prosecuted under s 2 of the Act. Advise the leaders of both sides of the likely outcome, applying the rules of statutory interpretation.

34. Section 3 of the *Public Safety Act 2022* (WA) says "It is illegal for any person to use a firearm to threaten or intimidate another person". Catherine is charged under this statute after using a toy gun to threaten a shop assistant. She argues that a toy gun is not a firearm, and therefore, the statute does not apply. Advise of the likely outcome using each of the common law rules of statutory interpretation.

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PART 2: LAW OF CONTRACT

Chapter 2: Introduction to the Law of Contract

Chapter 3: Agreement: Offer and Acceptance

Chapter 4: Intention to Create Legal Relations

Chapter 5: Consideration, Promissory Estoppel and Formalities

Chapter 6: Contractual Capacity

Chapter 7: Genuine Consent

Chapter 8: Legality of Object

Chapter 9: Contents and Interpretation of the Contract

Chapter 10: Operation of the Contract

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Chapter 2

Introduction to the Law of Contract

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Introduction

[2.10] Contracts come in all shapes and sizes. Some involve vast and complex deals worth billions (think tunnels and freeways); others are trivial (think coffee and muffins); and yet others fall in between (think cars, university fees and smart phones). Some contracts last for years (think mortgages); others are over in a flash (think Kit Kats). The content varies just as much: some contracts deal with a specific area and are often regulated by statute (credit contracts, sales of goods, leases, mortgages, consumer contracts, some employment contracts) but most do not, in which case the "general principles" of contract law apply. In this part, we are concerned with the "general principles" of contract law that usually have their roots in the common law.

In the face of this variety of contracts, what can we say about these "general principles"? Are there principles or elements that are common to them all? There have been many attempts to define what a contract is (or is not), but there is a general recognition that Professor Treitel's attempt is a satisfactory starting point:

> A contract is an agreement giving rise to obligations which are enforced or recognised by law.[1]

Similar definitions usually contain words such as "provisional" because, as we shall see, there are significant qualifications that flesh out the circumstances in which a promise will be legally binding. Although the precise words may differ, the essence of each definition is basically the same: there must be a promise or promises made (usually) between two or more parties that create rights and obligations that are enforceable in the courts. The law is (usually) agnostic about what

1 E Peel, *Treitel on Contract* (15th ed, Sweet & Maxwell, London, 2020).

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those rights and obligations are, but what it does is set out the boundaries or parameters within which the agreement must fall if it is to be enforceable in the courts. These boundaries relate to the entire arc of a contract's life – from formation through to performance and ultimately termination of the contract.

So it is important to appreciate the judicial approach to resolving a dispute that comes before the courts (because it is also the path we follow in our study of the law of contract):

1. In the first place, the court may have to determine whether there is a contractual agreement at all. (Have the parties entered into a legally enforceable contract?) This may be self-evident because of the nature of the agreement – in writing, signed by the parties – but that is not always the case.
2. If there is an agreement, the court must then examine the terms of the agreement to determine what the rights and obligations of the parties are.
3. If there is a breach of a contractual duty, the court must determine what remedies, if any, are appropriate.

Intention

[2.20] Before proceeding it is necessary to refer to an important preliminary matter. What is the approach of the courts when seeking to determine the *intention of the parties* in relation to contracting? In *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2004] HCA 55, the High Court of Australia re-affirmed that "the *objective approach to determining the existence, content and interpretation* of a contract is a deeply entrenched feature of the common law of contract". Without it, security and sanctity of contract would be seriously undermined. The relevant question is "what a reasonable person would have taken the parties to have agreed by reason of the parties' words and conduct in light of the surrounding circumstances".[2] Lord Steyn spoke about this principle of objectivity in a law review article:

> Our law is generally based on an objective theory of contract. This involves adopting an external standard given life by using the concept of the reasonable man. The commercial advantage of (this) approach is that it promotes certainty and predictability in the resolution of contractual disputes … it is not unfair to impute to contracting parties the intention that … a neutral judge should decide the case applying an objective standard of reasonableness.[3]

This focus on an objective theory in relation to determining the parties' intention to some extent flies in the face of the classical "will theory" of contract law. This is the 19th century idea that *contractual rights and obligations are voluntarily assumed by the parties to create their own private law* (freedom of contract) *and the function of the court was to discover what the parties have agreed and give effect to it* (sanctity of contract). Will theory can now be seen to be more honoured in the breach than the observance: the law is more concerned with *objective* reality than the *subjective* intentions of the parties.[4]

2 *Realestate.com.au Pty Ltd v Hardingham* [2022] HCA 39.
3 Lord Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 *Law Quarterly Review* 433.
4 Further, as we shall see, the idea that the parties are free to agree on any terms they choose has been qualified by the courts and parliaments imposing standards of conduct that apply to an agreement *regardless of the intent of the parties*.

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Functions of the law of contract

[2.30] The basic functions of the law of contract are:

- *To promote commercial certainty and facilitate planning* – there is an understanding that contractual promises must be honoured or, if not, the innocent party will be compensated. This allows parties to more confidently plan for the future, knowing what is expected of them and what they can expect of the other party.
- *To allocate risk* – this is the most fundamental function of serious commercial contracts. The risks of things changing (eg, regarding the price of raw materials or the supply of goods or services or any other number of factors that might change from the date of the contract to its conclusion) are allocated by the parties when they enter the contract. Thereafter the contract must (generally) be performed as promised and the fact that buyers or sellers have "remorse" (because, for instance, the price has risen or fallen) is, on its face, irrelevant.
- *To provide for a formal dispute-resolution process* – that includes the courts – if and when required. While most business disputes do not make it to the courts, these disputes are settled in the "shadow of the law", with the law acting as a default mechanism – albeit a slow, uncertain and expensive one – on the rare occasions that non-legal mechanisms fail to work.

Example 1: Risk allocation in an "off-the-plan" contract

Mr K, a property tycoon, has resorted to Supreme Court action to claw back millions of dollars from investors who failed to pay up for luxury apartments … For some customers who bought the Capitol Grand apartments off the plan after its launch in 2015 the (property) bubble has burst. Mr K filed Supreme Court writs against 16 people who were not able, or refused, to settle on time …

Some buyers who paid high prices for units in the early stages of development were stung on settlement when property experts valued the properties well below the agreed sale price. For example, apartment buyer Mr T (who failed to settle on the unit) agreed to buy a unit for $1.295 million in November 2017. Similar-sized apartments are on the market for between $999,000 and $1.18 million.

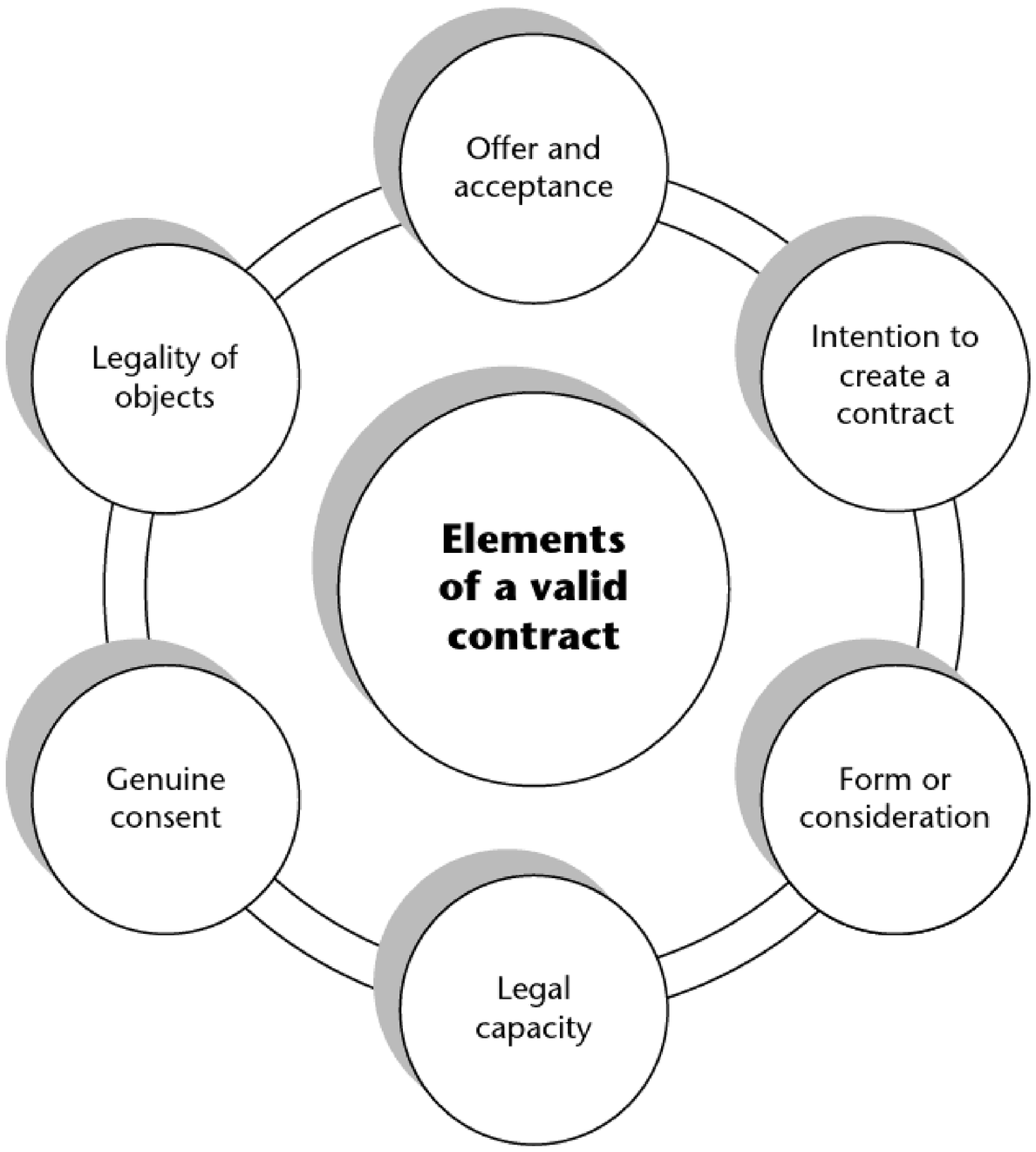
Example 2: Risk allocation in building and construction contracts

The recent difficulties, including insolvency issues, suffered by some of the biggest building and construction companies are, in part, the result of the most common form of domestic building contract – the "fixed price" lump sum contractual agreement. The parties agree on a fixed amount that covers the labour and materials required to complete the total build (or whatever the scope of the work). In so doing, they have *allocated the risk* of circumstances changing (as has occurred in the COVID-19 environment concerning material shortages and resulting increases in supplier prices caused directly by COVID-19 and the lockdowns etc that followed). It may be that the parties, for pragmatic or ethical reasons, agree on a variation of the contract terms (like the price or completion date) but, on its face, the contract the parties signed allocated the risk and, in theory at least, the terms are enforceable.

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Essential elements of a contract

Figure 2.1 : Elements of a valid contract



[2.40] For there to be a contract, certain essential elements must be present. In the absence of one or more of these elements, the agreement between the parties will not constitute a contract and will not be enforced by the courts.

The essential elements of a contract are as follows:

1. an offer by one party and its acceptance by the other indicating the parties have concluded an agreement;
2. the intention of the parties to create legal relations;
3. valuable consideration (unless the promise is made by deed);
4. legal capacity of the parties to act;
5. genuine consent by the parties; and
6. legality of the object of the agreement.

The first essential element is that there must be an offer made by one party followed by an acceptance of that offer by the other party.

Not all agreements are enforceable by law. For example, a social agreement (say, where A agrees with B to go to the movies on Saturday night) does not give rise to contractual rights since no reasonable person would say that the parties intended their agreement to be legally binding (ie, enforceable in the courts if necessary). Hence, the requirement that the *parties must intend their agreement to create legal relations*.

A further essential element in the formation of a contract is that some *value* must have been given in exchange for the other party's promise. That is, in a simple contract, the agreement must be supported by

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consideration. This requirement means that the law will not enforce a promise for which nothing is given or promised in return. For example, a serious promise, even one in writing, by A to give $5,000 to B is not legally enforceable because B has not provided anything or suffered any detriment in return. An exception is where the promise is made under seal, that is, contained in a formal deed.

The parties to a contract must have the *legal capacity* to enter into a contract. Our primary concern here is with the capacity of minors to enter into contracts.

To be enforceable, the parties must have freely and genuinely consented to the agreement. Factors affecting genuine consent such as mistake, misrepresentation, duress and undue influence may affect the enforceability of the agreement.

And finally, the contract must be *legal*. At common law, if a contract is to do something prohibited by law (eg, to buy and sell black market tobacco or vapes) or to do something legal (eg, to buy a tobacco shop) but where the object (eg, using it as a place to buy and sell illegal tobacco or vapes) or agreed method of performance (eg, laundering money from the sale of illegal tobacco or vapes) is prohibited by statute or is against public policy, the contract is void.

Each of these essential elements of a contract is discussed in further detail in the following chapters.

Classification of contracts

[2.50] There are several ways in which contracts can be classified.

Is it a simple contract or a contract under seal?

[2.60] All contracts other than contracts under seal (deeds) are called "simple contracts". In general, a simple contract may be oral, may be wholly or partly in writing or may be implied by the conduct of the parties. There are, generally speaking, no legal requirements regarding the form a simple contract can take. By contrast, a contract under seal (or deed) must take a certain form or it is invalid. The current requirements are that it must be wholly in writing, it must be signed by the person(s) executing the deed and must be witnessed, and it must be delivered. Delivery is generally achieved if the parties to it intend it to be immediately binding. The major difference between a deed and a simple contract is that there is no requirement that consideration be provided. Contracts under seal are discussed in greater detail at [5.220].

Is the contract express or implied?

[2.70] Contracts are "express" when the parties set out in writing or orally all, or most, of the terms of their contract. There will however usually be terms that are implied into the express contract. An implied contract is one in which the terms of the contract are inferred from the conduct of the parties and the surrounding circumstances. An example of this type of contract is when you hail and enter a taxi. By this act, the law implies that you promise to pay the fare to your destination and the taxi driver impliedly agrees to transport you.

Is the agreement bilateral or unilateral?

[2.80] Most contracts are formed by an exchange of promises. In the typical scenarios of buying and selling of goods and services, including consumer items, education and health, construction and transport (and many others), one party promises to provide the goods or services (for example) and the other promises to receive and pay for them. Such a contract is called a *bilateral* contract. At the time of formation of the contract, the obligations of both parties are unperformed ("executory").

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A *unilateral* contract, on the other hand, is one in which an offer is made to an offeree who accepts the offer by *performing an act* and the performing of that act is all that the offeree is required to do. The promise must be made *in return for* the doing of the act: there is a difference between a person saying "I promise you $1000 *on* your arrival in Melbourne" and one that says "I will pay you $1000 *if* you go to Melbourne".

The term "unilateral" may be confusing because there are, in fact, two parties – there must always be at least two parties to an agreement – but, because the offeree has performed ("executed") the act required, only one of them, the offeror, is under any contractual obligation at the time of formation. The so-called "dog reward" cases are simple examples of unilateral contracts. We will consider them in more detail when we address the most famous unilateral contract case of them all: *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 (at [3.40]).

To what extent, if any, is the agreement enforceable?

[2.90] A *valid* contract is one in which all the essential elements are present. As a result, it is enforceable against both parties. The usual remedy for breach of contract is an award of damages. Sometimes an equitable remedy such as specific performance may be available.

If a contract is merely *voidable*, it will be effective unless and until it is set aside ("rescinded") by the innocent party who, because of a defect in the way the agreement was made (such as fraud or mistake or duress or unconscionable conduct), has the power to rescind. Unless and until that party elects to rescind the contract, the contract is valid and effective and, therefore, until that time, it can transfer property and create other contractual rights and obligations.

A *void* contract is one which, as far as the law is concerned, never existed at all. It is of no legal effect between the parties and thus cannot create legal rights or obligations. For example, where the contract is illegal, either as formed or performed, such as a contract to commit a crime, the contract would be void and treated as if it never existed.

An *unenforceable* contract is one which is on its face a valid contract but which by reason of some technical defect is not capable of being enforced by legal action by one or both of the parties. For example, an oral contract which is required by statute to be "in writing" or at least "evidenced in writing" is not enforceable.

Further reading for Chapters 2–12

JW Carter, *Contract Law in Australia* (8th ed, JW Carter Publishing, Sydney, 2023).

S Graw, *An Introduction to the Law of Contract* (11th ed, Thomson Reuters, Sydney, 2023).

A Robertson and J Paterson, *Principles of Contract Law* (6th ed, Thomson Reuters, Sydney, 2020).

H Beale, B Fauvarque-Cosson, J Rutgers and S Vogenauer, *Cases, Materials and Text on Contract Law* (3rd ed, Hart, Oxford, 2019).

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Tutorial activities

1. Which of the main functions of the law of contract do you consider the most important?
2. Explain how the experience of purchasers of units at [2.30] illustrates the "risk allocation" function of contracts.
3. The twin foundational concepts on which the law of contract, as it evolved in the 19th century, was based were freedom and sanctity on contract. Explain these concepts. To what extent are they relevant in the 21st century?
4. What is the basic definition of a contract and what are the essential elements of a contract?
5. In determining whether the parties have made an agreement, the High Court has emphasised that the parties' intentions are assessed objectively (see [2.20]).

   What does this mean? What is the difference between subjective and objective intention and, considering contracts are about agreements made between parties, why do the courts generally disregard evidence of subjective intentions?
6. Explain the difference between a unilateral and a bilateral contract. What is it that is "unilateral" about the former?

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Chapter 3

Agreement: Offer and Acceptance

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Introduction

[3.10] This chapter is concerned with the circumstances in which parties will be regarded by the law as having made an agreement. Without an agreement, there can be no contract. An offer and acceptance analysis is the traditional tool used to establish whether an agreement has been made. This so-called classical analysis of contract formation works well enough in most normal consumer transactions where there is a clear offer and a clear and immediate acceptance with delivery shortly thereafter. There may be some negotiation over price or quantity, but generally, the agreement is made orally and with minimal fuss and no paperwork (except perhaps a receipt).

However, where there are complex or protracted negotiations or where the negotiations are conducted and agreements are made online, the classical model cannot be so easily applied and, in the event of a dispute as to whether an agreement has been made, a court may adopt a more sophisticated, nuanced approach.

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But in many instances – like auction sales, tenders for the supply of goods, supermarket purchases, online transactions and boarding buses and trains – the courts, having adopted a rather rigid and technical set of rules around contract formation, often squeeze the facts, a little uncomfortably, into the offer and acceptance pigeonholes. For example, a court may examine the conduct of the parties to determine whether the parties acted in a way that indicates that an agreement had been made.

Or, if the parties have had prior dealings with one another, a court may look at how those agreements have been made in the past. Or, if negotiations were conducted by a combination of phone conversations and emails, a court may ask whether, on all the evidence, it is reasonable to say that there was an offer and acceptance.

Further, in relation to many large commercial agreements – infrastructure contracts, resource contracts, construction contracts and so on – where the contractual documents containing the terms are drafted by teams of lawyers on all sides, it is not relevant who made the offer and who accepted it. Instead, there is (often) a very thick contract simultaneously signed and exchanged by each party that comes into effect on a particular date. And, in such contracts, the agreement is a moveable feast – many of the major terms, especially regarding cost and completion date, can be varied depending on the circumstances.

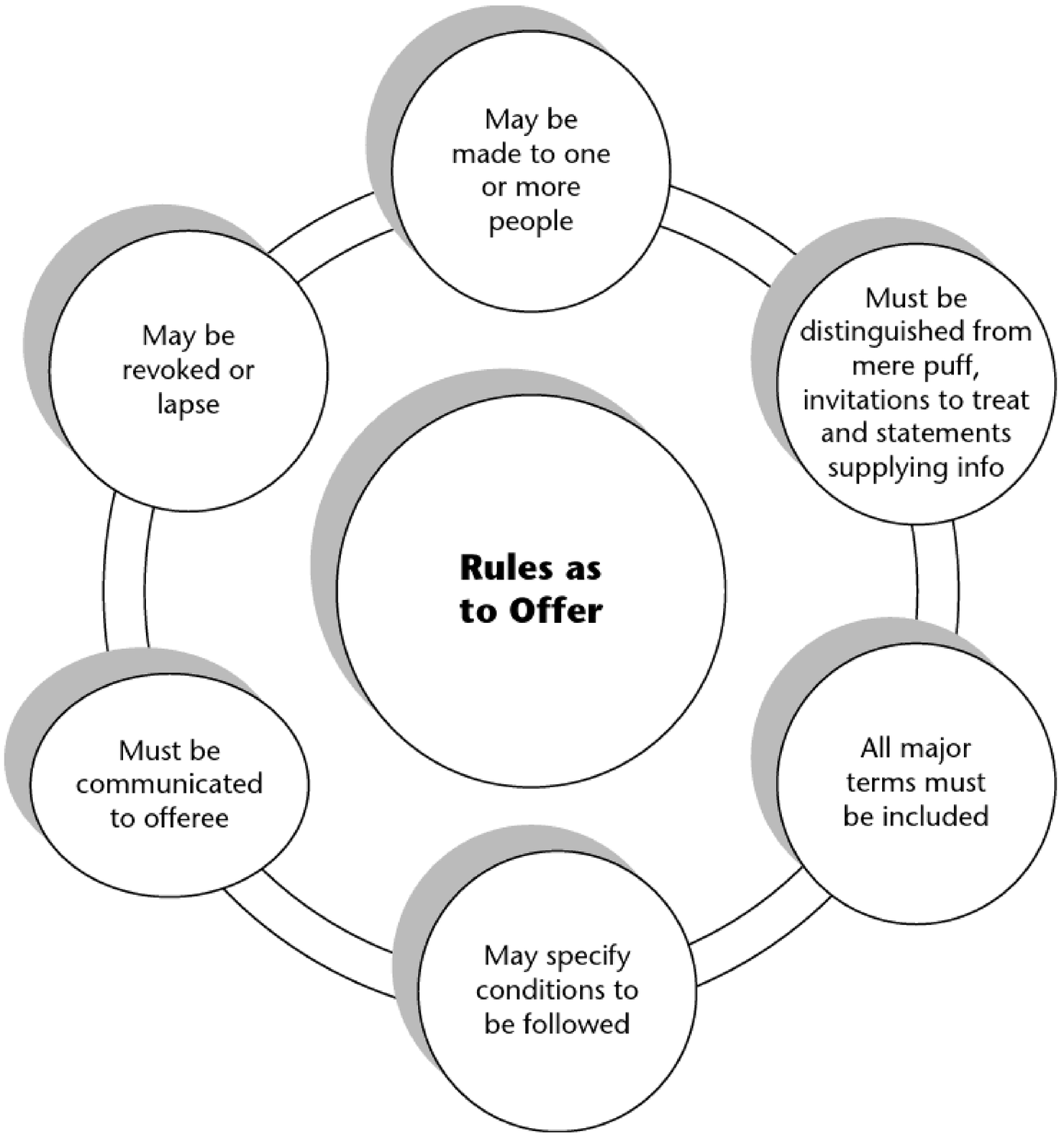
Finally, there are many contracts that are formed where major terms are not agreed to before the agreement is made. For example, contracts with professional people – for example, medical professionals – often do not include the price of the service before it is done. There is no doubt the parties have made an agreement – though the traditional offer and acceptance analysis may not be appropriate – and there is no doubt a court would "fill the gap" (ie imply a term) in the event of a dispute about pricing, for example.

Notwithstanding that in today's sophisticated marketplace there will be many agreements that do not easily fit into the classical binary offer/acceptance model of contract, it remains the dominant analytical tool for determining whether the parties have reached agreement. It is therefore our focus in this chapter.

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Offer

Figure 3.1 : Rules as to offer



[3.20] An offer is an expression by one party of a willingness to enter a contract, on specified terms, that, if accepted by the other party, results in a legally binding contract. An offer may be express – in writing or oral – or it may be implied from the offeror's conduct.

It is important to appreciate that in this, as in so many other contractual matters, the courts, recognising they cannot possibly know what is in the minds of the parties, apply *an objective test*, asking what *a reasonable person* would say about the communication. So, in determining if a communication was an offer, the question is clear – would a reasonable person believe the communication was an offer that would result in a binding agreement if it were accepted?

The following cases demonstrate that that the courts have distinguished offers from other types of communications.

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Offers distinguished from mere puffs, invitations to treat and statements merely supplying information

Offers and mere puffs

[3.30] The advertising and marketing world is replete with "puffery": statements containing such exaggerated claims and assertions about products or services or property that no reasonable person would take them seriously. The well-known advertising slogan *Red Bull Gives You Wings* might well be considered the perfect piece of puffery. It is difficult to imagine any consumer believing the statement literally and, as the footnoted advertisement demonstrates, the advertisements often involved ridiculous outcomes,[1] all linked to the use of Red Bull. Nonetheless, litigation about these advertisements occurred (in the United States).[2] Under Australian contract law, since puffs would not be taken seriously, puffs are not regarded as offers, in the legal sense, and have no contractual significance. Of course, there may be borderline cases, and the following case has made its way into contract law folk history as an example of a case where an advertisement was regarded as an offer and not an invitation to treat.

Carlill v Carbolic Smoke Ball Co

[3.40] *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256. The flu epidemic of 1891 was responsible for many deaths in Britain and no shortage of medical quackery followed in its wake. In an advertisement published in an English newspaper, the Carbolic Smoke Ball Company, manufacturers of the "carbolic smoke ball", claimed it would prevent the onset of influenza and other maladies and offered to pay £100 to any customer who, despite using the ball as directed, caught influenza. The company deposited £1,000 with its bankers, "showing our sincerity in the matter". Mrs Louisa Carlill saw the advertisement, bought a smoke ball and used it as directed. She nevertheless contracted influenza. When she requested that the company pay her the £100, it refused and she sued the company for breach of contract. The company denied liability. The case involved a number of legal issues – the first was whether the advertisement constituted an offer or was "mere puffery".

The Court held that the advertisement was more than a "mere puff". The company made a serious offer to the whole world that could be accepted by anyone coming forward and satisfying the conditions. The Court relied on the statement in the advertisement, "£1,000 is deposited with the Alliance Bank showing our sincerity in the matter", as evidence that the company was not engaging in mere puffery. Lindley LJ said:

> Now for what was that money deposited or that statement made except to negative the suggestion that this was a mere puff and meant nothing at all? The deposit is called in aid by the advertiser as proof of his sincerity in the matter – that is the sincerity of his promise to pay this £100 in the event which he has specified. I say

1 https://www.youtube.com/watch?v=K31dg86OmuM.

2 In the United States, consumers sued Red Bull when they did not "grow wings". The lead complainant in the class action argued that the advertising campaign as a whole (not just the "grow wings" statement) represented that the special ingredients in Red Bull made it a better energy source, worthy of being more expensive than a cup of coffee. In fact, there was no scientific evidence base to support the claim. As Red Bull settled the class action for $13 million, those allegations remain untested, but the idea that Red Bull consumers succeeded based on their failure to "grow wings" lives on – along with the familiar refrain "only in the United States".

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this for the purpose of giving point to the observation that we are not inferring a promise; there is the promise, as plain as words can make it. Then it is contended that it is not binding. In the first place, it is said that it is not made with anybody in particular. Now that point is common to the words of this advertisement and to the words of all other advertisements offering rewards. They are offers to anybody who performs the conditions named in the advertisement and anybody who does perform the condition accepts the offer. In point of law this advertisement is an offer to pay £100 to anybody who will perform these conditions, and the performance of these conditions is the acceptance of the offer.

Figure 3.2 : Carbolic Smoke Ball advertisement



[3.50] Compare *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 with the following case *from* the United States. After watching the YouTube reference and/or watching the Netflix documentary, we may very well also say "*only* in the United States".

Leonard v PepsiCo

[3.60] *Leonard v PepsiCo* 88 F Supp 2d 116 (1999). PepsiCo ran an advertising campaign in which consumers were encouraged to collect "Pepsi Points" from specially marked packages of Pepsi soft drink. A television commercial for "Pepsi Stuff" showed a series of products with the

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Pepsi logo and the number of Pepsi Points that were required to purchase them. (It was possible to purchase additional Pepsi Points for 10 cents each, if a person wanted an item for which they had insufficient points.) In the final scene from the advertisement, a young boy is seen flying a Harrier fighter jet to school. After he parked the jet on the school playground, he emerged with a Pepsi in hand, and the words "HARRIER FIGHTER 7,000,000 PEPSI POINTS" appeared on the screen.

The commercial, which jokingly suggested that the jet was available for 7,000,000 Pepsi Points, caught the attention of John Leonard, a 21-year-old business student. Leonard noticed that additional Pepsi Points could be purchased for 10 cents, and he convinced five investors to lend him a total of $700,000. Leonard sent a check for $700,008.50 (including $10 for shipping and handling) and 15 labels, per promotion rules. Although the Harrier jet option was not listed on the claim form as an option, Leonard manually wrote it on (and ticked it). Pepsi refused the claim, referring to the promotion of the Harrier jet in the commercial as "fanciful", and stated that its intention was to create a "humorous and entertaining ad". Leonard sought specific performance of the unilateral contract that he alleged had been formed when he performed his obligations.

The Court decided that because of the comical or playful nature of the commercial, a reasonable person would not conclude that PepsiCo was offering a Harrier jet to anyone who collected 7,000,000 Pepsi Points. It was a mere puff and could not be accepted by Leonard and his syndicate. The court stated that:

> In light of the Harrier Jet's well-documented function in attacking and destroying surface and air targets, armed reconnaissance and air interdiction, and offensive and defensive anti-aircraft warfare, depiction of such a jet as a way to get to school in the morning is clearly not serious even if, as plaintiff contends, the jet is capable of being acquired 'in a form that eliminates [its] potential for military use.'[3]

Offers and invitations to treat

[3.70] It is important to also distinguish an "offer" from an "invitation to treat". An offer, if accepted, may give rise to a contract. An invitation to treat does not; it is essentially an indication that a person is prepared to enter into or continue negotiations that may or may not result in a contract. Often what appears to be to be an offer is not, because the "offeror" does not expressly or impliedly indicate that a contract will result upon a valid acceptance.

In the following case, it was important for the plaintiff to try to prove that the Council's letter constituted an offer that he duly accepted, as otherwise there could be no contract.

3 To view the original advertisement, see https://www.youtube.com/watch?v=U_n5SNrMaL8. Note also that in 2022, a fascinating documentary called *Pepsi, Where's My Jet?* was released on Netflix. That documentary notes that in the aftermath of the dispute, Pepsi continued to air the commercial, but it updated the cost of the Harrier jet to 700 million Pepsi Points and added a clarifying "Just Kidding" disclaimer. It also notes the Pentagon stated that the Harrier jet would not be sold to civilians without "demilitarization", which, in the case of the Harrier, would have included stripping it of its ability to land and take off vertically.

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Gibson v Manchester City Council

[3.80] *Gibson v Manchester City Council* [1979] 1 All ER 972. Manchester City Council adopted a policy that allowed its housing tenants to purchase their flats. Gibson, one of the tenants, was sent a letter in which the Council said it "may be prepared to sell" him the flat for a particular price and outlining other terms and conditions. It went on, "If you would like to make a formal application to buy your Council house please complete the enclosed application form and return it." Gibson completed an application form, but before formal contracts were signed, the Council's policy changed and it only proceeded with those contracts that had already been executed. Gibson argued that the Council's letter was an offer and his response was an acceptance of that offer. By contrast, the Council argued that its letter was an invitation to treat and that Gibson's response was an offer that had not been accepted by the Council.

The House of Lords decided that there was no agreement. The Council's letter was an invitation to treat, not an offer. Lord Diplock said:

> … the words (of the letter) … make it quite impossible to construe this letter as a contractual offer capable of being converted into a legally enforceable open contract for the sale of land by Mr Gibson's written acceptance of it. The words "may be prepared to sell" are fatal to this; so is the invitation … "to make formal application to buy" on the enclosed application. It is … a letter setting out the financial terms on which it may be the council would be prepared to consider a sale … in due course.

[3.90] Window displays, catalogues, circulars and the like are generally regarded as invitations to treat and not offers. *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* and *Partridge v Crittenden* are unusual in the sense that they are in fact *criminal* prosecutions, where the guilt of the defendant depended on the answer to a basic *contractual* question – had the defendant made an offer to sell pharmaceuticals or wild birds, respectively? In both cases, the answer was that no offer had been made.

Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd

[3.100] *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1952] 2 QB 795. Boots Cash Chemists opened the first large self-service pharmacy in England. Pharmaceutical supplies, including medicines and pharmaceutical drugs, were displayed on the shelves for customers to select and take to the cash register where a qualified pharmacist was always in attendance near the cash registers. The Pharmaceutical Society objected to this new method of retailing pharmaceuticals and attempted to close down the self-service part of the business by having Boots prosecuted under the *Pharmacy Poisons Act 1933* (UK). The Act required prescribed drugs to be "sold" under the supervision of a pharmacist. The Society argued that an offer was made when the chemist placed the drugs on the shelves and the offer was accepted and a contract was made when the customer placed the drugs in their shopping basket. If a sales agreement was made in this way, it would have breached the Act because the sale would not have been "supervised" as required. Boots argued that its placing of the goods on the shelf was an invitation to treat, and the customer made the "offer" by taking it to the cashier who "accepted" the offer under the watchful gaze of a registered pharmacist.

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The Court accepted Boots' argument:

> … the mere fact that a customer picks up a bottle of medicine from the shelves … does not amount to an acceptance of an offer to sell. It is an offer by the customer to buy and there is no sale effected until the buyer's offer to buy is accepted … the sale takes place under the supervision of the pharmacist … it would be wrong to say that the shopkeeper is making an offer to sell every article in the shop to any person who might come in and that that person can insist on buying any article by saying "I accept your offer". I agree with the illustration put forward during the case of a person who might go into a shop where books are displayed … There is no contract by the shopkeeper to sell until the customer has taken the book to the shopkeeper … and said "I want to buy this book" and the shopkeeper says "Yes". That would not prevent the shopkeeper, seeing the book picked up, saying: "I am sorry I cannot let you have that book: it is the only copy I have got and I have already promised it to another customer".

Partridge v Crittenden

[3.110] *Partridge v Crittenden* [1968] 2 All ER 421. Crittenden advertised a number of Bramblefinch cocks and hens (birds) at 25/- for each. Under the *Protection of Birds Act 1954* (UK), it was a criminal offence "to offer for sale" any wild live bird. The RSPCA brought a prosecution against him for breach of the Act. The issue was whether the advertisement constituted an "offer of sale" (if so, the defendant was guilty) or an "invitation to treat" (if so, he was not guilty). At trial, he was convicted of making an offer to sell.

On appeal, the Court decided that the advertisement was, in fact, an invitation to treat. The Court was persuaded to this view because the advertisement had appeared in the "classified advertisements" section of a magazine and there was no specific mention of there being an "offer for sale". As a matter of statutory interpretation, it is interesting to observe that the Court ignored the apparently obvious intention of the Parliament which was to ban the trafficking of wild live birds in the United Kingdom. Instead, it gave the phrase "offer for sale" its limited *contractual* meaning – that is, that an advertisement is an invitation to treat, not an offer for sale – and acquitted Crittenden.[4]

[3.120] An advertisement may be regarded as an offer if it is sufficiently definite in its terms (eg in relation to quantity, quality and price) and is communicated in such a way that a reasonable person would say that the advertiser intends to enter into a contract if the response from the person receiving the communication is positive. For example, an advertisement that says that "the first 50 people through the doors on Boxing Day will receive a Samsung TV at half price" is a unilateral offer that is "accepted" by the first 50 people who come through the doors on 26 December (perhaps as confirmed by CCTV footage or AI interventions).

4 If the case were heard today, 50 years later and with many David Attenborough documentaries behind us, it is likely that the purposive approach to statutory interpretation would be adopted (asking what was the purpose of the legislation?) and Crittenden would be convicted. Alternatively, Parliament could amend the legislation to define an "offer to sell" as including "advertising or soliciting for sale …".

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Offers and the mere supply of information

[3.125] For a communication to be considered an offer, there must be a firm promise to do or not do something. No firm promise – no offer. So, if a person makes a statement that is only intended to supply information, from which a contract may or may not result, that statement is not an offer and therefore cannot be accepted by the other person.

Harvey v Facey

[3.127] *Harvey v Facey* [1893] AC 552. Harvey sent a telegram to Facey stating, "Will you sell us Bumper Hall Pen? Telegraph lowest cash price." Bumper Hall Pen was a property. Facey replied via telegram, "Lowest price for Bumper Hall Pen £900." Harvey then sent another telegram agreeing to buy the property for £900. Facey did not respond further and did not agree to sell the property. The issue was whether Facey's telegram quoting the lowest price constituted an offer to sell the property, or merely a statement supplying information.

The Privy Council decided there was no evidence of intent on Facey's part to be bound by a contract simply by stating the price. Facey's telegram was merely a statement of the minimum price he would accept *if* he decided to sell the property. It was not an offer.

The effect of the Australian Consumer Law

[3.130] It should be noted that cases such as *Carlill* (see [3.40]), *Red Bull* (see [3.30]) and the Samsung TV example (see [3.120]) would now likely be decided under statutory consumer law rather than the law of contract. Indeed, it is increasingly important that parties who are negotiating contracts or advertising goods or services are aware of the broad reach of the misleading or deceptive conduct provisions of the *Australian Consumer Law*, contained in Sch 2 of the *Competition and Consumer Act 2010* (Cth). The effect of the legislation is that a representation that may have been regarded as mere puffery, an invitation to treat or as part of non-binding pre-contractual negotiations at common law may now be considered to breach the statute. We will examine this part of the law in detail in Chapter 13.

Auction sales

[3.140] An auction is a sale conducted in an environment where bidders compete against each other to purchase goods or property. The value of the goods or property varies from the very modest to quite immodest.[5] The process remains the same: the bidder who offers the highest bid is (normally) the successful buyer. An auction can be performed either by the seller/owner or through an agent/auctioneer (who is generally the agent of the seller). Bidders may be present or may bid by phone or via the Internet. When the auctioneer calls for bids, this is an *invitation to treat*. When bidders communicate their bids, these are *offers*. If or when the seller/auctioneer "knocks down" the property to the successful bidder, this is the *acceptance*. In this way, a binding contract is created. It is not unusual for the seller to set a reserve (or minimum) price in advance. In such a case, the owner reserves the right not to sell the property and may withdraw the property from sale at any time prior to acceptance or possibly – it is not a point that has

5 As an example of the latter, see footage of the auction of Leonardo Da Vinci's Salvator Mundi: https://youtu.be/3ork mMlSpmI.

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been settled by a court – before the reserve has been reached. If that is the case, once the reserve has been reached, the bidder is in the same position as the bidder at an auction without reserve (see [3.160]).

Harris v Nickerson

[3.150] *Harris v Nickerson* (1872–1873) LR 8 QB 286. The defendant advertised that an auction of certain goods would take place at a stated time and place. The plaintiff travelled to the auction only to find that items that he was interested in had been withdrawn. He claimed compensation for breach of contract, arguing that the advertisement constituted an offer, and his travelling to the auction was an acceptance by conduct.

The Court held that the advertisement was not an offer: it was merely a declaration of intention or an invitation to treat.

[3.160] Auctions "without reserve" raise interesting questions. An auction without reserve is a type of auction in which the item or property being sold is offered without any minimum bid requirement or reserve price. Applying the conventional auction analysis, the auctioneer could reject a bidder's offer, even if it were the highest bid, where, for instance, the seller thought that the bid was too low or the bidder undesirable. However, as the following case shows, in the case of an auction held "without reserve", the auctioneer may be said to have themselves made an implied promise[6] to sell to the highest bidder.

Barry v Davies

[3.170] *Barry v Davies* [2000] 1 WLR 1962. Davies put his two unused engine analyser machines up for auction without a reserve price. Barry bid £200 for each machine, but the auctioneer refused to accept the bids and passed the machines in, selling them privately for £750 each. Barry then sued the auctioneer arguing that as the auction was without reserve the auctioneer was bound to accept the highest bid.

The Court agreed. Turning the usual analysis on its head, it held that Davies had made an offer (either at the time the auction was advertised as "without reserve" or when the machines were actually put up for sale) that Barry accepted by making the highest bid. He was awarded £27,600 in damages (ie the cost of buying the machines (£28,000) minus his bid (£400)). It is likely that, in Australia, the auctioneer/seller may be similarly liable. Note that the contract in this case was between the buyer and the auctioneer: the effect of the auctioneer's action was to prevent a contract between the buyer and seller coming into existence.

While an auctioneer may generally withdraw a lot from auction at any time *before* a reserve price has been reached, there is a view that the auctioneer cannot do this once the reserve price has been reached (putting the auctioneer in the same position they would be in where the auction is held without reserve).[7]

6 The implied promise may also be said to be a *collateral warranty*. See [9.250].

7 The auctioneer/seller could mitigate their risk by including in the conditions of sale a specification that "the auctioneer is not obliged to accept any or the highest bid".

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Online auction sales

[3.180] Auctions conducted online, such as on eBay, raise interesting questions about the process of contract formation. So, too, does Internet shopping in general. In *Smythe v Thomas*, the seller auctioned an aircraft with what was effectively a collateral promise to sell to the highest bidder once the bid was accepted. In this sense, in an online auction, the *listing* constitutes an offer, not merely an invitation to treat.

Smythe v Thomas

[3.190] *Smythe v Thomas* [2007] NSWSC 844. Thomas listed a Wirraway aircraft on eBay with an effective disclosed reserve of $150,000. Smythe made a bid of $150,000 in accordance with eBay's rules and was the highest bidder. Both parties received a notification that Smythe had won the "auction". Thomas, however, refused to complete the transaction, arguing that no contract had been made between Smythe and himself. He argued there were only contracts between eBay and the buyer, and eBay and the seller.

The Court decided that when Thomas listed the plane on eBay he agreed to be bound by eBay's terms and conditions, one of which was that Thomas was obliged to enter into a contract with the highest bidder.

Tenders

[3.200] An advertisement calling for tenders is usually regarded as an invitation to treat and not an offer. The tender process is often used by governments and councils to, for example, provide services, like hard rubbish collection for a local council or to build freeways or tunnels or other infrastructure. A party submitting a tender makes the offer, and there is no contract until the person who called for tenders accepts the tender. Further, unless it says otherwise in the original tender document, the person calling for tenders is not obliged to accept the lowest (or any) tender. However, as the following case demonstrates, a particular call for tenders can amount to an offer to consider tenders that are delivered on time or meet other threshold criteria, and a failure to comply may be a breach of a collateral warranty (promise) to do so.

Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council

[3.205] *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195. The Council invited tenders for a concession to operate pleasure flights from Blackpool Airport. The invitation specified that tenders must be submitted by a certain deadline (but did not say that the Council was bound to examine each and every timely tender). The Club that had held the concession for many years submitted its tender on time, depositing it in the Town Hall letterbox before the deadline. However, due to an administrative error, the tender was not collected from the letterbox and was marked as "late" by the Council's staff. As a result, the Club's tender was not considered and the contract was awarded to another bidder.

The Court held that an express request for a tender gives rise to an implied contract between the Council and those who submitted tenders, obliging the Council to consider all tenders submitted before the deadline. The Council had breached its obligation under that implied agreement.

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Persons to whom an offer may be made

[3.210] An offer can be made to a specific person or persons, to a particular class of persons, or to the world at large. The person or persons for whom it was intended are the only ones who can accept it. However, if the offer is made to the world at large, for example, by way of a general advertisement, then it may be accepted by anyone who reads the advertisement. *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 is a good example (see [3.40]).

Communication of offer

[3.220] The offer must be communicated, that is, brought to the notice of the person(s) to whom it is made. It is self-evident that unless a person is aware of the offer and its terms, they cannot be said to have accepted the offer. However, as the following unilateral offer in a murder/reward case illustrates, once a person has become aware of the offer, it can be accepted regardless of the motive or reason for accepting. But, as *R v Clarke* (another murder/reward case) illustrates (see [3.230]), the person must, at the very least, be aware of the offer when providing the information leading to the claim.

Williams v Carwardine

[3.225] *Williams v Carwardine* (1833) 172 ER 1101. In response to a murder, the victim's family offered a reward of £20 (it was, after all, 1833!) for information leading to the conviction of the murderer. The advertisement for the reward was widely circulated. Williams, who had knowledge of the murder and the reward offer, provided information that led to the conviction of the murderer. Williams provided the information partly because she felt her death was imminent and wanted to ease her conscience (she believed her own misconduct had contributed to the murder). After providing the information, Williams recovered and then claimed the reward. The family refused to pay, arguing that Williams did not provide the information with the intention of claiming the reward but rather to ease her conscience.

The Court held that Williams was entitled to the reward: the key issue was whether Williams knew about the reward and performed the act specified in the offer; her motive for doing so was not relevant.

R v Clarke

[3.230] *R v Clarke* (1927) 40 CLR 227. Two policemen were murdered in Western Australia. A proclamation offered a reward of £1,000 for information that would lead to the arrest and conviction of the person(s) responsible. Clarke and an associate were arrested and charged with the murder of one of the policemen. Clarke gave evidence that led to the conviction of two men for the murder. Clarke was subsequently released from custody and claimed the reward of £1,000. There was evidence that at one point he was aware of the offer of reward but in a statement Clarke himself said:

> When I gave evidence in the Criminal Court I had no intention of claiming the reward. I first decided to claim the reward a few days after the appeal had been dealt with.

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> Inspector Condon told me to make application. I had not intended to apply for the reward up to that date … I had not given the matter consideration at all. My motive was to clear myself of the charge of murder. I gave no consideration and formed no intention with regard to the reward …

In the face of this statement, the High Court accepted the evidence that Clarke had volunteered the information to clear himself of a false charge of murder and did not act in response to the offer.

> Clarke had seen the offer, indeed; but it was not present to his mind – he had forgotten it, and gave no consideration to it, in his intense excitement as to his own danger. There cannot be assent without knowledge of the offer; and ignorance of the offer is the same thing whether it is due to never hearing of it or to forgetting it after hearing. But for this candid confession of Clarke's it might fairly be presumed that Clarke, having once seen the offer, acted on the faith of it, in reliance on it; but he has himself rebutted that presumption.

Termination of an offer

[3.235] An offer is terminated and cannot be accepted when it is revoked by the offeror, it is rejected by the offeree or it lapses.

Revocation of offer

General rule

[3.240] An offer can be revoked at any time before acceptance. The revocation is only effective when it is communicated to the offeree. To be effective, the revocation of an offer, like the offer itself, must be communicated to the offeree.

Revocation and unilateral contracts

[3.242] The revocation of a unilateral contract raises some interesting issues. The rule that an offeror may revoke at any time before acceptance of the offer works well enough in offers relating to bilateral agreements (acceptance occurs when communicated to the offeror), but not so well when acceptance is when the offeree performs the required work or task (eg returns the dog to its owner). The question is whether the offeror should be able to revoke prior to the act being completed?

Imagine that Angela promises Bettina $10,000 if she swims across the Swan River in Perth. Bettina departs from Point Betches (the agreed departure point) and swims to within 100 metres of Elizabeth Quay (the agreed destination point) when Angela (with a loud speaker) informs her that her offer is revoked. Is that a valid revocation of a unilateral offer? In the following case, the court suggests that unilateral offers, in the absence of an implied warranty to give the offeree a chance to complete performance or an estoppel preventing revocation on unconscionability grounds, may be revoked at any time before performance. The case is, of course, a commercial one, far different from our hypothetical involving Bettina and her swim across the Swan River.

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Mobil Oil Aust Ltd v Wellcome

[3.245] *Mobil Oil Aust Ltd v Wellcome* (1998) 81 FCR 475. Mobil represented to its dealers that any dealer who performed at a prescribed level for six years would be given a franchise for a further nine years at no cost. Mobil subsequently discontinued the scheme, making it impossible for the dealers to complete the act of acceptance. As a result, a number of dealers sued Mobil for breach of contract. It is accepted that in a unilateral agreement, the act of acceptance (and the consideration) is the act of performance. The trial judge held that where a unilateral offer was made, requiring performance as the act of acceptance, the offeror could not revoke the offer once the offeree had begun to perform.

The Full Court disagreed. Although in some cases there may be an "implied ancillary unilateral contract" in which the offeror promises not to revoke once the offeree commences performance, there is no universal proposition that an offeror is not at liberty to revoke the offer once the offeree commences performance of the sought act of acceptance.

Revocation must be communicated

[3.246] Like the offer itself, a revocation must be communicated before it is effective. Until the offeree is aware of the revocation, the offeree can accept the offer (and create a valid contract). The following case illustrates this principle.

Byrne & Co v Leon Van Tienhoven & Co

[3.250] *Byrne & Co v Leon Van Tienhoven & Co* (1880) 5 CPD 344. Van Tienhoven wrote on 1 October from Cardiff offering to sell 1,000 boxes of tin plates to Byrne in New York. Byrne received the offer on 11 October and accepted it by telegram on the same day, and by letter on 15 October. Meanwhile, on 8 October, Van Tienhoven had posted a letter withdrawing the offer (because the price of tin plates had risen by 25%). The letter did not reach Byrne until 20 October.

The Court held that the withdrawal of the offer was ineffective. While an offer could be revoked at any time before its acceptance, a revocation of the offer was not effective until it had been communicated to the offeree. A contract binding both parties had been entered into on 11 October when Byrne accepted by telegram the offer of 1 October.

[3.260] The law does not stipulate any particular way in which the revocation must be communicated to the offeree. It simply requires that the offeree be made aware that the offer has been withdrawn. Accordingly, any method of communication is sufficient, provided revocation actually comes to the offeree's notice.

Revocation and the option agreement "exception"

[3.270] A promise by the offeror not to revoke an offer for a period of time is not enforceable. To make it enforceable, the parties must enter into a separate option agreement. Under an option agreement, the offeree provides consideration (something of value, usually money) to the offeror in exchange for the promise to keep the offer open. The offeror is then unable to revoke the offer for the

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period agreed to. Note that the offeree is under no obligation to accept the original offer; they have just bought themselves some time to consider the offer or to arrange finance, etc. Note also that the price of the option is neither refundable nor is it included in the sale price as a deposit (if the offeree ultimately accepts the offer). *Goldsbrough Mort & Co Ltd v Quinn* provides a good illustration of an option contract and highlights the remedies that may be available where land is the subject matter of the contract.

Goldsbrough Mort & Co Ltd v Quinn

[3.280] *Goldsbrough Mort & Co Ltd v Quinn* (1910) 10 CLR 674. Quinn promised Goldsbrough Mort that it would have the right to purchase certain property within one week at an agreed price. Goldsbrough Mort paid Quinn the sum of 5/- in consideration for this option. Before the week expired, Quinn purported to revoke the offer. Goldsbrough Mort accepted the offer within the week and sued for specific performance of the contract of sale of the property at the agreed price.

The Court held that the option, having been given for value (5/-), could not be revoked, and that the acceptance of the offer by Goldsbrough Mort resulted in a binding contract. The Court made an order of specific performance, forcing Quinn to transfer title to the land (and not simply pay damages for breach of the option contract). Note that had Goldsbrough Mort not provided value, the promise to keep the offer open for a week could have been revoked by Quinn (provided that it did so before Goldsbrough Mort accepted within the week).

Rejection or counteroffer

[3.300] The offeree may reject the offer. Once this is done, the offer is "killed" and may no longer be accepted. A counteroffer functions as both a rejection of an offer to enter into a contract, as well as a new offer that materially changes the terms of the original offer. Because a counteroffer serves as a rejection of the original offer, the original offer can no longer be accepted. For example, if X offered to sell her car to Y for $50,000 and Y replied that she would pay $45,000 for the car, this reply would be a counteroffer and the original offer would lapse. Y could not later "accept" the original offer to buy for $50,000. The essential criterion of a counteroffer is that it changes or seeks to change one or more of the *material* or important terms of the offer (such as price or quantity or quality). The courts distinguish between a counteroffer and a request for information (or enquiry relating to one or more of the terms), the latter not being counteroffers and not "killing off" the original offer.

Hyde v Wrench

[3.310] *Hyde v Wrench* (1840) 49 ER 132. Wrench offered to sell land to Hyde for £1,200. When Hyde rejected the offer, Wrench offered to sell it for £1,000. Hyde responded by offering to purchase the land for £950, but Wrench refused to sell at that price. Hyde then said that he would accept his earlier offer to sell at £1,000. When he refused to sell, Hyde brought an action for specific performance (ie Hyde asked the Court to find that a contract existed and to order Wrench to perform it and hand over title to the property).

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The Court decided that there was no agreement – the earlier offer to sell at £1,000 was terminated by Hyde's counteroffer of £950. The counteroffer effectively "killed the offer" and it could not subsequently be revived by Hyde. Of course, Wrench was free to reject the counteroffer (which he obviously did).

A request for information or a counteroffer

[3.320] It is not unusual for the offeree to want to clarify or seek more information about the terms of the offer. They may be seeking information as to whether the offeror is prepared to modify one or more terms, is prepared to deliver on a particular day, or is prepared to offer a discount for cash. It is a question of fact in each case whether the offeree's response is a counteroffer (that "kills off" the original offer) or whether it is a reasonable attempt to clarify or seek additional information about the terms of the offer. In *Stevenson Jaques & Co v McLean*, the Court decided that the offeree was clarifying the terms of the offer and was therefore still able to accept the original offer (and subsequently sue for breach of the agreement).

Stevenson Jaques & Co v McLean

[3.330] *Stevenson Jaques & Co v McLean* [1880] 5 QBD 346. The parties were operating in a volatile iron ore market where price fluctuated quickly. McLean, an iron merchant, offered to sell iron to Stevenson Jaques, a buyer, for "40 shillings net cash". McLean promised that the offer would remain open until Monday. Stevenson Jaques responded by asking whether McLean would accept 40 shillings "for delivery over two months or if not the longest limit you would give". McLean, without answering, sold to another buyer. On Monday, when it had not received a response, Stevenson Jaques purported to accept the offer but discovered that McLean had sold the iron elsewhere. Stevenson Jaques sued McLean for breach of contract. The issue was whether its initial response was a request for information or a counteroffer. If the former, the offer was still able to be accepted (as a revocation had not been communicated). If the latter, Stevenson Jaques could no longer accept (as a counteroffer kills the offer which cannot subsequently be revived).

In contrast to the decision in *Hyde v Wrench* (see [3.310]), the Court decided that acceptance was valid here – the response was merely seeking to clarify the terms of the offer, not impose new or different terms. While the promise of the offer remaining open until Monday was not itself binding and the offeror could revoke at any time before acceptance, no revocation had been communicated in this case. McLean was therefore in breach and liable in damages for its non-delivery of the iron.

Lapse of the offer

[3.340] An offer may lapse in a number of circumstances, rendering it no longer capable of being accepted to form a binding contract:

(a) Time limit

An offer may lapse if it is not accepted within a *specified time* limit. The offeror can expressly stipulate a time by which the offer must be accepted. If the offeree fails to accept the offer within

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this time frame, the offer automatically lapses. If the offer specifies a deadline, the offer lapses at the end of that period. For example, if an offer states that it is open for acceptance until 30 June, it will lapse if not accepted by that date. If no time frame is specified, the offer will lapse after a *reasonable* period. What constitutes a "reasonable time" depends on the circumstances, including the nature of the subject matter of the contract, any relevant industry standards and the means used to communicate the offer (the more urgent the means used, the more reasonable it would be to expect a reasonably quick reply).

Ramsgate Victoria Hotel v Montefiore

[3.345] *Ramsgate Victoria Hotel v Montefiore* (1866) LR 1 Ex 109. Montefiore, the defendant, applied for shares in the Ramsgate Victoria Hotel Company on 8 June 1864. Montefiore paid a deposit when he made the application. The company did not immediately accept Montefiore's offer to buy shares. On 23 November 1864, the company allotted the shares to Montefiore. Montefiore refused to take up the shares, arguing that the offer to purchase shares had lapsed due to the delay. The main issue was whether an offer to purchase shares remains open indefinitely or whether it can lapse if not accepted within a reasonable time.

The Court ruled in favour of Montefiore. An offer does not remain open indefinitely. Offerors have the right to expect a response within a time that is reasonable given the nature of the offer and the circumstances surrounding it. In this instance, the five-month delay was deemed unreasonable.

(b) Death or incapacity

The death or incapacity of either the offeror or the offeree can cause an offer to lapse. If the offeror dies or becomes legally incapacitated before the offer is accepted, the offer generally lapses, as the offeror can no longer perform their part of the contract. Similarly, if the offeree dies or becomes incapacitated, they cannot accept the offer, and it lapses.

(c) Failure of a condition precedent

An offer may be subject to certain conditions that must be met before acceptance. If these conditions are not fulfilled, the offer lapses. If an offer is conditional on a specific event or action occurring, and that event or action does not occur, the offer lapses. Common examples include sale of land offers that are made "subject to finance" or "subject to planning approval", etc.

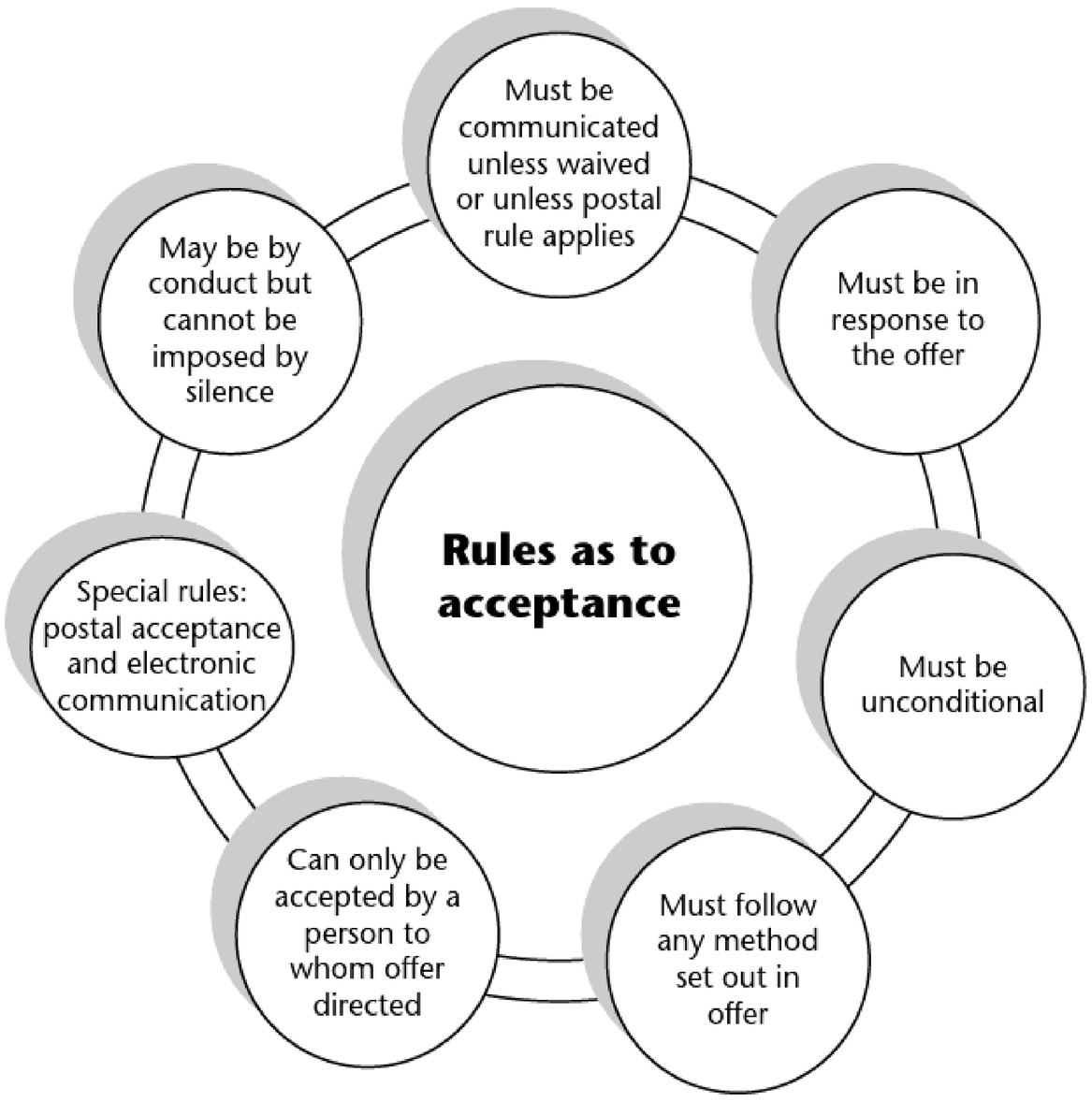
(d) Supervening illegality or incapacity

An offer will lapse if it becomes illegal to perform the contract after the offer is made but before it is accepted. If a change in law renders the subject matter of the offer illegal, the offer automatically lapses. For example, from 1 July 2024, a new law bans the sale of vapes in Victoria except via a pharmacy and only on prescription. If this law came into effect after an offer by a supplier to sell such products to a tobacconist or supermarket, but before acceptance, the offer would lapse. Similarly, an offer lapses if an offeror becomes incapable of performing the contract (if the offer were accepted) because of a physical or mental incapacity, making performance of the contract impossible.

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Acceptance

Figure 3.3 : Rules as to acceptance



[3.350] An agreement is concluded when the offeree communicates a clear, final and unqualified acceptance of the offer to the offeror.

Rules as to acceptance

[3.360] The general principle is that, for an agreement to be made, *acceptance of an offer must be communicated to the offeror*. Acceptance can be communicated by express words or in writing, by conduct or by performance of an act requested by the offeror. At common law, where instantaneous or electronic communication is used as a method of acceptance, acceptance is effective when the offeror receives the communication. We will consider the effect of electronic communications legislation on clarifying the specific time of the receipt of these types of communications below.

Brinkibon Ltd v Stahag Stahl GmbH

[3.370] *Brinkibon Ltd v Stahag Stahl GmbH* [1983] 2 AC 34. Brinkibon was a London company that bought steel from Stahag, a seller based in Austria. Brinkibon sent their acceptance to a Stahag offer by telex (an old form of electronic communication) to Vienna. A dispute arose and Brinkibon wanted to issue a writ against Stahag and applied to serve it outside the jurisdiction of the Court. This was not permitted in Austria but was possible under English law. However, English law would only apply if the contract had been formed in England.

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The Court decided that the contract was formed in Vienna. The Court accepted the principle that in the case of instantaneous communication (such as telex but now obviously emails, etc), the formation of a contract generally occurs in the place where the acceptance is received.

[3.380] Acceptance can be *implied from the conduct* of the parties either from past dealings or, in a particular instance where, as in the following two cases, the traditional "offer and acceptance" model is not a convenient framework.

Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd

[3.390] *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523. A property developer, Empirnall, hired architects, Machon Paull, to act as project managers, to draw plans and to obtain permits for a property development. Machon Paull forwarded a contract for signature and sent a progress payment claim to Empirnall, which paid on the claim and asked Machon Paull to submit further progress claims. However, Empirnall did not sign the contract because its director "does not sign contracts". Later, when Machon Paull sent another progress claim, it again forwarded a contract for signature. Again, the contract was not signed. Some two weeks later, they wrote saying:

> … we are proceeding on the understanding that the conditions of the contract are accepted by you and works are being conducted in accordance with those terms and conditions.

It was important for Machon Paull that the Court decide that the written contract had been accepted because the written contract contained a clause that gave Machon Paull some security over the land in question. A dispute subsequently arose and Empirnall denied that the written contract had ever been accepted. The question was whether it could be implied from Empirnall's conduct that it had accepted that the work was to be done according to the written contract.

The Court decided that because Empirnall had taken the benefit of the work done and paid on the invoices submitted, a reasonable person would say that it had accepted the written contract.

In the following case, the Victorian Supreme Court of Appeal adopted a similarly pragmatic approach.

PRA Electrical Pty Ltd v Perseverance Exploration Pty Ltd

[3.395] *PRA Electrical Pty Ltd v Perseverance Exploration Pty Ltd & Anor* [2007] VSCA 310. PRA was an electrical contractor who successfully tendered to carry out some work for Perseverance, with written contract terms negotiated as part of the tender process. PRA started work and for some months the parties acted in accordance with the terms of the contract. However, a dispute arose and Perseverance argued that there was in fact no binding agreement between the parties because the written contract had not been executed, *and there was a condition in the written document that said the contract would not come into effect until the document was signed*.

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> The Court held that where, subsequent to the preparation of an unexecuted document which the parties intended should constitute a contract between them, those parties acted consistently with the document's provisions, it might be concluded that they had entered into an informal or implied contract in the terms of that document and from a date identified by the particular conduct. A contract *had been formed by the conduct of the parties*, irrespective of the proviso in the written terms. The Court found that the giving and acceptance of bank guarantees and the subsequent making and payment of the progress payments as required by the contract terms was "unequivocal evidence" that the parties had concluded an agreement.[8]

Acceptance and unilateral contracts

[3.400] There are a number of exceptions to the rule that acceptance must be communicated to the offeror. The first is where the contract is a unilateral contract. As we saw earlier, a unilateral contract is one where acceptance and performance occur simultaneously. In *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, for example, Mrs Carlill did not have to communicate with the company to accept its offer. Performance is acceptance: the offeror has waived its right to communication of acceptance.

Postal acceptance rule

[3.410] The second exception concerns the postal acceptance rule. The post presents issues that most other forms of communication do not: there is always a gap between posting and delivery that presents a risk that a letter of acceptance may be lost or delayed. The question that arises is who should bear the risk of this happening? Should it be the offeror (who, having not heard from the offeree, may have revoked the offer and sold the goods to someone else) or the offeree (who has accepted by post but whose acceptance would not ordinarily be effective until communicated to the offeror)?

The courts developed a special rule – the postal acceptance rule – to deal with this issue of risk. In essence, the rule states that *where acceptance by post is contemplated by the parties* the acceptance is complete when a properly addressed letter of acceptance is properly *posted* by the offeree: *Henthorn v Fraser* [1892] 2 Ch 27. Therefore, where the postal acceptance rule applies, the letter of acceptance creates a binding contract *at the time of its posting* and, significantly, thereafter the offeror cannot lawfully revoke the offer. Where the rule does *not* apply – because the parties do not reasonably expect that acceptance could be by post – the normal rule applies: an acceptance is not effective until communicated to the offeror.

Obviously, as the offeror can specify the required method of acceptance, the offeror may exclude the operation of the postal acceptance rule by specifying, for example, that acceptance will not be effective until *actual* communication of the acceptance has occurred. As a matter of fairness, where the offeror does not exclude the operation of the postal acceptance rule, and it is reasonable for the offeree to use the post, the offeror should be the one to bear the risk of a letter being delayed or lost in the post.[9]

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8 As we shall see in Chapter 5, even if that were not the case, if one of the parties has led the other to believe that a binding contract was in place, and the other party has acted in reliance on that representation, then principles of promissory estoppel may apply, preventing the representor from denying a binding contract had been made.

9 Note that given the rise in the number of emails and other electronic communications used in contract negotiation (and the readiness of offerors to insist on actual communication), the postal acceptance rule is of greatly diminishing importance.

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Elizabeth City Centre Pty Ltd v Corralyn Pty Ltd

[3.420] *Elizabeth City Centre Pty Ltd v Corralyn Pty Ltd* (1995) 63 SASR 235. Corralyn sent a letter by ordinary post to Elizabeth City Centre (ECC) giving notice within the specified time that it wished to exercise an option to renew its sub-lease. ECC claimed that it never received the letter. A clause in the sub-lease provided that a notice mailed by registered or certified letter was deemed to be served on ECC on the third business day following that on which it was posted.

The Court held the postal acceptance rule did not apply because it had been excluded by the clause requiring "notification by certified mail". Therefore, the ordinary rule requiring communication of acceptance applied. As Corralyn's notice had not been actually communicated to ECC, the Court decided that Corralyn had not properly exercised the option to renew. Had the postal rule applied, Corralyn's exercising of the option would have been within time (because it would have been effective at the time of posting).

Acceptance cannot be imputed from silence

[3.430] Acceptance cannot be inferred from the silence or inaction of the offeree. In other words, an offeror cannot say that if the offeree does not communicate, this will be taken to be an acceptance of the offer. *Felthouse v Bindley*, unfortunately a rather dated case involving a horse, an uncle, a nephew and a forgetful auctioneer, illustrates the point well.

Felthouse v Bindley

[3.440] *Felthouse v Bindley* (1862) 142 ER 1037. Felthouse offered to buy a particular horse from his nephew and stated in a written offer that "if I hear no more about it, I consider the horse mine at £30 15s". His nephew did not reply but instructed the auctioneer, Bindley, not to sell the horse. Unfortunately, Bindley forgot to withdraw the horse from sale and sold it to another buyer. Felthouse sued the auctioneer in the tort of conversion (selling property belonging to another person). To succeed in an action for conversion, Felthouse needed to demonstrate that he, Felthouse, was the owner of the horse at the time of the sale – as he would have been if there were a valid contract between himself and his nephew.

The Court decided that Felthouse could not impose on his nephew a duty to respond if he did not wish to sell on those terms. There was no communication of acceptance before the sale and therefore the uncle was not the owner of the horse at the time the auctioneer sold the horse to another.

Acceptance in response to an offer

[3.450] An acceptance must be in response to an offer. It may happen that a person carries out certain acts (such as returning a lost dog) without knowing that an offer of a reward exists. In such a case, there is not an acceptance capable of resulting in a binding contract: *R v Clarke* (1927) 40 CLR 227 (see [3.230]).

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Acceptance must be unconditional

[3.460] A qualified acceptance is, in fact, a counteroffer. For example, if the offeree said she would accept the offer "provided you deliver the goods to my place of business" or "provided I can arrange satisfactory finance", this is a qualified or conditional "acceptance" and does not result in a legally enforceable agreement.

Where an acceptance is made "subject to contract" or "subject to a formal contract to be drawn up by our solicitors", then, in the absence of cogent evidence of a contrary intention, there will be no binding agreement between the parties until a formal document has been drafted and signed. This is increasingly common where business people negotiate using emails in which they express informal agreement on the terms but say "it is subject to a formal contract being executed".

Masters v Cameron

[3.470] *Masters v Cameron* (1954) 91 CLR 353. Masters signed an agreement to purchase Cameron's rural property. The agreement included the following clause:

> This agreement is made subject to the preparation of a formal contract of sale which shall be acceptable to my solicitors on the above terms and conditions.

Masters paid the agent £1,750 deposit when he signed the agreement. When Masters refused to proceed with the purchase, both parties claimed the deposit moneys. Masters argued there was no binding agreement made when the contract was signed and therefore he was entitled to a refund. Cameron argued that a binding agreement had been made and the moneys, being a deposit, were forfeited when the purchaser refused to proceed.

The High Court decided that there was no binding agreement. On the evidence, the Court said that the parties had not intended that a legally binding agreement would exist until or unless a formal contract acceptable to Masters' solicitors was signed. As this had not occurred, the £1,750 had to be refunded. In the course of the judgment, the High Court noted that where parties reach agreement on the terms of a contract but also say that the agreement shall be expressed in a more formal way, one of three alternatives is possible:

- the parties intend to be immediately bound by the agreement but say that the agreement should be restated in a more precise way. Thus, *a contract exists at the time the agreement is made and the parties are bound to perform it whether the formal document is signed or not*;
- the parties have agreed on all the terms but have made performance conditional on the execution of a formal document. Again, as in the first alternative, *a contract exists at the time the agreement is made* but, in this instance, the parties have agreed that *a formal document must be executed before they perform the agreement*; and
- the intention of the parties is *not to conclude an agreement at all unless or until a formal contract is executed*.

The High Court then said:

> … in each of the first two cases there is a binding contract but the third class (of agreements) are fundamentally different. They are cases in which the terms of agreement are not intended to have, and therefore do not have, any binding effect of their own

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> … there shall be no contract binding upon the parties before the execution of their agreement in its ultimate shape.

Although not set out in *Masters v Cameron*, the existence of a *fourth category of agreement* is now widely accepted in Australia, namely where the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms.

Recently, in *Al-Freah v Thompson* [2023] QCA 17, the Queensland Court of Appeal outlined what factors it considered when deciding that the parties had made an agreement that was immediately binding with the terms of the agreement to be restated in a more precise form (in other words, the first *Masters v Cameron* option). The factors were as follows:

- The words of the emails exchanged by the parties were indicative of an immediately binding agreement;
- There was no language used by the parties that indicated that they did *not* intend to be bound until a further deed was entered into;
- The emails contained all the details that were necessary for the agreement to be binding; and
- The parties' subsequent conduct was consistent with there being an immediately binding agreement – the court being able to have regard to that subsequent conduct for the purpose of determining whether a binding agreement had been reached.

In the following case, the Victorian Court of Appeal provides details of the factors it considers important in reaching its decision and a summary of the legal principles to be applied. The decision is a reminder to parties that an agreement will be binding if the substance of the agreement is irrevocably resolved, with only procedural or non-essential matters outstanding.

Sully v Englisch

[3.480] *Sully v Englisch* [2022] VSCA 184. In September 2020, Sully and Englisch attended mediation to settle a dispute regarding misleading or deceptive conduct in relation to a contract for the sale of land. The two reached an agreement to settle but did not prepare any written terms of settlement on the day of the mediation. The mediation was left open by the mediator. After the mediation, Sully argued that the parties had reached a binding settlement agreement at the mediation. Englisch claimed that they had not.

The settlement as agreed was uncomplicated, it involved a small quantum, and there was no history of formal negotiations documented in writing that would suggest the parties would not have intended a less formal agreement to be binding. In addition, the time constraints on the mediator meant that the parties were left with no time, within the mediation, to document their agreement; that assisted in explaining why the parties, having reached a binding agreement, left the documentation of that agreement to a later date.

The Victorian Court of Appeal unanimously held that a reasonable person observing the mediation would have concluded that the parties had made a binding agreement by the end of the mediation. For these reasons, the court considered that Sully had proven that the parties intended to be immediately bound by the agreement they reached on the day of the mediation,

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and the trial judge had erred in concluding otherwise. There was no dispute between the two as to the relevant legal principles to be applied in determining whether parties have agreed to be immediately bound by an agreement they have reached. These include:

whether an agreement reached is meant to be immediately binding should be determined objectively, taking into account the presumed or inferred intent of the parties. The ultimate question to answer is what each party, by its words or conduct, would have led a reasonable person in the position of the other party to believe;

a party's subjective intention or belief is not determinative although it may be relevant;

for an agreement to be immediately binding, the original oral agreement must be complete, certain and enforceable on its terms. A written agreement may be executed later.

Parties may, however, leave certain aspects of the agreement to be decided later in the negotiations, while agreeing to be bound immediately by the other agreed terms. In *Vantage Systems Pty Ltd v Priolo Corporation Pty Ltd* and *Stellard Pty Ltd v North Queensland Fuel Pty Ltd*, negotiations were conducted by email and made subject to more formal documents being prepared and executed. The question in both cases was whether the parties had agreed to be bound immediately but intended that the agreement should be restated in a more precise way (option 1 from *Masters v Cameron*), or alternatively whether the intention was not to conclude an agreement at all unless or until a formal contract was executed (option 3 from *Masters v Cameron*). The decisions underscore the need to remember that emails, whose informality and frequency may breed complacency, can create binding agreements.[10]

Vantage Systems Pty Ltd v Priolo Corporation

[3.490] *Vantage Systems Pty Ltd v Priolo Corporation Pty Ltd* [2015] WASCA 21. The parties negotiated a lease, mainly by email. The landlord emailed the tenant with a proposal for a renewal of a lease, "subject to formal lease documents being signed". Amendments were then negotiated by email, and the essential terms were agreed upon by email. The tenant asked the landlord to prepare lease documents although some minor terms (eg the car parking licence fee) had not been agreed upon. However, the tenant then refused to sign the lease.

The Western Australian Court of Appeal found that whilst the parties intended that their binding email agreement would be superseded by a formal lease, that lease would simply incorporate all of the express terms of the revised proposal which the parties had already agreed to. Relevant considerations in coming to this decision included:

the fact Vantage had been in occupation of the premises for a number of years and was familiar with the premises and the suitability of the premises for its business requirements;

Priolo had been the owner of the property for a number of years and was familiar with the representatives of Vantage;

Vantage had not identified any other office premises which it might lease and was not endeavouring to locate alternative premises;

10 Please note that emails and online contracting are discussed in more detail at [3.580].

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the revised proposal embodied all terms that were legally necessary to form a contract;

communication by Vantage's representatives showed that Vantage had approved the terms of the arrangement; and

the terms of the new lease were not materially different from those contained in the existing lease.

Stellard Pty Ltd v North Queensland Fuel Pty Ltd

[3.500] *Stellard Pty Ltd v North Queensland Fuel Pty Ltd* [2015] QSC 119. A buyer offered to purchase a roadhouse business and property for $1.6 million. The seller's agent emailed the buyer, setting out the basis on which the seller would sign a contract. The email included all the main terms – price, deposit, settlement date and other conditions – attached in a draft. There were further negotiations by phone and email. The buyer confirmed its offer by email, "subject to contract and due diligence as previously discussed", and asked for the offer to be accepted immediately so that it could begin its investigations. The seller accepted the offer by email, "subject to execution of the contract provided". The buyer sought further amendments to the form of the contract, but in the meantime, the seller found another buyer for a higher price (in fact, the seller was playing one buyer off against the other) and refused to execute the contract.

The Court decided that the seller intended to be immediately bound by the initial offer, despite the fact that no formal contract had been signed. The broader context of the emails strongly suggested that the parties intended to be bound immediately by the terms they had agreed upon, with the intention that they would be formally recorded later.

An acceptance must follow the conditions stated in the offer

[3.510] Where the offeror does not specify any particular form of acceptance, there is a presumption that acceptance will be in the same form as the offer.

Acceptance can be made only by the party to whom the offer is made

[3.520] As we have seen, an offer may be made to one or more people or to the world at large: *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

Communication of acceptance must be made in an authorised manner

Powell v Lee

[3.550] *Powell v Lee* (1908) 99 LT 284. Powell applied for the position of headmaster of a school. The school board passed a resolution appointing him. The resolution was not communicated to Powell officially. One of the board members privately informed him of it. Subsequently, the resolution was rescinded.

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The Court held that Powell's offer had not been accepted as the resolution was never communicated to him in an authorised manner.

Offer and acceptance in the real world: the battle of the forms

[3.560] The "battle of the forms" is a common issue in relation to commercial contracts. It arises when two businesses are negotiating the terms of a contract and each party purports to use its own standard form contract. These standard forms often contain terms and conditions that conflict with each other. The term "battle of the forms" refers to the legal struggle to determine which of two sets of terms become part of the contract when these forms are exchanged. In traditional contract law, a contract is formed when an offer made by one party is unequivocally accepted by the other. However, in the context of standard form contracts, the offer and acceptance analysis can become complex because the terms are often not identical. Indeed, they may be in conflict in one or more significant respects (such as the inclusion (or exclusion) of a price variation clause or an exclusion clause).

Traditionally, under the common law "last shot" doctrine, the terms of the contract are those contained in the last document sent before performance begins. This means that the party who fires the "last shot" in the form of the final document before performance (and thus acceptance) wins the battle and their terms prevail. The same outcome is achieved via the common law "mirror image" rule. This says that an acceptance must correspond exactly with the offer. Any deviation from the terms of the offer is a counteroffer rather than an acceptance. In battle of the forms scenarios, this would mean that no contract is formed until one party performs under the terms of the last form sent, thereby, impliedly, through their conduct, accepting those exact terms.

In the following landmark decision of the English Court of Appeal, the court did not apply the "last shot" rule but considered the entirety of the negotiations and the parties' conduct.

Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd

[3.565] *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 WLR 401. On 23 May, the Butler Machine Tool Co Ltd (Butler) offered to sell a machine tool to Ex-Cell-O Corp (Ex-Cell-O) for £75,535. The offer included Butler's standard terms, which had a price variation clause allowing Butler to increase the price if their costs rose before the date of delivery (which in this case was to be 10–11 months after the contract date). On 27 May, Ex-Cell-O responded with an order for the machine but included their own standard terms, which were significantly different from Butler's terms and, relevantly, did not include a price variation clause. The order had a tear-off slip for signature and return that accepted the order "on the terms and conditions hereon". On 5 June, Butler replied with a letter acknowledging the order and enclosed an acknowledgment slip stating that delivery was to be "in accordance with our revised quotation of May 23 for delivery in March/April 1970". In fact, Butler was unable to deliver the machine until September but by then Ex-Cell-O's production schedule meant it could not take delivery until November 1970. At that time, Butler invoked the price variation clause, claiming an additional £2,892 as a result of increased costs. There is no doubt that a contract was concluded on 5 June. But on what terms? Butler relied on their general conditions and on their last letter which said "in accordance with our revised quotation…". Ex-Cell-O relied on

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their acknowledgement which accepted the buyer's order "on the terms and conditions stated thereon" which did not include the price variation clause.

The Court of Appeal unanimously ruled in favour of Ex-Cell-O but the approach taken by two of the three judges differed from the third judge (who was, not surprisingly, Denning LJ). The approach adopted by the majority is a traditional one: the court must examine the correspondence between the parties in search of a matching offer and acceptance. If there is one, there is a contract; if not, there is no contract. In this case, the majority found that there was such a match and a contract existed. They decided that the offer came from Ex-Cell-O, and Butler accepted when they signed the tear-off acknowledgement slip thus indicating their assent to the Ex-Cello-O's terms. In other words, Ex-Cell-O's order on 27 May was not an acceptance but a counteroffer because it materially altered the terms by excluding the price variation clause. Butler's subsequent actions were deemed to be an acceptance of Ex-Cell-O's counteroffer. Not surprisingly, given his record on the Bench,[11] Denning LJ rejected the traditional approach – the matching offer and acceptance approach – as "out of date". He advocated for a wholistic approach, saying: "The documents have to be considered as a whole … and as a matter of construction … the acknowledgement of June 5 is the decisive document. It makes clear that the contract was on the buyers' terms … and the buyers' terms did not include a price variation clause".

In the following "battle of the forms" case, a similar question arose: was an exclusion clause part of the contract or not? The Court considered the communications as a whole before deciding which party was successful in having its terms included in the contract.

Maxitherm Boilers Pty Ltd v Pacific Dunlop Ltd

[3.570] *Maxitherm Boilers Pty Ltd v Pacific Dunlop Ltd* [1998] 4 VR 559. In response to a request from Pacific Dunlop, Maxitherm submitted a quote for the installation of a steriliser, on terms and conditions that were said to be attached but were not. Later, it sent a fax to Pacific Dunlop saying it would be on Maxitherm's standard terms (that, relevantly, included an exclusion clause). Pacific Dunlop orally accepted the quote but did not read the terms, including the exclusion clause. After further discussions about specifications, Maxitherm sent its standard terms to Pacific Dunlop, again including the exclusion clause. Pacific Dunlop then prepared and sent an amended purchase order (with a 25% deposit) that contained no terms except one of Maxitherm's standard terms. Maxitherm then went ahead and manufactured and installed the steriliser. Shortly, after installation the steriliser exploded. Pacific Dunlop sued for the loss it suffered. Maxitherm sought to rely on the exclusion clause contained in its standard terms.

The Court said that the sequence in which documents are exchanged is crucial but the conduct of the parties, especially the delivery and acceptance of goods, plays a significant role in determining which terms govern the contract. In particular, acceptance by performance can indicate agreement to the terms of the counteroffer. The Court's approach, in keeping with Denning LJ's approach in *Butler Machine*, reflects a move away from the rigid "last shot"

11 See p 16 (and beyond) in this article on Denning LJ's life and times: https://www6.austlii.edu.au/au/journals/QldJSchol/2015/68.pdf.

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doctrine, focusing instead on the overall conduct and objective intentions of the parties. It concluded that the *offer* consisted of the original quotation, the fax and the specifications and, importantly, the exclusion clause sent by Maxitherm; the *acceptance* of that offer occurred when Pacific Dunlop prepared and sent its purchase order. The contract, therefore, was on Maxitherm's terms.[12]

The Electronic Transactions Acts and the formation of e-contracts

[3.580] The *Electronic Transactions Act 1999* (Cth) and parallel legislation in all States and Territories[13] provides a legal framework for the use of electronic communications and transactions in Australia. One of the key features of the ETA is its provision for the legal recognition of electronic transactions, electronic signatures and electronic documents. This recognition ensures that electronic transactions carry the same legal weight and validity as their paper-based counterparts, promoting trust and confidence in electronic commerce.

[3.590] In this part, we examine the relevant legal issues in relation to the *formation* of a contract in an e-commerce context. In Chapter 9, at [9.440], we consider broader substantive questions related to the incorporation of terms within and the interpretation of e-commerce contracts. It should be noted at the outset that the parties may choose to exclude the operation of the *Electronic Transactions Acts* if they wish (or vary the effect of them).

The *Electronic Transactions Acts* state that a contract is not invalid because it took place wholly or partly by means of one or more electronic communications.[14] In other words, a contract is enforceable even though it was made electronically (by email or via the Internet, etc).[15] Just as well, you might say. Its central purpose is to provide functional equivalence: where the electronic version of a contract serves the same function as the traditional paper-based equivalent, it should be treated equally before the law.

As we have seen, under the common law in relation to the making of an agreement, the time of dispatch and receipt of communications may be crucial. We have seen for instance that an offer (and a revocation of the offer) is valid only when received by the offeree. With some exceptions, it is also the case that an acceptance must be communicated to the offeror. Where the parties use electronic communications, it may be difficult to establish precisely when each of a series of events is legally taken to have occurred. For this

12 Note that the exclusion clause was held to be part of the agreement even though Pacific Dunlop had not read the term. As we shall discuss in Chapter 9, where a person expressing consent has not read the terms, their consent may be taken to be a consent to those terms which are appropriate for the type of contract in issue (ie not harsh or unusual). The Court held that MB's terms were unexceptional.

13 See *Electronic Transactions Act 2000* (NSW); *Electronic Transactions (Victoria) Act 2000* (Vic); *Electronic Transactions (Queensland) Act 2001* (Qld); *Electronic Communications Act 2000* (SA); *Electronic Transactions Act 2011* (WA); *Electronic Transactions Act 2000* (Tas); *Electronic Transactions Act 2001* (ACT); *Electronic Transactions (Northern Territory) Act 2000* (NT).

14 *Electronic Transactions Act 1999* (Cth), s 8; *Electronic Transactions Act 2000* (NSW), s 7; *Electronic Transactions (Victoria) Act 2000* (Vic), s 7; *Electronic Transactions (Queensland) Act 2001* (Qld), s 8; *Electronic Communications Act 2000* (SA), s 7; *Electronic Transactions Act 2011* (WA), s 8; *Electronic Transactions Act 2000* (Tas), s 5; *Electronic Transactions Act 2001* (ACT), s 7; *Electronic Transactions (Northern Territory) Act 2000* (NT), s 7.

15 Generic expressions such as "electronic communications" are used, so that the Acts apply to emails, web-chatting, phone-texting, voice recognition systems and the like.

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reason, the Acts have laid down some basic rules about the time and place of dispatch and receipt for electronic communications.

Time of dispatch of electronic communications

[3.600] An electronic communication is taken to have been *dispatched by the sender* when the electronic communication "leaves an information system under the control" of the sender. However, where the electronic communication has not left an information system under the control of the sender, the time of dispatch is when the electronic communication is received by the addressee. This second circumstance was included in recent amendments to the *Electronic Transactions Acts* and deals with the position where, in certain email systems, the sender retains the ability to recall an email from the recipient. For this reason, it is dispatched when "received".[16]

Time of receipt of electronic communications

[3.610] An electronic communication is taken to have been *received by the addressee* when it becomes "*capable of being retrieved*" by the addressee at an electronic address designated by the addressee. Where the addressee has not designated an electronic address, the time of receipt is when the electronic communication has become *capable of being retrieved* by the addressee and the addressee has become aware that the electronic communication has been sent to that address.[17] This is presumed to be when the electronic communication reaches the addressee's electronic address *whether or not it is opened or read*. For instance, in *Bauen Constructions Pty Ltd v Sky General Services Pty Ltd* [2012] NSWSC 1123, the Court decided that the email had reached the email address of the receiver even though the email was caught by the receiver's spam filter.

Evidence of the precise time of receipt by servers can be determined from email logs and can affect contract formation and effective service of notices.

Place of dispatch and receipt of electronic communications

[3.620] The place where an agreement is made may be important. For instance, as we saw in *Brinkibon Ltd v Stahag Stahl GmbH* at [3.370], the place where a contract is made is relevant in determining the law that will apply in the event of litigation. Under the common law, a contract (including contracts where electronic communications are used) is made in the place where acceptance is *received*. The Acts confirm this position: *an electronic communication is taken to have been dispatched at the place where the originator has its place of business and to have been received at the place where the addressee has its place of business.*[18]

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16 *Electronic Transactions Act 1999* (Cth), s 14; *Electronic Transactions Act 2000* (NSW), s 13; *Electronic Transactions (Victoria) Act 2000* (Vic), s 13; *Electronic Transactions (Queensland) Act 2001* (Qld), s 23; *Electronic Communications Act 2000* (SA), s 13; *Electronic Transactions Act 2011* (WA), s 13; *Electronic Transactions Act 2000* (Tas), s 11; *Electronic Transactions Act 2001* (ACT), s 13; *Electronic Transactions (Northern Territory) Act 2000* (NT), s 13. See Explanatory Note to the UN Convention, paras 177–178.

17 *Electronic Transactions Act 1999* (Cth), s 14A; *Electronic Transactions Act 2000* (NSW), s 13A; *Electronic Transactions (Victoria) Act 2000* (Vic), s 13A; *Electronic Transactions (Queensland) Act 2001* (Qld), s 24; *Electronic Communications Act 2000* (SA), s 13A; *Electronic Transactions Act 2011* (WA), s 14; *Electronic Transactions Act 2000* (Tas), s 11A; *Electronic Transactions Act 2001* (ACT), s 13A; *Electronic Transactions (Northern Territory) Act 2000* (NT), s 13A.

18 *Electronic Transactions Act 1999* (Cth), s 14B; *Electronic Transactions Act 2000* (NSW), s 13B; *Electronic Transactions (Victoria) Act 2000* (Vic), s 13B; *Electronic Transactions (Queensland) Act 2001* (Qld), s 25; *Electronic Communications Act 2000* (SA), s 13B; *Electronic Transactions Act 2011* (WA), s 15; *Electronic Transactions Act 2000* (Tas), s 11B; *Electronic Transactions Act 2001* (ACT), s 13B; *Electronic Transactions (Northern Territory) Act 2000* (NT), s 13B.

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Uncertain and incomplete agreements

[3.630] When asked to resolve a contractual dispute, the courts may need to decide if an agreement or a particular term in the agreement is so vague, incomplete or uncertain that it cannot be enforced. There is a degree of push and pull in the way the courts have gone about trying to resolve these kinds of disputes. On the one hand, the courts will not make an agreement for the parties where those parties have not, themselves, been able to agree. It is for the parties to make their agreement and to ensure that, whatever form the agreement takes, it is sufficiently certain for the courts to be able to enforce it in the event of a dispute. On the other hand, the courts do not want to be regarded in the commercial world as wreckers of agreements in circumstances where the parties appear to have agreed and, even more so, where the parties have been performing the contract on the basis that the agreement is binding.

This approach is borne out in the following three cases where the UK and Australian courts have shown a readiness to import standards of reasonableness to give meaning to terms that were, on the face of it, vague or uncertain.

Foley v Classique Coaches Ltd

[3.635] *Foley v Classique Coaches Ltd* [1934] 2 KB 1. Foley owned some land and a petrol station. He sold part of the land adjoining the station to Classique Coaches Ltd, a coach company. One of the conditions of the agreement was that the company purchase all of their fuel for the coaches from Foley's filling station as long as it could be provided by him. The agreement also contained an arbitration clause. It did not, however, provide a price for the agreement. Classique complied with the terms of this agreement for three years until one of their lawyers advised them that as a price had not been indicated, it was unlikely that there was a binding agreement. After this, Classique stopped buying fuel from Foley, who sued them for breach of contract. The main issue was whether the agreement between Foley and Classique Coaches was sufficiently certain to be enforceable, given that the price of the petrol was not fixed and there was no explicit mechanism for determining it.

The Court of Appeal held that the agreement was enforceable despite the lack of a fixed price for the petrol. The judgment included several key points:

The Court found that where an agreement lacks certain certainty or completeness on particular terms, such as the price, the court can imply reasonable terms to give effect to the parties' intention. In this case, a promise to pay a "reasonable price" could be implied into the agreement. "In order to give effect to what both parties intended the Court is justified in implying that in the absence of agreement as to price a reasonable price must be paid …";

The Court rejected the argument that the agreement was too vague to be enforced. The parties' conduct over three years demonstrated that they believed they had a binding contract, and their consistent behaviour provided a basis for determining reasonable terms; and

The Court said that one of the factors supporting enforceability was the long-term compliance with the exclusivity clause by Classique Coaches which indicated a clear intention to be bound by the agreement.

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Hillas & Co. Ltd v Arcos Ltd

[3.637] *Hillas & Co Ltd v Arcos Ltd* (1932) LT 503. Hillas & Co entered into a contract with Arcos Ltd to purchase timber in 1930. The contract included an option for Hillas to buy additional timber the following year under specified conditions, which stated that the terms would be "of fair specification". When Hillas tried to exercise this option in 1931, Arcos refused, arguing that the terms were too vague to be enforceable. The central issue was whether the option clause in the contract was sufficiently certain to constitute a binding agreement.

The House of Lords held that the option was enforceable. The Court made a number of points:

Commercial contracts should be interpreted with a view to upholding them whenever possible, based on the intentions of the parties. It said that despite the lack of detailed terms, the clause "of fair specification" was sufficiently certain when viewed in the context of the trade and the prior dealings between the parties.

Even if certain terms are not explicitly detailed, a contract can still be enforceable if the essential terms are clear and if there is a mechanism or understanding in place to determine the unspecified details. This is particularly relevant in industries with established practices and trade usages.

Previous dealings between the parties are important. If parties have a history of transactions, their past behaviour and understanding can be used to interpret the terms of a contract.

In the following High Court decision, the Court adopted a similar approach to the House of Lords by shunning a "narrow or pedantic approach", indicating a readiness to uphold contracts where they can, especially if they have already been part performed.

Council of the Upper Hunter County District v Australian Chilling & Freezing Co Ltd

[3.640] *Council of the Upper Hunter County District v Australian Chilling & Freezing Co Ltd* [1968] HCA 8. The Council signed a contract to supply ACF with electricity. Clause 5 of the contract stated, "if the Supplier's costs shall vary in other respects than has been herein before provided, the Supplier shall have the right to vary the maximum demand charge and energy charge …". The Council sought to increase its charges, but ACF said the contract was unenforceable because of the lack of certainty about the term "Supplier's costs". The parties had made no attempt to define what those costs might be.

The High Court decided that a contract is not automatically void for uncertainty because it may be construed in more than one way. It observed that a "narrow or pedantic approach" to interpretation should not be taken – it was clear that in this case there was no uncertainty even though there may be scope for disagreement about what constituted "Supplier's costs" in individual cases. The High Court said:

> So long as the language … is not so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention … the contract cannot be held to be void or uncertain or meaningless …

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There may not always be an obvious, precise point in time at which the requirements of a valid contract can be said to be satisfied but, as further evidence of a judicial desire to "save rather than destroy" contracts, in *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11, McHugh JA stated "agreements concerning terms and conditions which might be too uncertain or too illusory to enforce at a particular time in the relationship may by reason of the parties' *subsequent conduct* become sufficiently specific to give rise to legal rights and duties. *It is necessary therefore to look at the whole relationship and not only at what was said and done when the relationship was first formed*".

Hall v Busst

[3.645] *Hall v Busst* (1960) 104 CLR 206. A dispute arose from an agreement between the parties regarding the sale of land. Hall had agreed to sell a portion of his land to Busst but was given the option to repurchase it at a specified price less "a reasonable sum to cover depreciation of all buildings and other property …". The High Court, in a more restrictive frame of mind, refused to enforce the contract. The Court held that a reasonableness standard was not sufficiently certain to be enforced. In a split 3-2 decision, the High Court found that the price adjustment mechanism, which relied on future valuations and lacked clear criteria, did not provide a sufficient basis to determine the exact price to be paid. The contract was therefore void for uncertainty.

Similarly, in *Whitlock v Brew* (1968) CLR 445, the Court decided a term stating that a purchaser would lease land back to the vendor "on such reasonable terms as commonly govern such a lease" was void for uncertainty because there was no evidence that any such terms existed. If they had existed, the decision would likely have been different.

[3.650] Where parties have reached agreement on the terms of a particular transaction and intend to be immediately bound by those terms but intend to have them embodied in a formal document, there will be a binding contract from the date of their initial agreement.

Godecke v Kirwan

[3.660] *Godecke v Kirwan* (1973) 129 CLR 629. Godecke (the buyer) and Kirwan (the vendor) entered into a written agreement for the sale of land for $110,000 which included a clause that said, if Kirwan required it, Godecke would execute a further agreement containing the terms of that agreement and any others as determined by Kirwan's solicitors (within reason). Kirwan subsequently refused to proceed with the sale.

The Court held that a binding agreement may leave some important matter to be settled by a third party or even by one of the parties. The parties had set out all the principal terms governing the sale of land, including "an obligation to execute a formal contract" and a promise by the seller to "execute, if required … a further agreement". The Court said that although the clause gave the vendor the choice of inserting additional terms to those already agreed upon, the vendor could not insert terms that were inconsistent with those in the document and that

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any such additional conditions needed to be "reasonable". This was an agreement by Godecke to accept additional provisions if reasonably required. A binding agreement had been made.

Incomplete contracts

[3.662] The courts take a similar view of contracts that are, on the face of it, incomplete. They will not enforce an agreement where the parties' intentions cannot be determined objectively. Although there is an element of inconsistency in the decisions, what is clear is that what the parties regarded as "essential" terms need to be agreed to (or a mechanism or formula provided that will allow the term to be completed at a later time). The obvious "essential terms" for many contracts are the price, the subject matter and the parties, but it could be any term that the parties could be said, objectively, to regard as "essential".

Agreements to agree

[3.665] It is not unusual for businesses to enter into an agreement based on an understanding, express or implied, that a further agreement will be reached at some future time, when certain things – cost, supply, transport, industrial agreements, sanctions – may have become clearer. As a result, rather than negotiating those terms before or at the time of contracting, the parties agree that certain terms of that agreement will be determined in the future. In these circumstances, the original contract will often contain a provision whereby the parties indicate that they intend to reach a new agreement in the future. Sometimes these provisions set out detailed mechanisms for doing so, while other times they can be a fleeting reference. However, while such "agreements to agree" may be common and useful, in a business sense, it is clear that "agreements to agree" have traditionally been held to be void for uncertainty. As we have seen, courts generally require the parties to agree on the essential elements of a contract and where the parties have been unable to agree, the courts will not make the contract for them. However, a term will not be unenforceable merely because it requires further agreement if the courts can resolve the uncertainty.

Thus, if the relevant term can be regarded as "non-essential" and, if the rest of the contract can stand alone in its absence, it is possible the court may "sever" the term. Alternatively, if the relevant term, even an essential term, can be given a meaning by the application of a formula (eg "the contract sale price of the Basmati rice shall be the price plus 10% obtained at the West Bengal Grain Exchange on a particular date") or by the intervention of a designated third party (eg "the President of the RESI or his delegate shall fix the amount of rental payable by the lessee") that may be enough to save the agreement from being struck down. The following case is an illustration of the latter point.

Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd

[3.670] *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* [1982] HCA 53. Booker leased to Wilson a service station and car park. A clause of the lease gave an option for a further three years at a rent "to be mutually agreed". Failing such agreement the lease provided for rent to be set by an arbitrator appointed by the President of the Law Society. Wilson purported to exercise the option but Booker refused, arguing that an essential term had not been agreed to, and sought to recover possession.

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The High Court decided there was a valid agreement to renew because the parties had provided a mechanism that allowed an essential term (the rent) to be determined by a third party with no further agreement required of the parties. Had the lease said the option could be exercised but at a "rental to be agreed", there would be no enforceable agreement.

Best endeavours clauses

[3.680] As we have seen, the main objective of a written contract is to provide the parties with certainty about their rights and obligations under the contract. To provide absolute certainty via the written agreement is not always possible or desirable. In many commercial deals, particularly long-term supply or infrastructure or energy contracts, circumstances change or are unknown at the time of contracting so some flexibility is required to be built into the contract. Phrases like a party must use "reasonable endeavours" or "best endeavours" are thought to be a solution – inserted into the contract to provide an appropriate degree of flexibility or to provide a bridge where an impasse has been reached in negotiations. Such a clause may avoid the need to agree on a matter at the time of contracting or provide specific details on major issues (like cost), but the contract risks being declared void by a court on the grounds that it is uncertain or vague or that it is an agreement to agree. Certainly the words "best endeavours" and "reasonable endeavours" are not terms of art and, like all other words used in a contract, they must be interpreted in accordance with usual principles of interpretation. That is, the answer depends on what a reasonable person would have understood the words of the contract to mean at the relevant time and in the relevant context in which the contract was entered into.

[3.690] The starting point for any discussion regarding how a "best endeavours" obligation in a commercial contract is to be interpreted is the High Court decision in *Transfield Pty Ltd v Arlo International Ltd* (1980) 144 CLR 83. In this case, Mason J held that a "best endeavours" clause prescribed a standard of endeavour which is measured by what is reasonable in the circumstances, having regard to the nature, capacity, qualifications and responsibilities of the person owing the obligation viewed in the light of the particular contract. Then in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, Barwick CJ held that "an obligation to use "best endeavours" does not require the person who undertakes the obligation to go beyond the bounds of reason; he is required to do all he reasonably can in the circumstances to achieve the contractual obligation, but no more".

Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd

[3.700] *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd* (2014) 251 CLR 540. Verve Energy, a state-owned electricity generator in Western Australia, had entered into long-term gas supply agreements with a consortium of gas suppliers including Woodside Energy Ltd. These agreements were critical for Verve Energy to secure a steady supply of gas for its power generation activities. Under these agreements, the suppliers were obligated to use "reasonable endeavours" to supply a certain quantity of gas. However, due to unforeseen circumstances and market conditions, the suppliers reduced the amount of gas they provided to Verve Energy and instead sold the gas on the spot market at higher

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prices. The primary issue was how the "reasonable endeavours" clause in the gas supply agreement should be interpreted. Verve Energy argued that the suppliers were required to take all reasonable steps to supply the contracted amount of gas, even if it meant foregoing more profitable sales on the spot market.

The High Court ruled in favour of the gas suppliers, Woodside Energy Ltd., and the other members of the consortium. The Court held that a "reasonable endeavours" clause[19] only obliged the suppliers to take steps that were reasonable *in the context of their own commercial circumstances*. The Court emphasized that the term "reasonable endeavours" must be interpreted in light of the entire contract and the commercial context in which it was made. It concluded that the suppliers had not breached the "reasonable endeavours" obligation by prioritizing more profitable sales. The High Court made three key observations about the construction of reasonable endeavours clauses:

An obligation expressed as an obligation to use "reasonable endeavours" to achieve a contractual object is *not an absolute or unconditional obligation*.

The nature and extent of any obligation to use "reasonable endeavours" are necessarily conditioned by *what is reasonable in the circumstances*, and this can include circumstances which may affect the business of the party tasked with the obligation.

Some contracts containing an obligation to use or make "reasonable endeavours" to achieve a contractual object may contain their own *internal standard of what is reasonable*, by express reference to the business interests of the party tasked with the obligation.

Applying these principles, the Court held that Woodside had not breached its "best endeavours" obligations. Its obligation to use "reasonable endeavours" was qualified by a paragraph which entitled the parties to take into account all relevant commercial, economic and operational matters pursuant to the contract; this qualification provided an internal standard of reasonableness by which the obligation to use reasonable endeavours could be measured; and the agreement was commercial in nature, which meant that the parties were entitled to pursue their own interests, having regard to their capacity to supply as well as their business interests.

The approach taken by the High Court in *Woodside Energy* sets the standard of effort exceptionally low by allowing commercial interests to reduce the obligation required. Woodside arguably made no effort at all to satisfy their "best endeavours" obligation to supply the buyer with extra gas. Parties will always have "commercial interests", which may reduce the scope and meaning of "best endeavours" clauses in appropriate circumstances.

Further reading

See texts listed at the end of Chapter 2.

19 No distinction was drawn between "reasonable endeavours" and "best endeavours".

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Tutorial activities

1. "Agreement" is central to the formation of contracts. The offer-acceptance analysis works well enough for many conventional transactions. But not all. Explain why with reference to the circumstances referred to in [3.10].
2. What is an "offer"? Refer to Figure 3.1. How is it different from an invitation to treat, a "mere puff" or a statement supplying information? Refer to newspapers, magazines or other material (online or hard copy) and provide current examples of each.
3. *Carlill v Carbolic Smoke Ball Co* (see [3.40]) is an example of a unilateral contract. In what sense is it "unilateral"? What transformed the statement (that the company would pay a then-significant amount of money to a person who contracted the flu) from mere puffery to an offer? Watch the YouTube video that was central to *Leonard v PepsiCo* (see [3.60]) (https://youtu.be/U_n5SNrMaL8) and explain why Leonard and his syndicate were not so fortunate.
4. In *Gibson* (see [3.80]), *Boots* (see [3.100]) and *Partridge* (see [3.110]), what did the respective courts decide about whether an offer had been made in each case?
5. Describe how an auction contract is formed. Is it the same with eBay? Refer to *Harris* (see [3.150]) and *Barry v Davies* (see [3.170]) in relation to conventional auctions and *Smythe v Thomas* (see [3.190]) in relation to online 'auctions' such as those conducted via eBay.
6. What is revocation and when is it possible to revoke an offer? Explain why the revocation was ineffective in *Byrne v Van Tienhoven* (see [3.250]).
7. What is an option contract? What makes it different from a mere promise not to revoke an offer? What obligation, if any, is the offeree under with regard to the main offer?
8. What is a counteroffer? How is a counteroffer different from a request for information? Explain the decision in *Stevenson Jaques v McLean* (see [3.330]).
9. What are the rules in relation to acceptance? See Figure 3.3.
10. In order to be effective, must an acceptance be communicated? In your answer explain *Carlill* (see [3.40]) and comment on the effect of *Brinkibon* (see [3.370]).
11. What is the postal acceptance rule? What distinguishes it from the traditional rule that acceptance is not effective until communicated? Why do you think the courts developed the rule? How can the offeror avoid the rule? Refer to *Elizabeth City Centre* (see [3.420]).
12. Acceptance of an offer can be implied from the conduct of the parties. What was the conduct of the firm in *Empirnall Holdings Pty Ltd* (see [3.390]) that indicated it had accepted the offer of the architects? Why was it important for the architects that the firm had accepted the written offer?
13. An acceptance must be unconditional. What, in effect, is a conditional acceptance? *Masters v Cameron* (see [3.470]) is an example of a contract that was "subject to ..." or "conditional upon ...". What did the High Court decide about whether a binding contract had been made?
14. In an online environment, both *Vantage Systems* (see [3.490]) and *Stellard Pty Ltd* (see [3.500]) illustrate that contracts can be formed via exchanges of emails. Read the extracts and explain how the contracts were made in each case.

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15. What is meant by the "battle of the forms"? What is the general rule as to who wins the "battle"? Refer to *Maxitherm Boilers* (see [3.570]) and explain on whose terms the contract was made (in particular, was the exclusion clause included or not?).

16. Under the *Electronic Transactions Act 1999* (Cth), a communication (like an email) is deemed to have been received when it becomes "capable of being retrieved". What does this mean?

17. As the courts attempt to uphold contracts wherever possible, it is not necessary for each term to be certain and agreed to. In this context, explain why the contracts in *Godecke v Kirwan* (see [3.660]), *Booker Industries v Wilson Parking* (see [3.670]) and *Upper Hunter* (see [3.640]) were held to be enforceable (despite the arguable ambiguity and uncertainty and lack of completeness).

18. In the wake of the decision in *Woodside Energy* (see [3.700]) draft a "best endeavours" clause that might have been of some benefit to Verve.

19. Hardly Normal Pty Ltd, a vendor of electronic equipment, advertised:

> NEVER TO BE REPEATED OFFER. 75in SAMSUNG OLED 4K SMART TV @ $4500 each.

Ben saw the advertisement and the next day (Thursday), straight after his business law lecture, he went to the store and said to Mary, the sales manager: "I accept the offer on the advertised TV – here is my card – please deliver it as soon as possible". Mary told him to slow down. "Unfortunately, there has been a rush and we've sold out", she said. "Look", said Ben, "I know my business law – we've got a contract". Mary told him he was a fool but went on to say:

> The only TV left is the demonstration model, and you can have that for $4,000. Not a bad price as the sale price is $4,500. That should make you happy.

Ben was not sure and said that he would think about it and let her know by 1.00 pm the next day (Friday). Mary said she would definitely keep it for him until then. However, at 9.00 am on Friday, Jin Tao walked into the store, saw the demonstration model and offered Mary $4,500 for it. Mary sold it to her. At 10.00 am on Friday, Ben rang Mary and, before she had a chance to speak, told her that he would buy the demonstration set at the price she offered. Mary then told him the bad news – the set had been sold.

Ben comes to your law office and seeks your advice as to whether a contract has been formed. Advise him.

20. Watch the YouTube video of an Amazon Go shopping experience and discuss *how* the contract is made, using the invitation to treat, offer and acceptance model used in *Boots Cash Chemists* (see [3.100]): https://www.youtube.com/watch?v=NrmMk1Myrxc.

21. On Monday, Ruth sent an email to Raymond offering to sell Dark Caviar (her very fast racehorse) for $3 million. As Dark Caviar is not cheap, Raymond replied (in another email) that he needed some time to organise a syndicate. Ruth, replied "don't worry – let me know by Sunday 6.00 pm. I'll keep the offer open until then".

On Friday, Ruth sold Dark Caviar to Bart, a retired trainer, and sent an email to Raymond informing him that Dark Caviar had been sold. However, Raymond does not check his email during the weekends.

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On Sunday morning, Raymond finally organises a syndicate to pay the $3 million price, and, in a state of great excitement, calls Ruth and, before she can get a word in, accepts her offer in these words: "Ruth, I accept – assuming we can agree on a delivery date". Ruth then informs him that she has sold Dark Caviar to Bart.

Raymond is shocked. He drives straight to your office and asks if Ruth is entitled to sell to Bart. Please advise him. In your advice, indicate whether:

(a) Ruth's promise that she would keep her offer open until Sunday at 6.00 pm is enforceable;

(b) Ruth's revocation by email is effective; and

(c) assuming the offer is open on Sunday, indicate whether Raymond's purported acceptance is valid. In the course of your answer, discuss the various options regarding his response.

22. Aurora Ltd is a food distributor. Borealis Ltd is a grain supplier. They have had dealings with each other over many years. The normal routine is that Aurora sends an order for two month's supply of goods. Its order refers to its terms and conditions. Borealis responds with an invoice that contains its own terms and conditions. If there are no issues, Aurora signs and approves the invoice for payment. Borealis then deliver the goods. One of terms in the invoice is a price variation clause (PVC) that allows Borealis to vary the contract price up until the date of supply "if the price on the Chicago Futures market exceeds its price by more than 10%". Aurora's terms contain no such PVC. In July 2024, Aurora ordered 20 tonnes of rice for delivery in December 2024. As a result of the July 2024 global Microsoft IT outage, the price of rice has risen by more than 23%. Borealis provides notice to Aurora that it intends to vary the contract price on the order. Is it permitted to do so?

23. Before reading on, watch https://www.youtube.com/watch?v=vxkwRNIZgdY.

As you can see from the link, on 6 October 2018, a Banksy painting, *Girl With Balloon*, was auctioned at Sotheby's auction house in London. As soon as the painting was knocked down (for £1.04 million) the painting self-shredded. The anonymous and mischievous British artist had set the whole thing up. Sotheby's manager said, "We have not experienced this situation in the past … We are busily figuring out what this means in an auction context … We are in discussion about the next steps."

Advise the purchaser if when and how a contract was made. Make it clear who bears the risk at the moment the painting self-shredded.

Note 1: The purchaser did not dispute the outcome of the auction. That turned out to be a wise move: the value of the (now very famous) painting has increased significantly since it was shredded.

Note 2: Please watch the video again and admire the auctioneer: a lesson in how to just "carry on" when all about you is in chaos.

24. You win an important tender with a bus company to supply charging stations for its new generation EV buses. The contract terms are settled and the contract is filed away, but, in all the excitement, it remains unsigned. The work proceeds smoothly for over three months – you're supplying equipment and your invoices are being paid in accordance with the contract terms. But then a dispute erupts and the bus company refuses to accept any further equipment. When you suggest "lawyering up", the manager says, with great

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authority, that the contract has never been signed and is therefore unenforceable. Is he right? Answer with reference to *Empirnall* (see [3.390]) and *PRA Electrical Pty Ltd v Perseverance Exploration Pty Ltd* (see [3.395]).

25. Reginald decided he no longer wanted to sell his holiday house at Rye. He had put it on the market and Tom responded. On 10 June, they agreed on a purchase price of $1,280,000 and signed a Sale Note that included the following: "This agreement is made subject to the preparation of a formal contract of sale which shall be acceptable to the purchaser's solicitors on the above terms and conditions." Is there a binding contract on 10 June?

26. Lionel Messi's football career with Barcelona started when he was just 13 years old with a contract written on a napkin. British auction house Bonhams sold the napkin in an online auction on behalf of Horacio Gaggioli, his agent at the time, for $1.4 million. The napkin bears the signatures of Gaggioli and Barcelona's sporting director. It outlines an agreement in principle to sign Messi and was intended to reassure his father, Jorge, that the deal would go through for the highly talented but then very young footballer. A more formal and detailed contract with the club followed soon after. Ignoring for the moment that Lionel was 13 at the time, advise Barcelona whether the "napkin agreement" was a conditional agreement that was not enforceable until the more formal and detailed contract was signed.

27. Cosmic Pharma is well known for their "medicines and remedies" that, among other things, claim to cure or reduce the effect of various kinds of respiratory diseases. While the world was anxiously awaiting a COVID-19 vaccine, the company saw a great opportunity to market its new wonder drug: the Corona Snort Pill (CSP) that promised complete protection from the virus, if snorted as directed.

    To increase interest, Cosmic Pharma said that if anyone should contract the virus after snorting the pill as instructed, it would pay them $10,000. The advertising campaign was very effective. Amy, an 82-year-old lady, whose immune system was already compromised, was very concerned about contracting the virus. When she saw the advertisement, and the offer of a reward, she was persuaded to buy a packet of pills and immediately began snorting, as instructed. Unfortunately, she still contracted the virus. Fortunately, she survived and now demands payment of the $10,000 reward. Cosmic Pharma refuses to pay, arguing:

    (a) the advertisement was not an offer because (i) it was addressed to the whole world and you cannot make a contract with the whole world; (ii) advertisements are invitations to treat, not offers; and (iii) in any event, no one would take the statement about the reward seriously.

    (b) even if the advertisement was an offer, there was no valid acceptance of that offer by Amy because (i) the offer was not addressed to her, and (ii) she did not communicate her acceptance to the company.

    Addressing each of the arguments raised by Cosmic Pharma, advise whether it has a contractual obligation to pay the reward to Amy. (Thanks to Ben Grunberg, a colleague at Monash University, for the creative re-working of the Carbolic Smoke Ball Co's advertisement.)

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Chapter 4

Intention to Create Legal Relations

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Introduction

[4.10] A further essential element of a binding contract is the parties must intend to create a legally enforceable agreement. If they did not intend their agreement to be legally binding, there is no contract; the agreement may be morally binding or binding in honour only but any sanctions for "breach" of the agreement are non-legal though they may be effective (eg, being socially or commercially ostracised as a "promise-breaker" may be a powerful deterrent).

If there is a dispute about the intention of the parties, the courts ask what a reasonable person would *objectively* conclude, based on their words and conduct; the parties' *subjective* intentions are irrelevant, and, in any case, usually the parties will, in fact, have given no thought to the question of legal sanction. Contracts are usually made optimistically, with their performance rather than their breach and legal enforcement in mind.

The courts, in determining, objectively, the question of intention (or its absence), have traditionally fallen back on the double (rebuttable) presumption: commercial deals are, and social/domestic arrangements are not, intended to be legally binding unless the contrary is shown. Until *Ermogenous v Greek Orthodox Community of SA Inc*, this twofold presumption represented the position of the common law. However its weakness was that it solved only obvious cases, such as, on the one hand, those involving commercial transactions (eg, buying and selling goods and services) and, on the other, obvious domestic or social arrangements (eg, agreements to meet for dinner and a movie or for little Johnny to mow the family lawns in exchange for a gold coin (or perhaps, these days, it might be a bitcoin)). As we shall see, it was less helpful with atypical cases that do not obviously fit into either category.

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However, in the wake of *Ermogenous*, the role of presumptions in determining intention has been diluted. As the High Court said, these presumptions are merely an aid to determining the intention of the parties – the fact that an agreement is a family matter or is an arrangement within a religious community or arises out of a commercial relationship is not determinative of the issue but forms part of the surrounding circumstances from which the court will decide whether the parties intended to enter into a legally binding agreement.

Ermogenous v Greek Orthodox Community of SA Inc

[4.20] *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95. Archbishop Ermogenous resigned after more than 20 years' employment with the Greek Orthodox Church. When he did so, he claimed payments in lieu for annual leave and long service leave. The Church refused, arguing that his employment with the Church was not a true employment contract. The High Court overruled the Full Court of the Supreme Court of South Australia that had decided there was no intention to make a contract because of the nature of the employment contract (ie, it was not a "proper" employment contract because it involved religious parties). The majority noted the objective nature of the enquiry and said that:

> Because inquiry about intention may take account of the subject matter of the agreement, the status of the parties to it, their relationship to one another and other surrounding circumstances, not only is there obvious difficulty in formulating rules intended to prescribe the kinds of cases in which an intention to create contractual relations should or should not, be found to exist, it would be wrong to do so … there is frequent reference to "presumptions". It is said that it may be presumed that there are some "family arrangements" which are not intended to give rise to legal obligations and it was said in this case that it should not be presumed that there was an intention to create legal relations because it was a matter concerning the engagement of a minister of religion. For our part, we doubt the utility of using the language of presumptions in this context … Reference to presumptions may serve only to distract attention from that more basic and important proposition.

[4.30] After *Ermogenous*, it seems that the issue of intention will now be determined, not by resorting to presumptions, but by examining the words and conduct of the parties and the surrounding circumstances to decide, objectively, whether the parties intended to enter into a legally enforceable agreement or not.

In regard to social or domestic agreements, the party who asserts that there was an intention to create a contract still has the onus (burden) of proving that there was such an intent but that onus may be easier to satisfy if the old presumption (that there was no intention) is not operative. Where the agreement is a commercial one, the reverse is true. The party asserting that there *was* an intention to create a legal relationship can no longer rely on the old presumption (that there was an intention). They will need to prove that, based on the evidence, there was an intention. Only at that point will the other party have to produce objective evidence that there was no intention.

So, post-*Ermogenous*, we move beyond presumptions and rebuttals and simply ask the question "objectively, taking into account all the circumstances, did the parties intend to make a contract that, in the event of a dispute, would end up in court?"

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Bearing in mind that, while the analytical approach may now be different, the outcomes probably would not be, we will consider the intention question in the context of the traditional binary: social/domestic agreements and commercial agreements.

Intention and social and domestic agreements

[4.40] Domestic arrangements concerning the ordinary course of family life are rarely enforceable by the courts because the circumstances surrounding such agreements almost always indicate that, objectively, the parties did not intend to create legal relations. However, arrangements not relating to the vicissitudes of family life – for example, a partnership or an employment contract – are not presumed to lack intention merely because the parties are married or are close family members. The presumption is also set aside where family relationships have broken down. But, to reaffirm the High Court view in *Ermogenous*, each case, where intention is an issue, must be examined objectively, on its merits, taking into account all of the surrounding circumstances.

Agreements between partners

[4.50] In normal circumstances, where the parties were living "in amity" at the time an agreement was made, the courts will regard them as not having intended to create a legally binding agreement.

Balfour v Balfour

[4.60] *Balfour v Balfour* [1919] 2 KB 571. The defendant was a civil engineer employed by the Government of Sri Lanka (or Ceylon, as it was then called) as Director of Irrigation. He and his wife lived in Sri Lanka together until they returned to England for his leave. When he returned to Sri Lanka, she was unable to accompany him because of her ill health. At this point, he promised to pay her £30 a month as maintenance during the time that they were forced to live apart. When the relationship deteriorated, she commenced divorce proceedings. She claimed she was entitled to the amount she and her husband had agreed upon. Her action failed. The Court held that the agreement was an ordinary domestic arrangement, which was not intended to give rise to a legally binding contract. Atkin LJ said:

> The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold courts … the plaintiff has not established any contract.

[4.70] For obvious reasons, the courts have said that the parties may intend to create legally binding agreements where those agreements are made *after* their relationship has broken down. One might say the parties are, at that point, living "in enmity" instead.

Merritt v Merritt

[4.80] *Merritt v Merritt* [1970] 1 WLR 1211. After a couple had separated, it was arranged that the husband would pay the wife a monthly allowance. From this allowance, she was to pay the outstanding balance on the mortgage of the matrimonial home that was in their

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joint names. The husband signed a document that said that "in consideration of her paying all charges in connection with the home until the mortgage repayments had been completed" he would transfer the house into her sole name. When Mrs Merritt paid off the remainder of the mortgage, her husband refused to transfer the house to her. The Court held that, since the parties had separated, the agreement regarding the ownership of the matrimonial home was intended to create legal relations and was binding on them.

Other family or social agreements

[4.90] Although the surrounding circumstances in many family arrangements may suggest the parties did not intend to create a binding agreement, the courts are more inclined to find an intention to create legal relations where one of the parties has significantly changed their position in reliance on the agreement or there is, materially speaking, a lot at stake. However, as always, each case depends on its own facts and, as we have seen from *Ermogenous*, it is an objective determination of all the circumstances (not a subjective one) as to whether an intention to create a legal relationship exists.

Todd v Nicol

[4.100] *Todd v Nicol* [1957] SASR 72. Mrs Nicol was living in South Australia by herself after her husband died. She wrote to her sister-in-law, Margaret Todd, and Margaret's daughter, Gracie, who lived in Scotland, and invited them to come and live with her on the understanding that they would live rent-free and that she would leave her house to them when she died. The Todds accepted her invitation. They terminated the lease on their home and sold their furniture and surplus belongings. Margaret resigned from her job, and they bought tickets to travel by sea to Australia. Shortly after they arrived in Australia, there was some evidence that the Todds behaved badly towards Mrs Nicol. In any event, Mrs Nicol sought to remove her relatives from her house. The Todds sued, claiming a contract had been formed on the terms outlined by Mrs Nicol. The Court decided that although there was (then, before *Ermogenous*) a presumption that in a family arrangement of this kind there was no intention to create a legal relationship, it was, in this case, rebutted by evidence of the cost and inconvenience incurred by the Todds in relocating to South Australia from Scotland.

Note: There was a twist in the tail: although the Todds succeeded in establishing that there was an intention to create a contract, the Court held there was an implied term in the agreement that obliged the Todds to behave in a reasonable manner. Because of the breach of this implied term, the Court refused to order Mrs Nicol to allow them to live in her home. It was, in other words, a pyrrhic victory for the Todds and illustrates the fact that "winning" on contract formation does not necessarily mean "winning" an overall contract law dispute.

Jones v Padavatton

[4.105] *Jones v Padavatton* [1969] 1 WLR 328. A mother and daughter came to an arrangement whereby the mother agreed to maintain her daughter if she gave up her job in Washington and went to London and agreed to study for the Bar with a view to practising law in Trinidad where

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the mother lived. Initially the promise took the form of a monthly allowance, but in 1964, the mother bought a house for her daughter where she could live while she studied, rent out rooms and use the money for her allowance. The daughter commenced her studies in 1962 but by 1968, the date of the court hearing, she had only completed half the course. In 1967, the mother and daughter had a serious falling out and the mother sought to re-possess the house. The daughter resisted the claim and counter-claimed for the money she had spent on the house. The daughter argued that she and her mother had entered into a legally binding contract pursuant to which the daughter had a contractual right to live in the house. She claimed there had been an intention to create legal relations (and she had provided consideration[1] (value) for her mother's allowance by studying for the bar). The mother argued there was merely an informal family arrangement with no intention to create legal relations and she was, therefore, entitled to recover possession of the house. Even if there was an enforceable contract, she asserted the terms of the arrangement were too vague for the court to enforce.

The Court, applying the traditional presumption/rebuttal analysis, decided that there was no intention to create a contract and awarded possession of the house to the mother. There is (or was) a presumption that family arrangements are based on mutual trust, family ties and affection and that there is no intention to create legally binding contracts capable of enforcement in the courts. This presumption can be rebutted, but the lack of formality regarding the agreement between mother and daughter strongly indicated there was no such intention and the daughter had no defence to her mother's claim for the house. And the evidence of the daughter did not serve her cause. When she was asked about the occasion when her mother visited the house and for several hours she refused to let her inside, she replied "I didn't open the door because a normal mother doesn't sue her daughter in court".

Note: If the case were decided in a post-Ermogenous Australia, it is unlikely that the decision would be different. The court would ask whether, in all of the circumstances, objectively speaking, the parties intended to enter into a legally binding contract? Given who the parties were, the informal and vague nature of the (housing) agreement and how it "evolved" over time, it is unlikely that the daughter, who bears the onus of proof, could prove, on the balance of probabilities, that there was such an intention.

Ashton v Pratt

[4.110] *Ashton v Pratt* [2015] NSWCA 12. Around November 2003, the late Richard Pratt, described as a man of "exceptional wealth", offered Madison Ashton the position of his "mistress" (the label they used to describe her status) in exchange for a trust of $2.5 million to be set up for each of her children, a payment of $500,000 per year for her services, a car and certain allowances – some of which were to encourage Ashton not to return to her work in the escort industry. This agreement was never reduced to writing. From this time until approximately December 2004, Ashton was Pratt's "mistress". She received the use of a car and certain allowances, but the entire agreement, including the establishment of a trust, was never carried out. After Pratt's death, when the executor refused to comply with Ashton's demands, she sued the estate, seeking damages for breach of the agreement including the trust.

1 The consideration requirement is covered in Chapter 5.

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The Court of Appeal was unanimous in finding that there was no intention to create a legally binding agreement. This was not because of the presumption that there was no intention to create a legal relationship. Rather it was because of all the circumstances surrounding the agreement: (a) the conversation was "not cast in the language of obligation"; and (b) important matters of detail were not addressed or discussed – there was no detail on the duration of any arrangement, how it might be terminated and what should happen upon its termination; the definition of the services which Ms Ashton was required to do; and little detail in relation to the establishment of the trust.

Granny flat arrangements

[4.120] In recent times, with the dream of home ownership slipping away, a number of disputes have come before the courts where either the parents have provided money to their children to buy property or the parties put in place so-called "granny flat arrangements" of one kind or another. In fact, as the following two cases demonstrate, when such arrangements go wrong, they are difficult to resolve because it is not clear whether the parties intended to enter into a contractual arrangement – the agreements are often not reduced to writing, the elderly parents have not received legal or financial advice, and the parties have often not properly considered what would happen if the relationship breaks down.

Flourentzou v Spink

[4.125] *Flourentzou v Spink* [2019] NSWCA 315. A mother obtained $147,000 by selling her home and gave the money to her daughter and son-in-law for the purchase of a property in Sydney. The daughter and son-in-law agreed the mother would live with them at the property in a separate part of the house. After sharing a residence for three years, the mother, daughter and son-in-law had a falling out and the mother was evicted from the property. The question on appeal was whether the $147,000 from the mother was a gift or a conditional loan.

The Court of Appeal stated that a transfer is a gift if it is made voluntarily and without receipt by the transferor of any material advantage in return. It is an absolute or unqualified gift if "the donor intends that the donee should have enjoyment of the subject matter *to the entire exclusion of the donor*". Where the donor reserves a right to a refund "or otherwise qualifies enjoyment of the subject matter by the donee", the payment is likely to be regarded as a "conditional gift". The Court decided that payments by Mrs Spink were made to obtain the right of residence in the appellants' property. This positive intention was inconsistent with the making of an absolute gift. "Spink did not outlay the $147,000 as an absolute gift intended purely as an exercise in altruism engendered by love and affection (or gratitude)". Mrs Spink was therefore entitled to the return of her contribution to the acquisition and renovation of the property, plus interest, secured by an equitable charge over the property.

Wallis v Rudek

[4.127] *Wallis v Rudek* [2020] NSWCA 207. A mother and father entered an arrangement with their adult daughter, under which the daughter paid $827,498.27 to discharge her parents'

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mortgage balance, and her parents transferred ownership of the home to her. The daughter and her immediate family moved into the house, and the parents continued to reside on the ground floor. A license agreement was prepared for the parents to sign at some point, but they refused to do so. When the two families fell out, the daughter instructed her parents to move out. The parents resisted, relying on an alleged promise by their daughter that they would live on the ground floor of the house until they died, that they would not pay any rent and that their daughter and her family would live in the upstairs part of the house. The daughter said there never was such an agreement.

Preferring the daughter's evidence, the trial judge found that there was no intention to enter into a binding contract. However he ordered the daughter to pay the parents compensation for the difference between what she paid to discharge their mortgage and the value of the property (around $1 million) and gave the daughter possession of the house. The Court of Appeal affirmed both the decision and the remedy.

Intention and commercial agreements

[4.130] Where an agreement is reached in the course of business dealings, the circumstances will generally indicate that the parties intended to create legal relations. Rogers CJ said it well in *Banque Brussels Lambert SA v Australian National Industries Ltd* (1989) 21 NSWLR 502:

> There should be no room in the proper flow of commerce for some purgatory where statements made by businessmen, after hard bargaining and made to induce another business person to enter into a business transaction would, without any express statement to that effect, reside in a twilight zone of merely honourable engagement. The whole thrust of the law today is to attempt to give proper effect to commercial transactions. If the statements are appropriately promissory in character, courts should enforce them when they are uttered in the course of business and there is no clear indication that they are not intended to be legally enforceable.

Malago Pty Ltd v AW Ellis Engineering Pty Ltd

[4.140] *Malago Pty Ltd v AW Ellis Engineering Pty Ltd* [2012] NSWCA 227. Following mediation, the parties entered into a Heads of Agreement.[2] The Agreement provided that:

> … without affecting the binding nature of these Heads of Agreement the parties within 7 days [are] to execute a formal document or documents as agreed between their respective solicitors to carry out and express in more formal terms.

The New South Wales Court of Appeal held that the Agreement, despite being a Heads of Agreement, was binding. The words "without affecting the binding nature" of the Agreement were "decisive" in establishing the intention to be bound.

2 A Heads of Agreement is a (normally) *non-binding* document which sets out the key terms of a *proposed* agreement between parties. It is commonly used as a part of the process of negotiating commercial transactions. Normally, parties sign the Heads of Agreement at the pre-contractual stage of negotiations, with the intention of the parties continuing negotiations (consulting lawyers, accountants and relevant experts) and ultimately, all things going well, entering into a legally binding contract.

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Express exclusion of intention

[4.150] Where the parties' agreement includes an express stipulation that it is not intended to give rise to legally enforceable obligations, the courts will give effect to such provision, and the agreement will not be enforceable. Such provisions are sometimes called "honour clauses" because their result is that the agreement is enforceable in "honour" (party reputation) only, and not via the courts.

Rose & Frank Co v JR Crompton & Bros Ltd

[4.160] *Rose & Frank Co v JR Crompton & Bros Ltd* [1925] AC 445. An agreement contained a clause which stated:

> This arrangement is not entered into … as a formal or legal agreement, and shall not be subject to legal jurisdiction in the law courts … but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they each honourably pledge themselves, with the fullest confidence – based on past business with each other – that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation.

It was held that the agreement was not legally binding. The use of words in the agreement such as "not … a formal agreement" and "honourably pledge" indicated that the parties did not have the intention to create a legally binding agreement. As Atkin LJ said:

> In this document, construed as a whole … the clause in question expresses in clear terms the mutual intention of the parties not to enter into legal obligations … I see nothing necessarily absurd in businessmen seeking to regulate their business relations by mutual promises which fall short of legal obligations, and rest on obligations of either honour or self-interest.

[4.170] It is common to insert in competition and lottery forms a stipulation to the effect that entry into the competition is not intended to give rise to legally enforceable obligations.

Jones v Vernon's Pools Ltd

[4.180] *Jones v Vernon's Pools Ltd* [1938] 2 All ER 626. The plaintiff alleged that he had sent in a completed football coupon to the defendant pools company (ie, to a competition). It would have been a winning coupon but could not be traced by the defendant. When sued by the plaintiff, the defendant relied on the following clause included on its coupons:

> It is a basic condition of the sending in and acceptance of this coupon that it is intended and agreed that the conduct of the pools and everything done in connection therewith … shall not be attended by or give rise to any legal relationship, rights, duties or consequences whatsoever or be legally enforceable or the subject of litigation, but all such arrangements, agreements and transactions are binding in honour only.

The Court held that the clause was decisive: the agreement was not intended to give rise to a legally binding contract.

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Letters of comfort

[4.190] A letter of comfort is usually written by a parent company to a lender giving "comfort" to the lender about a loan to be made by the lender to a subsidiary of the parent company.[3] The question is then whether or not the letter may be regarded by the lender as an alternative to a guarantee or other form of security for the loan (ie, a contract to pay out the subsidiary's loan). Letters of comfort tend to be construed by the courts as merely statements of commercial intent and not as legally enforceable contracts of security, such as guarantees. However, in *Banque Brussels*, the Court said that, objectively speaking, the letter of comfort in that case was, in fact, intended to be contractual.

Banque Brussels Lambert SA v Australian National Industries Ltd

[4.200] *Banque Brussels Lambert SA v Australian National Industries Ltd* (1989) 21 NSWLR 502. Banque Brussels was negotiating a loan of $5 million to Smedley Securities. ANI (which had a controlling interest in Smedley's parent company) provided a letter of comfort to the bank in which it agreed to inform the bank if it decided to dispose of its holding in Smedley's parent company. The letter also said:

> We take this opportunity to confirm that it is our practice to ensure that Smedley Securities Ltd will at all times be in a position to meet its financial obligations … (including) repayment of all loans made by your bank.

ANI disposed of its holding without giving notice and Smedley went into liquidation. When the bank could not recover its loan, it sued ANI, arguing that the letter of comfort contained a contractual promise that it would in effect guarantee the loan made to Smedley. ANI argued that the letter was not intended to create a legal relationship between itself and the bank. The Court began with the (old) presumption that parties to commercial arrangements intend their agreements to have legal effect and found that ANI had not adduced enough evidence to rebut the presumption.

Anglican Development Fund Diocese of Bathurst v Palmer

[4.205] *Anglican Development Fund Diocese of Bathurst v Palmer* (2015) 336 ALR 372. A bank provided a Diocese Development Fund with a $40 million loan facility. The Bishop of the Diocese wrote a "letter of acknowledgment" which stated that the Diocese "undertakes to use its best endeavours and powers … to resolve issues that may arise within the loan facilities" and to "take control of the Debtor's affairs, to facilitate clearance of loan amount(s) outstanding". When the debtor defaulted, the bank looked to the Fund. The Fund denied a contract existed between it and the Bank.

3 The parent company, in law, is a separate legal entity from the subsidiary and is not, in law, responsible for the debts of the subsidiary. However, as it owns the subsidiary company, a potential creditor may ask the parent to "vouch" for its subsidiary before approving a loan to the subsidiary. We will examine the law of corporations in Chapter 19.

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The Court held that the letter was legally binding. It had been provided at the insistence of the bank as part of a large commercial loan. It was given as "security" for the transaction. It was a formal instrument written under the signature and seal of the Bishop. The language of the letter was "that of binding obligation, commitment and promise".

Government policy proposals

[4.210] The fact that the federal or a state government is a party to an arrangement gives rise to a question of classification: is the arrangement a contract, governed by the principles of private law, or is it an administrative or political arrangement and therefore not justiciable (subject to legal action)? Although the High Court has once resolved this problem by relying chiefly on the doctrine of consideration, which is addressed in Chapter 5, the weight of authority now favours a solution which is based directly on an analysis of the parties' intentions. Hopefully, with a government agency involved, this intention would be expressed in writing, but even governments rarely take such precautions. Therefore, the courts are left to work out intention in the same way as other disputes about intent: from the terms of the arrangement and the circumstances of the case.

What is clear is that the courts, relying on intention or consideration hurdles, have traditionally kept out of politics, in much the same way (as we saw earlier) that they have been reluctant to intervene in family disputes. Where promises made by government are policy commitments (eg, promises regarding tax cuts, cost-of-living hand-outs, inducements to buy EVs or solar panels, etc), the courts have been reluctant to say that these promises are intended to create *contractual* obligations between the government and some or all of the citizenry. Thus, breaches of such policy commitments may have political consequences, but they do not generally have legal ones.

However, where the government enters into normal commercial agreements to buy or sell goods or services (eg, it signs contracts to purchase a fleet of cars or to construct a school hall or to build a $26 billion tunnel or it signs a $368 billion contract with the United States and the United Kingdom to build a number of nuclear submarines), it is bound by the normal position that the parties to commercial contracts intend them to be legally enforceable. In those circumstances, any such contracts are enforceable by and against the government. So, for example, in the case of the above submarine contract, the government was to pay $890 million in damages to France for wrongful termination of its prior agreement with that nation. And after the Victorian government terminated its contract to host the Commonwealth Games in 2026, it has had to pay out $589 million (including $150 million for employee and operating costs, and a $380 million settlement) to Commonwealth Games bodies.

Australian Woollen Mills Pty Ltd v Commonwealth of Australia

[4.220] *Australian Woollen Mills Pty Ltd v Commonwealth of Australia* (1954) 92 CLR 424. During the Second World War, the Commonwealth acquired the whole of the Australian wool clip (ie, the total amount of Australia's wool), using part of it for export, and selling part at fixed prices to Australian manufacturers of woollen and worsted goods. The Commonwealth also controlled the prices at which those manufacturers were allowed to sell their products on the Australian market. The prices had been fixed to allow a reasonable profit margin. However, in June 1946, the Commonwealth re-introduced wool auctions, thus freeing the price of raw

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wool, while still maintaining price control over manufacturers' products. Since the price for raw wool soon rose, manufacturers' profit-margins were in jeopardy. To deal with this problem, the Commonwealth offered to pay a subsidy on all woollen goods sold on the home market, to make up the difference between the earlier (controlled) price for raw wool and the average market price prevailing from time to time at wool auctions. The AWM claimed to have fulfilled the conditions on which the right to payment under the scheme depended; the Commonwealth maintained that the subsidy scheme was outside the realm of private contract law and that, at any rate, any undertaking the Commonwealth might have given was not supported by consideration.

On the latter point and one we will discuss in the next chapter, it is clear that had the intention hurdle been cleared, there would have been little difficulty in relation to consideration (something of value provided by AWM in exchange for the promise by the government): the purchase of wool by AWM and the manufacture of woollen goods and their sale on the home market would have been sufficient consideration provided by the plaintiffs in exchange for the undertaking by the Commonwealth to pay a subsidy.

However, the High Court found that there were several factors that indicated that there was, in fact, no intention to create a binding agreement. It regarded the subsidy scheme as more in the nature of an administrative scheme rather than a contractual obligation. For instance, the Commonwealth expressly reserved the right to vary the amount of the subsidy and there was no formal agreement between the government and the manufacturers. These factors, combined with the general reluctance of the courts to regard policy commitments by governments as contractual obligations, meant that there was no binding agreement to subsidise the wool purchases made by AWM.

The Administration of the Territory of PNG v Leahy

[4.230] *The Administration of the Territory of PNG v Leahy* (1960) 105 CLR 6. Leahy, a grazier in PNG, arranged with the Department of Agriculture that the Department would eradicate cattle ticks from his property. The Department's officers "through deficiencies of character and over-indulgence in alcohol" failed substantially in their duty and as a result Leahy's cattle were more seriously affected by ticks than they were before. Leahy sued the Department, claiming damages for breach of an alleged contract.

The High Court held that there was no intention to create legal relations. The Department was doing no more than giving effect to government policy for tick eradication when it agreed to assist Leahy. The plaintiff had sought aid and in responding the defendant was doing no more than performing a function of government in accordance with settled policy. It was not a matter of private contract. Dixon CJ said:

> I am clearly of opinion that the Administration of the Territory, by its officers, did not contract with the plaintiff; there was no intention on their part to enter into any contract, to undertake contractual obligations or to do or undertake more than was considered naturally and properly incident to carrying out their governmental or departmental function in the conditions prevailing. They were merely pursuing the policy adopted for the eradication of tick.

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Further reading

See contract texts listed at the end of Chapter 2.

Tutorial activities

1. In assessing whether there is the required intention to create a legally binding agreement, the courts have previously relied on the concept of "presumptions". What are those presumptions and, most importantly, what did the High Court say in *Ermogenous* (at [4.20]) about the use of the presumptions?
2. What were the main reasons for the decision in *Ashton v Pratt* (at [4.110])? Do you believe the decision was fair? If the same situation arose again, what would you advise Ashton to do?
3. What is the essential difference between *Balfour* (at [4.60]) and *Merritt* (at [4.80])? If you were Mrs Balfour, would you feel aggrieved at the decision in your case?
4. What is a letter of comfort and why is it provided? Is it necessarily legally enforceable? Refer to *Banque Brussels* (at [4.200]).
5. Read *Flourentzou v Spink* (at [4.125]). The Court of Appeal upheld the initial decision, finding that the payment of $147,000 by the mother was a conditional gift. How would the Court have decided the question of intention when the parties had not expressed their intention in writing?
6. Paddy was 34 years old and a single mother living in Melbourne. She had a good, reliable, well-paid job as a clerk. Her mother, Jay, wanted her daughter to become a lawyer and promised to pay her university fees provided she graduated in the minimum time and did so with First Class Honours. Paddy did both. Unfortunately, the mother and daughter had a serious falling out (over Paddy's participation in campus political protests) and Jay told her daughter she would not be paying her fees (that amounted to $60,000). Paddy seeks your advice as to whether there is an enforceable contract between her mother and herself.
7. Simkin was a boarder at Peta's house where Peta lived with her granddaughter, Billie. Simkin regularly entered into newspaper competitions. For one of the weekly newspaper competitions, the three agreed that Simkin would fill in a weekly coupon, with each person making three predictions, they would submit them in Peta's name, and they would divide the prize equally in the event of a prize being won. After a short while, one of Simkin's predictions won a substantial prize (under Peta's name). When Peta refused to distribute the prize, Simkin claimed his one-third share of the prize under their agreement. Advise him whether the agreement is legally enforceable.
8. Mac Investments Pty Ltd (MI) received a call from Como Bank Ltd (Como). It was concerned about lending a substantial sum of money to Bankers Trust Pty Ltd (BT), a subsidiary company of MI. In the wake of the 2009 Global Financial Crisis, the parent company was aware that BT needed to borrow funds to continue trading in the securities and futures market and wrote a letter to Como in the following terms:

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- MI supports the loan to BT and undertakes to ensure that it remains in a position to repay the loan.

BT subsequently defaults on the loan and Como looks to MI to compensate it for its losses. Advise Como of its rights and explain how it might better protect itself in the future.

9. Promises made by governments that are of a political nature (eg, the promise to pay a subsidy to employees affected by COVID-19 or to rebuild infrastructure after the horrific bushfires of 2019–2020) are not enforceable. Can you justify this position according to the rules of contract law?

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Chapter 5

Consideration, Promissory Estoppel and Formalities

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Introduction

[5.10] This chapter discusses three issues. First, the third essential element in the formation of a simple contract is that consideration (some value or benefit) must be given or promised by one party in return for the other party's promise. Second, we consider the doctrine of promissory estoppel that may offer some relief from the strict rule that a promise is not enforceable unless some consideration has been provided. Third, a limited number of contracts will only be enforceable if they comply with certain formalities.

Simple contracts

[5.20] The vast majority of contracts are simple contracts. In this sense, "simple" means that the agreement is not formal. A contract that is oral or wholly or partly written is a simple contract unless the writing is in the form of a deed. Where a promise is contained in a deed it does not need to be supported by consideration. Such contracts are often referred to as "contracts under seal" (see [5.220]). All valid simple contracts must be supported by consideration, although that statement must be qualified by the doctrine of promissory estoppel.

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Consideration

The requirement of consideration

[5.30] The requirement of consideration means that a promise can only be enforced by the promisee (a person to whom the promise is made) if they can show that they have given (or promised to give) something of value or have incurred a detriment (given up something or refrained from doing something that the promisee is entitled to do) in return for the promise. This is the so-called "bargain theory" that underpins the consideration requirement: we look for an "*act, forbearance or promise*" *made in exchange for a promise*, or in Latin, a "*quid pro quo*" (something for something). Or in the classic definition, replete with legalese, of Lush J in *Currie v Misa* (1875) LR 10 Ex 153:

> A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given suffered or undertaken by the other.

This legal language – forbearance, detriment, value, benefit accruing, and even a bit of Latin – makes it difficult to see the basic idea behind the concept of consideration. A simplified, but no less true, definition is that "to be enforced by the courts, a promise must be paid for". What constitutes "payment" is the interesting bit.

Beaton v McDivitt

[5.35] *Beaton v McDivitt* (1987) 13 NSWLR 162. McDivitt promised to transfer a part of some land to Beaton when a rezoning occurred if, in the meantime, he worked the land according to permaculture principles. Beaton went onto the block, built a house, farmed the land as required and assisted with an access road. After 7 years they had a dispute and Beaton was ordered off the land.

The New South Wales Court of Appeal held that McDivitt's promise was enforceable, the consideration for which was Beaton coming onto the land and working it as required. This was a detriment to Beaton and, thereafter, it was not open to McDivitt to withdraw from the promise made.

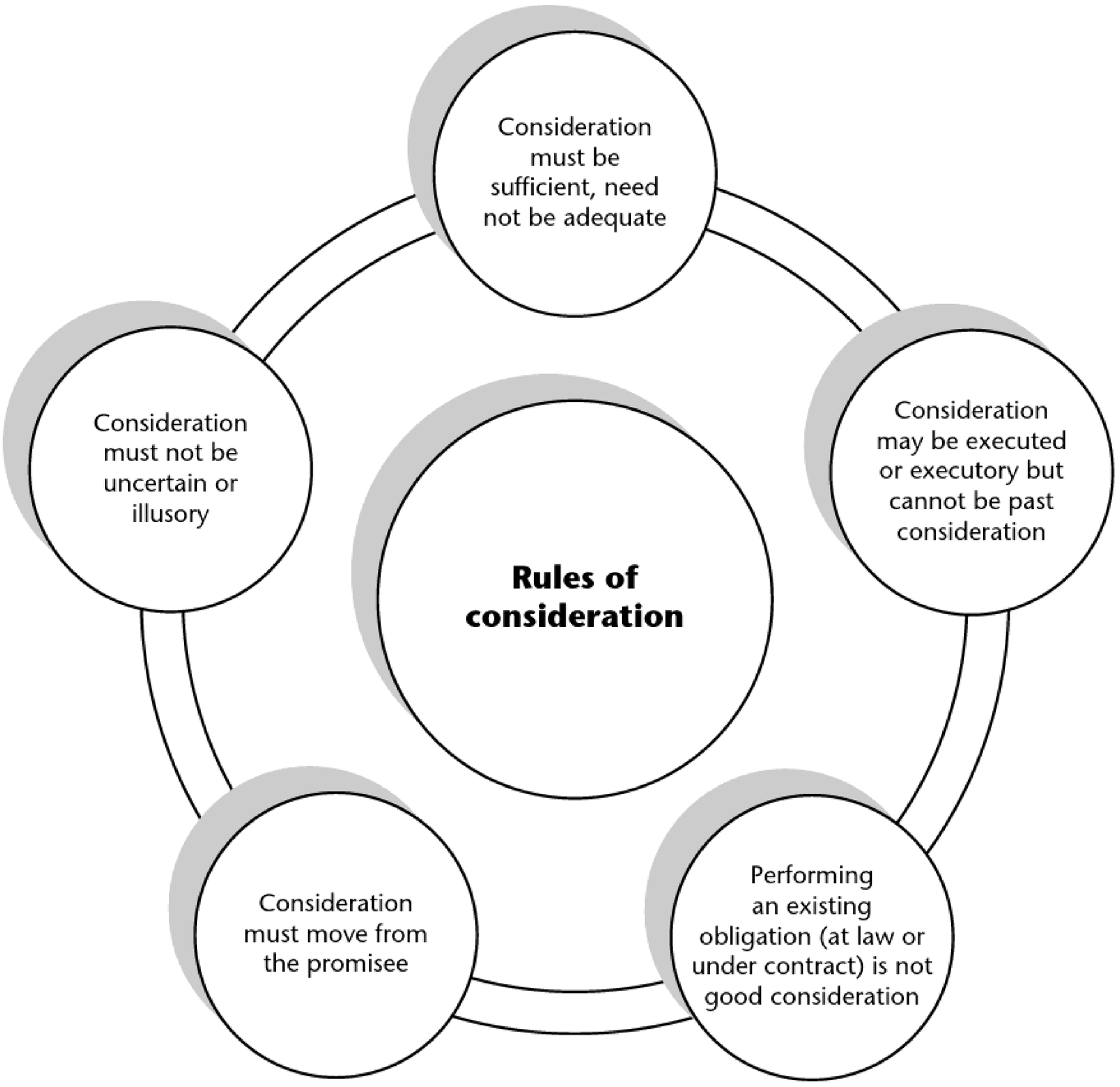
[5.36] In most cases, the consideration requirement is not difficult to satisfy. The "bargain", or the "exchange", between the parties is obvious. For example, a simple promise by A to give B her Tesla EV is not enforceable. B has not "paid" anything, given nothing of value, to A in exchange for the promise. However, if A makes the same promise in exchange for B's promises to pay her $1000 or paint her portrait or babysit her children, the parties have made a legally enforceable agreement (notwithstanding the "value" promised by B may not be "adequate" in the sense of being equal to the value of the car). The crucial difference is that B has provided something of value to A.

Rules regarding consideration

[5.37] There are a number of rules that the courts have developed in relation to what is good or valuable consideration.

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Figure 5.1 : Rules of consideration



[5.40] 1. **Consideration must be sufficient but need not be adequate.** So long as consideration exists (is "sufficient"), the court is not (generally) concerned as to its "adequacy" (equivalency in value to the promise being paid for). The courts are not concerned with whether the deal was a good deal (although a "bad deal" may indicate that the consent of the promisee has been compromised by the fraud or unconscionable conduct or other matters discussed in Chapter 7). All that is required is that the consideration has some recognised legal value. Indeed, much of what follows is concerned with defining what is and what is not "value" according to law.

Thomas v Thomas

[5.50] *Thomas v Thomas* (1842) 2 QB 851. Just before he died, John Thomas expressed a desire for his wife to have their house. After his death, the executors of his estate, in order to meet John's wishes, agreed with his wife that she would stay in the house and pay £1 per year and, after a period of time, she would receive title to the house. John's wife did live in the house for the specified period of time but the executor refused to complete the conveyance, claiming the agreement was unenforceable because no valuable consideration had been provided.

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The Court decided in favour of Mrs Thomas. It said that the *motive* for entering the agreement (ie whether promises are motivated by love and affection or, in this case, the desire to honour a dying man's wish) is irrelevant. The only relevant question is whether *sufficient* consideration was provided. The peppercorn rental[1] (£1) may not have been *adequate* (equivalent value) but it was sufficient (something of value) and, for this reason alone, the agreement was enforceable.

[5.55] It might be said that the requirement of "value" is too easily met. On the odd occasion where the "consideration" is very marginal ("I will give you my iPad if you get it from my bedroom") the promisor may be said to be promising an (unenforceable) *conditional gift* rather than entering into an enforceable agreement. And obviously questions of intention to create legal relations would arise in these circumstances too.

[5.60] 2. **Consideration must not be vague or illusory.** If it is, it will have no legal value and cannot be consideration for the promise that the promisee is seeking to enforce.

White v Bluett

[5.70] *White v Bluett* (1853) 23 LJ Ex 36. Bluett had lent his son some money. After Bluett died, the executor, White, sued the son when he refused to repay the loan money. In his defense, the son argued that his father had said he need not repay provided the son would stop complaining about how his father would distribute his property in his will (he was anxious about his siblings getting more than him). White succeeded.

The Court held there was no consideration provided by the son to his father for any discharge of the obligation to repay. Pollock CB said:

> The plea is clearly bad … The son had no right to complain, for the father might make what distribution of his property he liked; and the son's abstaining from doing what he had no right to do can be no consideration.

Evans v Davantage

[5.75] *Evans v Davantage* [2019] FCA 884. A class action arose involving extended motor vehicle warranties issued by Davantage to Evans and approximately 27,000 individuals who purchased a second-hand motor vehicle. The warranties conferred on Davantage an absolute discretion to reject claims even if they fell within the terms of the warranty and were not the subject of an exclusion. It was alleged that, among other things, the warranties were unsupported by consideration and that Davantage's conduct in issuing the warranties, when they did not have any substance or provide any substantial protection for Evans and the group members,

1 The peppercorn (the fruit of a peppercorn tree) has assumed significance in law because it represents a nominal or token payment used to satisfy the requirement that a promisee provide something of value in order for a promise to be binding. It can be $1 or, literally, a peppercorn. The peppercorn featured in *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87 where the Court embellished the peppercorn metaphor: "a peppercorn does not cease to be good (valuable) consideration if it is established that the promisee does not like pepper and will throw away the corn".

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amounted to unconscionable conduct, conduct that was was misleading and/or deceptive and contract terms that were were unfair.

In granting Davantage an absolute discretion to reject a customer's warranty claims, the Court held that it thereby compromised the essential nature of the contract itself and made the promise – the consideration – illusory.[2]

[5.80] **3. Consideration must move from the promisee.** The party who wishes to enforce a contract must be able to show that they have provided the consideration. It need not move *to* the promisor but could move to a third party at the request of the promisor. For instance, if A promises B $5,000 to paint C's house, A's promise is enforceable even though A is not, on the face of it, receiving a benefit.

[5.90] **4. Consideration may be executed or executory. It cannot be past.** Consideration is *executed* where one party performs an act in exchange for the other party's promise. For example, A offers a $100 reward for the return of his lost wallet. B, on finding and returning the wallet, has performed her part of the bargain. It remains for A to fulfil his obligation by paying the reward. Executed consideration is relevant in the case of unilateral contracts.

Consideration is *executory* where one party has given a promise to do something in exchange for the other party's promise. This is a very common contractual scenario and serves to illustrate the point that *promises* matter – each promise provides consideration for the other, even though nothing may have been done yet. For example, when A and B sign a contract for the supply of goods or services where those goods and services will be provided in the future and payment is to be on 30-day terms, neither, at the moment of agreement, has performed their promise. Similarly, when C and D sign a lease or a home construction contract, neither, at the time the agreement is made, has performed their obligations. Nonetheless, there is a binding agreement when the promises are exchanged (or for many more significant contracts) when the contract is signed. Executory consideration is relevant in the case of bilateral contracts.

On the other hand, *past consideration* is not considered to be consideration at all. As "consideration" is defined as the price paid in *exchange* for a promise, acts that are done *prior to the promise* cannot generally amount to consideration. If a person does something (eg enters a contract to purchase a television) and then, after the contract is made, the supplier makes a promise (eg that the television has certain qualities) that promise is unenforceable because the purchaser did not provide value *in exchange for* the promise. Of course, the contract in relation to the purchase of the television is still enforceable: there is consideration in that context. *Roscorla v Thomas* is a classic example of past consideration.

Roscorla v Thomas

[5.100] *Roscorla v Thomas* (1842) 3 QB 234. Roscorla bought a horse from Thomas. After the sale had been completed, Thomas promised him that it was a "sound horse" and was "free of vice". The truth, however, was quite different: the horse was ferocious. Roscorla sued for breach of the promise. The Court decided that Thomas' promise concerning the horse's character had been made *after* the sale had been completed and was therefore unenforceable.

2 Note that the Court accepted a $9.5 million settlement (as all that Davantage could afford) with the following split: $2.4m for the applicant's legal costs, $600,000 for the costs of the litigation funder (who funded the class action) and $2.7m as profit for the litigation funder and $1.1m in settlements. The message is clear – class actions may not be what they appear (at least from a lead applicant's perspective).

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[5.101] An old American case provides an excellent example of the (harsh) consequences of the past consideration rule.

Mills v Wyman

[5.105] *Mills v Wyman*, 20 Mass (3 Pick) 207 (1825). Levi Wyman returned from a trip and became ill. Mills took care of him, providing room, board and care. Wyman subsequently died. Wyman's father sent a letter to Mills promising that he would pay for all expenses related to the care of his son. However, Wyman's father later refused to pay and Mills sued. The issue was whether Mills had provided valuable consideration in respect of her past care of Levi Wyman's son.

The Court held that neither (a) the *actual services performed by Mills before* the father's promise nor (b) the *moral obligation* of the father to pay for his son's care created sufficient consideration to make the promise enforceable.

[5.110] There are exceptions to the rule that past consideration will not support a simple contract:

1. **Past consideration can be good consideration** if (a) it was provided at the request of the promisor; (b) the parties understood that the act would be remunerated; and (c) had the promise occurred in advance of the act it would have been enforceable: *Pao On v Lau Yiu Long* [1980] AC 614.
   For example, assume Jane, a law faculty administrative officer, is asked to assist at a law conference to be held on the weekend. The conference is successful and, on the following Monday, a very chuffed Dean of Law promises her a bonus of $1,000. Later, when he has reverted to his true self, he changes his mind and informs her there will be no bonus. In a scenario such as this Jane may argue that although the consideration appears to be "past" (the promise to pay came *after* the act of working at the weekend) the three criteria mentioned in *Pao On v Lau Yiu Long* have been met: (a) Jane worked at the promisor's (the Dean's) request; (b) it was reasonable to expect she would be rewarded (as her ordinary salary would cover her regular weekday working hours, and not weekend hours); and (c) the promise would have been enforceable – it was of value, it was clear and certain – if it had been made *before* the act in question.
2. **The consideration for a bill of exchange** may be based on an antecedent debt or liability: *Bills of Exchange Act 1909* (Cth), s 32(1)(b).
3. **A subsequent promise to pay a past debt** on which action is statute-barred by the limitation of actions legislation will be enforceable.

[5.120] 5. **Performing an existing public duty.** The traditional common law position is that if one party promises the other party an *additional* payment if the other completes a public duty that the person was already bound to perform, the promise is not binding. *Collins v Godefroy* and *Glasbrook v Glamorgan County Council* illustrate the point.

Collins v Godefroy

[5.130] *Collins v Godefroy* (1831) 109 ER 1040. Collins was subpoenaed (a subpoena is a court order) to give evidence on Godefroy's behalf in a case in which Godefroy was a litigant. Collins sued to recover moneys which he alleged Godefroy had agreed to pay him in consideration of his giving evidence.

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The Court held that as Collins had a public duty to give evidence (because he had been subpoenaed) the giving of evidence did not constitute valuable consideration.

Glasbrook v Glamorgan County Council

[5.140] *Glasbrook v Glamorgan County Council* [1925] AC 270. A miners' strike at a coal mine resulted in the police being called. In discussions as to how best to protect the mine, the company asked for police to be stationed permanently at the coal mine. However, the police felt that a mobile patrol would be sufficient. The mine company then offered to pay £2,200 for the police to have a presence on the premises and the police accepted. The mine company later refused to pay, arguing that the police had not provided consideration for the promise – they were doing no more than their *public* duty.

The House of Lords decided that valuable consideration had been provided by the police. The police were under a public duty to provide protection for the mine but they had formed the view that a mobile patrol was adequate and a promise to provide more protection than their public duty required was consideration for the promise by the company to pay for these services.

[5.145] **6. Agreements to modify a contractual obligation.** The same principle applies to promises concerning the performance of an existing contractual duty. A party who is performing or promising to perform an existing contractual duty is not providing consideration. The promisor, in effect, is getting nothing more than they were already contractually entitled to. If, on the other hand, the promisee promises to do something additional, to perform something they were not bound to do, there will be consideration and the promise will be binding. The following two cases illustrate the point.

Stilk v Myrick

[5.150] *Stilk v Myrick* (1809) 2 Camp 317. Stilk contracted to work as one of 11 seamen on a return voyage from London to the Baltic at the rate of £5 per month. During that voyage, two seamen deserted and Captain Myrick promised the remaining seamen that they could divide the deserters' wages between them if they continued to sail the ship. The plaintiff sued for his share when the captain returned to London and refused to honour his promise.

The Court decided that Stilk was under a contractual duty to provide his services, *including the duty to cover for others in an emergency*. As he had done nothing more than what he was obligated to do under the existing contract, he had not provided valuable consideration for the captain's promise. Perhaps the decision should be seen in the light of the dangerous conditions on the high seas at the time, where it was felt necessary to deter promises obtained by mutinous or extortionate behaviour from being enforced.

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Hartley v Ponsonby

[5.160] *Hartley v Ponsonby* (1857) 7 E & B 872. Hartley signed on as a crew member of the sailing ship *The Mobile*. When the ship reached Port Philip (in Victoria), 17 of the 36 crew deserted, leaving only 19 to sail back to India. Of those 19, only five were qualified mariners. To encourage the remainder to continue, Captain Ponsonby promised them additional wages. Hartley sued when Ponsonby refused to honour his promise.

The Court held that, in the wake of the desertion of so many men, the ship had actually become unseaworthy, so that, in fact, Hartley had a contractual right to terminate the contract for breach. In agreeing to sail on, in the new, post-desertion circumstances, Hartley had provided valuable consideration for the Captain's promise. Continuing to sail was no longer just doing what Hartley was already contractually obligated to do.

Part payment of a debt – the rule in Foakes v Beer

[5.165] Promises concerning part payments of a debt are addressed in the so-called rule in *Foakes v Beer*. Essentially, under this rule, part payment of a debt is not good consideration for a promise to forgive the whole.

Foakes v Beer

[5.170] *Foakes v Beer* (1884) 9 App Cas 605. Dr Foakes owed money to Mrs Beer who obtained a judgment against him. The defendant asked for time to pay. It was agreed that if Foakes would pay a certain sum immediately and the balance by instalments, Beer would not take any action to enforce the judgment debt. Foakes ultimately paid the whole amount of the judgment debt but Beer then claimed the interest that had accrued.

The Court held that Beer's agreement to accept the judgment debt in full settlement was *not* supported by consideration: Foakes had agreed only to do what he was already obliged to do (pay the judgment debt). The House of Lords confirmed very old precedents that stated that if a creditor promised to release a debtor from part of a debt if a debtor would pay the rest, the creditor's promise was not binding.

[5.175] Applying the rule in *Foakes v Beer* to a more accessible set of facts, assume A owes B $10,000 and the debt is payable on 1 January 2024. If, on 1 January 2024, A offers B $8,000 in full settlement of the debt and B accepts, at common law, B can subsequently renege and claim the balance.

Where, however, a debtor agrees to do *something more* or *something different* from that which they were obliged to do and the creditor agrees to accept that in discharge of the existing obligation, the common law has regarded that as sufficient consideration even though the substituted performance may not be as valuable as the original obligation.

Taking the above example a little further, the parties may agree that:

- the $8,000 is to be paid earlier than the due date (eg on 31 December 2023);
- it be paid in a different currency (eg in US dollars);

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- something additional is promised (eg the $8,000 plus a canary); or
- the debt is to be paid to a third party, at the request of the creditor (A agrees to pay the $8,000 to C, who would usually be B's creditor).

In each of the above scenarios, the rule in *Foakes v Beer* would not apply. In each instance, the debtor has provided something of value in return for the promise to forgive the whole. The promise to accept $8000 in full settlement would be enforceable.

Furthermore, the creditor's promise to accept part payment in full settlement may be enforceable where:

- the practical benefit test is satisfied (see [5.180]); or
- the promise is engrossed in a deed (see [5.220]); or
- the doctrine of promissory estoppel applies (see [5.240]).

A new approach: the practical benefit test

[5.180] The commercial inconvenience caused by these applications of the doctrine of consideration to modified agreements has led the courts to seek alternate routes to a more realistic outcome. In recent times, when faced with the question of when the performance of a prior contractual obligation may be considered to have satisfied the consideration requirement, the courts have adopted a far more expansive view of consideration to that in *Stilk v Myrick*. In essence, after *Williams v Roffey Bros & Nicholls (Contractors) Ltd*, the common law position is that a promise to pay the other party an additional sum if it performs its existing contractual duty does not fail for lack of consideration if the promise was not the result of duress and if it produces a practical benefit for the promisor.

Williams v Roffey Bros & Nicholls (Contractors) Ltd

[5.190] *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1990] 1 All ER 512. Roffey Bros and Nicholls Ltd (Roffey), a construction company, had contracted with a housing association to renovate a block of flats. There was a penalty clause in the main contract, compelling Roffey to pay significant damages to the purchaser of the flats if it finished late. Some of the carpentry work was subcontracted to Williams for £20,000. Williams performed some of the work and received £16,200. However, it then became clear that Williams had under-quoted for the job and would not be able to fulfil his obligations on time. When Roffey became aware of this, he promised to pay Williams a total of £10,300. Only £1,500 was paid to Williams before a dispute arose and Roffey refused to pay any more money, relying on the rule in *Stilk v Myrick*. Certainly, Williams faced a difficulty in establishing the existence of consideration to support the promise to pay more money because *Stilk v Myrick* stated that performance of an existing contractual obligation (in this case the carpentry work) could not be a sufficient consideration to support a fresh promise because there was no additional legal benefit to the promisor and no additional detriment suffered by the promisee. But his lawyers submitted that: (a) *Stilk v Myrick* did not apply to variations in the construction context and/or could be explained by the special conditions on the high seas at the time it was decided; and (b) since the development of economic duress, it was no longer necessary to adopt the strict approach to the definition of consideration which had been adopted in *Stilk v Myrick* in order to prevent promises obtained by extortion from being enforceable.

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The Court took a broader view. It decided that Williams could enforce the contractual variation even though there was no additional legal benefit to the promisor and no additional detriment suffered by the promisee. The Court said that the traditional common law rule in *Stilk v Myrick* does not apply where:

- A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B;
- at some stage before A has completely performed their obligations under the contract, B has reason to doubt whether A will be able to complete their side of the bargain;
- at the initiative of either party, B promises A an additional payment in return for A's promise to perform his original contractual obligations on time;
- as a result of A giving his promise, B obtains, in practical terms, a benefit (or obviates a disbenefit); and
- B's promise is not given as a result of economic duress or fraud on the part of A.

The first three criteria had been met. But what "practical benefit" had Roffey received because of the variation? The practical benefits were identified as (a) avoiding the penalty for delay; (b) avoiding the trouble and expense of having to secure a replacement subcontractor if this subcontractor walked off site; and (c) avoiding having to sue Williams for his breach of contract (litigation that would be expensive with an uncertain outcome), although ironically litigation ended up occurring in any event (initiated by Williams instead).

Furthermore, and a very important consideration for those who argue that contractors might be "held to ransom", there was no suggestion that Williams had applied any duress to Roffey. It was, in fact, Roffey who had initiated the variation. Had Williams threatened not to work until Roffey promised him an extra payment, the variation would not have been enforced (as it would encourage opportunistic or oppressive behaviour by a party in a stronger position).

[5.195] Where does this leave the old rule in *Stilk v Myrick*? *Williams v Roffey Bros* represents a significant limitation on *Stilk*. It is true that the Court concluded that it merely refined the application of the principle in *Stilk* and emphasised that consideration is still required, not only for the *formation* of a contract but also for contractual *variations* where a practical benefit cannot be identified. However, it is clear that consideration is no longer required for most contractual variations (it is hard to imagine a situation where a party would make such a promise to pay more for the same thing unless there *was* a practical benefit). It recognises the commercial reality that promises are made that, although they do not fit within the rules of consideration, should, in certain circumstances, be enforced.

[5.200] Although the reasoning in *Williams* was accepted (and extended) in the following New South Wales case, it remains to be seen whether appellate courts in Australia, particularly the High Court, ultimately accept it.

Musumeci v Winadell Pty Ltd

[5.210] *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723. Musumeci leased a shop in a shopping mall owned by Winadell. He sold fruit and vegetables. Winadell subsequently leased another shop in the centre to another fruit and vegetable business. Musumeci asked for a 30% rent reduction to compensate for this and, rather than lose a tenant, Winadell agreed. When

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a dispute later arose, Winadell changed his mind about having Musumeci as a tenant. He terminated the lease, arguing the new one (with the reduced rental) was not binding because Musumeci had not provided sufficient consideration for the promise to reduce the rental.

The New South Wales Supreme Court held that the promise to reduce the rent was properly supported by consideration and therefore legally binding. Winadell had received a practical benefit (retaining a tenant) in exchange for his promise and was therefore bound by it.

[5.215] Note that the courts have not applied the *Williams v Roffey Bros* "practical benefit" test to assist promisees who unquestionably have suffered injustice as a result of the rule in *Foakes v Beer* regarding part payment of a debt.[3] Instead, as we shall see at [5.240], they found another way to change the law.

Contracts under seal

[5.220] A contract under seal (a deed) must be in writing and signed, sealed and delivered. Contracts under seal obtain their binding force from their *form alone*: consideration is not required. Every deed must now be signed and witnessed by at least one witness who is not a party to the deed. There is no requirement that a seal be actually affixed; it is sufficient if the contract is *expressed* to be a deed. As to "delivery", in some jurisdictions (*Queensland* and the *Northern Territory*), "delivery" is defined as "the intention to be legally bound either immediately or subject to the fulfilment of a condition".[4] Where the parties intend that the deed would *not* take effect until all parties are bound, there is no intention to be bound immediately and therefore the instrument had not been "delivered". Note that an unexecuted deed (ie one that does not meet the requirements of a deed) may be enforceable as a simple contract provided the essential elements for a simple contract are present (particularly the requirement that there be consideration). Some deeds encountered in commercial practice, including deeds of release concluded by business and employees where a business pays a sum of money to an outgoing employee and the employee forgoes their right to pursue legal action against the business, would satisfy the consideration requirement in any event.

Differences between contracts under seal and simple contracts

[5.230] The basic differences between contracts under seal and simple contracts are:

1. A gratuitous promise is binding if under seal but is not binding in the case of a simple contract.
2. A party to a contract under seal is "estopped" (prevented) from denying the facts expressed in it. The same does not apply to simple contracts.
3. In the context of deeds, one party may be bound but not the other. Once a deed has been signed, sealed and delivered by one party, that party is bound even if the other party has not executed the deed.
4. The period during which a right of action arising out of a contract under seal can be enforced is 15 years in *Victoria* and *South Australia* and 12 years in *New South Wales*, *Queensland*, *Tasmania*,

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3 However in a possible harbinger, in *MWB Business Exchange Ltd v Rock Advertising* [2016] EWCA Civ 553, the UK Court of Appeal in fact did decide that the approach in *Williams v Roffey Bros* could also apply to a promise to accept part payment of a debt, or payment of it by instalments, if that would be of a practical benefit to the promisor. Although the decision was overruled by the Supreme Court – it decided that No Oral Modification (NOM) clauses, such as the one in the MWB contract, should be upheld so as to promote certainty and uphold party autonomy – the Court did suggest that the traditional *Foakes v Beer* rule may need to be reconsidered: see *MWB Business Exchange Ltd v Rock Advertising* [2018] UKSC 24.

4 *Property Law Act 1974* (Qld), s 47(3); *Law of Property Act 2000* (NT), s 49(3).

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Western Australia, *Australian Capital Territory* and the *Northern Territory*. In the case of a simple contract, the period is six years in most jurisdictions.

Promissory or equitable estoppel

The general nature of promissory estoppel

[5.240] We have seen that the common law demanded that a promisee provide consideration for a promise made by a promisor before that promise could be enforced. However, as we saw in Chapter 1, equity developed certain principles and doctrines that were designed to soften the harsh or unfair consequences that flowed from a rigid application of common law rules. One example has been the development of the equitable doctrine of promissory estoppel. The modern evolution of the doctrine began with the following English decision.

Central London Property Trust Ltd v High Trees House Ltd

[5.250] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130. The defendant lessee (HTH) leased a block of flats in London from the plaintiff/landlord (CLPT). During the blitz of London, many of its sub-tenants moved out and HTH could not pay the rent. CLPT promised to reduce the rent by 50% for the duration of the war. However, towards the end of the war, when conditions had improved and people began to return to London in 1940, the plaintiff gave notice to the defendant that it wished to return to the rental to which the parties originally agreed.

The Court decided that the plaintiff was entitled to give notice that it wished to return to the original rental. However, in an important *obiter dictum*, the Court indicated that *if* the landlord had gone further and claimed the arrears of rent back to 1940, it would have been "estopped" from doing so. Although the parties had not formally varied the lease, and notwithstanding that the promise by CLPT was not supported by any consideration from HTH, it would have been unconscionable for it to be allowed to break its promise – HTH had relied on the promise and would suffer detriment if the promise was broken.

[5.255] The issue of what constitutes a detriment is central to the decisions in *Je Maintiendrai Pty Ltd v Quaglia*, *Waltons Stores (Interstate) Ltd v Maher* and *Sidhu v Van Dyke*, the last two of which are decisions of the High Court of Australia.

Je Maintiendrai Pty Ltd v Quaglia

[5.260] *Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101. Quaglia was a hairdresser in a shopping centre owned by Je Maintiendrai. Je Maintiendrai had trouble keeping tenants so they lowered the rent. Quaglia had a three-year fixed lease at $278 per month which was increased annually with changes in the consumer price index. A couple of months after the lease was signed, Je Maintiendrai agreed to a rent of $240 for an indefinite period. Je Maintiedrai was happy with this arrangement until Quaglia decided to leave. Je Maintiedrai then wanted to claim back the rent that it had foregone for the previous years.

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The Court held that the landlord was estopped. A person who makes a promise that is intended to be acted upon is not prevented from resiling from that position unless it would result in some detriment to the promisee. On the question of what detriment the tenant had suffered, the Court said that the tenant may have suffered detriment by continuing in the relationship in reliance on the promise to reduce the rent. Quaglia could have simply repudiated the contract and taken a chance on being sued for breach or the tenant may have been able to sub-lease to another person. Furthermore, Quaglia had probably spent the money on other things and may have had difficulty meeting a demand for a lump sum.

In the following important decision, the High Court expanded the scope of the doctrine of promissory estoppel. The doctrine had been limited to a defensive role and could not be actively used by a promisee to sue the promisor. "Estoppel is a shield not a sword", it was said in previous times. The *Waltons Stores* case changed that position, enabling Maher to actively initiate an action against the promisor.[5] It also decided that the doctrine may apply even where there is no pre-existing contractual relationship between the parties.

Waltons Stores (Interstate) Ltd v Maher

[5.270] *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. Waltons Stores negotiated with Maher for the lease of commercial premises. Under the proposal, Maher was to demolish an existing structure on the site and erect a new building that would be leased by Waltons. After discussions between the parties' solicitors, the contractual documents were drawn up. Maher's solicitors proposed certain amendments. Waltons' solicitors said they believed approval for the amendments would be forthcoming from their client. A few days later, Maher's solicitors, having heard nothing about the amendments, submitted documents executed by their client for signature by Waltons. Receipt of these documents was not acknowledged for nearly two months because Waltons was privately reconsidering their position in view of impending policy changes to their future trading operations. Meanwhile, Maher sought finance for redevelopment of the site and proceeded to demolish the existing building and commence the new building to ensure completion by the required date. Waltons was aware of this but delayed advising Maher that it did not intend to proceed with the transaction. As there was no exchange of contracts, no binding contract to lease the premises had been concluded.

The High Court held that Waltons was estopped from denying the existence of a binding contract. Maher had assumed that exchange of contracts would take place as a mere formality. The inaction of Waltons in retaining the executed documents and saying or indicating nothing constituted clear encouragement or inducement to Maher to continue to act on the assumption that the lease was proceeding. It was unconscionable for Waltons, knowing that Maher was exposing himself to financial loss (detriment) by acting on the basis of a false assumption, to adopt a course of inaction that had encouraged Maher to proceed. The Court affirmed

5 Regarding *Williams v Roffey*, the question is often asked why the plaintiff did not rely on the doctrine of estoppel to prevent the defendant from resiling from his promise? The answer is that he would have needed to use estoppel as a sword to trigger the cause of action. His lawyers obviously considered that there was more chance of success in trying to expand the rules around consideration to include the practical benefit test than in seeking to remove the limitation on the doctrine of promissory estoppel (that no longer exists in Australia, courtesy of Mr and Mrs Maher in *Waltons Stores*).

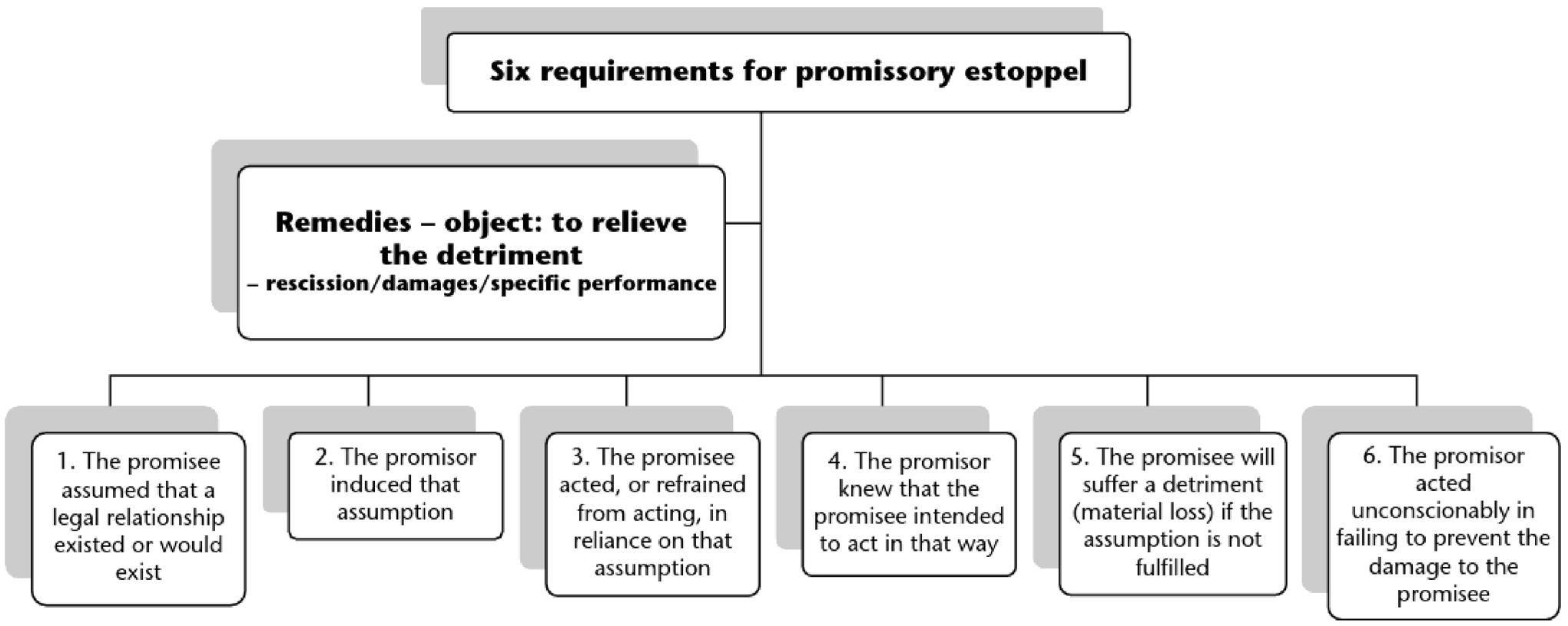
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that the appropriate relief was for Waltons to pay the respondent damages in lieu of specific performance of an agreement for a lease.

Brennan J summarised the criteria (see Figure 5.2) that must be met before a promisor will be estopped from adopting a course of action that would cause harm to the promisee (the relevant conduct in *Waltons Stores* is in parentheses):

- The promisee assumed that a legal relationship existed or would exist (the parties had been in negotiations for a long time, and clear indications from Waltons were that a lease would be signed).
- The promisor induced that assumption or expectation (Waltons solicitors' statement that "we shall let you know tomorrow if any amendments are not agreed to" induced Maher's assumption).
- The promisee acted, or refrained from acting, in reliance on that assumption or expectation (Maher sent the executed lease and began the demolition in reliance on the assumption).
- The promisor knew that the promisee intended to act in that way (Waltons was aware of Maher's actions and, indeed, had encouraged Maher to act by stressing that Waltons needed the premises urgently).
- The promisee will suffer a detriment (material loss) if the assumption is not fulfilled (Maher's detriment was the reliance loss, the wasted expenditure on the demolition and reconstruction of the building).
- The promisor acted unconscionably in failing to prevent the damage to the promisee (it was unconscionable when Waltons, knowing that Maher was acting on the assumption that a lease would be executed, decided not to inform him of their change of heart.).

Figure 5.2 : Six requirements for promissory estoppel



[5.280] In *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, the High Court made it clear that *simple reliance* by A on a promise made, or an assumption created, by B on which A relied, causing A detriment, is not enough for an estoppel. *The true basis for an estoppel is the unconscionable conduct* of the promisor in retreating from the promise made or assumption created, upon which the other party reasonably relied and which caused detriment to A.

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In *Sidhu v Van Dyke*, the High Court explained the notion of detrimental reliance.

Sidhu v Van Dyke

[5.290] *Sidhu v Van Dyke* [2014] HCA 19. Ms Van Dyke had rented Oaks Cottage from Sidhu and his wife who lived on a property nearby. Van Dyke and Sidhu commenced a sexual relationship that led to the breakdown of Van Dyke's marriage. Sidhu told Van Dyke not to worry about getting a property settlement in the divorce, as he would subdivide the land belonging to him and his wife and give the cottage to Van Dyke. However, when his relationship with Van Dyke ended some eight years later, Sidhu reneged on his promises (and his wife refused to consent to a subdivision).

The Court accepted that Van Dyke had relied on Sidhu's promise and, to her detriment, had continued in the relationship and remained on the property. As such, it would be unconscionable for Sidhu to now resile from his promise.

[5.295] Where there is no unconscionability, there is no application of promissory estoppel, as the following case demonstrates.

Austotel Pty Ltd v Franklins Selfserve Pty Ltd

[5.300] *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582. Austotel (a property developer) negotiated with Franklins (a supermarket chain) for the lease of a supermarket in one of its shopping complexes. During the negotiations, Franklins agreed to lease an area larger than in its earlier written agreement. Austotel built the supermarket to Franklins' specifications, Franklins ordered equipment and Austotel used Franklins' intended presence as a means of getting the extra finance it needed. No lease was executed and exchanged. When Franklins learnt that Austotel was negotiating with another supermarket, it sought an order for specific performance of the lease, arguing on the basis of *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 that Austotel should be estopped from resiling from its position, even though no contract had been signed.

The Court refused to grant the order. It decided that the parties were of equal bargaining power and had engaged in some tough commercial negotiating but it was no more than that: Austotel had not behaved unconscionably.

[5.310] As the following case, *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*, shows, a representation must be clear and unambiguous in order for a promissory estoppel to arise.

Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd

[5.320] *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2016] HCA 26. Crown is the owner of the Melbourne Casino and Entertainment Complex. Cosmopolitan held two leases in the complex limited to a term of five years. The leases required Cosmopolitan to undertake extensive refurbishments. Crown did not renew either of the leases following a tender process.

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Cosmopolitan subsequently became insolvent in part because of the losses it suffered in the value of the refurbishments that were carried out. It alleged that, in order to induce it to enter into the leases with a short five-year term, Crown made an *oral* statement that Cosmopolitan would be "looked after at renewal time" that (a) amounted to a *collateral contract* that the landlord would renew the leases for a further five years if they undertook the refurbishments (see [9.290]); or (b) Crown was *estopped* from resiling from its promise.

On the estoppel issue, the High Court held that the statement that the tenant would be "looked after at renewal time" did not give rise to an estoppel because the representation was not capable of conveying to a reasonable person that the tenant would be offered a further lease on the same terms as the original lease. As the Court said, "it would reduce the law to incoherence if a representation, too uncertain or ambiguous to give rise to a contract or a variation of contractual rights and liabilities, were held to be sufficient to found a promissory estoppel".

The decision demonstrates, once again, that best practice demands that if *oral representations or promises are important to the promisee, they should be included in the written contract.* While equity (in the form of an estoppel) may come to the rescue, it is more efficient and the outcome is more certain if the statement is included in the written contract in the first place.

The remedy where promissory estoppel is granted

[5.330] The remedy for promissory estoppel depends on the facts of each case, but the guiding principle is to do the *minimum amount necessary to relieve the detriment caused by the unconscionable conduct.* Therefore, depending on the facts of each case, it may not be necessary to force the representor to honour the assumption it had created. For instance, in *Waltons Stores v Maher*, the Court ordered Waltons to pay Maher damages for losses sustained by Maher, in lieu of an order for specific performance of an agreement for a lease. Similarly in *Sidhu v Van Dyke*, the Court awarded compensation rather than order specific performance. Had the Court made an order for specific performance, it would have forced Sidhu to transfer ownership of the property to Van Dyke. In the view of the Court, this was more than was necessary to "relieve the detriment".

In *Giumelli v Giumelli*, the High Court fashioned a specific remedy that provided a relief to the son but did not order the parents to transfer the title to him.

Giumelli v Giumelli

[5.340] *Giumelli v Giumelli* (1999) 196 CLR 101. Mr and Mrs Giumelli owned a property as part of their orchard business. When their son Robert left school at the age of 15, he immediately started to work for his parents and assisted in the development of the property over a number of years. The parents made a number of promises at various times all of which indicated that he would receive part of the property. When he fell out with his parents over his intention to marry, they refused to transfer the property to him. Robert brought an action claiming that he was entitled to a proprietary interest in the property.

The High Court said that the criteria for promissory estoppel had been met – the parents had made promises intended to be relied upon, Robert had relied on them, and had done so to

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his detriment (he could have pursued employment elsewhere) and it would be unconscionable for them to refuse to honour their promises. The interesting aspect of the case is that the Court did not order specific performance (and force the parents to transfer the property into Robert's name) but awarded him damages to compensate him for the loss he had suffered (in not owning the part of the land that he had been promised).

Formalities

[5.350] The common law does not require a simple contract to be in writing nor that written evidence of the details of the contract exist in order for the contract to be enforceable. As long as the requirements of a contract are met (eg agreement, intention, consideration), the *form* the contract takes is not relevant. Many contracts, particularly those of a minor nature, are made by word of mouth and are legally enforceable (provided, of course, that the plaintiff can prove what the parties promised). Obviously, where the contract is of importance, it is usually reduced to writing as this provides valuable evidence of the terms of the agreement in the event of dispute. Accordingly, in practice, many oral contracts are confirmed in writing as soon as possible after they are made. Still, this is a practical step and is not one that is legally required.

However, in a small number of situations, the law requires that for a contract to be enforceable, it must be *entirely in writing*. In other cases, there are statutory provisions to the effect that in order for a contract to be enforceable, the contract must be *evidenced in writing*.

Contracts required to be entirely in writing

[5.360] Certain kinds of simple contracts are required by various statutes to be *entirely in writing*; otherwise they will be void or unenforceable. Examples are as follows:

1. Bills of exchange and promissory notes: *Bills of Exchange Act 1909* (Cth), ss 8, 89.
2. Cheques: *Cheques Act 1986* (Cth), s 10.
3. Assignments of copyright: *Copyright Act 1968* (Cth), s 196(3).
4. Contracts of marine insurance: *Marine Insurance Act 1909* (Cth), s 28.
5. Assignments and mortgages of life insurance policies: *Life Insurance Act 1995* (Cth), s 200(2)(a).
6. An acknowledgment of a debt barred by the State Limitation of Actions Acts.
7. Most forms of consumer credit contracts.

Contracts required to be evidenced in writing

[5.370] In order to prevent fraud or false claims that oral promises were made that should be enforced, some contracts are required by legislation to be *evidenced in writing*. That means that one or more documents must exist that prove the existence of the contract. This requirement is different from the requirement addressed above that the contract itself must be in writing.

The main types of contracts required to be evidenced by a written memorandum are (a) contracts dealing with an interest in land and (b) contracts of guarantee.

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(a) Contracts dealing with an interest in land

[5.380] A contract for the sale or other disposition of land or any interest in land is required to be evidenced in writing.[6] Agreements to buy, sell, or lease land fall within the provision.

(b) Contracts of guarantee

[5.390] A further important category of contract required to be evidenced in writing is a guarantee.[7] In a recent unreported decision in the UK, Lend Lease Ltd claimed a sum under a parent company guarantee. However it was forced to discontinue the claim because neither Lend Lease nor the parent company could find the guarantee … and, as guarantees must be evidenced in writing and signed by the guarantor, without the physical document, no valid claim could be made.

The memorandum required for contracts to be evidenced in writing

[5.400] Attention must be paid to the following matters that must be covered by the memorandum:

1. The names of the parties must be specified.
2. The subject matter must be stated.
3. The consideration must be clear.
4. The memorandum must be signed by the party to be sued.

The memorandum is not the agreement; it is merely evidence of the agreement. To be effective, the memorandum must contain all the express terms of the agreement.

Effect of non-compliance: the doctrine of part performance

[5.410] A contract that is not evidenced in writing as required by the legislation is unenforceable at common law. However, equity will enforce such a contract provided that the claimant for relief has *partly performed* the contract. The basis of the equitable doctrine is that it would be unconscionable to allow a defendant to rely on the requirement that the contract be evidenced in writing to deny relief to a claimant who has performed either the whole or part of her or his obligations in reliance on the contract. The application of the doctrine of part performance has, in practice, generally been confined to contracts for the sale or other disposition of an interest in land.

Riley v Osborne

[5.420] *Riley v Osborne* [1986] VR 193. The deceased had orally agreed with the defendant Osborne that he would build a house for her if she would take care of him, as part of her family, for the rest of his life. After the house was built, Osborne and her family moved in with the deceased and looked after him for 23 years before he died. The deceased's administrator, obviously at the behest of the deceased's family, brought an action to recover possession of the house.

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6 *Conveyancing Act 1919* (NSW), s 54A; *Instruments Act 1958* (Vic), s 126; *Property Law Act 1974* (Qld), s 59; *Law of Property Act 1936* (SA), s 26; *Mercantile Law Act 1935* (Tas), s 6 and *Conveyancing and Law of Property Act 1884* (Tas), s 36; *Law of Property Act 2000* (NT), s 62; *Civil Law (Property) Act 2006* (ACT), s 204.

7 *National Credit Code 2009* (Cth), ss 8, 9; *Mercantile Law Act 1962* (ACT), s 12; *Law of Property Act 1974* (Qld), s 56; *Mercantile Law Act 1935* (Tas), s 6; *Instruments Act 1958* (Vic), s 126; *Law Reform (Statute of Frauds) Act 1962* (WA), s 2.

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The Court decided Osborne had performed what was asked of her and made an order for specific performance. It decided that the contract was one in which, in consideration of her caring for him as one of her own family for the rest of his life, the deceased had agreed to transfer the title of the property to her.

[5.430] A claimant must establish that the acts of part performance relied on are linked to the contract. For instance, payment of money, on its own, will not usually be regarded as a sufficiently unequivocal act since it may also be consistent with some other kind of agreement between the parties.

Further reading

See the contract texts listed at the end of Chapter 2.

Tutorial activities

1. What is "consideration"? Why is some form of consideration required in all simple contracts?
2. What is a deed? Why is consideration not required when a deed is executed?
3. What is the difference between executed, executory and past consideration? Provide an example of each, and explain how the concepts of executed and executory consideration relate to unilateral and bilateral contracts respectively.
4. What is the rule in *Stilk v Myrick* [5.150] and how do the developments in *Williams v Roffey Bros* [5.190] and *Musumeci* [5.210] modify the rule?
5. What principle of law does *Glasbrook v Glamorgan County Council* [5.140] illustrate?
6. Explain the rule in *Foakes v Beer* [5.170]. Why could the promisor break her promise to forgive her debtor interest on the judgment debt in that case? In your view, is it fair that this could be the law?
7. Read *High Trees* [5.250] carefully. What was the relevant promise? At common law, could the landlord have demanded the tenant repay the rent that had been reduced? Why? What is the position in equity under the doctrine of promissory estoppel? In equity, could the landlord, on reasonable notice, require the tenant pay the rent agreed to in the lease? Explain how the decision in this case, dating from 1947, might be relevant in the context of promises to reduce rent during the COVID-19 lockdown era.
8. Read the High Court decision in *Waltons Stores* [5.270]. Note that no contract had been signed and exchanged by the parties. Nevertheless, Waltons was estopped from denying it *intended* to enter into a contract. Why? What are the six criteria that Brennan J said were required before promissory estoppel would operate? Apply these criteria to the facts of the case and explain why Waltons was estopped (prevented) from denying the intention to enter into a contract.
9. A central issue in *Sidhu* [5.290], *Crown* [5.320] and *Giumelli* [5.340] was whether the promisor was estopped from resiling from promises that were made. Can you explain why the estoppel argument succeeded in *Sidhu* and *Giumelli* but did not succeed in *Crown*?

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10. The following things happen to Alex, the owner of a classic Harley "Easy Rider" Davidson motorcycle, in December 2024:

    (a) Alex orally offers to give his Harley (valued at $8,500) to Freddy. Freddy orally accepts. Is there a valid contract? Would it make a difference if the promise was in writing and was signed by the parties? Would it make a difference if Freddy agrees to pay $1 for the bike?

    (b) Alex agrees to buy a new Harley Davidson motorbike from Mr Hopper's Bikes for $13,000. After the contract is signed but before the price is paid, he asks Peter Fonda, the sales manager, if they will provide the first service free of charge. Peter agrees. When Alex shows up for the first service, Peter says that he has changed his mind and that Alex will be charged for the service. Advise Alex whether he can enforce Peter's promise.

    (c) Alex promises to give his Harley to his best friend Otto "provided you stop smoking for three years and become a lawyer". Otto does both of those things. Leaving to one side issues of intention to create a legal relationship, is Alex bound by the promise? Would your answer be different if Alex promises his Harley to Otto "provided you are nice to your mother"?

    (d) Alex makes an agreement with Camille whereby Alex promises to provide Camille with a motorcycle riding lesson in three weeks time, and Camille promises to arrange for Alex to have a private tour of a famous motorcycle collectors' garage two weeks after that. Is there a legally binding contract at the time the agreement is made?

11. Peter lives in an apartment that he leases from Sally for $2,000 per month. In March 2020, Peter invested most of his money in the booming share market only to see his investment halve in the space of four weeks when the COVID-19 pandemic hit the economy. By May 2020, with his income slashed, Peter was unable to pay his rent and so went to see Sally. She agreed to accept half the rent until December 2020. However, by September 2020, the market had improved and Sally wrote and told him he would have to resume paying $2,000 per month in October. His reaction was so negative that she also claimed the rental that she had foregone from May to October.

    (a) Please advise Peter whether he has to resume paying the original rental immediately.

    (b) Also advise Sally whether she could claim the rent that she had foregone.

12. Jonathon and his family were negotiating a lease for commercial premises to be used for their Italian restaurant. Part of the negotiation concerned the ability of Jonathon to demolish a wall in order to remodel the interior and build a pizza oven. The landlord shook Jonathon's hand and told him they had a deal and that he could go ahead and get started. Jonathon took out a large bank loan to finance the remodelling. Four weeks later, Jonathon received a letter from the landlord indicating that he did not intend to proceed with the lease. Jonathon has already spent $100,000 on the remodelling, but he has not received a signed lease as yet. Please advise Jonathon of his contractual rights under the common law and in equity.

13. Judy runs an antique jewellery store. One evening, a hooded man stormed into her store and robbed $100,000 from the register. One month later, Judy decides to run a stocktake

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sale from 5.00 pm to midnight but is still afraid of being robbed. She asks Shelley, a police officer she knows, if she will attend her store while the stocktake sale is on and provide her with personal protection from any potential robbers. She offers to pay Shelley $1,000 for her effort. Shelley agrees, even though it is normally her night off duty. During the sale, she stays by Judy's side to provide protection. The next day, she attends the store to collect her payment and Judy refuses to pay her. "You were just doing your duty - protecting me is what cops do", Judy says. Can Shelley enforce their agreement?

14. Michaella enters into a contract with her tax accountant, Andrew, to prepare her business tax return within four weeks of the end of the tax year. The contract provides that Andrew is to receive $1,500 for his work and specifies that time is "of the essence". Three weeks after the end of the tax year, Andrew calls Michaella saying that there may be delays in processing the tax return. He demands an extra $500 to make sure that the return is submitted on time. Michaella agrees. The tax return is finished on time and she receives her tax refund. She arranges a bank transfer to Andrew for $1,500 only. Andrew rings her to remind her about the extra $500 that was due to be paid "as agreed". Is Andrew legally entitled to the $500?

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Chapter 6

Contractual Capacity

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Introduction

[6.10] The assumption underlying any contract is that each party has freely entered into a binding agreement, having assessed whether the terms are in their best interests. Some categories of person – including minors and people with impaired mental capacity – have traditionally been regarded by the law as being incapable of looking after their own interests, and through various rules, a "legal disability" has been imposed on them. Generally, if a person with a legal disability attempts to make a contract, that contract can be declared ineffective. Contract law does not, however, require a person's ability to understand the implications of a contract to be assessed. Instead, the common law developed a complex set of rules categorising transactions, especially by minors, in terms of whether there is a legal "disability".

The capacity of the following persons to enter into valid contracts will be discussed:

1. Minors
2. Corporations
3. Mentally incapacitated and intoxicated persons
4. Married women
5. Bankrupts

Minors

[6.20] A minor is a person who has not reached the age of majority. In all States and Territories, the age of majority in Australia is 18 years.[1] In *New South Wales* and *South Australia*, the legal position of minors

1 *Minors (Property and Contracts) Act 1970* (NSW), s 6(1); *Age of Majority Act 1977* (Vic), s 3(1); *Law Reform Act 1995* (Qld), s 17; *Age of Majority (Reduction) Act 1971* (SA), s 3(1); *Age of Majority Act 1972* (WA), s 5(1); *Age of Majority Act 1973* (Tas), s 3(1); *Age of Majority Act 1974* (ACT), s 5; *Age of Majority Act* (NT), s 4.

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differs markedly from that in the other States. The position in these States will be considered separately at the end of this section.

With the exception of *New South Wales* and *South Australia* (see [6.140]), contracts with minors may be considered under three headings depending on their legal effect. Such contracts may be:

1. valid;
2. voidable; or
3. void.

Valid contracts

[6.30] Two classes of contracts with minors are binding, namely:

1. a contract for the supply of "necessaries"; and
2. a beneficial contract of service, such as a contract of apprenticeship.

A minor is liable under a contract for "necessaries"

[6.40] The word "necessaries" is not confined to articles necessary for the maintenance of life but includes goods and services fit to maintain the person in question at the standard of living and in the position in life which they enjoy. So far as goods are concerned, necessaries have been defined as "goods suitable to the condition in life of such minor and … to his actual requirements at the time of the sale and delivery".[2]

In any given case, there are two questions involved:

1. Are the goods or services within the classes of goods which can be classified as "necessaries" for a person in the circumstances of the minor in question?
2. Were the goods or services in fact necessary to the minor at the time?

It follows that no hard and fast rules can be laid down as to what a minor will be made liable to pay for, as each case is dependent on its own facts. What makes the topic interesting is that these common law rules were laid down in cases decided in the pre-digital age. Minors today are now entering into more varied, more expensive and more sophisticated transactions than in the past. Minors are shopping online, on retail websites like Amazon, creating social media accounts such as via Facebook, WhatsApp and Instagram, and are providing online services on online platforms (eg creating or consuming products for education or apps). These transactions are distinct from and in addition to, the contracts that have existed since time began – such as contracts for necessaries, for employment or apprenticeships, for service or for education – as regards both the kind of contract and the method of contracting. Despite these massive social changes, the position remains the same: minor contracts are unenforceable against minors unless they are "contracts for necessaries" or contracts "for the benefit" of the minor.

Thus, in *Scarborough v Sturzaker* (1905) 1 Tas LR 117, it was held that a minor who was accustomed to cycle a distance of some 12 miles to his daily employment was liable to pay for a new bicycle. By contrast, in *Bojczuk v Gregorcewicz* [1961] SASR 128, a minor who lived in Poland and had a permanent job there, but who wished to emigrate to Australia, was held not to be liable to repay to a relative, who had paid for her passage to Australia, the cost of the passage.

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2 *Goods Act 1958* (Vic), s 7; *Sale of Goods Act 1896* (Qld), s 5; *Sale of Goods Act 1895* (SA), s 2; *Sale of Goods Act 1895* (WA), s 2; *Sale of Goods Act 1896* (Tas), s 7; *Sale of Goods Act 1954* (ACT), s 7; *Sale of Goods Act 1972* (NT), s 7.

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If the court finds that the goods or services are not within the classes of necessaries, or were not, in fact, necessary, then the minor is not liable to pay nor, unless they obtained them by fraud, return the goods. Even where the goods are found to be necessaries, the minor is not bound to pay the contract price but only a reasonable price.

A minor is liable under a beneficial contract of service

[6.50] Courts have carved a separate exception for agreements where minors are engaged to perform a specific service and the contract is for the minor's benefit. The contractual exception exists for educational instruction, apprenticeships and certain employment relationships. For the contract to be enforceable against the minor, the contract, when read as a whole, must be beneficial to the minor. The idea that people should be presumed to be capable unless shown to be otherwise enhances their dignity and capacity to manage their affairs. The treatment of contracts as binding unless avoided complements this approach.

Hamilton v Lethbridge

[6.60] *Hamilton v Lethbridge* (1912) 14 CLR 236. Lethbridge, a minor, entered a contract for articles of clerkship (what would now be known as a graduate lawyer position) with Hamilton, a lawyer, binding himself to serve as an articled clerk for five years. In return for training and remuneration, Lethbridge agreed not to practise as a solicitor within 50 miles of the town that Hamilton practised after his admission. However, Lethbridge breached this restrictive covenant shortly after being admitted to practise. The High Court noted that "[a] contract made by an infant cannot be enforced against him during infancy unless it is held to be for his benefit" and decided that the contract was overall beneficial to the minor. Hamilton would not have likely agreed to contract Lethbridge as his clerk without a restrictive covenant. Balancing the contractual terms as a whole, the benefit to the minor outweighed any unfavourable terms of the contract.

[6.70] In contrast, if the contract is not beneficial to the interests of a minor, it will not be enforced against them.

De Francesco v Barnum

[6.80] *De Francesco v Barnum* (1890) 45 Ch D 430. In an apprenticeship agreement that could only have been made in the 19th century, a girl aged 14 years entered into a seven-year apprenticeship with the plaintiff to be taught stage dancing. She agreed that she would not marry during the apprenticeship and would not accept professional engagements without the plaintiff's permission. The plaintiff did not bind himself to provide her with engagements nor was he obliged to maintain her while she was not working. Furthermore, the pay that he agreed to give in the event of her employment was trifling. He was also entitled at his own discretion to terminate the contract if, after a fair trial, he decided that she was unfit for stage dancing. When he sought to enforce the agreement, the Court decided that the agreement as a whole was unreasonable, not beneficial to her, and therefore not binding.

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[6.85] Courts have held that, even though contracts with minors are beneficial to them, such contracts are not legally enforceable against minors unless it is necessary for them to make a living. This principle was applied in the following UK case involving the famous English footballer Wayne Rooney's representation contract with his agent.

Proform Sports Management Ltd v Proactive Sports Management Ltd

[6.87] *Proform Sports Management Ltd v Proactive Sports Management Ltd* [2006] EWHC 2903 (Ch). Proform had entered into an exclusive management and agency agreement with Rooney for a term of two years when he was 15 years old. After coming of age, Rooney terminated the contract and signed with Proactive. He argued he could do so because he was a minor at the time of contracting. Proform disagreed and sued Proactive in the tort of interference with contractual relations.

In deciding that Rooney was not bound, the Court considered that (a) the contract was not like apprenticeship and employment contracts, and (b) it was not beneficial to Rooney. It was ultimately held that Rooney's contract with his agent was not analogous to a contract for necessary services as it was simply a representation agreement and Rooney had already registered with Everton Football Club before signing up with Proform. In essence, the Court decided that a representation agreement, as opposed to a contract whereby someone earns a living, is not binding on the minor.

[6.90] The question of whether the contract is beneficial to the minor is the crucial issue in determining the validity of the contract. However, this does not mean that *any* contract that benefits minors will be enforced against them. Thus, it is well established that a trading contract is not binding on minors, notwithstanding that it may be financially beneficial. For example, a minor who carried on business as a haulage contractor agreed to purchase a truck under a hire-purchase agreement. When he was sued for arrears under the agreement, the Court held that the contract was a trading contract and therefore the minor could not be bound: *Mercantile Union Guarantee Corp Ltd v Ball* [1937] 2 KB 498.

Voidable contracts

[6.100] The contracts voidable by a minor are either:

1. those binding unless repudiated by the minor during their minority or within a reasonable time after attaining their majority; or
2. those not binding unless ratified within a reasonable time after attaining the age of majority.

Those binding unless repudiated by the minor during their minority or within a reasonable time after attaining their majority

[6.110] This applies to contracts which are of a permanent nature – those which involve a continuing obligation, for example, contracts relating to:

1. shares in a company;
2. leases;
3. partnerships; or
4. marriage settlements.

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A minor is bound by such contracts unless they take steps to repudiate them within a reasonable time after attaining majority. If the minor has received no benefit under the contract, they may repudiate it and also secure a return of any money paid on the contract.

If, however, the minor had the benefit or the use of goods, they, while able to renounce the contract, cannot obtain a refund of the money paid for them. In other words, rescission avoids future liability only.

Those not binding unless ratified within a reasonable time after attaining the age of majority

[6.120] These are contracts which are not of a continuing nature, for example, the purchase of goods which are not necessaries. These contracts require the express ratification of the minor after coming of age to make them binding. In *Victoria*, these contracts, that is those not binding unless ratified within a reasonable time after attaining the age of majority, are not effective, as in that State, legislation makes such contracts absolutely void and incapable of ratification by the minor after attaining majority.[3]

Void contracts

[6.130] In *Victoria*, all contracts entered into by minors, whether simple or made under a deed, are void:

1. for the repayment of money lent or to be lent;
2. for the payment of goods supplied or to be supplied (other than contracts for necessaries); or
3. all accounts stated (ie an account acknowledged by the parties to be correct): *Supreme Court Act 1986* (Vic), s 49.

This does not include contracts for the purchase of land, provision of services or employment – the common law still applies for those contracts. Although these contracts are "void" (of no effect), it has been held that property can still pass under (this kind of) "void" contract, and money paid by a minor can be recovered only where there is a total failure of consideration (eg they pay money under a contract of sale and receive nothing in return). This is different to the usual situation with void contracts, which are treated as if they never existed and never had any legal effect. The provisions also permit loan contracts and contracts for the sale of goods to be enforced by a minor. In addition, minors who purport to ratify *after* becoming an adult are offered some protection. In particular, a minor cannot ratify a contract made during minority (a new contract would need to be entered into): s 50. Further, in *Victoria*, a contract made by a minor, after he or she comes of age, to repay a loan contracted during minority is void.[4]

Contractual capacity of minors in New South Wales and South Australia

[6.140] The *Minors (Property and Contracts) Act 1970* (NSW) contains extensive provision for regulating the contractual capacity of minors in New South Wales. In South Australia, the *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA) is to similar effect. The section references that follow relate to the *New South Wales Act*.

The liability of minors is based on their participation in a civil act: s 16. The legislation defines "civil act" as including a contract; an election to rescind or determine a contract for fraud, mistake or breach; a disposition of property; an assent to or waiver of any matter affecting their rights or obligations under

3 *Supreme Court Act 1986* (Vic), s 49.
4 *Supreme Court Act 1986* (Vic), s 51.

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a contract or relating to property; and any other act relating to contractual or proprietary rights or obligations: s 6(1).

The Act provides that where a minor participates in a civil act and that participation is for their benefit, the civil act is "presumptively binding" on the minor: s 19. The expression "presumptively binding" means that the civil act is as binding on the minor as if they were not a minor at the time of their participation: s 6(3).

The Act also makes certain transactions presumptively binding on a minor even though they may not necessarily be for their benefit. For example, where a minor makes a disposition of property for a consideration which is not manifestly inadequate and they received the whole or any part of the consideration, the disposition is presumptively binding on the minor: s 20(1). Similarly, the disposition of property by the minor either wholly or partly as a gift, where the disposition was reasonable at the time it was made, is another example of a civil act made presumptively binding on a minor: s 21. However, a minor will not be presumptively bound by a civil act where they lack, by reason of youth, the understanding necessary for participation in such act: s 18.

Where a civil act, for example, a contract entered into by a minor, is not presumptively binding on the minor, it may be affirmed on their behalf by a court while the minor remains a minor: s 30(1). A minor may personally affirm a civil act, not otherwise presumptively binding, after they attain the age of 18 years: s 30(1)(b). The effect of affirmation is to make the civil act presumptively binding on the minor: s 30(4).

A civil act may be repudiated by a minor at any time during minority or before they attain the age of 19 years: s 31(1). To be effective, the repudiation must be in writing, signed by the person making it or their agent and served on the person affected by the repudiation: s 33(2). The court also has power to repudiate a civil act on behalf of a minor at any time during minority: s 34(1). However, in all cases, a purported repudiation is of no effect if it appears that, at the time of repudiation, the civil act is for the benefit of the minor: ss 31(1), 34(2).

Misrepresentation by minors

[6.150] Minors are not liable for a tort[5] directly connected with any contract upon which no action will lie against them. It is impossible indirectly to enforce such a contract by changing the form of action to one in tort. Thus, an action of deceit does not lie against minors who, by falsely representing themselves to be of full age, have fraudulently induced another to contract with them, since to enable a plaintiff to convert a breach of contract into a tort would destroy the protection that the law affords to minors.[6]

Corporations

[6.160] Corporations are created by the *Corporations Act 2001* (Cth) and are referred to as "bodies corporate". Many businesses are conducted through corporations. However, it is to be noted that the *Corporations Act 2001* (Cth) gives corporations all of the legal capacity of a natural person: s 124. This legal capacity allows a corporation to enter contracts, own assets and sue and be sued (eg for negligence or breach of contract).

5 A tort is a civil wrong, committed by one person against another, consisting in the infringement of a right created independent of contract, giving the injured party a right to claim damages or compensation. The tort of negligence is addressed in detail in Chapters 15 and 16.

6 This is no longer the position in New South Wales: see *Minors (Property and Contracts) Act 1970* (NSW), s 48.

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A corporation is able to enter a contract either directly (by using the company seal or by the directors signing) or by using an agent: ss 126, 127. Most people would be familiar with corporations through the transactions they engage in with businesses in daily life, for example, banking, purchasing food in a supermarket and education services. In most of these routine, everyday interactions, the corporation often acts through an agent (usually an employee) rather than acting directly itself.

Although the *Corporations Act 2001* (Cth) gives corporations full legal capacity, a corporation may specify in its company constitution that its legal capacity is restricted in certain ways. For example, a corporation may state in its constitution that it will not borrow money or that it will not sell off its main business venture or that contracts must be signed by all of the members of the board. Such statements in the constitution will not affect the corporation's capacity to contract with third parties and the corporation will be bound (providing the contract is valid in other respects): s 125. Under amendments to the *Corporations Act 2001* (Cth), such restrictions in the corporation's constitution will be binding internally on the members and directors and officers of the corporation. The constitutional restrictions will not be binding on third parties dealing with the corporation, however, unless the third party is aware of the restriction: s 128.

Mentally incapacitated and intoxicated persons

[6.170] Mentally incapacitated and intoxicated persons may be made liable under contracts for the provision of necessaries. However, all other contracts entered into by them will be voidable provided:

1. they were incapable of understanding the nature of what they were agreeing to at the time they contracted; and
2. the other party was aware, or should have been aware, of their incapacity.

Accordingly, a person of unsound mind will not be able to avoid a contract where the other party was unaware of their mental incapacity. The onus of proving the existence of both incapacity and the knowledge of the other party of that incapacity rests with the mentally incapacitated or intoxicated person.

The effect of mental incapacity or intoxication is to make the contract voidable at the option of the person suffering the disability and does not entitle the other party to set aside the contract.

A voidable contract can be ratified on the intoxicated person regaining sobriety, or the mentally incapacitated person recovering their health, and the ratified contract will then become binding.

Both mentally incapacitated and intoxicated persons are bound to pay a reasonable price for necessaries obtained while incapable of knowing what they were doing.[7]

Married women

[6.180] In what must be a surprise to many, once upon a time (and, in the overall scheme of things, not that long ago) married women lacked legal capacity. Women were regarded as losing their legal capacity on marriage when the "very being or legal existence of the women is suspended during the marriage and … consolidated into that of the husband".[8] This concept was known as "coverture" and theoretically

7 *Sale of Goods Act 1923* (NSW), s 7; *Goods Act 1958* (Vic), s 7; *Sale of Goods Act 1896* (Qld), s 5; *Sale of Goods Act 1895* (SA), s 2; *Sale of Goods Act 1895* (WA), s 2; *Sale of Goods Act 1896* (Tas), s 7; *Sale of Goods Act 1954* (ACT), s 7; *Sale of Goods Act 1972* (NT), s 7.

8 Sir William Blackstone, *Commentaries on Laws of England* (Chapter 15) (1765–1769), Co Lit 112. The same William Blackstone who, in Chapter 1, made *terra nullius* possible in the time of colonialisation.

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provided the woman, upon marriage, with the protection of her husband. Thankfully, the law no longer holds onto these completely outdated and antiquated ideas. The position of married women is now the same as that of other people, and this is enshrined in legislation throughout Australia.[9]

Bankrupts

[6.190] A bankrupt is not deprived of their general capacity to contract. However, there are certain provisions of the *Bankruptcy Act 1966* (Cth) which relate to dealings by bankrupts.

If an undischarged bankrupt, or a debtor who is party to a debt agreement, obtains credit or enters into a contract for goods and services involving an obligation to pay $3,000 or more (indexed in accordance with the consumer price index) without disclosing they are an undischarged bankrupt, they are liable to imprisonment for up to three years: s 269. An undischarged bankrupt is liable to the same penalty if they carry on business under an assumed or firm name without disclosing the bankrupt's true identity and the fact that they are an undischarged bankrupt.

Certain transactions by a bankrupt in relation to property acquired after the date of the sequestration order are valid against their trustee, provided they are completed before any intervention by the trustee: s 126.

Further reading

See contract texts listed at the end of Chapter 2.

Tutorial activities

1. Explain, with reference to the cases, how a court concludes whether a minor is liable under a contract for "necessaries" or for a "beneficial contract of service".
2. Certain contracts entered into by a minor or by a mentally incapacitated or intoxicated person are voidable. Explain using examples.
3. What capacity does a corporation have to enter a legally binding contract?
4. Joshua, a 15-year-old boy, signs a contract for a mobile phone service. The contract obliges him to pay $29.95 a month for a year. After the first month, he refuses to pay. His parents also refuse to take over the contract on his behalf. Please advise the mobile phone company whether it can sue Joshua (or his parents).
5. James Marsden, who owned $280,000 worth of shares in a mining company, was an alcoholic. His fondness for alcohol was well known. On one occasion, when he was under the influence, the local bank manager got Marsden to transfer the shares to the bank as security for an unsecured loan it had given to Marsden three months earlier. When he sobered up and learned what had happened, Marsden wanted to have the agreement declared void. Advise him.

9 *Married Persons (Equality of Status) Act 1996* (NSW), s 4; *Marriage Act 1958* (Vic), ss 156–161; *Law Reform Act 1995* (Qld), s 18; *Law of Property Act 1936* (SA), ss 92–111; *Law Reform (Miscellaneous Provisions) Act 1941* (WA), ss 2–3; *Married Women's Property Act 1935* (Tas), ss 3, 7, 11; *Married Persons (Equality of Status) Act 1989* (NT), s 3.

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6. Please read the following report from *The Guardian* in February 2024:

   https://www.theguardian.com/australia-news/2024/jan/02/melbourne-30000-sneaker-sale-real-estate-agent-denied-refund-school-kid. On the available facts, does this seem like a fair and legally reasonable decision from the VCAT referee?

7. We considered the following problem in relation to legal requirements about the formalities of an agreement. Please consider it again in relation to the enforceability of contracts against minors.

   Lionel Messi's career with Barcelona started when he was just 13 years old with a contract written on a napkin. British auction house Bonhams sold the napkin in an online auction on behalf of Horacio Gaggioli, his agent at the time for $1.4 million. The napkin bears the signatures of Gaggioli and Barcelona's sporting director. It outlines an agreement in principle to sign Messi and was intended to reassure his father, Jorge, that the deal would go through for the highly talented but very young footballer. A more formal and detailed contract with the club followed soon after.

   Assume that things did not go well and, on turning 18, after years of coaching and mentoring at Barca, Lionel decides he wants to play for Real Madrid. Advise Barcelona of its rights, if any, assuming that Australian law applied.

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Chapter 7

Genuine Consent

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Introduction

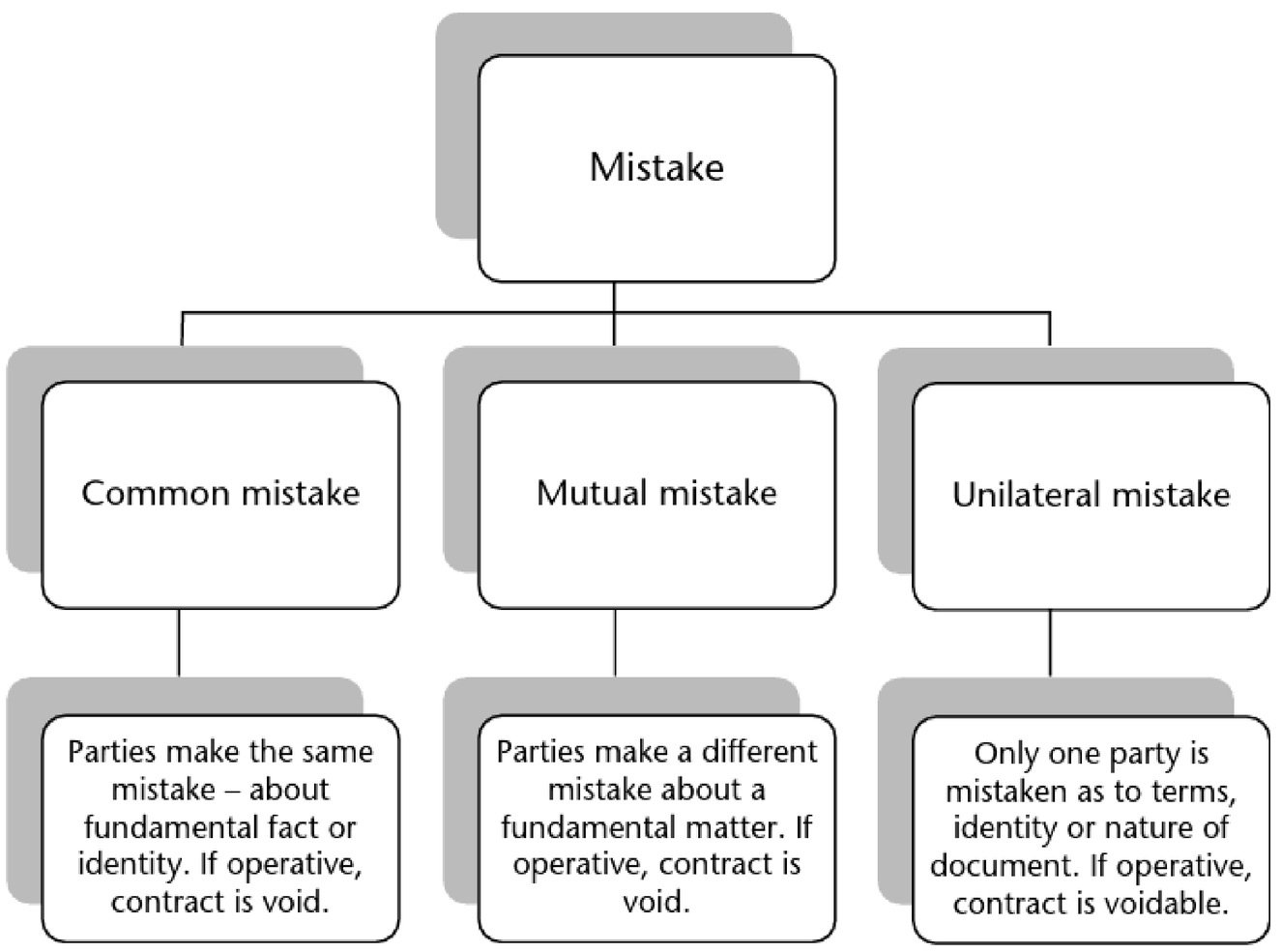
[7.10] Consent is the *sine qua non* (an essential part) of the law of contract. With some exceptions and qualifications, each party must voluntarily and intentionally consent to the terms of the contract. If the (apparent) consent is affected by one or more of the vitiating factors – mistake, misrepresentation, duress, undue influence or unconscionable conduct – the contract may be rescinded or declared void. In this chapter, we examine each of these factors. We also briefly consider the statutory initiatives, particularly in relation to misrepresentation and unconscionable conduct, that have significantly reformed the law.

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There are links and overlaps between the various factors that make this topic quite difficult (and interesting). Mistake and misrepresentation are closely linked and can arise from the same set of circumstances. Common mistake and frustration (that we consider in Chapter 11) are both concerned with common assumptions that turn out to be wrong; it is only the timing – when the unfounded assumption occurred – that determines whether the proper cause of action is mistake or frustration. Duress, undue influence and unconscionable conduct share a common theme – the unfairness, in one form or another, of the concluded agreement.

Mistake

Figure 7.1 : Mistake



Common law view

[7.20] After a contract has been made, one (or both) of the parties may discover that they entered the contract under the influence of a mistake. The common law has always distinguished between mistakes generally and "operative" mistakes. An "operative" mistake is one that a court recognises as one that vitiates consent leading to the contract being declared void *ab initio* (from the beginning). However, the common law restricted the scope of operative mistakes. The reason is simple: a contract that is declared void *ab initio* has no legal effect and cannot be enforced by either party. No obligations or rights can arise from it and, as far as possible, the parties are restored to their pre-contractual position. Third parties may also be adversely affected, especially if the "contract" was for the transfer of property or other significant interests. For example, if A, under the influence of an operative mistake, sells a painting to B and B sells it to C, no title passes to C if the contract between A and B is declared void *ab initio*.[1] In these circumstances,

1 This is because no title (ownership) can pass under a void contract – *nemo dat quod non babet* (one cannot give what one does not have).

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A retains the title to the painting and can sue for its return from C (who obviously bears the loss). In the example, it can be assumed that B did not pay A and has disappeared with C's money. In this scenario, C loses all.

Therefore, under the common law, there was little room to argue that a mistake was operative: if the parties intended to undertake the obligations they have undertaken, those obligations should be enforceable. Motive – the reason *why* a party entered into a contract – is irrelevant. As Lord Atkin said in *Bell v Lever Bros Ltd* (1932) AC 161:

> It seems immaterial … that if he had known the true facts he would not have entered into the bargain. A buy's B's horse; he thinks the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he known the horse is unsound … A is bound and cannot recover back the price … If parties honestly comply with the essentials of the formation of contracts … they are bound.

The effect of equity

[7.25] Equity, however, took a more flexible approach, offering relief to a party where the strict enforcement of common law rights was unfair or unconscionable. Equity treated contracts affected by operative mistake as *voidable* (not void *ab initio*) which meant the contract could be set aside (rescinded) on terms aimed at achieving a fair outcome. Therefore, referring to the above example, if the contract between A and B is voidable, rather than void, the contract is valid until A rescinds it – so title can pass to C from B provided A has not rescinded the contract between A and B. After title has passed to C, the contract can no longer be rescinded by A. In this scenario, A loses all.

Mistakes of fact

[7.30] It is difficult to appreciate the nature of the legal principles without distinguishing between the various types of mistakes. The first kind of mistake is one where the parties make the same mistake – a common mistake; the second is one where the parties are at cross-purposes – a mutual mistake; and, third, there is a mistake made by one party only – a unilateral mistake. A mistake may also be made when recording the agreement. When this occurs (and the scope is narrow), a court may order rectification of the document so that it conforms to agreement that the parties intended to make. Finally, a party may not be able to understand the document that they have signed. When this kind of mistake occurs (and, again, the scope is narrow), the affected party may be able to plead *non est factum* (a legal rule translating to "this is not my deed").

Common mistake

[7.40] A common mistake occurs where both parties make the same mistake. After a contract has been formed, one party argues that because of a fundamental common mistake the agreement is void *ab initio*. Such cases are usually restricted to situations where the very existence of the subject matter of the contract is the issue. For example, A and B agree on the sale of A's car that they (understandably) assume exists. In fact, unknown to A, the owner, the car was stolen the night before the contract was made and was destroyed. The contract is void. *Scott v Coulson* (see [7.50]) is an example.

More difficult is the case where the mistake is one that relates to the *quality* of the subject matter of the contract. As we noted above, in such a case, the courts are reluctant to allow a party to invoke mistake because of concern about eroding certainty and stability if a disappointed party can too readily walk away

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from a contract that has turned sour. For that reason, a mistake as to quality will rarely operate to set aside a contract. For example, where A sells B a Kia EV car, both mistakenly believing that it has the longest range of any EV in its class (when, in fact, it does not) the mistake is one concerning the *quality or attribute* of the subject matter so the contract is valid and enforceable.

The basic question in such cases is which of two innocent parties should bear the loss that flows when the truth emerges (about the car or the colt in the examples here or about the provenance of the painting in *Leaf* (see [7.70])). If the contract is void *ab initio*, no contract ever existed. Consequently, there can be no transfer of ownership. Therefore, for example, if a claim in mistake had been made out, the purchaser in *Leaf* could return the painting (because the gallery owner could not have transferred property if the contract was void *ab initio*).

Scott v Coulson

[7.50] *Scott v Coulson* [1903] 2 Ch 249. A contract for the assignment of a life insurance policy was made upon the basis of a belief common to both parties that the assured was alive. In fact, he had died *before* the contract of assignment was made. Therefore, the Court decided that there was a common mistake, and the contract was void and could not be enforced.

[7.60] As noted at [7.40], contracts are rarely avoided where the common mistake concerns the qualities or attributes of the subject matter. In *Leaf* even a common mistake as to the authenticity of a famous painting was regarded as a mistake as to the painting's *quality* and, as a result, the contract was not void; the loss was borne by the owner.

Leaf v International Galleries

[7.70] *Leaf v International Galleries* [1950] 2 KB 86. The plaintiff purchased a painting of Salisbury Cathedral from the defendants. Both parties mistakenly believed the painting was by the landscape artist John Constable. When the plaintiff attempted to resell the painting, he discovered that it was not a Constable. The plaintiff argued this was a common mistake of a fundamental fact, rendering the contract void.

The Court of Appeal decided that this was a common mistake, but it was a mistake about the *quality* of the subject matter – both parties believed the picture to be a Constable original – and such a mistake does not avoid the contract. The parties were agreed on the subject matter – they were buying and selling a painting of Salisbury Cathedral (not a Constable painting) – and therefore, as the consent was genuine, the contract was valid.[2]

[7.80] If the court believes that the agreement between the parties was conditional on something being true (such as the subject matter of the contract being available), then, if it is not (for instance, if the subject matter of the contract has been destroyed), the contract may be void. If, however, there is no such

2 The plaintiff sought to have the contract declared void for mistake because the remedies for innocent misrepresentation (which this clearly was) would not have allowed him a remedy (because, at common law, no damages can be awarded for an innocent misrepresentation and, as we shall see, the right to rescind a contract for an innocent misrepresentation lapses after a reasonable time).

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condition, the contract will be valid and the seller liable for breach of contract if the subject matter of the contract is not available. This was the position in the following case.

McRae v Commonwealth Disposals Commission

[7.90] *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377. The CDC advertised for tenders for the purchase of a wrecked tanker on a reef near Indonesia. The plaintiff was the successful tenderer and spent a considerable amount of money on the recovery effort but, in fact, unknown to both parties, no wreck ever existed on the reef specified. The plaintiff sued for breach of contract, but the CDC argued that there was a common mistake about the existence of the wreck and therefore the contract was void.

The High Court decided that there was a valid contract. The CDC had impliedly *promised* that the wreck existed and was therefore liable for the breach of that promise. The CDC was ordered to compensate McRae for the costs incurred in attempting to locate the wreck.

Mutual mistake

[7.100] Where there is a mutual mistake, the contracting parties are at cross-purposes – there is in fact no correspondence of offer and acceptance. For example, one party believes that she is purchasing a tonne of Sri Lankan green tea from the estate at Nuwar Eliya and the other believes the tea is from the Hatton estate. In such cases, the court seeks to determine what a reasonable person would infer from the negotiations. If the court cannot say what a reasonable person would have concluded (for instance, that it was reasonable to believe that the tea would come from Hatton), then there is no enforceable agreement.

Unilateral mistake as to a fundamental term

[7.110] A unilateral mistake is one where only one of the parties is mistaken. Generally speaking (and consistent with the common law's general approach to mistake), a unilateral mistake will not affect the contract unless:

1. one party makes a mistake about a fundamental term;
2. the other party is aware of the mistake; and
3. the other party seeks to take unfair or unconscionable advantage of the mistake.

If these three criteria are met, the contract is voidable and the mistaken party is entitled to rescind the contract. Up until the contract is rescinded, it is a valid contract.

In the following case, the High Court considered the consequences of a unilateral mistake as to a fundamental term where all three of the above criteria were met.

Taylor v Johnson

[7.120] *Taylor v Johnson* (1983) 151 CLR 422. The vendor granted to a purchaser an option to purchase two adjoining blocks of land. The option was exercised and the parties entered into a written contract of sale for the land. In both the option and the sale agreements, the

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total purchase price was $15,000. The vendor later refused to complete the purchase on the ground that she had mistakenly believed that the option and sale agreements provided for a price of $15,000 *per acre* which would have amounted to a total purchase price of $150,000, the two blocks comprising 10 acres. The High Court accepted the evidence that at the time of both the option and the time the contract was signed Taylor believed Johnson was under some serious mistake or misapprehension about either the terms (price) or the subject matter (its value) of the transaction. Taylor avoided mention of the purchase price and, at the execution of the option, misled Johnson when he said he did not have a copy of the option to which he could refer.

All the evidence, according to the High Court, was that he "deliberately set out to ensure Johnson did not become aware that she was being induced to grant the option and subsequently to enter into the contract by some material mistake as to its terms or subject matter". The High Court decided that, in these circumstances, the contract was voidable and should be rescinded.

Where the unilateral mistake relates to the actual terms of a written contract, the mistaken party cannot rely on their mistake to say that the contract was void *ab initio*. The contract is voidable only, that is, it is binding on the parties unless and until it is set aside.

Unilateral mistake as to the identity of the contracting party

[7.130] Mistakes as to the identity of the contracting party may or may not be fundamental. Mistakes as to identity occur when one party is deceived by a "rogue" and believes they are contracting with another (uninvolved) third party. In typical situations of this kind, the contract will either be *void for mistake* or *voidable for fraud*. Much depends on the manner in which the contract was made – either the parties contract through correspondence and do not meet or the parties meet face-to-face (or, these days, via an electronic equivalent such as Zoom). When a seller deals with a person face-to-face, the strong presumption is that they intend to contract with that person, even though the latter fraudulently impersonates someone else. The significance of the distinction between a void and voidable contract, as in *Cundy v Lindsay*, is that an innocent third party receives no title to the goods under a void contract, but may receive title under a voidable contract (depending on whether the seller rescinds the contract *before* the rogue sells to an innocent third party).

Cundy v Lindsay

[7.140] *Cundy v Lindsay* (1878) 3 App Cas 459. Alfred Blenkarn wrote to Lindsay offering to purchase goods. He signed the letter so that it appeared that it was signed by W Blenkiron & Co, a well-known and respected firm. Lindsay sent the goods to the impostor, who sold some of the goods to Cundy. Lindsay sued to recover the goods from Cundy.

The Court held that the contract in which Blenkarn purported to sell the goods to Cundy was void. Alfred Blenkarn knew of Lindsay's mistake because he had induced it. As Lindsay intended only to deal with Blenkiron, there was a unilateral mistake and the contract was void. Cundy, therefore, derived no title to the goods (no title can be transferred under a void contract) even though he was entirely ignorant of the fraud.

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[7.150] In *Phillips v Brooks Ltd* and *Lewis v Averay*, the plaintiffs were fraudulently induced to believe that the person with whom they were contracting face-to-face was someone else.

Phillips v Brooks Ltd

[7.160] *Phillips v Brooks Ltd* [1919] 2 KB 243. A rogue expressed a wish to buy jewellery at the plaintiff's shop. He wrote out a cheque for £3,000, saying that he was Sir George Bullough and provided the latter's address. The plaintiff allowed the rogue to take away the jewellery, which he then pledged to the defendant, who had no knowledge of the fraud.

The Court decided that the plaintiff had contracted to sell to the person who had entered the shop even though he believed that he was Sir George Bullough. The contract was made with the person physically present, but his identity was regarded as that of another. The contract was voidable for fraudulent misrepresentation, but not void for mistake. The result was that the innocent defendant third party derived a good title to the jewellery because the sale to him occurred *before* Phillips rescinded the contract. That is, at the time the rogue sold the jewellery to the defendant, a valid contract still existed.

Lewis v Averay

[7.170] *Lewis v Averay* [1972] 1 QB 198. Lewis advertised his car for sale. A rogue led Lewis to believe he was the well-known television actor Richard Greene. The rogue wrote out a cheque for the agreed price of the vehicle and signed it "RA Green". He wanted to take the vehicle, but Lewis was hesitant and asked for proof of identity. The rogue produced an admission pass to Pinewood Studios with the name "Richard A Green" and his own photograph. Lewis let the rogue have the car. The cheque was stolen. Meanwhile the rogue had sold the car to Averay, who bought it without knowledge of the fraud.

The Court held that the contract between Lewis and the rogue was *not* void for mistake because, as in *Phillips v Brooks Ltd*, Lewis intended to contract with the person in front of him. The contract was, however, voidable for fraudulent misrepresentation and could have been rescinded by Lewis had he had acted *before* the rogue sold the car to Averay. This he had not done and, therefore, Averay (the innocent third party) received good title to the car.

Mistake as to the nature of the transaction

[7.180] If a person signs a written document which they mistakenly believe to relate to a transaction entirely different in character from that to which in fact it does relate, they will not be bound. To an action on the contract, such person has a defence which is called *non est factum* ("it is not my deed"). This defence will only succeed where the person seeking to rely on it can prove:

1. that the document they signed was fundamentally different in character from that which they thought it to be (eg the difference between an option and a receipt); and
2. that they were not careless in failing to take reasonable precautions before signing the document (eg leaving blank spaces in the document that enabled a fraud to occur).

Petelin v Cullen is an excellent example of (1) above.

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Petelin v Cullen

[7.190] *Petelin v Cullen* (1975) 132 CLR 355. Petelin owned land that Cullen wished to buy and develop. He obtained a six-month option to purchase for which he handed over a cheque for $50 and promised another $50 later on. Shortly *after* the expiry of the option, he wrote a letter to Petelin enclosing a further cheque for $50. When Cullen saw Petelin, he asked him whether he had received the cheque. Petelin said that he had, and Cullen then showed him a document that he pretended was a receipt for the cheque but was in fact an extension of the option. Petelin, who could not read English, signed the document in the belief that it was a receipt. Cullen exercised the option within the period of the second six months, but Petelin refused to sell the land. When Cullen brought an action for specific performance of the option, Petelin relied on the defence of *non est factum*.

The High Court decided that Petelin had discharged the onus of showing that there was a radical difference between what he signed (ie an extension of the option) and what he thought he was signing (ie a receipt) and had therefore made out the defence.

Effect of mistake of fact

[7.200] The general position where a mistake is legally operative is that it renders the contract *void*. However, the High Court in *Taylor v Johnson* (1983) 151 CLR 422 held that a unilateral mistake as to the actual terms of a written contract does not render the contract void, but *voidable*, that is, binding unless and until set aside in *equity*: for example, for reason of fraud, misrepresentation or unconscionable dealing.

Mistake of law

[7.210] A mistake of law concerns the law as the parties understood it to be at the date of the contract. For example, as *David Securities Pty Ltd v Commonwealth Bank of Australia* illustrates, moneys are recoverable where they are paid because the parties (mistakenly) believe there was a legal obligation on them to do so.

David Securities Pty Ltd v Commonwealth Bank of Australia

[7.220] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353. The appellants entered into an agreement with the Commonwealth Bank for a foreign currency loan. The loan agreement required the appellants to pay the bank in respect of its withholding tax liability. Subsequently, the appellants suffered considerable financial losses owing to adverse fluctuations in exchange rates and claimed damages against the bank and the accountants who had advised them in relation to the loan. The bank cross-claimed for recovery of moneys due under the loan.

The High Court held that money paid under a mistake such as this (called a mistake of law here because the mistake was about a tax law) is recoverable. However, the recipient of money paid under such a mistake will not be liable to repay the money if, in reliance upon receipt of the payments, the recipient, in good faith, changed its position to its detriment (eg can point to expenditure or financial commitment which can be ascribed to the mistaken payment).

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Remedy of rectification

[7.230] Where the parties have agreed and the contract has been reduced to writing but, by a common mistake, there is an error in the writing, *equity* will order the written contract to be *rectified* (rewritten) to accord with the intention of the parties. For rectification of a contract to be granted, convincing proof must be given that the written contract does not embody the final intention of the parties and the omitted ingredient must be capable of such proof in clear and convincing terms.

Pukallus v Cameron

[7.240] *Pukallus v Cameron* (1982) 180 CLR 447. Both parties to a sale of land believed that an area containing a bore and some 27 acres of cultivated land lay within the portion sold. In fact, they were mistaken: it was within land retained by the vendor. This was only discovered after completion of the contract. The purchaser sought rectification of the contract to include the bore and cultivated land.

The High Court refused the request for a rectification of the contract. The purchaser had not proven that there was an error in the written contract. The term that he proposed was clearly inconsistent with the description of the land in the contract and, further, he had failed to prove where the new boundary line should be. In other words, the contract was exactly as the parties intended it to be.

[7.250] In some cases where the mistake is a *unilateral* one, for instance, where one party has "snapped up" an offer which they knew was not intended, and the contract has then been reduced to writing, the court has given the defendant a choice of either having the contract rectified or having it rescinded by the court. The Victorian Court of Appeal has stated the principles concerning rectification for unilateral mistake as follows:

> 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: *Leibler v Air New Zealand Ltd* [1999] 1 VR 1.

Rectification may thus be granted for a unilateral mistake by one party where the conduct of the other party is unconscionable: *Vantage Systems Pty Ltd v Priolo Corporation Pty Ltd* (2015) 47 WAR 547. In that case, the contract mistakenly provided for a licence fee of $375 per year rather than per month. Rectification was granted where one party unconscionably sought to "take advantage" of the other party's "obvious and significant mistake".

Misrepresentation

Introduction

[7.260] There are two types of statement that can be made before a contract is made. The statement can be a *promise* that forms part of the contract (ie a term of the contract). Or it can be a *representation*, a

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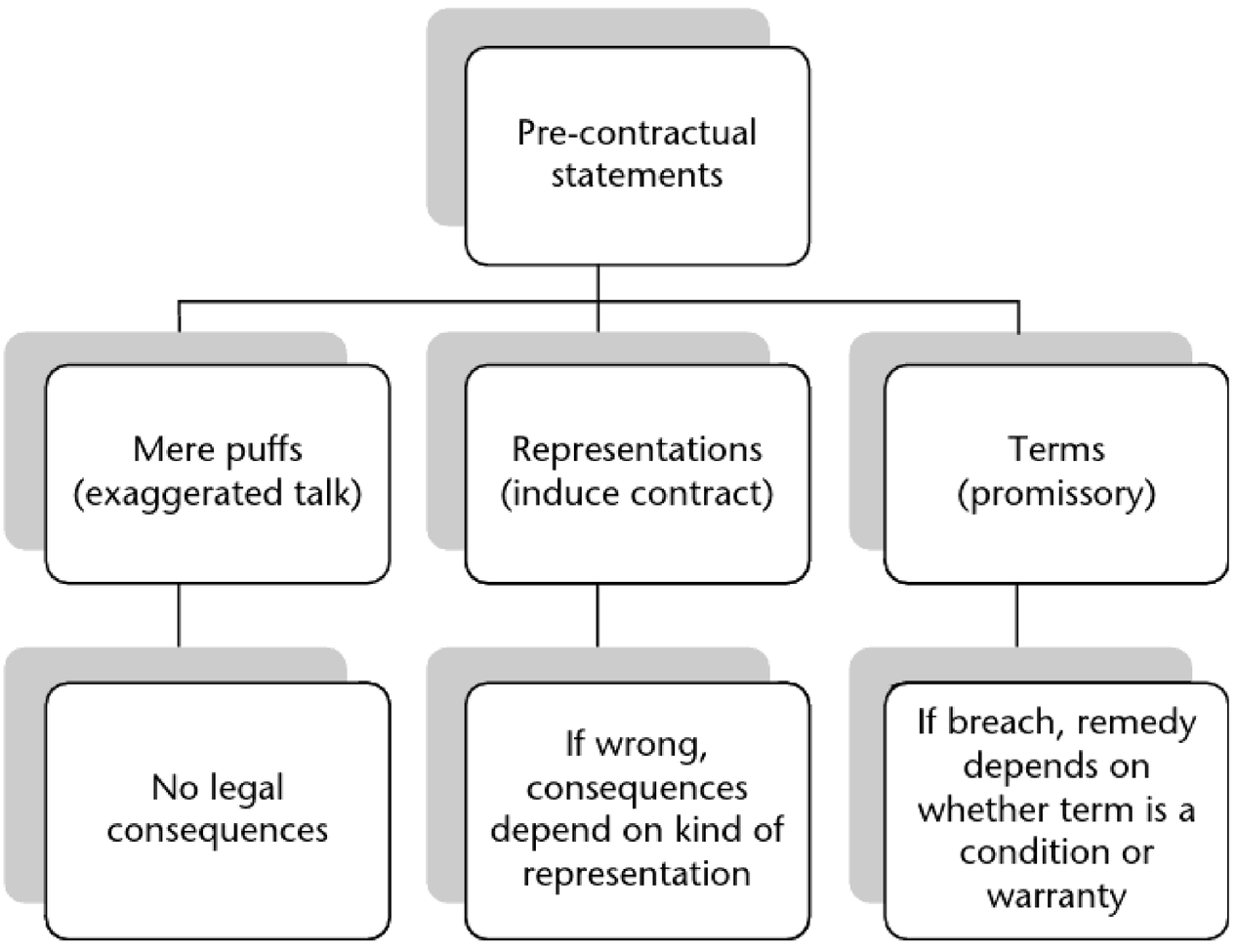
statement made by one party, during the pre-contractual negotiations, about some past or present fact that is one of the factors that induces or persuades the other party to enter into the contract.

It is sometimes difficult to distinguish between the two. For example, the statement that "the cafe made a profit of $1 million in the previous financial year" may be a statement that *induces* a person to buy the business – a representation – or it may be a *promise* – a term of the agreement. If it is a representation and is untrue, it constitutes a *mis*representation. Rescission is the main remedy for misrepresentation, but there are stronger and broader remedies available under the *Australian Consumer Law*.[3] If it is a term and the term is breached, the innocent party is entitled to contractual remedies, including damages and termination.

[7.265] How do we distinguish between the two? How do we decide whether a statement is a term or a representation? This distinction between a *representation* inducing the contract and a *term* of the contract itself is an ancient and, prior to the introduction of the *Australian Consumer Law* (and its antecedents), an important one. Basically the courts attempt to determine what the intention of the parties was when they made the agreement. However, as we have seen many times already, they do not ask what the individual parties intended – which would be a subjective test – but rather they ask what a reasonable person, considering all the evidence known to the parties at the time, would conclude. To assist with the answer to that basic question, a number of guidelines have been developed and are discussed in detail at [9.220].

Each of the categories of fraudulent, innocent and negligent misrepresentation will now be considered.

Figure 7.2 : Pre-contractual statements



Fraudulent misrepresentation

[7.270] Fraud exists "when it is shown that a false representation has been made (a) knowingly, or (b) without belief in its truth, or (c) recklessly, careless whether it be true or false": *Derry v Peek* (1889) 14

3 The law of misrepresentation must be read in conjunction with the material in Chapter 13 on misleading conduct and other unfair practices because the common law action of misrepresentation has been largely subsumed by the statutory action.

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App Cas 337. For a person who has been induced to enter into a contract by a fraudulent misrepresentation to successfully take action, the following six elements must be established:

1. The representation must be one of fact.
2. The representation must be false.
3. The party who makes such representation must know that what they are stating is false, or they must have no belief in its truth, or be reckless about whether it is true or false.
4. The party who makes the representation must intend the other party to the contract to act upon such representation.
5. The representation must, in fact, have been acted upon by the other party.
6. The plaintiff must have suffered damage.

The presence of each element is necessary in order to satisfy the grounds for an action for fraud.

1. Statement of fact

[7.280] Generally, misrepresentations consist of oral or written statements concerning a *past or present fact*. They may also be communicated through silence. Some statements of intention (as to future actions) or statements of opinion and law may also be representations. For example, a statement such as "we have a contract with X to build a railway to our iron ore deposits" is a statement of fact that is either true or false when made. A statement of opinion ("In my opinion X will invest in the scheme") or intention ("It is my intention to negotiate a successful outcome with X") or a prediction about the future ("I would say that X will invest") cannot be true or false at the time the statement is made. However, they may be characterised as misrepresentations *if the representor does not, in fact, hold that opinion or have that intention or does not have reasonable grounds for making the prediction*.

The following four cases illustrate the issues that arise with respect to statements about the future, statements of opinion and the effect of silence or non-disclosure.

Edgington v Fitzmaurice

[7.285] *Edgington v Fitzmaurice* (1885) 29 Ch D 459. The directors of a company, the Imperial Mercantile Credit Association, issued a prospectus inviting the public to subscribe for debentures. The prospectus stated that the purpose of the debentures was to raise money to complete alterations in the company's buildings, purchase horses and vans, and develop their trade (improve the supply of fish). In reality, the money was intended to pay off the company's existing liabilities. Edgington subscribed to the debentures, relying on the statements in the prospectus. Subsequently, the company went into liquidation. Edgington brought a claim against the directors, arguing that he had been induced to invest by the false statements in the prospectus. The primary legal issue was whether a misrepresentation about a future intention could be actionable if the statement was false at the time it was made.

The Court decided that this was an actionable misrepresentation. A statement about a future intention can be a statement of fact if it is shown that, *at the time the statement was made*, the person making it had no intention of carrying out the stated intention. This makes the statement a misrepresentation of a present fact (ie the state of the mind of the person making the statement). As Bowen LJ famously put it, "… the state of a man's mind is as much a fact as the state of his digestion". The Court also confirmed that for a misrepresentation to be actionable, it must have induced the claimant to enter into the contract, but need not have been

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the only, or indeed, the decisive inducement. Once it was established that Edgington had relied on the statements in the prospectus, and was induced to subscribe to the debentures because of the false representations, the fact that there were other inducements was irrelevant.

Bisset v Wilkinson

[7.286] *Bisset v Wilkinson* [1927] AC 177. A farmer stated that "it was his opinion" that land being purchased could hold 2,000 sheep. When it could not support that number of sheep the purchaser sought to rescind the contract and obtain a refund.

The Court decided that the statement was a statement of opinion, not fact. The Court considered the context in which the statement was made. Given that both parties were aware of Bisset's lack of expertise in sheep farming, it was unreasonable for Wilkinson to treat the statement as a factual guarantee. It is irrelevant whether the statement of opinion made is unreasonable or whether the representor could have subsequently checked whether their opinion was correct.

Smith v Land & House Property Corporation

[7.287] *Smith v Land & House Property Corporation* (1884) 28 Ch D 7. The claimant put its hotel up for sale with the particulars stating that it was currently leased to "a most desirable tenant". Before settlement the tenant went into liquidation and the defendant rescinded on the basis that the claimant had misrepresented the nature of the tenant. The claimant sought specific performance. The issue was whether the claimant's statement as to the quality of the tenant was a statement of opinion or a representation, which induced the defendant to enter into the contract.

The Court decided that the claimant had sufficient knowledge of the tenant and its business practices to be able to state, as a matter of fact, whether it was a desirable tenant. The statement was a misrepresentation, and the contract could be rescinded.

Misrepresentations must generally be made by words or conduct. The general rule is that, absent a fiduciary or other special relationship, contracting parties are not obliged to disclose matters, even material matters, in their pre-contractual negotiations. That is, a party has a right to remain silent. However, there are exceptions:

- *a half-truth can amount to a misrepresentation*. A misleading half-truth is a true statement up to a point. All the relevant information is not disclosed. For example, a statement by a restauranteur that his restaurant can seat 68 people may be true. The failure to say that it is only *licensed* to seat 40 people makes it a misrepresentation. By extension, silence can also constitute a misrepresentation where a reasonable person would expect that in all the circumstances a disclosure would have been made;
  a statement that is initially true must remain accurate throughout the negotiation process up to the point of contract completion. If it becomes false, the party who made the statement must correct it. The failure to do so amounts to a misrepresentation. For example, a statement that "no planning permit is

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required for the project" may be true when made but, if the regulatory authority changes its policy and then requires a permit, the landowner would be liable for a misrepresentation if he did not update the other party; and

- *where a person deliberately conceals something*, such as a defect in the goods that are being sold, so as the purchaser is left with a false understanding about the quality of the goods.

With v O'Flanagan

[7.288] *With v O'Flanagan* [1936] Ch 575. Dr O'Flanagan was selling his medical practice. In January 1934, during negotiations, he represented to With, the buyer, that the practice was worth about £2,000 a year. Shortly after this representation, O'Flanagan fell ill and was unable to work. Consequently, the practice's income drastically declined. In May 1934, the contract was signed without O'Flanagan updating With about the significant decrease in the practice's income. After taking over the practice, With discovered the actual financial condition of the practice and claimed that O'Flanagan's failure to disclose the change constituted a misrepresentation. The main legal issue was whether O'Flanagan's failure to inform With of the change in the practice's income constituted a misrepresentation, thus making the contract voidable.

The Court of Appeal held that if a party makes a representation that is true when made, but subsequently becomes false due to a change in circumstances, there is a duty to inform the other party of this change. The failure to do so can amount to a misrepresentation. The Court reiterated that for a misrepresentation to be actionable, the false statement must have induced the claimant to enter into the contract. In this case, With relied on the initial representation about the practice's income.

2. *Falsity*

[7.290] This is obviously a necessary part of liability for misrepresentation. It is a question of fact in each case whether the representation is false or not. Again, the question is would a reasonable person – not the parties themselves – in the position of the parties, taking into account the context in which the statement was made, regard the statement as true or false.

The extent or degree of the falseness is also a relevant consideration.

Avon Insurance Plc v Swire Fraser Ltd

[7.295] *Insurance Plc v Swire Fraser Ltd* [2000] 1 All ER 573. The claimant said it had been induced into the contract by assurances made by the defendant as to how the risk of each potential insured party was to be assessed. The claimants asserted that a booklet produced by the defendant stated that each insured party would be individually assessed by the defendant's lead underwriter. The claims were not assessed individually in this manner and the claimant sought damages.

The Court held that the booklet did not constitute a misrepresentation. The fact that the risks were assessed by a team under the control of the head underwriter was not a significant departure from the words of the booklet. The representation was true, even though it did not exactly match the terms of the booklet. If most, but not all, of the statement was true, the

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statement would be regarded as true for the purposes of the law of misrepresentation. In any event, this statement had not been the primary inducement to the claimant to enter into the agreement and therefore, there was no misrepresentation.

3. Known to be false, or without belief in its truth, or recklessly careless whether it be true or false

[7.300] The representor need not actually know that what they are representing is in fact untrue. The representor is liable if they make the false statement when they have no knowledge whether it is true or false and also when they are reckless as to whether the statement is true. If, on the other hand, the person making the representation genuinely believes the statement to be true, there is no fraud (even if the representor has been negligent). For example, assume Perdue Ltd, the manufacturers of OxyContin, a pain relief opioid designed to relieve chronic pain, represented, without evidence, that OxyContin had no addictive qualities. As it turned out, the drug was highly addictive. The company, at the very least, is guilty of fraud because it has been reckless about the truth. If, on the other hand, the company genuinely believed – based on evidence – that the drug was non-addictive, the company may be liable in negligence but is not guilty of a fraudulent misrepresentation.[4]

4. Intended to be relied upon

[7.310] This means, for example, that the representor intends the other party to act on the strength of the representation by, for example, entering into a contract or doing any other act in reliance on the statement. For example, where a person exaggerates the revenue of a business in order to induce a sale of the business.

5. In fact relied upon

[7.320] The misrepresentation must have induced the other party to enter into the contract. Accordingly, if the party to whom the representation is made is fully aware of the falsity of the statement, they will be unable to show that it induced them to enter into the contract. However, even where the person to whom the representation was made did not believe the representation to be entirely true, they will still have a remedy for fraudulent misrepresentation so long as they were not aware at the relevant time of the extent of the fraud.

6. Resulting in damage

[7.330] The person so acting must suffer loss or damage. The damage can be personal or to property or it can involve financial loss. If no damage is suffered from the false representation, no action lies.

Remedies for fraudulent misrepresentation

[7.340] A person who has been induced to enter into a contract by reason of fraudulent misrepresentation may refuse to be bound by the contract (or successfully defend any attempts to enforce the contract against them) or may affirm the contract and claim damages for any loss sustained. Where the latter approach is adopted, the general principle in assessing damages is that the plaintiff is to be put, so far as possible, in the position they would have been in if they had not acted on the fraudulent inducement. For example, where

4 For the real story of OxyContin and the Sackler family behind it, see "Dopesick" or the "Crime of the Century" on HBO.

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a person complains that they have been induced by fraud to buy something and pay more for it than it was worth, the measure of damages which that person is entitled to recover is, *prima facie*, the amount by which the price paid exceeds the value of the thing purchased at the time of sale. Consequential or indirect loss is also recoverable in an appropriate case. Traditionally, "consequential loss" referred to those losses falling under the second limb of *Hadley v Baxendale* (special knowledge required of, eg, abnormal loss of profit).

Innocent misrepresentation

[7.350] An innocent misrepresentation occurs when a person makes an untrue statement of fact which was intended to, and did in fact, induce the other party to enter into the contract, but without any intention on the part of the representor to deceive. There are obviously many examples of such statements in commercial life. It simply requires *a person to make a statement that is wrong but which the person believed to be true*. For example, each of the following statements is a representation of fact:

- this business has turnover of $1 million
- this air conditioner can cool a 12 square metre room in 30 minutes
- this cello was owned by Yo Yo Ma
- this property can be subdivided into four lots
- this Toyota 4WD ute has never been driven through the Simpson Desert.

Assuming each of these representations is false, but that the representor believed the statements to be true, the statements are innocent misrepresentations.

Remedies for innocent misrepresentation

[7.360] The common law provided no remedy for an innocent misrepresentation (where the representation was not made a term of the contract); it neither awarded damages nor regarded the contract as void or voidable.

A person induced to enter a contract by an innocent misrepresentation may have the right:

1. to *rescind* the contract (see [7.390]); or
2. to resist an action for specific performance of the contract (ie to defend an action if the representor attempted to enforce the contract that the innocent party was induced to enter by the misrepresentation).

The following case is an example of an innocent misrepresentation.

Redgrave v Hurd

[7.370] *Redgrave v Hurd* (1881) 20 Ch D 1. Redgrave, an elderly solicitor, advertised for a partner to join the business and buy the house in which the practice was located. Hurd responded. During the negotiations, Redgrave told Hurd that the practice brought in £300 per annum, when, in fact, it brought in only £200 pa. Redgrave produced the accounts that indicated the business brought in £200 pa and told him that the rest of the £300 figure was borne out by other papers in the office that he could check if he wished. He did not do so (and, in fact, they showed no extra business). Hurd realised the true position just prior to settlement

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and refused to complete the transaction. Redgrave sued for specific performance, and Hurd counterclaimed for rescission based on fraudulent misrepresentation (because he wanted to claim damages as well). Hurd was unsuccessful at the trial because the Court said he should have checked the documents himself.

On appeal, Hurd's counterclaim for *fraudulent* misrepresentation failed – there was no evidence that Redgrave knew the statement was untrue nor was he reckless as to its truth. However, the Court, in deciding that there was no duty on the purchaser to inspect the papers, ordered rescission of the contract on the basis of the innocent misrepresentation made by Redgrave.

[7.380] Several legislative modifications of these principles are discussed briefly at [7.410] and extensively in Chapter 13 regarding the effect of the *Australian Consumer Law*.

The remedy of rescission

[7.390] This equitable remedy is available in the case of both fraudulent and innocent misrepresentation. It amounts to setting the contract aside and restoring the parties to the position they occupied before the contract was made. However, there are certain bars to rescission:

1. The right is lost if the party entitled to rescind *affirms the contract* after becoming aware of the falsity of the representation. A contract is affirmed if the representee, after full knowledge of the facts, declares their intention to proceed with the contract, or does some act from which such an intention may be inferred. For example, affirmation will be inferred where a purchaser of goods, who is entitled to rescind the contract for misrepresentation, retains the goods. A representee will not generally be taken to have affirmed a contract unless they were also aware of their right to rescind. Where the contract is affirmed, the representee retains a right to sue for damages only if the representation was fraudulent.
2. The right is lost if *third parties acting in good faith acquire rights* in the subject matter of the contract before the right to rescind is exercised. This occurred in *Lewis v Averay* [1972] 1 QB 198 (see [7.170]) where title to the car had passed to Averay before Lewis rescinded the contract with the rogue (ie after the bank had notified him that the cheque had bounced).
3. The right to rescind is lost if, by reason of the changes that have occurred to the subject matter, it is *no longer possible to restore the parties* substantially to their pre-contractual position. For example, the right to rescind a contract for the purchase of oranges will have been lost once the oranges have become orange juice. However, *Alati v Kruger* at [7.400] illustrates the lengths the court will go to in ordering payments and adjustments to be made, particularly in a case of fraudulent misrepresentation.

Alati v Kruger

[7.400] *Alati v Kruger* (1955) 94 CLR 216. Kruger purchased a fruit business from Alati for £700. Kruger alleged that he had been induced to enter into the contract of purchase by fraudulent misrepresentations as to the takings of the business made respectively by Alati and others. He also alleged that Alati had warranted in clause 21 of the contract that the average

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takings of the business were approximately £100 per week. The takings proved immediately to be much less than £100 per week. In fact, during the first two weeks he was in possession of the business, the takings were less than half of the warranted amount.

The Court noted Kruger had three options: first, he could sue for damages for breach of the warranty contained in clause 21, but he could not do this and rescind the contract for misrepresentation. Second, he might sue to recover as damages for fraud the difference between the price he had paid and the fair value of the property at the time of the contract. However, again, he could not do this and rescind the contract. Or, third, provided that he was in a position to restore Alati substantially to the position he was in before the contract, he might rescind and sue to recover his purchase money. This is what he did. The High Court affirmed the decision to rescind the contract, ordered the return of the purchase money and awarded damages for the losses Kruger suffered.

Misrepresentation under the Australian Consumer Law

[7.410] As we noted earlier (at [7.260]), the *Australian Consumer Law* provides civil remedies where misrepresentations by a person constitute misleading or deceptive conduct: s 18(1). Civil remedies including the imposition of civil pecuniary penalties (effectively a form of civil law fine) are available where certain types of misrepresentations are made in connection with the supply of goods or services: s 29(1). Misrepresentations in relation to the sale or grant of an interest in land are also prohibited: s 30(1).

In Victoria, the *Australian Consumer Law and Fair Trading Act 2012* (Vic) provides that if a purchaser enters into a contract for the supply of goods following an innocent representation, the purchaser has the same right to rescind the contract as if the misrepresentation had been fraudulent. The right to rescind may be exercised by giving notice to the supplier within a reasonable period after acceptance of the goods: s 24(1). The purchaser must return the goods to the supplier or allow the supplier to take possession of them: s 25(2).

A more detailed account of the false or misleading representation provisions of the *Australian Consumer Law* will be found in Chapter 13.

Negligent misrepresentation

[7.420] So far we have been considering the remedies available where a person has been induced to enter into a contract with another as a result of an innocent or fraudulent misrepresentation made by the latter. However, a person may enter into a contract as a result of negligent advice or information. Misrepresentations are negligent if:

1. the representor owed the representee a duty of care – often this will happen where professional advice is being given;
2. there was a breach of that duty – the representor was negligent in failing to do what a reasonable person would have done; and
3. the representee suffered loss as a result of the negligent misrepresentation.

We will examine this area of law in depth in Chapters 15 and 16.

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Duress, undue influence and unconscionable conduct

[7.430] Duress, undue influence and unconscionable conduct all vitiate consent and render contracts voidable. In all three categories of the case, there is an element of coercion or pressure applied to the affected party. This pressure may be threats of harm to the person, their property or their economic interests (duress); improper use of authority that one party has over another (undue influence); or exploitation of a weaker party's vulnerabilities or disadvantages (unconscionable conduct). In each case, the affected party's consent to the transaction or agreement is compromised. The party exerting duress, using undue influence, or engaging in unconscionable conduct is usually in a position of dominance or advantage over the other party.

Duress is often asserted in conjunction with undue influence and unconscionable conduct as there can be some overlap, depending on the conduct alleged. Nonetheless, there are important conceptual differences. Broadly speaking, duress is assessed by reference to the *effect of the pressure* applied by the offending party; undue influence is more focused on the *quality of the consent* of the "weaker" party.

One reason why there is no clear distinction is that undue influence can arise from widely different sources, one of which is excessive pressure. Importantly, however, since pressure is only one of the many sources for the influence that one person can have over another, it is not necessary that the pressure which contributes to a conclusion of undue influence be characterised as illegitimate or improper.

Unconscionable conduct, on the other hand, is focused on *the nature of the conduct* of the "dominant" party. The principles concerning relief against unconscionable conduct are closely related to those concerned with undue influence. The same circumstances can result in the conclusion that the person seeking relief: (a) has been subject to undue influence; and (b) is in a position of special disadvantage for the purposes of the doctrine concerned with unconscionable conduct.

Although undue influence and unconscionable conduct will overlap, they have distinct spheres of operation. One difference is that although one way in which the element of special disadvantage for a finding of unconscionable conduct can be established is by a finding of undue influence, there are many other circumstances that can amount to a special disadvantage which would not establish undue influence. A further difference between the doctrines is that although undue influence cases will often arise from the assertion of pressure by the other party, which might amount to victimisation or exploitation, this is not always required. In *Commercial Bank v Amadio* (see [7.560]), Mason J emphasised the difference between unconscionable conduct and undue influence as follows:

> In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.

The following case highlights the blurring of the boundaries between the three causes of action.

Thorne v Kennedy

[7.435] *Thorne v Kennedy* [2017] HCA 49. Kennedy and Thorne met online in 2006. Thorne, an Eastern European woman then aged 36, was living overseas. She had no substantial assets. Kennedy, an Australian, aged 67 and a divorcee with three adult children, had assets worth over $18 million. Shortly after they met online, Kennedy told Thorpe that, if they married, "you will

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have to sign paper. My money is for my children". Shortly after they met, Thorne moved to Australia to live with Kennedy with the intention of getting married. Days before their wedding, Kennedy told her that they were going to see solicitors about signing an agreement. He told her that if she did not sign it then the wedding would not go ahead. An independent solicitor advised "I hold significant concerns … I urge you to reconsider your position as this Agreement is drawn to protect Kennedy's interests solely and in no way considers your interests." However, she relied on Kennedy for all things and believed that she had no choice but to enter the agreement and just four days before their wedding, both signed the agreement and another similar one two months later. The couple separated in 2011 and, in 2012, Thorne sought to rescind both agreements and get an adjusted property order and a lump sum spousal maintenance order. One of the issues before the primary judge was whether the agreements were voidable for duress, undue influence, or unconscionable conduct.

The primary judge set aside both agreements for "duress". Kennedy successfully appealed to the Full Court of the Family Court that held the agreements should not be set aside because of duress, undue influence or unconscionable conduct. The High Court unanimously allowed the appeal. It held that the agreement should be set aside for unconscionable conduct. A majority of the Court also held that the agreements should also be set aside for undue influence considering that this was a better characterisation of Kennedy's conduct than duress (relied on by the trial judge).

Duress

Duress to persons or property

[7.437] Duress to persons or property is actual or threatened violence to a person or their immediate family or near relatives ("I will shoot you if you don't sign up today") or their property ("I will firebomb your tobacco shop unless you sign up today") in order to pressure or coerce such person into entering into a contract. A person who has been coerced into entering into a contract under duress has been deprived of their free will to act and thus there is no true consent to the agreement. The important point is that duress does not require that the person's will be overborne. Nor does it require that the pressure be such as to deprive the person of *any* free agency or ability to decide. The person is usually able to assess alternatives and to make a choice. In this sense, they would much prefer to sign the contract than be shot or have their tobacco shop reduced to ashes.

A contract made under duress is voidable at the option of the party coerced, that is, they can elect not to be bound by the contract. Duress need not be the sole reason for the party subjected to the duress to enter into the contract; it is sufficient if it was one of the reasons for doing so.

Barton v Armstrong

[7.440] *Barton v Armstrong* [1976] AC 104. The plaintiff claimed that he had executed a deed for the purchase of the defendant's shares in a company because of the defendant's threats against his life. At trial, it was held that the plaintiff had also been motivated to execute the deed for business reasons. The Privy Council held that:

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> [T]hough 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.

Economic duress

[7.450] The common law doctrine of duress has gone beyond threats of physical harm and property damage and now includes not only unlawful threats, but also may include lawful threats or conduct which are considered to be "illegitimate". This is called "economic duress".[5] It refers to a situation where one party is induced to enter into a contract (or amend an existing one) because of threats to that party's economic interests.

The test for economic duress involves several key features explained by the court in *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40. The first element is *pressure which amounts to a compulsion of the will* of the victim. The pressure must be more than just a part of the normal rough and tumble of commercial negotiations – the effect needs to compel a person such that they feel there is *no reasonable alternative* but to enter into the contract. The focus should be on the quality of the person's consent under the pressure.

The second part is the application of pressure which is *illegitimate*. However, the question – what is *illegitimate*? – has not been settled by the High Court. For many years, McHugh JA's statement in *Crescendo* was regarded as the current state of the law: pressure will be illegitimate "if it consists of unlawful threats or amounts to unconscionable conduct" but the categories are not limited by this definition. This suggested the pressure can be *unlawful* (eg breaching a contract) or *lawful* (eg unconscionable conduct).

However, in the following case, the same court in New South Wales in 2005 decided that "unconscionable conduct" should be removed from the notion of duress noting the vagueness inherent in the terms "economic duress" and "illegitimate pressure".

Australia & New Zealand Banking Group Ltd v Karam

[7.455] *Australia & New Zealand Banking Group Ltd v Karam* (2005) 64 NSWLR 149. Karam Bros Footwear Pty Ltd (the Company) was a family owned and operated business. It borrowed money from ANZ Banking Group Ltd (the Bank). The Bank obtained security over the assets of the Company and the personal assets of the directors of the Company. The directors were initially unaware that they were personally liable for the Company's debts. They became aware of the full extent of their exposure when they requested further financial accommodation at a time when the Company was in a perilous financial condition. Unknown to the directors, the Bank had doubts about the enforceability of the original securities. To shore up its security position, the Bank made the provision of further accommodation dependent on the directors executing additional documents including acknowledgments that they were personally liable for the company's debts and a cross deed of covenant. Further, at the request of the Bank, the directors sold various properties to reduce the Company's indebtedness. The directors sought

5 Or, in England, its title – "lawful act duress" – gives a better insight into the nature of the beast.

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relief in relation to the securities on the basis that they were unjust and unconscionable under the general law and should be varied or set aside. The trial judge held the original security transactions were unconscionable and that the subsequent transactions should be set aside on the grounds of economic duress and unconscionability.

The Court of Appeal upheld the appeal. It made several points:

1. A claim to relief based on "illegitimate pressure" with respect to conduct, which is not in itself unlawful, should be determined under the equitable doctrines of undue influence, unconscionability and relevant statutory remedies and *not under economic duress*.
2. The fact that one party is in financial difficulties, of which the other party is aware, will be relevant but not sufficient to establish unconscionable conduct on the part of the stronger party. Something more is required and may be sought in the terms of the particular transaction.
3. Even unusual terms, however, will not necessarily demonstrate taking unconscionable advantage of the situation of the weaker party. The greater the financial risk, the greater the justification for increased security.
4. The Karams understood the nature and effect of the action they were taking and took it because they understood it was necessary to obtain further credit, essential to the continued operation of the Company.
5. The financial circumstances of the Company were not as a result of the Bank's actions so there was no basis for saying that the Bank, in a legal sense, subjected the Karams to pressure undue or otherwise. Rather, it was the Karams who asked the Bank for additional credit, without which the Company would have to cease trading. The Bank was under no obligation to extend the credit facilities, nor to do so without securing its own position.

Unfortunately, the High Court does not appear anxious to settle this controversial area. It denied leave to appeal the decision from the New South Wales Court of Appeal and did not take the opportunity to examine the boundaries of "economic duress" and, in particular, so-called "lawful act duress" when it heard the appeal on the "best endeavours" issue (see [3.700]) in *Electricity Generation Corporation t/as Verve Energy Ltd v Woodside Energy Ltd* [2014 HCA 7. Until the High Court decides the matter, there is likely to continue to be uncertainty about the scope of economic duress.

In the meantime, economic duress is unlikely to rescue many of those who might claim there was "no reasonable alternative" but to sign the contract. There are two clear indicators of this position: first, Australian law does not recognise a doctrine of inequality of bargaining power nor is a general doctrine of good faith on the horizon. As a result, as things are, it is very likely that a party will be able to use its superior position to extract from the other party favourable terms that it would not have been able to get if it were not in a powerful bargaining position. Second, the proper use of legal process does not constitute economic duress. So, for example, when the relationship between the parties is that of debtor and creditor, a threat by the creditor to institute legal proceedings or to pursue another legal remedy to recover the debt would not be illegitimate.[6] *And the following case underscores the sense that courts will be cautious in expanding the doctrine.*

6 *McKay v National Australia Bank Ltd* [1998] 4 VR 677.

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Beerens v BlueScope Distribution Pty Ltd

[7.460] *Beerens v BlueScope Distribution Pty Ltd* (2012) 39 VR 1. BlueScope supplied steel to a customer on informal credit terms for many years. BlueScope subsequently required the customer to enter into a formal credit arrangement. A creditor brought a winding-up application against the customer. BlueScope then insisted that the customer's director provide a guarantee in his own name if credit was to continue. If no guarantee was given, BlueScope would not join in the winding-up application. The customer gave the personal guarantee and then sought to have the arrangement rescinded for economic duress.

The Court held that the guarantee was *not* voidable for economic duress. The Court held that to pressure a creditor by indicating, in good faith, a preparedness to join in a winding-up application was not improper pressure that would constitute economic duress.

With these limits in mind, Lord Hodge's comments in *Pakistan International Airline Corporation v Times Travel (UK) Ltd* probably reflects the position here in Australia:

> Against this commercial background the pressure applied by a negotiating party will very rarely come up to the standard of illegitimate pressure or unconscionable conduct. It will therefore be a rare circumstance that a court will find lawful act duress in the context of commercial negotiation.

The effect of duress

[7.465] Under the doctrine of duress, an agreement (or termination of an agreement) is voidable if illegitimate pressure compelled a person to enter into (or terminate) the agreement. Under this doctrine: (a) the person asserting duress has the onus of proving that illegitimate pressure was brought to bear on them; and (b) if that onus is met, the party imposing the pressure has the burden of proving that the pressure did not cause the person to enter into (or terminate) the agreement. These principles were confirmed by the New South Wales Court of Appeal in the following case where the focus was on what constitutes affirmation of a contract affected by duress.

Elite Realty Development Pty Ltd v Sadek

[7.467] *Elite Realty Development Pty Ltd v Sadek* [2023] NSWCA 165. A disagreement erupted between two parties in a joint venture. As a result, Mr Afyouni changed the access settings on Elite's bank account so that money could only be withdrawn if both he and his partner Mr Sadek were signatories. Soon after, a labourer employed by Sadek threatened Afyouni with a gun and demanded that he unblock the Elite bank account. He said that if he were not paid, he would return the next day. Following the gun attack Afyouni unblocked the Elite bank account and a few days later the parties orally agreed to terminate the joint venture agreement, on certain agreed terms. Shortly after, Afyouni withdrew $200,000 from Elite's bank account as the first instalment of the $700,000 termination payment. A month later, Afyouni received payment of the remainder of the termination payment and signed documents transferring his share of the joint venture company and resigning his directorship. A few months later Afyouni claimed, for the first time, that he had entered into the termination agreement under duress. The Court ruled that he had "affirmed" the termination by: (a) accepting a payment under the

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termination agreement; and (b) signing certain documents without complaint. Thereafter the contract could not be rescinded.

The following case also deals with the issue of affirmation, but in the context of economic duress.

North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd

[7.470] *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] 1 QB 705. A shipbuilding company threatened to terminate a contract for the building of a tanker unless the shipowner paid increased payments following a currency devaluation (payments which were not required under the contract). The shipowner agreed because it required the vessel for a lucrative charter it was negotiating. Sometime after delivery of the vessel, the shipowners sought to recover the increased payments they had been compelled to make.

The Court held that the shipbuilder's threat to break the contract without any legal justification unless the owners agreed to the increased payments amounted to economic duress. The contract for the increased payments was therefore voidable and the moneys prima facie recoverable. However, because of the eight-month delay in bringing the case to court "the action and inaction of the owners can only be regarded as an affirmation of the variation".

Alternative actions under the Australian Consumer Law

[7.480] It is more likely that allegations of duress, particularly economic duress, will be dealt with under s 21 (which prohibits unconscionable conduct in relation to goods and services) or s 50 of the *Australian Consumer Law* (which prohibits the use of physical force, or undue harassment or coercion in connection with the supply of or payment for goods, services or land). The Australian Competition and Consumer Commission (ACCC) has indicated a preference for using s 21 when businesses allege unfair pressure/duress by large corporations in relation to the buying and selling of goods and services. *Australian Competition and Consumer Commission v Coles* at [7.490] and *Australian Competition and Consumer Commission v Woolworths* at [7.500] both involve allegations by the ACCC of unconscionable conduct by the two largest supermarkets in the country. The decisions differ because, *on the particular facts of each case*, the Federal Court decided that Coles had crossed the line of what was regarded as societal norms, but Woolworths had not.

Australian Competition and Consumer Commission v Coles

[7.490] *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405. The proceedings related to Coles' Active Retail Collaboration (ARC) program which was designed to improve Coles' earnings. The ACCC alleged that Coles pursued some suppliers for a variety of payments, including payments for "profit gaps", waste and fines, or penalties for alleged short or late deliveries by suppliers. The ACCC alleged that Coles engaged in unconscionable conduct by making threats when certain suppliers declined to participate in the ARC program. The threats included threats that Coles would: cease giving support to the supplier from Coles' replenishers; not acquire new products from the supplier;

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not meet with the supplier about its business; and not continue contractual negotiations then on foot with the supplier in circumstances where Coles had a greater bargaining position. Also, suppliers were not being provided with adequate information and were being pressured to consider or assess the value, if any, of the purported benefits of the ARC program to their business within a short period of time.

By consent (ie Coles did not contest the allegations), the Federal Court ordered Coles to pay penalties of $10 million plus costs. Coles also entered a court-enforceable undertaking to the ACCC (pursuant to s 87B of the *Competition and Consumer Act 2010* (Cth)) to establish a formal process to provide options for the redress of over 200 suppliers referred to in the proceedings. In her judgment, Gordon J said:

> Coles' misconduct was serious, deliberate and repeated. Coles misused its bargaining power. Its conduct was "not done in good conscience". It was contrary to conscience. Coles treated its suppliers in a manner not consistent with acceptable business and social standards which apply to commercial dealings. Coles demanded payments from suppliers to which it was not entitled by threatening harm to the suppliers that did not comply with the demand. Coles withheld money from suppliers it had no right to withhold. Coles' practices, demands and threats were deliberate, orchestrated and relentless.

Australian Competition and Consumer Commission v Woolworths

[7.500] *Australian Competition and Consumer Commission v Woolworths* [2016] FCA 1472. Employing a similar strategy to Coles, Woolworths' "Mind The Gap" scheme sought retrospective payments from a large number of suppliers to make up the shortfall in Woolworths' expected and actual profit for the December 2014 half year. As a result of the scheme, Woolworths obtained $18.1 million in payments. The ACCC initiated proceedings against Woolworths arguing its conduct was unconscionable because: the conduct was not of a standard of accepted behaviour of businesses generally operating in any industry; the conduct was an abuse of Woolworths' substantially stronger bargaining position relative to its suppliers; and engaging in those types of negotiations was not a right that was included in the contract.

The Court concluded that the conduct was not unconscionable because it was within the ordinary course of business in the supermarket industry and met the "norms of society" (or at least the norms of "supermarket society"). The Court found: (a) from the perspective of any individual supplier, the "Mind The Gap" scheme was no different to any ordinary negotiation that the supplier might have had with Woolworths; (b) Woolworths was not in a substantially stronger bargaining position than all its relevant suppliers, particularly its large multinational suppliers whose products customers expect to be available in supermarkets (although, it noted, being in a superior bargaining position alone does not constitute unconscionable conduct); and (c) Woolworths was not acting outside of its contractual rights to enter into those negotiations, so there was nothing illegitimate about its actions.

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Undue influence

[7.510] Undue influence is the improper use of the ascendancy acquired by one person over another for the benefit of the ascendant person themselves or someone else, so that the acts of the person influenced are not their free voluntary acts. Undue influence usually arises in transfers of property for no or inadequate consideration. The granting of relief on account of undue influence is founded on the principle of correcting abuses of confidence and is applied where two persons are so situated that one may obtain considerable influence over the other.

Where the following special relationships exist, undue influence is presumed and the onus of proof rests with the party in the dominant position (usually the defendant) to show there was not in fact any undue influence:

1. parent and child, until the child has withdrawn from the influence of the parent;
2. guardian and ward;
3. trustee and beneficiary;
4. solicitor and client;
5. religious adviser and devotee; or
6. doctor and patient.

However, the list of relationships that may give rise to a presumption of undue influence is not closed. Thus, it is open to a person to establish that a special relationship of trust and confidence has arisen such as to give rise to a presumption of undue influence against the person in the dominant position.

Where a special relationship of confidence exists between the parties to a contract such as to raise a presumption of undue influence, the onus is on the person in whom the confidence is reposed to establish that the transaction in question was the "pure voluntary and well-understood" act of the person reposing the confidence, that is, that the latter's mind or intention was not subject to any undue influence.

Lloyd's Bank Ltd v Bundy

[7.520] *Lloyd's Bank Ltd v Bundy* [1975] QB 326. Bundy, an elderly farmer, and his only son had been customers of the bank for many years. The son formed a company that banked at the same branch of the bank as his father. Bundy guaranteed the company's overdraft and charged the whole of his farm, his sole remaining asset, to secure the amount under the guarantee.

The Court decided the bank had breached its fiduciary duty to Bundy and set aside the guarantee and charge for undue influence. Bundy had not been advised to seek independent advice despite the fact that the effect of the guarantee and charge could have resulted in him being left penniless in old age.

In the absence of establishing a special relationship giving rise to a presumption of undue influence, the onus of proving undue influence will rest on the person alleging it (ie the plaintiff).

A marriage relationship (or being an engaged couple: see *Thorne v Kennedy* [2017] HCA 49) does *not* give rise to a presumption of undue influence. However, as the following case illustrates, in an appropriate case a special relationship of control and dominance may be established giving rise to such presumption.

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Johnson v Buttress

[7.530] *Johnson v Buttress* (1936) 56 CLR 113. Three years before he died, John Buttress gifted his land and cottage to Mary Johnson, whom he had known for 20 years, and who had been very good to his wife and who had helped him in various ways. After his death, the administrator of his estate challenged the gift on the basis that the relationship was one of trust and confidence so as to give rise to the presumption of undue influence.

In the view of the administrator, Buttress was illiterate, ignorant of commercial matters and did not understand the irrevocable nature of what he had done. The finding of the trial judge was more colourful – the deceased was "highly excitable, very stupid and mentally unstable".

The High Court agreed with the administrator. Having established that a relationship of trust existed, the onus then shifted to Johnson to prove that she had not exercised undue influence on Buttress. This, according to the High Court, she had not done. In the words of Latham CJ:

> The learned judge found that a relation of trust and confidence obtained between the deceased and the defendant of such a character that he relied upon her for advice on any matter of business … This being so, I agree with the learned judge that, in order to maintain the transaction, it was necessary for the defendant to show affirmatively that the deceased knew what he was doing when he made the transfer, in the sense that he understood its effect and significance in relation to himself, and further to show that the transfer was the result of his own will … (T)hough it has not been affirmatively proved against the defendant that she exercised undue influence, yet she has not displaced the presumption of undue influence which arises in the circumstances of this case …

Effect of undue influence

[7.540] Undue influence renders a contract voidable at the option of the "weaker" party.

If an unreasonable length of time is allowed to elapse after the entire cessation of the influence, the right of a person to have a transaction set aside on the ground of undue influence may be lost. What is "reasonable" is a question of fact that depends on the circumstances of the case.

Unconscionable conduct

General principles

[7.550] Unconscionable conduct requires the innocent party to be subject to a special disadvantage which seriously affects the ability of the innocent party to make a judgment as to [the innocent party's] own best interests. The other party must also unconscientiously take advantage of that special disadvantage. This has been variously described as requiring "victimisation", "unconscientious conduct" or "exploitation". Before there can be a finding of unconscientious taking of advantage, it is also generally necessary that the other party knew or ought to have known of the existence and effect of the special disadvantage. The general rule is that the court will not grant relief to a party merely because the contract they have entered into contains harsh terms. However, as the decision in *Commercial Bank of Australia Ltd v Amadio* below indicates, the courts are prepared to act where one of the parties is suffering from a disadvantage and the consent of that party is affected by the unconscionable conduct of the other party.

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In *Commercial Bank of Australia Ltd v Amadio*, the High Court clarified the principles to be applied in determining whether a contract should be set aside on the ground that it was unconscionable.

Commercial Bank of Australia Ltd v Amadio

[7.560] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. The plaintiffs, Mr and Mrs Amadio, were an elderly Italian couple of little formal education and limited knowledge of the English language. They signed a mortgage to the defendant bank over a block of shops as security for payment of its debts by one of their son's building companies. The mortgage included a guarantee under which the plaintiffs became liable for the total present and future indebtedness of the company. At the time of signing the mortgage/guarantee, the plaintiffs believed the company to be profitable. However, it was in serious financial difficulty and was being kept afloat by the very same Commercial Bank (that had inadequate security to cover the son's indebtedness). Earlier on the day of their signing the mortgage/guarantee, the plaintiffs' son had led them to believe that their liability was limited to $50,000 and was to run for no longer than six months. Later the same day, the manager of the son's bank (who was aware of the son's financial difficulties) called on the plaintiffs at their home with the mortgage/guarantee contract. There was little discussion. The plaintiffs did not try to read the document, nor did the manager purport to explain its meaning or effect, except to correct Mr Amadio's apparent misunderstanding that the mortgage/guarantee was only for six months. Having obtained the plaintiffs' signatures, the manager left without leaving them a copy of the agreement. The son's company ultimately went into liquidation and the bank claimed nearly $240,000 from the plaintiffs under the terms of the mortgage/guarantee. The plaintiffs sought to have the contract with the bank set aside.

A majority of the High Court decided that the mortgage/guarantee should be set aside on the ground of unconscionable dealing. The plaintiffs were in a position of *special disadvantage* in that they were mistaken as to the extent of their liability under the agreement and as to the financial circumstances of their son's company. In consequence, the plaintiffs were ill-informed as to the seriousness of their position in signing the mortgage/guarantee which spelt financial ruin for them but ameliorated the position of the bank. Their age, background and reliance on their son's misleading advice contributed to their position of special disadvantage. Although the bank may not have had full and actual knowledge of the plaintiffs' disability, the bank's failure to make further inquiry as to whether the transaction had been properly explained to them amounted to wilful ignorance. The Court said that to rescind a contract for unconscionable conduct the following criteria must be met:

> [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.

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In essence, therefore, the weaker party must prove:

- that they were under a *special disadvantage* in relation to the transaction so that they could not decide what was in their best interests;
- the *other party knew*, or should have known, of the disadvantage; and
- nevertheless, the other party *took advantage* of their superior position.

[7.570] The High Court in *Amadio's case* recognised that it was impossible to definitively describe all circumstances which would give rise to a situation of *special disadvantage* which, if unfairly taken advantage of, may lead to relief being granted by the court on the ground of unconscionable dealing. It would certainly include circumstances such as age, illiteracy, illness, economic circumstances and commercial inexperience. However, it may (or may not) be surprising to note that, in *Louth v Diprose* at [7.580], the High Court expanded the circumstances in which a person could be regarded as being at a "special disadvantage" to include the (unrequited) love of a smitten lawyer for a woman (whom the Court regarded as a *femme fatale*).

Louth v Diprose

[7.580] *Louth v Diprose* (1992) 175 CLR 621. Louis Diprose was "utterly infatuated" with Carol Louth. She, on the other hand, was indifferent to him and never changed. In 1984, she was in financial difficulties and was living in a house owned by her sister's husband. She told Diprose she was going to be asked to leave the house and that if this happened she would commit suicide. This was untrue. She was under no immediate pressure to vacate the house. In this atmosphere of crisis in May 1985, Diprose agreed to buy the house for Louth for $58,000 and, at her insistence, put it in her name. For the next three years, Diprose's infatuation continued but was not reciprocated. For various reasons, Diprose moved into the home he had bought for her, but their relationship deteriorated. Diprose told Louth he wanted the house transferred to him. She refused, and Diprose sued to recover the gift. Deane J said:

> [T]he 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 … the appellant deliberately used that love or infatuation and her own deceit to create a situation in which she could unconscientiously manipulate the respondent to part with a large proportion of his property. The intervention of equity is not merely to relieve the plaintiff from the consequences of his own foolishness. It is to prevent his victimisation …

In the following case, the Victorian Supreme Court distinguished *Louth v Diprose*.

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Mackintosh v Johnson

[7.590] *Mackintosh v Johnson* (2013) 37 VR 301. A 73-year-old man and a 45-year-old woman were in a relationship. He bought a house in her name and paid large amounts to support her business. After the relationship broke down, he sought a transfer of title to the house and repayment of the money. The Court held that the facts did not establish unconscionable conduct. The man's infatuation and lavish spending did not constitute a special disadvantage making him unable to make decisions in his own best interests. The Court distinguished *Louth*. In *Louth*, the woman had created a false atmosphere of crisis and the man had given away most of his assets even though he had three dependent children. In *Mackintosh*, the woman had not created a false impression of crisis and there was less emotional dependence on the part of the other party who was wealthy and could easily afford to make these gifts.

In *Kakavas v Crown Melbourne Ltd*, the High Court refused to intervene to rescue a "high roller" gambler, stating that, in commercial transactions, unconscionable conduct required more than indifference to the welfare of the other party.

Kakavas v Crown Melbourne Ltd

[7.600] *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392. Kakavas lost over $20 million while gambling at a Victorian casino over a 14-month period. He had a compulsion to gamble, though he was able to control that compulsion. The High Court rejected his unconscionability claim against the casino. Gambling is a rare commercial activity in which each party inherently seeks to cause financial damage to the other party. Equity did not characterise as victimisation the ordinary operation of a lawful commercial activity. If a casino encouraged a pensioner to cash their pension cheque for gambling purposes, that would constitute victimisation. If a gambler was drunk or under an incapacity, that could also constitute victimisation.

By contrast, Kakavas was a wealthy "high roller". He did not suffer a constant compulsion that would have prevented him from staying away from the casino. He was able to stay away from the casino when he so wished. He had gone to great lengths to persuade the casino that his previous gambling problems were now past. Equitable intervention required "proof of a predatory state of mind". Indifference to the welfare of the other party in respect of an arm's length commercial transaction was not enough.

Guarantees by married women for their husbands' debts

[7.610] A special principle of equity was applied to a guarantee given by a married woman to secure her husband's business debts. If a married woman's consent to become a guarantor for her husband's debt was procured by her husband without her understanding its essential effect and the creditor accepted the guarantee without taking steps to inform the wife of her obligations, the guarantee could be set aside. In *Garcia v National Australia Bank Ltd*, the High Court affirmed this principle of equity.

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Garcia v National Australia Bank Ltd

[7.620] *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395. In November 1987, the appellant wife had signed a guarantee in favour of the respondent bank guaranteeing repayment to the bank of loans made to her husband's gold trading company. The guarantee was secured by an "all moneys" mortgage over the family home. The husband and wife had given the mortgage to the bank some eight years prior to the wife signing the guarantee in dispute. In June 1990, the appellant wife commenced proceedings to have the guarantee and mortgage set aside. The respondent bank claimed $327,189.69 under the guarantee and sought possession of the mortgaged home. In the meantime, the husband's company had been wound up and the couple divorced.

The High Court held that the guarantee and mortgage should be set aside. The Court said that the rationale of this principle was "not to be found in notions based on the subservience or inferior economic position of women" nor on their "vulnerability to exploitation because of their emotional involvement" but rather on the "*trust and confidence*" between marriage partners. In a marriage relationship, one partner, often the wife, may well leave business judgments to the other partner. Accordingly, business decisions "may be made with little consultation" between the partners and the "explanation of a particular transaction" given by one spouse to the other may be "imperfect, incomplete or simply wrong". The majority considered that it would be unconscionable to allow a bank to enforce a guarantee in the following combination of circumstances:

1. the wife did not understand the effect of the transaction;
2. the wife gained no financial benefit from the contract, the performance of which she agreed to guarantee;
3. the lender understood that, as a wife, she may repose trust and confidence in her husband in matters of business and that he may not fully and accurately explain the effect of the transaction to her; and
4. the lender did not itself take steps to explain the transaction to the wife or find out that a stranger had explained it to her.

Agripay Pty Ltd v Byrne

[7.630] *Agripay Pty Ltd v Byrne* [2011] 2 Qd R 501. A wife guaranteed her husband's debts relating to his investment in a tax minimisation scheme. The husband and wife held a joint superannuation fund. The Queensland Court of Appeal held that the guarantee should be set aside. The Court held that the wife was a volunteer. A guarantor will not be a volunteer where they will receive a benefit that is direct or immediate. In this case, any possible benefit for the joint superannuation fund was indirect and remote in time. The tax minimisation benefits of the scheme were for the husband's benefit.

The wife understood the concept of a guarantee. However, she did not understand her actual potential liability under this particular guarantee. She was mistaken about the amount of the debt and the term of the loan. She was not aware of the large management fees payable.

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She thus did not understand critical details of the transaction guaranteed. She did not receive independent advice before signing the guarantee and she was unaware of all the important details relating to the transaction. The lender could have ensured that the guarantee was valid by ensuring that she was properly informed.

Under the Australian Consumer Law

[7.640] The *Australian Consumer Law*, set out in schedule 2 to the *Competition and Consumer Act 2010* (Cth) (and addressed in detail in Chapter 13) contains important provisions prohibiting persons from engaging in "unconscionable conduct" (ss 20–22). These provisions are discussed in Chapter 13.

Under the National Credit Code

[7.650] The *National Credit Code* (set out in Sch 1 of the *National Consumer Credit Protection Act 2009* (Cth)) provides for the reopening of a credit transaction where the court is satisfied that in the circumstances relating to the credit contract, mortgage or guarantee at the time it was entered into, it was unjust: *National Credit Code*, s 76(1). "Unjust" includes "unconscionable, harsh or oppressive": *National Credit Code*, s 7(8). The provisions apply to all personal (ie non-business) credit.

Further reading

See contract texts listed at the end of Chapter 2.

Tutorial activities

1. In what ways can the (apparent) consent of a party be vitiated?
2. Where consent is affected by one of the vitiating factors, the remedy of rescission may be available. What is rescission and in what circumstances is it possible to rescind a contract?
3. "Mistakes generally don't matter in the law of contract." Explain why this is so, referring to the examples at [7.20].
4. The Court decided that the mistake made by Mrs Johnson in *Taylor v Johnson* [7.120] was a fundamental mistake of fact and the contract was rescinded. However, the mistake in *Leaf v International Galleries* [7.70] was not so regarded and the contract could not be rescinded. Can you explain the difference between the two cases?
5. Why did the mistake as to the identity of the rogue contracting party in *Cundy* [7.140] render the contract void, whereas in *Phillips* [7.160] and *Lewis* [7.170] the mistakes did not affect the contract? What difference did it make to the innocent third party who purchased the goods from the rogue?
6. Explain the criteria that must be met before a person can rescind a contract because they made a mistake about the document that they signed. Refer to *Petelin v Cullin* [7.190] to illustrate your answer.

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7. What is the definition of a misrepresentation? How is a representation different from a term? How is an innocent misrepresentation different from a negligent or fraudulent misrepresentation?
8. What remedies are available to a plaintiff who has entered into a contract because of an innocent misrepresentation?
9. The common thread in duress, undue influence and unconscionable conduct actions is the imbalance in power and position between the plaintiff and the defendant. Explain using cases to illustrate.
10. When does "the rough and tumble of commercial bargaining" cross the line and become "economic duress"? In your answer, please refer to *Australian Competition and Consumer Commission v Coles* (2014) (see [7.490]) and *Australian Competition and Consumer Commission v Woolworths* (2016) (see [7.500]) and explain why the decisions differed, noting that these were decisions under the *Australian Consumer Law* and not under general law principles.
11. What are the elements that must exist before a contract may be rescinded for unconscionable conduct? Refer to *Commercial Bank of Australia Ltd v Amadio* (see [7.560]).
12. An employee's mistake resulted in its website listing laser printers for sale at $66 when the correct price was $3,854. Orders were placed for 1,606 printers at the incorrect price. Confirmation emails were automatically sent for each order. The retailer subsequently refused to sell the printers at the incorrect price. Advise the disappointed would-be purchasers as to the enforceability of their contracts and the application of the law of mistake.
13. Imogen sells her unit to Clare. It overlooks a beautiful park. In their conversations about the unit and the environment, Clare is obviously very attracted by the park and by the fact that she could walk her three dogs there. She does not ask whether any changes to the park are planned, so Imogen does not mention the fact that the Council has approved a 12-storey multi-unit dwelling that includes a car park and skateboarding rink that will reduce the size of the park by half and alter the ambience dramatically. Shortly after Clare moves in, so do the bulldozers. She is very upset and seeks your advice as to whether she can rescind the contract for misrepresentation.
14. Eddie purchases a Persian carpet from Khali the Rug Dealer in High St, Prahran. On the back of the rug is an authentication certificate that says the rug is from Baluchistan in Iran, a region noted for its fine carpets. Khali assures Eddie that this is true, and Khali believes it to be so. On the basis of Khali's assurances, Eddie pays $25,000 for the carpet. Three years later when Eddie tries to sell the carpet, a prospective buyer brings Ali Khan, a rug valuer, to inspect it. Ali says it is not a Baluchistan carpet – "the knots are tight but the silk is not of the finest quality. This one is from a small village near Herat in Afghanistan – it's nice but worth only $4,000". Eddie packs it up and heads off to see Khali.

    Please advise Eddie on whether he has any rights under the law of mistake or misrepresentation.
15. Will and Vernon are parties to a Gas Sale Agreement (GSA) under which Will is required to supply Vernon with gas up to a maximum daily quantity. Due to an explosion at a gas production facility owned by Andy (the other main supplier of gas in the market), available

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supply dropped and the market price spiked. Will informed Vernon that it would no longer supply Vernon with the additional gas under the GSA but would supply an equivalent quantity of gas under short-term GSAs at a much higher price. This constitutes a breach of the GSA. Vernon agreed but later argued that the short-term GSAs were voidable under the doctrine of economic duress because the pressure it was put under by Will was illegitimate. Advise the parties of the likely outcome.

16. A clergyman formed a close friendship with one of his parishioners. When he learned she intended to sell her rural retreat in the Yarra Valley, he offered to buy it at a price that the parishioner believed to be a fair price. In fact, it was well below the market price. Advise the (disillusioned) parishioner as to whether she has any remedy for undue influence.

17. Mr and Mrs Sarnath migrated to Australia from Sri Lanka in 2018. They are dependent on their only son, Jayantha, for advice and support. They have limited education, no business acumen and poor language skills, and their only income is the aged pension. They own their own home, which is valued at around $400,000. Jayantha is a charming but feckless businessman, who is always (according to himself) on the verge of something great. In June 2024, he needs $150,000 to pursue a dotcom opportunity that he believes will make him rich. He is able to borrow money from the West Bank but only after he persuades his parents to act as guarantors. He misleads his parents as to the extent and purpose of the loan. The bank is unaware of this. After investigating their financial position, the bank manager meets with Mr and Mrs Sarnath and goes over the guarantee contract. He asks whether they have any questions, and when they do not, they sign the documents as required. Jayantha uses the money to invest in the Internet company. The company is worthless, and Jayantha loses his entire investment. When he is unable to repay the loan, West Bank looks to the parents to honour their obligations as guarantors. Advise Mr and Mrs Sarnath as to whether they may seek relief under the law of unconscionable conduct.

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Chapter 8

Legality of Object

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Introduction

[8.10] The final vitiating factor, that we address here in its own chapter, is illegality. In some ways, it is the most challenging of all. This is because of the difficulty of determining whether a contract is impliedly prohibited by statute, the difficulty of determining the impact of an offence where the contract itself is not illegal and the interplay between statutory illegality and public policy. We can begin by identifying the three ways in which a contract may be void for illegality. First, the making of the contract itself may be expressly prohibited by statute (see *Re Mahmoud & Ispahani* at [8.40]). Second, the making of the contract may be impliedly prohibited if its formation or mode of performance involves conduct prohibited by statute (see *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* at [8.60]). Third, even if a contract is not prohibited by statute, it may nevertheless be void and unenforceable at common law if it offends public policy (see *Seidler v Schallhofer* at [8.230]).

Contracts prohibited by statute

[8.20] Statutory illegality is the most common form of contractual illegality. The prohibition under a statute may be express or implied, and it may refer to contracts as formed or as performed. It encompasses contracts which are:

- expressly or impliedly prohibited by statute (eg contracts to buy and sell illicit tobacco or vaping products);
- entered into for an illegal purpose (eg to kill or injure another person or burn down a building);
- performed illegality (eg failure to have a heavy-duty truck license in the course of delivering goods);
- otherwise made void by statute (eg certain unfair terms in consumer contracts).

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Express or implied prohibition

[8.25] A statute may expressly prohibit a contract and set out the consequences of non-compliance. If it specifies that the contract is void or that particular contractual terms are void, there is normally no issue.[1] Conversely, where the statute expressly provides that a consequence of non-compliance is that the contract is voidable, that, too, is conclusive proof that the parliament did not intend that the contract itself would be void because of illegality. In *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2007] HCA 38, a case that involved numerous contracts (to supply a number of State purchasing authorities of sterile fluids used for dialysis treatment) that had a prohibited purpose of substantially lessening competition, the High Court said:

> … when 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 on 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, it is a matter of statutory construction.

[8.30] The following case demonstrates the potentially devastating effect of a decision to declare a contract void (and therefore the reluctance of a court to declare the contract itself void).

Re Mahmoud & Ispahani

[8.40] *Re Mahmoud & Ispahani* [1921] 2 KB 716. A statutory regulation provided that a person was not to buy or sell or otherwise deal in linseed oil without a licence issued by a government official. The defendant told the plaintiff that he had the necessary licence and contracted to purchase a quantity of linseed oil from the plaintiff. He did not in fact have a license. The defendant later refused to take delivery. The plaintiff sued him for damages for breach of contract and the defendant pleaded illegality as a defence.

The Court denied the plaintiff's claim. The regulation clearly prohibited the sale of linseed oil to an unlicensed purchaser and therefore expressly prohibited the contract in question. Accordingly, the contract was illegal and unenforceable:

> The contract 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.

The result of this decision is that the seller could not enforce the contract even though he was innocent of wrongdoing.[2]

[8.50] It is common for a statute to require or proscribe certain conduct and to provide a penalty for non-compliance. The issue is then to determine whether non-compliance was also intended to affect a

1 For example, s 23 of the *Australian Consumer Law* makes an unfair contractual term void. And s 45 of the *Competition and Consumer Act* prohibits cartel conduct.

2 It could have been worse: if the plaintiff had actually delivered the oil but the defendant refused to pay, the defendant would have been (unjustly?) enriched.

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contract involving such conduct: if so, then the contract may be regarded as being impliedly prohibited by the statute and therefore illegal and unenforceable. On the other hand, the statute may be construed as limiting the sanction for non-compliance to the penalty or fine specified in the statute but otherwise leaving the validity of a contract involving the conduct unimpaired.

The issue arose for consideration by the High Court in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410.

Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd

[8.60] *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410. The respondent company lent the first appellant $132,600, repayment of which was secured by a mortgage which incorporated a guarantee given by the other appellants. Default having been made in repayment of the loan, the respondent sued the appellants on the personal covenants in the mortgage. The appellants contended that the mortgage (including the guarantee) was illegal and void on the ground that the respondent had been carrying on the business of banking without authorisation under the *Banking Act 1959* (Cth).

The Act provided that a corporation was not to carry on a banking business unless it was authorised to do so and provided a penalty of $10,000 per day for contravention of this provision. It was agreed between the parties that the lender was carrying on the business of banking in contravention of the Act. The question to be determined was whether such offence rendered the contract between the parties illegal and unenforceable.

The High Court held that, having regard to the scope and object of the provision prohibiting the carrying on of any banking business without authority, and in particular to the heavy penalty provided for its contravention, the provision did not, upon its proper construction, either expressly or impliedly prohibit such a loan on mortgage. Accordingly, the respondent lender was entitled to enforce the mortgage.

[8.70] As we noted earlier, in determining the effect on a contract of conduct proscribed by statute, the courts have regard to the intention of the legislation. This is particularly so where it is apparent that the statute was aimed at protecting the public or furthering some public policy objective.

Buckland v Massey

[8.80] *Buckland v Massey* [1985] 1 Qd R 502. A Queensland statute provided that it was an offence to sell a second-hand motor vehicle without a certificate of roadworthiness. It was agreed between the seller of a second-hand vehicle and the buyer that the seller need not obtain the requisite certificate but that the buyer would do so. The seller sought to recover the balance of the purchase price.

The Court said that the whole of the statute was concerned to ensure that motor vehicles for use on the road are roadworthy. The clear implication of the Act was to prohibit contracts for the sale of second-hand vehicles where a roadworthiness certificate had not been obtained. Accordingly, it was held that the contract was impliedly prohibited by the Act and therefore unenforceable.

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Gaffney v Ryan

[8.90] *Gaffney v Ryan* [1995] 1 Qd R 19. A statute provided that it was an offence for a registered builder to perform general building construction when not registered as a general builder. A monetary penalty was prescribed for non-compliance. A registered builder performed work in breach of this provision.

The Court held that non-compliance with the statutory provision by the builder did not render void and unenforceable his contractual liability for the loss caused by his defective workmanship. The builder was liable for damages for his faulty workmanship. To have decided otherwise would not have been consistent with the statutory purpose of protecting those for whom building work is performed.

Gnych v Polish Club Ltd

[8.100] *Gnych v Polish Club Ltd* (2015) 255 CLR 414. The State liquor legislation provided that a licensee must not lease any part of licensed premises except with the approval of the liquor authority. Violation of this provision was punishable by a fine. A licensee leased part of its premises to a restaurant without obtaining the approval of the authority.

The High Court held that this provision of the liquor legislation was directed at the licensee's conduct in granting a lease, not the rights under the contract between the licensee and the restaurant. The "adverse consequences" for the innocent party (the restaurant) were a factor weighing against attributing to the legislature an intention to render the contract void. The offence under the liquor legislation occurred when the licensee granted the lease. Carrying out the lease was not prohibited. The punishment for the breach was a fine. While the authority had power to cancel a liquor licence, it could leave the existing situation unchanged. If the violation of the statute "automatically" voided the lease, that would "pre-empt" the authority's power of supervision of licensees.

[8.105] The following two cases, including a significant High Court decision, demonstrate that the courts are increasingly reluctant to find that a contract is unenforceable as a result of an express or implied statutory prohibition.

Fitzgerald v FJ Leonhardt Pty Ltd

[8.110] *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215. Fitzgerald hired Leonhardt to drill boreholes on his land. The *Water Act 1992* (NT) required landowners to have a permit when drilling for water. Fitzgerald did not have such a permit. A dispute arose and, upon completion, Fitzgerald refused to pay Leonhardt claiming that the contract was performed illegally and therefore was unenforceable. Leonhardt sued. The Court decided that the contract was enforceable. It did so on three grounds:

- the Act did not prohibit the drilling of the bore – it only penalised such conduct *if done without a permit*. The Court said that when a statute penalises but does not prohibit conduct, the court must consider whether prohibition was implied but generally the penalties are

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sufficient and the contract is enforceable. In this instance, the imposition of an additional sanction (the inability of the driller to recover moneys from the owner) would prejudice an innocent party without furthering the objects of the legislation;

- The drilling contract itself was not expressly or impliedly prohibited. It was possible for the contract to be performed without contravening the Act. Insofar as the contract was performed in contravention of the legislation, the contravention was the consequence of failure by the owner to observe requirements imposed upon him. There was no failure by the driller to observe requirements placed upon it by the Act; and
- The contract was not made to further an illegal purpose. The contract as framed did not call for the commission of any illegality. 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 in, if not causing, then at least suffering or permitting the construction and drilling of bores, without the grant to the owner of permits. The refusal of the courts in such a case to regard the contract as enforceable stems not from an 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.

In summary, the performance of the drilling contract resulted in the commission of an offence by the owner, but the manner of performance by the driller did not turn it into a contract which was prohibited by the Act. The Act contemplated drilling by a licensed driller. Section 56 was intended to penalise conduct – in this case, the conduct of the owner in failing to obtain a permit – and not to prohibit and make unenforceable the contract itself.

On the general point regarding the growing reluctance of a court to declare a contract unenforceable, Kirby J said

> This reluctance probably grows out of a recognition of the multitude of legislative provisions, important and unimportant, which may indirectly impinge upon the contractual relations of parties and, if enforced with full rigour, cause harsh and unwarranted deprivation of rights. In part, this reluctance may be no more than a species of the general rule of statutory construction that legislation will not be interpreted to deprive parties of basic rights at common law without a clear expression of the legislative will to do so.

Subsequent cases, including the following decision of the New South Wales Court of Appeal, confirm the views of the High Court in *Fitzgerald* about the enforcement of contracts that are affected by illegality in performance of the contract.

REW08 Projects Pty Ltd v PNC Lifestyle Investments Pty Ltd

[8.120] *REW08 Projects Pty Ltd v PNC Lifestyle Investments Pty Ltd* [2017] NSWCA 269. The NSW Court of Appeal dismissed an appeal from a property vendor from a decision to grant the purchaser's claim for specific performance of the contract for sale. The vendor argued that it was not required to complete the sale as the contract was void for illegality. The parties had entered into the contract in such a way as to delay the payment of stamp duty.

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The Court gave several reasons for dismissing the appeal including:

1. The Taxation Administration Act 1996 (NSW) provides for the payment and collection of stamp duty but does not provide that an agreement is unenforceable because its purpose was to avoid the payment of stamp duty;
2. The delay in payment of stamp duty was not essential to the bargain between the parties;
3. The purchaser should not be deprived of the benefit of the contract which it entered into, as such a penalty would be disproportionate to the alleged wrong; and
4. If the contract was not enforced, the vendor would benefit from an unjustified windfall as the property could be resold at the current market price, rather than the 2013 price in the contract.

Illegality at common law

[8.190] As a general rule, at common law, the courts refuse to enforce agreements that are "contrary to public policy". However, it must be said that the notion of "public policy" is inherently a mutable concept. As Dixon J stated in *Stevens v Keogh* (1946) 72 CLR 1, what is contrary to public policy is something that varies "according to the state and development of society and conditions of life in a community". And, therefore, in light of such mutability, we must be careful in applying previous decisions that decided certain contracts were illegal as being contrary to public policy.

For this reason, in applying notions of public policy to decide the enforceability of a contract, a court should only elect to refuse to enforce a contract on such a ground in the clearest of circumstances. As Mason J stated in *A v Hayden* (1984) 156 CLR 532:

> The refusal of the courts to enforce contracts on grounds of public policy is a striking illustration of *the subordination of private right to public interest*. The problem is one of formulating with any degree of precision the criteria or the circumstances which will justify a court in refusing to enforce a contract on the ground that there is a countervailing public interest amounting to public policy.

[8.195] Contracts illegal at common law fall into two basic categories:

1. contracts described as illegal because of their more reprehensible character; and
2. those simply described as void, rather than illegal, because of their less serious nature.

A contract which is illegal will also be void and unenforceable in the courts. The rationale for the distinction between contracts which are *illegal*, and those which are simply *void*, on grounds of public policy is said to be justified because of the more severe consequences which may ensue where the contract is illegal.

Contracts illegal at common law

[8.200] Contracts that are illegal at common law on grounds of public policy are as follows:

1. contracts to commit a crime, a tort or a fraud on a third party;
2. contracts promoting sexual immorality;
3. contracts prejudicial to the administration of justice;
4. contracts tending to promote corruption in public life;
5. contracts prejudicial to public safety; and
6. contracts to defraud the revenue.

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Contracts to commit a crime, a tort or a fraud on a third party

[8.210] A contract involving the commission of a crime, a tort or a fraud on a third party is illegal at common law and will not be enforced.

Contracts promoting sexual immorality

[8.220] In general, contracts that promote immoral conduct are considered void and unenforceable. In the past this included, for example, agreements for the letting of premises or the hire of vehicles for an immoral (ie sexual) purpose. As noted earlier, public policy must reflect current community standards and community standards of "immorality" have undergone a massive change from the 19th-century position as to what is and what is not sexually immoral. We need only look back at *Ashton v Pratt* [2015] NSWCA 12 (see [4.110]) to see how community standards have shifted.

Seidler v Schallhofer

[8.230] *Seidler v Schallhofer* [1982] 2 NSWLR 80. An agreement provided for the continuation of a de facto relationship for six months and for marriage or separation thereafter. In the event of separation, the plaintiff was to get a refund of her payments towards the purchase of a house in return for the transfer to the defendant of her half share as joint tenant in the property.

The Court decided that the agreement was not void as being contrary to public policy.

Contracts prejudicial to the administration of justice

[8.240] Agreements which are regarded as hindering the administration of justice are illegal at common law on grounds of public policy. This includes agreements to conceal offences, compromise prosecutions or prevent or impede the justice system.

Two categories of agreement require further consideration in this context:

1. agreements to stifle a prosecution; and
2. agreements for the maintenance of a suit and champerty.

[8.250] An example of the first category of agreement is the following:

Public Service Employees Credit Union Co-operative Ltd v Campion

[8.260] *Public Service Employees Credit Union Co-operative Ltd v Campion* (1984) 56 ACTR 39. The defendant guaranteed repayment of a loan advanced by the plaintiff credit union to his son on the understanding that the credit union would not report his son to police for misappropriation of moneys from the credit union. It was held that the guarantee was void for illegality as an agreement to stifle prosecution for an indictable public offence.

[8.265] To be contrasted with that case is the decision of the Supreme Court of Western Australia in *Scolio Pty Ltd v Cote* (1992) 6 WAR 475.

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Scolio Pty Ltd v Cote

[8.270] *Scolio Pty Ltd v Cote* (1992) 6 WAR 475. An auditor's report disclosed evidence of misappropriation of moneys by the respondent, a manager of the appellant company. The manager signed a deed to repay the moneys by instalments, being given to understand that if he did not do so, the auditor's report would be referred to the police. The Court held that it was not established that the manager had signed the deed under duress and there was no evidence of an implicit agreement to stifle a prosecution. Accordingly, judgment was entered against the respondent manager for the amount of the deed.

Contracts tending to promote corruption in public life

[8.280] A contract with a person to use their official position to obtain a benefit for another is illegal. For example, a contract to procure a title of honour for reward is illegal.

Parkinson v College of Ambulance Ltd

[8.290] *Parkinson v College of Ambulance Ltd* [1925] 2 KB 1. The secretary of a charity made an arrangement with the plaintiff that if he would make a donation to its funds it would take steps on his behalf and procure him at least a knighthood. He paid £3,000 and undertook to pay more when the knighthood was forthcoming. However, he did not receive a knighthood and sued for the return of the money.

The Court held that he was unable to recover because the contract was illegal as being contrary to public policy.

Wilkinson v Osborne

[8.300] *Wilkinson v Osborne* (1915) 21 CLR 89. A, the agent for the owners of land, who was negotiating on their behalf for its sale to the Crown, entered into an agreement with B and C, who were members of the State Parliament and carried on business in partnership as land agents. Under the agreement, B and C, for monetary consideration, undertook to put pressure upon the government, of which they were supporters, to agree to purchase the land. The completion of the purchase and the earning of the reward were contingent upon the approval of the House of which they were members, so that the completion was or might be dependent upon their votes.

The Court held that the agreement was illegal as being contrary to public policy.

Contracts prejudicial to public safety

[8.310] Agreements in this category are of two types: first, trading agreements between a national and an enemy alien (citizen of a foreign power) in wartime; and second, agreements which might rupture the existing friendly relationships between one country and another.

Contracts to defraud the revenue

[8.320] A contract which is designed to defraud the revenue (ie, the collection of taxes by taxing authorities), whether national or local, is illegal as being contrary to public policy.

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Contracts void at common law

[8.330] There are three categories of contract usually regarded as being void (rather than *illegal*) at common law on the basis that they are contrary to public policy:

1. contracts to oust the jurisdiction of the courts;
2. contracts prejudicial to the status of marriage; and
3. contracts in restraint of trade.

Contracts to oust the jurisdiction of the courts

[8.340] A provision in a contract which purports to prevent recourse to the courts in the event of dispute between the parties is void as being contrary to public policy. It has been stated in the High Court that:

> No contractual provision which attempts to disable a party from resorting to the Courts of law was ever recognized 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: *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643.

It might be remembered that Chapter 1 identified commercial arbitration as a method of alternative dispute resolution and identified that parties may agree to arbitrate their commercial disputes via a clause in their original contract or via agreement at the time that a dispute arises. Agreements to arbitrate are not void for ousting the jurisdiction of the courts; on the contrary, legislation at both the State and Territory and Commonwealth levels provides for the enforcement of such agreements, meaning that parties can be compelled to arbitrate their disputes (rather than going to court) if that is what they have agreed to do.

Contracts prejudicial to the status of marriage

[8.350] A contract or a term of a contract which prejudices the status of marriage will be void as contrary to public policy, for example, a pre-marriage agreement not to live together after marriage. One type of contract invalidated is that known as "marriage brokerage", that is, an agreement to procure a marriage.

Contracts in restraint of trade

[8.360] Contracts of employment sometimes contain covenants restraining the employee from exercising their profession or trade in a certain area or for a certain time after the termination of their employment. Covenants in restraint of trade contained in contracts of employment will only be enforced so far as they are necessary to prevent the employee using the knowledge, trade secrets or connections of their past employer in competition with that employer and not to prevent the employee from using their own skill and knowledge in their trade or profession, even if acquired in the previous employer's service.

The law does not readily allow a person to contract out of their means of livelihood. A certain number of restraints rest on the employee, however, quite independently of any express covenant. For example, a person can be restrained from disclosing a secret process belonging to their employer which they have memorised. A person can also be prevented from using a list of their employer's customers for the purpose of soliciting business for themselves.

[8.370] A restraint which is imposed simply for the purpose of preventing an ex-employee from using their own skill and knowledge in competition with their former employer will not be enforceable. However, a reasonable restraint designed to protect trade connections, confidential information or trade secrets acquired by the employee in the course of their employment will be enforceable.

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Jardin v Metcash Ltd

[8.380] *Jardin v Metcash Ltd* (2011) 285 ALR 677. Jardin was the CEO of a subsidiary of Metcash, IGA Distribution, which distributed groceries to independent retailers. Jardin's contract of employment provided that he must not accept any other employment without the company's permission, compete with the company, or hold investments of more than 5% of the issued investments of any class of another company. Metcash decided to terminate his employment. Jardin sought to take a majority shareholding in a competitor of Metcash.

The New South Wales Court of Appeal held that these contractual restraints were valid. Metcash was entitled to protect itself from the risk that Jardin would use his connections with its customers to seek to entice them away to a competitor. The evidence showed that over the 10 years of his employment Jardin had acquired knowledge and influence over customers that was sufficient to justify a restraint.

Pearson v HRX Holdings Pty Ltd

[8.390] *Pearson v HRX Holdings Pty Ltd* (2012) 205 FCR 187. Pearson was employed in a senior role in a human resources firm, marketing the firm to possible clients. His contract provided that he could not be employed by a business "similar to or competitive with" the firm for two years after ceasing employment with the firm. The contract also contained confidentiality and non-solicitation obligations. The Full Federal Court upheld the restraint. The firm's customer connections were a legitimate interest which could validly be protected by a restraint. Pearson's role had been to market the firm to potential customers. The confidentiality and non-solicitation provisions were not sufficient to protect the firm's customer connections. The firm also had a legitimate interest in securing the full benefit of its bargain with Pearson during his employment through preservation of the goodwill and expansion of the business he generated.

[8.400] The principles governing the operation of the restraint of trade doctrine have also been applied to provisions which seek to unduly limit the circumstances in which an employee may be relieved from the employment contract.

Buckley v Tutty

[8.490] *Buckley v Tutty* (1971) 125 CLR 353. Tutty, a professional footballer, contracted to play with the Balmain Rugby League Club. Under his contract, Tutty could not transfer to any other club except with the consent of the Balmain Club, which had refused to give its consent. Further, even if the Balmain Club agreed to put Tutty on a transfer list, the amount of transfer fee which it could fix was within its own discretion.

The High Court held that the rules relating to the retention and transfer of players were in restraint of trade and that appropriate orders could be granted to prevent the club from continuing to observe them. The Court stated:

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> [T]he rules … go beyond what is reasonable in two main respects. In the first place, they enable a club to prevent any professional who has played in one of its teams from playing with another club, notwithstanding that he has ceased to play for the club which retains him and no longer receives any remuneration from that club. There is no time limited for the exercise of this power … A second objection to the rules … is in relation to the question of transfer fees. Although a club does not wish to retain a player, and is prepared to see him go to another club, it may fix a transfer fee, most of which goes to the club itself, although it may be quite unrelated to any benefit which the player has received from his membership of … the club … The transfer fee may not only prevent a player from reaping the financial rewards of his own skill but it may impede him in obtaining new employment.

[8.500] In determining whether a restraint is reasonable, the court may also have regard to the relative bargaining positions of the parties. That is to say, where there is an inequality of bargaining power, the court will have regard to the fairness of the bargain in determining whether the restraint in question is reasonable in the circumstances.

A Schroeder Music Publishing Co Ltd v Macaulay

[8.510] *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308. A young songwriter entered into an agreement with a music publishing company on one of the company's standard forms. Under the contract, the company engaged his exclusive services as a songwriter for a period of five years, with provision for automatic extension for another five years if royalties exceeded £5,000. Copyright in all compositions created by the songwriter during the term of the contract was to be assigned to the company. The songwriter received no payment (apart from an initial £50) unless his work was published but the company was under no obligation to publish or promote his work. If the company did not publish, the songwriter had no right to terminate the agreement or to have copyright in his compositions reassigned to him. The company could terminate the agreement by giving one month's notice but there was no corresponding provision for the benefit of the songwriter. The company also had complete power to assign its rights under the contract, but the songwriter could not do so without the publisher's written consent.

The House of Lords held that the contract was an unreasonable restraint of trade and void as being contrary to public policy. In determining whether the Court would relieve the songwriter of his legal duty to fulfil his obligations, it was necessary to "assess the relative bargaining power of the publisher and the songwriter at the time the contract was made and to decide whether the publisher had used his superior bargaining power to extract from the songwriter promises that were unfairly onerous to him".

[8.520] The validity of a restraint is determined as at the time of entry into the contract. The covenantor's subsequent unlawful conduct does not confer validity upon an invalid clause. Such a clause remains of no effect.

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Consequences of illegal contracts and void contracts

[8.530] A distinction has been drawn between those contracts which are categorised as illegal in the strict or narrow sense and those which are regarded as simply void (rather than illegal). This distinction is maintained in the following discussion, which considers the consequences of illegal and void contracts.

Consequences of illegal contracts

[8.540] The consequences of illegality under either statute law or common law are basically the same. The general position is as follows.

The contract is totally void

[8.550] The general effect of illegality in the formation of a contract is that the contract is void and neither party can sue on it.

Money paid cannot generally be recovered

[8.560] Money paid or property transferred under an illegal contract is not generally recoverable. Should one of the parties seek to recover money paid under the contract, the defendant is in the stronger position where there is equal culpability. This means that a party cannot recover moneys paid under the illegal contract to the other if they are equally blameworthy.

Exceptions

[8.570] A party can recover money paid or property transferred if that party was not "*in pari delicto*", that is, not equally to blame. This will apply where, under a contract prohibited by statute, money is paid by the person whom the statute was designed to protect: *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192. The parties are not "*in pari delicto*", and accordingly recovery is allowed, where a person is induced to enter into the illegal contract by the exercise of fraudulent misrepresentation, duress or oppression.

Shelley v Paddock

[8.580] *Shelley v Paddock* [1980] QB 348. The plaintiff, an English resident, agreed to purchase a house in Spain from the defendants who were English nationals resident in Spain. The defendants said that they were selling the house as agents for the owner. In fact, they had no authority to sell the house. The plaintiff paid the defendants the purchase price. On discovering the true situation, the plaintiff sued the defendants. However, the defendants contended that the moneys paid by the plaintiff were irrecoverable on the ground that the transaction was illegal since it contravened the *Exchange Control Act 1947* (UK).

It was held the plaintiff could recover since the parties were not *in pari delicto*. The defendants "were guilty of a swindle. It is only fair and just that they should not be allowed to keep the benefit of their fraud".

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Severance and void contracts

Extent of invalidity

[8.590] Where a contract is void (but not illegal), the position is similar whether it is void under statute or at common law. The contract will be unenforceable only to the extent that its terms contravene the statutory or common law constraint. Accordingly, if the void part of the contract can be severed (separated from the rest of the contract), the remainder of the contract can still be enforced. Void words or parts of a clause may also be severed from the remainder of the clause.

However, the court will not sever promises or terms of a contract if to do so would alter the whole nature of the contract. Where severance is not possible, then the whole contract will be void. The general test for determining whether terms that are void are severable was stated by Jordan CJ in *McFarlane v Daniell* (1938) 38 SR (NSW) 337:

> 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 contract, the valid promises are severable …

A common situation in which the question of severance has arisen is in relation to restraint of trade clauses. This led to the inclusion of clauses imposing harsh restraints but also providing that if that restraint was unenforceable, some lesser restraint should be adopted. Such clauses are sometimes known as "ladder clauses"; they provide a "ladder" of restraint options of varying severity in the hope that if the more severe options are struck down, the less severe options will still be enforced. The more onerous parts of the clause are severed from the contract and the remaining restraints enforced.

Severance and illegal contracts

[8.600] The courts have held that severance also applies to contracts which are illegal. In practice, the scope of severance in the case of illegal contracts tends to be limited, since the usual effect of failure to comply with a statutory prohibition is to make the whole contract illegal and void.

Money paid recoverable

[8.610] Money paid under a contract which is merely void (rather than illegal) is generally recoverable. It appears that this is so whether or not the party who has paid it can prove a total failure of consideration. This is illustrated by the case of a marriage brokerage contract.

Hermann v Charlesworth

[8.620] *Hermann v Charlesworth* [1905] 2 KB 123. The defendant agreed that he would introduce certain gentlemen to the plaintiff (an unmarried woman) with a view to matrimony for an initial fee of £52 and a later payment of £250 should a marriage take place. He introduced certain gentlemen to her, but no marriage resulted.

The Court held that the plaintiff was entitled to the return of her £52 since the payment had been made under a void contract and was recoverable.

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Further reading

See contract texts listed at the end of Chapter 2.

Tutorial activities

1. Read *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (see [8.60]). Also read [8.20]. What are the four ways in which a contract can be illegal?
2. In *Yango Pastoral* (see [8.60]), why was the bank able to enforce its contractual rights even though the contract was illegal?
3. Why has the High Court in *Fitzgerald v Leonhardt* (see [8.110]) noted (and endorsed) the growing reluctance of a court to declare a contract unenforceable? What were the specific reasons for the High Court's decision that the contract was enforceable?
4. In what circumstances is a contract void under a statute? What is the effect of such a contract on the parties? For instance, can the punter (gambler) recover his money if a wagering contract is void? What is an example of a contract that is void and voidable for mistake?
5. After recent increases to penalties for illicit trade in tobacco the Government said:

   > The Government's approach will further bolster disruption and deterrence of illicit tobacco in Australia, building on the significant outcomes achieved with state and territory partners since the creation of the Illicit Tobacco Taskforce in July 2018. We continue to send a clear message to individuals and organisations involved in illicit tobacco – involvement in the Illicit tobacco trade is a serious offence.

   A enters into a contract to deliver 12 trucks of illicit tobacco products and various kinds of illegal vapes to B for $4 million dollars on an agreed date and time and at a specific warehouse. Assume B has paid in advance, but A does not deliver. What advice would you give B about any remedy he may have for breach of contract?
6. Andrew is a currency trader with Grabbit and Run Partners. He has a friend, Jessica, who is on the Board of the Reserve Bank. Andrew hands $40,000 to Jessica for information about Reserve Bank decisions on interest rates when it meets on the first Tuesday of November. She agrees to provide the information. This is, of course, illegal under the Reserve Bank charter. Jessica takes the money but never provides information. Please advise Andrew whether he can recover the money from Jessica.
7. Padma and Chandra purchase an Indian restaurant from Gopal. It is located in Glen Waverly, south-east of Melbourne. In order to ensure she does not establish a similar restaurant in the same vicinity, they include a term in the contract that prohibits Gopal "owning or managing" a restaurant within a 20-km radius of the restaurant for five years. Advise them whether this term would be an illegal restraint.
8. Elders Ltd lent $2 million to Tongo Ltd, repayment of which was secured by a mortgage and personal covenants. Tongo defaulted, so Elders sued on the personal covenants in the mortgage. Tongo contended that the mortgage (including the guarantee) was illegal

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and void on the ground that Elders had been carrying on the business of banking without authorisation under the *Banking Act 1959* (Cth), which provides that "a corporation is not to carry on a banking business unless it is authorised to do so" and provided a penalty of $10,000 per day for contravention of this provision. It was clear that the lender had in fact been carrying on the business of banking in contravention of the Act. Elders seeks your advice as to whether the contract between the parties is illegal and unenforceable.

9. A Victorian statute provides that "a person was not to buy or sell or otherwise deal in genetically modified canola oil without a licence". George Mahout informs GM Oils that he has the necessary licence and contracts to purchase a quantity of canola oil from GM. He does not in fact have the necessary licence. George later refuses to take delivery, and GM Oils sues him for damages for breach of contract. Advise GM Oils of its position in relation to the contract.

10. In the high-profile criminal trial involving Donald Trump, the prosecution alleged that Trump directed his former lawyer, Michael Cohen, to pay $130,000 to Stormy Daniels, during the 2016 presidential campaign, to prevent allegations that they had an extra-marital sexual relationship from becoming public before the election. Trump then repaid Cohen. Trump has been found guilty on 34 counts of falsifying his business records to hide the payment made to Daniels via Cohen. Now for the relevance to the law of contract. In evidence at the trial, Cohen said that, in fact, he was instructed by Trump to delay the payment of the money to Daniels until after the election and then he would simply refuse to pay. Cohen, however, had to pay the money because of the risk that Daniels would go public. The contract law question is: whether the agreement between Daniels and Trump would have been enforceable by Daniels had she not been paid? Assume, for present purposes, that Australian contract law applies.

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Chapter 9

Contents and Interpretation of the Contract

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Introduction

[9.10] As we saw in Chapter 3, the parties themselves (generally) create the rights and obligations – *the terms* – that form the basis of their agreement and only use the courts if a dispute arises about what those terms are and/or the meaning of those terms. One party may, for example, say that the other party has an obligation to perform a certain task, but the other party may say that this was not included in the contract or, if it was included, it does not mean what the party says it means.

Therefore, the **first step** in the two-step process of contractual dispute resolution is the ***incorporation stage*** where the court decides what the **express and implied** terms of the contract are. To do this the court determines:

- what statements – written or oral – were made by the parties;
- of these statements, which were intended to be contractually binding;
- how important the term is; and
- whether it is necessary to imply a term into the contract.

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Regarding **express terms**, it is important to determine whether a statement made by one party to the other during the pre-contractual negotiations has been incorporated into the contract as a term. If the statement is a term, then a failure to comply is a breach of contract that enables the innocent party to sue for breach. On the other hand, if the statement has not been incorporated, there can be no breach of contract and any remedy can only be for misrepresentation.[1]

The task of deciding what the parties expressly agreed to may be difficult. If the contract is oral (or partly oral and partly written) the parties may not agree on what one or the other of them promised to do, leaving the courts to decide, on the available evidence, which of two versions of events to believe.

It is usually an easier task when the contract is in writing: *prima facie*, the terms are set out in the written document. However, it is not always straightforward. One party may argue that the written document is not the whole agreement – that there is another part (oral or written) that also contains statements that should be regarded as terms or that the written document is ambiguous or uncertain or misrepresents what was agreed to by the parties in the pre-contractual phase.

This leaves the courts with a secondary question – where the parties have taken the time, trouble and expense to put their agreement in writing. Is one or other of the parties, nevertheless, able to introduce evidence that there were *other* terms (usually oral but it could be another written document) that the court should also consider? Or should the written document be considered as the one and only document containing terms? The *parol evidence rule* is an attempt to answer this question.

The terms of a contract are generally express but there may also be **implied terms.** In limited circumstances a court may imply a term (not actually agreed upon by the parties) in order to give effect to what a reasonable person would say was what the parties intended to include in the contract.

Having determined *what* the terms of the agreement are, the **second step** is the ***construction or interpretation stage***[2] where the courts construe or interpret the terms to determine their meaning and legal effect. Terms may have to be interpreted in order to work out what the parties were actually required by the contract to do. Disputes regarding interpretation generally occur because the parties, at the time of contracting, cannot anticipate all future circumstances. So the contract may be silent on a particular issue or it may be ambiguous or inadequate in setting out how to resolve the matter. Or, as often happens with long term contracts (like infrastructure or construction projects), the parties may have deliberately left things vague believing they will find a solution if and when the issue arises.

In this chapter, cases involving **exclusion clauses** – terms that attempt to limit, exclude or qualify one party's contractual responsibilities – feature prominently. Exclusion clauses are an excellent case study through which we can understand how contractual terms are incorporated and interpreted. There are cases in which courts must (a) determine whether an exclusion clause was incorporated into the contract and/or (b) construe the clause to determine whether or not it is effective.

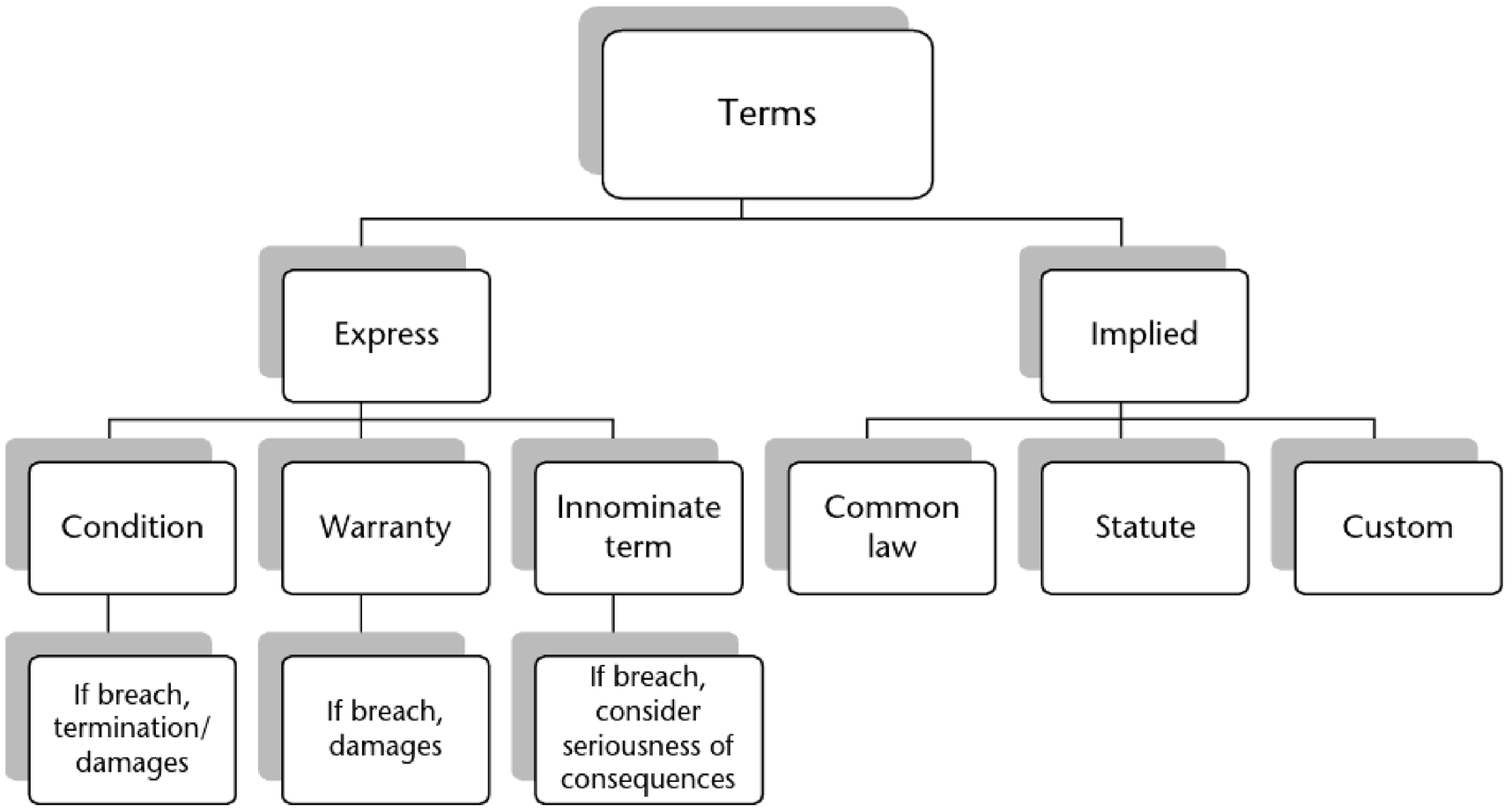
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1 The distinction between a term and a representation is not as important as it once was because, as we saw in Chapter 7, there are now significant statutory rights and remedies for false representations and misleading or deceptive conduct.

2 The words "construction" and "interpretation" are synonyms and can be used interchangeably.

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Figure 9.1 : The contents of a contract



Determining intention – the objective approach

[9.20] When considering questions around incorporation or interpretation, the courts, as we have seen so often, favour an *objective* test, asking what a reasonable person, in the position of the parties, would conclude about what was promised and/or the meaning of those promises. Such an approach to identifying and interpreting the terms of a contract is commercially sensible because it removes the uncertainty that would inevitably result if the parties' *subjective* intentions were determinative.

Identifying the express terms

[9.30] Express terms are terms to which the parties have expressly agreed and intend to incorporate into the contract. That contract may be oral or written or partly oral and partly written. In many significant commercial contracts, the parties may record their agreement in a written and signed document that is intended to be the entire agreement. In such a case, deciding what constitutes the express terms of a signed contract is relatively straightforward.

It is also possible for the parties to record their agreement in a written document that does *not* contain all the statements (written or oral) made during the negotiations. The statements may be found in the various communications used by the parties during negotiations (eg instant messaging, emails, letters or other correspondence, telephone conversations) or they may be located in notices or signs (eg in car parks or gymnasiums) or, increasingly, on a website. If one of these statements (eg "the apartment you are buying (online) has an ocean view") is false, deciding on the legal status of that statement is crucial. If it is a term of the contract, the innocent party may seek a remedy for breach of contract. If the statement is a representation, a remedy for breach of contract is not available (although a remedy for common law misrepresentation or statutory misleading or deceptive conduct may be available).

Where a contract is made orally, the express terms of the contract will be ascertained by determining first, what the parties said when the contract was made and second, which of those statements made during

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the negotiations were intended to be part of the final agreement. In the event of a dispute in relation to an oral agreement, there are obvious evidentiary obstacles that do not exist where the parties have reduced their agreement to writing.

Contracts in writing and the parol evidence rule

[9.40] In the event of a dispute about what the terms of the contract are, it is important to note the distinction between a contract that is entirely in writing and one that is oral or partly oral and partly written. Where a contract is *oral or partly oral and partly written*, in the event of a dispute about what the terms are, all relevant evidence may be put before the court, including evidence about what was said and done when the parties were in negotiations.

Where a contract appears to be *entirely in writing*, as with most significant commercial contracts, the *parol evidence rule* applies, limiting the evidence that may be brought before the court for the purpose of identifying and interpreting the contract's terms.

The *parol evidence rule* states that that where a contract is entirely in writing, evidence of other (*parol*) terms will not be admissible *to add to, vary or contradict* the written agreement. In other words, where it applies, the parol evidence rule excludes any evidence outside (or extrinsic to) the written document that would add to or vary or contradict the scope (the terms) or the meaning (the interpretation) of the written contract. The rule is at its most relevant in relation to the statements, written or oral, made by the parties during negotiations and when those negotiations ended with a formal written document that appears to contain the entire agreement.

The *parol evidence rule* was originally created by the courts to protect weaker or vulnerable parties from (unfounded) allegations by stronger parties that the parties had made (oral) promises that altered the written agreement (in favour of the stronger party) and which the stronger party now wished to enforce. With this historical context in mind, it is not surprising that a number of exceptions or qualifications to the parol evidence rule have evolved to prevent it from being abused:

- Parol evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language of the written contract is ambiguous or susceptible to more than one meaning. On the other hand, if the contractual terms are clear, evidence of surrounding circumstances is not admitted.
- Parol evidence is admissible to prove that the written contract is illegal, invalid or unenforceable because of a misrepresentation, undue influence, duress or unconscionable conduct.
- Parol evidence is admissible to establish that one or more of the terms has a trade or technical meaning or usage.
- Parol evidence is admissible to prove that the written contract is *not* the entire agreement and therefore the parol evidence rule does not apply. In this regard, collateral warranties are discussed at [9.250].
- Parol evidence may be given of the subject matter of the contract or the identity of the parties to the contract.

An **entire agreement clause** is commonly included in the terms of a standard form contract.[3] The purpose of an entire agreement clause is to ensure that the document in which it appears constitutes the whole agreement between the parties. This is an example of a typical entire agreement clause:

3 A standard form contract is a contract between two parties, where the terms and conditions of the contract are set by one of the parties, and presented to the other on a "take it or leave it" basis, with no genuine negotiation.

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> This contract supersedes all prior discussions, representations, negotiations and understandings and states all the terms of the agreement between the parties in respect of its subject matter.

On one level, this promotes contractual certainty because the parties know that the agreement is confined to the written document and establishes the case for the application of the parol evidence rule. On the other hand, it may be used unfairly if the other party is unaware of the term and enters into the contract because of one or more of the "*discussions, representations, negotiations and understandings*" preceding it. For this reason, such a clause may not protect a party who has engaged in misleading or deceptive conduct in contravention of s 18(1) of the *Australian Consumer Law*.

Contracts in writing – the effect of a signature

The rule in L'Estrange v Graucob

[9.50] The general rule is that a person who signs a contractual document is bound by the terms in that document. It is irrelevant whether the person read or understood the terms. As the following case demonstrates, this rule, referred to as the rule in *L'Estrange v Graucob* (an early English decision) is part of Australian law and practice.

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd

[9.60] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52. Alphapharm Pty Ltd entered into a freight and storage agreement with Toll, a transport company with a fleet of refrigerated vans. Alphapharm had purchased a large quantity of flu vaccines and planned to sell and distribute them throughout Australia. The vaccine was perishable unless stored at a temperature between 2 and 8 degrees centigrade. The agreement was formed by a series of written communications. An employee of Alphapharm signed the contract but was unaware of a term that excluded Toll's liability for "any loss, injury or damage suffered by the Customer in respect of any goods being carried or stored on its behalf". Unfortunately, Toll did not maintain the vaccines within the specified temperature range during the transport and, as a result, the laboratories rejected them. When sued, Toll relied on the clause, arguing it had been incorporated into the contract by the employee's signature. Alphapharm submitted Toll had not done what was reasonable to give Alphapharm notice of the term and therefore the clause was not part of the contract.

The High Court held that the employee's signature was binding. It said:

> … to sign a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to a reasonable reader of the document. The representation is that the person who signs either has read and approved the contents of the document or is willing to take the chance of being bound by those contents, … whatever they might be. That representation is even stronger where the signature appears below a perfectly legible written request to read the document before signing it … It was reasonable of Toll to treat (the employee's) signature as a manifestation of assent to the conditions he had been invited to read before signing.

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Situations where a signature may not be binding

The document, signed or unsigned, is not a "contractual" document

[9.70] The rule in *L'Estrange* is only applicable where the document in question is a contractual document, one that the parties knew, or a reasonable person would conclude, contained contractual terms. If the document in question might reasonably be considered a non-contractual document, such as a receipt, voucher or docket, the party will not be bound by the terms.

Causer v Browne

[9.80] *Causer v Browne* [1952] VLR 1. Causer took a dress for dry cleaning to Browne and received, at that time, a docket on the face of which appeared printed conditions purporting to exempt the cleaner from liability for loss, including loss caused by breach of contract and negligence. The dress was returned damaged by the negligence of the company. When Causer sued the company, it relied on the exclusion clause.

The Court held that there was no evidence that the voucher would be reasonably understood as including terms of the contract. Therefore, as Causer was unaware of the term, the question was whether the assistant had done what was reasonable to bring it to his attention. The Court decided she had not.

In *La Rosa v Nudrill Pty Ltd* [2013] WASCA 18, the exclusion clauses on an invoice were not incorporated into the contract between the parties because the invoice was regarded as a claim for payment rather than a contractual document. And, as the following case demonstrates, even where the document is signed, the rule in *L'Estrange* will not apply when the document containing the relevant term is not a contractual document.

Le Mans Grand Prix Circuits Pty Ltd v Illiadis

[9.90] *Le Mans Grand Prix Circuits Pty Ltd v Illiadis* [1998] VSC 331. Le Mans carried on the business of providing for hire to the public "go-karts and a go-kart racing track". A local radio station had booked the track for a corporate promotion night. Illiadis attended the promotion night. When he arrived at the track, he was told to sign a particular form so that he could register his name and be able to enter the go-kart race. Illiadis signed the form but was not given time to read it and he regarded it as a marketing or registration exercise. Illiadis qualified to race and in the course of a race his vehicle overturned, and he fractured his arm. When he sued, Le Mans argued that Illiadis was bound by his signature on the document (that contained a broad exclusion clause, excluding Le Mans from liability for negligence).

The Court found that the signed document was not contractual. His Honour concluded:

> … (N)or is there any satisfactory evidence that the [plaintiff] or any other participant was asked to read the form or to treat it as anything more than a registration or application form for the purpose of obtaining a so-called licence to drive a go-kart. It might be thought that the information which the person signing was asked to provide in the form – name, address, telephone number and date of birth and date of signing – was consistent with that. It is not easy to see – at least in the absence of explanation – why a statement of the date of birth was otherwise relevant.

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Misrepresentation of the content of the term

[9.100] The rule in *L'Estrange* will not apply where, as in the following case, the nature or extent of the term in question has been misrepresented.

Curtis v Chemical Cleaning & Dyeing Co Ltd

[9.110] *Curtis v Chemical Cleaning & Dyeing Co Ltd* [1951] 1 KB 805. Mrs Curtis took a dress to be dry-cleaned and was asked to sign a receipt which contained an exclusion clause. She asked why she had to sign and was told that the drycleaner would not accept liability for damage "to beads or sequins". She then signed the document. The dress was returned with a serious stain. When Mrs Curtis sued the company, it sought to rely on the document that contained the following clause (that, incidentally, was obviously not drafted by a wordsmith):

> This or these articles is accepted on condition that the company is not liable for any damage howsoever arising, or delay.

The Court decided that the drycleaner could not rely on the clause. The Court said that Mrs Curtis was informed that:

> there were certain risks, in this case beads and sequins, which the defendants were not prepared to accept. … That, I think, plainly is a misrepresentation. The words on the document purported to exempt them from all liability, howsoever arising. In those circumstances, owing to that misrepresentation, this exception never became part of the contract between the parties.

Incorporation of terms by notice – actual or reasonable

[9.120] Where a contract is unsigned, and therefore where the signature rule does not apply, a person is only bound by a term if they know of the term (or at least know the relevant document or notice contains a term) or if the party seeking to rely on the term has provided reasonable notice of the term. A party who wishes to incorporate terms by providing notice to the other party must fulfil three criteria.

1. The document must be a contractual document

[9.122] Where there is a document containing terms, those terms can only be incorporated by notice where the document is a contractual document. So, for example, where a bill of lading is presented to an owner/shipper of goods by the shipping company, the owner will be bound by the contractual terms in the bill of lading, even if the terms are unread, because the owner actually knows, or a reasonable person would know, that such a document contains contractual terms. The same conclusion was not reached, however, in different circumstances in the case below.

Chapleton v Barry Urban District Council

[9.125] Chapleton v Barry Urban District Council [1940] 1 KB 532. Chapleton went to Barry Island and hired a deck chair from Barry Urban District Council. He saw a pile of deck chairs with a notice indicating the hire cost was 2d per session, and that tickets should be obtained

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from the chair attendant. He took a ticket, which he did not read, thinking it was just a receipt. The back of the ticket contained an exclusion clause that exempted the Council from liability for any injury caused by the deck chair. When he sat on the chair, it collapsed, causing him injury. The main question was whether the exclusion clause printed on the back of the ticket was part of the contract between Chapleton and the Council.

The Court held that the exclusion clause was not part of the contract. The ticket was deemed to be a mere receipt, not a contractual document so the Council could not rely on the exclusion clause to avoid liability. The Court emphasised that a reasonable person would regard the ticket as a mere receipt rather than a contractual document.

2. *The requirement of reasonable notice*

[9.128] The second requirement is that the party seeking to rely on the terms must have taken reasonable steps to bring the terms to the notice of the other party. The courts look to the party relying on the terms and ask whether, in all the circumstances, that party has done what is reasonable to bring notice to the other party. To determine whether reasonable steps have been taken, the courts look to factors such as whether the other party would understand it to be a contractual document/notice, where it is located and how prominent or accessible it is.

Thornton v Shoe Lane Parking Ltd

[9.130] *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163. Thornton was attending an engagement at the BBC. He drove to the defendants' new automatic car park. At the entrance was a notice that read "All Cars Parked at Owner's Risk". He drove in, was stopped by a red traffic light and took the ticket issued by the machine. When he took the ticket, the light turned green allowing him to proceed into the garage where his car was parked by mechanical means. The ticket contained in small print on the bottom left-hand corner the words "issued subject to conditions … displayed on the premises". A set of printed conditions displayed in a panel on a pillar opposite the machine included a provision exempting the defendants from liability for injury to a customer. Thornton knew there was printing on the ticket but did not read it and was not aware of the exclusion clause contained therein. In order to read the "conditions of issue" he would have had to leave his car and walk to the pillar opposite the ticket machine. Thornton was run down and severely injured when he returned to collect his car. In an action for damages, the defendants sought to rely on the exclusion clause.

It was held that the clause did not exempt the defendants from liability because the company had not done what was reasonably sufficient to bring the clause to Thornton's notice at or before the time the contract was made. As Megaw LJ said:

> [B]efore it can be said that a [restrictive] condition of that sort has been fairly brought to the notice of a party to a contract *there must be some clear indication which would lead an ordinary sensible person to realise at or before the time of making the contract that a term of that sort, relating to personal injury, was sought to be included* … it is a highly relevant factor … that the first attempt to bring to his notice the intended inclusion of those conditions was at the time when as a matter of hard reality it would have been practically impossible for him to withdraw from his intended entry … for

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the purpose of leaving his car there … *it would be fiction if not farce to treat customers as persons who have been given a fair opportunity before the contracts are made of discovering the conditions by which they are to be bound.*

Oceanic Sun Line Special Shipping Company Inc v Fay

[9.140] *Oceanic Sun Line Special Shipping Company Inc v Fay* (1998) 165 CLR 197. Upon payment for an ocean voyage, Dr Fay was handed an "exchange order" which stated it would be exchanged for a ticket when boarding. The ticket had a printed condition that the Greek courts would have exclusive jurisdiction in any action against the owner. If this clause was part of the contract, it would have required Dr Fay to bring any legal action relating to the trip in the Greek courts. Dr Fay received serious injuries when taking part in trap shooting and sued the defendant for negligence.

The High Court decided that a brochure was not contractual in nature and did not form any part of the relevant contract of carriage. Essentially it was a marketing document designed to induce people to sign up to the appellant's cruises around the Mediterranean. Its reference (under "Things To Know Before You Go") to the cruise being governed by the terms and conditions printed on the passenger ticket contract was informative but not contractual. And it was expressed in that context that the ticket contract "may be inspected at any Sun Line office". Such a statement was not particularly helpful if there was no Sun Line office in Australia.

The High Court concluded:

> where an exemption clause is contained in a ticket or other document … the carrier cannot rely on that clause unless, at the time of the contract, the carrier had done all that was reasonably necessary to bring the exemption clause to the passenger's notice. The only step taken by the defendant was a note in the brochure that Conditions of Carriage were printed in a (then unavailable) ticket contract.

3. *The notice must be given at or before the time of contracting*

[9.145] The "reasonable steps" to bring the "contractual document" to the notice of the other party must be taken before or at the time of contracting.

Olley v Marlborough Court Ltd

[9.150] *Olley v Marlborough Court Ltd* [1949] 1 KB 532. The plaintiff and her husband booked into the defendant's hotel. They went up to their room where on one of the walls a notice was displayed stating that: "The proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody". The plaintiff's fur coats were stolen from the room because of negligence on the part of the hotel staff.

The Court decided that reasonable notice of the clause had not been given because the contract had been made in the hotel lobby *before* the plaintiff had had an opportunity to see the clause in her room.

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Alameddine v Glenworth Valley Horse Riding Pty Ltd

[9.160] *Alameddine v Glenworth Valley Horse Riding Pty Ltd* [2015] NSWCA 219. The plaintiff, Alissa Alameddine, was a 12-year-old girl injured while participating in a quad bike trail ride at Glenworth's premises. The plaintiff's mother reviewed Glenworth's website and telephoned to book the quad biking activity for herself and seven children, including the plaintiff. The following day the plaintiff, together with her mother and other family members, attended the facility to participate. After the family arrived at the facility, the plaintiff's older sister completed an application form that included an exclusion clause that, amongst other things, excluded the defendant from liability for negligence. On the quad bike trip, the plaintiff was in a group of four. The group ahead were moving further away. The instructor accelerated to catch up and the plaintiff increased her speed to keep up with him. While travelling at a faster speed, the plaintiff lost control of the quad bike causing her to fall off and injure herself. Glenworth sought to rely on the exclusion clause.

The NSW Court of Appeal decided that Glenworth could not rely on the clause because the contract between the plaintiff's mother and Glenworth was concluded when the plaintiff's mother rang and booked the visit. As a consequence, the clause in the application form that was completed on the day of the activity did not form part of the contract.

[9.165] Referring back to *Thornton* [9.130] note that Denning LJ (unlike Megaw LJ) argued that the car park could not rely on the exclusion clause because the contract between it and Thornton had been concluded at the entrance of the car park; any subsequent notice of the exclusion clause was not sufficient:

> … In the present case the offer was contained in the notice at the entrance giving the charges for garaging and saying "at owner's risk", that is risk of the owner so far as damage to the car was concerned. The offer was accepted when Mr Thornton drove up to the entrance, and, by the movement of his car, turned the light from red to green and the ticket was thrust at him. The contract was then concluded, and it could not be altered so as to exempt the company from liability for personal injury due to their negligence … this customer is (only) bound by the exempting condition if he knows that the ticket is issued subject to it; or if the company did what was reasonably sufficient to give him notice of it.

Particular notice requirements when terms are harsh or unusual terms

[9.180] Where a term in a contract is harsh or unusual, the reasonable notice requirement is harder to meet. The notice must be proportionate to the degree to which the term is a harsh or unusual term.

Interfoto Picture Library Ltd v Stiletto Visual Programs Ltd

[9.190] *Interfoto Picture Library Ltd v Stiletto Visual Programs Ltd* [1989] 2 QB 433. Interfoto ran a library of photographic transparencies. It delivered 47 transparencies in a bag to Stiletto, who had not dealt with Interfoto before. Included in the bag with the transparencies was a delivery note. At the bottom of the note was the word "Conditions" printed clearly and prominently. There were nine conditions. Condition 2 said there was a late fee of £5 *per transparency per day* after the 14-day loan period. Stiletto did not read the standard terms that were inside the bag. Stiletto kept the transparencies for a month after which Interfoto, in accordance with its rights under Condition 2, sent it a bill for £3,783.50. When Stiletto refused

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to pay, Interfoto sued to recover the fee. The issue was whether it had done what was reasonable to bring the clause to Stiletto's attention.

The Court said that the contract was not made until Stiletto opened the bag and took out the delivery note. Therefore, the Court said that Stiletto would have had reasonable notice of "normal" terms on that note but decided that Interfoto had not done what was reasonable to draw Stiletto's attention to the clause in question:

> (Stiletto) are not to be relieved of that liability because they did not read the condition … they are to be relieved because the plaintiffs did not do what was necessary to draw this unreasonable and extortionate clause fairly to their attention. … Interfoto was under a duty in all fairness to draw Stilleto's attention to the high price payable if the transparencies were not returned on time.

In the following case, the New South Wales Court of Appeal showed similar concerns about an exclusion clause that limited the liability of a shipping company for personal injury and loss of personal effects.

Baltic Shipping Co v Dillon

[9.195] *Baltic Shipping Co v Dillon* (1993) 176 CLR 344. The cruise ship "Mikhail Lermontov" sank off the south-eastern coast of New Zealand. Mrs Dillon, a passenger on the ship, suffered physical injuries and emotional trauma and also lost items of personal property. She claimed compensation. The shipping company sought to rely on an exclusion clause limiting the company's liability. The issue was whether the clause had been incorporated into the contract. To book the cruise, the plaintiff paid a deposit. Ten days later she received a Booking Form that stated that a "Contract of carriage … will be made only at the time of the issuing of tickets and will be subject to the conditions … printed on the tickets" which were available at the company's offices. The ticket was issued to the plaintiff six weeks after full payment and two weeks before departure. It contained an exclusion clause limiting liability for personal injury and damage to personal property.

The High Court accepted that, in accordance with the statement on the Booking Form, the contract was made when the ticket was issued. For the terms, including the exclusion clause, to have been properly incorporated in the contract, the plaintiff must have been given notice of them. However, until she received the tickets – two weeks before departure – the only information she had been provided with concerning the conditions of the "contract of carriage" was what was in the Booking Form. The Court said that the information contained in the Booking Form may have been reasonable notice of many of the conditions. However, *the mere availability of the conditions at the company's office was inadequate notice of terms, including the exclusion clause, that were likely to be unusual or unexpected* such as the clause limiting liability in the way that this one did. Therefore, the exclusion clause had not been incorporated into the agreement.

Incorporation by a previous course of dealing.

[9.200] For terms to be incorporated by a prior course of dealings, that course of dealings must have been regular, uniform in form and content and the relevant document must be of a contractual nature. Contracts are often made over the phone or online, and dockets or "sold notices" containing terms are often provided

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when the goods are delivered or the services are provided. Where there has been a prior course of dealings, the customer will be considered to have received reasonable notice at some stage in those dealings of those terms even though they may not have read the clause on this occasion or, even though the clause may have been provided too late on this occasion.

Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association.

[9.205] *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association* [1969] 2 AC 31. Feedstuff was sold by some merchants to a farmer. It was found to be defective. The farmer sued the merchants. The merchants brought into the litigation, as a third party, the persons from whom they had purchased the feeding-stuff; they in turn brought in their suppliers; and there was a long list of many parties brought in right down the supply chain. As between two of these suppliers a point arose as to whether a term that the buyer under the contract took the responsibility of any latent defects was a term which had been imported into the contract in question by reason of the course of dealing between those parties. There had been more than a hundred prior dealings between the parties, of a similar character, over a period of three years, in which an oral contract for the sale of goods had been followed by a confirmatory 'Sold-Note', sent the next day, by the seller to the buyer containing, on the reverse, 'Conditions of Sale'. The buyer's agent knew that there were conditions on the reverse but had never read them. The Court decided that the past dealings were sufficient to infer that defendant had accepted the goods on the terms set out on the notice even though he had never read them. Diplock LJ said:

> Where the parties … have entered into an oral contract with the intention of thereby creating legal rights and liabilities and it is sought to rely upon a term contained in some written document as modifying the respective rights and liabilities which would arise by implication of law from the nature of the contract, *the only question is whether each party has led the other reasonably to believe that he intended that the rights and liabilities towards one another which would otherwise arise by implication of law from the nature of the contract, namely, a contract for the sale of goods, should be modified in the manner specified in the written document.*

Robertson v New Balmain Ferry Company

[9.210] *Robertson v New Balmain Ferry Company* (1906) 4 CLR 379. Balmain Ferry used a private wharf in the course of their business of running a steam ferry in Sydney from Circular Quay to Balmain. Passengers of the ferry would pay at the turnstiles. A notice board near the turnstiles presented the conditions:

> Notice. A fare of one penny must be paid on entering or leaving the wharf. No exception will be made to this rule, whether the passenger has travelled by ferry or not

Robertson, a solicitor, arrived at the wharf and was about to embark on a very expensive journey to the office. He paid the penny and stepped onto the wharf. Unfortunately, he missed the ferry and tried to leave the wharf. At this point, he was asked to pay another penny and

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refused. The company refused to allow him to leave. He sued them for false imprisonment and the outcome of the case turned on whether Robertson had reasonable notice of the above term (that required him to pay a penny on entering and leaving the wharf whether he had travelled or not). Robinson lost at the trial, and on appeals to the Full Court and the High Court.[4] The High Court said:

> Having travelled on many occasions backward and forward by the company's boats, and paid his fare to the officers at the turnstiles, he must have been aware that the company's method of conducting their business was to release the turnstiles only on payment of a penny.

However, to emphasise that reasonable notice is the key to incorporation of a term such as this, contained in a Notice, the High Court added:

> If the plaintiff had been a stranger who had never before been on the premises, it would have been for the defendants to prove that they had done what was reasonably sufficient to give the plaintiff notice of the conditions of admittance.

Terms and representations

[9.220] Contractual disputes generally arise in relation to statements made during the pre-contractual negotiations that are not subsequently included (or referred to) in the written contract.[5] Assuming evidence of the statement is admissible,[6] for the statement to be a term of the contract (or a collateral contract), the statement must have been a promise and not a representation. There is no definitive statement as to what constitutes a term, but the test is an objective one: would a reasonable person, considering all the evidence, conclude that the statement was intended to be a term? To assist with the answer to that basic question, a number of relevant factors have been identified as providing guidelines.

1. The existence of a formal written contract. If a statement is made and the agreement is subsequently reduced to writing, any statement not included in the written contract is likely to be regarded as a representation. The more formal the written document is, the stronger the argument is that if the parties had intended the statements made in the pre-contractual stage to form part of the contract, they would have included those statements in the final document. As the following case illustrates this is a straightforward application of the parol evidence rule.

Equuscorp Pty Ltd v Glengallan Investments Pty Ltd

[9.225] *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471. A dispute arose between Equuscorp, a finance company, and Glengallan Investments and others who were involved in a farming enterprise. Equuscorp provided a loan to the respondents under a loan agreement. The respondents later defaulted on the loan, leading Equuscorp to seek repayment.

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4 Because of the basic common law rule that, in civil disputes, the loser pays both parties' costs, Robertson, a solicitor, who represented himself, would have been significantly out of pocket by the time he failed in the High Court. All for a penny. As the old saying goes, "a lawyer who acts for himself has a fool for a client".

5 That is, in situations where the parol evidence rule does not apply.

6 Either because the contract is partly oral and partly written thus avoiding the parol evidence rule (see [9.40]) or because it is a collateral contract (see [9.250]).

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The borrowers subsequently sought to introduce evidence of oral representations (and collateral contracts) that allegedly altered the nature of the written loan agreement.

The High Court found in favour of Equuscorp, emphasising the importance of the parol evidence rule and the need for contractual certainty. The Court said:

> The respondents, each having executed a loan agreement, each is bound by it. Having executed the document, and not having been induced to do so by fraud, mistake, or misrepresentation, the respondents cannot now be heard to say that they are not bound by the agreement recorded in it. The parol evidence rule … proceeds from the premise that a party executing a written agreement is bound by it. Where parties enter into a written agreement, the Court will generally hold them to the obligations which they have assumed by that agreement. Different questions may arise where the execution of the written agreement is contested; but that is not the case here. In a time of growing international trade … this is not a time to ignore the rules of the common law upholding obligations undertaken in written agreements. The obligations of written agreements between parties cannot simply be ignored or brushed aside.

Further, the Court rejected the argument that the contract should be regarded as partly written and partly oral (thereby avoiding the parol evidence rule) with the oral statement being a collateral contract. The oral statement alleged by the respondents contradicted the terms of the written loan agreement. If there was an earlier oral consensus, it was displaced and the parties' agreement was recorded in the signed document.

2. The relative importance of the statement. The more important the statement in the context of the contract, the more likely it is to be regarded as a term. In *Van Den Esschert v Chappell* [1960] WAR 114, a case that we discuss at [9.310] in relation to collateral contracts, the purchaser of a house (before signing a contract for the purchase of a house) asked the vendor whether there were any white ants in the house. On receiving an oral assurance that there were none, the purchaser signed the contract that contained no reference to the absence of white ants. The Full Court of the Supreme Court of Western Australia decided that the oral statement was indeed a term. The Chief Justice said:

> I would think that on the purchase of a house … an enquiry regarding the presence of white ants was most important … and gets an affirmative answer … it was intended to be made a part and parcel of the contract and was to be regarded as a term.

3. The time the statement was made. The less time that has elapsed from the making of the statement to the time the agreement was made, the more likely it is that the statement is to be regarded as a term.

4. The language used. A statement made during the pre-contractual negotiations is more likely to be regarded as a term where the language of the parties is suggestive of contractual or promissory intent. Words such as "promise", "warrant", "guarantee", "terms and conditions" and the like are of this ilk. On the other hand, as the following case illustrates, where a party uses the language of opinion or speculation it is more likely that a statement will be regarded as a representation. Also see *JJ Savage v Blakney* (1970) 119 CLR 435 (at [9.270]).

Ross v Allis-Chalmers Australia Pty Ltd

[9.230] *Ross v Allis-Chalmers Australia Pty Ltd* (1980) 32 ALR 561. Ross was negotiating to buy a harvester for commercial use. To be successful, he needed to be able to harvest around

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120–130 acres per day. He was looking at a harvester and asked the salesman about its capacity. The salesman, who was experienced in this kind of work, said: "In my experience the best this one could do is 90 acres per day". Ross bought the machine but found it could not do 90 acres per day. He sued for breach of contract, arguing the salesman's statement was a term of the contract. The Court held that the statement was merely a statement of opinion, based on the agent's own experience, and was not intended to be promissory

5. The relative expertise of the parties. If the party making the statement has greater knowledge or experience about the matter than the other party, the statement is more likely to be regarded as a term. The contrasting results in the following two cases illustrate this point.

Oscar Chess Ltd v Williams

[9.235] *Oscar Chess Ltd v Williams* [1957] 1 WLR 370. Williams traded-in his second-hand car to the plaintiff dealers as part payment for a new one. He had described his car as a 1948 Morris, this being the date of the first registration of the vehicle shown in its registration papers. On this basis, the dealers allowed him £290 trade-in. However, eight months later, the dealers discovered that the vehicle was a 1939 model and not a 1948 model, the appearance of the models having remained the same in the intervening years. A previous owner of the vehicle must have fraudulently altered the date in the logbook. The dealers sought to recover £115 as damages, being the difference in value between a 1939 and a 1948 model, on the ground that the defendant's statement constituted a term of the contract. However, the Court decided that Williams did not *promise* that the car was a 1948 model; it was an innocent *misrepresentation* for which damages could not be awarded. Denning LJ said that much depends on the precise words used:

> If the seller says, "I believe it is a 1948 Morris. Here is the registration book to prove it", it is a statement of belief, not a contractual promise. But if the seller says "I guarantee that it is a 1948 Morris …" there is clearly a warranty (promise). The seller is making himself contractually responsible, even though the registration book is wrong … What is the proper inference from the known facts? It must have been obvious to both that the seller had himself no personal knowledge of the year when the car was made … It is unlikely that such a person would warrant the year of manufacture. The most he could do was state his belief.

Dick Bentley Productions Limited v Harold Smith (Motors) Ltd

[9.240] *Dick Bentley Productions Limited v Harold Smith (Motors) Ltd* [1965] 1 WLR 623. The purchaser of a motor car was told by the vendor during negotiations that the car had travelled only 20,000 miles since being fitted with a replacement engine and gearbox. In fact, it had done approximately 100,000 miles. If the statement were a term of the contract, the purchaser could get damages for breach of contract, whereas if it were a representation, he could only rescind the agreement (and, as we have seen (see [7.390]) a right of rescission is easily lost).

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The Court decided that the statement was a term of the contract. The fact that the vendor was a car dealer who possessed superior knowledge and expertise was obviously a key factor in the decision.

Alternative pathways for oral statements to be effective

Collateral contracts

[9.250] Where the main contract has been reduced to writing, it may not be possible for an oral statement to take effect as a term of the contract because of the *parol evidence rule*. However, where it can be shown that the contract was *not* entirely in writing because the oral statement was *promissory* (ie contractual), the oral statement may be a *collateral* contract.

A collateral contract is usually a single term contract – made in consideration of the party for whose benefit the contract operates agreeing to enter into the main contract – that sets out additional terms relating to the same subject matter as the main contract. Breach of the collateral contract is normally a breach of warranty, enabling the innocent party to sue for damages for breach.

For a statement to be considered a collateral contract, three criteria must be met:

1. the statement must be promissory (ie intended to be part of the contract);
2. it must not be inconsistent with the main contract; and
3. consideration must be provided by the promisee (usually the consideration provided by the promisee is entering into the main contract).

[9.260] The following two cases illustrate the first criterion – a court will only treat a statement as a collateral contract where it is satisfied that the statement was intended to be promissory. *JJ Savage* is a particularly helpful case because the High Court outlined the three alternatives for a person to whom the statement is made.

JJ Savage v Blakney

[9.270] *JJ Savage v Blakney* (1970) 119 CLR 435. Blakney contemplated purchasing a motorboat from boat builder Savage. During the negotiations, Blakney sought the written advice of Savage regarding various engines which might be used to power the boat. Savage recommended an engine, stating that it had an "estimated speed of 15 mph". Relying on this statement Blakney contracted to buy the boat with that engine. The contract contained no reference to the capacity of the boat to achieve any particular speed. When the boat's maximum speed proved to be only 12 mph, he sued Savage for damages for breach of an alleged collateral warranty in respect of the statement concerning the estimated speed.

The Court rejected the claim because it held that Savage's statement, in inducing Blakney to enter the contract, constituted a mere representation and not a collateral warranty. It was not sufficient simply to show that one party would not have entered into the contract but for the statement made by the other. When Savage recommended the engine, the negotiations for the construction of the boat were still incomplete. Accordingly, there were three options open to Blakney:

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1. he could have asked that the speed of the boat be inserted as a *term* of the contract;
2. he could have sought a *collateral promise* from Savage that the boat would attain that speed as a prerequisite to his ordering the boat; or
3. he could have formed his own judgment after receiving Savage's opinion.

In this instance, the Court held that Blakney had formed his own judgment as to which engine he should order for the boat and, as such, no promise (either a term or a collateral promise) was made by Savage. Savage had offered his opinion (non-promissory) and Blakney had accepted it.

[9.280] *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* involved a complex commercial relationship between two large corporations. It demonstrates, again with reference to the first criterion, that the courts are reluctant to interfere when the parties have signed a formal agreement.

Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd

[9.290] *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2016] HCA 26. Crown leased space in its casino to two restaurants. The parties negotiated a new lease. The term of the lease was for five years. The lease required the tenants to undertake major refurbishments of their restaurants. The tenants were concerned that they might not recoup the cost of the refurbishments within five years, so they sought the inclusion of a right to renew the lease for a further five years. Crown was unwilling to agree to such a term. During the negotiations, a representative of Crown assured the tenants that they would be "looked after at renewal time". The tenants entered into the lease and undertook the major refurbishments. Crown refused to renew the lease.

The High Court decided that Crown was not bound by a collateral contract to offer a renewal of the lease. Crown's statement was no more than "vaguely encouraging" and was not "a contractual promise of any kind". There had been no agreement about essential terms of a renewed lease and Cosmopolitan agreed that the statement that it would be "looked after at renewal time" was not a promise to compensate it for any loss incurred as a result of the refurbishment.

Note: see [5.320] for an examination of the promissory estoppel issue.

The following case illustrates the second of the above criteria.

Hoyt's Pty Ltd v Spencer (1919) 27 CLR 133

[9.300] *Hoyt's Pty Ltd v Spencer* (1919) 27 CLR 133. The defendant sub-leased premises to the plaintiff. The written sub-lease contained a proviso entitling the defendant to terminate the agreement on giving four weeks' written notice. However, the defendant promised that he would not terminate the sub-lease unless required to do so by the landlord. When the defendant subsequently terminated the sub-lease on four weeks' notice (and without being forced to do so by the landlord), the plaintiff sued for breach of the oral promise.

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The Court held that the defendant's oral agreement not to terminate the sub-lease was inconsistent with the proviso in the written sub-lease giving him an unqualified right to terminate the sub-lease. The oral agreement was therefore unenforceable.

In the following case, all three criteria were established and a collateral contract was found to exist.

Van Den Esschert v Chappell

[9.310] *Van Den Esschert v Chappell* [1960] WAR 114. A purchaser, before signing a contract for the purchase of a house, asked the vendor whether there were any white ants (termites) in the house. On receiving an assurance that there were none, the purchaser signed the contract. The contract itself contained no reference to the vendor's statement about the termites. Some months after taking possession, the purchaser discovered termites in the house and the premises had to be treated to eradicate them.

The Court decided that the parol evidence rule did *not* apply because there were, in fact, two parts to the contract – a written contract and a collateral warranty that consisted of one term only – a promise that the house was free of termites. The three criteria for a collateral contract were satisfied: the statement was promissory; it was not inconsistent with the main contract; and consideration was present (in this case, the consideration provided by the promisee was entering into the main contract).

Estoppel

[9.320] The doctrine of promissory estoppel that we discussed in Chapter 5 (and which was unsuccessfully argued by the plaintiff in *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2016] HCA 26 (see [5.320])) may apply to grant relief to a party who has relied on an assumption that the other party would modify or refrain from enforcing the terms of a written contract and would suffer detriment if the promisor were permitted to resile from the promise.

Statutory protection

[9.330] It may also be that a person who has relied on a pre-contractual oral statement that does not form part of the written agreement may have a claim for misrepresentation, or misleading or deceptive conduct under s 18(1) the *Australian Consumer Law*.

The interpretation or construction of the contract

[9.340] The interpretation of a contract is the judicial process where the courts resolve disputes about the meaning or effect of the contractual terms: assuming that they are terms and that they have been incorporated into the contract. Such disputes arise for various reasons. A contract cannot cover every contingency; the parties may have used vague or ambiguous language; the parties may have chosen to ignore the risk of an event occurring; or they believe that in the event of a dispute occurring they will "sort it out". Regardless of the reason, when a dispute arises about the meaning of particular terms, it is the courts that have to interpret or construe them.

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There are some broad principles that the courts use when engaged in the interpretation or construction of contractual terms, including exclusion clauses. These principles are significant because of the number of commercial disputes that come before the courts that concern the interpretation of contracts.

1. The construction of a contract's terms requires a determination of what *a reasonable person* would have understood those terms to mean. In most cases, to determine the meaning involves no more than a reading of the contract in the light of its context and with an eye on the commercial *purpose or objects* to be secured by the contract.
2. In the absence of a contrary intention, the courts have moved away from a literal approach towards an approach to the interpretation of contracts that favours the adoption of a "*commercially sensible construction*". Lord Steyn's statement in *Lord Napier and Ettrick v RF Kershaw Ltd* [1999] 1 WLR 756 is consistent with the principles applied in Australia:

   > Loyalty to the text of a commercial contract … read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.

3. The courts may consider, even if there is no apparent ambiguity, the full range of objectively known circumstances that existed at the time the contract was made.[7]
4. Where the wording is ambiguous, the courts consider the application of the *contra proferentem* rule – if there is doubt about the meaning or scope of a term (particularly an exclusion clause) the ambiguity should be resolved against the party who drafted it. The rationale here is that a party who drafts a term with ambiguous language should bear the risk of that language.

The construction of exclusion clauses

[9.350] In the following section, we examine these interpretation issues through the prism of one particular type of term – the exclusion or limitation clause. We choose to focus on exclusion clauses because they are common, controversial and invite examination across a wide range of interesting issues.

Exclusion or limitation clauses are terms in a contract that limit or exclude a party's common law liability for breach of contract but also potentially for negligence. They vary in scope – some seek to:

- exclude liability altogether (eg by stating that no liability is accepted for loss or damage);
- put limits on liability (eg by putting a cap on the amount payable as compensation);
- restrict the types of loss recoverable (eg by excluding loss caused by negligence);
- qualify liability by making it subject to certain requirements (eg by stating that a valid claim for breach must be lodged within 12 months); or
- seek to limit liability for breach by confining the agreement to the written contract (eg by including an entire agreement clause).

7 Note that the High Court in *Electricity Generation Corporation t/a Verve Energy v Woodside Energy Ltd* [2014] HCA 7 said that evidence of surrounding circumstances and commercial purpose can be admitted even where the words are clear and there is no ambiguity.

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In all cases, the operation of exclusion clauses – assuming that they are part of a contract – depends on the construction of the contract. The basic principle of the construction of exclusion clauses is consistent with the approach to interpreting contracts generally: to give effect to the presumed intention of the parties by interpreting the clause in the context of the contract as a whole and giving the words their natural and ordinary meanings. The High Court of Australia in *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 affirmed this approach. The Court said:

> … the interpretation of an exclusion clause is to be determined by construing the clause according to its *natural and ordinary meaning*, read in the light of the *contract as a whole*, *giving due weight to the context in which the clause appears*, including the *nature and object* of the contract, and, where appropriate, construing the clause *contra proferentem* in case of ambiguity.

Exclusion clauses in non-B2B or consumer contracts

[9.360] The basic principle of construction is similar where the clause is contained in non-B2B (business-to-business) or consumer contracts. However, in contracts of this kind, courts are more inclined to apply the *contra proferentum* rule, recognising the imbalance of power, the use of standard forms, and the absence of backup or insurance options. The following three examples and also *Insight Vacations Pty Ltd v Young* provide examples of the judicial attitude to exclusion clauses in such transactions:

- An exclusion clause that excludes liability for breach of *warranty* does not exclude liability for breach of *condition*: *Wallis, Son & Wells v Pratt & Haynes* [1911] AC 394.
- An exclusion clause that excludes liability for breach of *implied* conditions and warranties will not protect a party from breach of an *express* term of the contract: *Andrews Bros (Bournemouth) Ltd v Singer & Co Ltd* [1934] 1 KB 17.
- Where the conditions of sale at an auction provided that "as all lots are available for inspection … the same are sold with all faults, if any", it was held that the meaning of the words "with all faults" was limited to those that would be revealed by an inspection and did not extend to hidden defects: *Elder Smith Goldsbrough Mort Ltd v McBride* [1976] 2 NSWLR 631.

Insight Vacations Pty Ltd v Young

[9.370] *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149. Stephanie Young was on a tour bus in Europe, travelling from Prague to Budapest. When she got out of her seat to get something from her bag, the coach driver braked suddenly causing the plaintiff to fall backwards and suffer injury.

The bus company attempted to rely on the following exclusion clause:

> Where the passenger occupies a motorcoach seat fitted with a safety belt, neither the Operators nor their agents or co-operating organisations will be liable for any injury, illness or death or for any damages or claims whatsoever arising from any accident or incident, if the safety belt is not being worn at the time of such accident or incident.

The High Court decided that the clause did not protect the defendant. Relying on the ordinary meaning of the words in the clause, the clause only applied "where the passenger occupies a motor coach seat fitted with a safety belt". The purported exclusion clause should, therefore, be read as referring *only* to times when the passenger is seated, and not to times when the passenger stands up to move around the coach or to retrieve some item from an overhead shelf as occurred on this occasion.

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Exclusion clauses and liability for negligence

[9.380] It is not uncommon that conduct that is in breach of contract may also constitute negligent conduct. For example, a gym instructor who provides equipment, such as a treadmill, that is so unsafe that a client injures herself when using it in the proper way, may be liable for both a breach of an implied term (that they will properly maintain their equipment) *and* may also be liable in the tort of negligence (for breaching a duty of care they owe to their clients). The question that has arisen is whether an exclusion clause that excludes liability for "any injury howsoever caused" (or similar) is effective in protecting the party relying on it for its breach of contract and/or its negligence.[8]

Many exclusion clauses omit any *express* reference to excluding liability for negligence. It is easy to see why a clause that "excludes liability for negligent or careless conduct in relation to the performance of this contract" is unlikely to be warmly embraced by consumers.

One of the earlier rules of judicial construction was that clear and specific words were necessary if liability for negligence was to be excluded. Therefore, if there is any other ground of liability, apart from negligence, to which the exemption could apply, such as for breach of a term of the contract, the exclusion clause would be interpreted as applying to that ground and would not exclude liability for negligence.

In more recent times, courts consider whether, in the context of the contract and, in particular, to the insurance position, an exclusion of liability for negligence might be seen as an expression of the intention of the parties. In such circumstances, a properly worded exclusion clause need not expressly mention liability in negligence in order to exclude such liability. For example, a clause that excluded liability for "all claims and demands whatsoever in respect of the contract" was held to exclude liability for negligence: *MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd (in liq)* (2010) 31 VR 575.

Alameddine v Glenworth Valley Horse Riding Pty Ltd

[9.390] *Alameddine v Glenworth Valley Horse Riding Pty Ltd* [2015] NSWCA 219. See [9.160] for the facts and discussion concerning the case's incorporation issues. In relation to Glenworth's attempt to exclude liability for negligence, the exclusion clause said:

> As a potential participant, you acknowledge and accept that recreational activities including … quad biking … constitute a dangerous recreational activity … and that participation in the activity involves a significant risk of physical harm or personal injury … Any such injury may result not only from your actions including physical assertion but also from the action, omission or *negligence of others*.

In a decision that reflects the *contra proferentum* rule, the Court decided that, even if the exclusion clause had formed part of the contract between the parties, it was *not* broad enough to extend to Glenworth's negligence. The exclusion clause referred to the "negligence of others", which the Court interpreted to include the negligence of other participants, *not* the negligence of Glenworth itself or its staff. Obviously, a slight change to the wording of the relevant clause

8 A similar question may arise in relation to a clause that, in fact, clearly excludes liability for negligence but where liability for breach of the implied terms is an issue. For instance, in *John Dorahy's Fitness Centre Pty Ltd v Buchanan* [1996] NSWCA 278, a clause that excluded liability for "any injury … arising out of the negligence of the Centre" protected the gym for its negligent conduct. However, the Court found that the balance of the clause did not protect the gym for breach of the implied term that it would provide safe equipment.

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(eg deleting "of others") may have led to a different conclusion (on that particular issue). This decision, like many others we have studied in this chapter, shows that the particular words used in an exclusion clause matter, a lot.

Exclusion clauses and liability for acts done outside the scope of the contract – the four corners rule

[9.400] Midway through the last century, a rule of law developed in England and to a lesser extent in Australia, known as the "doctrine of fundamental breach". The rule asserted that there were some breaches that were so fundamental that no exclusion clause, however cleverly drafted, could exclude liability for loss or damage caused by such a breach. The doctrine is no longer good law. As *Council of the City of Sydney v West* demonstrates, rather than rely on any doctrine of fundamental breach, the Court concluded that an exclusion clause will not cover an act that is neither authorised nor permitted by the main object of the contract. This "four corners rule" was stated by Scrutton LJ in *Gibaud v Great Eastern Railway* Co [1921] 2 KB 426:

> The principle is well-known … that if you undertake to do a thing in a certain way, or to keep a thing in a certain place with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for … you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it …

Council of the City of Sydney v West

[9.410] *Council of the City of Sydney v West* (1965) 114 CLR 481. The plaintiff parked his car at a parking station and received a ticket, which contained the following clause: "The council does not accept any responsibility for the loss or damage to any vehicle … however such loss, damage … may arise or be caused" together with a statement that the "ticket must be presented before taking delivery of the vehicle".

West placed the ticket in his pocket without reading it and parked the car as directed. What happened next is very unusual. A person stole West's vehicle. He did it in this way. He gave his name to an attendant as "Paul Robinson" and said that he had parked his car in the station and, after providing a false address, obtained the issue of a duplicate parking ticket for a vehicle (that was not West's). Having armed himself with the duplicate ticket which, on its face, related to another car, Robinson got into West's vehicle and drove it away without any further inquiry. The High Court decided that the clause did not protect the Council. The release of the car was not merely a negligent act but was a delivery *not authorised* by the contract. The Court said:

> [T]he act of the attendant in permitting "Robinson" to proceed after handing over the duplicate ticket which he had obtained constituted an unauthorized delivery of possession by him to "Robinson" and not a mere act of negligence in relation to some act authorised by the contract of bailment. The fact that the attendant at the exit through which the car was driven was negligent is of no consequence in the case; *the act of delivery was one which was neither authorised nor permitted by the contract* and in our view the appellant was not entitled to be exonerated by the exempting clause.

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> In other words, while the clause may have protected the car park from the consequences of the employee's careless actions (eg if he had accidentally damaged the car while parking it), it did not protect it where the act was "unauthorised", in the sense that the parties would not have intended the act that occurred (eg giving a thief the means to get into the car and drive it away).

Exclusion clauses and commercial contracts

[9.420] Because consumers are, to a significant extent, protected by statute from the effect of exclusion clauses in standard form contracts, the courts generally take the view that the parties to commercial contracts can look after their own interests and that the inclusion of an exclusion clause may be a valid and efficient way of allocating risk in such contracts. For this reason, in the event of a dispute about the meaning of words used, exclusion clauses are construed like any other contractual term – objectively. The question is what a reasonable businessperson would have understood its meaning to be, giving words their natural and ordinary meaning by reference to "text, context and purpose". The following case illustrates the point, showing that if the words used permit the result, even significant and unusual losses can be protected against.

Photo Production Ltd v Securicor Transport Pty Ltd

[9.430] *Photo Production Ltd v Securicor Transport Pty Ltd* [1980] AC 827. Securicor contracted to provide a night patrol service to the plaintiff's factory. While one of Securicor's employees was on patrol at the factory one night, he deliberately started a small fire by throwing a match onto some cartons. The fire got out of control and ultimately destroyed a large part of the factory. The plaintiff sued Securicor for damages on the ground that they were liable for the act of their employee. Securicor relied on an exclusion clause in the contract which provided that "under no circumstances" were they to be:

> responsible for any injurious act … by any employee of the company unless such act … could have been foreseen and avoided by the exercise of due diligence … nor … any loss suffered by the customer through … fire … except … as … solely attributable to the negligence of the company's employees acting within the course of their employment.

The House of Lords' decision marked a shift in favour of party autonomy, particularly in commercial contracts; courts should simply determine what the parties agreed to and interpret accordingly. Thus, although Securicor was in breach of their obligation to operate their service with due and proper regard to the safety and security of the plaintiff's factory, the exclusion clause was clear and unambiguous and effectively protected Securicor from liability. The House of Lords said:

> in commercial matters generally, where the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said … for leaving the parties free to apportion the risks as they think fit and for respecting their decisions.

Some courts have suggested a narrower construction of an exclusion clause may be warranted, which can involve the rejection of words, indeed whole provisions, if they are inconsistent with the main purpose of

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the contract. But the prevailing position, endorsed in the following case, is that an exclusion that denies the "main purpose" of a contract will still be effective *if that is its true construction*.

Darlington Futures Limited v Delco Australia Pty Ltd

[9.435] *Darlington Futures Limited v. Delco Australia Pty Ltd* (1986) 161 CLR 500. Darlington Futures was a commodities broker. It entered into a contract with Delco, a company seeking to engage in futures trading for tax minimisation purposes. Darlington was not authorised to trade at its own discretion or operate a discretionary account. It did engage in 'day trading' that involved leaving Delco exposed to the market for one day in the hope of making profits. Without authority from Delco, some contracts were left open for periods in excess of a day, causing Delco to suffer significant losses. When sued the broker relied upon the following exclusion clauses:

> 6 The Client … acknowledges that the Agent will not be responsible for any loss … arising from trading by the Agent on behalf of the Client. The Client … acknowledges that the Agent will not be responsible for any loss arising in any way out of any trading activity undertaken on behalf of the Client whether pursuant to this Agreement or not …
>
> 7 (c) Any liability on the Agent's part or on the part of its servants or agents for damages for or in respect of any claim for damages for or in respect of any claim arising out of or in connection with the relationship established by this agreement or any conduct under it or any orders or instructions given to the Agent by the Client, other than any liability which is totally excluded by paragraphs (a) and (b) hereof, shall not in any event (and whether or not such liability results from or involves negligence) exceed $100.

The Full Court of the Supreme Court of South Australia considered that cl 7(c) by its terms had no application to claims arising out of conduct which was outside the scope of the agreement and the relationship between the parties established by it. In a unanimous decision the High Court reversed the Full Court's decision. It said:

> This is to place a more restrictive interpretation on the clause than its language will naturally bear … A claim in respect of an unauthorized transaction may nonetheless have a connection, indeed a substantial connection, with the relationship of broker and client established by the agreement. We are unable to discern any basis on which cl.7(c) can be construed so as not to apply to such a claim.

The Court stressed the importance of "construing the language of (an exclusion clause) in the context of the entire contract of which it forms part" and "giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause *contra proferentum* in cases of ambiguity". The Court held that clause 6 could, on its terms, only operate to protect the appellant where any trading activity was carried out *with authority*. Clause 7, by referring to any claims "in connection with" the relationship established by the agreement was, however, wide enough to allow Darlington to limit its damages notwithstanding the unauthorised nature of the trading. In the result, clause 7(c) operated to limit the liability of Darlington to $100 in respect of each of the unauthorised contracts.

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Online contracting

[9.440] One of the (economic) consequences of COVID-19 has been the extraordinary growth in online transactions. There is a strong sense that consumers' preference for the online world has outlived the virus.

For that reason, in Chapter 3, we considered issues concerning the *formation* of online agreements (see [3.580]). In this part, we consider the incorporation issue in relation to online agreements. We consider two common types of online agreements: "click-wrap" and "browse-wrap" agreements. Click-wrap agreements generally present the terms of contract that are offered (almost always by the online provider, a supplier of goods, services or information) and ask the website user to indicate that they acknowledge and agree to the website provider's terms by clicking an online "button", usually with words such as "I agree" on the button. The website user clicks on the acceptance button immediately following the terms, and this would usually indicate that the website user has seen the terms, or at least has clear notice of them, and has accepted those terms. Extending the principle in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52, clicking on the acceptance button operates in the same way as a signature and indicates that the person accepts the terms and is bound by them, regardless of whether or not they have read or understood them.

Browse-wrap agreements are similar except that the terms of contract are not on the page where the website user indicates their agreement – the terms of the contract are on another webpage or website and the user is able to access those terms through visiting, or linking, to that other page or site. These agreements are more difficult to enforce because there are often questions about whether or not the user has agreed to the terms and whether the terms are incorporated into the contract. In contrast to click-wrap agreements, in browse-wrap agreements there is often no evidence that the user is aware of the terms as the terms are located on another webpage or site. In these circumstances, the question revolves around whether reasonable notice was given of the terms such that the user can be said to have agreed to the terms. Again, the common law principle established in *Olley v Marlborough Court Ltd* [1949] 1 KB 532 should apply, requiring the court to consider whether the website, app, or other online provider has taken reasonable steps to draw the terms to the notice of the user. This will require the court to review the facts as to how and when the notice of the terms located on another webpage or site was drawn to the user's attention.

The expressions "click-wrap" and "browse-wrap" have not been used in any Australian case to date. However, in *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450, the Federal Court accepted the position that contracts are binding when the user clicks the appropriate icon. In this case, users entered into contracts by clicking a series of icons to purchase tickets for a concert.

Implied terms

[9.480] In most cases, there is more to a contract than the express terms in the written or oral agreement. Nearly all contracts – from the simplest to the most complex – also include some implied terms. Consider even the simple purchase of a take-away cup of coffee: at most, the express terms include the type of coffee and the price. Nothing is said about the coffee being a typical temperature, or even that it be fit for human consumption: these gaps are filled by implied terms.

Terms may be implied by the courts *ad hoc* or on a factual basis (implied "in fact") so that the particular contract "works" as intended, or they may be implied in law (by common law or statute) because of the particular class of contract. Terms may also be implied by custom or trade usage.

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Terms implied by law – implied "in law"

[9.485] Terms can be implied under both the general or common law and statute. Under the general or common law certain terms are implied in various *types* of contracts. For example, in a contract for the hire of goods, there is an implied condition that the goods will be reasonably fit for the purpose for which they are hired. In a contract for skill and labour and the supply of materials, as in the case of a contractor who carries out repairs, there are implied terms that reasonable care and skill will be exercised in the performance of the work and that the materials used will be reasonably fit for the purpose intended. The terms implied in a contract at common law can be excluded by the parties.

Statutes also increasingly imply terms into certain classes of contract. For example, in consumer, employment, residential tenancy and in sale of land contracts, terms are implied by statute. The *Australian Consumer Law*, which we examine in detail in Chapter 13, provides for statutory guarantees in contracts for the supply of goods and services to consumers. These are not technically implied terms – they apply by virtue of the statute and remedies for their breach are statutory, rather than contractual – but they are to similar effect, and they replace a prior regime of equivalent statutory implied terms. Importantly, statutory implied terms override the common law so, although the parties under the common law of contract are generally free to make a contract on any terms they choose, a statute can imply terms to which they have not agreed (and often, depending upon the statute, they cannot be excluded).

Terms implied by the court – implied "in fact"

[9.490] Terms which may be implied by the court also include terms implied in particular contracts to give business efficacy to contracts, called terms implied "in fact".

[9.500] Whether through oversight or poor drafting or because, in complex commercial contracts, every possible contingency that may affect the operation of the contract cannot be predicted, the courts may be asked to imply a term or terms that make the contract work (ie to give it "efficacy"). Certainly, where the courts can "save" a contract by implying an appropriate term *in accordance with the presumed intention of the parties*, they will do so. The most frequently cited test for determining whether a term should be implied in a contract is as follows:

> *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": *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206.

The Moorcock is the seminal case on "business efficacy".

The Moorcock

[9.510] *The Moorcock* (1889) 14 PD 64. The defendant wharfies (waterside workers) contracted to allow the plaintiff to use their jetty to unload his ship. The ship was damaged at low tide by settling on a ridge of hard ground which lay beneath the river mud. It was held that the defendants were liable for the damage since the parties must have intended to contract on the basis that the berth would be safe for the plaintiff's ship at low tide. And, of the two contracting parties, it was clear the jetty owner was in the much better position to verify the safety of the berth. They were thus in breach of an implied term requiring them to take reasonable care to

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ascertain the condition of the berth and "either have it made reasonably fit for the purpose or inform the persons with whom they have contracted that it is not so".

In the words of Bowen LJ: "[I]n 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 businessmen".

[9.512] In *BP Refinery* the Privy Council identified the five criteria that must be met for an implication in fact to occur. These criteria have been approved by the High Court on many occasions, including in *Codelfa Constructions* (see below at [9.520]). But the presence of the criteria does not alter the fact that terms implied in fact are, Bowen LJ said, intended to give effect to the *presumed intentions of the parties* – in other words, the courts are engaged in an exercise of construction or interpretation where the basic question is simple: what was the intention of the parties?

BP Refinery (Westernport) Pty Ltd v Hastings Shire Council

[9.515] *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1978) 180 CLR 266. BP Refinery operated an oil refinery in the Shire of Hastings, in southwestern Victoria. BP Refinery and the Shire of Hastings had entered into a rating agreement, which provided BP with a reduced rate of local government taxes in return for BP's commitment to significant investment in the area. The agreement was intended to last for the lifetime of the refinery. However, BP decided to restructure its Australian operations and in December 1969 wrote to the Shire of Hastings stating "I hope I may assume that there will be no difficulty over transferring" the rights and privileges including the Rating Agreement to BP Australia Ltd. That the Rating Agreement would transfer was apparently so obvious to BP that it did not wait to hear the position of the Shire of Hastings before transferring the assets to BP Australia Ltd. BP claimed that the benefits of the rating agreement should continue despite the sale. The issue was whether a term could be implied into the contract that would allow BP to transfer the benefits of the agreement to BP Australia Ltd. The case was ultimately decided by the Privy Council which stated that terms could only be implied in fact into a contract if certain very stringent conditions were met:

1. It must be reasonable and equitable. The term must be reasonable and fair to *both* parties;
2. It must be necessary to give business efficacy to the contract. This requirement is usually understood to mean that the term must be necessary to make the contract "workable" or, without it, the contract would be unworkable or would operate in a manner that would defeat the intentions of the parties;
3. It must be so obvious that "it goes without saying". Thus, if an officious bystander had suggested the term to the parties at the time they made their contract, they would have agreed to it without demur;
4. It must be capable of clear expression. The term must be capable of being clearly expressed or able to be precisely formulated; and
5. It must not contradict any express terms of the contract. The term should be consistent with the existing terms of the agreement.

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> In applying these principles, the majority held that the term that the Supreme Court implied – that the agreement would end once BP ceased to be liable to pay rates on the property – was not necessary to give business efficacy to the Rating Agreement and that it was wholly unreasonable to limit the ability of the BP group to make changes in its corporate structure. The identity of the particular member of the BP group that benefited from the Rating Agreement could not have been important to the Shire of Hastings. Instead the Court implied an entirely different term permitting the assignment of the rights within the BP group.

In *Codelfa* the High Court was asked to decide if a proposed implied term was "so obvious" that if it had been suggested as an express term when the contract was being negotiated the parties would have said "Oh, of course!" As we will see, this requirement was not satisfied, and the relevant term was not implied.

Codelfa Construction Pty Ltd v State Rail Authority of NSW

[9.520] *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337. Codelfa Constructions contracted with the State Rail Authority to build tunnels for a new railway. Under the agreement, Codelfa had to complete the contract in 130 weeks. The parties contracted on the common assumption that the company would be able to work three eight-hour shifts per day, six days a week. This in fact occurred until an injunction was obtained by a resident restraining the company from working from 10 pm to 6 am (with no work to occur at all on Sundays). As a result, Codelfa asked the court to imply a term in the agreement granting a reasonable extension of time.

The High Court declined to imply such a term. Codelfa had to prove that the term was necessary to make the contract work (and not just rescue Codelfa from a difficult position) and was "so obvious that it goes without saying" (ie if the parties had known what was to happen when making the contract, they would have agreed to the express term that was now sought to be implied). Codelfa could not persuade the Court of this.[9] Mason J said:

> [T]here remains an insurmountable problem in saying that "it goes without saying" that had the parties contemplated the possibility that their legal advice was incorrect and that an injunction might be granted to restrain noise or other nuisance, they would have settled upon the term implied by the Court of Appeal … This is not a case in which an obvious provision was overlooked by the parties and omitted from the contract. Rather it was a case in which the parties made a common assumption which masked the need to explore what provision should be made to cover the event which occurred. In ordinary circumstances, negotiation about that matter might have yielded any one of a number of alternative provisions, each being regarded as a reasonable solution.

The High Court of Australia recently considered the circumstances in which terms can be implied in fact in informal contracts.

9 Note however that the High Court found that the changed circumstances brought about by the injunction frustrated the contract: see [11.420].

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Realestate.com.au Pty Ltd v Hardingham

[9.530] *Realestate.com.au Pty Ltd v Hardingham* [2022] HCA 39. Hardingham is a professional photographer and sole director of Real Estate Marketing Australia Pty Ltd (REMA). REMA entered into informal oral agreements with real estate agencies to supply photographs and floor plans of residential properties for the purpose of marketing the sale or lease of those properties. It was understood by REMA that the agents would upload the photos and floor plans to realestate.com.au, a real estate listings site operated by Realestate.com.au Pty Ltd (REA). When uploading content to realestate.com.au, the agents were required to agree to REA's terms and conditions of use (REA Terms). The REA Terms required the agents to licence to REA the use of content uploaded and further permitted REA to sub-licence the content as it desired. REA granted a licence to RP Data Pty Ltd, which operates a data and analytics property platform that includes information on property sales and rentals, including images for particular properties. RP Data then reproduced some of REMA's photos and floor plans for use on its platform. REMA sued RP Data in the Federal Court for copyright infringement. RP Data joined REA to the proceeding as a respondent. The trial judge found there was an implied term in the agreements between REMA and the agents which authorised the agents to sub-licence the works to REA in accordance with the REA Terms. This included an authorisation for REA to grant a further sub-licence to RP Data. The decision was reversed on appeal to the Full Court of the Federal Court. REA and RP Data then appealed to the High Court.

The High Court found in favour of REA and RP Data – there was no copyright infringement since their use of the copyright works was authorised due to an *implied licence* in the agreement between REMA and the agencies. This implied licence permitted the agencies to supply the copyright works to REA in accordance with the REA Terms. The REA Terms also authorised REA to grant a sub-licence to RP Data to use the works. The High Court confirmed that the rights and liabilities of parties under a contract – whether formal or not – are to be determined objectively according to the "outward manifestations" of the parties' intentions (rather than their subjective intentions). When assessing the terms of an informal contract the court looks to the parties' words and conduct and asks "what reasonable people with knowledge of the background circumstances then known to the parties would be taken by their words and conduct to have agreed".

In this case, the High Court decided that a reasonable person in the position of the parties would have known that one of the very purposes of the applicants providing the photos and floor plans to the agencies was so that the agencies could provide them to REA. In doing so, the agencies had no real choice than to accept the REA Terms, which included the requirement that the agencies provide a licence to REA to use the photos and floor plans indefinitely and to provide these to third parties (such as RP Data) by way of a sub-licence.

This decision makes the clear the need to follow a two-step approach when assessing the need to imply a term in fact in informal contracts:

1. *Identifying the express terms of a contract.* The express terms must be identified (through the parties' communications and conduct) before the test for implied terms can be applied. In this case, the High Court concluded that there was no express term in the contract concerning a licence to use the photos and floor plans.

2. *Identifying the implied terms.* The identification of an implied term occurs by *inference from all the circumstances and the application of the BP Refinery criteria*: the term must

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be reasonable and equitable, capable of clear expression, non-contradictory of the express terms of the contract, give business efficacy to the contract, and it must be so obvious that "it goes without saying". For informal contracts, flexibility is particularly important and the general focus will be upon both the reasonable and equitable and the business efficacy criteria.

Terms implied by custom or trade usage

[9.540] Where parties have contracted in a particular trade, the customs or usages of that trade may be implied into the contract. In *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur (Australia) Ltd* (1986) 160 CLR 22, the Court set out the criteria for implying terms by custom or trade usage:

1. There must be evidence that the custom relied on is so notorious that everybody in the trade enters into a contract with that usage as an implied term. It must be uniform, reasonable and certain as to its content.
2. A term will not be implied into a contract on the basis of custom or trade usage where it is contrary to the express terms of the agreement.
3. The test is objective – persons may be bound by a custom or trade usage notwithstanding the fact that they themselves had no knowledge of it.

British Crane Hire v Ipswich Plant Hire

[9.550] *British Crane Hire v Ipswich Plant Hire* [1975] QB 303. Both parties were in the business of hiring out plant (industrial) machinery. The defendant, Ipswich Plant Hire (IPH), was doing some work on some marsh land and urgently required a special crane so it contacted British Crane Hire (BCH). Unfortunately the crane, driven by a BCH driver, sank down in the marsh land. It was accepted that this was not the fault of either party. However, it was an expensive operation to recover the crane and BCH sued to recover the costs of reclaiming and repairing its machine. The contract between the parties was concluded over the phone. A copy of the terms and conditions of hire was then handed to IPH on delivery of the crane, although it had not read or signed it. The contract specified that the risk remained with the company that hired the machinery (IPH).

The Court decided that the *express* term relating to risk was *not* incorporated into the contract because reasonable notice of it had not been given to IPH who was unaware of it at the time the contract was made. However, the Court *implied* the term into the contract by custom or trade usage. Both parties were in the business of plant hire and it was common knowledge, to them and in the industry, that such terms applied in the trade.

Implied duty to cooperate

[9.560] It is important to note that the law will imply, in appropriate circumstances (a) a positive obligation to cooperate and do all things required to enable the other party to have the benefit of the agreement – the *performance duty* and (b) a duty not to hinder or prevent the fulfilment of the purpose of the express promises made in the agreement – *the prevention duty.*

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In practice, the present state of the law in Australia is that a duty of co-operation is *not* implied in all commercial contracts. Rather, *the duty is implied only where it meets the usual tests for an implied term*, including that is *not inconsistent* with the express terms of the contract. Further, where it exists, *the duty applies only to acts which are necessary* to securing the performance of fundamental obligations under the contract and which are *reasonable*. Such necessity can be demonstrated only where, "(without) the implication, the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps seriously undermined; or the contract would be deprived of its substance, seriously undermined or drastically devalued": *Bensons Property Group Pty Ltd v Key Infrastructure Australia Pty Ltd & Ors* [2021] VSCA 69.

In *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, the High Court endorsed the general principle, explained its limits and the need to balance the interests of the parties:

> It is easy to imply a duty to co-operate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract. It is not quite so easy to make the implication when the acts in question are necessary to entitle the other contracting party to a benefit under the contract but are not essential to the performance of that party's obligations and are not fundamental to the contract. Then the question arises whether the contract imposes a duty to co-operate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done, even if the consequence of his decision is to disentitle the other party to a benefit. In such a case, the correct interpretation of the contract depends…not so much on the application of the general rule of construction as on the intention of the parties as manifested by the contract itself.

Even where a duty of cooperation is found to exist, it is subject to the principle of *reasonableness*. For example, in *Secured Income*, refusal of Secured's offer to take the lease of unlet building spaces was held to be reasonable, due to justifiable apprehension as to the financial capacity of Secured to perform the obligations of the intended lease. And, in another example, in *Wolfe v Permanent Custodians Limited* [2013] VSCA 331, the Victorian Court of Appeal said the duty of cooperation did not require a financier to assist the borrower to set up a direct debit facility so that the borrower could make repayments in that manner. This was because there was more than one possible way of making repayments, with the Court saying:

> What was required under the 1 December 2009 arrangement was that all future repayments be made on time. It was not fundamental to the performance of this obligation that the payments be made by direct debit, although it is clear that that mode of payment is what was contemplated by the parties.

Again, to demonstrate the strict limits placed on the implied duty, where there is no underlying contractual promise, a party will not be in breach of an implied duty to cooperate, even if its actions tend to destroy the subject matter of the agreement. Thus, in *Impact Funds Management Pty Ltd v Roy Morgan Research Ltd* [2016] VSC 221 the Court said that in the absence of an express promise to extend the lifts in an office building, there was no obligation on a lessor to cooperate with the lessee's initiative to do so or to invite lift contractors who had been invited to tender for the replacement works to provide an estimate of the cost of extending the lifts, even if this would be to the convenience of the lessee.

Finally, the duty of cooperation is not a tool to soften the impact of "hard, even harsh or unconscionable" contractual provisions: *Council of the City of Sydney v Goldspar Australia Ltd* [2006] FCA 472, where Gyles J said that the "duty of cooperation does not extend to being nice or even reasonable to the other party". Similarly, it is also not a way of inserting a duty of good faith into the contract.

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In essence, despite its limits, the implied duty to cooperate can in some instances be a powerful supplement to the express terms of a contract, in ensuring that a commercial party is not denied the fundamental benefits for which it contracted, by the actions of the other party. The following three cases provide examples where the Court did imply a duty to cooperate.

Fitzgerald v FJ Leonhardt Pty Ltd

[9.570] *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215. A land owner engaged a company to construct and drill a minimum of three water bores. The landowner refused the driller's claim for unpaid fees for a number of reasons, including the fact that construction and drilling were not authorised by the required legislative permits.

When the dispute went to the High Court, the Court that it was possible for the contract to be performed without contravening the Act. In so far as the contract was performed in contravention of the legislation, the contravention was the consequence of failure by the owner to observe requirements imposed upon him … *each party to the contract agreed to do all that was necessary on its part to enable the other party to have the benefit of performance of the contract, so that there was an implied undertaking by the owner to procure the grant of any bore construction permits required under the Act for the construction and drilling of the bores by the driller.*

ACT Cross Country Club Inc v Cundy

[9.580] *ACT Cross Country Club Inc v Cundy* [2010] FCA 782. The parties had been in dispute about the running of the Canberra Marathon. Finally, they entered a settlement agreement that allowed Cundy to organise it. However, the roads authority refused to allow the event unless and until the parties confirmed in writing that their dispute had been settled.

The Federal Court held that the Club had an implied duty to inform the roads authority that the dispute had settled. Perram J described the duty to cooperate in performance and the duty to cooperate in ensuring contractual benefit as constituting "a basic principle of commonsense".

Adaz Nominees Pty Ltd v Castleway Pty Ltd

[9.590] *Adaz Nominees Pty Ltd v Castleway Pty Ltd* [2020] VSCA 201. Castleway Pty Ltd provided services to the TPC Group. Castleway was entitled to payment of a service fee, calculated as a percentage of TPC's *annual taxable income*. TPC made a $20 million charitable donation that had the effect of significantly reducing its annual taxable income and thereby the amount of the service fee. Castleway claimed that on the basis of implied terms the service fee should not be reduced as a result of the donation.

The majority of the Court of Appeal held that TPC breached an implied duty to cooperate by making the donation that deprived Castleway of "a substantial part of its remuneration" and "seriously undermined … the benefit for which Castleway had contracted". Castleway and TPC were both obliged to do all things as were necessary to enable the other party to have the benefit of the agreement, and not to hinder or prevent the fulfilment of the purpose of the express promises made in the agreement.

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Further reading

See also contract texts listed at the end of Chapter 2.

Tutorial activities

1. "In order to determine the rights and obligations of the parties to a contract, it may be necessary to consider both incorporation and interpretation issues." Explain, in broad terms, what is meant by "incorporation" and "interpretation".
2. What is the difference between the express and implied terms of a contract?
3. What is the parol evidence rule? What is its purpose?
4. What is the difference between a representation and a term of the contract? Discuss the guidelines that may be used to distinguish between the two. Refer to *Equuscorp* (see [9.225]), *Ross* (see [9.230]) and *Oscar Chess* (see [9.235]).
5. What is a collateral contract? What are the criteria that must be met? In *JJ Savage* (see [9.270]), how could the vendor's statement have been classified? What conclusion did the Court come to? When he buys his next boat, what would you advise Blakney to do to protect himself?
6. In *Crown* (see [9.290]), why did the Court decide that no collateral promise had been made by Crown? Compare the decision in *Van Den Esschert* (see [9.310]).
7. In relation to incorporation, what is the effect of a signature on a contract that contains an exclusion clause? Refer to *Toll v Alphapharm* (see [9.60]) in your answer. In light of the rule applied in *Toll*, please explain the decision in *Le Mans v Illiadis* (see [9.90]).
8. In the absence of a signature, what is required before a term may be incorporated into a contract? Refer to *Thornton* (see [9.130]), *Oceanic* (see [9.140]), *Olley* (see [9.150]) and *Alameddine* (see [9.160]) to illustrate your answer.
9. Why was the notice not considered reasonable in *Interfoto* (see [9.190]), but was considered reasonable in *Robertson* (see [9.210])?
10. What is the general approach of the courts when they are called upon to interpret the meaning of the term(s) of a contract? Refer to the *contra proferentum* rule and the High Court decision in *Insight Vacations* (see [9.370]).
11. Can an exclusion clause protect a party from the consequences of negligent conduct? Refer to [9.380] and the decision in *Alameddine* (see [9.390]).
12. An exclusion clause cannot operate to protect a person who has acted outside the "four corners" of the contract. Explain with reference to *Sydney City Council v West* (see [9.410]) and *Photo Productions v Securicor* (see [9.430]).
13. What is the difference between a term that is implied in fact and one that is implied in law?
14. What is the difference between a term that is implied in fact in a formal contract and one that is implied in an informal contract? Use *BP Refinery* (see [9.515]) and *Hardingham* (see [9.530]) as your guides.

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15. In *Codelfa Constructions* (see [9.520]), explain why Codelfa was unsuccessful in its attempt to imply a term into its contract with the State Rail Authority.

16. David and his wife Hillary want to buy a unit in the country "off the plan" (ie sign a contract to purchase before the house is built). They receive a brochure from a property developer, Dolphin Estates Pty Ltd, advertising a housing development called "Lake View Retreat". The brochure contains a number of statements, including the following:

- "all the appliances throughout the unit, in the lounge, kitchen and laundry, will be European brands";
- a recreation centre, including a gym and swimming pool, will be built; and
- all units are three-bedroom units with the main bedroom having an ensuite with spa.

Classify the statements in the brochure as representations or terms.

17. Pedro bought a holiday house with an ocean view. During his meeting with the vendor, Maria, prior to sale, Pedro asked if there was any serious rust affecting the steel frames in the house as a result of the salt air. Maria assured him that she had the property inspected by engineers before she listed it on the market, and their report did not identify any structural rust. Pedro noticed that the contract of sale did not mention an engineer's report but was happy with Maria's oral assurance. After living in the house for six months, Pedro discovers significant rust to the steel frame, caused by the salt air. Advise Pedro whether he could seek damages for breach of contract.

18. Tony has for many years operated a successful clothing manufacturing and importing business. His business continues to grow and thrive and he decides to extend his factory premises. Tony discusses with Brett, a building contractor, his requirements and they sign a lengthy written contract in which the factory extension will be constructed of solid brick with a slate roof and wooden window frames clearly listed as specifications.

The written contract does not mention a completion date. However, it is agreed orally that the extension be completed by 1 April 2024. Time of completion is critical and Tony advises Brett that finishing on time is very important because Tony needs to accommodate the new cutting machines that he has purchased and meet the growing number of orders submitted by clients, including local retailers.

It is 1 September 2024 and Brett has not yet completed the building extension. Additionally, Tony discovers that the terms of the contract relating to the materials used for construction of the roof and the window frames are not being complied with. The roof is being constructed of tin and the window frames are aluminium. The building itself is solid brick.

Advise Tony of any contractual remedies he may have.

19. Sophia operates a large transport business. Drillers Ltd is a large oil and gas rig operator in Western Australia. Drillers Ltd has used Sophia many times in the past. This time, Drillers Ltd asks her whether she would transport some very expensive rigging equipment from Perth to Broome. Sophia agrees to do the job for an agreed price. She is aware of the value of the equipment she is carrying. When Sophia arrives to pick up the goods, she provides an employee (as usual) with an invoice that he signs. On the reverse side of the invoice, there is the following exclusion clause:

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> All goods are handled, lifted or carried at the owner's risk. The Contractor [Sophia] shall not be liable for any loss or damage of property and/or goods of the Client [Drillers Ltd] whether such damage was caused by any act, default or negligence on the part of the Contractor, and/or his servants.

Although Drillers Ltd has used Sophia many times, the company is unaware of the existence of the exclusion clause. All goes well on the long drive until Sophia decides to spend a couple of hours swimming with the dolphins at Monkey Mia. Unfortunately, she leaves the truck unattended and, during her swim, some of the equipment is stolen. Drillers Ltd seeks your advice as to whether the exclusion clause will prevent it from claiming damages from Sophia.

20. Jill is off to the opera at the State Theatre. She drives her Mercedes to the underground car park owned and operated by Bilsons Ltd. Outside the car park is a large sign that says "Take ticket from machine. Ticket contains terms. Pay when leaving. No liability accepted". Jill does not read the sign. As she approaches the boom gate, an automatic ticket machine issues her with a ticket with these words printed on it:

> CONDITIONS OF PARKING
>
> It is a condition of the issue of this ticket that vehicles are parked on these premises at the car owner's risk. The car park proprietors accept no responsibility for loss or damage to vehicles in the parking area whether caused by negligence or in any way whatsoever.

When she returns to get her car, it is missing. An hour later, it is found in a nearby river. The police confirm that an employee of the car park broke into the car, somehow managed to start the engine and drove off. When he had finished joy-riding, he abandoned the car in the river. Not only is the car beyond repair but Jill's laptop, valued at $5,000, is also destroyed.

Jill seeks your advice as to whether the exclusion clause will prevent her from claiming damages from Bilsons Ltd.

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Chapter 10

Operation of the Contract

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Introduction

[10.10] In this chapter, we consider the operation of a contract, that is, the rights and liabilities of the parties under a contract. In particular, the following topics are considered:

1. privity of contract;
2. liability for inducing a breach of contract; and
3. assignment of contracts.

Privity of contract

General principle

[10.20] The doctrine of privity of contract means that a contract cannot confer rights or impose obligations on any person except the parties to the contract.

In certain circumstances, rights and liabilities may pass to persons other than the original parties either by their own act (ie by assignment) or by operation of law: see [10.140].

The basic principle, then, is that "a person not a party to a contract may not himself sue upon it so as directly to enforce its obligations": *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460. Thus, if A contracts with B to do something for the benefit of X (eg install air-conditioning in X's apartment), X cannot sue A if A fails to fulfil their promise to B.[1]

1 This is no longer the position in *Queensland* where by virtue of s 55 of the *Property Law Act 1974* (Qld), a promise by A to B for valuable consideration to do something for the benefit of a third-party beneficiary X is, on acceptance by X, enforceable by X against A. There is a similar provision in Western Australia (*Property Law Act 1969* (WA), s 11(2), (3)) and the Northern Territory (*Law of Property Act 2000* (NT), s 56(6)).

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Tweddle v Atkinson

[10.30] *Tweddle v Atkinson* (1861) 1 B & S 393. The plaintiff was engaged to the daughter of William Guy. Guy promised the plaintiff's father that he, Guy, would pay the plaintiff a sum of money upon the marriage. Guy did not do so and when he died Tweddle sued the executor.

The Court decided that Tweddle failed because of the doctrine of privity; he was not entitled to enforce a promise which had not been made to him. Wrightman J said:

> … it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit …

[10.40] However, although a third person, X, cannot sue A on A's promise to B (that would benefit X), B may have a remedy against A for breach of contract. The application of these principles can be seen in *Beswick v Beswick*.

Beswick v Beswick

[10.50] *Beswick v Beswick* [1968] AC 58. B transferred his coal merchant business to his nephew who promised in return to pay B an annuity during B's lifetime and after B's death to pay a slightly smaller annuity to B's widow. Following B's death, the nephew failed to make the promised payments to B's widow. The widow brought an action against the nephew both in her personal capacity and as administratrix of B's estate.

The House of Lords held that the widow could not succeed in her personal capacity, as she was not a party to the contract between B and his nephew. However, it was further held that she could succeed in her capacity as B's administratrix, that is, as the legal representative of B who would have been entitled to sue the nephew for breach of contract. Accordingly, in her capacity as administratrix of B's estate, B's widow obtained an order for specific performance of the nephew's promise to B to pay her the annuity.

[10.60] In *Clarence City Council v Commonwealth of Australia*, a third party attempted to avoid the strict application of the doctrine of privity.

Clarence City Council v Commonwealth of Australia

[10.70] *Clarence City Council v Commonwealth of Australia* [2019] FCA 1568. Two Tasmanian councils went to the Federal Court seeking declarations that they were each owed the benefit of contracts to which they were not parties. The contracts concerned two leases, between the Commonwealth of Australia, on the one hand, and the operator of Hobart and Launceston airports, on the other. Each lease provided that the airport operator would pay rates to the councils in respect of those parts of the airport sites where "trading or financial operations" occurred. There was no *statutory* obligation for the airport operators to pay rates as the land was Commonwealth land and, as such, was exempt. The payment was *ex gratia* (in other words by favour, or a gift).

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There was no dispute between the contracting parties – the Commonwealth and the airport operators. The dispute arose because the parties to the leases and the councils disagreed about how much of the airport sites were being used for "trading or financial operations" and about how to calculate the *ex gratia* rates to be paid. The councils argued that a greater area of the airport sites was "rateable" than the area argued by the airport operators.

The Court did not need to interpret the contract (ie decide what parts of the airport were "rateable") because it decided that, at a threshold level, the councils lacked "standing" (ie they could not bring the action to the court). They were third parties to the lease and the doctrine of privity of contract prevented third parties from enforcing contracts.

The agency and trust "exceptions" to the doctrine of privity

[10.80] There is an (apparent) "exception" to the doctrine of privity of contract where it can be established that a contracting party entered into the contract as an agent of a third-party principal. Once the contract is made, the agent acting within his or her authority withdraws and the contract is, in fact, between the principal and the third party with the agent having no rights or obligations under the contract. This is not a true exception to the privity doctrine because the agent has, at all times, when acting within his or authority, been acting for the third-party principal: *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1980) 144 CLR 300.

The insurance exception to the doctrine of privity

[10.90] The one genuine exception to the privity rule, affecting those named in an insurance contract, was introduced in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107.[2] However, the real importance of the case lies in its potential application to other kinds of contracts.

Trident General Insurance Co Ltd v McNiece Bros Pty Ltd

[10.100] *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107. T Ltd entered into an insurance contract with B Ltd, to provide cover against liability in respect of alterations being carried out at the latter's limestone crushing plant. The public liability policy was expressed as extending not only to B Ltd and all its related companies but also to all contractors, subcontractors and suppliers. M Ltd, the principal contractor at the plant, was held liable for injuries sustained by a crane driver employed by one of its subcontractors. M Ltd sought an indemnity under the insurance policy between T Ltd and B Ltd. T Ltd refused the claim on the ground that M Ltd was not a party to the contract and had given no consideration.

The High Court decided that T Ltd was bound to indemnify M Ltd under the insurance policy with B Ltd. The Court was critical of the general operation of the doctrine of privity of

2 Section 48 of the *Insurance Contracts Act 1984* (Cth) effectively abrogated the common law doctrine of privity of contract in its application to insurance contracts to which the Act applies. However, the facts of *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 occurred before the coming into operation of the Act, and hence the Act did not apply to the facts of the case.

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contract, as well as its particular application to insurance contracts, but Gaudron J went further than the other members of the Court in saying that in her view:

> [A] promisor who has accepted an agreed consideration for a promise to benefit a third party comes under an obligation to the third party to fulfil that promise and the third party acquires a right to bring an action to secure the benefit of that promise.

On the other hand, the dissenting minority were firmly of the view that the "settled and fundamental" doctrine of privity was too entrenched to be overturned by the Court.

[10.110] The exception to the privity doctrine in relation to insurance has been incorporated into the *Insurance Contracts Act 1984* (Cth). Section 48(1) provides:

> Where a person who is not a party to a contract of general insurance is specified or referred to in the contract, whether by name or otherwise, as a person to whom the insurance cover provided by the contract extends, that person has a right to recover the amount of his loss from the insurer in accordance with the contract notwithstanding that he is not a party to the contract.

Property law exception to the doctrine of privity: land covenants

[10.120] Another genuine exception to the doctrine of privity exists in the law of property. Benefits and liabilities attached to the land by way of restrictive covenants "run with the land" and may benefit or bind successors in title to that land. Thus, A may sell land to B who covenants not to develop a high-rise building on the land. Provided the covenant is properly registered, anyone who subsequently purchases the land will be bound by the covenant, even though they were not a party to the original contract.

Liability for inducing a breach of contract

[10.130] Although no right of action in *contract* generally exists against a person who is not a party to a contract, the law will make a third person liable to an action, in *tort*,[3] if, intentionally or recklessly and without sufficient justification, they induce a party to a contract to commit a breach of their existing contractual obligations. For example, if Paris Saint Germain were to induce Kylian Mbappe to break his new contract with Real Madrid and return to PSG, it would be committing the tort of inducing a breach of contract (at least, hypothetically, under Australian law). However, to induce a party to *lawfully* terminate a contract (by, for instance, providing the required notice under the contract) does not constitute inducing a breach of contract.

Interference with contractual rights may be justified where there is a just cause for the interference. However, it is generally difficult to establish such justification.

Assignment of contracts

[10.140] As we have seen, a party must be a party to the contract in order to enforce rights or incur liabilities under a contract. However, in certain circumstances, the *original* contracting parties may assign their rights and liabilities to assignees who may then enforce, or be bound by, the terms of the agreement.

---

3 A civil wrong, based on infringement of a legal right, independent of an agreement. We study the law of tort in Chapters 15 and 16.

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Relevant definitions

[10.150] The relevant definitions are:

- **Assignor:** An assignor is the one who assigns or transfers contract rights and liabilities to another.
- **Assignee:** An assignee is the one to whom an assignment is made.
- **Assignment:** An assignment of a contract is the act by which one party to a contract substitutes another person for themselves as a party to that contract either for some or all the purposes of the contract.

Assignment of liabilities

[10.160] A person liable under a contract may not transfer their liability to another person without the consent of the other party to the contract and the consent of the "transferee".

Assignment of rights

[10.170] Although at one time, at common law, debts and other choses in action[4] were not assignable, they are now made assignable by virtue of special statutory provisions in force in each State. A cause of action may be assigned where the assignee has a genuine commercial interest in enforcing the assignor's claim.[5]

Assignments by statute

[10.180] Statutory provisions[6] allow an assignee of a debt or other legal chose in action to take action against the debtor in the assignee's own name provided that:

1. the assignment is absolute and not merely by way of charge;[7]
2. the assignment is in writing; or
3. express notice of the assignment is given in writing to the debtor.

In order for notice of an assignment to be effective, it is necessary that the debtor actually receive such notice. Accordingly, where notice of an assignment of a loan was sent by post by a bank but not received by the debtor, there was no effective notice of the assignment. Further, a generalised message on the bank's website that the majority of its loans were transferred was not effective notice to the debtor of assignment of his loan to a third party: *Goodridge v Macquarie Bank Ltd* (2010) 265 ALR 170.

The assignee takes their rights "subject to equities" (ie subject to any rights that other people may have). In essence, the assignee cannot obtain a better title than that of the transferor.

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4 A chose in action is a personal property right to an intangible object (most commonly a debt but also a right to unpaid wages or right to a share of an estate).

5 A cause of action is a legally recognised wrong (eg a breach of contract or a claim in tort for negligence) that creates the right to sue.

6 *Conveyancing Act 1919* (NSW), s 12; *Property Law Act 1958* (Vic), s 134; *Property Law Act 1974* (Qld), s 199; *Law of Property Act 1936* (SA), s 15; *Property Law Act 1969* (WA), s 20; *Conveyancing and Law of Property Act 1884* (Tas), s 86; *Civil Law (Property) Act 2006* (ACT), s 205; *Law of Property Act 2000* (NT), s 182.

7 In this sense, a charge is merely an encumbrance on the asset – the assignor/creditor is still the "owner" of the debt. There is no true and genuine transfer of rights to enforce the debt to the assignee.

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Assignments in equity

[10.190] Equity applies different rules from those of the common law relating to assignment and, accordingly, assignments of choses in action are recognised and enforced.

Assignment by operation of law

[10.200] Another form of assignment occurs in the transfer of the rights under a contract by operation of law. The most common example involves death.

[10.210] The estate of a deceased person passes to their executor or administrator on a grant of probate or letters of administration.[8] The liabilities of a deceased person under contracts made by them also devolve on the executors or administrators, but the extent of the liability is limited to the assets that come into their hands as such executors or administrators.

Contracts for personal services not assignable

[10.220] A contract with a person having special qualification is of a personal nature and probably would not be able to be performed by another person to the satisfaction of the other original party. For this reason, it is not assignable. For example, a contract between publisher and author is not assignable.

Further reading

See contract texts listed at the end of Chapter 2.

Tutorial activities

1. What is the doctrine of privity? Is it not the same as the principle that a contract is not enforceable by a person who has not provided consideration?
2. It is understandable why a third party should not have obligations imposed on them. Do you think this justifies application of the doctrine of privity?
3. Why should a third party not be able to enforce agreements made for their benefit? Discuss with reference to the position of the local councils in *Clarence City Council v Commonwealth of Australia* (see [10.70]).
4. In what sense does *Trident General Insurance Co Ltd v McNeice Bros Pty Ltd* (see [10.100]) allow a third party to enforce a benefit from a contract to which they are not privy? Does *Trident* provide a general exception to privity of contract, or only an exception in the insurance context? What does statute law now have to say about third parties and insurance contracts?

8 A grant of probate is issued to the executor(s) named in the last valid will of the deceased. Letters of administration are issued when the deceased person has died intestate (without a will) or the will they have made is not valid (eg the will is improperly executed).

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5. Atlas Ltd, an insurance company, and Bose Ltd, an insured, agree that the insurance policy taken out by Bose Ltd will cover Bose's employees/agents/contractors. Colin, a contractor of Bose, is injured and makes a claim under the policy. Advise Colin whether the doctrine of privity will prevent him from making a claim under the policy.
6. Harry assigns to Kerry his right to receive $1,000 from Bruce. For this to be a valid assignment, is it necessary for him to notify Bruce? What if Kerry has not provided consideration?

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Chapter 11

Performance and Breach of Contract

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Introduction

[11.10] Up until this point, we have considered disputes about contract formation, about consent and about the contents of the contract. We are now looking at disputes that arise in the final stage of a contract – disputes about how a contract is terminated.

Termination normally (and happily) occurs when the parties have performed all their obligations under the contract. However, there are situations where one or both parties have a right to terminate before the contract has been completely performed (or performed at all). In this chapter, we examine the circumstances in which a right to terminate can occur:

- by performance;
- by an agreement between the parties;
- by breach of a condition or a repudiatory breach;
- by frustration; and
- by operation of law.

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Termination by performance

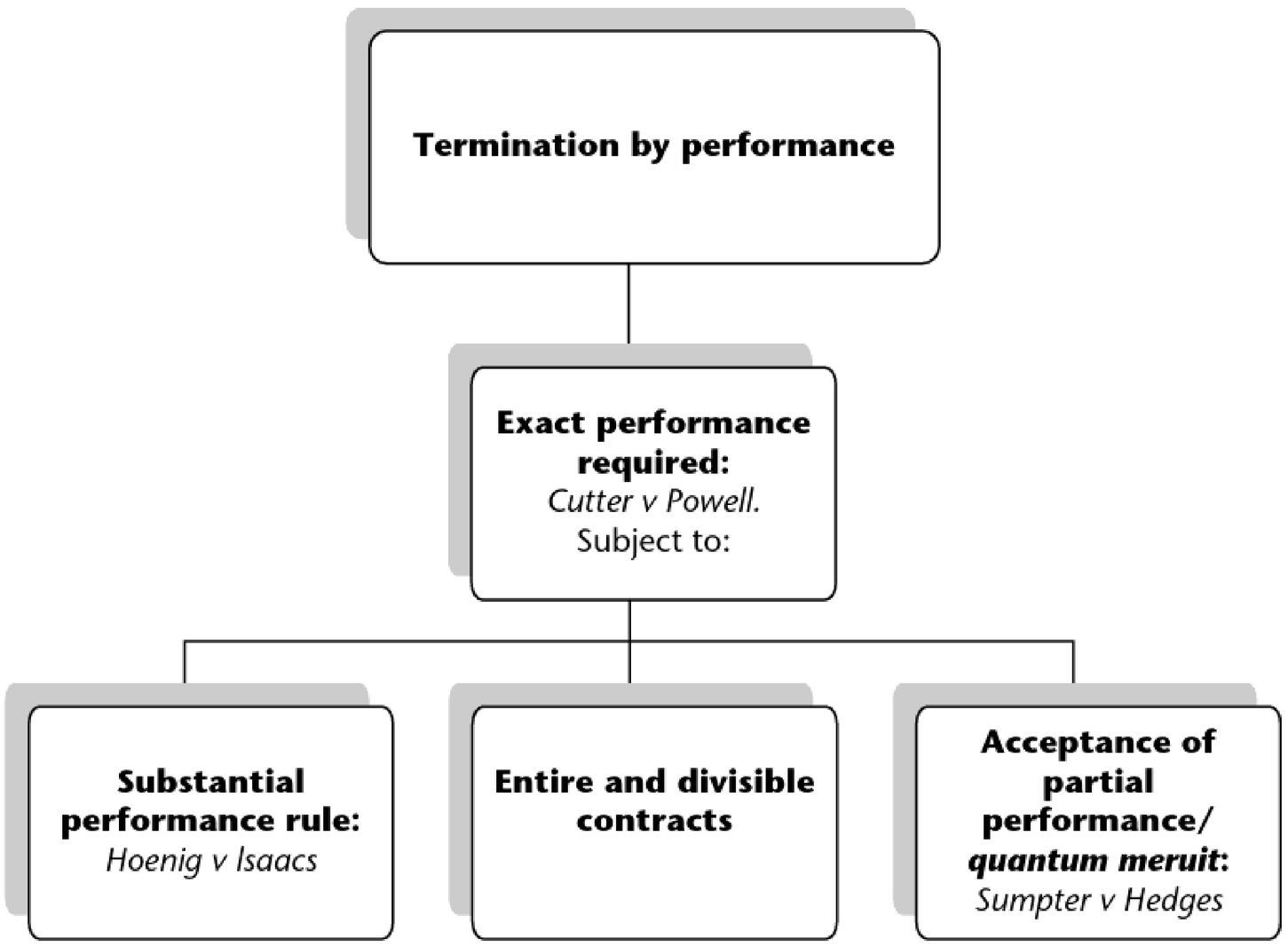
Exact performance required

[11.20] In every contract, each party undertakes certain obligations; when each party has performed those obligations, the contract is terminated by performance. For example, assume X and Y have contracted for the construction of a saltwater swimming pool with landscaping that includes the planting of a dozen evergreen shrubs. The price of $60,000 is payable in instalments. X completes the job as required and Y pays the agreed price. The contract is terminated by performance. But things do not always go so smoothly. X may say the job is done and claim the final instalment only for Y to argue that (a) the installed filter is only suitable for a chlorine not a saltwater pool – cost to fix $8000; and (b) that X has planted deciduous trees (that drop leaves into the pool) instead of the promised evergreen shrubs – cost to fix $500. As a result, Y refuses to pay the final instalment until the problems are fixed.

The general rule is that *exact performance* is required before a contract is terminated by performance. If performance is not exact, the party at fault is not entitled to demand that the other party perform their part of the deal. So, the builder cannot claim the final instalment until he does what he was obliged to do under the contract. Similarly, if A promises to deliver to B 20 cases of tinned apricots with 30 tins in each case and, instead, delivers cases with only 24 tins in some of the cases, B may reject the entire order and sue for any loss that the breach has caused: *Re Moore Ltd and Landauer* [1921] 2 KB 519.

The exact performance rule can lead to unfair outcomes, and the courts have developed some important exceptions to the exact performance rule, insofar as claims to payment are concerned. It is important to note, however, that exact performance remains required in order for a contract to be terminated by performance.

Figure 11.1 : Termination by performance



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Where the contract is entire or divisible

[11.30] An *entire* contract is one where the whole contract must be performed before the party is entitled to claim the *contract price*. Where the parties agree that the performance of the contract is to proceed in stages or instalments (with payment due at the completion of each stage), the contract is a *divisible* contract, allowing a party to enforce the payment of each instalment after each stage is performed. Our swimming pool contract is an example of a divisible contract (as payment was by instalments).

It is a matter of construction depending on the particular facts and an objective assessment of the intentions of the parties as to whether a contract is entire or divisible, but, as a rule, a contract will be entire when it provides for a single payment at the end and, conversely, will be regarded as divisible when the payment for goods or services is divided into stages. For example, such arrangements are typically in place for construction contracts where progress payments are paid as each stage is completed, in most technology contracts at the completion of each phase of the design and installation, and for the sale of goods delivered in instalments.

Where there has been substantial performance

[11.40] The doctrine of *substantial performance* allows a party who has "substantially" performed their obligations to claim the full contract price, subject to the right of the innocent party to deduct the amount required to bring the contract up to an exact performance. Whether the performance by one party constitutes substantial performance depends on all the circumstances, including the nature of the contract, the nature of the defects and the relative cost involved in rectifying or completing the contract. The following two cases explain why, in our swimming pool example, X's failure to install the correct filter would probably prevent a claim that there has been substantial performance, whereas the failure to plant evergreen shrubs would not.

Hoenig v Isaacs

[11.50] *Hoenig v Isaacs* [1952] 2 All ER 176. Hoenig, an interior decorator, agreed to decorate and furnish Isaac's flat for £750. The terms of payment were "net cash as the work proceeds, and balance on completion". Isaacs made two payments of £150. Sometime later, Hoenig advised that the work had been completed and claimed the balance of £450. Isaacs paid £100 but refused to pay the balance, alleging faulty design and workmanship. He argued this was an entire contract that had not been exactly or substantially performed and therefore Isaacs was not entitled to recover any money. It would have cost £55 to bring the work up to the exact performance level.

The Court accepted this was an entire contract but, as there had been substantial performance, Hoenig was entitled to recover the contract price less the amount required to bring it up to the exact performance standard.

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Bolton v Mahadeva

[11.60] *Bolton v Mahadeva* [1972] 2 All ER 1322. Bolton agreed to install central heating and to perform certain other work in Mahadeva's house. The contract price for the installation and work was a lump sum of £560. The central heating was installed but there were defects in the work that would cost £174 to fix.

The Court held that Bolton was not entitled to be paid. The defects in workmanship were of such a character (very poor workmanship) and amount (in proportion to the contract price) that the Court held that he had not substantially performed the contract. In other words, unlike in *Hoenig*, Bolton had so poorly performed his contractual obligations (measured by the amount, as a proportion of the contract price, it would have taken to bring the contract up to exact performance level) that he was not entitled to any payment at al.

Where the innocent party has accepted partial performance

[11.70] A person who *voluntarily* accepts a benefit under a contract (such as a load of timber for a house construction that is not in accordance with the contract specifications) must pay on a *quantum meruit* ("the deserved amount") basis rather than the full contract price. If the innocent party could retain the benefit that they have received, without compensating the party in breach, the innocent party would be "unjustly enriched".[1] The court determines what is the fair and reasonable value of the work performed. The *quantum meruit* principle is not applicable where the innocent party has no choice but to accept the goods (eg as in *Bolton v Mahadeva* where it would have been difficult to retrieve the central heating unit – a very large item in the early 1970s – without seriously inconveniencing the householder) or, as *Sumpter v Hedges* illustrates, where the guilty party abandons the contract.

Sumpter v Hedges

[11.80] *Sumpter v Hedges* [1898] 1 QB 673. Sumpter agreed to build two houses for Hedges for a lump sum of £565. It was an entire contract (though some progress payments had been made for work completed). However, when Sumpter ran out of money, he abandoned the contract leaving Hedges to finish the project. Hedges used materials left by Sumpter. Sumpter claimed payment on a *quantum meruit* basis (ie he wanted compensation for the value of the work he had carried out and materials used).

The Court decided that Sumpter was not entitled to a *quantum meruit* payment because he had abandoned the project. Hedges therefore retained the benefit of the work done (though, as noted above, he had made some progress payments).

1 This is an action in restitution. Unjust enrichment is the basis of restitution. It allows a plaintiff, independent of contract, to recover the value of a benefit (as in the example) that has been conferred on the other party before termination or repudiation or was conferred pursuant to a void or unenforceable contract. See further at [12.430].

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Termination by agreement

Termination under the original contract

Express power to terminate

[11.90] It is also possible for *the contract itself* to expressly give a party the right to terminate the contract in the event of a breach. If the contract itself confers such a right (and the termination procedure specified in the contract is followed), there is no need to consider the common law requirements for termination; the express term is sufficient. For example, a contract OF loan with a bank may provide that the bank can terminate its contractual arrangements with the borrower in the "Event of Default" by the borrower and declare that the moneys lent are immediately due and payable. A further common illustration, though not related to a breach of contract, is a stipulation in the contract that it will terminate "at the expiration of a specified period", for example, a contract for a lease for a specified number of years. At the end of that time, the lease will automatically come to an end, again pursuant to the contract's express terms.

Implied right to terminate

[11.100] Where a contract does not contain a provision as to its duration, the court may imply a right to terminate on giving reasonable notice to the other party. For example, where a distributorship agreement was silent as to its duration, it was held that a period of six months' notice of termination was appropriate. The contract would otherwise have been of indefinite duration: *Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd* (1988) 14 NSWLR 438.

Termination by subsequent agreement

[11.110] A contract is the result of agreement and may be terminated by means of a further agreement. A subsequent agreement must itself be a valid contract in order to terminate or modify a prior contract. A void agreement cannot rescind or vary a valid earlier contract.

A subsequent agreement may either:

1. cancel the original contract; or
2. vary the terms of the original contract.

Cancellation of the original contract

[11.120] Both parties may agree to cancel the original contract. However, such an agreement can only operate as a termination of the original contract where there is still something to be done by each party under the original contract. In such a case, the promise by one party to abandon their rights under the original contract would be given in consideration of the other party's promise to do likewise.

[11.130] If one party has completed their undertaking and the other has not, then the only method of cancelling the contract is by agreement under seal (a deed, which does not require consideration) to release the defaulting party *or* by giving some further consideration for the release by the party still under an obligation.

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Contingent conditions

[11.140] The parties to a contract may make the *performance* of their contract conditional upon the occurrence of a specified event (a condition precedent) or conditional upon an event not occurring (a condition subsequent).

Condition precedent

[11.150] A condition precedent is an event which must occur *before* performance under a contract becomes due.[2] If the condition precedent does not occur, one or both parties may terminate the contract. However, it is important to understand that there is no breach of contract (and therefore no remedy) because neither party has *promised* that the event will occur. For example, one of the conditions in a contract for the sale of land may state that performance of the contract is subject to a planning certificate being issued by the Council permitting the construction of a factory. If the Council does not issue the required certificate, the purchaser may terminate (without breaching the contract).

Condition subsequent

[11.160] A *condition subsequent* is a condition contained in a contract, the occurrence of which will terminate the contract. The parties' obligation to perform the contract is immediately binding but will come to an end should the event specified in the condition occur. For example, an insurance contract may specify that if the owners lease the property to a third party, the contract of insurance is to immediately terminate. Or a contract between the government and transport operators may specify that in the event that certain timetable targets are not met, the contract may be terminated.

Time for performance and the right to terminate

[11.170] The failure of a party to comply with a "time clause" is often a cause of contractual disputes. Generally speaking, in the absence of a "time is of the essence" clause, or some other indicator in the contract, a mere failure to comply with a time requirement does not entitle the other party to terminate. Conversely, the failure to exercise a *right* within the time period – as in an option agreement – will generally prevent the right being exercised. In other words, in circumstances like that, time is "of the essence".

If it is expressly or impliedly agreed by the parties that time is "of the essence" (or it is made so by one party giving notice to the other that time is now "of the essence"), the time clause has the status of a condition, allowing the innocent party to terminate if it is not complied with. In other circumstances, where time is not "of the essence", and the time clause is not precisely observed, the term will be regarded as a warranty, allowing the other party to sue for damages where there is a breach but not allowing the other party to terminate the contract.

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2 Note that the discussion about conditions precedent (and cases such as *Masters v Cameron* [1954] 91 CLR 353) at [3.470] concerned a condition precedent to the *formation* of the contract. The discussion here concerns conditions precedent to *performance* of a contract. That is, the agreement has been made but its performance is dependent on the condition precedent occurring.

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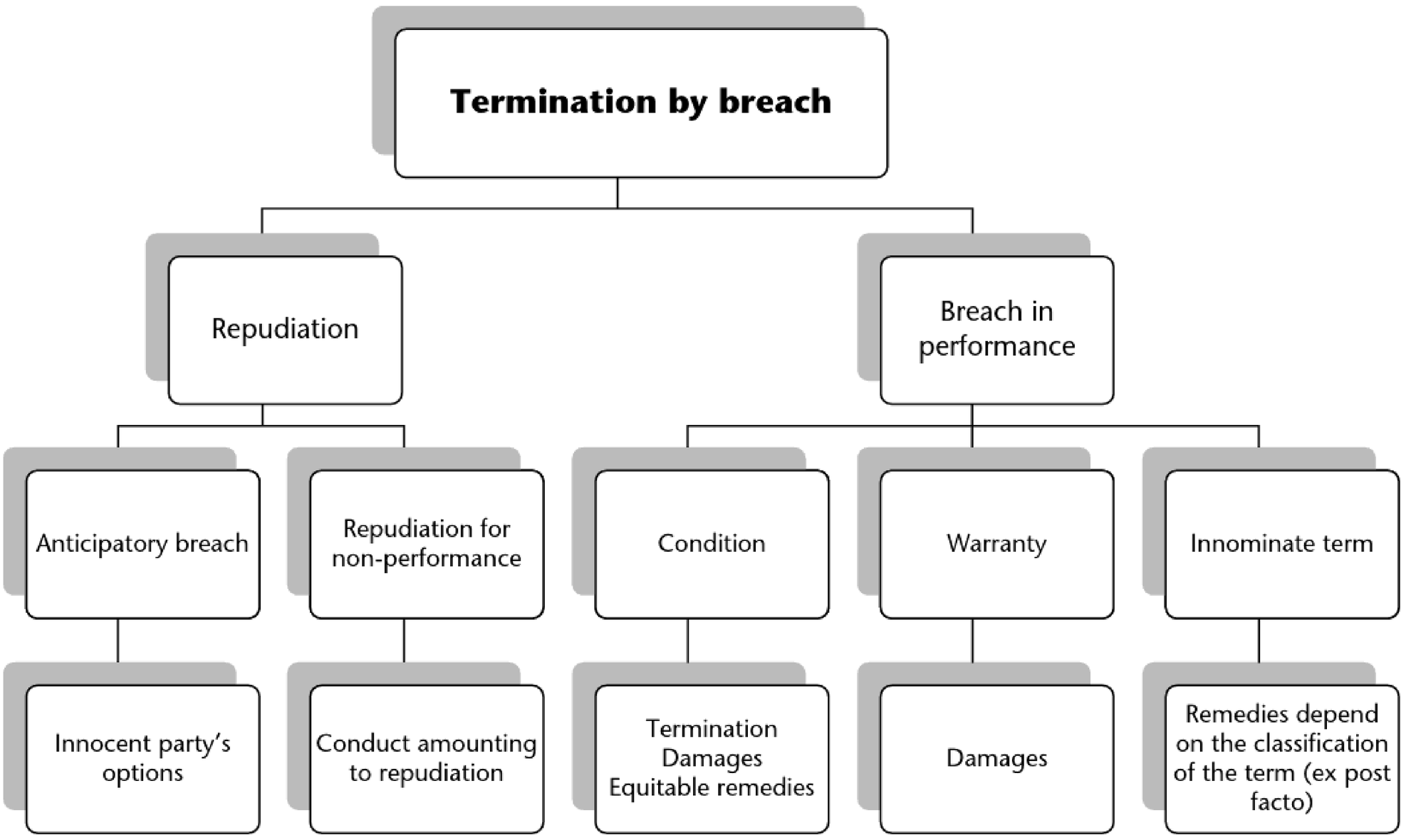
Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd

[11.180] *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623. In October 1985, Capalaba agreed to lease a shop in a shopping mall to Laurinda for six years. Under the contract, Capalaba agreed to do what was necessary to put the lease into registrable form and then register it (or forward to Laurinda for registration) by the time Laurinda went into possession "or so soon thereafter as is practicable". Laurinda went into possession in December 1985. In March and again in August of 1986, Laurinda sought the lease but did not receive it. Finally, in September, Laurinda terminated the lease, arguing that the inordinate delay in registration amounted to a repudiation of the lease.

The High Court agreed that Capalaba's conduct amounted to a repudiation because it showed an intention to perform the contract in a manner that was substantially inconsistent with its obligation (to put the lease into a registrable form at the time Laurinda went into possession or soon after). Laurinda therefore had the right to terminate.

Termination by breach

Figure 11.2 : Termination by breach



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[11.190] In this part, we discuss the circumstances in which one party is entitled to terminate the contract as a result of the other party breaching the contract. There are two basic situations to consider in relation to the right to terminate:

1. where one party *repudiates* the whole contract or such a substantial part of it that it has the effect of depriving the innocent party of substantially the whole of the benefit of the contract; and
2. where one party breaches a *condition* of the contract or an *intermediate term* of the contract that has the effect of depriving the innocent party of substantially the whole of the benefit of the contract.

Repudiation of the contract

[11.200] Courts will not readily find that a contract has been repudiated. A right to terminate for repudiatory conduct is limited to conduct that evinces "an unwillingness or an inability to render substantial performance of the contract" or "an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations": *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61. As is evident from this description, the bar for a contract's repudiation is high.

[11.210] The most obvious case of repudiation is where a party to a contract expressly or impliedly states or indicates that they are unwilling or unable to perform the contract. Furthermore, a party may repudiate a contract by putting it out of their power to perform the contract. For example, where S and B have agreed on the sale of a painting but, before the contract is performed, S sells the painting to a third person, the contract between S and B would be repudiated.

It is not every indication that a party is unwilling or unable to perform their obligations that amounts to repudiatory conduct – the unwillingness or inability must relate to the whole contract or at least to a condition of the contract so that the failure to carry out the obligation went to the root of the contract, thus depriving the innocent party of substantially the whole of the benefit of the unperformed part of the contract.

Whether conduct is repudiatory depends on the objective conduct of the repudiating party, not their subjective state of mind. Thus, it is irrelevant that the party repudiating the contract believed that their action was justified under the contract. In *Shevill v Builders Licensing Board* (1982) 149 CLR 620, Gibbs CJ stated that:

> [A] contract may be repudiated if one party … evinces an intention no longer to be bound by the contract … or shows that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way … In such a case the innocent party is entitled to accept the repudiation, thereby discharging himself from further performance, and sue for damages.

Progressive Mailing House Pty Ltd v Tabali Pty Ltd

[11.220] *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17. As a result of a dispute about certain work carried out by the Lessor, the Lessee did not pay the rent for the first two months of the lease and from May 1979 to October 1979. The Lessee persisted in maintaining a false claim that it was under no liability to pay the rent until the work in question was carried out satisfactorily.

The High Court held that, although the failure to pay the rent would not, on its own, evince an intention not to be bound by the contract, the Lessee's action, withholding the rent, persisted

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over a period of several months and coupled with the circumstances relating to other breaches of various maintenance covenants meant that the Lessee had repudiated its obligations under the contract and was therefore liable in damages.

The worm can turn quickly when a party believes, genuinely but falsely, that the other party has repudiated the contract. If the party maintains the false view, they can themselves be regarded as having repudiated the contract. However, it is important to acknowledge that not every wrongful termination can be regarded as a repudiation. A party that wrongly terminates the contract but indicates a willingness to be bound by a learned opinion as to the correct interpretation will not generally be regarded as having repudiated the contract. In *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423, the High Court said:

> No doubt there are cases in which a party, by insisting on an incorrect interpretation of a contract, evinces an intention that he will not perform the contract according to its terms. But there are other cases in which a party, though asserting a wrong view of a contract because he believes it to be correct, is willing to perform the contract according to its tenor. He may be willing to recognize his heresy once the true doctrine is enunciated or he may be willing to accept an authoritative exposition of the correct interpretation. In either event an intention to repudiate the contract could not be attributed to him.

In the following recent High Court decision, one of the main issues was whether a party that acts in compliance with lawful directions from the government can be regarded as having repudiated a contract.[3]

Dyco Hotels Pty Ltd v Laundy Hotels (Quarry) Pty Ltd

[11.230] *Dyco Hotels Pty Ltd v Laundy Hotels (Quarry) Pty Ltd* [2023] HCA 6. The dispute arose from the sale and purchase of a hotel known as the Quarryman's Hotel as a going concern (that is, as an ongoing business operation). Clause 50.1 of the contract required that *"the vendor must carry on the business in the usual and ordinary course as regards its nature, scope and manner"* until completion. However, after signing the contract and seven days before settlement, the NSW Government issued a Public Health Order that came into effect to address COVID-19. It required hotels to be closed to the public and restricted to selling takeaway food and drink. Dyco notified Laundy that because of the Public Health Order, Laundy was not in a position to complete the contract because it was unable to carry on the business in the usual and ordinary course that existed at the time the contract was entered into. Laundy disputed this and served a notice to complete on Dyco. When Dyco did not complete, Laundy terminated the contract, entitling Laundy to keep the deposit and sue for damages. Dyco commenced legal proceedings against Laundy for repudiation of the contract.

The NSW Supreme Court held that Laundy was *not* in breach of the contract and that it had carried on the business as far as it was possible in accordance with the law. Dyco appealed the decision, and the Court of Appeal held that Laundy was *not* ready, willing and able to complete,

3 It is clear that where a party treats the other's compliance with lawful directions as constituting a repudiation of the contract, it runs a serious risk that it will, itself, be regarded as the repudiating party.

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as the Public Health Order rendered Laundy's compliance with its contractual obligation illegal and therefore suspended, meaning that Laundy's notice to complete served as a repudiation of the contract.

The High Court reversed the decision. It held that the Public Health Order (PHO) meant that the vendor was unable to carry on its business in the same way it had at the making of the contract. However, this did not mean it was not in compliance with Clause 50.1. The vendor was obliged to *carry on the business in a way that was lawful and in compliance with the PHO*. Accordingly, it was not in default, and was "ready, willing and able to complete", at the time it served the notice to complete. As time was "of the essence", the purchaser was in breach of the contract, entitling the vendor to terminate the contract, keep the deposit and sue for damages.

In the following case, the NSW Court of Appeal had to interpret a word used in a rental guarantee deed in order to determine if a repudiatory breach had occurred.

OZ International Investment Pty Ltd v Star Moon Investments Pty Ltd

[11.240] *OZ International Investment Pty Ltd v Star Moon Investments Pty Ltd* [2023] NSWCA 148. As part of a transaction by which Oz International Investment Pty Ltd and its sole director, Mr X Yang (the appellants) bought commercial property in Sydney in early 2020, they and Star Moon Investments Pty Ltd (the respondent) entered into a deed of rental guarantee as well as an agreement appointing the appellants as the exclusive managing agents of a property. Under the rental guarantee deed, the appellants were obliged, for a number of years, to make up the difference between the rent *actually* received by the respondent in leasing the property and a minimum *guaranteed* rental amount. However, under clause 3 the respondent was obliged to enter into a lease with any tenant "recommended" by the appellants. From the time the respondent acquired the property until August 2022, the property remained vacant. The appellants did not pay the minimum guaranteed rental amount. In May 2021, the respondent commenced proceedings, demanding payment of the minimum guaranteed rental, arguing that the appellants had, by their conduct, repudiated the agreements. The appellants responded that the respondent was in breach of clause 3 because it failed to enter into a lease with a tenant the appellants had "recommended". The appellants claimed to have "recommended" a number of tenants, referring to several conversations and to emails sent between the parties. They argued that this failure to comply with Clause 3 amounted to repudiatory conduct by the respondent that entitled *them* to terminate the deed.

Both the trial judge and the Court of Appeal found in favour of the respondent, holding that the appellants were required to pay the rental shortfall under the Deed. The Court of Appeal decided that the appellant had *not* actually "recommended" any tenants pursuant to cl 3 of the Deed – despite the appellants' emails and other communications it had never got to the point of a "recommendation" – and therefore that the respondent had not repudiated the Deed; the appellant was unable validly to terminate the Deed.

The following case highlights the importance of a party being able to establish its *own capacity for substantial contractual performance* prior to exercising a right to termination for repudiation by the other party.

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Armada Balnaves Pte Ltd v Woodside Energy Julimar Pty Ltd

[11.250] *Armada Balnaves Pte Ltd v Woodside Energy Julimar Pty Ltd* [2022] WASCA 69. Armada were the owners of the floating production storage and offloading (FPSO), *Armada Claire*. It sued Woodside (the charterers) for wrongful termination (repudiation) of an agreement. Woodside terminated a charter party in March 2016, with more than two years to go before its term expired. At that time, the recently converted FPSO had been moored in the Balnaves oil field off Western Australia, which Woodside operated. In terminating, Woodside asserted that Armada had failed to complete certain operational Endurance Tests satisfactorily and on time, and thereby relied on an *express termination for cause* provision in the charter party. Armada claimed that Woodside had wrongfully repudiated the contract, and, therefore, it purported to terminate, claiming damages exceeding US$280 million. Armada argued that while the charterers had the right to terminate in February 2015, Woodside's subsequent conduct amounted to an *affirmation of the contract* meaning that the right to terminate had been extinguished. Therefore, by purporting to terminate in March 2016, Woodside acted outside its contractual right to terminate for cause.

At trial, the Court held that Woodside's conduct did not demonstrate such an affirmation, and therefore, Woodside had not lost the right to terminate in March 2016. Alternatively, it held that Armada itself had *unjustifiably repudiated the charter party because it had not been ready, willing and able to perform* the Endurance Tests by the time it purported to terminate the contract. The Court of Appeal dismissed the appeal. It disagreed with the trial judge on the question of the affirmation (Woodside did affirm the contract by its conduct after February 2015) but agreed on the issue of Armada's repudiation of the contract.

Anticipatory breach of contract

[11.255] One important part of the law on repudiation concerns what is known as an anticipatory breach. An anticipatory breach occurs when one party, *before the time for performance* is due, indicates by words or actions that they are unwilling or unable to perform their contractual obligations. When this occurs, the innocent party can immediately accept the repudiation, elect to terminate the contract and/or sue for damages. The result is that the party claiming breach does not have to perform its obligations and cannot be liable for not doing so. The reason for allowing a person to elect to terminate ahead of time for performance is clear: it is an efficient use of time, energy and resources to allow a person to terminate a contract immediately when the other party has indicated that their contractual promises will not be performed.

For example, on 1 August 2024, Jackie signs a contract of employment with AI Pty Ltd and is due to begin on 1 January 2025. If she were to inform AI on 1 November 2024 that she has accepted an offer to work at Google's Gemini AI University Division, this is an anticipatory breach (because the breach *anticipates* the time for commencement of the agreement with AI). On 1 November, AI can accept the repudiatory breach, terminate the contract and sue for damages, thus allowing it to get on with life after Jackie.

On the other hand, if an anticipatory breach is *not* accepted by the innocent party, it may eventually become an *actual* breach (on the due date). In that event, the contract remains on foot and the innocent party must perform their own obligations under the contract and has no right to damages unless and until an actual breach occurs. Furthermore, if the innocent party does not terminate for an anticipatory breach, the possibility exists that the repudiating party may be "rescued" prior to the due date, perhaps by the occurrence of a frustrating event, such as Jackie's death or incapacity or a law banning the use of AI at universities. For

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these reasons, the innocent party would usually accept the repudiation and sue for damages for any loss or damage caused by the repudiation. Indeed, in relation to most examples of repudiation, the innocent party has no choice but to accept the repudiation because the repudiating party (eg a construction company) has indicated it is not going to perform the contract (at all or, at least, not in a manner that meets its contractual obligations). There may, however, be particular circumstances where it is in a plaintiff's interests not to accept a repudiation and treat a contract as terminated. For a sale of land contract, for example, it is possible to obtain an order for specific performance – the plaintiff may decide it is better to keep the contract on foot, wait for a breach in actual performance, and seek to obtain an order for specific performance from a court.

Effect of repudiation

[11.260] If a right to terminate as a result of a contract's repudiation arises, the innocent party needs to decide whether to elect to:

- affirm the contract and claim damages for the breach; or
- terminate the contract and claim full loss of bargain damages.

If a contract is affirmed, as it was in *Armada Balnaves Pte Ltd v Woodside Energy Julimar Pty Ltd*, it cannot subsequently be terminated for the same breach (unless the breach is of a continuing nature giving rise to a subsequent right to terminate). Termination requires words or conduct clearly evincing an intention to terminate. An election to affirm will be inferred from conduct, which is consistent only with the continued existence of the contract, such as continued performance.

Breach of the term(s) of the contract

[11.270] The common law does not confer a right to terminate the contract for all breaches of the contract. Whether there is such a right depends on whether the particular term breached is classified as a condition, warranty or intermediate/innominate term. If the term is a condition, there is a right to terminate for *any* breach of that term. If the term is a warranty, a breach of that term does not, in and of itself, allow the innocent party to terminate. If the term is an intermediate or innominate term, the right to terminate depends on the seriousness of the consequences of the breach.

It will be obvious that there is considerable overlap between repudiation and the common law right to terminate for breach of a condition or breach of certain innominate terms. Both may also amount to a repudiation, but as the innocent party has a right to terminate for a breach of a condition and a breach of an innominate term that is sufficiently serious, a finding that the breach is repudiatory will not be necessary.

Breach of a condition

[11.280] A condition is an essential term of the contract, and any breach gives rise to the right to terminate. A term may be classified as a condition by the parties in the contract itself or by the courts when interpreting the contract.

Where the parties label the term a condition

[11.290] An express contractual provision may provide that a term is a condition. However, the mere fact that the parties have used the word "condition" in their contract does not necessarily mean that they have used it in the strict technical legal sense. The court may find that the parties have used the word "condition" in a non-technical sense as simply meaning a term of the contract (recall the common phrase "terms and conditions") and did not intend that breach of the term would have the effect of entitling one party to terminate the contract.

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L Schuler AG v Wickman Machine Tool Sales Ltd

[11.300] *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235. Schuler manufactured certain tools and granted Wickham the sole right to sell them. Clause 7 of the contract, described in the contract as being a "condition", stated that Wickman would send a sales person to each of a list of named customers once a week (making up a total of 1,400 visits in total). Wickman failed to make one of the visits and Schuler terminated the contract for breach of the condition. Wickham argued the term was, in fact, a warranty, breach of which did not give Schuler a right to terminate.

The House of Lords agreed and decided that the term was only a warranty. Lord Reid said the "failure to visit a firm once out of the many times that the contract required was not an irredeemable loss and could be remedied by other means … what the contract deemed a "condition" was not using the word in its strict legal sense since a condition in law is something that is so fundamental to the contract that its breach merits termination … the more unreasonable the result, the more unlikely the parties were to have intended it".

The following case illustrates that some leasing agreements provide that specified terms are essential terms or conditions and that any breach of such terms will be fundamental, allowing for termination.

Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd

[11.310] *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237. Gumland owned a shopping complex. It entered a commercial lease with Duffy Bros. The lease provided that the payment of rent was an essential term. Duffy Bros fell behind in paying the rent and Gumland terminated the lease before the end of its term and sought to recover arrears of rent and loss of bargain damages.

The High Court held that Duffy Bros had breached the lease and that Gumland had a right to claim for rent not paid (by a sub-lessee). The High Court held that normally a covenant to pay rent would *not* be treated as a condition entitling termination. However, as occurred here, it is open to a lessor to provide that the obligation to pay rent *is* an essential term giving the lessor the right to demand loss of bargain damages. In arriving at this conclusion, the High Court supported the view that permits *any and all terms to be stipulated as essential*. The essential clause in question must be viewed not in isolation but in the context of other related terms and the Court did advise that a claim about a term's "essentiality" will be stronger if it can be inferred from reinforcement given by other provisions of the contract.

Where the parties have not labelled the term: the role of the courts

[11.320] Where the parties have not indicated their intention concerning the status of the term, it is for the courts to decide, *as a matter of construction*, how the term is to be classified. Traditionally, the courts, preferring to save rather than destroy contracts, have been cautious about classifying a term as a condition because any breach, no matter how slight, then gives the innocent party a right to terminate the contract. Nevertheless, the court must weigh up a range of factors before arriving at a conclusion as to the status

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of the term. The most important of these is whether the term satisfies the *essentiality* test. The High Court stated in *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 that:

> Whether a term of a contract is essential or not is a question of construction which is to be answered with due regard to the general nature of the contract considered as a whole and to its particular terms … The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor.

In coming to its decision, the court considers the *contract as a whole*, the *surrounding circumstances* and, consistent with the judicial view that it is better if contracts are performed rather than terminated, *whether damages would adequately compensate* the innocent party.[4]

Luna Park Ltd v Tramways Advertising Pty Ltd

[11.330] *Luna Park Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286. Luna Park contracted with Tramways Advertising to display advertising boards on Sydney's trams. Tramways Advertising had stipulated as a term of the contract that "*we guarantee that these boards will be on the tracks at least 8 hours per day throughout your season*". Luna Park said that the term was a condition and, as the boards had not been displayed for 8 hours each day, it refused to pay. Tramways Advertising agreed that the advertising was not on display each day for 8 hours but that it met its obligation by displaying the boards *on average* 8 hours a day.

The High Court said Tramways Advertising had not performed the contract in accordance with its terms. An interpretation based on *average time* was inconsistent with the natural meaning of the words. The term was "so essential to its very nature that its non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all". The essential character of the clause appears from its own terms and from the circumstances in which the contract was made. The words "*we guarantee*" in the contract emphasised the importance of the term.

Associated Newspapers Ltd v Bancks

[11.340] *Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322. Bancks contracted to prepare a weekly drawing relating to a cartoon character, "Ginger Meggs", for Associated Newspapers. It, in turn, promised to present the drawing each week as a full-page feature on the front page of the comic section of its Sunday newspaper. As a result of problems arising from a newsprint shortage, Bancks' "Ginger Meggs" cartoon appeared on page three of the comic section of the newspaper instead of on page one. This occurred on three consecutive

4 In *OZ International Investment Pty Ltd v Star Moon Investments Pty Ltd* (see [11.240]), the Court, by way of *obiter*, said that even if there were an obligation to enter into a lease with a recommended tenant, it was not an essential term of the deed. It had not been described as a condition in the contract and, had there been a breach of the term, an award of damages would have been an adequate remedy.

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Sundays, whereupon Bancks terminated the contract for breach of a condition. Associated News argued that Bancks, in wrongfully terminating the contract, had, himself, repudiated the agreement.[5]

The High Court held that the conduct of Associated Newspapers amounted to a "refusal to be bound by the contract" which entitled Bancks "to treat the contract as discharged". The Court said:

> He was employed as a comic artist and his true work was to produce this weekly drawing … It was what he was really engaged to do … Obviously it was of prime importance to the defendant that there should be continuity of publication so that his work should be kept continuously before the public … and that it should be published on the most conspicuous page … (T)he undertaking … formed a condition a substantial failure in the performance of which would enable the defendant to treat the contract as at an end … [S]uch a failure to perform the condition went to the root of the contract and gave the defendant … the right immediately to treat the contract as at an end.

Bettini v Gye

[11.350] *Bettini v Gye* (1876) 1 QBD 183. Gye, the director of an opera company, contracted for the exclusive services of Bettini as an opera singer for a period of three months. Clause 7 of the contract provided that Bettini would be in London at least six days before the commencement of his engagement for rehearsals. Bettini, through illness, only arrived two days earlier. As a result, Gye refused to accept his services and terminated the contract.

The Court held that cl 7 was a warranty. The failure to attend rehearsals during the six days prior could only affect the theatrical performances during the first week or so of a 15-week engagement. Therefore, Gye could sue for any damages that he suffered but was not entitled to terminate the contract.

Intermediate or innominate terms

[11.360] Whether a term of a contract is a condition or warranty depends on determining the intention of the parties to the contract *at the time the contract was made*. In some cases, however, it is more appropriate to look at the *nature and effect* of the breach in deciding what remedy should be available to the innocent party, rather than simply asking whether the parties intended, at the time of contracting, the term to be a condition or a warranty. Intermediate or innominate terms (the phrases are interchangeable) are mid-way between conditions and warranties: it is not clear from the outset that breach allows or does not allow termination, and instead, the severity of the breach needs to be considered in working out whether termination for breach is allowed.

5 This illustrates the care that needs to be taken when a party elects to terminate a contract for an (alleged) repudiation. If the conduct is judged not to be repudiatory (or a breach of condition), the decision to terminate may backfire and itself constitute a repudiation of the contract: see and *Armada Balnaves Pte Ltd v Woodside Energy Julimar Pty Ltd* [2022] WASCA 69.

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Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd

[11.370] *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1952] 2 QB 26. The plaintiffs chartered (effectively, hired) a ship for a period of two years. A term of the contract required the shipowners to provide a seaworthy ship that was "in every way fitted for ordinary service". They also promised to "maintain her in a thoroughly efficient state in hull and machinery during service". There was a 57-day delay in delivering the ship in seaworthy condition because of the incompetence of the engine room personnel. A further 91 days were likely to be lost because of the need to repair the vessel's engines. In all, it would be 20 weeks before the charterers could sail the ship. They terminated the contract, arguing that this was a breach of the "seaworthiness" condition. The plaintiffs argued that the defendants' actions were a repudiation of the contract (ie a wrongful termination) and sued for damages.

The Court decided that not all contractual undertakings were easy to classify. The breach of some undertakings would always deprive the innocent party of substantially the whole benefit of the contract, enabling the innocent party to terminate. The breach of others would never deprive the innocent party of substantially the whole benefit of the contract, allowing the innocent party to sue for damages only. (These are the traditional categories of conditions and warranties, respectively.) However, in the words of Diplock LJ:

> There are … many contractual undertakings … which cannot be categorised as being "conditions" or "warranties" (at the start) … all that can be predicted is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit (of the contract) … (the undertaking to deliver a seaworthy ship) is one of that large class of contractual undertakings (that could be either a condition or a warranty).

The Court decided that, although the plaintiffs were obviously in breach of their promise to provide a seaworthy ship, this was not a condition because the delays caused by the breach, in the context of a two-year charter, were not so great as to deprive the defendant charterers of the substantial part of the benefit of the contract.

After some uncertainty, the innominate term concept was declared part of Australian law by the High Court in *Koompahtoo*.

Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd

[11.380] *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115. Koompahtoo and Sanpine entered into a joint venture agreement for the development of a large area of land south of Newcastle, NSW. Koompahtoo contributed the land, which had been acquired under the NSW *Aboriginal Land Rights Act*, and Sanpine managed the project. Despite accruing costs of more than $2 million, the project did not proceed to rezoning. It involved sensitive environmental issues, was controversial within the Koompahtoo community, and had difficulty attracting finance. In February 2003, an administrator was appointed. He attempted to obtain from Sanpine information on the financial position of the joint venture, including how money from two lenders had been used but in December 2003, on behalf of Koompahtoo, he terminated the joint venture agreement. Sanpine commenced proceedings

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seeking a declaration that the termination was invalid. The trial judge found for Koompahtoo, and Sanpine appealed to Court of Appeal, which upheld the appeal. Koompahtoo appealed to High Court.

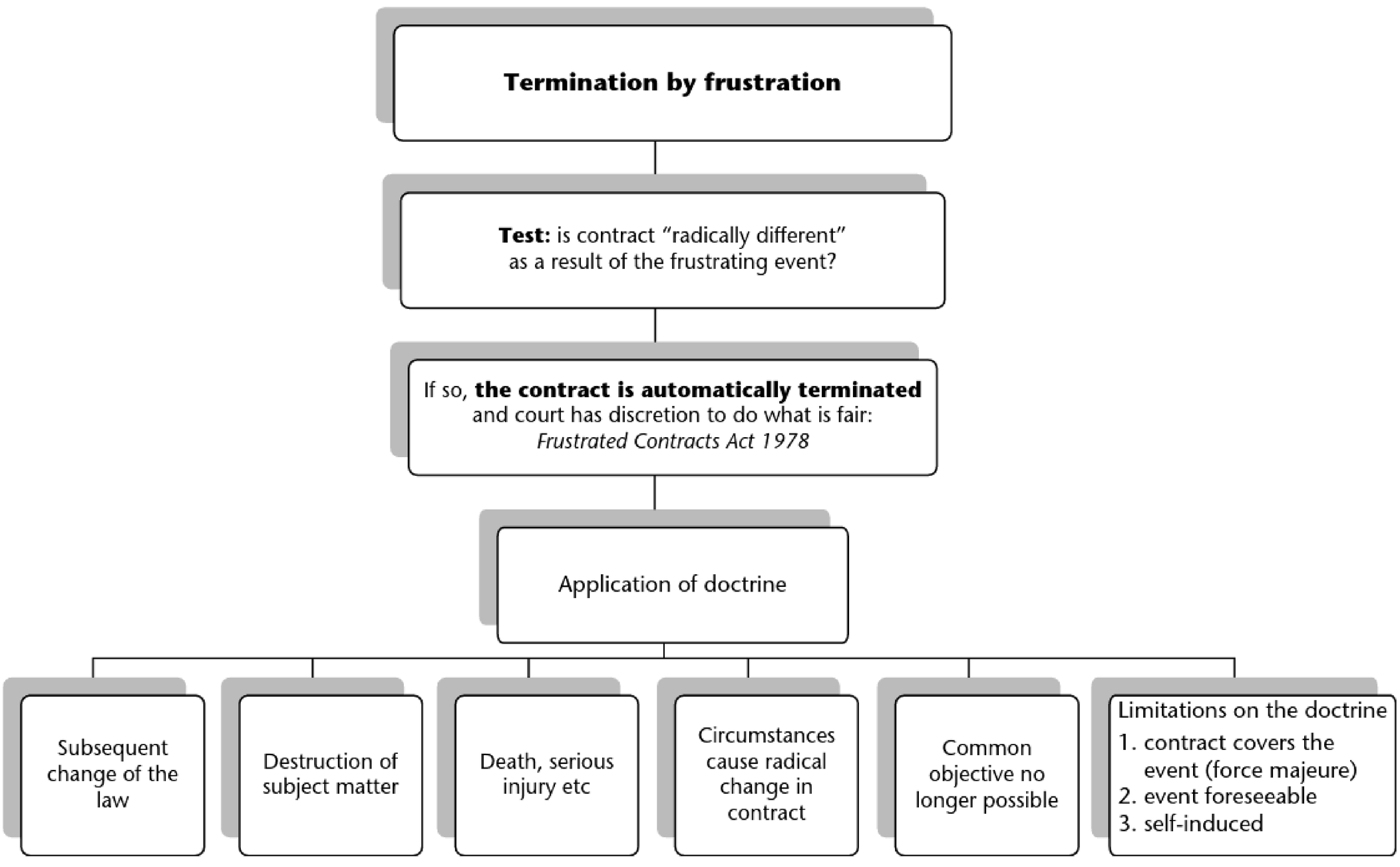
The High Court decided that the termination of the joint venture agreement by Koompahtoo had been justified:

> We rest our decision in the appeal *not* upon the ground of breach of an essential obligation, *but upon application of the doctrine respecting intermediate terms* … Even if one were to accept that all of the contractual obligations with which Sanpine failed to comply were inessential in that, on the true construction of the contract, not every breach would justify termination and that the obligations were intermediate terms in the sense earlier discussed, nevertheless, … the breaches of Sanpine were in a number of respects gross, and their consequences were serious … it ought to be accepted that breaches of that order deprived Koompahtoo of a substantial part of the benefit for which it contracted. Such breaches justified termination.

While a single breach of a non-essential term will not provide grounds for termination, multiple breaches may. It must be shown however, that when taken in their entirety, the consequence of the multiple breaches was of a serious enough nature that it "went to the root of the contract."

Termination by frustration

Figure 11.3 : Termination by frustration



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Introduction

[11.390] The performance of a contract may be disrupted by an event beyond the control of either party. Floods, cyclones, wars, riots, labour issues, court orders, changes in the law and, of course, pandemics are all examples of such events. If the contract can no longer be performed, the real question is what should happen in the aftermath? Does the contract remain on foot or is future performance excused? Who should bear the risk and suffer the loss caused by the event? If the contract remains on foot, one party may not be able to perform their part and be liable for breach of contract. If it is terminated, how are the losses distributed?

It is in these circumstances that the doctrine of frustration plays a role. As a general rule, the doctrine of frustration operates to terminate the contract (automatically) where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental state of affairs exists and will continue to exist or that some future event which forms the basis of the contract will (or will not) take place; and an unforeseen and unforeseeable event in relation to this foundational basis of the contract renders performance impossible or only possible in a way that is radically or fundamentally different from that contemplated, but without default of either party.

The early common law courts, fearing rising contractual uncertainty and instability if a party could be excused from performing a contractual promise, allowed no excuses. As the following case illustrates, contractual promises were (at that stage) considered "absolute".

Paradine v Jane

[11.400] *Paradine v Jane* [1647] EWHC KB J5. Paradine sued Jane for the rent arrears for the lands that Paradine had leased to Jane. The defendant acknowledged that he owed the money for the rent but said he did not pay because the land was invaded by the enemy of the King, his cattle was driven away and he was expelled from the land, so effectively, he could not enjoy it. The question was whether a lessee who was expelled from his land by the King's enemy should be liable for rent for a period in which he has been expelled from the land.

The Court said that "where a party creates a duty or charge upon himself by virtue of a contract, he is bound to perform the duty or pay the charge, notwithstanding any accident. The reason why this is so, is because the party could have inserted a clause in the contract, which prescribes what is to be done with the rent in case of an accident". Jane was bound to pay the rent.

The modern doctrine

[11.410] There remain strict limits on the doctrine of frustration. However, the law has moved on from *Paradine v Jane*. As the following two cases show, the modern basis of the doctrine is that performance of the contract is, because of the event, *radically different* from what the parties intended when they entered into the contract.

Codelfa Construction Pty Ltd v State Rail Authority of NSW

[11.420] *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337. Codelfa contracted to excavate tunnels and do concrete work in connection

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with a railway. Various stages of the work were to be completed by certain dates. The whole of the work was to be completed within 130 weeks of the date of notice to proceed. Time was made of the essence of the contract. The work made so much noise and caused terrible vibrations in nearby suburban areas that a resident obtained an injunction to restrain Codelfa from performing construction work between 10 pm and 6 am and preventing any work on Sunday. The crucial point is that, as a result of a learned QC's opinion, the parties shared an assumption that no such injunction could be granted. It was assumed that Codelfa could work three shifts a day, seven days a week. Codelfa was released from further work on the project. As the contract was now terminated, Codelfa was not able to recover any further payments under the contract. However, Codelfa argued that the contract was frustrated when the injunction was granted, allowing it to recover monies for the work it had completed up to that time. The dispute was referred to arbitration. The arbitrator found that the work could not be carried out as agreed except on the basis of three shifts per day and that neither party foresaw the possibility of the restrictions that were imposed on the hours of work as a result of the injunction.

The High Court held that the contract had been frustrated. Crucial to the decision was whether the situation resulting from the grant of the injunction was *fundamentally different* from the situation contemplated by the contract on its true construction in light of the surrounding circumstances. Here, the injunction created a situation in which the contract work could only be performed in a manner radically different than that contemplated in the contract.

Davis Contractors Ltd v Fareham Urban District Council

[11.430] *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696. Davis Contractors tendered a contract with the council to build 78 houses within a period of eight months. The tender was accompanied by a letter, which stated that the tender was "subject to adequate supplies of material and labour being available as and when required to carry out the work within the time specified". The contract was to build the houses at a fixed price subject to certain adjustments. For various reasons, mainly the lack of skilled labour, the work took 22 months (instead of the agreed eight months) to complete. The appellants contended that the contract price was not binding as the contract had been frustrated.

The Court decided that the lack of material and the labour shortage was not enough to frustrate the contract. The classic statement from Lord Radcliffe reflects the general reluctance of the courts to expand the scope to the operation of the doctrine of frustration.

> [F]rustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. ("It was not this that I promised to do") … it is not hardship or inconvenience or material loss itself which calls the principle into play. There must be as well such a change in the significance of the obligation that the thing undertaken would if performed be a thing different from that contracted.

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Application of the doctrine

[11.440] The difficulty with the doctrine of frustration is in its application. Once the facts have been determined, the question is always the degree to which the event has affected the performance of the contract. It is not hardship or inconvenience or loss that is the true test. As each of the following cases demonstrates, the courts have had to construe the contract in order to determine if the performance, post event, is so radically different that the parties, or one of them, could legitimately plead *non haec in foedera veni*.[6]

Supervening illegality

[11.450] Where a subsequent change in the law renders further performance illegal, the contract may be terminated. In the COVID-19 lockdown world that we all experienced a couple of years ago, there were many examples of conduct that was previously lawful (eg opening a cafe or a gym or a hairdresser) that became unlawful because of government regulation. The recent change to vaping laws in Australia that makes sales of vapes, other than through a pharmacist and only on prescription, illegal may frustrate many contracts that have been made (but not executed) between manufacturers and suppliers.

Death or illness

[11.460] Where the contract is one of personal service and the party to perform the service dies or suffers from some serious disability or illness making performance of the contract impossible, the contract will be frustrated.

Destruction of subject matter – impossibility of performance

[11.470] Where performance of the contract is rendered impossible by the physical destruction of the subject matter before performance falls due, the contract is terminated. In *Taylor v Caldwell*, a contract for the hire of a music hall for a concert at a future date was held to be frustrated when the music hall burnt to the ground.

Taylor v Caldwell

[11.480] *Taylor v Caldwell* (1863) 3 B & S 826; 122 ER 309. Caldwell agreed to hire Surrey Gardens and Music Hall to Taylor for five days for a series of concerts. However, six days before the first concert, fire destroyed the hall through no fault of either party. Taylor sued Caldwell for breach of contract because Caldwell had not done what he promised – provided a hall for the concerts. The issue was whether Caldwell's breach was excused by frustration.

The Court decided that the contract was frustrated by the event that occurred through no fault of either party. In a classic statement, Blackburn J said:

> … where from the nature of the contract … the parties must have known that it could not be fulfilled unless when the time for fulfilment of the contract arrived some particular specified thing (ie the hall) continued to exist, the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

6 It was not this that I promised to do.

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Futility – frustration of object

[11.490] When the happening of some particular event can be regarded as the real basis of the contract, then, if that event fails to eventuate, without the fault of either party, the contract is frustrated and the parties are discharged. Contrast the decisions in the following two cases, which differ because of different conclusions drawn as to the real basis of the contracts (notwithstanding both were connected to the same overall circumstances).

Krell v Henry

[11.500] *Krell v Henry* [1903] 2 KB 740. Henry booked Krell's apartment in London for two days on £25 deposit. Henry intended to use the apartment to watch the coronation of Edward VII. That was the sole reason for Henry booking the room. Although this objective did not appear in the agreement itself, both parties were aware that many other flats in the area had been rented for the same purpose. The coronation had originally been scheduled for 26 June, but two days before on 24 June, the future King Edward was diagnosed with appendicitis and the coronation was delayed. Krell sued for £50, the balance of the rent.

The Court held that performance will be excused when (a) the purpose of a contract is frustrated by an unforeseeable supervening event; and (b) the purpose was within the contemplation of both parties when the contract was made. The parties understood that the sole purpose of the contract was to allow Henry to view the coronation. When it was cancelled, the contract, although it could be performed, became futile and, as a consequence, was frustrated.

Herne Bay Steamboat Co v Hutton

[11.510] *Herne Bay Steamboat Co v Hutton* [1903] 2 KB 683. The Herne Bay Company agreed to hire a boat to Hutton to view the naval review at Edward's coronation and to cruise around the fleet. Owing to the King's illness, the naval review was cancelled but the fleet was assembled and the boat might still have been used for the intended cruise. It was held that the contract was not frustrated (and therefore Hutton was not discharged from performance) because the naval review was not the sole reason for him entering the contract.

Events that make contracts less profitable, more expensive or inconvenient

[11.520] Courts have drawn a distinction between *practical impossibility* (eg the concert hall in *Taylor v Caldwell* is burned to the ground) and *commercial impracticability* (eg I can build your house but the price of raw materials has increased by 50% since the contract was formed). An event that causes a reduction in profitability, greater inconvenience or more onerous conditions will not frustrate the contract. For instance, in the following case, the outbreak of war in the Middle East that forced the seller to take a longer and far more expensive route to Europe, did not frustrate the contract – it was still commercially practicable to deliver the goods. Similarly, a reduction in demand as a result of an event like COVID-19 does not necessarily mean a buyer cannot fulfil their contractual obligation to take delivery of the product, no matter how commercially unviable this obligation may have become. Thus, the fact that many caterers, restaurants or cafes – and many other businesses – could not use previously ordered stock because of the

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impacts of COVID-19 and the lockdown or social distancing measures put in place does not mean the event was frustrating (in the legal sense) and they would therefore not be relieved of the obligation to accept and pay for the stock previously ordered.

Tsakiroglou & Co Ltd v Noblee Thorl GmbH

[11.530] *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93. On 4 October 1956, the appellants agreed to sell to the respondents Sudanese groundnuts for shipment from Port Sudan to Hamburg during November–December 1956. On 2 November, the Suez Canal was closed.[7] The alternative route via the Cape of Good Hope would have increased the length of the voyage by four weeks and increased the appellants' costs of shipment. Significantly, no delivery date in Hamburg and no particular route had been specified in the contract (but it was assumed that the Suez Canal would be used).

The Court decided that although the route via the Cape would have involved a change in the method of performance of the contract than that originally contemplated by the parties, it was not such a fundamental change as to entitle the appellant sellers to say that the contract was frustrated.

Delays

[11.540] In deciding whether a contract is frustrated by delay, it is necessary to compare the length of the delay with the time that remains to run on the contract. For this reason, long-term contracts (like some commercial leases or construction projects) may be less easily frustrated. In the following case, the delay caused by the Council was insufficient, in the context of a 20-year lease, to frustrate the contract.

National Carriers Ltd v Panalpina (Northern) Ltd

[11.550] *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675. National Carriers granted Panalpina a 10-year lease of a warehouse. The sole means of accessing the warehouse was via a road that was closed by the local council for 20 months, in order that work could be carried out on a nearby property. Panalpina was therefore prevented from using the premises for that period and refused to pay rent. National Carriers sued to recover the unpaid rent. As we have seen, where the contracting parties are prevented by circumstances from performing their obligations under the agreement, the doctrine of frustration operates to terminate the contract and release the parties from further performance. Panalpina argued the closure of the only access road to the warehouse for 20 months frustrated the contract and meant they were not under a duty to continue to pay rent. National Carriers said the contract was not frustrated because the council's actions were of a short-term nature.

The Court held the closure to be a temporary event and not a "cataclysmic event" that gave rise to frustration of the lease by rendering the parties unable to perform their obligations for

7 The Suez Crisis began on 29 October 1956, when Israeli armed forces pushed into Egypt towards the Suez Canal after Egyptian president Nasser nationalised the canal, a vital waterway that controlled two-thirds of the oil used by Europe. French and British forces soon joined in support of Israel. Egypt emerged victorious, and the British, French and Israeli governments withdrew their troops in late 1956 and early 1957.

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the remainder of the lease. The court noted that whether a supervening event is a frustrating event or not is, in a wide variety of cases, a question of degree and, therefore, to some extent at least, a question of fact. However, even though the court found against frustration on the facts, on the question of whether the doctrine of frustration applies to lease agreements, Lord Hailsham said:

> *Is there anything in principle which ought to prevent a lease from ever being frustrated? I think there is not.* No doubt the circumstances in which the doctrine can apply to leases are exceedingly rare.

Governmental intervention

[11.560] Where government interference is such that it would make the subsequent carrying out of the remainder of the contract radically different from that envisaged by the parties, then they are absolved from further performance.

Metropolitan Water Board v Dick, Kerr & Co Ltd

[11.570] *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] AC 119. Dick, Kerr & Co contracted with the Metropolitan Water Board to construct a dam within six years, subject to a proviso that if the contractors should be delayed or impeded in the completion of the contract, it would be lawful for the engineer to grant an extension of time. The Ministry of Munitions, exercising wartime powers, appropriated the machinery of the company and work on the dam ceased. The Court decided that the interruption suffered was of such duration and character as to alter the contract on resumption, and therefore the contract had ceased to be operative.

Limitations on the doctrine of frustration

[11.580] Where the contract itself covers the event – *force majeure* clauses.

A *force majeure* clause may relieve a party of contractual liability in specified circumstances which leads to an inability to perform their contractual obligations. Unlike the doctrine of frustration, a *force majeure* clause is *a contractual mechanism*, the effect of which is a matter of interpretation or construction of the contract.[8] As we have seen, for an event to be frustrating, the event must be unforeseen. Therefore, because a *force majeure* clause anticipates the circumstances giving rise to the frustrating event, it is unlikely that the contract would be frustrated – the parties have contemplated the event occurring and agreed on how the risk should be allocated. The contract term applies instead of the doctrine of frustration.

Force majeure clauses generally are intended to include occurrences beyond the reasonable control of a party. Common *force majeure* events include "acts of God", "natural disasters", "government action or interference", "labour shortages", "national emergencies" and "acts of war". In major contracts, a *force majeure* clause can be exhaustive. Here is an example:[9]

8 See [9.340].

9 https://www.pwc.com.au/legal/assets/investing-in-infrastructure/iif-30-force-majeure-clauses-feb16-3.pdf.

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An event of force majeure is an event or circumstance which is beyond the control and without the fault or negligence of the party affected and which by the exercise of reasonable diligence the party affected was unable to prevent provided that event or circumstance is limited to the following:

(a) riot, war, invasion, act of foreign enemies, hostilities (whether war be declared or not), acts of terrorism, civil war, rebellion, revolution, insurrection of military or usurped power, requisition or compulsory acquisition by any governmental or competent authority

(b) ionising radiation or contamination, radioactivity from any nuclear fuel or nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive assembly or nuclear component

(c) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds

(d) earthquakes, flood, fire or other physical natural disaster, but excluding weather conditions regardless of severity

(e) strikes or industrial disputes at a national level, or strikes or industrial disputes by labour not employed by the affected party, its subcontractors or its suppliers, and which affect an essential portion of the works, but excluding any industrial dispute which is specific to the performance of the works or this contract.

The general principle that contractual rights and obligations should not be readily abrogated or amended means that *force majeure* clauses – like exclusion clauses – are interpreted strictly (narrowly), and the party who seeks to rely on the clause has the burden of proof. This will often involve establishing: (a) the existence of a *force majeure* event as defined in the clause; (b) a causal connection between that specific event and the inability of the party to perform its contractual obligations (or those that remain unperformed); (c) the party has taken reasonable steps to mitigate the impact of the event; and (d) the party has given any required notice of intent to rely on the clause. The following case provides a good illustration of a *force majeure* clause in a tour company's contract (that ultimately failed to protect the company seeking to rely on it).

Moore v Scenic Tours Pty Ltd

[11.590] *Moore v Scenic Tours Pty Ltd* [2020] HCA 17. David Moore and his wife contracted for a European river cruise with Scenic Tours that was marketed as "*a once in a lifetime cruise along the grand waters of Europe*". The tour started off in Paris on 31 May 2013, with the cruise scheduled to depart from Amsterdam on 3 June 2013 and to conclude in Budapest on 17 June 2013. However, because of severe weather conditions along the Rhine and Main Rivers, the cruise sailed for only three days instead of ten, there were at least two changes of ship during the tour and a large portion of the journey was spent on a bus. David Moore was the lead plaintiff in a class action commenced by 1,500 passengers of the 13 tours offered by Scenic Tours that were scheduled at the time. He alleged that Scenic Tours had failed to exercise due care and skill in the supply of the tours and was in breach of the consumer guarantees under the Australian Consumer Law. We examine the case in detail in relation to the *Australian Consumer Law* in Chapter 13 but, at this point, consider the *force majeure* clause that was included in the contract:

> Although We will use reasonable efforts to operate the Tour as close as possible to Your Itinerary, changes or substitutions may be necessary for reasons outside Our control. These circumstances may include, but are not limited to:

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(1) road, river or weather conditions;

(2) national or local holidays affecting the closure of public buildings and attractions;

(3) strikes; or

(4) civil disturbances and advices by governments or other Force Majeure Events.

Cruise itineraries may be varied due to high or low water levels, flooding, lock closures, unscheduled vessel maintenance or for any other circumstances beyond Our control.

The Court decided that the flooding that caused the disruption *was* a *force majeure* event, outside/beyond the control of Scenic Tours. However, the clause failed to protect the company because the consumer guarantees under the Australian Consumer Law cannot be excluded or limited by the terms of the contract. The High Court decided that the company had breached the non-excludable statutory guarantees contained in the *Australian Consumer Law*.[10]

It is important to understand that not only are the events that can trigger a *force majeure* clause those events set out in the clause, but the effect of a *force majeure* clause also depends on the contract. Whether or not the operation of a *force majeure* clause causes a contract to be terminated, or causes a contract's performance to be suspended, or causes some other effect, depends upon interpretation of the clause.

[11.600] The frustrating event must not have been one that the parties could reasonably have foreseen.

A frustrating event must not have been foreseen or must not have been reasonably foreseeable by the parties. If it were foreseeable, the courts presume that the parties have allocated the risk of the event occurring in the contract, perhaps through the inclusion of a *force majeure* clause. This limitation is not as easy to apply as it may appear. For instance, it is not clear how foreseeable the event needs to be, nor is it clear how foreseeable the effects of the event need to be. It is not, for example, difficult to say that hurricanes are a foreseeable event in the Gulf of Mexico. It is another matter to say that the destruction of New Orleans by Hurricane Katrina in 2005 was foreseeable.

[11.610] Where there is fault or self-induced frustration.

The frustrating event (or its effect) must not have been caused by the acts or omissions of the party seeking to rely on the frustration. The reason for this limitation is that a party should not be able to plead frustration in respect of an event that they could have prevented. For example, a contract for the carriage of goods may not be frustrated by the sinking of the vessel if the sinking was caused by the negligence of the shipper of the goods: *J Lauritzen AS v Wijsmuller BV* [1990] 1 Lloyds Rep 1. Again, the eruption of hostilities in and around a port may not allow the captain of a cruise liner to plead frustration if the captain deliberately allowed the vessel to sail into the port knowing that the likelihood of hostilities erupting was high.

Maritime National Fish v Ocean Trawlers

[11.620] *Maritime National Fish v Ocean Trawlers* [1935] AC 524. The claimant owned five fishing vessels, one of which was chartered (hired out) to the defendants. The fishing vessels were all fitted with otter trawler nets. New legislation was introduced requiring licences to be

10 Section 60 – failing to exercise due care and skill in the supply of the tours; s 61(1) – the tour services were unfit for the purpose for the tourists who acquired them; s 61(2) – the tour services were not of a nature and quality as could reasonably be expected.

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held by those using otter trawl nets. The claimant applied for five licences but was only granted three. He had to name which vessels the licences would be used on. He named his own vessels and excluded the vessel which the defendant was using. This meant that the defendant was unable to use the vessel for fishing. The claimant sued the defendant for the price of hire and the defendant in his defence stated the defendant had committed a breach in not providing a licence, so he was not obliged to pay for the cost of hire. The claimant argued there was no breach as the failure to provide a licence was a frustrating event in that the decision to grant licences rested with the secretary of state.

The Court held that the contract was not frustrated. The claimant had chosen to keep the three licences granted for himself rather than using one to fulfil his contractual obligation. He had therefore induced the frustrating event and was therefore in breach of contract.

Effect of frustration

[11.630] At common law, the consequences of frustration depend on the intentions of the parties and are, therefore, again, a question of construction of the contract. So, we begin with the common law rules and then we see if the parties have evinced an intention, objectively speaking, of departing from them. In this way, the common law rules operate as default rules. They are:

1. When frustration of a contract occurs, it *automatically terminates* the contract and brings the *whole contract permanently* to an end.
2. The contract is terminated – it is not treated as if it never existed.
3. The future obligations of the parties are discharged, but rights and liabilities that have accrued at the date of termination (such as payments due and payable at the time the contract was frustrated) remain.
4. Frustration does not involve breach – indeed, it is a way of avoiding a breach of contract. Therefore, no claims for damages or other contractual remedies for breach are available to either party.
5. Money may have been paid before the frustrating event. Under the common law, if money had been paid before the frustrating event and there was not a total failure of consideration (ie something of value, however small, had been provided to the payer) the "losses would lie where they fell". This common law position with respect to frustration resulted in harsh outcomes.

Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd

[11.640] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] UKHL 4. Fibrosa was a Polish-based textile company. In July 1939, it entered into a contract with Fairbairn, a British firm, to buy industrial machinery for its plant for £4,800. The contract was signed on 12 July 1939 and the following week Fibrosa made an advanced payment of £1,000. The machines were expected to arrive within three to four months. On 1 September 1939, Poland was invaded by Nazi Germany. Britain declared war on Germany on 3 September, and so began World War II. The following week, Fibrosa's agents contacted Fairbairn to request that the initial £1,000 payment be refunded as the contract was obviously frustrated. Fairbairn refused. The House of Lords found in favour of Fibrosa. In the circumstances, there was a *total failure of consideration* as Fibrosa had received *none* of the machinery ordered. However, it must be

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said that had Fibrosa received a single ball-bearing, there would not have been a total failure of consideration and it would not have been entitled to a refund of the money: the loss would have laid where it fell. Lord Atkin said:

> That the result of the law may cause hardship … is incontrovertible. One party may have almost completed expensive work. He can get no compensation. The other party may have paid the whole price, and, if he has received but a slender part of the consideration, he can get no compensation … These results follow from the fact that the English *common law does not undertake to apportion a prepaid sum in such circumstances*. It must be for the legislature to decide whether provision should be made for an equitable apportionment.

In order to address the unfairness that may arise as a consequence of frustration, and in particular the rule that losses fall where they lie, several Australian States (New South Wales, Victoria and South Australia) have indeed put in place legislation to allow a court to apportion money paid under certain kinds of frustrated contracts.[11] The legislation shares an overarching aim: to provide for a fairer distribution of loss than was the case under the common law. The common law is still relevant because, in all other jurisdictions, the common law position remains in place and, it is worth noting, the parties may elect to contract out of the legislation. Although the Victorian, NSW and SA legislation is not identical, the Victorian legislation, referred to in [11.650], is representative.

[11.650] In Victoria, contracts may also be frustrated under Pt 3-2 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic). The Act applies to certain contracts where parties are discharged from further performance because (a) performance becomes impossible or is otherwise frustrated; or (b) the contract is avoided where goods are destroyed prior to sale without fault of either party: s 35(1). The following rules apply where a contract is discharged by frustration:

- all amounts paid *before* the frustration event are to be repaid: s 36(1); and
- all unpaid amounts cease to be payable: s 36(2).

Despite the above:

- the court has discretion to allow for a party owed amounts under the contract, or that has incurred expenses before the frustrating event, to retain or recover an amount but not more than the expenses incurred: s 37;
- a party that "benefits" as a result of anything done by the other party before the time of discharge is liable to pay that other party any amount the court determines, but not more than the value of the benefit obtained: s 38(1)–(2);
- the Act maintains the sovereignty of the contract. In other words, the court looks to the frustrated contracts provisions of the Act *only to the extent that is consistent with the provisions of the contract*: s 41. So, for example, if a *force majeure* clause specifies what the parties intend to happen in the event of a pandemic that clause would be valid and enforceable and would determine the rights and obligations of the parties.

11 New South Wales (*Frustrated Contracts Act 1978*), South Australia (*Frustrated Contracts Act 1988*) and Victoria (*Australian Consumer Law and Fair Trading Act 2012*).

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Termination by operation of law

[11.660] A contract may be terminated independently of the wishes of the parties by operation of law.

Bankruptcy

[11.670] If a party liable under a contract becomes bankrupt, they are personally relieved of the contract, but the other party may claim on the bankrupt's estate for any loss or damage. There are also other provisions in the *Bankruptcy Act 1966* (Cth) under which a trustee in bankruptcy may adopt or rescind certain contracts into which the bankrupt has entered. When the affairs of the bankrupt have been wound up, the bankrupt is given a certificate of discharge by the court, which releases the bankrupt from all debts provable in bankruptcy, but the bankrupt is not released from liability in respect of certain types of debts, such as liability for fraud.

Merger

[11.680] A deed may, in certain cases, displace a simple contract (which is then terminated), and the relations and rights of the parties are governed by the deed. When that happens, the simple contract becomes merged in, and is extinguished by, the deed. The first agreement is terminated because the rights in the lesser contract merge by the operation of law into the greater.

In order that merger of a simple contract in a deed may take place, the following conditions must be fulfilled:

1. the parties to the two agreements must be the same;
2. the subject matter must be the same; and
3. the second security must be of a higher value than the first.

Another but different type of merger is that which takes place when a party recovers judgment upon a cause of action for breach of contract. Here, the cause of action merges in the judgment.

Further reading

See contract texts listed at the end of Chapter 2.

Tutorial activities

1. In what ways may a contract be terminated?
2. Is a party who has *substantially* performed a contract entitled to sue for the full contract price?
3. What is the difference between an entire contract and one that is divisible? Give an example of each and explain the significance of the distinction.
4. In what circumstances may a party in breach of contract be compensated on a *quantum meruit* basis?
5. Explain the difference between a contract that has been repudiated and one where there has been a breach in performance.

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6. What is an anticipatory breach and what options does the non-breaching party have?
7. What right to terminate the contract has a party where the other party has breached a term of the contract?
8. Explain why the courts have taken a conservative view of the doctrine of frustration.
9. What is a *force majeure* clause? What is the point of it? If such a clause were to refer to an event (such as floods, fires or pandemics) and prescribe the consequences for the parties, could that event still frustrate the contract?
10. Eunice has a successful printing and copying business. She goes through a lot of paper each day and relies heavily on the prompt, daily delivery of quality paper from her supplier, Alex. A term of the contract of delivery states that delivery of paper to Eunice must occur each day at 7.00 am. On Wednesday, Alex telephones Eunice to inform her that he is changing his delivery route and will be delivering paper to her premises every second day at 4.00 pm. This does not suit Eunice at all, and she would like to terminate the contract. Advise her.
11. Charlie enters into a contract with Angela to renovate his house. When Angela commences work, Charlie and family move out so she can get on with the renovations. The contract specifically says that "it is a Condition of the contract that the oil to be used on the exposed beams and all other exposed timber surfaces is to be top grade Rustin's Danish Oil". When Charlie inspects the property at the halfway mark, he notices that Angela has used a basic Tung Oil. He seeks your advice as to whether he can terminate the contract.
12. In June 2020, Alex and Mary entered into an "off-the-plan" contract to buy a townhouse from Good Living Pty Ltd (GL), a developer. At the time of signing the contract, the townhouse's outside area was bare dirt. Prior to signing the contract, the purchasers told the developer that a grassed area was essential for their toddler to play in. GL's manager assured them that there would be a grassed outdoor area as set out in the approved plans for the construction of the townhouse. Once assured of this, they signed the contract. Note that there is evidence that at the time GL's manager made the representation about the grassed area, he did have reasonable grounds for doing so (the plans were changed after the contract was signed because of an issue concerning the positioning of the stormwater tank).

    Advise Alex and Mary whether they can terminate the contract and/or what damages they may be awarded.

    (NB (a) to buy "off the plan" means the purchasers sign a contract when the building is not yet started/completed; and (b) in a sale of land contract, a deposit is paid at the time the contract is signed with the balance to be paid at "settlement" (completion date) which may be many months later, particularly when the place is bought "off the plan".)
13. Charles Clayton-Moggs is an ardent monarchist. He lives south of the Yarra River in a very desirable suburb. He was looking forward to the visit of His Royal Highness the Duke of Sussex and Her Royal Highness the Duchess of Sussex (hereafter, H & M) and made sure he booked an exclusive Riverview Suite in the Crown Hotel (at $5,000 a night) so that he could sit with a glass of champagne on the balcony, as the sun set, and get an uninterrupted view of the main event – the Royal Barge floating down the river to Docklands with H & M in full view. Unfortunately, however, M, who had recently announced that they were pregnant, had a bad dose of morning sickness and had to cancel the event. A shattered

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Charles cancels the booking and demands his money back. Crown refuses his request. Please advise Charles of his legal rights, with reference to the doctrine of frustration.

14. George, a logger, and Andrew, a farmer, entered into a logging contract on 1 January 2020. Under the contract, George would pay Andrew a fee of $10,000 on signing the contract for the sole rights to log a specified amount of Australian old-growth hardwood for a three-year period. George paid the fee and commenced logging. In March 2020, the government prohibits the logging of all old-growth timber. Advise George, with reference to the doctrine of frustration.

15. COVID-19 was, as we may remember all too well, a worldwide pandemic. Governments in Australia and elsewhere legislated lockdowns, social distancing requirements and other restrictions that had a major impact on commercial life (apart from saving lives). The virus – and the response to it – disrupted most sectors of the economy including supply agreements and event contracts. Many parties considered whether their contractual obligations could be discharged as a result of COVID-19 by means of a *force majeure* clause or the doctrine of frustration. Please advise the parties in the following three hypotheticals:

    (a) Multiplex has a contract with the government to build the NE Tunnel. It is due for completion in 2025. Multiplex obtains its building materials from a number of suppliers but due to the lockdown, the supply of building materials is delayed for six months. Could Multiplex argue that the contract with the government is frustrated? Draft a *force majeure* clause that would protect the government in these circumstances.

    (b) JC Hi Fi is suffering a loss of revenue due to decreased foot traffic because people wish to save money and stay at home to avoid infection. JC leases the store space and pays rent monthly. Could it argue that its lease contract is frustrated?

    (c) Sounds Good, a high-tech audiovisual company, has contracted with the RoxStars Pty Ltd to provide the sound and lighting for the Bruce Springsteen concert scheduled for October 2020. However, because of a government ban on public gatherings, the concert can no longer take place. Could RoxStars argue the contract is frustrated?

16. Assume the Bruce Springsteen concert contract referred to in question 15(c) above is, in fact, terminated by frustration. Also assume that RoxStars has pre-paid all the food suppliers that they contracted for the concert and will be out of pocket because the food suppliers will not be able to perform their obligations (ie supplying food at the event). Advise RoxStars of the likely result with respect to these sums paid (assuming the food suppliers do not return the money that they received).

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Chapter 12

Remedies

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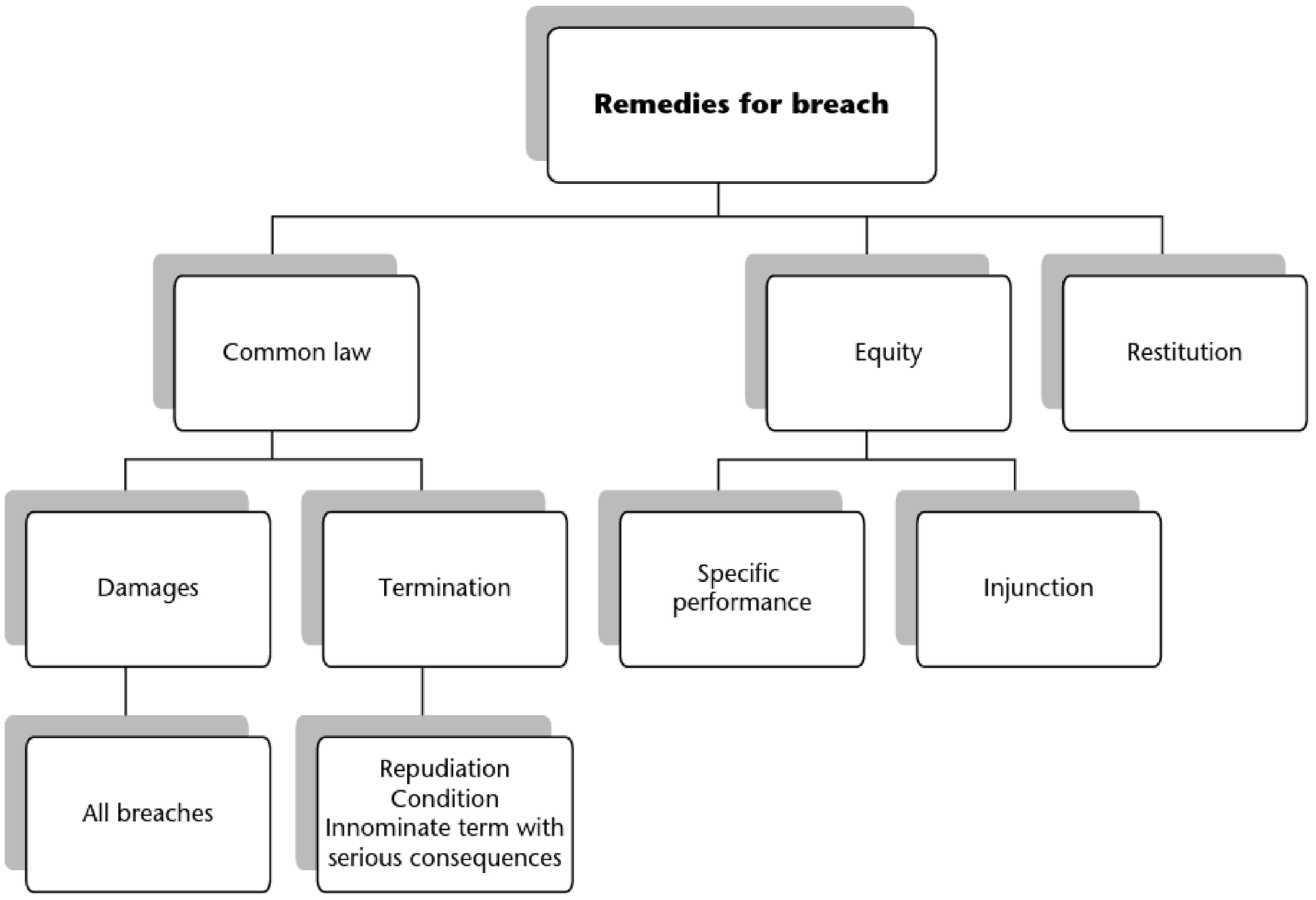
Introduction

[12.10] In the first part of this chapter, we examine the principal remedy available for a breach of contract – an *award of damages*. The right to damages exists independent of any right a party may have to terminate the contract. Unlike the right of termination, that is dependent on the breach being a breach of a condition or a serious breach of an innominate term, *every* breach of an obligation under a contract entitles the innocent party to seek compensation for the loss or damage caused by the breach. The breach may be a breach of a condition, of a warranty or of an innominate term; it may be a repudiatory breach or a breach of a collateral contract; it may be an actual breach or an anticipatory breach; it may be a breach of an entire or divisible contract. The point is that if there is *any* breach of a contractual obligation, the innocent party is entitled to be compensated in damages.

In the second part of the chapter, we examine equitable remedies. These include specific performance, injunctions and the remedy of *restitution*. The focus is on restitutionary claims to recover money paid to another party ("money had and received") and claims to recover reasonable payment (*quantum meruit*) for services performed for another party.

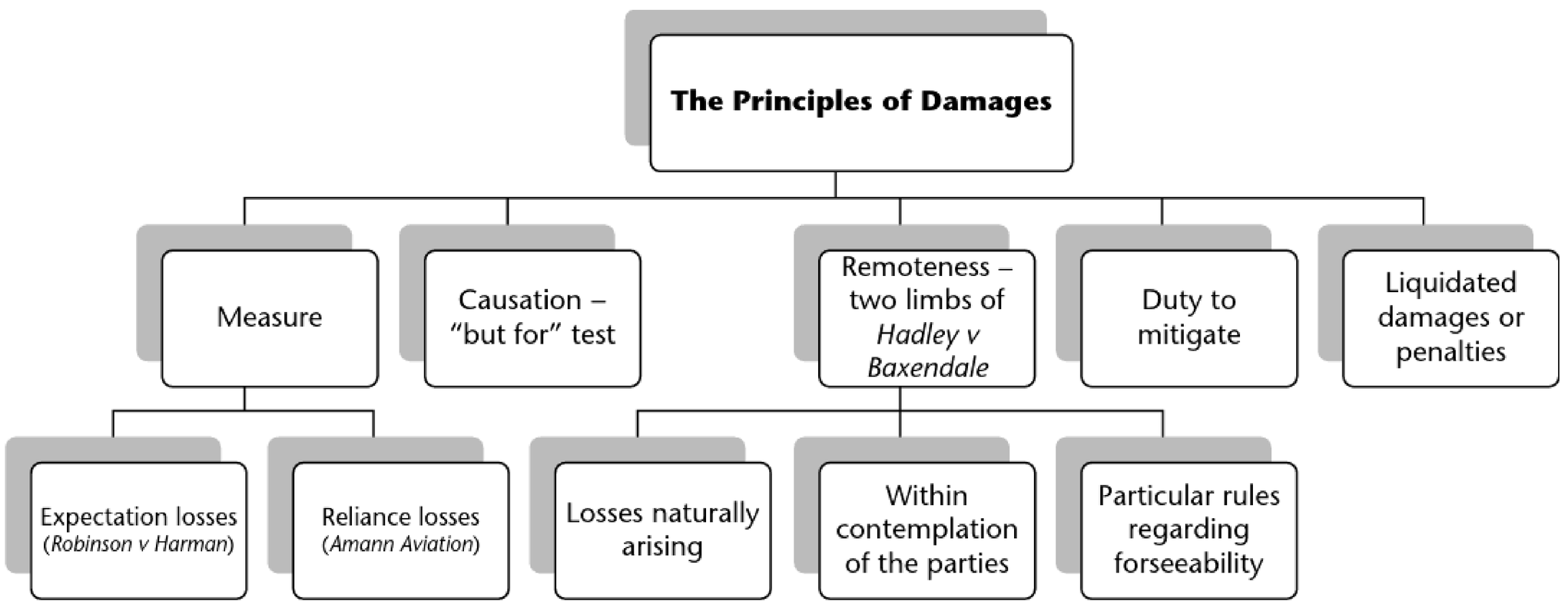
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Figure 12.1 : Remedies for breach



The remedy of damages

Figure 12.2 : The principles of damages



[12.20] Damages are monetary compensation for loss. Whether or not and to what extent damages can be recovered for a breach of contract is itself a legal question, with relevant case law addressed below.

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The measure of damages

Expectation losses – loss of benefit

[12.30] The general principle governing the measure of damages for a breach of contract was stated in *Robinson v Harman* [1848] 154 ER 363: the object of an award of damages is to *place the innocent party in the position they expected to be in had the contract been performed as promised*. In giving effect to this principle, courts make an award of *expectation damages* that compensate the innocent party for the "loss of benefit" they expected to get from the performance of the contract.

In other words, the law attempts to measure the difference between the position the innocent party would have been in if the contract had been performed properly and the position they are in because of the breach. For example, Alexandra, a chef, signs a one-year contract with Spiros, a Greek restaurant owner. She is paid $100,000 per annum. After nine months, Spiros dismisses her without cause. Alexandra accepts the repudiation of her contract and sues for damages. She is entitled to be put in the position she would have been in if the contract had been performed. That is, subject to the principle of mitigation (see [12.190]), she has a right to be paid the equivalent of three months' salary.

The innocent party is not entitled to be put in a *better* position than they would have been in if the contract had been performed. For example, Bob agrees to sell his Mercedes SUV to Chris for $50,000. In breach of contract, Chris refuses to complete the sale. Using the market value as a measuring stick, Bob's loss is the difference between the contract price and the market price (the price he can sell his SUV for *at the time of the breach*). Thus, if he can sell the SUV for $60,000 (ie *more* than the contract price), there is no loss and therefore no damages would be awarded. And, if the market price of a chef has risen to $150,000, Alexandra is still only entitled to damages based on her contract salary.

Expectation damages may also cover *consequential losses* caused by the breach. The phrase "consequential loss" may be confusing because, in a sense, all loss caused by a breach is consequential. Consequential losses, also known as indirect losses, are losses that do not flow directly from a breach of contract but result from special circumstances that the breaching party *knew or should have known about* at the time of the contract formation. Here are some examples:

1. Lost profits: If a business enters into a contract for a crucial piece of machinery, and the supplier breaches the contract by delivering a defective product, the business may claim for lost profits due to the inability to use the machinery;
2. Damage to reputation: If a breach of contract results in harm to a party's reputation, the damaged party may claim compensation for reputational damage;
3. Additional supplier costs: If a supplier fails to deliver goods on time, causing the buyer to incur additional costs to source the goods from another supplier, these additional costs can be considered consequential losses;
4. Loss of opportunity: If the breach of contract causes the injured party to lose future contracts, these losses might be recoverable; and
5. Increased operational expenses: If a party has to spend more on labour or materials due to a breach, these increased expenses can be claimed as consequential losses.

For example, A grows apples and sells them to various cake shops in the local area. A engages B to deliver their apples to C, who makes and sells apple pies at their local cake shop. B, in breach of contract, fails to

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deliver the apples to C who requests a refund from A. In this example, the direct loss will likely be A's loss from issuing the refund to C. C could also sue A for the loss of profits suffered because C was not able to sell the pies. This would be considered an indirect loss.

We will explore the distinction between direct and indirect damages when we consider the remoteness question and *Hadley v Baxendale* (at [12.140]).

Reliance losses

[12.40] The principle of compensation for *expectation losses* is not always an appropriate or fair measure of the loss suffered by an innocent party because of a breach. There are circumstances where it is difficult or impossible for the plaintiff to calculate the value or measure the loss suffered had the contract been performed. In these circumstances, courts may award *reliance damages* – designed to compensate for the money spent by the plaintiff in reliance on the contract being performed as expected. The leading decision on the application of these principles was the decision of the High Court in *Commonwealth v Amann Aviation Pty Ltd*. However, acknowledging that it is difficult to say what the true *ratio* of *Amann* is – there were *six* different sets of reasons given by the High Court judges – the High Court took the opportunity in *Cessnock City Council v 123 259 932 Pty Ltd* [2024] HCA 17 (see at [12.60]) to clarify the principles to be applied in reliance damages cases. For that reason, we will look at the facts and the decision in *Amann*, but we will discuss the principles as outlined by the High Court in *Cessnock*.

Commonwealth v Amann Aviation Pty Ltd

[12.50] *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64. Amann Aviation entered into a contract with the Commonwealth to conduct aerial coastal surveillance of Australia's northern coastline. The contract term was three years. There was a strong prospect that the Commonwealth would renew the contract at the expiry of the three years because, by that time, Amann Aviation "would be fully equipped with the cost of its aircraft written down. It would be very difficult for a competitor to match this advantage." At trial in the Federal Court, and on appeal to the Full Court of the Federal Court, it was held that the Commonwealth repudiated the contract six months after entry. One basis upon which Amann Aviation put its claim was to recover its wasted expenditure. In anticipation of, or reliance on, the performance of the Commonwealth's contractual obligations, Amann Aviation had spent considerable sums in reasonable pre-operational expenditure, in acquiring and fitting out aircraft (which had a resale value of far less than the amount spent), in termination payments and on a security deposit. The trial judge held that Amann Aviation would have made a profit on the contract, without renewal, of $820,000 but that, since there was a 50% chance that the Commonwealth would lawfully have terminated the contract, the damages were limited to $410,000. The Full Court of the Federal Court, however, held that Amann Aviation was entitled to have its damages assessed based on its wasted expenditure, which the Commonwealth failed to prove was expenditure that would *not* have been recouped. A majority of the Full Court refused to discount the damages for what it assessed to be a 20% chance that the contract would have been lawfully terminated before conclusion. The total awarded, before interest, was $5,475,184.

The High Court dismissed the appeal. It expanded the circumstances where it is *presumed* that the plaintiff would have recouped any expenditure reasonably incurred in reliance upon an

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unperformed contractual promise. Those circumstances now included situations where there is sufficient uncertainty as to what position the plaintiff would have been in had the breach not occurred.

As noted above, the High Court, in *Cessnock*, reconsidered the law governing the reliance loss and engaged in a significant exposition on contractual damages generally. The Court stated that the reasoning in *Amann Aviation* (where there were six separate concurring judgments) was broadly in conformity with the principles outlined in *Cessnock*, so *Cessnock* should be considered a *development and clarification of the law* concerning the facilitation principle (ie where there is uncertainty concerning proof of loss suffered by the plaintiff because of the defendant's breach).

Cessnock City Council v 123 259 932 Pty Ltd

[12.60] *Cessnock City Council v 123 259 932 Pty Ltd* [2024] HCA 17. Cessnock City Council ("the Council") is the registered proprietor of land on which the Cessnock Airport is located. The Council had hoped to develop the airport and accompanying land, so the Council entered an agreement with the plaintiff corporation ("Cutty Shark") to lease a prospective lot at the airport to it. The grant of the lease required subdivision of part of the Council's land. For that reason, a condition of the agreement for lease was that the Council would take all reasonable action to apply for and obtain registration of the plan of subdivision by 30 September 2011. The Council would have had to spend $1.3 million on sewage and other services to register the plan of subdivision. Not wishing to incur that cost, the Council breached the condition and repudiated the agreement for lease. Cutty Shark never obtained a lease. Prior to the Council's repudiation, and in reliance on the agreement for lease, Cutty Shark spent almost $3.7 million constructing an "iconic" hangar on the land. However, it was not successful in conducting businesses on the site of the proposed lease and the businesses failed. Following the Council's repudiation, the agreement for lease was treated as terminated and the Council acquired the hangar for $1. It is common ground that by this time, at the latest, Cutty Shark's expenditure was wasted, in the sense that it could not recoup any of the expenditure.

At the trial and on appeal the Council was found to have breached its obligation to take all reasonable action to procure registration of the plan of subdivision. However, at first instance, the judge held that Cutty Shark could not recover *wasted expenditure* (ie the costs of constructing the hangar) because, among other things, the breach did not make it *impossible* to assess Cutty Shark's position had the contract been performed. This was reversed on appeal, with the New South Wales Court of Appeal deciding that where a claim is made for wasted expenditure, the onus of proof is on the defendant to rebut a presumption that, had the contract been performed, those costs would *not* have been recouped.

The High Court unanimously dismissed the Council's appeal, holding that *it does not need to be impossible for the plaintiff to prove expectation loss for it to claim reliance damages*. The Court provided several key principles about damages generally and wasted expenditure specifically:

- The *foundational principle* is that contractual damages aim to put the innocent party into the position it would have been had the contract been performed.

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- The party seeking damages bears the legal burden of proving its loss was caused by the defendant's breach.
- Where the defendant's breach has caused or increased uncertainty about the position the plaintiff would have been in had the contract been performed, the plaintiff's legal burden of proof will be facilitated – *the facilitation principle* – by assuming or inferring that the plaintiff would have recovered any expenditure reasonably incurred in reliance on the contract's performance. This gives the plaintiff a "fair wind" to establish that its expenditure would have been recouped, but not a "free ride".
- The more difficult the defendant's breach has made it for the plaintiff to prove its position had the contract been performed, the stronger the assumption or inference will be that the plaintiff would have recovered its wasted expenditure. That is, the weight of the defendant's burden of proof in rebutting the inference will depend upon the extent of the uncertainty resulting from its breach.
- In other words, the High Court confirmed the principle in *Amann* by saying that proof that reasonable expenditure was incurred in reliance upon a contractual promise is itself sufficient to entitle the plaintiff to its recovery – except to the extent that the defendant demonstrates the likelihood of *non-recoupment*.
- In assessing the loss that can be recovered, that loss which is due to unreasonable or improvident actions of the plaintiff is generally disregarded by application of the rules of *mitigation of loss*. And that loss which is too remote is disregarded by application of the normal *Hadley v Baxendale* rules *regarding remoteness of loss*.

Reinstatement cost or loss of value

[12.70] In *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*, the High Court reaffirmed the basic principle that contractual promises must be performed as promised. When the tenant breached the lease in that case, the issue was whether the proper measure of loss is the *cost of reinstatement* to the position the innocent party would have been in had the contract been performed or the *diminution in the value* of the property.

Tabcorp Holdings Ltd v Bowen Investments Pty Ltd

[12.80] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272. A tenant of an office building carried out substantial renovations to the foyer without the consent of the landlord as required under the lease.

The High Court held that the landlord had a contractual right to the preservation of the building against alterations to which it had not given its consent. The issue was what damages the landlord was entitled to. The tenant argued that the landlord was only entitled to be compensated for the *depreciation in the value of the premises* (assessed at approximately $33,000), not the amount that it would take to put the landlord in the position it would have been in had the terms of the lease been honoured (*reinstatement* damages – $1.34 million). The High Court reaffirmed the basic principle that contractual promises must be performed: the landlord was entitled to the cost of restoring the foyer to the state it would have been in had the tenant not breached the lease.

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Damages criteria

[12.90] Damages for breach of contract are awarded to an innocent party provided:

1. the type of loss is recognised by law;
2. the breach caused the loss;
3. the loss is not too remote from the breach; and
4. the innocent party has mitigated the loss where possible.

The damage must have been caused by and must not be too remote from the breach

Causation

[12.100] The innocent party must establish that the damages it seeks were caused by the breach of contract. The courts use the "but for" test – "but for" the breach, would the loss have occurred? If the answer is no, causation is satisfied. If the answer is yes, the damage would have occurred anyway, so causation is not satisfied. In other words, we ask whether a particular act or omission that constitutes a breach of contract can fairly and properly be considered the *cause* of the loss.

Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd

[12.120] *Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd* [1968] 120 CLR 516. Reg Glass, seeking to protect its premises against burglary, contracted with Rivers Locking to supply security installations including the supplying, fitting and hanging of a steel-sheeted back door fitted with a superior locking system. Burglars broke into the shop in a comparatively short time by splintering and removing a door frame and the lintel, cutting into the brickwork and levering the door open.

The High Court said the breach did not necessarily imply that the defendant was liable to compensate the plaintiff for the loss caused by the burglary. However, the Court was satisfied that, had a door that was "reasonably fit" for its purpose been installed, the burglary would not have occurred. Thus, "but for" the breach of the (implied) term that the defendant would supply, fit and hang a door that would provide reasonable protection against a potential burglar, the loss would not have occurred.

When considering multiple causes or intervening events, the "but for" test is not the exclusive test of causation. In these cases, the courts refer to the *chain of causation* between the wrong complained of and the loss or damage suffered. Thus, if something intervenes between the breach and the loss to "break the chain" of causation, the defendant will not be responsible or will only be held partly responsible for the loss. Whether an intervening event breaks the chain of causation or merely reduces the effect of the defendant's breach, as a cause, depends on whether the event was "reasonably foreseeable" by the defendant: *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310. McHugh JA held that, to establish a causal connection between a breach of contract and the damage suffered, the plaintiff only needs to show that the breach was *a* cause of the loss – it need only have "causally contributed" to the loss. It was accepted that the "but for" test was the "leading test", but in those cases where several factors combined to produce the loss or damage it is only a "guide" and "the ultimate question is whether, *as a matter of common sense*, the relevant act or omission was a cause".

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Remoteness

[12.130] The common law considered that it would be neither just nor practicable for the party in breach to be liable for *every* loss that might have been caused by the breach. Therefore, a fundamental principle is that damages are not recoverable for losses that are too remote – that is, those that are not *reasonably foreseeable*.

What is a reasonably foreseeable loss? The classic test has been well established since *Hadley v Baxendale* (1854) 9 Exch 341. Reasonably foreseeable losses are those that may reasonably be considered to:

1. *arise naturally*, according to the usual course of things, from the breach – this is *imputed knowledge* (the defendant is assumed to know of the loss even if they did not actually know); or
2. have been *in the reasonable contemplation* of the parties at the time the contract is made as the probable result of the breach – this is *actual knowledge* (the defendant has knowledge of the loss even if the ordinary reasonable person would not be aware).

Hadley v Baxendale

[12.140] *Hadley v Baxendale* (1854) 9 Exch 341. Hadley were flour millers, powering their mills with a steam engine. When the crankshaft of the engine broke, preventing the steam engine from working, they contracted with a firm to make a new shaft. The firm required the broken shaft to be sent to them so they could copy it. Hadley contracted with the defendants to deliver the broken shaft. However, Baxendale took seven days to deliver the shaft instead of the expected two days, which resulted in the mills laying idle for five days, causing the plaintiffs significant loss of profits. Baxendale was unaware that the mill had to shut down until the new shaft arrived. The Court said, in an oft-quoted passage:

> Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.

The Court decided that the losses incurred by Hadley did not *arise naturally* from the delay in delivering the shaft (*first limb*) because it was reasonable to expect the mill owner would have had a spare crankshaft. The Court went on to say that if there were special circumstances (eg that there was no spare shaft so the mill would have to shut down) *and* these circumstances

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were communicated by Hadley at the time they entered into the contract, then Baxendale would be liable for the loss of profits caused by the breach (*second limb*).

On this basis, *direct losses* arise naturally and *consequential losses* are those losses that would have been in the contemplation of the parties at the time they formed the agreement. Or to put it in another way:

> The normal loss is that loss which every plaintiff in a like situation will suffer; the consequential loss is that loss which is special to the circumstances of that particular plaintiff.[1]

For almost a century, the courts, relying on *Hadley v Baxendale*, restricted recovery for consequential or indirect damages to those damages on which the promisor had implicitly agreed. That changed in 1949 with *Victoria Laundry v Newman*. After that decision, the second limb of *Hadley* was freed up: the defendant would now be liable for those losses if it had reason to know of the plaintiff's possible loss – in other words, if the loss was "on the cards".

Victoria Laundry (Windsor) Ltd v Newman Industries Ltd

[12.150] *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528. Victoria Laundry was in the laundry and dyeing business and contracted to buy a large vertical boiler from Newman Industries, an electrical manufacturer. Although Newman Industries knew at the time of contracting that Victoria Laundry was "most anxious" to have the boiler installed on time, it was not aware that this anxiety was heightened because Victoria Laundry had negotiated lucrative dyeing contracts with the government. The boiler was damaged during manufacture and as a result was installed 20 weeks late. The issue was whether Victoria Laundry could recover its loss of "ordinary business" and, in addition, the loss relating to the "special lucrative dyeing contracts".

The Court of Appeal held that Newman Industries only had to compensate for the ordinary, not the extraordinary, loss of profits. Asquith LJ distinguished losses from "particularly lucrative dyeing contracts" as a different type of loss that would only be recoverable if the defendant had sufficient knowledge of them to make it reasonable to attribute to him acceptance of liability for such losses. Asquith LJ found that the plaintiff had conveyed sufficient information by the date the contract was concluded to recover its lost profits for the first claim, but not for the second. It was said:

> [O]n April 26, in the concluding letter of the series by which the contract was made: "We are most anxious that this" (that is, the boiler) "should be put into use in the shortest possible space of time." Hence, up to and at the very moment when a concluded contract emerged, the plaintiffs were pressing on the defendant the need for expedition; and the last letter was a plain intimation that the boiler was wanted for immediate use.

1 H McGregor, *McGregor on Damages* (16th ed, Sweet & Maxwell Ltd, London, 1997), p. 20.

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Thus the vendor of the boilers would have regarded the profits on the particularly lucrative contracts as a different and higher form of risk than the general risk of loss of profits by the laundry.

Day v O'Leary

[12.160] *Day v O'Leary* (1992) 57 SASR 206. The O'Learys engaged Day to resurface a parquetry floor in a house that the O'Learys were renovating with a view to leasing the house out. Day's work was so defective that the floor had to be replaced causing considerable delays in the completion of the work. As a result, the O'Learys had to delay their plans to lease their house.

The Court decided that the O'Learys were entitled to damages for the cost of replacing the floor. However, their claim for loss of rent was rejected because they had not informed Day of their intention to let the house. Therefore, the loss of opportunity (for rental earnings) neither flowed naturally from the breach nor was it a loss that was reasonably contemplated by the appellants.

[12.170] *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* offers some assistance in determining whether a loss is, or should have been, within the "reasonable contemplation" of the parties (or at least the defendant).

H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd

[12.180] *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] 1 QB 791. The plaintiffs ordered a bulk food storage hopper from the defendants for the purpose of storing pignuts for feeding their pig herd. When the defendants installed the hopper, they failed to ensure that the ventilator at the top of the hopper was open. The result was that the pignuts became mouldy and caused the outbreak of an intestinal infection in the pigs and 254 of them died. The plaintiffs brought an action for substantial damages.

The Court held that the plaintiffs were entitled to recover their loss. Damages were recoverable in respect of injury or loss where the parties, at the time of the contract, would have "contemplated as a serious possibility the type of consequence, though not necessarily the specific consequence" that would result from a breach of this kind.

On this point, the House of Lords in *Koufos v Czarnikow Ltd* [1969] 1 AC 350 held that for loss to be damage in the "reasonable contemplation" of the parties the loss must be "a serious possibility", "a real danger", "liable to result" or "not unlikely" to occur.

The duty to mitigate the loss

[12.190] The law imposes a duty upon a person claiming damages to take all reasonable steps to mitigate the loss caused by the breach of contract. A person suing for damages for breach of contract is only required to act reasonably to limit their loss and is not required to take undue steps, expose themselves

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to risk or spend money which they cannot afford simply to reduce the amount of their loss. If a plaintiff does not take reasonable steps to mitigate their loss, their damages are reduced by the amount that could reasonably have been avoided.

Ultimately the test for mitigation is simply whether what the innocent party did was reasonable in all the circumstances. What an innocent party is required to do to mitigate its loss will always be a question of fact to be considered in all the circumstances. Examples of what may be required might include:

- entering into a substitute contract of a similar nature (eg an employee whose contract has been wrongfully terminated may be expected to mitigate their loss by accepting an offer of a similar employment contract elsewhere);
- re-selling or re-letting property where a purchaser or lessee has breached the agreement; or
- giving a builder a reasonable opportunity to rectify any defects (where it is reasonable to do so).

For example, Ace Ltd contracts with Zoo Ltd to deliver rotor blades needed for the production of wind generators. Zoo fails to deliver the blades on the agreed date, breaching the contract. What mitigation efforts does Ace employ?

- Ace immediately starts looking for another supplier who can provide the blades. They find another supplier, but at a higher cost.
- Ace also adjusts its production schedule to continue operating with the materials they have on hand to minimise downtime and losses.

Ace incurs additional costs due to the higher price of blades from the alternative supplier and potential inefficiencies in production. These additional costs are considered damages resulting from Zoo's breach of contract. However, Ace cannot claim for losses that could have been avoided by reasonable mitigation efforts. For example, if it did not seek an alternative supplier and allowed its production to halt completely, it may not be able to recover the full extent of those losses.

In any particular case, the important point is that the innocent party is not required to act other than reasonably and in the ordinary course of its business.

Payzu Ltd v Saunders

[12.200] *Payzu Ltd v Saunders* [1919] 2 KB 581. An agreement was reached between a buyer and a seller whereby the seller agreed to sell a fabric. Delivery was supposed to take place in instalments over the course of nine months, with payment due within one month of each delivery. Following the first delivery, the buyer failed to make its timely payment. The seller refused to continue delivering goods under the contract. Instead, they proposed to deliver the goods at the contract price only if the buyer agreed to pay in cash on delivery of each instalment. The buyer rejected this offer and terminated the contract based on the seller's repudiation (ie refusal to fulfil their contractual obligations). They sued the seller for breach of contract and claimed damages for the difference between the market price and the contract price (given that the market price of the goods had risen in the meanwhile).

The Court held that the buyer should have accepted the seller's revised offer and payment terms to mitigate its loss. But instead of doing so, it went on to purchase the goods from the market at a higher price. Since it permitted itself to sustain a large measure of loss despite being offered a reasonable option by the seller, it failed to mitigate the loss and hence, was not entitled to damages.

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Difficulty of quantifying damages no bar to recovery

[12.210] In certain circumstances, it may be difficult to quantify or assess the loss in monetary terms resulting from the breach of contract, particularly where the loss is speculative or uncertain. However, as *Howe v Teefy* demonstrates, the fact that the losses are uncertain or speculative does not relieve a court from the responsibility of estimating them as best it can.

Howe v Teefy

[12.220] *Howe v Teefy* (1927) 27 SR (NSW) 301. The defendant leased a racehorse to the plaintiff trainer for three years. Three months later, in breach of the contract, the defendant retook possession of the horse. The plaintiff brought an action claiming damages for the loss of profits he would have made from his own bets on the horse and providing tips (for reward) to others. The jury awarded the plaintiff £250 damages. The defendant appealed on the grounds that the prospective winnings of the plaintiff from bets and stable commissions were too remote to be recovered as damages and that there was no evidence on which the jury could have assessed such winnings.

The Court decided that the losses were reasonably foreseeable under *Hadley v Baxendale* principles and that the extent of those losses was capable of assessment in monetary terms.

Damages not usually recoverable for disappointment or distress

[12.230] The general rule is that damages are not recoverable for disappointment, distress, injured feelings or mere inconvenience arising from a breach of contract. An exception to the general rule is that damages are recoverable for distress or disappointment arising from breach of an express or implied term that the promisor will provide the promisee with pleasure, enjoyment or personal protection or where the distress or disappointment is a result of the suffering of physical injury or physical inconvenience.

Jarvis v Swans Tours Ltd

[12.240] *Jarvis v Swans Tours Ltd* [1973] 1 QB 233. Jarvis booked a holiday in Switzerland through the defendant, Swans Tours. The brochures were tantalising, leading Jarvis to believe that he would be part of a large house party that would have excellent skiing and lots of social activities. However, as Denning LJ sardonically noted:

> [Jarvis] found there were only 13 (guests) there in the first week. In the second week … he was the only person there … He was very disappointed, too, with the skiing. It was some distance away … There were only mini-skis … In the second week he did get longer skis for a couple of days, but then, because of the boots, his feet got rubbed and he could not continue even with the long skis. There were many other matters, too … He did not have the nice Swiss cakes, which he was hoping for. The only cakes for tea were potato crisps and little dry nut cakes. The yodeller evening consisted of one man from the locality who came in his working clothes for a little while, and sang four or five songs very quickly.

The Court awarded damages, a part of which was calculated to compensate Jarvis for the disappointment he suffered.

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Baltic Shipping Co v Dillon

[12.250] *Baltic Shipping Co v Dillon* (1993) 176 CLR 344. The respondent paid $2,205 in advance for a 14-day cruise in the South Pacific. The cruise was intended to be an enjoyable and relaxing holiday experience. However, after eight days, the ship struck a rock and sank. In an action against the appellant owners and operators of the vessel, Mrs Dillon was awarded $5,000 for disappointment and distress as a loss that was a reasonably foreseeable consequence of the breach of the implied term to provide a safe journey (in addition to damages for loss of belongings and personal injuries including the trauma she suffered in the shipwreck).

Damages and contributory negligence

[12.270] Under the apportionment legislation of the various States, the damages awarded to a successful plaintiff suing in tort are reduced by the extent of any contributory negligence on the part of the plaintiff. However, in *Astley v Austrust Ltd* (1999) 197 CLR 1, the High Court held that the apportionment legislation of South Australia required apportionment for contributory negligence only in a tort action, not in an action for breach of contract. The Court held that the South Australian apportionment legislation was thus directed only to claims in tort and not to claims in contract. The apportionment legislation of the other States was in similar terms. Consequently, the case would have been of application throughout Australia and would have meant that damages could not be reduced for contributory negligence where there was a breach of a contractual duty to exercise due skill and care.

However, all jurisdictions have now amended their apportionment legislation to permit the apportionment of damages for breach of contractual duty of care in cases of contributory negligence.[2] Note that the contributory negligence defence does not apply, however, to breaches of other contract terms that do not impose a duty of care.

Ordinary, nominal and exemplary damages

Ordinary damages

[12.280] The damages we have so far considered in this chapter are variously referred to as ordinary, actual or compensatory damages, that is, the damages that flow from the breach of contract to compensate the innocent party for the actual loss suffered. Ordinary damages are to be distinguished from two other kinds of damages – nominal damages and exemplary damages.

Nominal damages

[12.290] Where there has been an infringement of a legal right, for example, a breach of contract, but the plaintiff is unable to establish that they have suffered any actual loss, only nominal damages will be awarded, that is, a token sum of, say, $1.

2 See *Law Reform (Miscellaneous Provisions) Act 1965* (NSW), s 9; *Wrongs Act 1958* (Vic), s 26; *Law Reform Act 1995* (Qld), s 10; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA); *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Amendment Act 1947* (WA), s 4; *Wrongs Act 1954* (Tas), s 4; *Civil Law (Wrongs) Act 2002* (ACT), s 102; *Law Reform (Miscellaneous Provisions) Act* (NT), s 16.

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Exemplary damages

[12.300] Damages for breach of contract are (broadly) designed to put the plaintiff in the position they would have been in had the contract been performed properly. Punitive or exemplary damages – awarded where a court seeks to punish and deter a person from engaging in (usually) tortious behaviour – are not available in contract law cases.

Penalties and liquidated damages

[12.310] Normally, damages are "unliquidated", that is, no amount is specified in the contract; the matter is left for the court to determine, according to accepted principles. It is possible, however, for the contracting parties to insert a clause in the contract that specifies the amount of damages that will be paid to the innocent party in the event of a breach. Such clauses are sometimes referred to as "agreed sums for breach". For example, in a house construction contract, the parties may agree that in the event the builder does not finish the house on or before the date in the contract, the builder will pay the home owners $1,000 per week. In such a case, damages are said to be liquidated, and provided that the amount to be paid in the event of a breach is a genuine pre-estimate of the damages that the victim would suffer because of the breach, such clauses are enforceable.

If the amount specified in the contract is not a genuine pre-estimate, it will be regarded as a *penalty*. A penalty is a sum inserted in order to punish and/or deter the other party from a possible breach and which bears little or no relationship to the loss actually suffered by the plaintiff as a result of the breach by the defendant. In the example mentioned earlier, if the amount payable by the builder for late completion was, say, $5,000 per week, this may not be a genuine pre-estimate of the damages and may be regarded as a penalty, being unenforceable. Note that if an agreed sums clause is a penalty, this does not mean that no damages are recoverable: it only means that the clause is unenforceable, and ordinary damages rules apply to determine the loss recoverable.

It is frequently difficult to determine whether an amount expressed in a contract to be payable on a breach is actually a penalty or liquidated damages. In *Ringrow Pty Ltd v BP Australia* (2005) 224 CLR 656, the High Court held that *mere disproportion* to the likely damage was not sufficient to render a clause a penalty. The Court unanimously stated that, to be a penalty, the amount "must be judged extravagant and unconscionable in amount". It is not enough that it should be lacking in proportion. It must be "out of all proportion".

[12.320] The High Court recently decided that substantial fees charged by banks for late payment of minimum repayment amounts on credit card debts were *not* penalties.

Paciocco v Australia and New Zealand Banking Group Ltd

[12.330] *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525. A bank charged a substantial fee for late payment of the minimum monthly amount required under a customer's credit card. The High Court held that this late payment fee was not a penalty. The bank had three legitimate interests that were protected by the fee. The first interest was the operational costs of seeking payment by customers. The second interest was provisioning costs, since the risk of default by customers increased with late payment. The third interest was increased regulatory capital costs, since an increase in the risk of default by customers increased the amount of regulatory capital that the bank was required to maintain. When these interests

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were taken into account, the late payment fee was not "grossly disproportionate" to the bank's costs arising from a breach.

The Court decided that the interests that may be protected by a contractually required sum payable upon breach were not restricted to the amount that would be recoverable in an action for breach of contract. In this instance, recovery of such losses did not have a punitive purpose.

Equitable remedies: specific performance

[12.340] The common law is primarily interested in compensation for losses caused by a breach. However, an order for specific performance, where the court directs a party to perform their obligations under the contract, may also be issued. A failure to comply with such an order may result in contempt of court proceedings. Specific performance is an equitable remedy, and therefore the court has discretion whether or not to grant an application. It will be refused if its effect would be to cause unfairness or undue hardship to the defendant.

An order for specific performance will not be granted in the following situations:

Where damages are an adequate remedy

[12.360] An award of damages is usually regarded as a sufficient remedy to compensate for breach of contract. For example, in the event of a breach by a supplier, a buyer is expected to go out into the market and buy equivalent goods and, if he or she has to pay more for the goods, sue for losses sustained. Only in exceptional circumstances, where damages are plainly not an adequate remedy, will the court grant an order for specific performance. This may be where the contract is for the sale of goods that are rare or unique (eg a Monet painting that has come onto the market) or where the contract is for the sale of land (generally each piece of land is regarded as unique and irreplaceable).

Where the contract is for personal services

[12.370] It is regarded as undesirable (and probably futile and self-defeating) for a court to order a person, such as a professional athlete, an artist or an architect, to complete a contract that involves their personal services (playing football, painting a portrait or designing a town square). For this reason, an order for specific performance will *not* be ordered in such circumstances. However, as we shall see, there are circumstances where a court may issue an injunction *preventing* a person from, for example, playing for *another* football team.

Where the contract would require constant supervision by the court

[12.380] Specific performance will not be ordered where the Court may be required to supervise such performance in order to ensure compliance with the order.

Ryan v Mutual Tontine Westminster Chambers Association

[12.390] *Ryan v Mutual Tontine Westminster Chambers Assoc* [1893] 1 Ch 116. The lessor of a block of flats agreed to provide a porter who was to be "constantly in attendance" and

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perform specified duties. The porter appointed by the lessor was also employed as a chef in a nearby club and during his absence for several hours each day, his duties were performed by other persons. One of the tenants sought an order for specific performance of the obligation.

The Court decided that specific performance could not be ordered since the Court could not guarantee by its order that the porter would remain in attendance without constantly supervising such attendance.

Netline v QAV Pty Ltd (No 2)

[12.400] *Netline v QAV Pty Ltd (No 2)* [2015] WASC 113. The plaintiffs owned an apartment and engaged the defendant as an agent to provide caretaking and letting services. The Supreme Court of Western Australia found that the defendant had repudiated the agreements and awarded damages to the plaintiff. However, the Court refused to order specific performance because to do so would likely generate ongoing conflict and contempt proceedings rather than ensuring finality. In addition, the plaintiffs had failed to prove that damages would not be an adequate remedy.

"Equity does not order the impossible to be done"

[12.405] In addition, specific performance will not be ordered where it is not actually possible for the defendant to comply with the order.

Evans v Robocorp

[12.410] *Evans v Robocorp* [2014] QSC 26. The appellant entered into a contract for the sale of land to the respondent. However, the respondent subsequently got himself into serious financial trouble and was unable to settle. The appellant sought an order for specific performance.

The Court refused to order specific performance. It was satisfied that the respondent did not have the financial capacity to perform his obligations under the contract and that such an order would cause him disproportionate hardship. This case is a good example of the equitable maxim that "equity does not order the impossible to be done".

Injunction

[12.420] An injunction is an order of a court restraining a person from doing a wrongful act. In the present context, an injunction is an order restraining (prohibiting) a party from breaching their contractual obligations. Thus, an injunction may be granted to prevent an employer from unlawfully terminating a contract of employment. Like specific performance, an injunction is an equitable remedy. However, an injunction will not be granted where its effect would be to compel a person to do something that they would not have been ordered to do by a decree of specific performance. Thus, just as a court will not make an order that a university professor must specifically perform her contractual obligations, it will not grant the university an injunction preventing her from terminating her contract.

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On the other hand, if the injunction sought would not necessarily have the effect of forcing the defendant to perform their contract, then an injunction may be granted if it is necessary to protect the plaintiff from negative consequences flowing from the defendant's conduct in breaching the contract. Restraining breaches of the implied contractual obligation not to prevent the other party from performing the contract or not to obstruct or hinder the other party from performing the contract are key examples. There is also the obligation not to exercise contractual rights unreasonably. As with an order for specific performance, an injunction is a discretionary remedy and accordingly is likely to be refused where, for example, the plaintiff has been guilty of delay or is in breach of their obligations under the contract. Furthermore, again like an order of specific performance, an injunction will not usually be granted if, in the particular circumstances, damages would be an adequate remedy.

Restitution

Introduction

[12.430] Restitution is concerned with the restoring to the plaintiff a benefit conferred on the defendant at the expense of the plaintiff in circumstances which make it unjust that the defendant should retain the benefit. A claim for restitution is *not* a claim for breach of contract – it is *not* compensatory but rather is determined by reference to the benefit conferred on a *quantum meruit* basis (reasonable value for work done). An action in restitution is usually (but not always) brought either because there is no enforceable contract between the parties or because such a contract is void or unenforceable. Restitution will usually be awarded only where:

1. the innocent party has received some form of *benefit* (ie has been "enriched");
2. that benefit or "enrichment" was at the other party's *expense*;
3. it would be *unjust* (unfair, unconscionable or inequitable) to permit the innocent party to retain the benefit; and
4. there are no restitutionary defence available to the defendant, for example, change of position, estoppel, incapacity or illegality.

The most common restitutionary claims are associated with contracts that are invalid (and therefore where there is no right to payment under the contract). The basic principle is that a plaintiff may make a claim for reasonable payment (on a *quantum meruit*) if the benefit was conferred prior to termination for breach or repudiation by the defendant or the defendant has accepted the benefit. Not all restitutionary claims are made in connection with contracts. For example, where a bank mistakenly overpays a person, the bank is entitled to recover the money whether or not it has a contract with the (temporarily) fortunate recipient of the windfall. The possibility that a party may be awarded a reasonable value for the work performed means that restitution has been considered as a more favourable remedy compared to compensatory damages in some cases, where the reasonable value of the work exceeds the contract price. Further, unlike other claims in equity, once unjust enrichment is established, liability is strict and independent of the fault of the defendant and is not subject to obligations to mitigate or remoteness of damage concepts (that would otherwise apply to a claim for damages under contract).

Restitution in Australia

[12.440] In Australia, a coherent and principled law of restitution based on reversing unjust enrichment has been developed by the High Court. In 1986, the High Court in *Pavey & Matthews Pty Ltd v Paul*, a case involving an invalid contract, established the law of restitution as a separate cause of action, independent of

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the law of contract. It decided that, even in the absence of a valid contract, a party could recover the value of their work in order to prevent unjust enrichment (*quantum meruit*). Six years later, in *David Securities Pty Ltd v Commonwealth Bank of Australia*, in a wrongful payment case ("money had and received"), the High Court expanded the law of restitution when it accepted the defence of change of position and by abolishing the exclusion of mistake of law as a trigger for a restitution. And, in 2019, in *Mann v Paterson Constructions Pty Ltd*, the High Court placed limits on the circumstances where awards could be made to contractors by way of *quantum meruit* that substantially exceeded the amounts that would otherwise have been payable had the relevant contracts not been terminated.

Pavey & Matthews Pty Ltd v Paul

[12.450] *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221. Pavey & Matthews were builders who were licensed under the *Builders Licensing Act 1971* (NSW). They carried out building work for Paul pursuant to an oral contract. Under s 45, a building contract was unenforceable unless it was in writing and signed by each of the parties. When the work was completed, a dispute arose and Paul refused to pay the balance of the contract price. Although the contract was unenforceable, the High Court decided that the plaintiff was entitled to "reasonable remuneration", the basis of which was in "restitution or unjust enrichment". Paul had accepted the benefit and therefore had to pay a reasonable price (if not the contract price).

David Securities Pty Ltd v Commonwealth Bank of Australia

[12.460] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353. David Securities borrowed money from the Commonwealth Bank of Australia (CBA) through CBA's Singapore branch. Tax legislation required withholding tax to be paid on interest payments to non-residents. To overcome this issue, the Bank included a "grossing-up" clause that was intended to ensure CBA received its full entitlement under the contract. It provided that all interest payments be paid by the Borrower (David Securities) to the Bank without deducting tax and that the Borrower would pay additional tax sums as may be required. The "grossing-up" clause was however rendered void by the tax legislation and David Securities claimed that the extra payments made by it to the CBA constituted "money had and received" by the bank. They argued that they made the payment under the mistaken belief that CBA was by law entitled to demand the payment.

The High Court overruled the previous common law principle that money paid under a *mistake of law* could not be recovered. The Court determined that there should be no distinction between mistakes of law and mistakes of fact when it comes to the recovery of money. The Court emphasised the aim of restitution is to prevent unjust enrichment – if a party has received a benefit to which they were not entitled, they should return it, regardless of whether the benefit was conferred under a mistake of law or fact.

The High Court rejected the argument by the CBA that David Securities must independently prove "unjustness" over and above the mistake. The fact that the payment had been caused by a mistake is sufficient to give rise to an obligation on the part of the respondent to make restitution

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(ie to compensate David Securities to prevent the Bank from being unjustly enriched). Before that liability is displaced, the respondent must point to circumstances that the law recognises would make an order for restitution unjust.

Mann v Paterson Constructions Pty Ltd

[12.470] *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32. Peter and Angela Mann contracted with Paterson Constructions Pty Ltd to build two townhouses under a major domestic building contract in Blackburn, Victoria. Before the completion of the second townhouse, the Manns claimed the contractor repudiated the contract, based on the contractor's alleged delay in carrying out works. They elected to accept the repudiation and they excluded the contractor from the site. The contractor, in turn, asserted that the Manns' conduct in excluding it from the site itself amounted to repudiation, which it accepted. The contractor sought to recover, on a *quantum meruit* basis, the value of work done:

- regarding 42 variations that were directed orally, but for which the process prescribed in the Domestic Building Contracts Act 1995 (Vic) was not followed;
- under the contract, for which a contractual right to payment had accrued; and
- under the contract, for which no contractual right to payment had accrued.

At the time of termination, the contractor had received $945,787 as progress payments against a contract price of $916,779 (that did not include the cost of the variations). The contractor commenced VCAT proceedings. The Manns were ordered to pay the contractor a *quantum meruit* sum of $660,526.41, representing a recovery of considerably more than would have been awarded as damages for breach. The Manns unsuccessfully appealed to the Supreme Court of Victoria and the Victorian Supreme Court of Appeal.

On appeal to the High Court, the Court was required to determine two critical issues:

- the circumstances in which the contractor, having terminated for repudiation, could choose to recover on a *quantum meruit* basis, rather than seek damages for breach of contract losses; and
- the extent to which, assuming the contractor could recover on a *quantum meruit* basis, the contract price operated as a ceiling on the amount recoverable.

The High Court unanimously rejected the contractor's entitlement to sue on a *quantum meruit* basis *when it had accrued a contractual* right to be paid. It also held that the contractor could recover on a *quantum meruit* basis where no right to payment had accrued under the relevant contract, but that *the amount recoverable was limited to the contract price* for the relevant stage or part of the works.

Further reading

See contract texts listed at the end of Chapter 2.

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Tutorial activities

1. Generally speaking, what is the object of an award of damages for breach of contract?
2. Why might re-instatement losses be appropriate? Use *Tabcorp* (see [12.80]) as an example.
3. Why are "expectation losses" not always an appropriate measure of loss? Use *Amann Aviation* (see [12.50]) and *Cessnock* (see [12.60]) as examples.
4. The loss caused by a breach must satisfy both causation and remoteness requirements. Explain with reference to *Reg Glass* [12.120] and *Hadley v Baxendale* [12.140].
5. Explain the two limbs of *Hadley v Baxendale* (see [12.140]). Illustrate your answer with reference to *Victoria Laundry* (see [12.150]), *Day v O'Leary* (see [12.160]) and *Parsons* (see [12.180]).
6. A plaintiff has a duty to mitigate the losses suffered as a result of the defendant's breach. Explain why this is so. Refer to *Payzu* [12.200].
7. What is an order for specific performance? Why would a person seek such an order? When would such an order be made?
8. What is the basis of a claim in restitution? What is the trigger for such a claim?
9. Nancy is in her final year at university. In order to graduate in November, she must submit her final folio of work to her supervisor by October. Nancy takes her work to Casey to be professionally bound. She explains to Casey the importance of having the work completed by 1 October, and Casey assures her that this can be done. The binding process is delayed due to technical issues and the bound folio is not delivered to Nancy until late October. As a result, she is unable to graduate until February. Her parents have to cancel their flight from Perth to Melbourne and lose a deposit of $500. Advise Casey of his liabilities.
10. Jerry opens a delicatessen specialising in selling sandwiches and rolls to health-conscious university students. He signs a one-year contract with Vogel Breads to supply him with bread made from organic wheat. On 1 April 2024, an outbreak of a virus contaminates much of the organic wheat crop. Supplies cannot resume for a month. Jerry tries to find another supplier but is unable to do so. As a result, Jerry has to close the business for the month, losing $25,000 in profit. He is also unable to fulfil a contract to supply the bread at a national scout jamboree that coincidentally is scheduled for that week. Jerry loses $120,000 on that contract. Jerry wishes to terminate the contract with Vogel Breads and sue for damages.
    (a) Advise the parties whether Vogel has committed a breach of the contract that would allow Jerry to terminate the contract; and
    (b) Advise Jerry what damages he may be entitled to?
11. The *Princess Ruby* sets off from Sydney on a cruise around the South Pacific. On the third night, several passengers fell ill and were found to have COVID-19. The ship headed back to Sydney, and the infected passengers were quarantined in the ship's hospital. It subsequently emerges that the captain was aware that a crew member had symptoms but decided not to take any action because he did not want to ruin the trip. The cruise company

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admits liability for breach of an implied term in the contract and offers compensation for the cost of the trip. However, the passengers seek your advice as to whether they can claim damages:

(a) For the loss of enjoyment and pleasure that resulted from the breach; and

(b) Punitive damages to punish the cruise company for the gross negligence of its captain.

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PART 3: CONSUMER PROTECTION AND PRIVACY LAW

Chapter 13: Consumer Protection

Chapter 14: Data Protection and Privacy Law

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Chapter 13

Consumer Protection

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Introduction

[13.10] By the mid-1970s, consumer protection law in Australia was a confusing mess. The common law and a multitude of statutes in the States and Territories were failing to cope with the complex demands of the modern national marketplace. The passing of the Federal *Trade Practices Act 1974* (Cth) (TPA) in 1974 marked a turning point for consumer protection law as it introduced a new set of values and protections, more efficient enforcement and better remedies. However, for constitutional reasons, the consumer protection provisions were generally directed towards conduct engaged in by *corporations* and the TPA required complementary legislation in the States and Territories to ensure national coverage. Complex analysis was sometimes required to identify whether the TPA, or a State or Territory fair trading law, applied. For these and other reasons, on 1 January 2011, the *Competition and Consumer Act 2010* (Cth) (CCA) replaced the TPA. The CCA covers most areas of the market: including the relationships between suppliers, wholesalers, retailers and consumers. Its stated purpose is to enhance the welfare of Australians by: (a) promoting fair trading and competition; and (b) by providing consumer protections. The consumer protection provisions of the CCA are contained in the *Australian Consumer Law* (ACL), which is located in Sch 2 to the CCA. The ACL is also part of State and Territory law, overcoming the constitutional issues previously affecting the TPA. The protections in the ACL are generally reflected in similar provisions in the *Australian Securities and Investments Commission Act 2001* (Cth), meaning that financial products and services are treated in largely the same way as other products and services are under the ACL.

In this chapter, references to sections in and other parts of legislation are references to the ACL unless indicated otherwise.

Overview of the ACL

Objectives

[13.20] The main reforms introduced in the ACL were the following:

- a new single set of definitions and interpretive provisions;
- a new, national law on unfair contract terms;
- a new single set of provisions about unfair practices and fair trading;
- a new set of national consumer guarantee provisions;
- a new national regime for unsolicited consumer agreements;
- a simple national set of rules for lay-by agreements;
- a new national product safety legislative regime; and
- national provisions on information standards.

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Legislative framework

[13.30] The ACL, in so far as it is contained in Sch 2 of the CCA, is a law of the Commonwealth.[1] As noted above, it replaced the consumer protection provisions of the former TPA and the formerly separate State and Territory consumer protection Acts, such as the Fair Trading Acts and door-to-door sales legislation. It is administered by the Australian Competition and Consumer Commission (ACCC) and the State and Territory consumer law agencies,[2] and it is enforced by all Federal, State and Territory courts and tribunals.[3] It has very broad application: it applies to conduct engaged in and outside of Australia by Australian citizens or persons who are ordinarily resident in Australia;[4] to natural persons engaged in conduct involving postal, telegraphic or telephonic services, including the Internet;[5] and to corporations.[6]

Conduct by foreign corporations may also be subject to the ACL. In *Gill v Ethicon Sàrl (No 5)* [2019] FCA 1905, consumers suffered injuries due to safety defects in medical devices. The devices were manufactured by foreign companies *that did not have a place of business in Australia*. The devices were imported and supplied by an associated Australian company.

It was held that the foreign companies were liable because the devices were supplied by an Australian company to Australian surgeons and implanted in Australian patients. By supplying the goods *to* an Australian company, the manufacturer had carried on business *in* Australia. Foreign corporations have also been bound by the ACL in other cases such as *Valve Corp v Australian Competition and Consumer Commission* (2017) 258 FCR 190 and *Australian Competition and Consumer Commission v Sony Interactive Entertainment Network Europe Ltd* (2020) 381 ALR 531, both involving the supply of video games via digital (rather than traditional physical) means.

Organisation of the ACL

[13.40] The ACL includes the following protections for consumers:

- general consumer protection provisions prohibiting misleading or deceptive conduct, unconscionable conduct and unfair terms in standard form consumer contracts;

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1 *Competition and Consumer Act 2010* (Cth), s 131. This section is in Pt XI – Application of the *Australian Consumer Law* as a law of the Commonwealth. Pursuant to an intergovernmental agreement, each State and Territory applies the *Australian Consumer Law* as the law of its jurisdiction too. See *Competition and Consumer Act 2010* (Cth), ss 140–140K; *Fair Trading Act 1987* (NSW), s 28(1); *Australian Consumer Law and Fair Trading Act 2012* (Vic), s 12(1); *Fair Trading Act 1989* (Qld), s 16(1); *Fair Trading Act 1987* (SA), s 14(1); *Fair Trading Act 2010* (WA), s 19(2); *Australian Consumer Law (Tasmania) Act 2010* (Tas), s 6(1); *Fair Trading (Australian Consumer Law) Act 1992* (ACT), s 7(1); *Consumer Affairs and Fair Trading Act 1990* (NT), s 27(1).

2 New South Wales: Fair Trading; Victoria: Consumer Affairs Victoria; Queensland: Office of Fair Trading; Western Australia: Department of Energy, Mines, Industry Regulation and Safety – Consumer Protection; South Australia: Consumer and Business Services; Tasmania: Consumer Affairs and Fair Trading Tasmania; ACT: Access Canberra; Northern Territory: Consumer Affairs.

3 *Competition and Consumer Act 2010* (Cth), ss 138–138B.

4 *Competition and Consumer Act 2010* (Cth), s 5(1).

5 *Competition and Consumer Act 2010* (Cth), s 6(3).

6 *Competition and Consumer Act 2010* (Cth), s 131(1).

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- specific protections against certain defined "unfair" practices, including particular instances of misleading or deceptive conduct, pyramid selling, unsolicited supplies of goods and services, component pricing and the provision of bills and receipts;
- regulation of consumer transactions, including a system of statutory consumer guarantees and a legal framework for unsolicited selling;
- product safety laws; and
- enforcement and remedies provisions.

The role of the ACCC

[13.50] The ACCC is an independent Commonwealth statutory body that administers the CCA, including the ACL. The ACCC's role complements that of other regulators, including the State and Territory consumer affairs agencies, who share responsibility for enforcing the State and Territory versions of the ACL. The ACCC focuses on taking action that best promotes the proper functioning of Australian markets, protects competition, improves consumer welfare and stops conduct that is anti-competitive or harmful to consumers. The ACCC naturally cannot pursue every complaint or alleged breach of the ACL, so it has developed a practice of setting compliance and enforcement priorities.

The ACCC's 2023–24 compliance and enforcement priorities[7] reflect the times that we are living through: addressing, amongst other things, essential services (including energy, communication and gas markets) having the potential to affect current cost of living concerns, areas of social concern (including consumer, product safety, fair trading and competition concerns relating to environmental and sustainability claims), and current trading trends concerning the digital economy and digital platforms. The ACCC's previous 2022–23 priorities also targeted issues of contemporary concern such as the operation of comparison websites and the practices of social media influencers: focusing (in both cases) on failures to disclose paid promotions.[8]

The ACCC is also proactive in providing advice and guidance to consumers about their rights and obligations in particular circumstances. The ACCC website, for example, provides helpful and practical information about the consumer guarantees,[9] as well as information and advice for consumers regarding the various potential consequences of COVID-19 on contracts and commercial life generally.[10]

General protections: ACL Chapter 2

Overview of Chapter 2

[13.60] Chapter 2 contains the general protections that create normative standards of business conduct. These are:

- a general prohibition of *misleading or deceptive conduct*:
  - Section 18(1) of the ACL prohibits a person (a legal person, such as a corporation, or a natural person), in trade or commerce, from engaging in conduct that is misleading or deceptive or that is likely to mislead or deceive. This prohibition creates a broad, economy-wide norm of conduct.

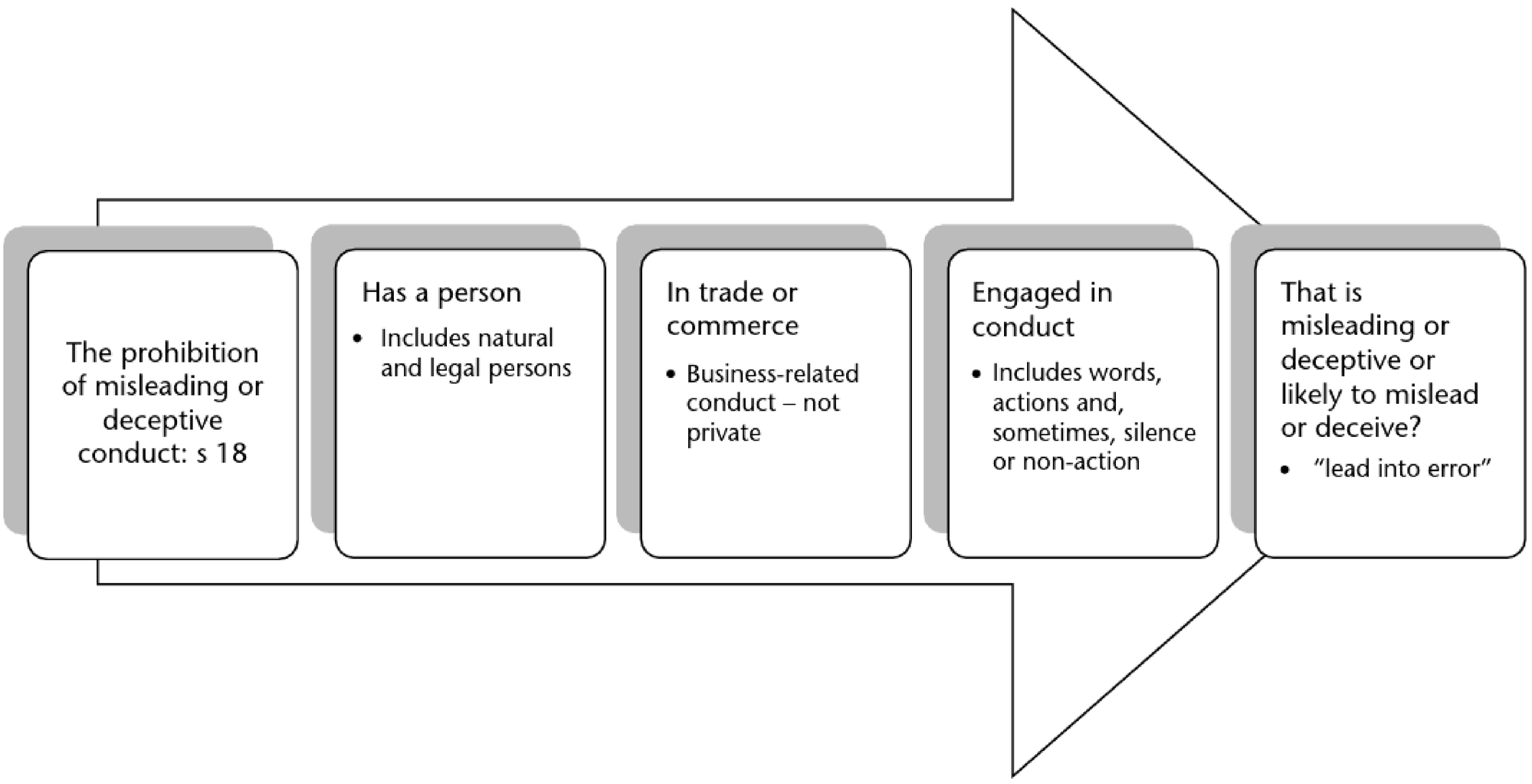
7 https://www.accc.gov.au/system/files/2023-24%20Compliance%20and%20Enforcement%20Priorities_0.pdf.
8 https://www.accc.gov.au/media-release/compliance-and-enforcement-priorities-for-2022-23.
9 https://www.accc.gov.au/consumers/buying-products-and-services/consumer-rights-and-guarantees.
10 https://www.accc.gov.au/about-us/publications/covid-19-coronavirus-information-for-consumers.

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- a general prohibition of *unconscionable conduct* and specific bans on unconscionable conduct in consumer and some business transactions:
  - A court may have regard to a number of matters in determining whether there has been unconscionable conduct in relation to the supply or acquisition of goods or services in trade or commerce. These matters include, but are not limited to: the relative strengths of the bargaining positions of the parties; the use of undue influence, pressure or unfair tactics by the stronger party; the willingness of the stronger party to negotiate the terms and conditions of a contract for supply; and the extent to which each party acted in good faith.
- a general prohibition on *unfair terms in standard form consumer contracts*:
  - A term is "unfair" when it causes a significant imbalance in the parties' rights and obligations arising under the contract, it is not reasonably necessary to protect the legitimate interests of the supplier, and it would cause detriment to the other party.

Misleading or deceptive conduct

Figure 13.1 : The prohibition of misleading or deceptive conduct



[13.70] Misleading or deceptive conduct is prohibited by the ACL, s 18(1) which provides that

> A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 18(1) creates a normative standard of conduct in trade or commerce. It applies to all persons, natural and legal (ie individuals and corporations), and can be relied on by consumers as well as corporations (such as competitors in the market) and the ACCC. Because of its breadth and the lack of specificity as to what "misleading or deceptive" conduct is, there are no civil penalties for breach of the prohibition. However, a wide range of other civil remedies are available. A person who has suffered loss or damage as a result of conduct that breaches s 18(1) may sue for damages: s 236. The court may also grant any other orders it thinks fit to prevent loss or damage as a result of a breach of s 18(1). In addition, s 18(1) is complemented by a number of specific prohibitions of particular types of false or misleading conduct that are set out in

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ss 29, 30, 31, 33, 34 and 37. These prohibitions, often used in conjunction with s 18(1), are important because a person who breaches these sections is liable for civil and, in exceptional circumstances, also criminal penalties. We shall now examine each of the elements of 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*.

Meaning of "person" and "in trade or commerce"

[13.80] The consumer protection provisions of the ACL prohibit conduct by a "person" that takes place "in trade or commerce". A "person" refers to legal persons (ie corporations) and also to natural persons. The High Court has held that the words "trade or commerce" are "not terms of art but are terms of common knowledge of the widest import": *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594. However, in *Nelson*, the High Court also made it clear that the word "in" means that s 18(1) is not intended to apply to *all* conduct of a corporation in the course of its overall business. It is necessary to ask whether, according to ordinary usage, the conduct complained of occurred *in the course of dealings* which, *of their nature*, have a trading or commercial character. So, for example, a private one-off transaction such as the sale of a private property will not be caught by s 18(1): *O'Brien v Smolonogov* (1983) 53 ALR 107. Similarly, (mis)representations made by homeowners about the quality of their renovations were not made "in trade or commerce" and the fact that the homeowners had renovated the house with the intention of reselling it at a profit did not affect this conclusion: *Williams v Pisano* (2015) 90 NSWLR 342.[11] Of course, the decision would have been different if the property were owned by a property developer and sold in the course of its property development business.

It is now clear that (under s 2(1) of the ACL) professional activities, such as providing accounting, taxation, legal or engineering advice, are in "trade or commerce". Section 2(1) is broader than its predecessor under the *Trade Practices Act 1974* (Cth) and now provides that "trade or commerce … includes any business or professional activity". Again, consistent with the decision in *Nelson*, this definition would not include absolutely everything done by a professional firm (eg purely administrative tasks); the activity would still need to be one that itself has a "trade or commerce" flavour.

Meaning of "engage"

[13.90] Section 18(1) provides that a person must not "engage" in misleading or deceptive conduct. Clearly, a person "engages" in conduct when they make a statement, a claim or a promise, or where they perform some action (or where they refuse to do so). However, a person is not liable if they act as a "mere conduit", passing on information that is received from another, in circumstances where it is clear that they are not the source of the information and that they are merely passing it on for what it is worth. In *Yorke v Ross Lucas Pty Ltd* (1985) 158 CLR 661, the High Court (after affirming that a corporation could contravene what is now s 18(1) even though it had acted honestly and reasonably) said:

> That does not, however, mean that a corporation which purports to do no more than pass on information supplied by another must nevertheless be engaging in misleading or deceptive conduct if the information turns out to be false. If the circumstances are such as to 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, merely passing it on for what it is worth, we very much doubt

11 The purchasers may still rely on ordinary contractual principles in these circumstances (eg the pre-contractual statements may be misrepresentations or collateral contracts).

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that the corporation can properly be said to be itself engaging in conduct that is misleading or deceptive.

In *Hyder v McGrath Sales Pty Ltd*, the purchaser of property sued the vendor's agent for misleading or deceptive conduct concerning the availability of car parking at the property. One of the issues was whether the agent had "engaged" in conduct, or was, instead, a "mere conduit" of the misleading information.

Hyder v McGrath Sales Pty Ltd

[13.100] *Hyder v McGrath Sales Pty Ltd* [2018] NSWCA 223. Amy Hyder entered into a contract for the purchase of a residential property for $9.4 million. Her husband, an experienced property developer, negotiated the contract and ultimately made the decision to proceed with the purchase. The property was formed from the subdivision of a larger parcel of land. McGrath described the property online as having a "double garage plus private off-street and driveway parking". However, the owners were only entitled to use the "private parking" area to the extent that this did not present an unreasonable interference with the rights of carriageway of the two other lots. A site plan was also published showing three cars parked at the end of the strip. A disclaimer appeared beneath the site plan stating:

> Scale in metres. Indicative only. Dimensions are approximate. 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 enquiries.

Hyder sued McGrath, claiming that she had suffered loss as a result of McGrath's misleading conduct. She argued that she would not have purchased the property for $9.4 million if the representation about parking had not been made. The trial judge held that, although the agent had engaged in misleading conduct, the conduct did not *cause* any loss (ie she would have bought the property anyway). Hyder appealed against the causation finding and McGrath counter-appealed, arguing that the agency was a "mere conduit" of the information and therefore not liable for its accuracy. McGrath succeeded. The Court of Appeal agreed that the agent did not purport to do anything more than pass on information supplied by another and had expressly and implicitly disclaimed any belief in the truth or falsity of that information. The information in question was not expected to be within the agent's own knowledge or expertise – it was a small agency with no legal or valuation expertise and could not be expected to have conducted its own investigation to determine the accuracy of the information. The purchaser failed to take reasonable care in respect of their own interests and to do their own due diligence. Moreover, the right of way was clearly disclosed in the title search annexed to the contract and, significantly, the purchaser's solicitor and valuer expressly reported the right of way to them.

The meaning of "conduct"

[13.110] As we will see, "conduct" is "misleading or deceptive" if it has the capacity to "lead into error". An error is simply something that is not true, and the courts have not attempted to embellish that basic definition. In *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 (see [13.170]), the Court explained how to approach the question of deciding whether conduct is misleading:

> … the question is whether in light of all the relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct which is likely to be misleading or deceptive …

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This quotation's references to acts, omissions, statements and silence also shed some light on what is meant by the "conduct" requirement under s 18(1). The s 2(2)(a) definition of "conduct" as the *doing or the refusing to do any act* contemplates both acts *and* omissions. In most instances, the "act" will consist of actions and statements, such as advertisements, promotions, quotations, statements and any representation made by a person. Because s 18(1) refers to conduct, and not to representations, we look to the effect of a pattern of conduct (in all of these senses) as a whole.

Puffs or exaggerated claims

[13.120] In relation to advertisements that may contain puffs or exaggerated claims, the courts have taken the realistic view that such things are not unusual business practice and should not be regarded as "conduct" that is "misleading or deceptive" in the context of s 18(1). However, it is still possible; the test is whether the statement was capable of leading "an ordinary and reasonable member of the audience to whom the statement was directed into error".

Silence or non-disclosure

[13.130] The definition of conduct under s 2(2) includes "refusing to do any act". The courts have held that, in certain circumstances, remaining silent or failing to disclose information (usually in pre-contractual negotiations) may be regarded as misleading "conduct". Where non-disclosure of a circumstance is alleged to constitute misleading or deceptive conduct, it must be shown that those to whom the conduct was directed had a *reasonable expectation* that the circumstance would be disclosed.

It is clear that in the normal course of negotiating a commercial contract between parties that are equally matched in their bargaining power, there is no "reasonable expectation" of the disclosure of information. This is even (or especially) so where that information may significantly affect the other party. As the High Court said in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 (see [13.160]), the prohibition on misleading conduct

> does not require a party to commercial negotiations to volunteer information which will be of assistance to the decision-making of the other party [or] volunteer information in order to avoid the consequences of careless disregard … of another party of equal bargaining power and competence.

However, as *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* demonstrates, silence may be misleading in pre-contractual negotiations where there are other circumstances (eg acts or representations) that may give rise to the required "reasonable expectation" that disclosure would be made.

Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)

[13.140] *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546. Henjo Investments owned a licensed restaurant. During negotiations for its sale to Collins Marrickville, its agent led the purchaser to believe that that restaurant seated 128 people and, indeed, the restaurant was set up to seat 128. However, the terms of the licence restricted the restaurant's seating capacity to 84. This reduced seating capacity had an impact on the profitability of the restaurant. The Full Court of the Federal Court decided that silence may constitute misleading or deceptive conduct where some qualification to a statement is necessary to avoid a party being actively misled:

> [T]he vendor sold a business knowing that it was subject to serious limitations upon its lawful seating capacity … which vitally affected the business, its goodwill, takings

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and profitability and knowing that in fact the restaurant was being conducted contrary to law … [T]hese circumstances gave rise to a duty on the part of Henjo as vendor to reveal the true position … before any contract was signed.

H Lundbeck A/S v Sandoz Pty Ltd

[13.150] *H Lundbeck A/S v Sandoz Pty Ltd* (2022) 96 ALJR 208. Lundbeck was the owner of a drug patent. Pharma, a subsidiary of Lundbeck, sold a generic version of the drug. The patent expired, but several years later Lundbeck was granted a retrospective extension of the patent term (which meant that the drug could not be copied and that generic drugs could not be produced by a competitor). Sandoz was a supplier of generic pharmaceuticals and sold a generic version of the drug after the patent expired. Pharma alleged that Sandoz engaged in misleading and deceptive conduct in supplying its generic products. It argued that Sandoz failed, refused or neglected to warn the representative member of the class to whom the conduct was directed (ie pharmacists) that the sale of its generic drug could infringe the patent.

The High Court held that a finding of misleading or deceptive conduct could not be sustained. This was based on the lack of a foundation in the evidence for considering that the pharmacists had held a reasonable expectation that Sandoz would inform them, not of an existing fact, but of a remote possibility that they might be exposed to proceedings for infringement if and when the patent was extended at a future date.

Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd

[13.160] *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357. A borrower applied to a lender (BMW) seeking an insurance premium funding loan. The borrower used the services of Miller & Associates, an insurance broker. The insurance policy for which finance was sought was a non-cancellable policy which was not suitable as security. The certificate itself did not state whether the policy was cancellable but BMW, who did not actually read the policy, incorrectly assumed that the policy was a property policy, which would usually be cancellable. The borrower defaulted on the loan. When BMW unsuccessfully sought to recover the unpaid moneys from the borrower and its directors, it sued the broker claiming that the broker should have disclosed that the policy was not cancellable and was thus not suitable as security.

The High Court unanimously held that the broker had not engaged in misleading or deceptive conduct. The Court decided that the insurance certificate would not have conveyed to its audience (an experienced premium lender) a representation that the policy was cancellable. The Court then considered whether the broker should have disclosed to the lender that the policy was not cancellable. It held that the prohibition on misleading conduct did not require a party to disclose information that would enable another party of equal bargaining power and competence to avoid the consequences of carelessly disregarding its own interests.

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Demagogue Pty Ltd v Ramensky

[13.170] *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31. Ramensky purchased land from Demagogue for a proposed development of several units. The plan, annexed to the contract, referred to a "driveway" that was, in fact, a public road. Demagogue had been negotiating with the relevant authority for the right to use the road as a driveway but up to that point had not been successful. Demagogue did not inform Ramensky of this issue. When Ramensky discovered the problem, he sought to rescind the contract. The Court held that Demagogue's silence constituted misleading or deceptive conduct because there was a *reasonable expectation* that there should have been disclosure of the unusual circumstances surrounding access to the property. Black CJ said:

> Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive … [T]here is in truth no such thing as "mere silence" because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed.

"Misleading or Deceptive"

[13.180] Section 18(1) concerns conduct that is "misleading or deceptive or is likely to mislead or deceive".

> Before a statement can be said to be misleading or deceptive … it must convey a meaning inconsistent with the truth. A statement which conveys no meaning but the truth cannot mislead or deceive or falsely represent; although a statement which is literally true may nevertheless convey another meaning which is untrue: *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181.

It is for the court to determine, objectively, whether the conduct under consideration is likely to mislead. The basic test concerns the likely reaction to the conduct of an ordinary or reasonable member of the class of persons to whom the conduct is directed (ie "the target audience"). Would a reasonable member of the target audience be led into error? If the answer is yes, the requirement that conduct be "misleading or deceptive" is satisfied.

To gain some understanding of the nature and extent of what is considered to be misleading or deceptive, we examine: (a) representations made to the general public (or to a specific group within the general public) in marketing strategies or advertising campaigns using various media (where proceedings are initiated by the ACCC or by trade competitors seeking to restrain rivals from engaging in conduct that is likely to mislead consumers); and (b) misleading or deceptive conduct in the context of commercial negotiations between parties (usually where one party argues that they were induced to enter into a contract as a result of representations or other conduct including non-disclosure made during pre-contractual negotiations). Note, though, that these are just examples; conduct of any kind, in trade or commerce, may potentially breach s 18(1).

Section 18: marketing and advertising

[13.190] In *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2020) 278 FCR 450, the Full Court of the Federal Court said that, *where the impugned conduct is directed to the public*

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generally or to a section of the public, in deciding whether the conduct is misleading or deceptive or likely to mislead or deceive, the Court must consider the likely characteristics of the persons who comprise the relevant class to whom the conduct is directed (the target audience). The Court must consider the likely effect of the conduct on ordinary or reasonable members of that class, disregarding reactions that might be regarded as extreme or fanciful.

In *Australian Competition and Consumer Commission v Google LLC (No 2)*, the Federal Court confirmed who in the "target audience" needs to have been misled and the importance of assessing the "dominant message" or "overall impression" of conduct in the context of the effectiveness of policy disclosures or disclaimers.

Australian Competition and Consumer Commission v Google LLC (No 2)

[13.200] *Australian Competition and Consumer Commission v Google LLC (No 2)* (2021) 391 ALR 346. The ACCC initiated proceedings against Google, alleging that it had breached ss 18(1), 29(1)(g), and 34 of the ACL by misleading users about personal location data collected through Android mobile devices. The Court found that Google had engaged in misleading or deceptive conduct and had breached ss 29 and 34. Conduct is misleading or deceptive if it conveys a meaning *inconsistent with the truth* and the *overall impression* of the conduct induces or is capable of inducing error.

The Federal Court found that Google's conduct breached the ACL through:

- misleading on-screen representations to users that their location data would not be collected if their "Location History" setting was turned off (which was the default setting); and
- not properly disclosing to users that a second setting called "Web & App Activity" (which was turned on by default) also had to be turned off if users did not want Google to collect their location data.

The Court ordered Google to pay $60 million in pecuniary penalties.

Who needs to be misled?

[13.210] The Court in *Google* considered how the various representations conveyed by Google would have been interpreted by *a variety of reasonable users from within the relevant class*. The decision shows that misrepresentations do not have to induce error in the majority of the reasonable members of the target audience: all that needs to be established is that *some* reasonable members of the relevant audience are likely to be, or may have been, misled. The Court said that confining a hypothetical member of the class to just one response was artificial:

> … where the effect of conduct on a class of person … was in issue, the section must be "regarded as contemplating the effect of the conduct on reasonable members of the class" … It may be that reasonable members of the class cannot be distilled into a single hypothetical reasonable person … One would not condone misleading conduct directed to the public at large just because 51% of consumers, or an even greater majority … would not be misled.

This involves an objective assessment: members of the class are expected to take reasonable care of their own interests, appropriate to the context and extreme or fanciful reactions to the conduct are disregarded.

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[13.220] The decision in *Google* emphasises that what is relevant is the *overall impression* given by a representation, *notwithstanding that a close reading of relevant terms might reveal the accurate position*. Google argued that prominent references to its written privacy policy formed an essential part of its representations to users, and that a reasonable user should be understood as having read that privacy policy carefully. The Court disagreed: most users are time-poor and would have only "scanned through the Privacy and Terms screen or read it relatively quickly".

In *Australian Competition and Consumer Commission v Kogan Australia Pty Ltd* and *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd*, the respective courts applied the same test as to the effect of the representations on "ordinary and reasonable" members of the target audience, again emphasising the importance of the dominant message conveyed through the conduct.

Australian Competition and Consumer Commission v Kogan Australia Pty Ltd

[13.230] *Australian Competition and Consumer Commission v Kogan Australia Pty Ltd* (2020) 145 ACSR 609. Kogan Australia is an online retailer selling a wide variety of goods including consumer electronics, furniture and toys. In May 2019, the ACCC launched legal proceedings alleging that Kogan made false or misleading representations about a 10% price reduction promotion. The Federal Court found that Kogan breached ss 18(1) and 29(1)(i) by making false and misleading representations about a tax time sales promotion. Kogan ran the online promotion in late June 2018 (towards the end of the financial year), advertising to consumers that they could use the code "TAXTIME" to reduce prices by 10% when they checkout. The promotion was advertised on its website and in emails and text messages sent to almost 11 million consumers. The Court found that the advertisements conveyed false or misleading representations because Kogan had increased the prices of more than 600 of its products immediately before the promotion. In its decision the Court said:

> The relevant question is whether the representations were apt to bring consumers into negotiation with Kogan rather than one of its competitors on the basis of an erroneous belief engendered by Kogan's advertisements … [T]he evidence supports an inference not only that the representations were apt to draw consumers into Kogan's marketing web, but they in fact did so … It is reasonable to infer that the representations enticed those consumers to visit the Kogan website and, where purchases were made, to purchase the products from Kogan.

Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd

[13.240] *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* (2014) 317 ALR 73. Coles advertised that the bread produced in its in-store bakeries was "baked fresh" and "baked today". In fact, the bread had already been partially pre-baked

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by a supplier to the supermarket and then frozen, often weeks earlier, and sometimes in a faraway place like Ireland. The Federal Court held that it was misleading conduct to describe bread as "baked today" where part of the baking had occurred before the day of sale. It was also misleading to describe the bread as "baked fresh", as that suggested baking from fresh dough. As to the test of whether the conduct engaged in by Coles was misleading, the Court said:

> Where conduct or representations is or are directed to members of the public at large, the conduct or representations must be judged by their effect on "ordinary or reasonable" members of the class of prospective purchasers … In a context such as the present, the purchasing of a staple such as bread in a supermarket, the ordinary or reasonable person may be intelligent or not, may be well educated or not, will not likely spend any time undertaking an intellectualised process of analysis, will often be shopping for many other items, and will be likely affected by an intuitive sense of attraction rather than by any process of analytical or logical choice. The dominant message of advertising for bread is likely to be simple [and] the advertisement will be misleading or likely to mislead or deceive if any reasonable interpretation of it would lead a member of the class … into error.

The High Court of Australia's decision in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* affirms that mass advertising must be assessed by reference to the "dominant message" conveyed. This case also confirms the need to assess the prominence of any qualifying information or disclaimers (the "fine print") when assessing whether the misleading nature of a dominant message has been overcome.

Australian Competition and Consumer Commission v TPG Internet Pty Ltd

[13.250] *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640. TPG Internet Pty Ltd (TPG) ran advertisements in the media promoting its new "$29.99 per month" unlimited ADSL2+ broadband Internet plan. In much smaller print, the advertisements stated that the customer was required to bundle the service with a landline rental for an additional $30 per month (for a minimum of six months) and to pay an overall minimum of $509.89 including a set-up fee and deposit. The advertisement was aimed at a wide audience that included first-time users of ADSL2+ services, who would not have had any starting assumptions as to whether TPG's offering was of a separate or a bundled service and who would rely on the advertisement for information as to the service offered.

Advertising directed to the general public often involves a headline, or a so-called "dominant message", with some qualifications in small print. The High Court found that the dominant message was that the Internet service was available without bundling, and that there would be no set-up fee or deposit. The qualifying information in the small print did not do enough to correct the false impression given to the reasonable or ordinary member of the class of consumers who saw the advertisement.

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Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 4)

[13.260] *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 4)* [2013] FCA 665. Poultry advertising and packaging claimed that their chickens were "free to roam around in large barns". That was true at some stages of the chickens' lives, but as the chickens grew, their size and number made free roaming impossible. The Federal Court considered the natural meaning of "free to roam" when applied to chickens and agreed with the ACCC's assessment that it means the "largely uninhibited ability of the chickens to move around at will in an aimless manner". The Court recognised that consumers pay a premium price for "free-range" eggs and, therefore, producers must not falsely represent that their eggs are from "largely uninhibited", "aimless" chickens. It held that this claim constituted a breach of ss 18 and 29(1)(a) – false representations about the history of the goods – and, in respect of the latter, the court imposed a penalty of $400,000.

In *Australian Competition and Consumer Commission v Reckitt Benckiser*, the ACCC successfully initiated legal proceedings against a multinational pharmaceutical company that engaged in misleading conduct.

Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd

[13.270] *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25. Between 2011 and 2015, Reckitt Benckiser made representations on the packaging of each Nurofen Specific Pain product (Nurofen Back Pain, Nurofen Period Pain, Nurofen Migraine Pain, and Nurofen Tension Headache) and on its website that each product was formulated to specifically treat a particular type of pain. The premium price reflected this. In fact, each product contained exactly the same active ingredient and was no more effective at treating the type of pain described on its packaging than any of the other Nurofen Specific Pain products.

In December 2015, Reckitt Benckiser admitted that it had breached ss 18(1) and 33 – false representations regarding the nature of goods, their characteristics, manufacturing process, or suitability for a specific purpose – and the Full Court of the Federal Court imposed a pecuniary penalty of $6 million. The High Court declined special leave for Reckitt Benckiser to appeal.[12]

[13.280] Online platforms, including social media, now make it easier than ever for people to share their opinions with the whole world about all kinds of products and services. This information sharing is closely related to the marketing and advertising activities being considered here, as algorithms have been developed to rank businesses based on these reviews, and consumers have come to rely upon these reviews when making almost every type of consumer purchase. It is therefore obviously vital to consumers that these reviews are genuine. As *Australian Competition and Consumer Commission v Meriton Property Services*

12 *Reckitt Benckiser (Australia) Pty Ltd v ACCC* [2017] HCASL 86 (5 April 2017).

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Pty Ltd and *Australian Competition and Consumer Commission v Trivago NV* illustrate, businesses must not attempt to manipulate the review process.

Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd

[13.290] *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* (2017) 350 ALR 494. Meriton is a very large builder and is the operator of serviced apartments and hotels. It subscribed to TripAdvisor's "Express Review" service that involved it providing TripAdvisor with their guests' email addresses. TripAdvisor would then contact the guests, asking them to post a review through their Facebook or TripAdvisor account. According to TripAdvisor, the "Express Review" service increased the number of reviews the platform received by 33%, which was enough to alter a service provider's ranking if they consistently interfered with the information provided to TripAdvisor. The ACCC argued that this is what Meriton did, when it directed staff to engage in "masking" (inserting additional letters ("MSA") in front of certain (complaining) guests' email addresses) to stop potentially negative reviews from appearing on TripAdvisor.

The Court agreed that Meriton had breached ss 18(1) and 34 – false representations as to the nature, characteristics or suitability of any services – and, in respect of the latter, ordered Meriton to pay a pecuniary penalty of $3 million.

Australian Competition and Consumer Commission v Trivago NV

[13.300] *Australian Competition and Consumer Commission v Trivago NV* (2020) 142 ACSR 338. Trivago runs an online hotel search engine that aggregates deals offered by online travel sites (like Expedia) and hotels for available rooms and then highlights one price out of all of their advertisers. In August 2019, the ACCC initiated proceedings against the company over misleading information on its website and in television advertising aired more than 400,000 times from late 2013 to mid-2018. The ACCC argued that Trivago misled consumers by representing its website would quickly and easily help users identify the cheapest rates available for a given hotel; when in fact, it used an algorithm that placed significant weight on which online hotel booking sites had paid Trivago the highest cost-per-click fee ("CPC fee"). The Court said, in part:

> Contrary to the impression created by the relevant conduct, the Trivago website did not provide an impartial, objective and transparent price comparison service … The fact that Trivago was being paid by the Online Booking Sites was not made clear. Many consumers would not have appreciated that Trivago was being paid by the Online Booking Sites, let alone that the amount it was being paid was a very significant factor in the selection of the Top Position Offer.

[13.310] In *Australian Competition and Consumer Commission v Kimberly-Clark Australia Pty Ltd*, the ACCC lost at trial and again on appeal to the Full Court of the Federal Court. It demonstrates that: (a) suppliers, particularly suppliers of consumer goods, should rigorously test whether they can support

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the claims made in relation to their goods and services; and (b) as Pental discovered to its cost, it is worth contesting allegations of misleading conduct or false representations where the defendant has attempted to meet or beat industry guidelines on the testing of those goods or services. It is also a reminder that whilst many of the cases we study involve the ACCC being successful, simply because these cases often provide the most interesting factual examples, the ACCC (consistently with the "rule of law" considerations addressed in Chapter 1) always has to prove its case just like any other litigant.

Australian Competition and Consumer Commission v Kimberly-Clark Australia Pty Ltd

[13.320] *Australian Competition and Consumer Commission v Kimberly-Clark Australia Pty Ltd* [2020] FCAFC 107. The ACCC initiated proceedings against the makers of two types of toilet wipes – Kimberly Clark Australia (KCA) and Pental Products Pty Ltd (Pental). The ACCC alleged that both companies had made false and misleading representations about their wipe products in breach of ss 18(1), 29 and 33 of the ACL. The ACCC alleged that KCA and Pental represented their wipes as "fit for flushing" when, in fact, they were not. Pental admitted the alleged breaches (and paid an agreed $700,000 pecuniary penalty). KCA defended the allegations.

At trial, the Federal Court decided that the claim by KCA that its wipes were "flushable" was not a false or misleading claim. Although the wipes did not break down and disperse as quickly or as comprehensively as toilet paper, this did not in fact create any significant increase in the risk of harm or blockage in households and sewerage systems.

The ACCC appealed to the Full Federal Court, which upheld the trial judge's decision. Crucial to this decision was the point, made at trial, that the KCA wipes had passed certain tests of "flushability" according to the industry guidelines of the International Nonwovens and Disposables Association and the European Disposables and Nonwovens Association. In fact, not only had the wipes excelled in meeting the minimum threshold outlined in the Guidelines, KCA had performed additional testing and did not just confine this testing to the Guidelines. At trial, this was seen as a "conscientious and scientific effort" on the part of KCA to establish that the wipes were "as represented".

One of the main arguments made on appeal by the ACCC was that more weight should have been placed on representations made about KCA wipes which likened them to toilet paper. This included a *written* representation that KCA wipes would "break up … like toilet paper" and a *pictorial* representation that depicted KCA wipes as essentially the same as a roll of toilet paper. The Full Court, in dismissing these arguments, said that both representations were flagged by *qualifying statements* which would lead a "reasonable consumer" to understand that the KCA wipes were not identical to toilet paper. For example, the representation that KCA wipes would break down like toilet paper also came with a warning not to flush more than two at once.

[13.330] Trade competitors have often sought injunctions from the courts restraining actions by their competitors, arguing that consumers may be misled by the similarity of the products of their competitors to their own products, or because they may falsely believe that there is some association between the two businesses.

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McWilliam's Wines Pty Ltd v McDonald's System of Australia Pty Ltd

[13.340] *McWilliam's Wines Pty Ltd v McDonald's System of Australia Pty Ltd* (1980) 33 ALR 394. As is almost universally known, McDonald's make "Big Mac" hamburgers. McWilliam's, a well-known Australian wine company, started to advertise its wines using the words "Big Mac" prominently displayed in its advertisements. McDonald's sought an injunction to restrain McWilliam's from using the words "Big Mac", alleging that the use of those words by McWilliam's constituted misleading conduct or conduct that was likely to mislead.

The Full Court decided that McDonald's had not made out a case that McWilliam's use of the words "Big Mac" was likely to mislead consumers by causing them to think that the wine – an entirely different type of product – was a product of McDonald's. Even though the advertisements might cause "confusion or wonder" in the mind of a person as to whether or not there was a business connection between McWilliam's and McDonald's, such a person would not be misled by the advertisement into believing that there was such a connection. Accordingly, there was no contravention of what is now s 18(1).

Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd

[13.350] *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191. Puxu manufactured and sold various items of furniture under the name "Post & Rail", including lounge suites and chairs in its so-called "Contour" range. Parkdale also manufactured and sold various items of furniture, including lounge suites and chairs called the "Rawhide" range. The latter furniture was very similar, indeed "almost identical" in shape, design and general appearance to the plaintiff's Contour range, although on close inspection various differences could be observed. Parkdale always labelled its furniture, stating that it was the manufacturer.

The High Court held that the defendant had not engaged in misleading or deceptive conduct. The decisive factor in reaching this conclusion was that the defendant always labelled its furniture, stating that it was the manufacturer. The manufacture and sale of a product which closely resembles the product of another manufacturer, but which is properly labelled with the name of its own manufacturer, does not constitute misleading or deceptive conduct. The lounges and chairs were properly labelled, and a prospective purchaser wishing to purchase the plaintiff's furniture could reasonably be expected to look for the label, or take other comparable steps such as making an inquiry. Evidence that *some* members of the public had in fact been misled because the defendant's label was missing, apparently removed by retailers, was not relevant since the defendant was not responsible for such conduct. Note that the nature of the goods and the care that purchasers would take in selecting them was important here, and differentiates this case from the *Coles Supermarkets* decision where customers would likely purchase bread without readings its labelling carefully: see [13.240].

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Apand Pty Ltd v The Kettle Chip Co Pty Ltd

[13.360] *Apand Pty Ltd v The Kettle Chip Co Pty Ltd* (1994) 52 FCR 474. Kettle began to market potato chips made by the "batch-cooking method" under the name "The Kettle Chip". The product was very successful. Three years later, Apand, the large multinational that makes "Smith's Crisps", sought to counter its loss of market share and began marketing a new line of potato chips under the name "Country Kettle". The Full Federal Court held that, at the time the appellant's chips came onto the market, the name "Kettle" had obtained a secondary meaning linked to the respondent's product. That is, there is a primary meaning of the word "kettle" (eg a device for heating water) but, through Country Kettle's usage, the word had, at least in the relevant market, attained a secondary meaning, as something attached to Kettle Chips. Accordingly, the Court upheld the trial judge's findings that Apand had engaged in misleading conduct. An obvious consequence of a decision of this nature is that the word "Kettle", at least in the context of potato chips and the relevant geographic market, had effectively become the property of Kettle Chip.

Section 18: representations made during pre-contractual negotiations

[13.370] Section 18(1) is now frequently used by individuals (or groups of particular individuals) who have been induced to enter into contracts as a result of pre-contractual misrepresentations. Though this is a different factual scenario to the marketing and advertising cases considered above, the same legal test for misleading or deceptive conduct applies: would a reasonable member of the target audience be led into error? Where the negotiating party is an individual person, the reasonable member of the target audience is effectively a like individual in that same position.

Byers v Dorotea Pty Ltd

[13.380] *Byers v Dorotea Pty Ltd* (1986) 69 ALR 715. Representations were made to the Byers by Dorotea as to the proposed features and quality of home units that they were considering purchasing "off the plan" (ie before the units were built). The Byers were told that the units would be "bigger and better", and a brochure contained a photo of a swimming pool. They agreed to buy the units, but the representations proved to be untrue. It was held that the applicants were induced to enter into the contracts by misleading statements in contravention of what is now s 18(1), and the Court ordered the refund of their deposits.

[13.390] In these circumstances, an analysis of whether the conduct was misleading or likely to be misleading focuses more on the *subjective* circumstances of the individual person or identified group, because the target audience is a single person (or a small group of people). For example, in *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 (see [13.420]), the High Court held that in order to decide if the conduct of the real estate agent (in including an inaccurate survey diagram in a sales brochure) was misleading it was necessary to consider the nature of the parties, the character of the transaction, and what each party knew about the circumstances of the other as a result of their dealings. The Court held that it was significant that the property was a very expensive one, and that the purchasers were intelligent and shrewd investors who had the benefit of advice from experts, compared with the agent who ran a small suburban office and who did not represent that he had expertise in verifying the title details of a property.

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The issue of fault and intention

[13.400] Section 18(1) imposes a form of strict liability: the plaintiff is not required to prove that the defendant was at fault or otherwise intended to mislead or deceive. The plaintiff is required to prove only that the conduct was misleading or deceptive, or likely to mislead or deceive, according to the relevant legal test: whether a reasonable member of the target audience would be led into error. It remains the case, as explored in [13.90]–[13.100], that making it clear you are merely passing on information for what it is worth does not lead to a breach of s 18(1). Here, it is not that there is no misleading conduct; but rather, no conduct has been "engaged" in. Outside of this limited circumstance, 18(1) can be breached even completely innocently.

Limiting liability for breach of s 18(1)

[13.410] Section 18(1) cannot be directly excluded by the presence of a term in a contract or by a term of which reasonable notice has been given (ie by the kinds of exclusion clauses that we considered in Chapter 9). For example, a notice on a wall of an accountant's practice or the insertion of a clause in a written and signed contract stating very clearly that "Section 18(1) of the ACL does not apply here" would – despite its clarity – be completely without effect. Nonetheless, exclusions, limitation clauses or disclaimers can still have more limited effects in very particular circumstances. They may, for example, help show that there is no *causal connection* between misleading conduct and loss or damage. This does not mean that there is no misleading conduct, but rather, that damages for breach of s 18(1) cannot be recovered. For example, a disclaimer in which a lawyer clearly states that she has "no expertise in tax law and any advice offered should not be relied upon without getting further advice from a taxation specialist" may not protect a lawyer from breaching the misleading or deceptive conduct prohibition in the first place, but may be effective in preventing a client from seeking compensation.

On the other hand, advertisements frequently contain exclusions or disclaimers in fine (sometimes very fine) print, and/or sometimes state that "conditions apply". These disclaimers do not automatically prevent a breach of s 18(1), but instead are a consideration in the legal test for misleading conduct: *whether a reasonable member of the target audience would be led into error, taking into account an advertisement's dominant message*. The type and context of the advertisement, and the prominence (even, in some cases, the actual legibility at all) of the fine print, will be relevant considerations.

Taking yet another view of the matter, exclusion clauses of the kind seen in *Hyder v McGrath* (see [13.100]) can confirm that there is no relevant "conduct" where a person has made it clear that they are a "mere conduit", passing on information for what it is worth, without making any claim as to its truth or falsity. In the following High Court case, a disclaimer's presence was found to have that same effect.

Butcher v Lachlan Elder Realty Pty Ltd

[13.420] *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592. In 1996, Butcher and his wife made enquiries with a small suburban real estate agent, Lachlan Elder Realty, about the forthcoming auction of a waterfront property on the northern beaches of Sydney. The agent gave them a one-page double-sided colour brochure, telling them that it contained all the information they would need to know about the property. As well as photographs and a sales pitch, the brochure contained a reproduction of a 1980 survey diagram, which showed that a swimming pool between the house and the water was above the mean high-water mark, which was the boundary between the land and the sea.

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The brochure contained two disclaimers on it, printed in a small font on the bottom of both sides of the brochure. The disclaimers were similar:

> Lachlan Elder Realty Pty Ltd ACN 002 332 247. All information contained herein is gathered from sources we believe to be reliable. However we cannot guarantee it's [sic] accuracy and interested persons should rely on their own enquiries.

Butcher advised the agent that he wished to relocate the pool to the western boundary. A builder who visited the property with Butcher said that this would be possible, basing his opinion on the survey diagram. Butcher subsequently purchased the property for $1.36 million. Soon after, it emerged that the mean high-water mark had changed and now went through the middle of the pool, which meant that part of the pool was on Government land. When the Government refused to allow Butcher to relocate the pool, Butcher sued the agent, alleging that the agent had engaged in misleading or deceptive conduct when it gave the brochure to him. The trial judge and the New South Wales Court of Appeal dismissed the claim. The purchasers appealed to the High Court.

The High Court dismissed the appeal and affirmed that although s 18(1) imposed a regime of strict liability (in the sense that a plaintiff need not prove fault), the disclaimer put the purchasers on notice that they should not rely on the representations in the brochure.

A different type of s 18(1) liability exclusion was unsuccessful, however, in *Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd*. This case confirms that each case's disclaimer needs to be assessed in its own context.

Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd

[13.430] *Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd* (2018) 56 VR 557. Brighton, a subcontractor, made claims against Multiplex relating to the construction of the National Australia Bank headquarters in Docklands, Melbourne. Among other things, Brighton argued that it had entered into the relevant subcontracts with Multiplex in reliance on representations made by Multiplex that it alleged were in breach of s 18(1). Multiplex argued that the claim had not been made out, in accordance with the subcontracts containing a clause *requiring notice of any claim, including a claim for breach of the ACL, to be given within seven days of the event occurring*. Brighton had not provided notice within that time frame.

The Supreme Court of Victoria held that Multiplex's attempt to rely on the time bar was an indirect method of excluding liability under the ACL, and was therefore ineffective as being "an unacceptable interference with the public policy underpinning" the ACL.

Exemption of news media in respect of news and information

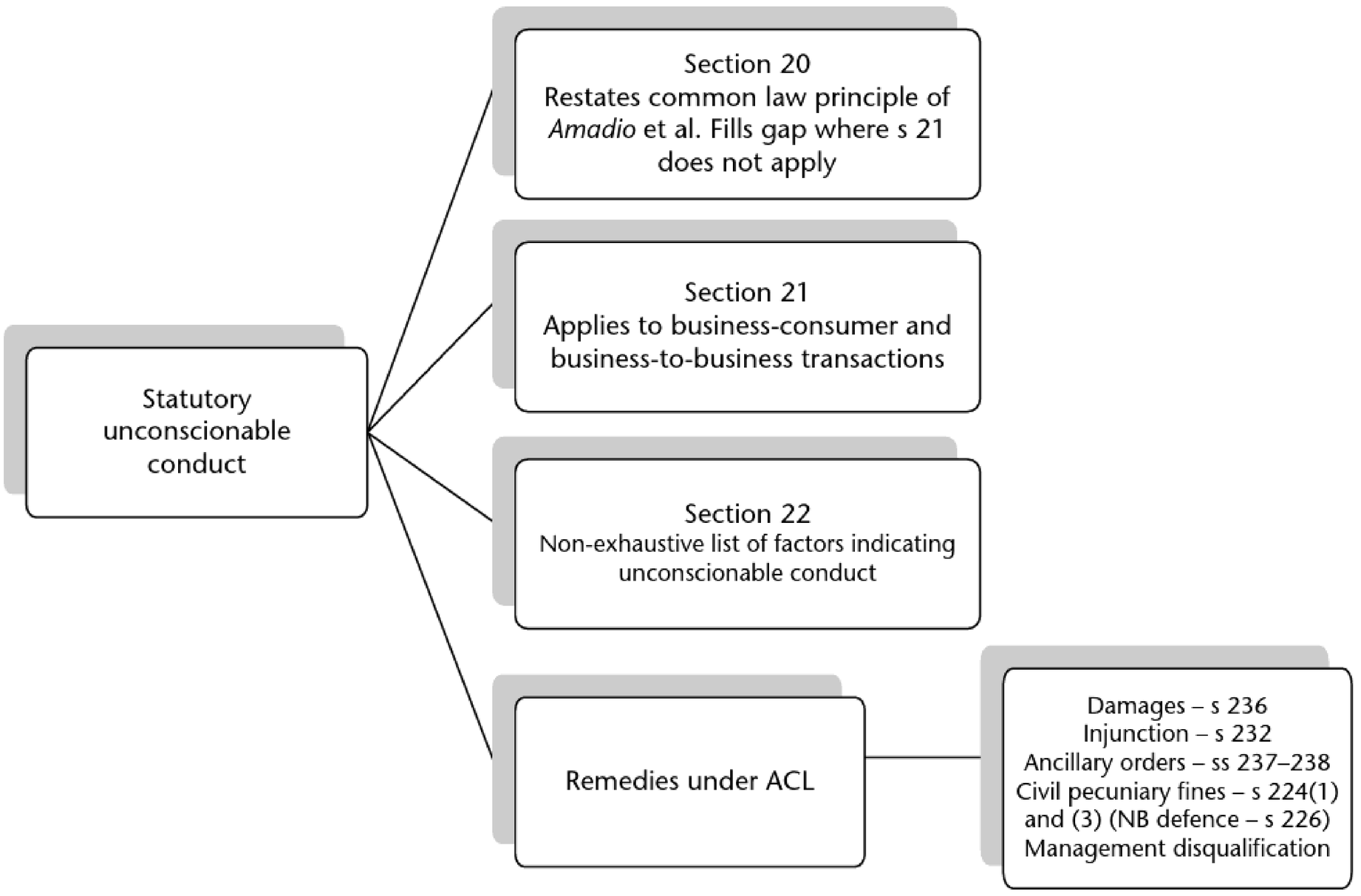
[13.440] The ACL exempts certain "information providers", most notably the news media, from the general prohibition of misleading or deceptive conduct: s 19(1). This is a vital protection, especially in light of the fact that s 18(1) can be breached without any intention or fault, because it allows the media certain protection from the threat of litigation in the event that statements made by media outlets are misleading. There are limits to this defence, as it does not apply (for example) to the publication of advertisements: s 19(2). Still, it might be (in the case of advertisements) that news media would be

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considered as merely passing on information for what it is worth, negating contravention of s 18(1) in any event: see [13.90]–[13.100].

Prohibition of unconscionable conduct

Figure 13.2 : Statutory unconscionable conduct



Introduction

[13.450] Courts of equity, introduced in Chapter 1, have long intervened to set aside contracts and other dealings (which would otherwise be binding at common law) because of what has come to be called "unconscionable conduct". This equitable doctrine exists as judge-made law, and forms part of the ordinary law of contract, but has now also been adapted and extended by legislation in ss 20–22 of the ACL.

Unconscionable conduct does not have a precise legal definition, and it is not a phrase that is commonly used or understood, even by those in boardrooms and sales departments (and even law firms). As we will see, even judges disagree on what exactly is and is not unconscionable conduct. Essentially, unconscionable conduct is a *moral* concept that depends on a judgment being made by a court that what someone did was in all the circumstances against "good conscience".[13] It was this moral dimension that underpinned Mr and Mrs Amadio's landmark win in the High Court against the Commercial Bank of Australia in 1983, a case decided using the equitable principles pre-dating the ACL.[14] The Court held that the Commercial Bank's conduct in obtaining a guarantee from the Amadios was unconscionable because: (a) the Amadios were in

13 For an excellent overview and a focus on the moral judgments that judges must make, see the article written by the former President of the Victorian Court of Appeal at: https://www.supremecourt.vic.gov.au/sites/default/files/2019-08/vlf_equity_and_good_conscience_-_web_1.pdf.

14 *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

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a situation of *special disadvantage* that seriously affected their ability to make a judgment as to what was in their own best interests; and (b) the bank *knew, or ought to have known*, of their special disadvantage; and (c) the bank had taken *unfair advantage* of the special disadvantage. These requirements of special disadvantage, knowledge and taking unfair advantage are the key requirements of making out a claim for unconscionable conduct as it is recognised under judge-made law.

Statutory unconscionable conduct: within the meaning of the unwritten law

[13.460] Section 20(1) provides

> 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.

The reference in s 20(1) to unconscionable conduct within the meaning of the unwritten law means unconscionable conduct as recognised under judge-made law (even though court judgments, strictly speaking, are "written"). Section 20(1) has the effect of making unconscionable conduct that would already be prohibited at equity also a breach of the statute: widening the range of remedies and enforcement opportunities available. Nevertheless, despite these advantages of making unconscionable conduct a breach of the ACL, the standard for proving unconscionable conduct remains high.

Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd

[13.470] *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51. A shopping centre tenant was engaged in litigation with the centre owners. The tenant wished to assign their lease as part of the sale of their business. The prospective buyer was willing to buy the tenant's business provided a new lease could be negotiated by the tenant. However, the lease was about to expire and did not contain an option to renew. The centre owners were willing to agree to a new lease provided that the tenant withdrew from the litigation. The tenant agreed to this condition for the new lease. What the ACCC considered to be unconscionable, leading to the initiation of court proceedings, was the exploitation of the weaker bargaining position in which the tenant found themselves.

The High Court held that the centre owner's conduct did *not* constitute unconscionable conduct under what is now s 20(1). *A person is not in a position of special disadvantage simply because of an inequality of bargaining power: many contracts are made between parties of unequal bargaining power, and good conscience does not require parties to contractual negotiations to forfeit their advantages or to neglect their own interests*. The lessees were not at any "special" disadvantage, in that they did not lack an ability to make judgments about their interests, and they acted in accordance with their best interests. Thus, there were no grounds for setting the contract aside for unconscionable conduct.

Australian Competition and Consumer Commission v Samton Holdings Pty Ltd

[13.480] *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* (2002) 117 FCR 301. The ACCC initiated action against lessors, Samton Holdings, alleging that

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they engaged in unconscionable conduct contrary to what is now s 20(1). The purchasers took an assignment of a lease over the premises but failed to exercise an option to renew the lease within the time permitted. The lessors demanded a payment of $70,000 from the purchasers for the privilege to renew the lease. The Full Federal Court decided that the purchasers were not at a "special" disadvantage. The Court held that unconscionable conduct always had to be "at the extreme end of the scale of unreasonable conduct". The conduct of the lessors, in demanding the $70,000, although avaricious and opportunistic, was not at the extreme end of the scale.

Statutory unconscionable conduct: in connection with goods or services

[13.490] Section 21(1), which applies in priority to s 20(1) (see s 20(2)), prohibits a person from engaging in "unconscionable" conduct in connection with the *supply or possible supply or acquisition or possible acquisition of goods or services*. Unlike s 20, s 21 "is not limited by the unwritten law" (s 21(4)(a)), and consideration can be given to the terms of the contract and the manner in which a contract is performed (not just circumstances relating to the formation of the contract) (s 21(4)(c)). The prohibition in s 21(1) is therefore wider than that in s 20(1) in this sense, although its application is (at the same time) limited to cases involving the supply or possible supply or acquisition or possible acquisition of goods or services.

The term "unconscionable" is not defined in s 21(1). Instead, s 22(1) provides an extensive (but non-exhaustive) list of matters that the court may have regard to when determining whether or not a business has contravened s 21(1) in relation to the supply or possible supply of goods or services to another person (the customer). The High Court, in *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* [2024] HCA 27, has recently clarified that the factors set out in s 22 do not limit the scope of the prohibition contained in s 21. That case also held that the s 22 factors do not need to be considered by judges in an inflexible and a mechanistic way: it is not necessary for a judge to address every single factor and indicate whether they are or are not relevant to the case at hand. The list contained in s 22(1) is as follows:

(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

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(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.

A similar extensive but non-exhaustive list applies in determining whether an acquirer of goods or services has engaged in unconscionable conduct in connection with an acquisition or possible acquisition of goods or services from a supplier under s 22(2), as follows:

(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.

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[13.500] *Australian Securities and Investments Commission v Kobelt* and *Australian Competition and Consumer Commission v Telstra* concern unconscionable conduct in relation to business dealings with Indigenous consumers. The first, a High Court of Australia case brought by the Australian Securities and Investments Commission rather than the ACCC (given its finance context), raised a number of interesting and controversial issues:

1. It provided concrete evidence that regulators regard Indigenous consumers living in remote areas as an "enduring priority"[15] because of the particular challenges Indigenous people face in asserting their consumer rights.
2. It confirmed that unconscionability remains an elusive concept and is ultimately to be decided on the facts of each particular case (the seven High Court justices were divided 4:3 on whether the particular conduct was unconscionable here).
3. The High Court was seriously divided on the question of whether conduct can be unconscionable where customers (this time from a remote and disadvantaged Indigenous community in the north of South Australia) have *voluntarily* engaged in the alleged unconscionable conduct. The majority regarded interference with the apparently voluntary transactions in this case as paternalistic; the minority argued that the so-called voluntariness was an illusion.

Australian Securities and Investments Commission v Kobelt

[13.510] *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1. From the mid-1980s until 2018, Lindsay Kobelt operated "Nobbys", a small convenience store in the remote town of Mintabie, an opal mining community in the Anangu Pitjantjatjara Yankunytjatjara (APY) lands in South Australia, selling a range of goods including food, groceries, fuel and second-hand cars.

Kobelt offered his Indigenous customers a form of credit known as "book-up". Under the book-up system, customers gave Kobelt their debit cards and PIN details, authorising him to withdraw their funds to repay their debts in return for the further supply of goods over the interval between pay days. At least half of his Anangu customers were dependent on Centrelink benefits as their main source of income and many were both illiterate and innumerate. ASIC brought proceedings in the Federal Court alleging that Kobelt operated his book-up system in breach of s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (that is relevantly identical to s 21(1) of the ACL, but concerns financial services). This section prohibits (amongst other things) a person engaging in conduct in connection with the supply of financial services that is, in all the circumstances, unconscionable.

Under the "book-up" system, Kobelt would withdraw all or nearly all of the available funds of his Anangu customers on the day that their accounts were credited. Half of the funds went towards reducing the customer's debt, while the other half were retained as "book-down" available for customers to spend at his store, or to withdraw as cash from his store, or for spending elsewhere by way of purchase order (for which a fee was charged). At the trial, the judge held that while the "book-up" system provided some benefits to the Anangu customers, it took advantage of their poverty and lack of financial literacy, and tied them to his store in an exploitative and predatory way. The Full Federal Court unanimously allowed the appeal, and

15 https://www.accc.gov.au/about-us/accc-priorities/compliance-and-enforcement-priorities#toc-enduring-priorities.

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by a slim 4:3 majority, the High Court of Australia upheld the Full Federal Court's decision that there was no unconscionable conduct.

Keane J held that "unconscionable conduct" refers to conduct that involves "exploitation" and a "calculated taking advantage of a weakness or vulnerability on the part of victims of the conduct in order to obtain for the stronger party a benefit not otherwise obtainable". Gageler J held that unconscionable conduct "is conduct that is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience". In applying these definitions, their Honours found that the evidence pointed both ways but, that in the end, the Anangu people had voluntarily entered into the "book-up" agreements, chose to continue them, and were not precluded from making that choice by reason of their vulnerability. Implicit in all three majority judgments was the notion that it is paternalistic to say that Indigenous customers are not capable of voluntarily entering into transactions. Explicitly, the judgments emphasised that such transactions may in fact be beneficial to them because of their particular culture and remote situation.

In two powerful dissenting judgments, the minority considered that the majority's view of what constitutes unconscionable conduct was too narrow. They argued that the focus ought instead to have been on Kobelt's *conduct* and the *manner* in which the customers' consent or intention was gained, rather than on the voluntariness of the Anangu customers' conduct. In the words of Edelman J, the decision to obtain credit by "book-up", in the circumstances of the case, was, in truth, a choice without a practical alternative – a take it or leave it situation. Furthermore, Edelman J identified that "impoverished and often illiterate and innumerate Aboriginal customers" do not voluntarily enter into the "book-up" system as suggested by the majority but are, rather, given the "choice" to utilise the system and have credit or have none at all. Nettle and Gordon JJ's strongest statement comes where their Honours note that such a system would not be acceptable in other areas of Australia and in relation to other groups of people who were not Indigenous:

> [T]he terms, nature and circumstances of Mr Kobelt's book-up system bespoke unconscionability … Putting to one side that the majority of Mr Kobelt's customers were financially illiterate Anangu living in a remote, harsh and impoverished part of northern South Australia, in what other circumstances would a small-scale consumer credit provider require, let alone expect, a borrower's assent to terms that, as security for relatively modest advances, the borrower hand over the right to receive the whole of the borrower's meagre monthly income, with not less than half of it to be applied in reduction of the loan; the borrower confer on the credit provider an untrammelled discretion as to how much, if any, of the other half should be made available to the borrower for the purchase of life's necessities; and the borrower be tied to purchasing all such necessities from the credit provider at the credit provider's prices, or else pay the credit provider for the privilege of a "purchase order"? … Surely, anywhere else with any other customer, such an arrangement would be regarded as unconscionable. It is no answer to say that the customers were Anangu people. It is no answer to say that the customers agreed.

This case is important not only for its discussion about what constitutes unconscionable conduct, but also for its clear difference of views as to whether, on the facts, Kobelt had engaged in such conduct. Ultimately it may be that the difference between the majority and the minority view comes down to a difference of perspective about how to assess the so-called voluntariness of the transactions.

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Australian Competition and Consumer Commission v Telstra Corp Ltd

[13.520] *Australian Competition and Consumer Commission v Telstra Corp Ltd* (2021) 392 ALR 614. On 26 November 2020, in another case of alleged unconscionable conduct in relation to Indigenous consumers, the ACCC brought proceedings against Telstra for unconscionable conduct in the sale of post-paid mobile phone products.

Telstra admitted that it acted unconscionably when sales staff at five licensed Telstra-branded stores signed up 108 Indigenous consumers to post-paid mobile phone contracts that they did not understand and that they could not afford. Many of the consumers spoke English as a second or a third language and had difficulties in understanding Telstra's written contracts, and many were unemployed and relied upon government benefits or pensions as the primary source of their limited income. In some cases, sales staff at the Telstra licensed stores did not provide a proper explanation of the consumer's financial exposure under the contracts. In many instances, sales staff also manipulated credit assessments, so consumers who otherwise may have failed its credit assessment could still enter into post-paid mobile contracts. This included falsely indicating that a consumer was employed.

The average debt per consumer was more than $7,400. The improper sales practices caused many of the affected consumers severe personal financial hardship and great distress. Telstra referred some unpaid debts to debt collectors, which had the potential to cause those consumers to feel further personal and cultural shame and embarrassment.

The Federal Court ordered Telstra to pay $50 million in penalties for engaging in unconscionable conduct. The size of the penalty imposed here is a good example of how the financial consequences of breaching the ACL can far outweigh the financial benefits obtained by a business through its breaching conduct.

Australian Competition and Consumer Commission v Ford Motor Company of Australia Ltd

[13.530] *Australian Competition and Consumer Commission v Ford Motor Company of Australia Ltd* (2018) 360 ALR 124. For several months in 2015–2016, Ford Australia put in place processes for dealing with and responding to complaints from customers about a faulty "PowerShift" transmission that:

- failed to ensure that proper consideration was given to the individual circumstances and actual or potential legal rights of customers;
- resulted in many customers accepting offers made by Ford Australia because customers were told refunds or no-cost replacements were not an option;
- failed to ensure that customers who signed settlement agreements understood that they may be compromising their legal rights; and
- had inadequate processes which caused many customers to purchase new replacement vehicles at a significant additional cost to the customers.

The Court decided that in these circumstances, Ford Australia had engaged in conduct that was unconscionable in contravention of s 21(1). The Court provided this explanation of the concept of unconscionability and its place in the commercial world, with reference to prior case law:

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> [Unconscionability] includes a recognition of the deep and abiding requirement of honesty in behaviour; a rejection of trickery or sharp practice; fairness when dealing with consumers; the central importance of the faithful performance of bargains and promises freely made; the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise … or take advantage; a recognition that inequality of bargaining power can (but not always) be used in a way that is contrary to fair dealing or conscience; the importance of a reasonable degree of certainty in commercial transactions; the reversibility of enrichments unjustly received; the importance of behaviour in a business and consumer context that exhibits good faith and fair dealing; and the conduct of an equitable and certain judicial system that is not a harbour for idiosyncratic or personal moral judgment and exercise of power and discretion based thereon.

Australian Competition and Consumer Commission v Mazda Australia Pty Ltd

[13.540] *Australian Competition and Consumer Commission v Mazda Australia Pty Ltd* [2023] FCAFC 45. Mazda, a car manufacturer, dealt with customer complaints on behalf of Mazda dealers. As described in [13.810], the Full Court of the Federal Court of Australia found that Mazda contravened ss 18(1) and 29(1)(m) of the ACL by misleading customers about their consumer guarantee rights ("appalling conduct"). However, the ACCC failed in its argument that those same circumstances meant that Mazda had engaged in unconscionable conduct in breach of s 21(1). Though Mazda had misled customers concerning their consumer law rights, and, although Mazda was found to have engaged in sub-standard customer service, it had not *sufficiently* departed from expected standards of commercial behaviour. Relevant factors in reaching this conclusion were that Mazda had not intentionally misled customers, it had not engaged in fraud, and its relevant representations which contravened other parts of the ACL had been implied rather than express.

The Full Federal Court has held that "[p]re-existing vulnerability or disability is not a necessary element of statutory unconscionability": *Ali v Australian Competition and Consumer Commission* (2021) 394 ALR 227. *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* illustrates this point.

Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd

[13.550] *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* (2021) 285 FCR 133. Quantum was an approved participant in the National Rental Affordability Scheme. Under the Scheme the government made incentive payments to investors who offered rental accommodation at below-market rents to those on low incomes. Quantum entered into agreements with investors to purchase houses that would be part of the scheme.

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These investors relied upon Quantum to pass on the government incentive payments and to confirm that the conditions for the investor's receipt of incentive payments were satisfied. The rental affordability scheme did not permit an investor to transfer to a different approved participant.

Quantum systematically exploited its much stronger bargaining position by pressuring investors to use the services of "approved" property managers, *without disclosing that it had commercial arrangements with those managers*. Quantum made false misrepresentations that investors who failed to use an "approved" manager would be in breach of their agreement with Quantum, which provided for their entitlement to receive incentive payments. Non-approved managers were required to pay a substantial "security deposit".

The trial judge held that Quantum's conduct could not be unconscionable under s 21(1) because Quantum had not exploited a *pre-existing vulnerability*. The Full Federal Court, on appeal, held that Quantum's conduct constituted statutory unconscionable conduct under s 21(1). The Court said that exploitation of a pre-existing vulnerability, disability or disadvantage is *not* an essential requirement for statutory unconscionable conduct. However, such exploitation will often (but not necessarily) be present in unconscionable conduct cases.

Unconscionable conduct and small business

[13.560] Unconscionable conduct in the supply of goods and services to consumers and unconscionable conduct in business transactions were formerly the subject of separate provisions in the ACL, being the former ss 21 and 22, respectively. The current ss 21 and 22 now apply to both types of transactions, meaning that unconscionable conduct cases involving conduct directed at small businesses are governed by the exact same principles described above.

As *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* and *Australian Competition and Consumer Commission v Woolworths Ltd* demonstrate, the ACCC has shown a willingness to use s 21(1) to protect suppliers from the allegedly unconscionable conduct of large supermarket chains.

Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd

[13.570] *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405. In October 2014, the ACCC initiated proceedings against Coles alleging that, outside of its existing trading contracts with the suppliers concerned, it:

- pursued agreements for the suppliers to pay the supermarket for "profit gaps" on a supplier's goods, being the difference between the amount of profit the supermarket had wanted to make on those goods and the amount it had achieved;
- pursued agreements for the suppliers to pay the supermarket, both retrospectively and prospectively, for amounts the supermarket claimed as "waste" on a supplier's goods, which occurred after the supermarket had accepted the goods, and price reductions or "markdowns" implemented by it to clear goods; and
- imposed fines or penalties on suppliers for short or late deliveries.

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The Federal Court, by consent, made declarations in two proceedings instituted by the ACCC that Coles engaged in unconscionable conduct. The Court ordered Coles to pay combined pecuniary penalties of $10 million and costs (Gordon J observing that the maximum penalties available at the time were "arguably inadequate" for a company with an annual revenue in excess of $22 billion).

In her judgment, Gordon J said:

> Coles' misconduct was serious, deliberate and repeated. Coles misused its bargaining power. Its conduct was "not done in good conscience". It was contrary to conscience. Coles treated its suppliers in a manner not consistent with acceptable business and social standards which apply to commercial dealings. Coles demanded payments from suppliers to which it was not entitled by threatening harm to the suppliers that did not comply with the demand. Coles withheld money from suppliers it had no right to withhold … Coles' practices, plans and instructions were deliberate, orchestrated and relentless … Coles' conduct was of a kind which merits severe penalty. But for Coles making the admissions it has now made and acknowledging the gravity of its contravening conduct, the conduct and circumstances in which it was committed would have warranted imposing penalties at or close to the maximum the law permits.

Australian Competition and Consumer Commission v Woolworths Ltd, a case reaching a different conclusion in respect of conduct that on its face is similar to that in *Coles*, confirms that each unconscionable conduct case is decided on its own facts.

Australian Competition and Consumer Commission v Woolworths Ltd

[13.580] *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 1472. In a similar strategy to Coles, Woolworths' "Mind the Gap" scheme sought retrospective payments from a large number of suppliers to make up the shortfall in Woolworths' expected and actual profit for the December 2014 half year. As a result of the scheme, Woolworths obtained $18.1 million in payments. The ACCC initiated proceedings against Woolworths, arguing that its conduct was unconscionable. The Court concluded that the conduct was not unconscionable as it met the "norms of society" (or at least the norms of supermarket society). The Court found that (unlike the position in *Coles*):

- from the perspective of any individual supplier, the "Mind the Gap" scheme was no different to any ordinary negotiation that the supplier might have had with Woolworths;
- Woolworths was not in a substantially stronger bargaining position than all its relevant suppliers, particularly its large multinational suppliers whose products customers expect to be available in supermarkets (although, it noted, being in a superior bargaining position alone does not constitute unconscionable conduct); and
- Woolworths was not acting outside of its contractual rights to enter into those negotiations so there was nothing illegitimate about its actions.

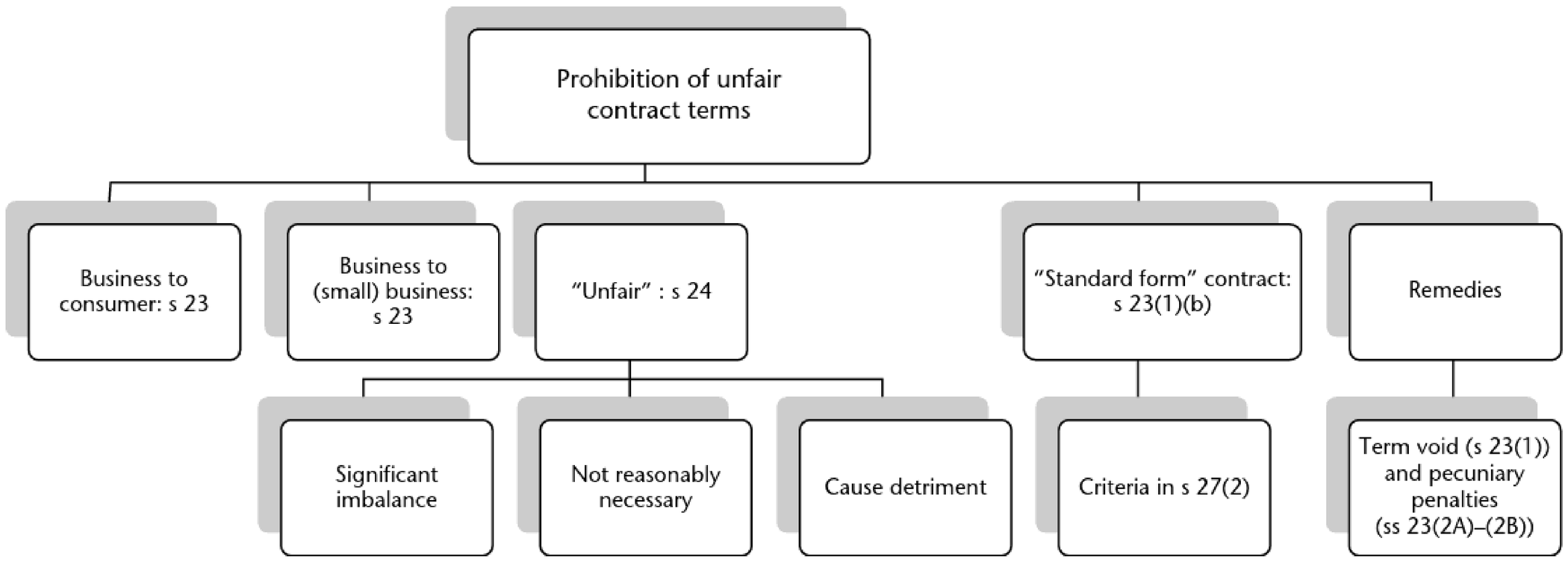
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Remedies for contravention

[13.590] Contravention of the unconscionable conduct provisions does not give rise to a criminal offence. However, a civil pecuniary penalty may be imposed (see from [13.1140]). Other civil remedies, for example, an injunction, or damages for the loss suffered, discussed later in this chapter, may also be sought for contravention of the unconscionable conduct provisions.

Unfair contract terms

Figure 13.3 : Prohibition of unfair contract terms



[13.600] The ACL prohibits *unfair* terms in *standard form* contracts that are *consumer* contracts or *small business* contracts. According to the ACL, 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". The contract, *as a whole*, will not be void, and will still continue to bind the parties, if it can operate without the unfair term: s 23(2).

Meaning of "consumer contract" and "small business contract"

[13.610] For the prohibition of unfair contract terms to apply, the contract at issue must be either a consumer contract or a small business contract. Both terms have legal definitions under the ACL.

A *consumer contract* is defined as one for the supply of goods or services or the sale of land to an individual who acquires them wholly or predominantly for personal, domestic or household use or consumption: s 23(3). Note that this definition differs from the "consumer" definition applicable under the consumer guarantees: it refers to individuals (natural persons) only and it is the individual's actual purpose of acquisition (not the ordinary purpose for goods of that kind) that is relevant.

Amendments to the definition of *small business contracts* came into force on 9 November 2023, broadening the range of small business contracts covered by the prohibition. Previously, it needed to be the case that at least one party to the contract (for goods or services, or the sale of land) employed fewer than 20 people and the upfront price payable under the contract was not more than $300,000

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(or $1 million if the contract was for more than 12 months). Now, from 9 November 2023, a contract is a small business contract if it is for the supply of goods or services or for the sale of land, at least one party to the contract employs fewer than 100 people, and the party's turnover for its last financial year was less than $10 million: s 23(4).

Meaning of "standard form contract"

[13.620] Even if the requirement that there be a consumer contract or a small business contract is satisfied, the provisions as to unfair terms only apply to standard form contracts. Standard form contracts are often used by businesses, on a "take it or leave it" basis, for common business transactions; for example, banks, electricity companies and phone companies use standard form contracts when dealing with consumers. There is no specific legal test for the term "standard form contract" under the ACL, but the legislation gives guidance. If a party alleges that a contract is a standard form contract, it is presumed that the contract is a standard form contract unless another party to the dispute proves otherwise: s 27(1). Section 27(2) then states that a court may consider such matters as it thinks relevant in determining whether a contract is a standard form contract but must consider:

(a) whether one of the parties has all or most of the bargaining power relating to the transaction;

(ba) whether one of the parties has made another contract, in the same or substantially similar terms, prepared by that party, and, if so, how many such contracts that party has made;

(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.

The terms referred to in s 26(1) are: those defining the main subject matter of the contract; terms setting the upfront price payable; terms required or expressly permitted by law; terms included by operation of the law; and terms that lead to one or more other terms applying by operation of law or terms that then require other terms to be included because of the operation of law. Section 26(1) also confirms that s 23 does not apply to these types of terms at all, meaning that (for example) the price for goods or services cannot constitute an unfair contract term.

Section 27(3) goes on to clarify that contracts can still be standard form contracts even though a party had an opportunity to negotiate changes to minor terms, a party had an opportunity to select a term from a range of options, or a party to another contract or proposed contract had the opportunity to negotiate terms. This provision, and paragraph (ba) of s 27(2) quoted above, are new provisions taking effect from 9 November 2023.

Meaning of "unfair"

[13.630] Under s 24(1), a term is unfair if it satisfies each of the following three requirements:

1. it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

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2. it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
3. it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

Thus, if the term protects a legitimate interest, it is *not* unfair. It is important to note that the onus of proving that a term protects the legitimate interests of the advantaged party rests with that party: s 24(4). In determining unfairness, the court may consider any relevant matters but must consider the transparency of the term and the contract as a whole: s 24(2). A term is "transparent" if it is expressed in reasonably plain language, it is legible, it is presented clearly and it is readily available to the affected party: s 24(3).

Remedies that may apply

[13.640] The remedial scheme for breach of the unfair contract terms prohibition changed significantly from 9 November 2023. It remains the case that unfair contract terms breaching this regime are void (s 23(1)) and that the rest of the contract continues to bind the parties if it can operate without the unfair term (s 23(2)), as described at [13.600]. A party or the ACCC can seek a court declaration that a term in a consumer contract (s 250(1)) or in a small business contract (s 250(2)) is unfair. Injunctions can also restrain a party from relying on a term that has been declared unfair.

From 9 November 2023, however, it is also the case that civil pecuniary penalties apply. It is a contravention of the ACL that can lead to a pecuniary penalty to make a consumer contract or a small business contract that is a standard form contract containing an unfair term after proposing the term (s 23(2A)). Each unfair term constitutes a separate contravention (s 23(2B)). A pecuniary penalty can also be imposed for relying on or purporting to rely on an unfair contract term in a consumer contract or in a small business contract that is a standard form contract (s 23(2C)).

Examples of unfair terms

[13.650] Potentially unfair terms given as examples under s 25 of the ACL include the following:

(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;

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(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.

Section 25 confirms that these kinds of terms "may" be unfair. However, it will always be necessary to apply the legal test for unfairness (see [13.630]). The following cases provide examples of how the unfair contract terms provisions have been enforced. However, because the context of each contract as a whole is crucial to deciding whether a term is unfair, precedents are of limited assistance in deciding future cases. This is especially so where proceedings are settled by agreement without a court order, as in the *Uber Eats* case.

Karpik v Carnival PLC

[13.660] *Karpik v Carnival PLC* (2023) 98 ALJR 45. In March 2020, the Ruby Princess cruise ship left Sydney with over 2,500 passengers on board but returned to Sydney shortly after as a result of an outbreak of COVID-19 on the ship. Karpik was a passenger on the Ruby Princess who instituted tort and ACL proceedings against the cruise operators. These proceedings are representative proceedings, a type of class action, brought on behalf of a large number of passengers. Some of those passengers entered into their cruise contracts overseas and were bound by terms and conditions that included a choice of law clause in favour of foreign law, a choice of forum clause that required all proceedings to be brought in foreign courts, and a class action waiver that required all claims to be brought individually.

The cruise operators attempted to stay the proceedings so far as they related to those particular passengers. It argued that those passengers needed to bring their claims, individually, overseas, in accordance with the contract terms described above. This aspect of the dispute eventually reached the High Court.

The High Court held that the ACL could apply (as a result of the *Competition and Consumer Act 2010* (Cth), s 5) despite the foreign choice of law clause, because the cruise operators dealt with customers in Australia. This was so even if these particular contracts concerning other customers were formed overseas. It also held that the proceedings could continue in Australia's courts. For present purposes, the High Court's decision is important as it determined, in addition, that the class action waiver clause was void as an unfair contract term in a consumer contract that was a standard form contract.

Of particular importance here was the fact that, if valid, the class action waiver clause would have had the practical effect of preventing claims being made. The costs of bringing individual claims would be prohibitive. Enforcing the class action waiver clause would also have led to fragmentation of the proceedings. In all of the circumstances, the legal test for an unfair contract term contained in the ACL, s 24(1) was satisfied.

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Interestingly, the High Court's unfair contract terms determination did not resolve the parties' actual substantive dispute in this case. Instead, it confirmed that one potential obstacle to the tort and ACL claims – the class action waiver clause – did not apply. Following on from this case, the claims are now able to be pursued via representative proceedings.

Australian Competition and Consumer Commission v Fujifilm Business Innovation Australia Pty Ltd

[13.670] *Australian Competition and Consumer Commission v Fujifilm Business Innovation Australia Pty Ltd* [2022] FCA 928. Fujifilm entered into or renewed approximately 34,000 contracts with small businesses for printers and related software. The vast majority of these contracts were made using standard form contracts. The ACCC initiated proceedings because it alleged that many of the terms were unfair contract terms and allowed Fujifilm to leverage the significant power imbalance between it and its small business customers. Notably, Fujifilm took action, including litigation, to enforce those terms.

On 12 August 2022, the Federal Court declared that 38 contract terms used in those contracts entered into by Fujifilm were unfair. The Court declared the unfair contract terms void and unenforceable, and ordered Fujifilm to stop enforcing those terms in current small business contracts and to cease using those terms for the next five years.

The types of terms that were declared unfair and void included the following:

- **Automatic renewal terms:** permitting Fujifilm to renew the contract for a further period unless customers cancel the contract a certain number of days before the end of the contract term.
- **Disproportionate termination terms:** allowing Fujifilm to terminate the contract in a significantly wider range of circumstances than those which allow the customer to terminate the contract, if any.
- **Liability limitation terms:** limiting Fujifilm's liability or requiring the customer to indemnify Fujifilm without corresponding rights for the customer.
- **Termination payment terms:** requiring customers to pay extensive exit fees to Fujifilm in the event that a contract is terminated, including certain charges which Fujifilm can set unilaterally.
- **Unfair payment terms:** requiring customers to pay Fujifilm for software licensed pursuant to the agreement irrespective of whether Fujifilm has delivered the software and, when goods are purchased, to pay the purchase price prior to delivery.
- **Unilateral variation terms:** permitting Fujifilm to unilaterally vary some terms of the contract including the charges and terms contained in documents other than the signed contract.

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Australian Competition and Consumer Commission v Smart Corp Pty Ltd (No 3)

[13.680] *Australian Competition and Consumer Commission v Smart Corp Pty Ltd (No 3)* (2021) 153 ACSR 347. A four-wheel drive car hire company required hirers to pay a large security bond when hiring a vehicle. A term of the contract of hire allowed the company to track the vehicles by GPS. The company used the GPS data to generate reports about driver behaviour. The contract prohibited drivers from driving outside built-up areas after dark or driving during fog or heavy rain. The contract allowed the company to make a substantial deduction from the bond every time a driver engaged in behaviour that was prohibited by the contract. Under the contract such prohibited behaviour was deemed to cause "excessive wear and tear" to the vehicle.

The company told consumers that its vehicles were fully insured, while a contract term gave the company a choice whether to claim against hirers for the cost of any damage or to lodge an insurance claim. The contract also contained a non-disparagement clause prohibiting hirers from saying anything negative about the company in online reviews or elsewhere.

The Federal Court held that GPS monitoring of hire vehicles was not unfair in itself but the GPS terms (containing wide deduction rights) brought about a "significant imbalance" in the rights and obligations of the parties and other terms (the insurance option) went further than was reasonably necessary to "protect the legitimate interests" of the hire company.

The non-disparagement term prevented even honest or genuine criticism of the company, and exceeded the company's legitimate interests since it was not limited to proscribing "unjustified, false or misleading statements". The Court declared that all three terms were void as unfair contract terms.

Australian Competition and Consumer Commission v Uber Eats

[13.690] *Australian Competition and Consumer Commission v Uber Eats* (2019) (administrative resolution). Uber Eats provided its services to restaurants under its standard Terms and Conditions. The standard form contracts included the following terms:

1. Uber is a technology platform only and does not provide any delivery or logistics services (despite the fact that "we deliver" is festooned on its website).
2. The drivers are agents of the restaurant (despite their workflow and pay being controlled by Uber, and not the restaurant).
3. Restaurants are responsible for any liability arising from issues attributed to the delivery of meal orders and Uber has the right to refund customers and deduct that amount from the restaurant (even when the problem with the meal or delivery may not have been the fault of the restaurant).

The ACCC considered that such terms were contrary to the unfair contract terms provisions of the ACL because they make restaurants responsible and financially liable for matters outside of their control, meaning that the terms:

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- caused a significant imbalance between the restaurants and Uber Eats; and
- were not reasonably necessary to protect Uber Eats; and
- could cause detriment to the contracting restaurants.

In July 2019, in response to the ACCC's investigation, Uber Eats agreed to amend its terms so as to clarify that restaurants will only be responsible for matters within their control such as incorrect food items being delivered or incorrect and missing orders. Under the amended contracts, restaurants are also able to dispute responsibility for any refunds to customers and Uber Eats will reasonably consider these disputes.

The importance of 9 November 2023

[13.700] As noted above, several key amendments to the unfair contract terms regime became effective from 9 November 2023. Transitional provisions address how this date is given significance. The amendments apply to standard form contracts initially made or renewed on or after 9 November 2023. They will also apply to terms of contracts added or varied on or after 9 November 2023 (even if the contract was first entered into before that time), and in that case, the new standard form contract rules also apply to the whole contract. As these changes to the law passed Parliament in the second half of 2022, businesses were given 12 months to prepare for the new regime coming into force (as it now has).

Specific protections: ACL Chapter 3

Overview of Chapter 3

[13.710] Whereas Chapter 2 of the ACL proscribes misleading or deceptive conduct, unconscionable conduct and unfair contract terms generally, Chapter 3 Pt 3-1 contains *specific* protections for consumers from various types of unfair practices. Contravention of these provisions gives rise not only to ordinary civil remedies, for example, the recovery of damages for loss suffered, but also to (civil) pecuniary penalties and (criminal) fines. As we shall see in relation to many of the cases addressed in this section, it is not uncommon that conduct breaching s 18(1) also constitutes a breach of other sections in Pt 3-1.

False or misleading representations about goods or services

[13.720] Section 29(1) prohibits a wide range of specific forms of false or misleading representations, in trade or commerce, in connection with the supply or possible supply of goods or services. Each of these preliminary requirements, separate to the prohibited representations themselves, are defined under the ACL. Though they will rarely be at issue in commercial contexts, it remains the case that there must be a supply, and either goods or services, for s 29(1) to apply.

[13.730] Goods are understood at common law as being physical, tangible, objects. However, the statutory definition of goods under the ACL extends this meaning to include "computer software" even if it is purely electronically delivered without any physical media involved: ACL, s 2(1). Services are defined broadly and inclusively but exclude the supply of goods or the performance of work under an employment contract: ACL, s 2(1). Supply, in turn, "includes: (a) in relation to goods – supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase" and "includes: (b) in relation to services – provide, grant or confer": ACL, s 2(1).

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[13.740] Section 29(1) provides that 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, make the following false or misleading representations:

(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).

[13.750] As was the case under s 18(1), there is no fault or intention requirement under s 29(1): it may be breached completely innocently, without any intention to make a false or misleading statement. The following cases provide examples of conduct contravening various paragraphs of s 29(1), along with other sections in Pt 3-1. As you will see from these cases, because of an overlap between s 18(1) and s 29(1), conduct contravening s 29(1) will almost inevitably also breach s 18(1) at the same time (though given the width of s 18(1), the reverse is not necessarily true).

Australian Competition and Consumer Commission v Airbnb Ireland UC

[13.760] *Australian Competition and Consumer Commission v Airbnb Ireland UC* [2023] FCA 1633. AirBnb, as is well known, operates an online platform where customers can, via a desktop

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or laptop computer, a mobile phone, a tablet or an app, book accommodation. Between 2018 and 2021, AirBnb's platform displayed prices to some Australian customers for accommodation in Australia that were actually in US dollars rather than in Australian dollars. That fact was not clearly disclosed. Because of the US dollar to Australian dollar exchange rate during that period, affected customers paid more (in Australian dollars) than the numerical figure displayed on the platform. AirBnb admitted that this conduct contravened s 18(1) and also s 29(1)(i) (price). The ACCC and AirBnb jointly proposed, and the Federal Court of Australia accepted and imposed, a pecuniary penalty of $15 million.

Australian Competition and Consumer Commission v Dell Australia Pty Ltd

[13.770] *Australian Competition and Consumer Commission v Dell Australia Pty Ltd* [2023] FCA 588. Dell Australia supplies desktop, laptop and notebook computers through its website. Between 2019 and 2021, when customers purchased a computer through the Dell website, that website would identify compatible monitors that were in stock, and would then suggest that customers add a relevant monitor to their purchase. The monitor was displayed as being discounted via a strikethrough price, and an actual price to be charged was also indicated, which was lower.

Dell admitted that it had breached ss 18(1) and 29(1)(i) (price). This was because this price display was misleading in a number of respects. Firstly, the add-on monitor price indicated was higher than the price of purchasing the same monitor through the website on a stand-alone basis. Secondly, the discount represented was not genuine as the monitors were not actually being sold at the strikethrough price if purchased on a stand-alone basis. Customers were not actually saving the difference between the two prices displayed, were misled into thinking that the strikethrough price would have applied without the discount, and were misled into thinking that the strikethrough price was the standard price for the monitors in question.

The ACCC and Dell jointly proposed, and the Federal Court accepted and imposed, a pecuniary penalty of $10 million: *Australian Competition and Consumer Commission v Dell Australia Pty Ltd (No 2)* [2023] FCA 983.

Australian Competition and Consumer Commission v Samsung Electronics Australia Pty Ltd

[13.780] *Australian Competition and Consumer Commission v Samsung Electronics Australia Pty Ltd* [2022] FCA 875. Between 2016 and 2018, Samsung Australia undertook an advertising and marketing campaign concerning seven models of its Galaxy smartphone. It represented that those models of phone were waterproof, and could be submerged in a pool or in sea water. Samsung Australia admitted that this was inaccurate, as there was "a material prospect that the charging port of those Galaxy phones might be damaged due to corrosion if the Galaxy phones … were then charged or attempted to be charged while some water remained in the charging port". Samsung admitted that it had contravened s 18(1), s 29(1)(a) (goods being of a particular

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standard or quality), s 29(1)(g) (goods having performance characteristics, uses or benefits) and s 33. The ACCC and Samsung Australia jointly proposed, and the Federal Court imposed, a pecuniary penalty of $14 million.

Australian Competition and Consumer Commission v Employsure Pty Ltd

[13.790] *Australian Competition and Consumer Commission v Employsure Pty Ltd* (2021) 392 ALR 205. Employsure's advertisements on Google were activated by searches for terms such as "Fair Work Ombudsman" or "Fair Work Commission". The advertisements would return a prominently displayed result headed with a caption such as "Fair Work Ombudsman Help – Free 24/7 Employer Advice". Employsure was a private workplace relations consultant and had no connection with these government agencies.

The Full Federal Court held that Employsure's advertisements constituted a false or misleading representation that its services had a sponsorship, approval or affiliation (s 29(1)(h)). The advertisements also breached s 29(1)(b) (false or misleading representation that services are of a particular standard, quality, value or grade), and s 18(1).

The Court identified the relevant class to whom the representations were made. The target audience for these advertisements were employers who use a search engine to find advice about employment law. That is a diverse class of people. However, the fact that these employers are searching on the Internet for advice about workplace relations law suggests that these businesses are typically too small to have their own human resources staff.

It should not be assumed that small businesses are necessarily run by people who are digitally literate or commercially sophisticated. As the Court explained, "[a]n advertisement may be misleading even if it fails to deceive the intelligent, the shrewd, the wary, the well-educated, the experienced, the digitally competent or commercially sophisticated".

Considering the target audience's breadth and diversity, a range of responses to the advertisements would be reasonable. Employers would often see the advertisements when they were urgently seeking advice about workplace relations matters, when they would be unlikely to closely scrutinise their contents. An ordinary employer seeing these advertisements would be unlikely to pay close attention to the advertisements, and may immediately contact the advertiser without further scrutiny.

The impression created by the advertisements was that the free advice would be given by a government agency. The fact that the advertisement was labelled as an "Ad" did not prevent this impression being misleading since government agencies often advertise in the media.

The Full Federal Court remitted the matter to the Federal Court for the determination of a penalty. The Federal Court imposed a pecuniary penalty of $1 million for the contraventions: *Australian Competition and Consumer Commission v Employsure Pty Ltd (No 2)* [2021] FCA 1488. The ACCC appealed this penalty determination, and on appeal, the Full Federal Court increased the pecuniary penalty imposed to $3 million: *Australian Competition and Consumer Commission v Employsure Pty Ltd* (2023) 407 ALR 302.

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[13.800] A recurring theme across cases concerning s 29(1) are those that involve s 29(1)(m) – false or misleading representations concerning consumer rights. This provision will be breached, for example, where there are false or misleading representations made about rights that consumers have under the ACL's consumer guarantees regime. In this sense, s 29(1) (and s 18(1)) also have an overlap with the consumer guarantees addressed later in this chapter. The following are a selection of just some recent cases on point.

Australian Competition and Consumer Commission v Mazda Australia Pty Ltd

[13.810] *Australian Competition and Consumer Commission v Mazda Australia Pty Ltd* [2023] FCAFC 45. Mazda, a car manufacturer, dealt with a number of complaints on behalf of Mazda dealers. Customers had experienced a number of issues with their Mazda cars including loss of power, rough idling, headlight issues, engine warning light issues, and the need to replace parts and engines (often without success in actually addressing the problems that had arisen). In dealing with customer complaints, the Full Court of the Federal Court of Australia found that Mazda made a number of implied representations breaching ss 18(1) and 29(1)(m) in relation to customer rights. For example, Mazda offered opinions to some customers that they had no right to a refund. Like representations about future matters (see [13.950]), opinions do not constitute misleading or deceptive conduct because they turn out to be wrong. However, in context, these opinions were found to also convey a separate representation that there were reasonable grounds for giving the opinions. This was not so: Mazda had not properly considered whether there had been major failures with respect to the consumer guarantees. Because this part of the case was pursued on the basis of Mazda giving an opinion without having a reasonable basis for holding that opinion, the ACCC succeeded in establishing a breach of ss 18(1) and 29(1)(m). This was so even without the ACCC showing, as a matter of fact, that major failures under the consumer guarantee regime had actually occurred.

The Federal Court of Australia imposed a pecuniary penalty of $11.5 million: *Australian Competition and Consumer Commission v Mazda Australia Pty Ltd (No 3)* [2024] FCA 83.

Australian Competition and Consumer Commission v FitBit LLC

[13.820] *Australian Competition and Consumer Commission v FitBit LLC* [2023] FCA 1535. FitBit, a manufacturer of wearable fitness trackers and smart watches, admitted that it had contravened ss 18(1) and 29(1)(m) when its customer service representatives dealt with Australian customers in relation to FitBit device complaints. Between 2020 and 2022, 18 customers were told that they did not have an entitlement to a refund because they had not returned their products within 45 days of purchase or shipment, which was a requirement of FitBit's policy. Across 2020 to 2022, 40 customers were also told that they were not entitled to a remedy for their complaints because FitBit's own two-year warranty period had expired. Both representations misled customers about their consumer guarantee rights because those rights are not limited to a 45 day return period, or to two years of device life. The Federal Court agreed with the proposal jointly put by the ACCC and FitBit to impose an $11 million pecuniary penalty.

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Australian Competition and Consumer Commission v Booktopia Pty Ltd

[13.830] *Australian Competition and Consumer Commission v Booktopia Pty Ltd* [2023] FCA 194. Booktopia is an online bookstore that supplies physical books, magazines, calendars, maps, stationery, games, puzzles and also digital content including ebooks and audio books, to Australian consumers. Between 2020 and 2021, Booktopia's terms of business policy stated that it "includes rights you are entitled to under Australian Consumer Law", that notification of incorrect, damaged, or faulty items was required within two business days of delivery, and that returns and refunds were not available for magazine subscriptions, gift certificates, ebooks, other digital content, bulk orders on firm sale terms, or print on demand orders on firm sale terms.

Booktopia admitted that its two-business-day and no returns or refunds rules breached ss 18(1) and 29(1)(m) because the ACL's consumer rights (which cannot be excluded) are not qualified in this way. Booktopia also admitted breaches where its customer service representatives told customers that they had no rights where complaints were made after the two days had passed. The ACCC and Booktopia jointly proposed, and the Federal Court accepted and imposed, a pecuniary penalty of $6 million.

Whilst Booktopia admitted the contraventions in this case, some of which related to ebooks, there is actually some uncertainty as to whether the consumer guarantees (and thus s 29(1)(m)) can apply to ebooks. This is because, as [13.730] explained, the common law definition of goods (physical, tangible objects) has only been statutorily extended to include "computer software". It is not yet clear what "computer software" actually means. The ACCC has stated its view is that "[c]ustomers who buy digital products online have exactly the same rights as they would if they made the purchase at a physical store".[16] This is only true, however, if the statutory term "computer software" is given an expansive interpretation to include things other than traditional desktop computer programs.

Country of origin representations

[13.840] The s 29(1)(k) prohibition of false or misleading representations about the place of origin of goods interacts with a separate set of provisions contained in Pt 5-3 (ss 254–258). Pursuant to s 254, country of origin representations do not breach s 18, s 29(1)(a) or s 29(1)(k) if they comply with s 255. Pursuant to s 255, a representation as to the country of origin of goods (eg that goods are "Made in Australia") can only be made if the goods have been "substantially transformed" in Australia. The requirement that the goods must have been "substantially transformed" includes circumstances where goods undergo processes in a country whereby they become fundamentally different in identity, nature or essential character from all of their imported ingredients: s 255(2)(b).

In addition, the *Country of Origin Food Labelling Standard 2016* imposes regulations concerning "standard mark" labels (consisting of a kangaroo in a green triangle and a bar chart showing the percentage of Australian content) for retail food grown, produced or made in Australia.

16 https://www.accc.gov.au/media-release/sony-to-pay-35-million-penalty-for-misrepresenting-playstation-gamers-rights.

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Australian Competition and Consumer Commission v Costco Wholesale Australia Pty Ltd

[13.850] *Australian Competition and Consumer Commission v Costco Wholesale Australia Pty Ltd* (2023) (administrative resolution). Costco's Casuarina warehouse in Western Australia sold lobsters labelled "Kirkland Signature PREVIOUSLY FROZEN WHOLE COOKED WA LOBSTER" and "Australian Lobster" when those lobsters were actually imported from Canada. Those lobster products also included the "standard mark" labelling indicating that they were of Australian origin. The ACCC issued, and Costco paid (without admission of contravention), two infringement notices totalling $33,000 on the basis of false or misleading labelling of the lobster products' country of origin.

Land

[13.860] Section 30(1) proscribes the making of false or misleading representations in connection with the sale or grant or the possible sale or grant or the promotion of the sale or grant of an interest in land. It provides that a person must not, in trade or commerce, in those contexts:

(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.

Williams v Pisano provides an example of the application of s 30(1), and also a reminder that the provision still only prohibits conduct in trade or commerce even though it concerns land.

Williams v Pisano

[13.870] *Williams v Pisano* (2015) 90 NSWLR 342. The vendors of a property made certain representations to the property's purchasers regarding the state of works that had been carried out on the property. The property had been used as a residence but had also been used in the course of the vendor's interior design business, and was considered to be an investment by the vendors. When the representations concerning the state of works that had been carried out on the property turned out to be false, the purchasers instituted legal proceedings which included claims under ss 18(1) and 30(1)(e) (characteristics of the land).

It was accepted that the representations were false, and that they concerned the characteristics of the land, and that they therefore in principle fell within s 30(1)(e). Nevertheless, the New South Wales Court of Appeal found that there was no breach as the sale of the residential property was not conduct in trade or commerce. The fact that the property was considered an

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> investment by the vendors and was used in running the vendor's interior design business did not change the fact that the sale was a sale of a residential property, which did not in itself have a trading or commercial character.

[13.880] For a misleading representation to be made "in connection with the promotion by any means of the sale" in contravention of s 30(1), there is no necessity to establish that a sale resulted from or was the likely result of the making of the statement. The fact that a brochure containing the representation was available to the public is sufficient: *Videon v Barry Burroughs Pty Ltd* (1981) 37 ALR 365.

Misleading conduct as to employment

[13.890] A person must not engage in conduct that is liable to mislead persons as to the availability, nature, terms or conditions, or any other matter relating to employment offered by the person or another person: s 31.

Offering rebates, gifts, prizes or other free items with the intention of not providing them as offered

[13.900] A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or an interest in land or in connection with the promotion by any means of such activities, offer rebates, gifts, prizes or other free items with the intention of not providing them or of not providing them as offered: s 32(1). For example, offering a "free" gift with goods and at the same time increasing the price of the goods to cover the cost of the gift would contravene this provision.

Misleading conduct as to the nature of goods and services

[13.910] 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: s 33. *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25 (see [13.270]) is a case where s 33 was contravened.

[13.920] 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: s 34. *Australian Competition and Consumer Commission v Google LLC (No 2)* (2021) 391 ALR 346 (see [13.200]) is an example of a recent case involving a contravention of this provision.

Profitability of certain business activities

[13.930] A person must not make a representation in trade or commerce 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: s 37(1).

It is further provided that a person must not, in trade or commerce, make a representation that is false or misleading in a material particular and concerns the profitability, risk, or any other material aspect of a business activity that the person invites (by advertisement or otherwise) other persons to engage in, and that requires the performance of work (and possibly also investment) by other persons: s 37(2).

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These provisions are designed to counter, for example, extravagant claims as to earnings which can be made from investment in dubious "franchise" schemes.

Australian Competition and Consumer Commission v South East Melbourne Cleaning Pty Ltd (in liq) (formerly known as Coverall Cleaning Concepts South East Melbourne Pty Ltd)

[13.940] *Australian Competition and Consumer Commission v South East Melbourne Cleaning Pty Ltd (in liq) (formerly known as Coverall Cleaning Concepts South East Melbourne Pty Ltd)* [2015] FCA 25. Coverall operated a cleaning franchise system in the following terms. Franchisees would enter into contracts with Coverall whereby they purchased different levels of franchise from Coverall for a certain amount of money. Coverall organised cleaning jobs for its franchisees, collected money for the cleaning work done, and was to pay its franchisees for the cleaning work that they had done (minus certain franchise royalties and fees).

Two franchisees entered into separate franchises with Coverall and at the time of their respective franchise negotiations, they were told that there was an income guarantee applicable for a certain period of time. They were told that if work of a particular value could not be provided, Coverall would pay the difference between the work it could provide and the income that was guaranteed. Breaches of s 37(2) were made out in both cases. Because these representations concerned the profitability and risk of the franchise businesses, and the franchise business required investment and work by the franchisees, and the representations were misleading, there was a breach. The representations were misleading because the franchise contracts actually only required Coverall to pay the franchisees if they were paid by the customers, and they also did not require Coverall to make up the shortfalls. To the extent that there were representations about future matters (see [13.950]), it was also the case that no reasonable grounds for making the representations were established, and in addition, there could not have been any reasonable grounds. It was not clear that Coverall had a business system that allowed it to pay its franchisees on time and in accordance with the requirements of their franchise agreements.

Representations and predictions about future outcomes

[13.950] The Federal Court of Australia in *Australian Competition and Consumer Commission v South East Melbourne Cleaning Pty Ltd (in liq) (formerly known as Coverall Cleaning Concepts South East Melbourne Pty Ltd)* [2015] FCA 25 (see [13.940]) explained that when representations are made about future matters, there is no misleading conduct only because those future matters do not come to pass. Instead, s 4(1) provides that where a person makes a representation as to any *future* matter, and they do not have reasonable grounds for making the representation, the representation is taken to be misleading. The focus is thus on whether or not there are reasonable grounds for making a prediction about future matters, and not on whether or not the prediction actually ends up being true. Pursuant to s 4(2), a party making a representation about a future matter is taken not to have had reasonable grounds unless there is evidence to the contrary. These rules apply to s 18(1) as well as to the Chapter 3 specific prohibitions being studied here.

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The ACCC has sought to invoke s 4(1) in the context of "green marketing", which is seen as an appealing strategy for businesses seeking the attention of a particular environmentally conscious demographic. It was unsuccessful in doing so in the first case presented below; whilst the second case (not involving "green marketing") involved a more straightforward application of s 4(1).

Australian Competition and Consumer Commission v Woolworths Group Ltd (formerly called Woolworths Ltd)

[13.960] *Australian Competition and Consumer Commission v Woolworths Group Ltd (formerly called Woolworths Ltd)* (2020) 281 FCR 108. The ACCC initiated action against Woolworths alleging, amongst other things, that Woolworths had engaged in misleading or deceptive conduct by representing that its Select Eco products were "Biodegradable and Compostable". The ACCC argued that this was a representation about a future matter (involving the likely performance of the product to do something in the future) and that the representation was made without reasonable grounds. Via s 4(1), the ACCC argued that misleading or deceptive conduct was made out under s 18(1).

The Federal Court, and then the Full Court of the Federal Court, rejected the ACCC's argument. The Full Court found that the representations concerned the inherent qualities of the products, rather than being representations about future compostability. This was consistent with an intuitive (rather than a carefully considered) reaction of ordinary and reasonable consumers.

The Court decided that, generally speaking, a representation about the nature, quality, character or capability of a product based upon its inherent characteristics will *not* be a representation with respect to a future matter and would therefore fall outside the ambit of s 4. A representation will only be with respect to a future matter if it is in the nature of a promise, forecast, prediction, or other like statement about something that will only transpire in the future – that is, a representation which is not capable of being proven to be true or false when made. This decision is consistent with another decision of the Full Court in *Australian Competition and Consumer Commission v Kimberly-Clark Australia Pty Ltd* [2020] FCAFC 107 (see [13.320]) which held that representations about wipes being "flushable" were not representations about future matters (even though a consumer needs to first use the wipes before they can be flushed).

Australian Competition and Consumer Commission v Taxsmart Group Pty Ltd

[13.970] *Australian Competition and Consumer Commission v Taxsmart Group Pty Ltd* [2014] FCA 487. Taxsmart made representations that it was offering a graduate program and 12 months of employment to accounting graduates with no previous work experience in tax accounting that *would enable* such graduates to satisfy the requirements for registration as tax agents and commence as franchisees. In this respect, Taxsmart made representations about future matters.

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The Court held that Taxsmart engaged in misleading or deceptive conduct because: (a) it had not made proper enquiries or adequately considered whether the graduate program would enable graduates, with no prior experience in tax accounting, to satisfy the legal requirements for registration as tax agents; and (b) the graduate program was not capable of enabling graduates, without any previous work experience in tax accounting, to satisfy the legal requirements for tax agent registration. The Court ordered Taxsmart to repay $260,400 in franchise fees to five former Taxsmart franchisees.

Consumer Data Right

[13.980] The Australian Government introduced the Consumer Data Right (CDR) provisions into Part IVD of the *Competition and Consumer Act 2010* (Cth) via the *Treasury Laws Amendment (Consumer Data Right) Act 2019* (Cth). CDR was introduced to give consumers greater control over their consumer data (CCA, s 56AA). It enables a consumer to direct a data holder to provide their CDR data to an accredited data recipient, in a CDR compliant format.

The *Competition and Consumer (Consumer Data Right) Rules 2020* (the "CDR Rules") provide the framework for how the CDR operates. The CDR Rules define the elements for consent, outline the accreditation framework and elaborate on the privacy aspects of the scheme.

The Minister may designate particular sectors of the economy in which the consumer data right is to apply: CCA, s 56AC. The following sector designations are currently in force: *Consumer Data Right (Telecommunications Sector) Designation 2020* (Cth), *Consumer Data Right (Energy Sector) Designation 2020* (Cth), *Consumer Data Right (Non-Bank Lenders) Designation 2022* (Cth), *Consumer Data Right (Authorised Deposit-Taking Institutions) Designation 2019* (Cth) (this last listed designation applying to the banking sector). These instruments set out the classes of information that are subject to the CDR as well as who holds this information and who is required to transfer it at the consumer's request.

Accredited data recipients must comply with privacy safeguards: CCA, s 56EA. These include the open and transparent management of data (CCA, s 56ED), the right of anonymity (CCA, s 56EE), notification to consumers of data collection (CCA, s 56EH), safeguards in relation to direct marketing (CCA, s 56EJ) and disclosure to overseas recipients (CCA, s 56EK), ensuring that information is up to date and complete (CCA, s 56EN), data security (CCA, s 56EO), and requests by consumers for the correction of data (CCA, s 56EP).

Provisions dealing with other forms of unfair practices

[13.990] Bait advertising is prohibited by s 35. This type of advertising essentially takes the form of attracting customers by the offer of goods at "special" prices for a particular period of time, only for the customer to be told (on following up the advertisement) that the "special" price goods have all been sold but that another product at a higher price is available for sale. Note that this prohibited bait advertising is different to the common practice of loss leading, where particular goods are sold at a loss in order to attract customers in the hope that they also purchase other goods. Loss leading is not prohibited bait advertising. In the case of loss leading, the "special" price goods are in fact available and are in fact sold.

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Reardon v Morley Ford Pty Ltd

[13.1000] *Reardon v Morley Ford Pty Ltd* (1980) 33 ALR 417. Morley Ford carried on business as a dealer in Ford cars. It advertised for sale in newspaper advertisements a particular Ford model at the special price of "$6,600 plus on-road costs and delivery fees". A prospective purchaser visited the defendant's showrooms where he was informed that there was only one vehicle available at the relevant price but that it had already been sold.

The Court decided that the defendant breached what is now s 35. The circumstantial evidence led to the conclusion that the managing director of the defendant corporation did not intend to offer the particular model of vehicle for sale in accordance with the advertisement.

[13.1010] Under s 36, a range of circumstances involving wrongly accepting payment are prohibited. All prohibitions apply in trade or commerce. A person must not accept payment or other consideration for goods or services if at the time of acceptance they intend not to supply the goods or services: s 36(1). A person must not accept payment or other consideration for goods or services if at the time they intend to supply materially different goods or services: s 36(2). Under s 36(3), there is a prohibition targeting supply within the time period specified or a reasonable time; and supply must occur within those timeframes under s 36(4) (unless a failure to do so is outside of the person's control and they took reasonable precautions: s 36(5); or unless the customer accepts an offer to supply substitute goods or services: s 36(6)).

[13.1020] Under s 39(1), a person must not send a credit card, debit card, or an article that may be used as a credit card or a debit card, to a person except pursuant to a written request, or where the card or article is a renewal or a replacement.

[13.1030] Rules relating to the provision of unsolicited goods and services are contained in ss 40 and 41. The s 40 rules contain a prohibition on asserting payment rights in relation to unsolicited goods or services. Under s 40(1) there is a prohibition (again restricted to conduct in trade or commerce) on asserting a right to payment in relation to unsolicited goods unless a person has reasonable cause to believe there is a right to the payment. An equivalent rule relating to services is contained in s 40(2). The person who asserts a right to payment has the burden of proving reasonable cause: s 40(4).

According to s 10(1), a person is taken to have asserted a right to payment if the person:

(a) makes a demand for the payment or asserts a present or prospective right to the payment; or

(b) threatens to bring any legal proceedings with a view to obtaining the payment; or

(c) places or causes to be placed the name of the other person on a list of defaulters or debtors, or threatens to do so, with a view to obtaining the payment; or

(d) invokes or causes to be invoked any other collection procedure, or threatens to do so, with a view to obtaining the payment; or

(e) sends any invoice or other document that: (i) states the amount of the payment; or (ii) sets out the price of unsolicited goods or unsolicited services; or (iii) sets out the charge for placing, in a publication, an entry or advertisement; and does not contain a statement, to the effect that the document is not an assertion of a right to payment, that complies with any requirements prescribed by the regulations.

[13.1040] The recipient of unsolicited goods supplied in trade or commerce is not liable to pay for them, nor for the loss of or damage to the goods other than loss or damage resulting from some wilful and unlawful act by the recipient: s 41(1). Furthermore, if a person sends unsolicited goods in trade or

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commerce, they cannot take action to recover those goods after the recovery period, at which time the goods become the other person's property: s 41(2). The recovery period is either three months after receipt or one month after the recipient gives a specific form of notice: s 41(4).

Similarly, the recipient of unsolicited *services* is not liable to pay for them, nor for any loss or damage as a result of the supply of the services: s 42.

[13.1050] Under s 43(1), the ACL prohibits a person asserting a right to payment from any person of a charge for making an entry or advertisement in a publication relating to the person or to their profession, business, trade or occupation. The exception is where the person knows or has reasonable cause to believe that the other person has authorised the making of the entry or advertisement: s 43(1). In the absence of authorisation, a person is not liable to make payment for and is entitled to recover any payment made for such entry or advertisement: s 43(4). In other words, a person cannot claim payment for an advertisement (in relation to another person) unless the person who is claiming payment believes that the other person authorised it.

[13.1060] The ACL prohibits pyramid selling in ss 44–46. In general terms, a pyramid selling scheme is one in which the participants are offered both the right to sell a particular company's product *and* to receive payment or other benefit for introducing other persons into the scheme. The problem experienced with such schemes has been that those at the top of the pyramid (usually the persons who promoted the scheme) may receive considerable benefit derived largely from the contribution of each new participant. However, those at the base of the pyramid who rely on sales of the product, and the introduction of new participants to recoup their initial investment, find that the market becomes rapidly saturated and that the product becomes almost impossible to sell.

Australian Competition and Consumer Commission v Jutsen (No 3)

[13.1070] *Australian Competition and Consumer Commission v Jutsen (No 3)* (2011) 206 FCR 264. A pyramid scheme claimed to offer accommodation and travel discounts and the chance to earn substantial money. Members had to pay $250 to join. The accommodation or travel discounts arising from membership were difficult or impossible to get or were of little or no value. Members were told that they could earn money by recruiting new members.

Nicholas J observed that a pyramid scheme has two essential characteristics. First, new participants make a payment to participate in the scheme. Second, new participants are induced to make such payments by the prospect of receiving payments for introducing new participants to the scheme. The scheme in this case possessed both characteristics.

[13.1080] Under the ACL's multiple pricing provisions, a person must not in trade or commerce supply goods if they have more than one displayed price, and the supply takes place at a price that is not the lower or lowest of those prices: s 47(1). This is the basis upon which New South Wales Fair Trading suggested that a 7–11 petrol station accidentally advertising an incorrect (low) fuel price on its large roadside signage on 2 December 2023 was required to honour that price; noting that there could be no misleading or deceptive conduct as the error would have been obvious to consumers.[17] In addition, a

17 https://www.drive.com.au/caradvice/sydney-petrol-pricing-typo/.

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person must not (in trade or commerce) in connection with: (a) the supply of goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption; or (b) the promotion of the supply of goods or services of that kind; make a representation concerning an amount that would constitute a part of the consideration unless they also prominently specify a single price for the goods or services: s 48(1). This provision has the effect that a single price for the types of goods and services covered must be displayed.

viagogo AG v Australian Competition and Consumer Commission

[13.1090] *viagogo AG v Australian Competition and Consumer Commission* [2022] FCAFC 87. An online ticket reseller facilitated the reselling of event tickets. The reseller allowed ticket holders to set a price for their tickets. If the ticket was sold, the reseller would add a "VAT and Booking Fee" of nearly 28% of the sale price. The website displayed the tickets at the price set by the ticket holders, but did not disclose the hefty "booking fee" until the final stage of the sale process.

The Full Federal Court held that s 48 was breached by the reseller's failure to display the full price of the tickets even though the full price was ascertainable. The reseller made representations about the price which did not include the whole price of the tickets. The supply of the tickets was a single transaction. It did not consist of separate transactions by the ticket holder and the reseller, each subject to a separate price.

[13.1100] The ACL s 49 contains a prohibition concerning referral selling. This is a method of selling whereby a person persuades a consumer to buy its goods or services by representing that after the consumer has paid over money, they will receive a rebate, commission, or some other benefit in return for giving the person names of other customers or otherwise assisting the person in selling their goods or services. The practice has been proscribed because consumers who paid in the expectation that they would receive some future benefit and recoup what they paid received nothing, either because they found it almost impossible to obtain referrals, or because the companies did not honour their promises to pay.

Thus under 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, a commission or other benefit in return for giving the person the names of prospective customers or 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 the contract is made.

[13.1110] Finally, for present purposes, a person must not use physical force or undue harassment or coercion in connection with the supply or possible supply of goods or services to a consumer or the payment for goods or services by a consumer (as well as in relation to the sale of land or payment for an interest in land): s 50(1).

In *Australian Competition and Consumer Commission v McCaskey* (2000) 104 FCR 8, French J held that a creditor will engage in undue harassment where the "frequency, nature or content" of the creditor's demands "is such that they are calculated to intimidate or demoralise, tire out or exhaust a debtor".

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Australian Competition and Consumer Commission v Panthera Finance Pty Ltd

[13.1120] *Australian Competition and Consumer Commission v Panthera Finance Pty Ltd* (2020) 143 ASCR 486. Panthera was a debt collection company engaged in relation to three consumers (referred to as Witnesses A, B and C). It admitted that it contravened s 50(1) by repeatedly contacting the Witnesses about debts alleged by Origin, Telstra and AGL (utilities companies). It required those Witnesses to disprove their liability for those debts, in circumstances where Panthera was aware that the Witnesses had disputed liability for those debts with their utilities companies, and where they were not in fact liable for those debts. Panthera also admitted that it contravened s 29(1)(m) in relation to Witness B by telling that Witness they had to pay at least $100 to have a debt default removed from their credit history when in fact they were entitled to have the incorrect listing removed free of charge under the *Privacy Act 1988* (Cth). The ACCC and Panthera jointly proposed, and the Federal Court accepted and imposed, a pecuniary penalty of $500,000 (being $125,000 for each of the four contraventions).

Enforcement and remedies for unfair practices

[13.1130] Contravention of the "unfair practices" provisions of the ACL may give rise to an action for:

1. a criminal penalty: ss 151–168;
2. a civil pecuniary penalty: s 224(1);
3. an injunction: s 232;
4. damages: s 236; and
5. other orders (eg rescission or variation of contracts): ss 237 and 243.

Civil and criminal penalties

[13.1140] According to ss 224(3)–(3A), the maximum civil pecuniary penalty that may be imposed with respect to breaches of the ACL's unfair practices provisions are:

for corporations, to the greater of:

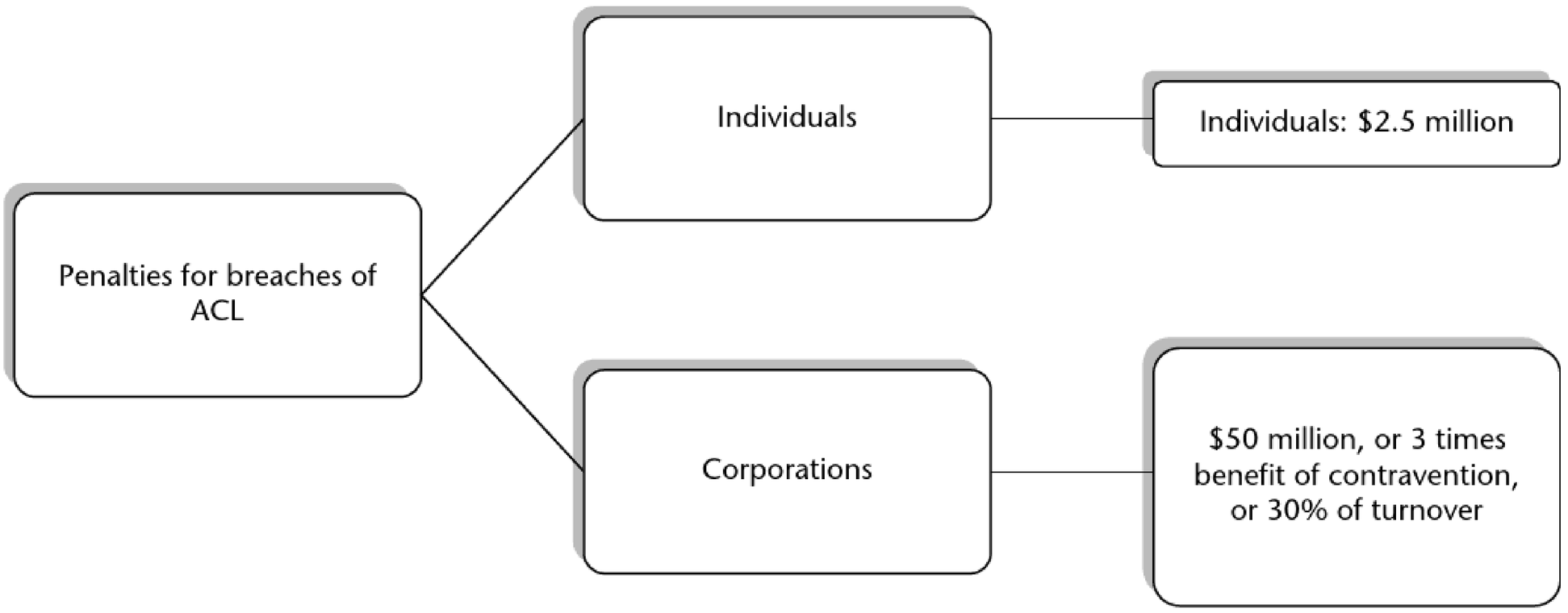
1. $50 million;
2. if the court can determine the value of the benefit that the body corporate and any related body corporate obtained directly or indirectly that is reasonably attributable to the breach, three times the value of the benefit; or
3. if the court cannot determine the value of the benefit, 30% of the body corporate's adjusted turnover during the breach turnover period; and

for individuals: $2,500,000.

Whilst these penalties apply to a number of ACL contraventions, the general prohibition of misleading or deceptive conduct (s 18(1)) is not subject to a civil pecuniary penalty. Note too that these maximum civil pecuniary penalty levels were recently increased and apply as of 10 November 2022, the day after royal assent was given to the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth). Many of the cases involving the imposition of civil pecuniary penalties referred to in this chapter were decided under the previous law, where the maximum penalties were much lower.

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Figure 13.4 : Penalties for breach of the ACL



[13.1150] The primary purpose of imposing a civil pecuniary penalty is deterrence of further contraventions. According to s 224(2), in determining the appropriate amount for a civil pecuniary penalty, courts must have regard to all relevant matters including the nature and extent of the breach and of any loss or damage suffered, the circumstances in which the breach took place, and whether there has been any previous similar breaching conduct. Other factors that are relevant to the assessment of a civil pecuniary penalty include:

- the size of the business;
- the deliberateness of the conduct;
- the time over which it extended;
- the involvement of senior management;
- cooperation with the Commission;
- contrition or regret;
- the financial position of the company; and
- the profit derived from the contravention.

It is important to note the variety of penalties and orders that can be made by the Federal Court. For example, in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* (2014) 317 ALR 73 (see at [13.240]), the Court imposed civil pecuniary penalties ($2.5 million) for breach of s 33 (misleading conduct regarding the manufacturing process of goods) and s 29(1)(a) (false or misleading representations concerning the history of the goods). It also, however, made the following orders designed to prevent the conduct from occurring again and to shame Coles into compliance with the ACL:

- Coles was restrained for three years from making any representation anywhere that its bread products were entirely baked on the day on which they were offered for sale; or were entirely baked in a Coles Bakery Store on the day on which they were offered for sale; or were baked from fresh dough – when that is not the case.

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- Coles was to display a Corrective Notice for 90 days in a prominent location clearly visible to customers at all times in each in-store bakery section admitting that it:
  - engaged in misleading or deceptive conduct (s 18(1));
  - made false or misleading statements as to the history of the goods (s 29(1)(a)); and
  - engaged in conduct that was liable to mislead the public as to the nature, the manufacturing process, and the characteristics of goods (s 33).

[13.1160] The size of the business is relevant because a larger penalty will be necessary to achieve a deterrent effect against a large corporation that has breached the Act. When imposing a penalty of $9 million in *Australian Competition and Consumer Commission v Apple Inc (No 4)* [2018] FCA 953, Lee J noted that "[t]he principal object of a pecuniary penalty is to attempt to put a price on a contravention that is sufficiently high to deter repetition by the malefactor and by others who might be tempted to contravene", but added that given "the notion that the size of a contravener is relevant to the size of the penalty … the sheer scale of operation of Apple Inc presents an unusual situation". Ultimately, Lee J agreed that the $9 million penalty imposed was "loose change" for a "behemoth" such as Apple, but that Apple Inc's size could not justify a higher penalty than otherwise would be imposed. His Honour referred to the Apple case as a classic example of the difficulties that can arise when the penalty regime fixes maximum penalties without reference to the capacity of the guilty party to pay. Note however, as set out in [13.1140] above, the current maximum pecuniary penalties are much higher than those applicable when this case was decided.

[13.1170] Where the Commission and the contravener jointly propose an appropriate penalty, as occurred in many of the disputes covered in this chapter, the court considers whether that proposed penalty is within the range of appropriate penalties. The court is not bound by that proposed penalty and may impose a higher penalty where it considers the agreed penalty to be insufficient to act as a general or a specific deterrent. It may also query whether the agreed penalty is too high.

[13.1180] The latter occurred in *Australian Competition and Consumer Commission v Uber BV* [2022] FCA 1466. In that case, Uber (the rideshare service) admitted contraventions of both ss 18(1) and 29(1)(i) for two reasons: its rideshare app calculated fare ranges that were not correct, and that app also incorrectly gave consumers a notice that ride cancellations may incur a fee even though a ride was cancelled within the free cancellation period. It is notable, however, that the incorrect fare ranges were incorrect for being too high – the actual fares eventually charged were lower – and even though an incorrect fee notice was displayed, where customers cancelled their rides in the free cancellation period, no fee was actually charged. The ACCC and Uber jointly proposed a $26 million penalty, but on this occasion, the Federal Court did not agree. The Court noted that it must be satisfied that the agreed penalty is within the range of possible penalties that the Court would impose, and requested additional information and submissions from the parties addressing the s 224(2) matters on two occasions as it felt that sufficient information to confirm the appropriateness of the proposed penalty had not been placed before the Court. Ultimately, the Court decided that a $21 million civil pecuniary penalty – and not a $26 million civil pecuniary penalty – was to be imposed.

[13.1190] It is interesting that the views expressed by O'Bryan J in the *Uber BV* case are in marked contrast to those expressed by Murphy J in *ACCC v Samsung Electronics Australia Pty Ltd* [2022] FCA 875 (see [13.780]). Samsung admitted engaging in misleading or deceptive conduct and making false or misleading representations in contravention of ss 18(1) and 29(1)(a) and (g), and s 33. Samsung, in an extensive advertising campaign, represented to consumers that its Galaxy phones would be suitable to be

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submerged in pool or in sea water, when, in fact, there was a material prospect that the charging port of the Galaxy phones might be damaged due to corrosion if the phones were submerged in such water and were then charged while water remained in the charging port.

In approving the jointly proposed $14 million civil pecuniary penalty, the Court observed that consumer loss had occurred, despite not being able to quantify the loss, as consumers "were entitled to assume that a large company like Samsung Australia would not advertise that its Galaxy phones could be safely submerged in pool or sea water, if in fact they could not be".

In the *Uber BV* case, the Court noted that reference to the theoretical maximum penalty must be understood in context, taking all relevant penalty considerations into account, when large numbers of separate contraventions mean that the theoretical maximum penalty might be in the range of billions or even trillions of dollars. Still, as the case below demonstrates, even a single contravention can have significant financial consequences.

Australian Competition and Consumer Commission v Jayco Corp Pty Ltd (No 2)

[13.1200] *Australian Competition and Consumer Commission v Jayco Corp Pty Ltd (No 2)* [2021] FCA 453. In previous proceedings, it was determined that Jayco (a caravan manufacturer and seller) had contravened ss 18(1) and 29(1)(m) on one occasion with respect to one customer, though the ACCC's allegations regarding other contraventions and also unconscionable conduct were not upheld. In these proceedings, addressing the appropriate civil pecuniary penalty, the ACCC and Jayco Corp Pty Ltd jointly proposed that a $75,000 penalty was appropriate. The Federal Court accepted that submission and imposed that penalty. It was noted that the contravening conduct had been engaged in by one employee who was not a senior manager, and that general deterrence was a more important consideration than specific deterrence in this case. In other words, this penalty reflected the need to deter others in the market from engaging in contravening conduct more so than the need to deter Jayco from contravening again in the future.

[13.1210] The unfair practices provisions that we have addressed, in addition to triggering liability for civil pecuniary penalties, are replicated as criminal offence provisions in ss 151–168. Though the possibility of prosecution for these criminal offences remains part of Australian law, it is much more likely for the ACCC to seek civil pecuniary penalties in civil law proceedings, in practice. In such proceedings, the ACCC can proceed itself (rather than having to liaise with the Commonwealth Director of Public Prosecutions), and it only needs to satisfy the balance of probabilities (rather than the beyond reasonable doubt) standard of proof.

Liability of a corporation for the conduct of its employees

[13.1220] A corporation can only act through its officers, employees and agents. Accordingly, the CCA makes a corporation responsible for the conduct of such persons. Any conduct engaged in on behalf of a corporation by a director, employee or agent of the corporation within the scope of their actual or apparent authority is taken to have been engaged in by the corporation: s 139B(2). Where it is necessary to establish that a corporation has a particular state of mind (eg intention), it is sufficient to show that a director,

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employee or agent engaged in relevant conduct (within their actual or apparent authority) and had that state of mind: s 139B(1).

Defences

[13.1230] Certain defences are available to a defendant prosecuted under the criminal law for contravention of the unfair practices provisions. For example, it is a defence if the defendant establishes "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": s 207(1). This defence does not apply in relation to information supplied by an employee or agent of the defendant, or if the defendant is a corporation, to information supplied by a director, employee, or agent of the corporation: s 207(2).

Thorp v CA Imports Pty Ltd

[13.1240] *Thorp v CA Imports Pty Ltd* (1989) 16 IPR 511. The defendants manufactured toy koalas from casings imported from Korea. The toy koalas were labelled "Made in Australia". The defendants were prosecuted for falsely representing that the toys were made in Australia. Over several years, the defendants had received advice from the Department of Trade that if more than 50% of its manufacturing costs were incurred in Australia, the product was entitled to be labelled "Made in Australia".

The Court held that, although the elements of the offence had been made out, the defendants had established the defence of reasonable reliance on information supplied by another person.

[13.1250] It is also a defence if the defendant to a criminal prosecution establishes 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": s 208(1). Note that the defences described here do not apply to claims for civil relief, including proceedings where the ACCC seeks the imposition of civil pecuniary penalties.

Injunctions

[13.1260] An injunction is an order by the court directed to a person requiring them to refrain from conduct of the type specified in the order. The court is empowered to grant an injunction restraining a person from engaging in conduct that constitutes a contravention of the ACL: s 232(1). An injunction may also be granted in respect of a proposed contravention and to restrain ancillary acts such as attempting to contravene, or being directly or indirectly knowingly concerned in a contravention. The court may grant an injunction by the consent of all of the parties to the proceedings without the court first having to satisfy itself that a person has engaged in or is proposing to engage in conduct which contravenes the ACL: s 233.

Who may apply

[13.1270] Application for an injunction may be made by the ACCC or by "any other person": s 232(2). By enabling "any other person" to apply for an injunction, access to the court is made available to private persons and organisations (including industry competitors) to restrain misleading or deceptive practices which contravene the provisions of the ACL.

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Damages

[13.1280] A person who suffers loss or damage by the conduct of another person that was done in contravention of a consumer protection provision may recover the amount of the loss or damage by an action against that other person or against any person involved in the contravention: s 236(1). An action may be commenced at any time within six years after the day on which the cause of action that relates to the conduct accrued: s 236(2). There is no stated limitation on the *kinds* of loss or damage – physical, psychological, property and/or purely economic – for which compensation may be recovered. Note, however, that because of the operation of s 15, these damages provisions do not apply to the consumer guarantee and safety defects regimes, which contain their own in-built rights to compensation.

Assessment of damages

[13.1290] The tort-based measure of damages (*reliance* or *actual* loss) is more appropriate than the contract-based measure of damages (*expectation* loss) in many actions under s 236, especially those involving misleading or deceptive conduct and the making of false statements. *Wakefield Trucks Pty Ltd v Lach Transport Pty Ltd* illustrates this point.

Wakefield Trucks Pty Ltd v Lach Transport Pty Ltd

[13.1300] *Wakefield Trucks Pty Ltd v Lach Transport Pty Ltd* (2001) 79 SASR 517. The appellant sold the respondent a vehicle. During the negotiations, the appellant made representations as to the vehicle's fuel consumption that was considerably lower than its actual fuel consumption. It was held that the respondent was entitled to all consequential loss directly flowing from its reliance upon the representation – the difference between the representations made regarding fuel consumption and the vehicle's actual fuel consumption.

[13.1310] The High Court in *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 held that given the variety of types of conduct prohibited under legislation that is now the ACL, it cannot be definitively said that common law, equitable, or tort damages are the measure adopted by the provision that is now s 236. It also suggested, however, that misleading or deceptive conduct claims are often similar to deceit (tort) claims and for that reason the tort measure of damages will usually be appropriate. Unlike the contract measure of damages, which looks to the difference between the plaintiff's current position and the position they would have been in had the contract been performed, the tort measure of damages looks instead to the position the plaintiff would have been in had the tort not been committed. The High Court offered the following example: if a person agrees to pay $50,000 for goods which the vendor falsely represents are worth $100,000 but which are, in fact, worth $50,000, what loss has been suffered by the purchaser who is misled? There is no loss recognised by s 236 because the purchaser ends up with goods having an actual value at least equal to what it paid. *Escape Media Pty Ltd v Lawler* provides a further example of this point.

Escape Media Pty Ltd v Lawler

[13.1320] *Escape Media Pty Ltd v Lawler* [2018] NSWCATAP 17. In 2015, Phillip Lawler purchased a two-year subscription to a magazine titled "4WD Touring Australia" published by Escape. Between March 2015 and January 2016, Escape conducted a subscription drive

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for its magazine in the form of a promotion titled "The Ultimate Escape". The promotion offered magazine subscribers entries into a competition or lottery to win a prize said to be valued at $151,291. That prize consisted primarily of a four-wheel drive vehicle, a camper trailer, a boat and a boat motor, as well as camping and four-wheel driving accessories. Mr Lawler was notified that he had won "The Ultimate Escape" package. Having received all components of the package, Mr Lawler claimed that the promotional material had overstated the value of the prize package by at least $30,000. The Court held that Lawler had suffered no loss; in fact, he had a windfall in the form of goods valued at approximately $120,000. Certainly he was no worse off than he was before he relied on the misleading representations.

Liability of persons involved in contraventions

[13.1330] The ACL makes natural persons such as employees liable in damages for a contravention by a corporation where, in effect, they have been closely involved in the contravention. The definition of "involved" in s 2(1) provides that a reference to a person involved in a contravention (as in s 236(1)) is to be read as a reference to a person who:

1. has aided, abetted, counselled or procured the contravention; or
2. has induced, whether by threats or promises or otherwise, the contravention; or
3. has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
4. has conspired with others to effect the contravention.

[13.1340] The definition of "involved" requires actual knowledge by the accessory of the essential elements of the contravention of the Act. In the case of a misrepresentation, the accessory must have *actual* knowledge that the representation is false. Liability on the basis of being "involved" in another's contravention under s 2(1) therefore has an intention element that is usually not required for primary liability (eg under s 18(1)). Still, it is not necessary for an accessory to know that the relevant conduct contravenes the law, for example, that a corporation's conduct would be classified as unconscionable conduct in breach of the ACL: *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* [2024] HCA 27. Note, however, that an individual who lacks the relevant intention may still themselves be primarily liable under s 18(1) even though they acted honestly and without any intent to deceive.

Other orders

[13.1350] In addition to its power to grant injunctive relief and award damages, the court is empowered to make further orders to compensate for the damage suffered or likely to be suffered by a person as a result of another's contravention of the ACL.

Compensation orders

[13.1360] On the application of a person who has (likely) suffered loss or damage because of another's conduct breaching the ACL or relying on an unfair term, the court may make such orders as it thinks appropriate against the breaching person to compensate the applicant for their loss or damage: s 237(1)–(2). The ACCC may make an application on behalf of those who have suffered or are likely to suffer loss or damage under these provisions too. An application for such an order must be made within six years from the date when the cause of action arose: s 237(3).

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Orders for non-party consumers

[13.1370] Orders may be made in respect of non-party consumers on the application of the ACCC. If a person contravened the consumer protection provisions or was advantaged by an unfair contract term, causing loss or damage to a class of persons, the court may make such orders as it thinks appropriate against that person (except an award of damages): s 239(1). The order must redress the loss or damage in whole or in part or prevent or reduce the loss or damage: s 239(3). An application for such an order must be made within six years of the date when the cause of action arose or when the contract term was declared to be unfair: s 239(4).

Kinds of orders that may be made

[13.1380] The orders which can be made against a person who has contravened the ACL under a compensation order (s 237) or under an order for non-party consumers (s 239) referred to above are as follows:

237. Compensation orders etc. on application by an injured person or the regulator

(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 another person has engaged in conduct in contravention of a provision of Chapter 2, 3 or 4; or

(b) on the application of the regulator made on behalf of, and with the consent in writing 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: 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 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 before the end of 6 years from the day on which the cause of action accrued that relates to the conduct referred to in that subsection.

239. Orders to redress etc. loss or damage suffered by non-parties

(1) If:

(a) a person: (i) engaged in conduct (the contravening conduct) in contravention of a provision of Chapter 2, Part 3-1, Division 2, 3 or 4 of Part 3-2 or Chapter 4; or (ii) is a party to a contract who is advantaged by a term (the declared term) of a contract in relation to which a court has made a declaration under section 250; and

(b) the contravening conduct or declared term caused, or is likely to cause, a class of persons to suffer loss or damage; and

(c) the class includes persons who are non-parties in relation to the contravening conduct or declared term;

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a court may, on the application of the regulator, make such order or orders (other than an award of damages) as the court thinks appropriate against a person referred to in subsection (2) of this section.

Note: The orders that the court may make include all or any of the orders set out in section 243.

(2) An order under subsection (1) may be made against:

(a) if subsection (1)(a)(i) applies – the person who engaged in the contravening conduct, or a person involved in that conduct; or

(b) if subsection (1)(a)(ii) applies – a party to the contract who is advantaged by the declared term.

(3) The order must be an order that the court considers will:

(a) redress, in whole or in part, the loss or damage suffered by the non-parties in relation to the contravening conduct or declared term; or

(b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the non-parties in relation to the contravening conduct or declared term.

(4) An application under subsection (1) may be made at any time within 6 years of the day on which:

(a) if subsection (1)(a)(i) applies – the cause of action that relates to the contravening conduct accrued; or

(b) if subsection (1)(a)(ii) applies – the declaration is made.

The non-exhaustive list of remedies contained in s 243 (referred to in the note of each of these two provisions) is as follows:

(a) an order declaring the whole or any part of a contract made between the respondent and a person (the injured person) who suffered, or is likely to suffer, the loss or damage referred to in that section, or of a collateral arrangement relating to such contract:

(i) to be void; and

(ii) if the court thinks fit – to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);

(b) an order:

(i) varying such a contract or arrangement in such manner as is specified in the order; and

(ii) if the court thinks fit – declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);

(c) an order refusing to enforce any or all of the provisions of such a contract or arrangement;

(d) an order directing the respondent to refund money or return property to the injured person;

(e) except if the order is to be made under section 239(1) – an order directing the respondent to pay the injured person the amount of the loss or damage;

(f) an order directing the respondent, at his or her own expense, to repair, or provide parts for, goods that had been supplied by the respondent to the injured person;

(g) an order directing the respondent, at his or her own expense, to supply specified services to the injured person;

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(h) an order, in relation to an instrument creating or transferring an interest in land, directing the respondent to execute an instrument that:

(i) varies, or has the effect of varying, the first mentioned instrument; or

(ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first mentioned instrument.

[13.1390] Whilst s 243 empowers a court to declare a contract void ab initio (ie from the very start) in appropriate circumstances, this is only one of a number of remedies provided by the section. The court may take into account the defendant's as well as the plaintiff's interests in moulding a fair and just response to a proven contravention of the ACL.

Other enforcement provisions

[13.1400] In addition to the criminal penalties and civil pecuniary penalties (and other remedies) discussed earlier in this chapter, the ACL provides for a number of other enforcement measures to secure compliance with its consumer protection provisions.

Enforceable undertakings

[13.1410] The ACCC may accept a written undertaking by a person in respect of a breach of the provisions of the ACL: s 218(1). If the court is satisfied that there has been a breach of the undertaking, it may make orders directing compliance with the terms of the undertaking, the payment to the Commonwealth or a State or Territory of any financial benefit reasonably attributable to the breach, the payment of compensation to any person who has suffered loss or damage as a result of the breach, or any other order the court considers appropriate: s 218(4).

Substantiation notices

[13.1420] The ACCC may issue a notice requiring a person to substantiate a claim promoting the supply of goods or services, the sale of land, or employment opportunities: ss 219(1)–(2). Non-compliance with a substantiation notice is a criminal offence punishable by a penalty of $16,500 for a corporation or $3,300 for a natural person: s 205(1).

Public warning notice

[13.1430] The ACCC may issue a public warning notice about the conduct of a person if it has reasonable grounds to suspect that their conduct contravenes the consumer protection provisions, is satisfied that other persons are likely to suffer detriment as a result of the conduct, and that it is in the public interest to issue the notice: s 223(1).

Non-punitive orders

[13.1440] On application by the ACCC, the court has the power to make a number of non-punitive orders for contravention of the consumer protection provisions. These include a community service order, a probation order for a period of up to three years, a disclosure order and an order requiring publication of an advertisement in specified terms: s 246(2).

A community service order is an order requiring a person to perform for the benefit of the community a service that relates to the contravening conduct. A probation order seeks to ensure that a person does not engage in the contravening conduct or similar conduct during the period of the order. The order may

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direct the person to establish a compliance, education or training program for its employees or to revise the internal operations of the person's business that led to the contravening conduct.

Adverse publicity orders

[13.1450] On application by the ACCC, the court may make an adverse publicity order in relation to a person who has contravened provisions of the ACL (excluding the general prohibition on misleading and deceptive conduct in s 18(1)). An adverse publicity order requires the person to disclose specified information and requires the person to publish, at their own expense, an advertisement in the terms specified in the order: s 247(1)–(2).

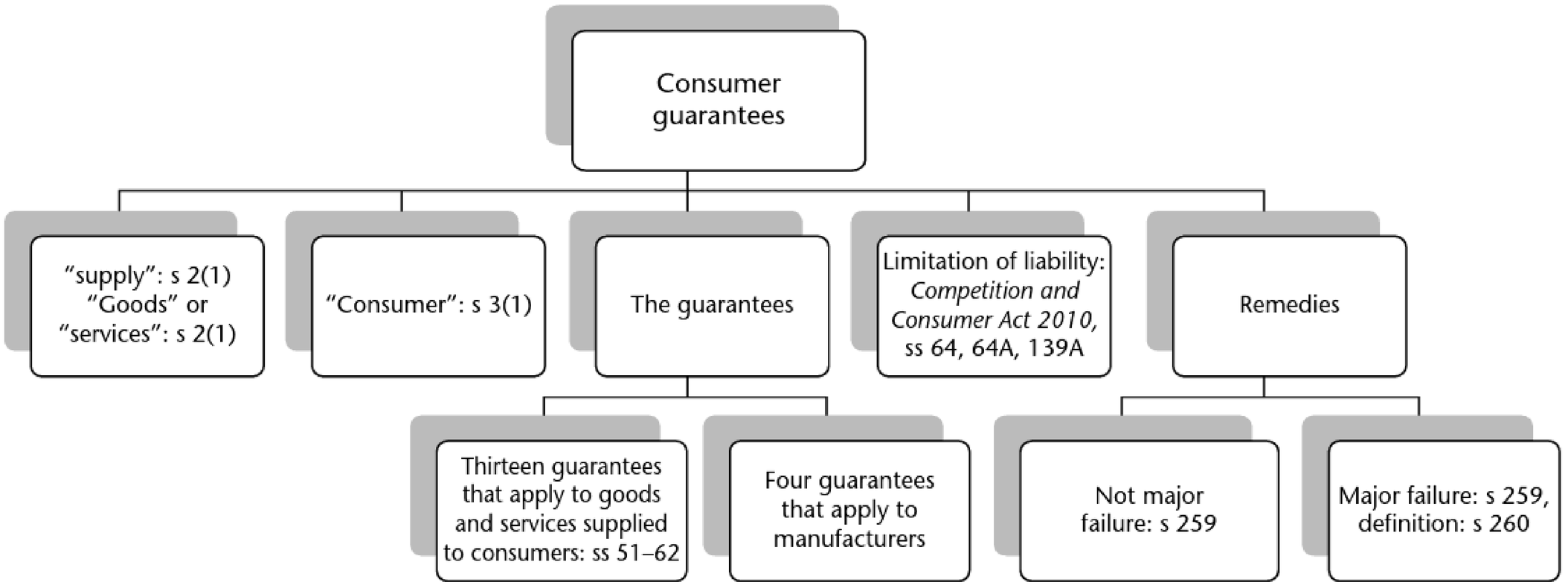
Orders disqualifying a person from managing corporations

[13.1460] If a person has contravened the consumer protection provisions of the ACL (excluding the general prohibition on misleading and deceptive conduct in s 18(1)), the court may disqualify that person from managing corporations for a period that the court considers appropriate: s 248(1). The court considers the seriousness of the contravention, the likelihood that the person will act in a similar manner in the future, the potential for harm to the public and the person's potential for reformation. The court is specifically required by the ACL to consider "the person's conduct in relation to the management, business or property of any corporation" as well as "any other matters the court considers appropriate": s 248(2).

Infringement notices

[13.1470] Finally, the ACCC can issue infringement notices where it has reasonable grounds to believe that a person has contravened an infringement notice provision: CCA, s 134A(1). Infringement notice provisions include the ACL's unconscionable conduct and false or misleading representation provisions: CCA, s 134A(2). Where a penalty set out under an infringement notice is paid, the person is not admitting to contravening the relevant infringement notice provision, and is not regarded as having committed a relevant offence: CCA, s 134D(2). Following payment of a penalty under an infringement notice, no further criminal or civil proceedings may be brought in relation to the relevant conduct: CCA, s 134D(3). The ACCC actively uses infringement notices as part of its enforcement strategy including, for example, in relation to Costco Wholesale Australia Pty Ltd (see [13.850]).

Figure 13.5 : Consumer guarantees



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Consumer guarantees

[13.1480] The ACL includes a regime of minimum, non-excludable, statutory consumer guarantee standards that must be met in relation to goods and services supplied to consumers. There are a range of guarantees applying to the supply of goods (ss 51–59) and also to the supply of services (ss 60–62). Before discussing these guarantees, however, it is necessary to explain some threshold terms – including "goods", "services", "supply" and "consumer" – as these requirements determine whether or not the consumer guarantees actually apply.

"Goods"

[13.1490] For the ACL, ss 51–59 consumer guarantees to apply, there must be a supply of "goods". Goods are defined inclusively under s 2(1) as follows:

> *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.

This definition adopts the common law definition of goods which encompasses movable, tangible objects and extends it in certain respects: most interestingly, via its reference to computer software. In *Valve Corp v Australian Competition and Consumer Commission* (2017) 258 FCR 190, computer software was held to include video games, though the reach of the term otherwise remains untested in the courts. In *Australian Competition and Consumer Commission v Booktopia Pty Ltd* [2023] FCA 194 (see [13.830]), Booktopia's admitted contraventions assumed that ebooks were within the scope of the consumer guarantees. However, the extent to which computer software includes digital items that do not comprise traditional desktop computer software remains unclear.

"Services"

[13.1500] Similarly, the ACL, ss 60–62 guarantees only apply to the supply of services. Services are also defined in s 2(1) to include "any rights … benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce". In *Valve Corp v Australian Competition and Consumer Commission* (2017) 258 FCR 190, at first instance, there was a dispute over whether computer games provided via the Steam gaming platform constituted services or goods; this difference mattered as the application of s 29(1)(m) in that case depended upon the goods guarantees applying. It was held, and not disputed on appeal, that the Steam computer gaming platform involved the provision of goods and not services.

"Supply"

[13.1510] The consumer guarantees are not confined to contracts for the sale of goods since they apply to contracts for the *supply* of goods (and services). The expression "supply" is defined to include (in relation

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to goods) not only contracts of sale but also contracts for the "exchange, lease, hire or hire-purchase" of goods: s 2(1). In relation to services, "supply" includes providing, granting, or conferring: s 2(1).

"Consumer"

[13.1520] The consumer guarantees apply to contracts for the supply of goods or services to a *consumer*. The term consumer here has a legal, rather than its ordinary, meaning: it is defined in s 3. A person acquires goods as a consumer only if the amount payable for the goods does not exceed $100,000 (increased from $40,000 as of 1 July 2021); *or* if the goods are of a kind ordinarily acquired for personal, domestic, or household use or consumption; *or* if the goods are a vehicle or trailer acquired for use principally in the transport of goods on public roads: s 3(1). Importantly, only one of these requirements needs to be satisfied, and in the case of the second requirement, it is the goods' ordinary use (not their actual intended use) that is relevant. This means that, subject to the qualification addressed below, businesses can be consumers for the purposes of the consumer guarantees.

It is important to appreciate that a person is not a "consumer" if they acquired the goods for the purpose of resupply or using them up or transforming them in the course of production or in the repair of other goods or fixtures on land: s 3(2). For instance, a farm worker who acquired tyres for the purpose of using them on his tractor was held to be a "consumer" because the goods were not used up as part of a process of production or manufacture or of repairing or treating other goods or fixtures: *Laws v GWS Machinery Pty Ltd* (2007) 209 FLR 53. On the other hand, Bunnings (the hardware store chain) is not a "consumer" if it purchases plastic shields (even if they are purchased for under $100,000) to resell to its customers; but it is a consumer if it purchases those shields for use as viral barriers for its workers on its cash registers (as is now common in many retail settings).

A person acquires *services* as a consumer only if the amount payable for the services does not exceed $100,000, *or* if the services were of a kind ordinarily acquired for personal, domestic, or household use or consumption: s 3(3). Again, only one of these requirements needs to be satisfied and it is the ordinary purpose of the services (not the particular services' actual purpose) that is relevant.

It is important to appreciate that this consumer definition applies to the consumer guarantees only. As noted in [13.610], there are different consumer tests that apply in the unfair contract term and the consumer guarantee contexts.

These provisions have the result that a wide range of purchases made by both natural persons and also businesses will qualify as consumer purchases for the purpose of the consumer guarantees. Still, the issue as to whether goods are *ordinarily acquired for personal, domestic, or household use or consumption* can be difficult to settle other than on a case-by-case basis. In *Bunnings Group Ltd v Laminex Group Ltd*, the Federal Court attempted to lay down some general principles.

Bunnings Group Ltd v Laminex Group Ltd

[13.1530] *Bunnings Group Ltd v Laminex Group Ltd* (2006) 153 FCR 479. Bunnings purchased thermal insulation products for use in its warehouses. It alleged that they were not fit for purpose and/or were not of acceptable quality. Young J decided that the goods were "ordinarily acquired for personal, domestic or household use or consumption". The Court said that "the statutory phrase should be construed broadly … so as to give the fullest relief which the fair meaning of its language will allow". Young J then suggested several propositions that

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could provide guidance as to the way in which the phrase should be applied, including the following:

- the word "ordinarily" means "commonly" or "regularly", not "principally", "exclusively" or "predominately";
- it might be relevant to conduct a broader inquiry into the evidence concerning the design, marketing, pricing and potential uses of the type of goods in question; and
- the question is ultimately a question of fact and degree.

A number of cases illustrate how courts have interpreted the phrase. Interestingly, in all but the final case, the courts decided that the goods or services at issue were *not* of "a kind ordinarily acquired for personal, domestic or household use".

- In *Crago v Multiquip Pty Ltd* (1998) ATPR 41-620, the Court decided that an ostrich egg incubator and hatcher were *not* "ordinarily acquired for personal, domestic or household use". Lehane J placed weight on evidence that the goods were used in the ostrich egg "industry" and that ostriches and their eggs were traded at high prices. There was also a lack of evidence that the incubators were in fact acquired for personal, domestic or household use.
- In *Minchello v Ford Motor Co of Australia* [1995] 2 VR 594, the Court used a common sense approach when deciding that, in the case of a prime mover, "it is hard to see that it would, in the ordinary understanding of those words, be 'ordinarily acquired for personal … use' ".
- In *Jillawarra Grazing Co v John Shearer Ltd* (1984) ASC 55-307, the Court rejected the applicant's contention that goods of a kind acquired for a farmer's personal, domestic and household purposes would encompass everything which is used on or in connection with his farm, including an air seeder.
- In *Westminster Properties Pty Ltd v Comco Constructions Pty Ltd* (1991) 5 WAR 191, the Full Court held that building services provided by the respondent pursuant to a contract to erect a multi-storey office block were not services of a kind ordinarily acquired for personal, domestic or household use or consumption.
- In *Carpet Call v Chan* (1987) ASC 55-553, although the case was decided on other grounds, the judge observed that "carpet" is a commodity, or a type of good, ordinarily acquired for domestic consumption, and it does not lose that description by reason of having a commercial rating, or some quality which makes it last longer than other carpet normally supplied for use in a domestic setting. Thus, such carpet could be a consumer good even though it was supplied for more than $40,000 (being the price test applicable at the time of this case) and even though it was actually acquired for use in a nightclub (an actual business purpose).

Consumer guarantees that apply to goods

[13.1540] The statutory guarantees applicable in respect of consumer contracts for the supply of goods are as follows.

Guarantee as to title, guarantee as to undisturbed possession and guarantee as to undisclosed securities

[13.1550] In every contract for the supply of goods by a person to a consumer, there is a guarantee that the supplier has a right to dispose of the property in the goods: s 51(1). There is also a guarantee that the

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consumer has the right to undisturbed possession of the goods except so far as it may lawfully be disturbed by the supplier or by another person who is entitled to the benefit of any security disclosed to the consumer before the contract is made: ss 52(1)–(2). In short, the supplier must have a right to sell the goods and, once bought, the consumer must have a right to retain them (except if the consumer has been told of someone else's, eg a creditor's, security interest in the goods). In fact, there is also a guarantee that the goods are *free from any security not disclosed* to the consumer before the contract is made: s 53(1). These guarantees are important because of the property law rule which states that one may not pass better title to property (including goods) than one has themselves.

Guarantee as to acceptable quality

[13.1560] Where a person supplies goods to a consumer, in trade or commerce, except by way of auction, there is a guarantee that the goods are of acceptable quality: s 54(1). This is, in practice, a key consumer guarantee.

[13.1570] According to s 54(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).

And then in turn, s 54(3) provides:

> 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.

[13.1580] Goods are taken to be of acceptable quality if the only reason why they were not so was specifically drawn to the consumer's attention before they were supplied: s 54(4). Disclosure on a written notice displayed with the goods is sufficient: s 54(5).

Goods do not fail to be of acceptable quality if the consumer causes them to become of unacceptable quality, or fails to take reasonable steps to prevent them from becoming so, and the goods are damaged by abnormal use: s 54(6). Further, goods do not fail to be of acceptable quality if the consumer examines them before agreeing to their supply, and the examination ought reasonably to have revealed that the goods were not of acceptable quality: s 54(7).

The objective nature of the acceptable quality test was recently addressed by the Full Court of the Federal Court of Australia in a decision that (at the time of writing) will soon be appealed to the High Court of Australia: *Toyota Motor Corporation Australia Ltd v Williams* [2023] HCATrans 162.

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Toyota Motor Corporation Australia Ltd v Williams

[13.1590] *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514. Williams, along with a large number of other customers, purchased Toyota cars suffering from a design defect that was triggered by particular driving conditions. All cars of the relevant make and model had this design defect, though the defect did not manifest until the car was subject to the relevant driving conditions triggering it. Group proceedings were commenced on behalf of affected customers. One of the issues in dispute was whether breach of the acceptable quality guarantee could be assessed collectively, for all group members together, or whether it had to be assessed on a case-by-case basis for each individual purchaser.

The Court held that all cars supplied to all consumers in the group proceedings failed to comply with the acceptable quality guarantee. It was possible to make this finding because of the objective nature of the test: the focus is on the reaction of a reasonable consumer, not each individual consumer. Even though s 54(3) requires attention to be given to particular factors surrounding transactions, those factors still feed into an objective assessment of the reasonable consumer's reaction to the goods. It is not always the case that a breach of acceptable quality will be established at the same time for an entire group. It was open to Toyota to show that the particular circumstances of even one customer meant that this was not possible. However, no evidence of this kind was provided by Toyota. It was also possible to hold that there was a breach of the acceptable quality guarantee for all cars even if the design defect had not manifested in all cars, as it was the inherent design defect itself (which was always present in all cars) that rendered them not of acceptable quality.

Guarantee as to fitness for any disclosed purpose

[13.1600] If a person supplies goods to a consumer in trade or commerce (other than by way of 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*: s 55(1). This is another key guarantee, in practice, concerning the supply of goods.

Merck Sharp & Dohme (Australia) Pty Ltd v Peterson

[13.1610] *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* (2011) 196 FCR 145. Graeme Peterson had suffered from arthritic back pain for many years when he was first prescribed Vioxx (a medication) on 10 May 2001. Vioxx provided him with relief from his arthritic pain without the adverse gastrointestinal side effects which he had suffered when using other drugs for his arthritis. Accordingly, he took it regularly over the next two and a half years. In early December 2003, Peterson experienced episodes of chest pain and on 8 December 2003, he suffered a serious heart attack. The withdrawal of Vioxx from the market in September 2004 led Peterson to conclude that there was a connection between his consumption of Vioxx and the occurrence of his heart attack and he sued MSDA. Peterson alleged, amongst other things, that Vioxx was not of merchantable quality and was not fit for purpose within the meaning of ss 74B and 74D of the *Trade Practices Act 1974* (Cth), which correspond to what are now ss 54 and 55 of the ACL.

Whether the consumption of Vioxx caused (or contributed to) Peterson's heart attack was the major issue in relation to all of Peterson's claims, the Full Court finding that the claims

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> under ss 74B and 74D could not be substantiated because it was not "more probable than not" that the consumption of Vioxx was a necessary precondition of Peterson's heart attack on 8 December 2003. Further, in relation to s 74D (fitness for specific purpose), there was no evidence to suggest that, at the time that Peterson purchased the Vioxx, he impliedly or explicitly made known to the supplier that he was purchasing the drug on the understanding that it had some quality of absolute safety or a complete absence of adverse side effects. Numerous drugs have potential side effects and may be unsafe for certain types of patients.

[13.1620] A disclosed purpose is a particular purpose for which goods are being acquired. It does not necessarily have to be a purpose for which the goods are commonly supplied. To be a relevant disclosed purpose for the consumer guarantee then:

1. the consumer must make it known, expressly or by implication, to the supplier, or to a person with whom prior negotiations for the acquisition of the goods were conducted; or
2. the consumer must make it known to the manufacturer of the goods either directly or through the supplier, or the person with whom prior negotiations were conducted: s 55(2).

There is no guarantee, however, where the circumstances show that the consumer did not rely, or that it was unreasonable for the consumer to rely, on the skill or judgment of the supplier, the person with whom the prior negotiations were conducted, or the manufacturer, as the case may be: s 55(3). Thus, for example, a consumer is unable to take advantage of this consumer guarantee where they themselves have comparatively superior information about the goods being supplied and it is not appropriate, in that context, for the consumer to rely upon what an inexperienced sales representative says.

Guarantee relating to the supply of goods by description

[13.1630] If a person supplies goods *by description* to a consumer in trade or commerce (other than by auction), there is a guarantee that the goods correspond with the description: s 56(1). Generally, a supply by description is one that is made without the buyer seeing the goods and having only a description of them from the seller to rely on. However, 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: s 56(2). This means that goods may still be sold by description (and must therefore comply with the description, for example, given on the package or in an advertisement) even though they are displayed (eg on the supermarket shelf) and are actually selected by the consumer.

If the goods are supplied by description as well as by reference to a sample or a demonstration model, the guarantees relating to correspondence with description and supply by sample or by demonstration model will both apply: ss 56(3) and 57(2).

Guarantees relating to the supply of goods by sample or by demonstration model

[13.1640] According to s 57(1):

> If:
>
> (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:

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(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.

Guarantee as to repairs and spare parts

[13.1650] If a person supplies goods to a consumer, in trade or commerce (other than by auction), there is a guarantee that the manufacturer will take reasonable action to ensure that repair facilities and spare parts are reasonably available for a reasonable period after the goods are supplied: s 58(1). There is no such guarantee where the manufacturer took reasonable action to give the consumer written notification that repair facilities or spare parts would not be available after a specified period: s 58(2). There is thus no absolutely unqualified right to repair under Australian law.

Express warranties

[13.1660] If a person supplies goods to a consumer, in trade or commerce (other than by way of auction), there is a guarantee that the manufacturer (s 59(1)) and that the supplier (s 59(2)) will comply with any express warranty that they respectively make in relation to the goods. This guarantee has the effect of making the ACL's remedies available where an express guarantee is not complied with, when only contract law remedies would otherwise have applied.

Exemption of auction sales

[13.1670] It will be observed that, with the exception of the guarantees as to title, undisclosed securities, and undisturbed possession, the other guarantees outlined above do not apply in relation to sales by auction.

Consumer guarantees that apply to services

[13.1680] The ACL also provides for certain guarantees in relation to contracts for the supply of services. If a person supplies services to a consumer, in trade or commerce, there is a guarantee that the services will be rendered with due care and skill: s 60. If a person supplies services to a consumer in trade or commerce and the consumer, expressly or by implication, makes known to the person any particular purpose for which the services are being acquired, there is also a guarantee that the services and any product resulting from the services will be reasonably fit for that purpose: s 61(1).

Alameddine v Glenworth Valley Horse Riding Pty Ltd

[13.1690] *Alameddine v Glenworth Valley Horse Riding Pty Ltd* (2015) 324 ALR 355. See [9.160] for the facts of the case. In addition to the finding on negligence, the Court held that the plaintiff was entitled to compensation under the ACL, as a result of Glenworth's failure to comply with the s 60 guarantee given to the plaintiff, as a consumer, that the services would be performed with due care and skill. In relation to ss 60 and 61, the respondent accepted on appeal that the appellant was a consumer and that in circumstances where a finding of negligence had been made, the guarantee of the service being supplied with due care and skill was not complied with.

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[13.1700] If a person supplies services to a consumer, in trade or commerce, and the consumer makes known, expressly or by implication, to the person or to a person by whom any prior negotiations were conducted, the result that the consumer wishes the services to achieve, there is a guarantee that the services, and any product resulting from the services, will be of such a nature and quality, state or condition that they might reasonably be expected to achieve that result: s 61(2).

However, there are no such guarantees under s 61(1) or (2) if the circumstances show that the consumer did not rely, or that it was unreasonable for the consumer to rely, on the supplier's skill or judgment: s 61(3). Significantly, the section does not apply to a supply of services of a professional nature by a qualified architect or engineer: s 61(4).

Finally, if a person supplies services to a consumer in trade or commerce and the time for the provision of the services is not fixed by the contract, there is a guarantee that the services will be supplied within a reasonable time: s 62. This would probably be required under the law of contract anyway but has the advantage of triggering the ACL's remedies and enforcement regimes where services are not provided within the reasonable time required.

The services guarantees contain a limitation in s 63, whereby they do not apply to services supplied under a commercial transportation or storage contract, or under a contract of insurance.

Limitation of liability

[13.1710] Unlike the case with exclusion clauses operating under ordinary common law, the general rule is that the consumer guarantees imposed by the ACL in relation to contracts for the supply of goods and services cannot be completely excluded. A term of a contract is void to the extent that it purports to exclude, restrict, or modify the application of the statutory guarantees discussed earlier: s 64(1). Contract terms are not taken to exclude, restrict, or modify the guarantees "unless the term does so expressly or is inconsistent with the provision": s 64(2).

Importantly, though, this general rule is subject to qualifications. Regarding goods, the qualification is that where the goods are *not* of a kind ordinarily acquired for personal, domestic or household use or consumption, a term of the contract will not be void merely because it limits the supplier's liability for failure to comply with a statutory guarantee (except those in ss 51 to 53: see [13.1550]) to one or more of the following: replacement, repair, the cost of replacement, or the cost of repair: s 64A(1). Regarding services, the qualification is that where the services are *not* of a kind ordinarily acquired for personal, domestic, or household use or consumption, a term is not void merely because it limits the supplier's liability to supplying the services again, or paying the cost of having the services supplied again: s 64A(2). These qualifications mean that there is no opportunity to limit liability where goods or services *are* of a kind ordinarily acquired for personal, domestic, or household use or consumption (even if those goods or services are actually acquired for business purposes).

In addition, a term in a contract limiting liability in the way described above cannot be relied upon where the person to whom the goods or services were supplied establishes that it is not "fair or reasonable" for the supplier to rely on such term: s 64A(3). In determining whether or not reliance on a term limiting the liability of the supplier is fair or reasonable, a court is to have regard to all of the circumstances of the case and, in particular, to the following matters, according to s 64A(4):

> (a) the strength of the bargaining positions of the person who supplied the goods or services and the person to whom the goods or services were supplied … relative to each other, taking into account, among other things, the availability of equivalent goods or services and suitable alternative sources of supply;

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(b) whether the buyer received an inducement to agree to the term or, in agreeing to the term, had an opportunity of acquiring the goods or services or equivalent goods or services from any source of supply under a contract that did not include that term;

(c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

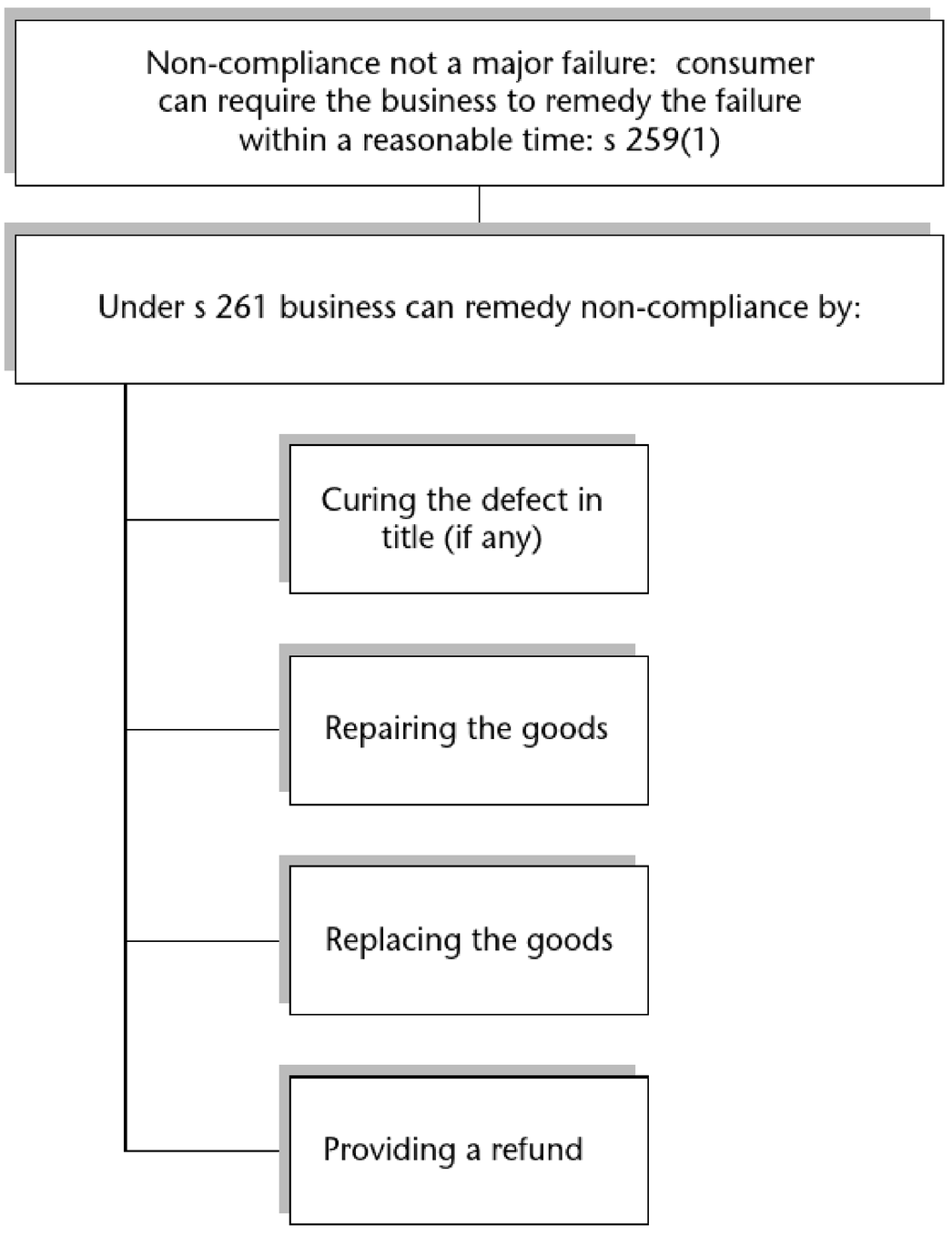
(d) in the case of the supply of goods, whether the goods were manufactured, processed or adapted to the special order of the buyer.

The purpose of this limited form of consumer guarantee liability exclusion permitted by the ACL is essentially to enable suppliers to exclude liability for *consequential losses* that may result from a defect in goods or improper supply of services, where the goods or services supplied are *not* of a kind ordinarily acquired for personal, domestic, or household use or consumption.

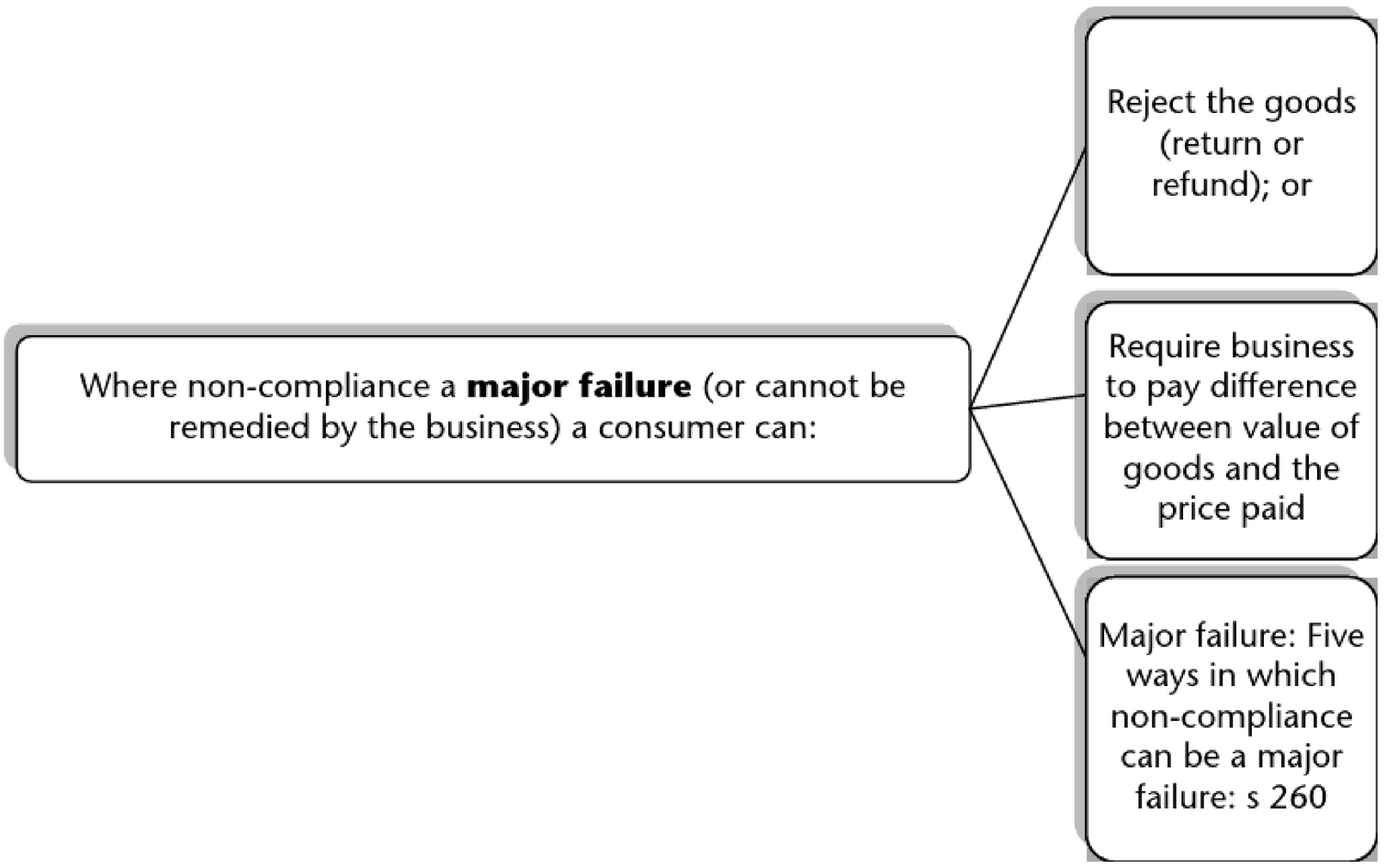
[13.1720] There is still one further qualification to the general rule that the consumer guarantees cannot be excluded or modified by agreement. A term in a contract for the supply of recreational services is not void by reason only that it limits liability for death or personal injury in relation to those recreational services: CCA, s 139A(1), (3). Recreational services are services that consist of participation in sporting activities, similar leisure-time pursuits, or other recreational activities, that involve a significant degree of physical exertion or physical risk: CCA, s 139A(2).

Remedies for non-compliance with the consumer guarantees

Figure 13.6 : Remedies for non-compliance with Pt 3-2



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[13.1730] The ACL contains a remedial regime under s 259 that is specific to breaches of the consumer guarantees. Section 259(1) provides a primary right for consumers to seek a remedy where goods fail to comply with the consumer guarantees regime, including requirements for the supplier to replace, repair or provide a refund with respect to defective goods. Further, s 259(4) provides for the recovery of consequential loss arising from a failure to comply with the consumer guarantees: *any* loss or damage suffered by the consumer because of the failure to comply with the guarantee is recoverable, if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure. There is an exception, however, if the failure occurs only because of a cause independent of human control that occurred after the goods left the supplier's control: s 259(5).

Consumers can choose to have a product replaced, repaired or to get a refund if there is a major failure to comply with a consumer guarantee, and they can also claim for any reduction in the value of the goods: s 259(3). Where there is a breach of the consumer guarantees that is not a major failure, the supplier can choose to remedy the breach by repair or replacement: s 259(2).

A major failure is defined in s 260(1) as a situation where:

(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 specific 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 (b) 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.

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Multiple (two or more) non-major failures to comply with the consumer guarantees may also constitute a major failure where the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of those failures, taken as a whole: s 260(2).

Whilst s 260(1)(a) is a major failure definition of general application, the definitions in s 260(1)(b)–(e) apply to specific guarantees; for example, s 260(1)(e) provides that goods have a major failure if they are "not of acceptable quality because they are unsafe", and therefore only relates to the acceptable quality guarantee. Thus, any acceptable quality breach arising as a result of goods being unsafe is by definition a major failure, though that lack of safety must still be serious enough to breach the guarantee of acceptable quality (applying the reasonable consumer test) in the first place. For example, consider a tractor that has a defect that results in an increased risk of brake failure, or an electric kettle with a fault that creates a risk of electrocution. Both of these scenarios will likely breach the guarantee of acceptable quality because the respective products would (amongst other things) not be as safe as a reasonable consumer would regard as acceptable. If that is the case, both breaches would also be major failures.

[13.1740] There are limitations upon the consumer's right to reject the goods, for example, where the rejection period has ended or where the goods have been lost, destroyed or disposed of by the consumer, or were damaged after being delivered to the consumer: s 262(1). The rejection period is the time within which it would be reasonable to expect that the failure would become apparent, having regard to factors such as the type of goods and the use to which it is likely that they would be put: s 262(2).

A consumer who rejects the goods must return them to the supplier, unless doing so would impose significant cost, in which case the supplier must collect the goods: s 263(2)–(3). The supplier must refund the money paid or replace the goods: s 263(4).

[13.1750] If the consumer gives the goods to another person as a gift, that person has the same rights and remedies that would have been available if they had acquired the goods from the supplier: s 266.

[13.1760] Though the provisions addressed above concern remedies applicable to breach of the consumer guarantees relating to goods, broadly similar remedies apply in relation to failure to comply with the consumer guarantees regarding the *supply of services*: ss 267–268.

[13.1770] Two recent decisions have addressed claims for damages, and for the reduction in the value of goods (respectively), under the ACL's consumer guarantees regime. The following High Court decision is primarily concerned with the extent to which damages for disappointment and distress are compensable for breaches of the consumer guarantees in relation to services (a particularly relevant question in a post-COVID-19 world, where thousands of passengers had holidays, cruises and tours significantly disrupted). The second decision, of the Full Federal Court of Australia, addressed a claim for reduction in the value of goods in the context of group proceedings (ie where a claim was brought on behalf of all of the purchasers of a good – a type of car – that had a design defect).

Moore v Scenic Tours Pty Ltd

[13.1780] *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326. David Moore had booked a tour through Scenic Tours costing $18,000. It would commence in Paris, and the river cruise part of the tour was scheduled to depart from Amsterdam and was to cruise along the Rhine, Main, and Danube Rivers. The tour was marketed as providing "all-inclusive luxury". Moore had chosen this particular tour because he was recovering from spinal surgery that prevented

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him from sitting comfortably for extended periods. The Scenic Tours cruise, as it was advertised in promotional material, would enable him to walk freely about the vessel and, importantly, would mean that he would only have to unpack his bags once.

In the months leading up to the tour, Europe experienced significant flooding. This meant that Moore's tour was significantly affected due to the high water levels on the rivers. This disrupted the scheduled itinerary to the extent that Moore only spent three days cruising and on three different ships, and the remainder of the trip was spent travelling by bus. Moore argued that:

- Scenic Tours failed to exercise due care and skill in supplying the tour: s 60;
- disruptions to the tour due to the adverse weather conditions rendered the tour unfit for the purpose for which it was acquired: s 61(1); and
- the tour was not of a nature and quality that could reasonably be expected to achieve the result that Mr Moore and each of the group members wished to achieve: s 61(2).

Mr Moore sought relief under s 267, the provision addressing the recovery of damages for breach of the consumer guarantees concerning services.

At the trial, the Court held that Scenic Tours had failed to comply with the ss 60–61 guarantees, and awarded Moore $10,990 in compensation for *loss of value* (under s 267(3)) and $2,000 for damages in *disappointment and distress* (under s 267(4)). The Court of Appeal of the Supreme Court of New South Wales affirmed the trial judge's conclusion that Scenic Tours had breached s 61(1) and (2), though overturned the trial judge's decision concerning a breach of s 60. The case went to the High Court on another issue.

Toyota Motor Corporation Australia Ltd v Williams

[13.1790] *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514. As summarised at [13.1590], Williams and other customers purchased Toyota cars suffering from design defects, leading to Williams bringing group proceedings seeking compensation. Separately to the issues addressed at [13.1590], a dispute also arose concerning the way in which the cars' loss of value was to be calculated. Loss of value compensation was sought under s 272(1)(a): a provision largely corresponding to s 259(3)(b), but allowing compensation to be sought against the manufacturer instead of the supplier.

At trial, the judge determined that there was a loss of value for all cars purchased by relevant customers of 17.5%, and the trial judge also held that events occurring after the initial purchase of the cars (including the development of a fix) were irrelevant to the compensation claims. On appeal, however, the Full Court of the Federal Court took a different view in two respects. As to the reduction in value, the Full Court determined that 10% was the appropriate figure. And as to the matter of issues arising after purchase, the Full Court held that these were in fact relevant to the reduction of value for each individual car purchaser and that these issues could affect the baseline 10% figure on a case-by-case basis. For example, the amount of time between a customer purchasing a defective car and the manufacturer's fix becoming available was a relevant factor to take into account.

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Manufacturers' liability for defective goods

[13.1800] As we have just seen from *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 (see [13.1790]), recourse for the supply of defective goods causing loss or damage might be sought against the goods' manufacturer, rather than their immediate supplier. Where goods supplied to a person are defective and where they cause loss or damage, generally speaking, the person has three options. First, the immediate supplier of the goods (eg the retailer) may be liable for *non-compliance with the statutory guarantees of acceptable quality and/or fitness for disclosed purpose* (see [13.1560]–[13.1620]). Liability for non-compliance with these guarantees does not depend upon proof of negligence on the part of the supplier, but simply on the existence of a contractual relationship between the parties.

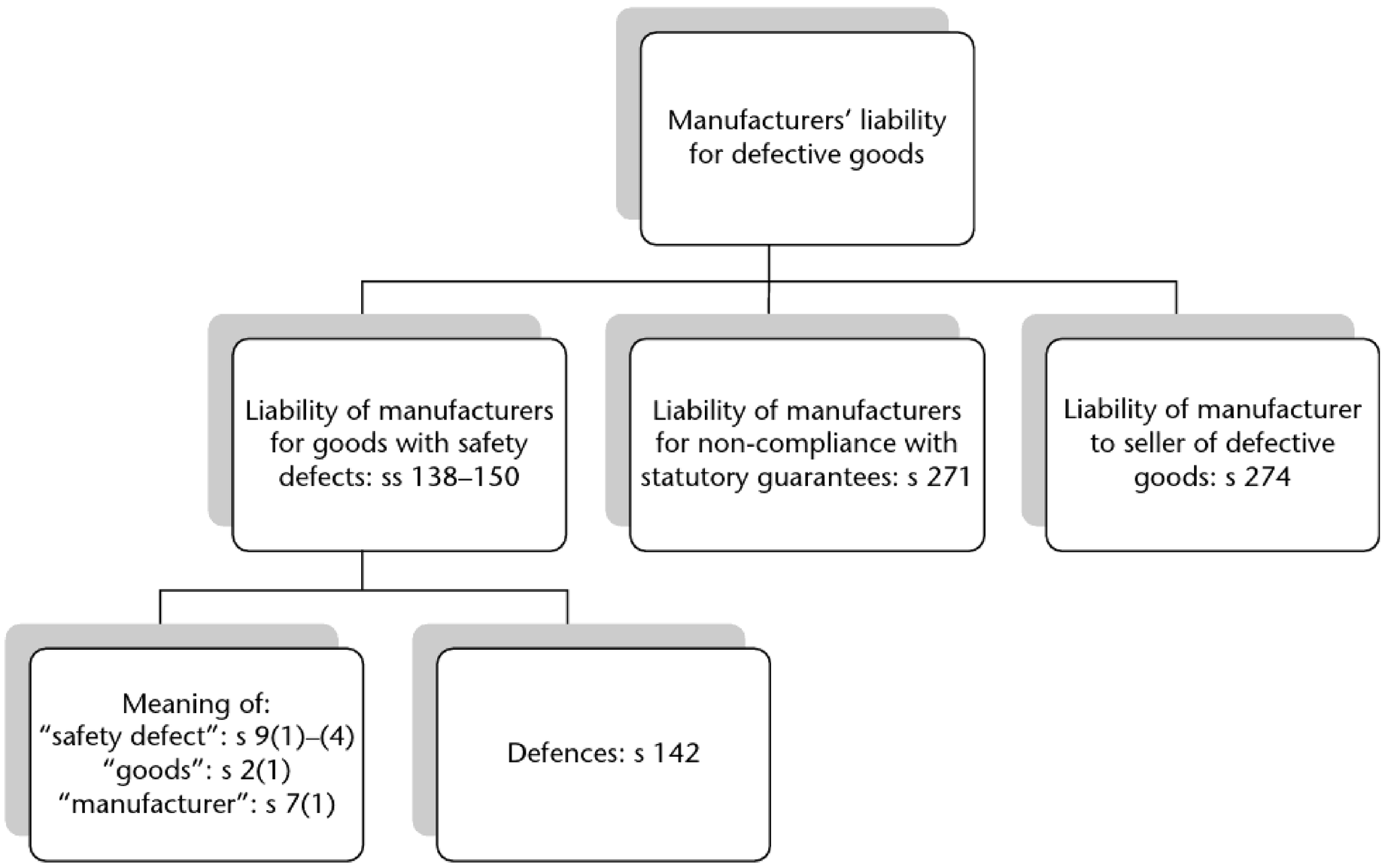
Second, where the person suffers personal injury or property damage because of the defective nature of the goods, they may have an alternative action for damages in *negligence* against the manufacturer of the goods. However, an action for negligence requires proof of fault on the part of the defendant, which can give rise to difficult factual and legal questions: see Chapter 16 regarding breach of the duty of care.

Our focus here is on a third option. Part 3-5 of the ACL contains important provisions that impose liability upon manufacturers for defective goods. It is liability that does not depend upon any proof of a contractual relationship or negligence. The provisions of the ACL imposing liability on manufacturers for defective goods are discussed under the following headings:

1. Liability of manufacturers for goods with safety defects: Pt 3-5 (ss 138–150).
2. Liability of manufacturers to consumers for non-compliance with the consumer guarantees: s 271.
3. Liability of manufacturers to the sellers of defective goods: s 274.

This is followed by a brief consideration of the product safety and information provisions of the ACL.

Figure 13.7 : Manufacturers' liability for goods



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Liability of manufacturers for goods with safety defects

Circumstances in which liability arises

[13.1810] The effect of Pt 3-5 is to make the manufacturer of goods containing a "safety defect" liable to compensate a person who is injured, or whose property is damaged, because of the safety defect. More specifically, s 138(1) provides that:

> A manufacturer of goods is liable to compensate an individual if:
>
> (a) the manufacturer supplies the goods in trade or commerce; and
>
> (b) the goods have a safety defect; and
>
> (c) the individual suffers injuries because of the safety defect.

Where these conditions are satisfied, the individual may recover from the manufacturer the amount of the loss or damage suffered by them: s 138(2). The meaning of "safety defect" is considered separately at [13.1820], with the meaning of "manufacturer" then addressed at [13.1850]. The definition of "goods" previously addressed at [13.1490] applies here.

It will be observed that liability in the section set out above is not restricted to cases where the person injured had bought or hired the defective goods. It applies generally, whenever a person is injured by goods having a safety defect.

Furthermore, where a dependent of an individual suffers loss as a result of the injuries sustained or the death of that individual because of a safety defect in the goods, such loss is recoverable from the manufacturer: s 139.

Liability also extends to loss resulting from other goods of a kind ordinarily acquired for personal, domestic, or household use (that were also actually intended to be used for personal, domestic or household use) being destroyed or damaged because of the defective goods: s 140.

A person who suffers loss or damage because land, buildings or fixtures (for private use) are destroyed or damaged because other goods with a safety defect are destroyed or damaged because of the safety defect is also covered: s 141. Damage to commercial property is outside of the scope of the provisions.

Meaning of "safety defect"

[13.1820] For there to be liability under this area of the ACL, the goods must have a *safety defect*. They have a safety defect "if their safety is not such as persons generally are entitled to expect": s 9(1). This is an objective standard based upon what the public at large, rather than any particular individual, is entitled to expect. According to s 9(2), the court may consider all relevant circumstances in deciding if the goods have a safety defect including:

> (a) the manner in which, and the purposes for which, they have been marketed; and
>
> (b) their packaging; and
>
> (c) the use of any mark in relation to them; and
>
> (d) any instructions for, or warnings with respect to, doing, or refraining from doing, anything with or in relation to them; and
>
> (e) what might reasonably be expected to be done with or in relation to them; and
>
> (f) the time when they were supplied by their manufacturer.

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An inference that goods have a safety defect is not to be made only because of the fact that, after they were supplied by their manufacturer, safer goods of the same kind were supplied: s 9(3). An inference that goods have a safety defect is also not to be made only because:

1. there was compliance with a Commonwealth mandatory standard for them; and
2. that standard was not the safest possible standard having regard to the latest state of scientific or technical knowledge when they were supplied by their manufacturer: s 9(4).

Ethicon Sàrl v Gill

[13.1830] *Ethicon Sàrl v Gill* (2021) 288 FCR 338. Ethicon manufactured surgical net-like mesh devices that were used as surgical implants for women with stress urinary incontinence or pelvic organ prolapse. Ethicon supplied the mesh devices to Johnson & Johnson, which in turn promoted and supplied the devices to Australian doctors and hospitals. The respondents all underwent surgery, at different times, for the implantation of Ethicon mesh devices as part of treatment for stress urinary incontinence, vaginal prolapse, and/or pelvic prolapse following childbirth. All respondents suffered severe and ongoing complications and side effects following the implantation of the mesh devices. The devices carried serious risks for patients that were not disclosed in the instructions to surgeons or in promotional materials. The goods were marked as compliant with European Union standards, though the goods fell short of those standards in many respects.

The Full Federal Court decided that the goods had a safety defect. Goods need not be completely free of all risks, but risks must be disclosed. Goods that pose a risk of injury may be defective if their manufacturer does not provide sufficient warning of that risk. Where medical goods are supplied to doctors rather than directly to consumers, manufacturers must warn doctors of any material risk of injury that may arise from the use of those goods, so that doctors may then inform patients of that risk. Goods may have a safety defect even if the defect affects only some people.

The representation about compliance with European Union standards was relevant to whether the goods had a safety defect. The goods had received Australian regulatory approval based upon compliance with those standards. Compliance with regulatory standards was relevant to the level of product safety that the public was entitled to expect. The manufacturers and suppliers were jointly and severally liable to compensate patients who had been injured by the safety defect. The supplier was deemed to be a "manufacturer" under the extended definition of that term in the Act since the supplier had imported the goods into Australia.

[13.1840] It is important to note that, as described in [13.1800], manufacturers' liability under Pt 3-5 is different to supplier or manufacturer liability for non-compliance with the consumer guarantees. For this reason, the definition of safety defect under s 9 applies to Pt 3-5 only, and does not apply for the purposes of s 54(2)(d) (the "safe" limb of the acceptable quality guarantee).

Meaning of "manufacturer"

[13.1850] A *manufacturer* is defined in the following way in 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;

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(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 the 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 [actual] manufacturer of the goods does not have a place of business in Australia.

As can be seen, and as was the case in *Ethicon Sàrl v Gill* (2021) 288 FCR 338 (see [13.1830]), this definition extends manufacturer responsibility to parties who may not be the actual manufacturer of goods (such as importers of goods).

Defences

[13.1860] Under s 142, it is a defence to an action for compensation regarding defective goods if the defendant establishes that:

(a) the safety defect in the goods that is alleged to have caused the loss or damage did not exist: (i) in the case of electricity – at the time at which the electricity was generated, being a time before it was transmitted or distributed; or (ii) in any other case – at the time when the goods were supplied by their actual manufacturer [in other words: the manufacturer is not liable for safety defects occurring later in the distribution chain]; or

(b) the goods had the safety defect only because there was compliance with a mandatory standard for them; or

(c) the state of scientific or technical knowledge at the time when the goods were supplied by their manufacturer was not such as to enable that safety defect to be discovered [this is a "state of the art" defence]; or

(d) if the goods that had that safety defect were comprised in other goods – that safety defect is attributable only to: (i) the design of the other goods; or (ii) the markings on or accompanying the other goods; or (iii) the instructions or warnings given by the manufacturer of the other goods.

If the court finds that the goods had a safety defect only because there was compliance with a Commonwealth mandatory standard for the goods, the Commonwealth is liable to pay the plaintiff for the amount of the loss or damage caused by the safety defect and not the manufacturer: s 148.

The "state of the art defence" in s 142(c) was mainly included after intense lobbying from the pharmaceutical industry which felt it necessary to have such a provision in order to shield innovators from liability for defects that could not have been prevented by what was known at the time that the goods caused the loss or damage. Therefore, for example, in *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* (2011) 196 FCR 145 it was noted earlier (see [13.1610]) that Peterson failed to prove his 2003 heart attack was caused by his consumption of Vioxx. Nonetheless, the Court took the opportunity to affirm the trial judge's finding in relation to the availability of the "state of the art" defence (under what is now s 142(c)). Peterson submitted that the trial judge should have found that the defect in Vioxx had been discovered by March 2000, when the results of the first study (the VIGOR study) were released. In affirming the decision of the trial judge, the Court held that the state of scientific or medical knowledge at the time that Mr Peterson took Vioxx was not such as to enable that safety defect to be discovered.

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Thalidomide: A case study

[13.1870] The Australian Law Reform Commission, plaintiff lawyers, and others argued strongly against the inclusion of the "state of the art" defence when the first round of product liability reforms were legislated in 1993. They objected mainly because its inclusion seriously undermined the strict liability (no fault) policy that underpins Pt 3-5 and that distinguishes it from a claim in negligence (where proof of fault is central). Although this may appear to be fair to the manufacturer – after all, we might ask, why should a manufacturer be liable in negligence or otherwise if it could not have known about a certain defect or danger at the time of making or selling the product? – the result is that the innocent victim who used the product as directed is the one who must bear the pain and wear the loss. The following case study presents an opportunity to examine how the competing interests of manufacturers and consumers operate in the real world, and to consider whether the legislation has got the balance right.

Thalidomide was first developed and sold in Europe in the 1950s as a tranquiliser. A West German company, Grünenthal, brought it to market, and by 1960, it was very commonly used in 46 countries. It was marketed as "completely safe" for everyone, including mother and child, "even during pregnancy". Doctors prescribed it to pregnant women as a relief for what was once commonly called morning sickness, not knowing of the drug's effect on unborn babies. By 1961, Dr William McBride, an Australian doctor, began to see that mothers taking the drug gave birth to children with severe deformities, including blindness, deafness, missing limbs, and flipper-like appendages, leading the manufacturers, who had previously ignored reports of the birth defects associated with it, to finally stop distribution within Germany. Other countries followed suit and, by March of 1962, the drug was banned in most countries. The exact number of victims is unknown but somewhere around 9,000 is probable, including hundreds in Australia.

Thalidomide was marketed and distributed in Australia by Distillers Company, a subsidiary of Diageo. The German manufacturer of the drug, Grünenthal, expressed regret to the victims but did not admit liability, arguing that it had conducted all necessary clinical trials. A settlement was reached in the United States in 1972. However, it was only in 2013, more than 50 years after the tragedy, under the terms of the settlement of a class action, that approximately 100 survivors in Australia and New Zealand received $89 million as compensation from Diageo.

The relevant question for present purposes is whether Pt 3-5 of the ACL would have provided a remedy for thalidomide victims, had it been in force in the 1960s. The drug clearly had a "safety defect". However, the manufacturers may have been able to rely on the s 142(c) "state of the art defence" by leading evidence that "the state of scientific or technical knowledge at the time when the goods were supplied by their manufacturer was not such as to enable that safety defect to be discovered". As a matter of fact, there was conflicting evidence on when the manufacturer became aware, or should have become aware, of the scientific evidence of a link between the drug and the risk of damage to unborn babies if taken early in pregnancy, and certainly no admissions were made in the settlement. The actions in negligence failed given the need to prove that the manufacturers were at fault (negligent), and it is likely that plaintiffs may have been thwarted by the "state of the art" defence after the introduction of Pt 3-5, meaning that the victims would also have been left to bear the pain and wear the loss in this (hypothetical) statutory product safety context.

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Contributory negligence

[13.1880] Where, in proceedings to recover the loss or damage suffered in respect of goods with a safety defect, the loss was partly due to the contributory negligence of the individual who suffered injury, the damages recoverable are to be reduced to the extent to which the court thinks fit having regard to the individual's share in the responsibility for the loss or damage: CCA, s 137A.

In *Hyder v McGrath Sales Pty Ltd* (discussed earlier at [13.100] and in [13.410]), the Court decided that the purchasers could not succeed in an action against the vendor's agent for misleading or deceptive conduct. However, the Court commented on the issue of contributory negligence that had been raised by the primary judge.

Hyder v McGrath Sales Pty Ltd

[13.1890] *Hyder v McGrath Sales Pty Ltd* [2018] NSWCA 223. Please see the facts at [13.100]. After deciding the causation issue, the Court went on to consider what loss in value it might have compensated the purchasers for, had causation been established. It set an amount of $150,000 in terms of value, plus stamp duty payable on that amount. However, the Court said that the failure by the Hyders to take reasonable care for their own interests was a more immediate cause of their loss than any misleading or deceptive conduct of the vendor's agent and, for that reason, the damages would have been reduced by two-thirds.

Limitation period

[13.1900] An action for compensation for the loss suffered in respect of the supply of defective goods must be brought within three years after the time that the person became aware, or ought reasonably to have become aware, of the alleged loss or damage, the safety defect, and the identity of the manufacturer of the goods: s 143(1). No action may be brought after 10 years of the supply of the goods by the manufacturer: s 143(2).

Non-exclusion

[13.1910] The provisions concerning the right to recover from a manufacturer the loss or damage suffered in consequence of a safety defect in goods cannot be excluded, restricted or modified. Any term of a contract which purports to do so is void: s 150(1).

Work-related injuries

[13.1920] The provisions do not apply to a loss recoverable under Commonwealth, State or Territory law relating to workers' compensation; that is, loss caused by work-related injuries is excluded: s 146.

Representative action

[13.1930] The ACCC and the State and Territory consumer protection agencies are empowered to commence a defective goods action on behalf of persons who have suffered loss or damage (s 149(1)) provided that the written consent of each person has been obtained (s 149(2)).

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Liability of manufacturer to consumer for non-compliance with statutory guarantees

[13.1940] Under the ACL, a manufacturer incurs liability to a consumer for non-compliance with certain of the consumer guarantees imposed upon a seller for the supply of goods to a consumer discussed earlier in this chapter: s 271. The associated damages provision, being s 272, was at issue in *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 (see [13.1790]). The broad effect of these provisions is to enable a consumer to recover damages from the manufacturer of goods which do not comply with the statutory guarantees for the following reasons:

1. the goods are not of acceptable quality (ss 54 and 271(1));
2. the goods do not correspond with a description which the manufacturer has applied, or allowed to be applied, to the goods (ss 56 and 271(3));
3. there is a failure to ensure that facilities for the repair of the goods or spare parts are available (ss 58 and 271(5)); or
4. there is a breach of express warranties contained, for example, in guarantees or in advertising matter (ss 59 and 271(5)).

In an action against the manufacturer, an "affected person" is entitled to recover damages for:

1. any reduction in value of the goods below:
   (a) the price paid for the goods; or
   (b) their average retail price at the time of supply (whichever is the lower); and
2. any loss or damage that was reasonably foreseeable as a result of the failure to comply with the particular guarantee: s 272(1).

An "affected person" is defined broadly in s 2(1) to mean:

1. a consumer who acquires the goods; or
2. a person who acquires the goods from the consumer (other than for the purpose of re-supply); or
3. a person who derives title to the goods through the consumer.

An action for damages may be commenced within three years of the day when the affected person first became aware, or ought reasonably to have become aware, that the guarantee was not complied with: s 273.

If an affected person has, in accordance with the manufacturer's express warranty, required the manufacturer to remedy a failure to comply with a statutory guarantee by repairing or replacing the goods, the affected person is not entitled to recover damages unless the manufacturer has refused to remedy the failure or has failed to do so within a reasonable time: s 271(6). The manufacturer bears the onus of proving that this defence applies.

Liability of manufacturers to the sellers of defective goods

[13.1950] As a result of the guarantees provided by the ACL in contracts for the supply of goods to a consumer (see [13.1540] onwards) and the liability imposed on a manufacturer of the goods to a consumer for non-compliance with the statutory guarantees (see [13.1940]), a consumer will often have a choice as to whether to sue their immediate supplier (eg the seller) or to sue the manufacturer directly where the goods supplied do not comply with the relevant statutory guarantees. If, in such a case, the consumer elects to sue their immediate supplier, the ACL requires the manufacturer to indemnify the supplier in respect of the costs incurred by the supplier because of the failure of the goods to comply with certain of the statutory

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guarantees: s 274. This manufacturer's liability relates to the consumer guarantees of acceptable quality (s 54), fitness for a disclosed purpose (s 55) and the description applied to the goods (s 56): s 274(2).

The supplier may commence an action against the manufacturer at any time within three years after the earliest of the following:

1. the day on which the supplier made a payment with respect to the supplier's liability to the consumer; or
2. the day on which the consumer commenced legal proceedings against the supplier: s 274(4).

Limitation of liability

[13.1960] The general position is that the manufacturer's liability to indemnify a supplier under these provisions cannot be excluded. A term of a contract is void to the extent that it purports to exclude, restrict or modify the supplier's rights against the manufacturer: s 276(1).

However, if the goods are *not* of a kind ordinarily acquired for personal, domestic or household use or consumption, the liability of the manufacturer to the supplier who supplied the goods to a consumer is limited to the cost of:

1. replacing the goods;
2. obtaining equivalent goods; or
3. having the goods repaired; whichever is the lowest amount: s 276A(1).

Such limitation on the liability of the manufacturer does not apply if the supplier establishes that it is not "fair or reasonable" in the circumstances: s 276A(2). In determining whether or not it is "fair or reasonable" for the manufacturer's liability to the seller to be so limited, the court is to have regard to all of the circumstances of the case and, in particular, to:

1. the availability of suitable alternative sources of supply of the goods;
2. the availability of equivalent goods; and
3. whether the goods were manufactured, processed or adapted to the special order of the supplier: s 276A(3).

These liability limits are, however, subject to any term of a contract between the manufacturer and seller imposing a greater liability on the manufacturer: s 276A(4).

Fulcher v Knott Investments Pty Ltd demonstrates that there are a number of causes of action that may be brought against a manufacturer (and an importer/retailer) by a consumer when the goods cause loss or injury to a person, their goods or their property.

Fulcher v Knott Investments Pty Ltd

[13.1970] *Fulcher v Knott Investments Pty Ltd* [2012] QSC 232. Early in the morning of 9 February 2004, a fire broke out in a Winnebago motorhome which the plaintiffs, Mr and Mrs Fulcher, had recently purchased and had parked in the packing shed on the property where they had a tomato growing and packing business. The shed and its contents were destroyed. The Court found that an electrical fault in the air-conditioning unit of the motorhome caused the fire. The plaintiffs sued the dealer, the manufacturer and the importer of the air-conditioning unit in negligence, in contract, and under provisions contained in the *Trade Practices Act 1974* (Cth) (which is now the ACL).

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The negligence claim. The judge found that the manufacturer had not been negligent because the evidence established that the fault in the electrical system could not have been detected by exercising reasonable care. The unit was acquired fully assembled, the supplier of the unit was reputable, and Winnebago had not had any problems in the past.

Breach of express warranty. The plaintiffs sued the manufacturers under the *Trade Practices Act 1974* (Cth), s 74G (now the ACL, s 59) for breach of an express warranty contained in the sales brochure that said, in part, under the heading "Safety & Warranty":

> You would expect that Australia's largest manufacturer of motorhomes would have safety and quality as top priorities – spot on. At Winnebago, all of our motorhomes are "built better and backed better".

The judge found that the warranty had not been breached. The warranty did not convey the meaning that the manufacturer would detect hidden defects in a component like an air-conditioner. The evidence showed that the manufacturer carried out regular safety checks.

Breach of statutory implied terms. The judge found that the manufacturer was liable for breaches of the *Trade Practices Act 1974* (Cth), ss 74B and 74D (similar to what are now the consumer guarantees in ss 54 and 55, which lead to liability under s 271). The fact that there was a fault in the air-conditioning unit meant that the Winnebago was not reasonably fit for its use as a motorhome (now the "fitness for disclosed purpose" consumer guarantee: see [13.1600] onwards), nor was it of merchantable quality (now the "acceptable quality" consumer guarantee: see [13.1560] onwards). The retailer and the importer were also found to be liable.

Product safety and information

[13.1980] The ACL contains provisions concerning product safety, product recall and information requirements. The provisions are contained in Pt 3-3. It is only possible here to outline their general effect.

A person must not supply consumer goods that do not comply with a prescribed safety standard: s 106(1). Doing so is a criminal law offence subject to a maximum fine of the greater of $50,000,000 or three times the benefit obtained or 30% of turnover for a corporation, and $2,500,000 for a natural person: s 194. The Minister may impose an interim or permanent ban on consumer goods that may cause injury: ss 109(1) and 114(1). Supplying banned consumer goods is a criminal offence, subject to the same maximum fines set out above: s 197. A person is also subject to civil law pecuniary penalties for supplying banned consumer goods: s 118(1).

The Minister is empowered to issue a recall notice for consumer goods in certain circumstances. Thus, where a person supplies consumer goods that:

1. are of a kind which, in the opinion of the Minister, will or may cause injury to a person;
2. do not comply with a prescribed safety standard; or
3. are the subject of an interim or permanent ban;

and the Minister considers that the supplier of the goods has not taken satisfactory action to prevent the goods causing injury, the Minister may require the supplier to take action to recall the goods: ss 122(1) and 123(1).

The Minister may also require the supplier to advertise that the supplier undertakes to repair or replace the goods or refund their price: s 123(1)(c).

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The mandatory recall power is only intended to be exercised where the supplier has not already taken satisfactory remedial action. A supplier must comply with the requirements of a recall notice and must not supply goods in which a defect or dangerous characteristic has been identified in the notice: ss 127(1), (2). Where a supplier contravenes the latter provision, and a person suffers loss or damage by reason of a defect in the goods, or as a result of not having information about the unsafe characteristics of the goods, the person is deemed to have suffered loss or damage as a result of the failure of the supplier to comply with the provision: s 127(3). The prohibitions in ss 127(1), (2) are civil penalty provisions and, in addition, failure to comply with a recall notice is a criminal offence: ss 199(1), (2).

A defence is provided in relation to a contravention committed by the supply of goods that did not comply with a safety or information standard. In such a case, it is a defence if the defendant (eg a retailer) establishes:

1. that the goods were acquired by the defendant for the purpose of resupply and 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
2. that the defendant did not know, and could not with reasonable diligence have ascertained, that the goods did not comply with the standard, or the defendant relied in good faith on a representation by the person from whom the goods were acquired that no safety or information standard had been prescribed in respect of the goods: ss 210(1) (criminal law) and 252 (civil penalty provisions).

Summary

[13.1990] Section 18(1) of the ACL provides that "[a] person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive". Whether an advertisement is misleading and therefore in breach of this provision is to be assessed not by whether it would induce consumers to enter into contracts with the advertiser, nor by whether it deceives a specific person, but whether it would lead into error a reasonable member of the target audience. In advertising contexts, this may involve inducing consumers to enter into negotiations with the advertiser, regardless of whether products are or are not ultimately sold.

Persons are prohibited from engaging in unconscionable conduct within the meaning of the unwritten law, that is, in accordance with common law and equitable principles. Persons are also prohibited via statute from engaging in unconscionable conduct in connection with the supply or acquisition of goods or services. In that context, the Act does not define the term "unconscionable" but provides that in determining whether there has been unconscionable conduct, the court may have regard to a set of non-exhaustive factors.

The Act prohibits unfair terms in standard form consumer contracts and in standard form small business contracts. The Act also prohibits the making of false or misleading representations in connection with the promotion and supply of goods and services or in connection with the sale or grant of an interest in land, as well as many other specific types of unfair practices.

Contraventions of the unfair practices provisions are subject to the imposition of pecuniary penalties, a type of monetary penalty that is imposed via civil law proceedings. Contravention of the general prohibition of misleading or deceptive conduct is not subject to a pecuniary penalty. However, conduct contravening the general prohibition may at the same time also contravene one or more of the unfair practices provisions. The court may also grant an injunction restraining a person from engaging in conduct that contravenes the ACL. A person who suffers loss or damage by the conduct of another person in contravention of the consumer protection provisions may, furthermore, recover damages.

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The ACL provides for statutory guarantees in contracts for the supply of goods and services to consumers. These include guarantees as to title, correspondence with description, acceptable quality and fitness for any disclosed purpose. These guarantees cannot be excluded by contract and can only have their effects limited in very specific circumstances.

Finally, the manufacturer of goods containing a "safety defect" is liable to compensate a person who is injured, or whose property is damaged, because of the safety defect. It is a defence that the goods had the safety defect only because there was compliance with a mandatory standard. It is also a defence that scientific knowledge available when the goods were supplied would not have enabled the safety defect to be discovered.

Further reading

Books

A Bruce, *Consumer Protection Law in Australia* (4th ed, LexisNexis Butterworths, 2022).

P Clarke and S Erbacher, *Australian Consumer Law: Commentary and Materials* (7th ed, Thomson Reuters, 2022).

J Paterson, *Corones' Australian Consumer Law* (5th ed, Thomson Reuters, 2023).

Journals

Competition and Consumer Law Journal (formerly *Trade Practices Law Journal*).

Internet sites

Australian Competition and Consumer Commission, http://www.accc.gov.au/consumers.

Australian Consumer Law, http://www.consumerlaw.gov.au.

SCAMwatch, http://www.scamwatch.gov.au.

Podcasts

Herbert Smith Freehills, 'Australian Consumer Law: 10 Years Old and Really Growing Up', https://soundcloud.com/herbert-smith-freehills/webinar-australian-consumer-law-10-years-old-and-really-growing-up.

Tutorial activities

1. What is the ACCC and what is its role in relation to consumer and competition law in Australia?
2. What is the Australian Consumer Law, and how does it form part of Commonwealth, and also State and Territory, law?
3. What are the three general prohibitions contained in Chapter 2 of the ACL?
4. Section 18(1) is the most important (and the most litigated) of the general prohibitions. What are its basic elements?

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5. One of the elements of s 18(1) is that a person must not "engage" in conduct that is misleading or deceptive. How does *Hyder* (see [13.100]) refine what is meant by this "engage" requirement? In your view, is this a fair decision? Does this decision conflict with the principle that fault is not a requirement under s 18(1)?
6. Although the common law does not impose a general or a positive duty to disclose information to a party with whom we are negotiating, there are circumstances where a failure to disclose (ie silence) may constitute misleading or deceptive conduct. Discuss with reference to *Henjo* (see [13.140]), *Miller* (see [13.160]), and *Demagogue* (see [13.170]).
7. In the context of the advertising and marketing of goods, what is the fundamental test for determining whether the conduct that a person has engaged in is "misleading or deceptive or likely to mislead or deceive" and therefore in breach of s 18(1)? Discuss with reference to *Kogan* (see [13.230]), *Coles* (see [13.240]), *TPG* (see [13.250]), *Turi* (see [13.260]), and *Reckitt* (see [13.270]).
8. There are serious consumer protection issues that arise in relation to online "reviews" and in relation to online "comparison" services. Explain how this is so, with reference to *Meriton Properties* (see [13.290]) and *Trivago* (see [13.300]).
9. Explain, with reference to *Kimberly-Clark* (see [13.320]), why it is vital for corporations to be able to justify their claims about their products. What does the decision of the co-defendant (Pental) to admit its own contraventions suggest?
10. How does an action by one trade competitor against another, under the ACL, ultimately protect the consumer? Refer to *McWilliam's* (see [13.340]), *Parkdale* (see [13.350]), and *Apand* (see [13.360]).
11. What is the effect of the decision in *Apand* (see [13.360]) on the right of competitors to use the word "kettle" in relation to their products? What would have been the effect on competition (in the relevant line of furniture) if, in *Parkdale v Puxu* (see [13.350]), Puxu had succeeded in its claim?
12. In relation to a s 18(1) action, is the plaintiff required to prove that the defendant intended to mislead or deceive? In other words, is fault a factor?
13. Is it possible for a person to directly exclude liability for breaches of s 18(1)? In the course of your answer, explain why the disclaimers were effective in *Butcher* (see [13.420]), but why the time limitation clause was ineffective in *Brighton* (see [13.430]).
14. In *Hyder* (see [13.100]), what did the New South Wales Court of Appeal say about the need for people to take reasonable care of their own interests with respect to s 18(1)? Was the disclaimer in this case effective? Do you think that this decision is a fair one?
15. What remedies are available for a breach of s 18(1)? Consider [13.1260], [13.1280], and [13.1360].
16. In the course of your answer to question 15, please explain why (with reference to the law and also to policy) a breach of the general prohibition on misleading or deceptive conduct under s 18(1) is not subject to the pecuniary penalties outlined at [13.1140].
17. In general terms, what is unconscionable conduct?
18. Explain what is meant by unconscionable conduct in s 20 (refer to *Berbatis* (see [13.470]) and *Samton* (see [13.480])), and contrast that with unconscionable conduct in connection

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with goods or services as prohibited in s 21 (refer to *Kobelt* (see [13.510]), *Telstra* (see [13.520]), and *Ford* (see [13.530])).

19. *Kobelt* (see [13.510]) is a particularly important decision. It is a split decision (4:3) of the High Court of Australia, on a matter of considerable sensitivity. The split decision demonstrates that even judges of the High Court sometimes cannot agree on whether conduct in a particular case is or is not unconscionable. Read the extract of the case carefully, outlining the view of the majority and also the view of the minority as to whether or not unconscionable conduct had been made out. Which of these views do you agree with?

20. Is unconscionable conduct automatically established where there are other breaches of the ACL, such as breaches of the consumer guarantees or breaches of the misleading or deceptive conduct provisions? Answer with reference to *Mazda* (see [13.540]).

21. Which of the list of factors in s 22 do you consider are more significant when a court is determining whether conduct is unconscionable?

22. How does the ACL protect small businesses from the unconscionable conduct of larger businesses? In your answer, refer to *Coles* (see [13.570]).

23. What remedies are available to victims of unconscionable conduct? See [13.590].

24. The ACL prohibits *unfair* terms in *standard form consumer* contracts. Clearly explain/define the italicised words/phrases. How do they reflect the three requirements of the prohibition?

25. What are the remedies that may apply if a court declares that a term is "unfair"? See [13.640]. Refer to *Karpik* (see [13.660]) and to *Fujifilm* (see [13.670]) as examples in your answer. Explain also how recent changes in the law affect the remedies that were available at the time that those cases were heard.

26. Chapter 3 prohibits specific unfair practices, including the false or misleading representations extracted at [13.740]. Read the extracts from the cases at [13.760]–[13.830] and identify the specific prohibitions at issue in each of those cases. Why are these actions in relation to specific unfair practices usually linked to an action under s 18(1)? Hint: consider the issue of the remedies that can follow from breaches of s 29(1) as compared to s 18(1).

27. Figure 13.4 shows the maximum penalties that are available for breaches of the ACL's unfair practices provisions. What are the current applicable penalties, and what factors may a court take into account when setting the penalty? See [13.1140], and in your answer, refer to *Apple* (see [13.1160]) and also *Jayco* (see [13.1200]).

28. Damages are often awarded for breaches of the ACL. What is the correct measure of damages? See the example provided in *Escape Media* (see [13.1320]).

29. Pablo purchased a perfectly serviceable and cost-effective washing machine in reliance on the defendant's false representation that the washing machine was made in Australia. The evidence is clear that Pablo needed a washing machine, and had he purchased an alternative that was genuinely made in Australia, it would have been more expensive. Is Pablo entitled to damages under s 236?

30. The ACL includes a regime of non-excludable guarantees that apply to goods or services supplied to *consumers*. For the purposes of this part of the ACL, what is the definition of a "consumer"? When can a business qualify as a "consumer" under the consumer guarantees?

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31. Referring to *Bunnings* and the other cases referred to at [13.1530], what is meant by the phrase "ordinarily acquired for personal, domestic or household use or consumption"? In what circumstances can goods actually acquired for business purposes still qualify?

32. What are the consumer guarantees for "goods" (ss 51–59) and for "services" (ss 60–62)?

33. Focusing on s 54, what is the legal meaning of acceptable quality? How do the considerations in s 54(3) relate to the requirements in s 54(2)? Refer to the decision in *Toyota* (see [13.1590]).

34. Focusing on s 55, what is the relevance of the requirement that the purpose be "disclosed"? How does the purpose guaranteed under s 55 differ from that guaranteed under s 54 concerning "acceptable quality"?

35. What are the remedies that are available for a breach of the statutory guarantees? Ensure that you are familiar with the concept of a "major failure". Refer to *Toyota* (see [13.1790]) in relation to contracts for goods, and *Moore* (see [13.1780]) and *Alameddine* (see [13.1690]) in relation to contracts for services.

36. To what extent can a party exclude or limit the effect of the statutory guarantees? Refer to ss 64, 64A, and CCA, s 139A.

37. Under Pt 3-5 of the ACL, in what circumstances will manufacturers be liable for defective goods? Discuss with reference to a manufacturer's liability for goods with safety defects: ss 138–150.

38. Define what is meant by a "safety defect" under ss 9(1)–(2).

39. How does the meaning of "safety defect" under ss 9(1)–(2) differ to the meaning of the safety requirement contained under the acceptable quality guarantee in s 54?

40. "Of the defences that are available to a manufacturer under s 142, it is s 142(c) that is the most controversial":

    (a) Explain why this is so, with reference to the Thalidomide case study at [13.1870].

    (b) Recall the race to develop a vaccine for COVID-19, taking place in recent years. If a vaccine had been developed and distributed, but had then proven to be dangerous in some way, in what circumstances would a pharmaceutical company have a defence under s 142(c)?

41. McDonald's is a globally renowned fast-food franchise and operates across many countries, including in Australia. McDonald's advertises its products extensively in the Australian market. Managers of McDonald's restaurants also give their employees instructions in relation to required safety precautions when working their shifts.

    (a) If a McDonald's advertisement is misleading or deceptive, would the advertising conduct be "in trade or commerce" for the purposes of the general prohibition in s 18(1)?

    (b) If a manager gives an employee incorrect safety instructions, leading to the employee following those incorrect instructions and then being injured, is the manager's conduct "in trade or commerce" for the purposes of s 18(1)?

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42. Trinco manufactures and sells outdoor furniture. Included in their range of outdoor furniture are sun lounges and deck chairs, which belong to Trinco's "Comfi" range and which are sold under Trinco's name. Another manufacturer, Contour, also sells outdoor furniture, including sun lounges and deck chairs, as part of its "Funtimes" range. The sun lounges and deck chairs in Trinco's "Comfi" range and in Contour's "Funtimes" range are almost identical in shape, design and general appearance, although on close inspection, some differences can be observed. In addition, in both cases, the manufacturer's identity and the name of the furniture's range is clearly indicated on the ticketing of the products. Has Contour, as the manufacturer of the "Funtimes" range, contravened s 18(1) of the ACL?

43. Big Bank, responding to concerns from its socially conscious consumers, releases a policy statement proclaiming that it will "no longer provide finance to the tobacco industry". Whilst Big Bank does cease providing finance to tobacco manufacturers, it continues to provide finance to businesses producing tobacco industry supply chain inputs such as cardboard and plastic packaging companies. Has Big Bank engaged in misleading or deceptive conduct in contravention of s 18(1)?

44. Consider whether the silence by the salesperson and the restaurateur in the following two examples could be considered misleading or deceptive conduct under s 18(1):

    (a) A consumer, who lives in a rural area, is looking to buy a mobile phone. The salesperson knows where the consumer lives but fails to tell them that the coverage is poor in their area and that the phone being purchased may be of limited use in that location.

    (b) A restaurateur is selling her restaurant. When the purchaser asks the restauranteur what the reason is for the sale, she does not mention that she is selling because a similar restaurant is opening nearby.

45. Dr Philip Lowe, the Chair of the Reserve Bank of Australia, said in 2021:

    "The RBA Board will not increase the cash rate until actual inflation is sustainably within the 2 to 3 per cent target range. For this to occur, wages growth will have to be materially higher than it is currently. This will require significant gains in employment and a return to a tight labour market. These conditions will not be met until 2024 at the earliest so interest rates will not move until then." Many people took out mortgages over this period, at a time when house prices had never been more expensive, with many taking those crucial four words – "2024 at the earliest" – into consideration when making the decision to buy a home. In fact, the RBA raised interest rates sharply in 2022 (to counter inflation) and many people suffered mortgage stress as a result.

    (a) For the purposes of s 18(1), would Dr Lowe's statement constitute conduct "in trade or commerce?

    (b) Assuming that the "in trade or commerce" requirement is satisfied, would Dr Lowe's statement be misleading or deceptive conduct for the purposes of s 18(1)? Please ensure that you consider the effect of ss 4(1)-(2) and their rules regarding representations about future matters.

46. Jawny Cayge, a martial arts expert and an action movie star, appears in advertisements for Elite Activewear. In these advertisements, Jawny Cayge describes Elite Activewear garments as being "of Olympic quality", and says that when he's training he "can't do

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without them". It turns out that Elite Activewear garments lose their shape and become unsuitable for wearing whilst exercising very quickly. It also turns out that Jawny Cayge has never actually worn Elite Activewear garments outside of filming of these advertisements. Has Elite Activewear's advertising breached s 18(1) and/or s 29(1) of the ACL? Why is it important to assess potential breaches of both provisions?

47. After viewing an Elite Activewear advertisement described in question 46, Anita purchases activewear garments from Sports Sports Sports (her local sporting goods store) to wear whilst conducting personal training classes. As outlined in question 46, the garments lose their shape quickly and become unsuitable for further use. Anita is unhappy when this occurs, as the garments were very expensive. Anita wants to return the garments to Sports Sports Sports.

(a) Is Anita a consumer for the purposes of the consumer guarantees?

(b) Do the garments comply with the consumer guarantee of acceptable quality contained in s 54?

(c) Is Sports Sports Sports entitled to rely upon a sign, displayed at its registers, that reads: "No refunds or returns permitted"?

(d) Assuming that there is a breach of the s 54 acceptable quality consumer guarantee, what remedies can Anita seek when returning the garments to Sports Sports Sports?

48. Georgie recently purchased the following items and now seeks your advice about any consumer guarantee remedies that she might have, and any legal issues that might arise, as a result of the following circumstances:

(a) Georgie purchased an 8K Ultra HD TV for $8,000. The TV never worked, but because of the pressures of Georgie's work as a sole practitioner financial adviser, she only managed to return it to the store 12 months later.

(b) Georgie purchased a second-hand wristwatch from a car boot sale (a type of second-hand market) and paid $300. It was described by its seller as "waterproof", and a leaflet provided by the seller claimed that it kept excellent time. When Georgie got home, she found that the watch was not waterproof, and also that it lost more than one minute in time every week.

(c) Georgie purchases some roofing tiles from a local builder. The tiles were mostly cracked and unusable. Georgie was in a hurry when she purchased them, and only had a quick look at the tiles and therefore did not notice that they were cracked. If Georgie had undertaken a proper inspection, she would have noticed the damage.

49. In 2024, CrowdStrike (a cybersecurity company) issued a software update that caused an outage for Windows computers around the world. Significant losses were suffered as a result of that outage.

On 22 July 2024, the following appeared in an article published in The Financial Review newspaper:

MinterEllison national cybersecurity legal partner Paul Kallenbach said CrowdStrike customers would be unlikely to succeed in seeking compensation individually from the company, due to various limitations and exclusions of liability tech vendors included in their contracts ...

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"The vendor will have a *complete exclusion* of *consequential-type losses* [emphasis added] – for example, loss of customers or revenue – which are often the main types of loss that the customer will suffer," Mr Kallenbach said.

Then on 30 July 2024, the following was published by the law firm Corrs Chambers Westgarth:

CrowdStrike's standard terms provide very limited warranties, limit CrowdStrike's liability for contractual breaches to a refund of fees paid by the customer and exclude liability for loss of revenue and other consequential losses.

Some customers will have negotiated better liability arrangements with CrowdStrike, but for many customers, their best avenue of recovery may be under the *Australian Consumer Law* (ACL).

Statutory consumer guarantees are available to businesses in certain circumstances and, in particular, where the goods or services purchased are valued at $100,000 or less. These include *a guarantee that any services will be provided with due care and skill* [emphasis added]. This guarantee may be breached in circumstances where an IT vendor introduces coding errors into a software update or fails to properly test the update before deploying it onto its customer's IT systems. A business may recover its "reasonably foreseeable losses" because of a "major failure" by a vendor to comply with a statutory consumer guarantee. In certain circumstances, this may include trading and other financial losses.

(a) Assuming that CrowdStrike's contracts contain comprehensive exclusion clauses that would completely protect it against any liability for losses under the law of contract, explain whether such an exclusion clause is effective in relation to the consumer guarantees provided under the ACL.

(b) Explain what would need to be established in order to show a failure by CrowdStrike to comply with the guarantee to provide services with due care and skill. When does the guarantee apply, what does it require and what kind of actions by CrowdStrike would (and/or would not) breach the guarantee?

50. Tenzin and Lobtse are Mongolian students studying at an Australian university. Under the terms of their student visas, they are allowed to work for 40 hours per fortnight. They both sign a contract with Kleen Cleaners and begin work cleaning carpets, bathrooms and toilets in a 10-storey office block. For two months, they are not paid. They speak to their manager who informs them that under the contracts that they signed, they agreed that the first three months were a "training period" for which there would be no payment. It is true that the contract does in fact contain this term, but Tenzin and Lobtse: (a) did not read it; and (b) received no training during that period. Analyse whether Tenzin and Lobtse can seek relief under the ss 20–22 prohibitions on unconscionable conduct.

51. Net Pty Ltd (Net) provides Internet access services throughout Australia under standard form contracts that include a list of "Terms and Conditions". One of the terms contained in that Terms and Conditions list states:

> Net reserves the right to change prices or services at any time without prior notice to customers or the public, except when the service is an Australian Broadband Guarantee Service. Price changes will not be retroactive for existing prepaid customers. It is the User's responsibility to check this online.

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Is this term likely to breach the unfair contract terms provisions of the ACL? If it does, what are the likely consequences? Would your answer to this second question differ depending upon whether a customer's relevant contract was entered into before or after 9 November 2023?

52. Super Markets operates a nation-wide network of retail supermarkets and sources its fresh food from farms across Australia. Super Markets includes a clause in its standard form fresh food supply contracts requiring farms to reimburse it for any damage caused to purchased fresh food after it leaves the farms, regardless of the damage's cause. Ammyl's farm employs 30 staff and has a modest annual turnover by industry standards. Is the contract between Ammyl's farm and Super Markets a small business contract for the purposes of the unfair contract terms provisions? Would your answer differ depending upon whether Ammyl's contract with Super Markets was formed before or after 9 November 2023?

53. Silicone-based breast implants are marketed towards women to increase their breast size, and are also used as part of breast reconstruction surgery. However, recent studies have shown that women with breast implants may have an increased risk of developing serious complications including anaplastic large cell lymphoma (ALCL), a rare type of non-Hodgkin's lymphoma. It usually involves a swelling of the breast, typically 3–14 years after the operation to insert the breast implant. Manufacturers sold the silicone implants only after extensive clinical trials and a clearance by the Therapeutic Goods Administration. Manufacturers continue to deny that the implants cause ALCL. You are asked to advise Jane, who has had a breast implant and who now has ALCL. What must Jane prove in order to successfully sue the manufacturer under Pt 3-5 of the ACL?

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Chapter 14

Data Protection and Privacy Law

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Introduction

[14.10] Privacy is a major concern for a majority of Australians.[1] This is particularly so, given the number of significant data breaches affecting Australians in recent years.[2] On 22 September 2022, Optus announced the unauthorised disclosure of consumer data that could affect 9.8 million customers, with the Office of the Australian Information Commissioner (OAIC) launching an investigation of that incident on 11 October 2022.[3] Shortly after the Optus data breach came an even more damaging breach, with Australia's largest private health insurer (Medibank Private) confirming that hackers stole sensitive health information of all of its 9.7 million current and former customers. Again, the OAIC launched an investigation into this incident, on 1 December 2022,[4] confirming on 5 June 2024 that it was also initiating civil penalty proceedings as an enforcement measure.[5] Following Medibank's refusal to pay the ransom demanded by the hackers, it was reported that 5 GB of Medibank's customer data was posted to the dark web.[6] More recently, the OAIC has opened investigations relating to Medlab Pathology[7] (also leading to the institution of civil penalty proceedings)[8] and the Latitude group of

1 The Office of the Australian Information Commissioner's (OIAC's) *Australian Community Attitudes to Privacy Survey 2023* found that 62% of Australians "see the protection of their personal information as a major concern in their life": https://www.oaic.gov.au/__data/assets/pdf_file/0025/74482/OAIC-Australian-Community-Attitudes-to-Privacy-Survey-2023.pdf.

2 The OAIC's *Australian Community Attitudes to Privacy Survey 2023* also found that "[h]igh-profile data breaches have drawn attention to the collection, retention and protection of personal information": https://www.oaic.gov.au/__data/assets/pdf_file/0025/74482/OAIC-Australian-Community-Attitudes-to-Privacy-Survey-2023.pdf.

3 https://www.oaic.gov.au/newsroom/oaic-opens-investigation-into-optus-over-data-breach.

4 https://www.oaic.gov.au/newsroom/oaic-opens-investigation-into-medibank-over-data-breach.

5 https://www.oaic.gov.au/newsroom/oaic-takes-civil-penalty-action-against-medibank.

6 https://www.theguardian.com/australia-news/2022/dec/01/medibank-hackers-announce-case-closed-and-dump-huge-data-file-on-dark-web.

7 https://www.oaic.gov.au/newsroom/oaic-opens-investigation-into-medlab-over-data-breach.

8 https://www.oaic.gov.au/newsroom/oaic-commences-federal-court-proceedings-against-australian-clinical-labs-limited.

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companies,[9] as well as the law firm HWL Ebsworth,[10] noting a 26% increase in data breaches.[11] A particularly notable contemporary data hack, at the time of writing, relates to Ticketmaster,[12] following earlier reports of the separate Ticketek ticket booking system being compromised during Taylor Swift's 2024 Australian "Eras Tour".[13] So sensitive are Australians to potential privacy breaches that reports addressing more routine online system outages are often quick to point out that no cyberattack was involved, where that was the case.

These recent significant data breaches and associated investigations show that no organisation is immune: it is often said that cyber attacks are a matter of "not if, but when" for businesses. Now that personal information is virtually a prerequisite to navigating the internet and/or subscribing to government and other services, it is clear that businesses must be able to assure consumers (so far as they are able to) that their data is safe. Businesses must also give careful consideration as to how long they retain customer data, and why they choose to do so. Whilst Medibank, for example, had little choice but to retain the health claims data of its customers, questions were raised as to why Optus needed to hold on to passport, driver's licence, and other details of its customers.

[14.20] What is clear is that it took these recent massive data breaches for governments and corporations (and the community at large) to more fully and properly appreciate the scale and scope of the adverse impacts and outcomes that can result from a data breach. In particular, it is now acknowledged that data breaches have the potential to cause serious financial and emotional harm to consumers and others. This is why it is essential to have an understanding of the law governing data protection and privacy in Australia. That said, it is also important to understand that data protection law is in a state of flux. This chapter will therefore provide you with an understanding of the current state of Australian data protection and privacy law and will also explain the nature of some proposed future amendments. This chapter will also identify how privacy concerns can interact with other bodies of law, including the *Australian Consumer Law* that was studied in Chapter 13.

The Privacy Act and the Australian Privacy Principles

[14.30] In Australia, privacy is regulated at the federal level by the *Privacy Act 1988* (Cth) in conjunction with the Australian Privacy Principles (APPs).

The broad objective of the Act is to balance the need to protect the privacy of individuals against the interests of entities getting on with their functions and activities. It is particularly difficult to strike that balance when so many businesses depend upon acquiring and dealing with personal information in order to function. To provide some more context, the *Privacy Act 1988* (Cth), s 2A provides that:

> The objects of this Act are:
>
> (a) to promote the protection of the privacy of individuals; and
>
> (b) to recognise that the protection of the privacy of individuals is balanced with the interests of entities in carrying out their functions or activities; and

9 https://www.oaic.gov.au/newsroom/joint-australianew-zealand-investigation-into-latitude-group.
10 https://www.oaic.gov.au/newsroom/oaic-opens-investigation-into-hwl-ebsworth-over-data-breach.
11 https://www.oaic.gov.au/newsroom/cyber-security-incidents-impact-data-breach-risk.
12 https://www.abc.net.au/news/2024-05-30/ticketmaster-data-breach-how-to-check-if-you-have-been-hacked/103912494.
13 https://www.theguardian.com/music/2024/feb/13/taylor-swift-eras-tour-australia-ticketek-pop-ups-details-locations-scam-help.

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(c) to provide the basis for nationally consistent regulation of privacy and the handling of personal information; and

(d) to promote responsible and transparent handling of personal information by entities; and

(e) to facilitate an efficient credit reporting system while ensuring that the privacy of individuals is respected; and

(f) to facilitate the free flow of information across national borders while ensuring that the privacy of individuals is respected; and

(g) to provide a means for individuals to complain about an alleged interference with their privacy; and

(h) to implement Australia's international obligation in relation to privacy.

[14.40] Whilst the *Privacy Act 1988* (Cth) is a federal statute, it does not apply to all Australian businesses. According to the *Privacy Act 1988* (Cth), s 15, an "APP entity" must not breach an APP, and according to the *Privacy Act 1988* (Cth), s 13(1), an "APP entity" interferes with the privacy of an individual if they breach an APP in relation to an individual. Thus, understanding the legal definition of an "APP entity" is crucial in order to understand the Act's reach.

An APP entity is defined as an agency or an organisation: *Privacy Act 1988* (Cth), s 6(1). Putting aside the case of agencies, for present purposes, an organisation is an individual, a body corporate, a partnership, or any other unincorporated association, except for a small business operator: *Privacy Act 1988* (Cth), s 6C(1). A small business operator carries on one or more small businesses: *Privacy Act 1988* (Cth), s 6D(3). A small business, in turn, has an annual turnover of $3,000,000 or less in the last financial year: *Privacy Act 1988* (Cth), s 6D(1).

The net effect of these rules is that the *Privacy Act 1988* (Cth) and its APPs apply to any business that has an annual turnover of more than $3 million. With some exceptions, at the present time, businesses having an annual turnover of $3 million or less are exempt from the regime.

The Australian Privacy Principles: What do businesses need to do?

[14.50] For APP entities, as defined above, the APPs are the cornerstone of the privacy protection framework established in Australia via the *Privacy Act 1988* (Cth). For APP entities, the APPS set out what businesses actually need to do.

The full text of the APPs is attached to the *Privacy Act 1988* (Cth) as Sch 1, and it is also available on the website of the OAIC.[14] Key requirements imposed by the APPs are summarised below.

[14.60] **APP 1 – Open and transparent management of personal information.** APP entities must take reasonable steps to ensure compliance with the APPs and to deal with inquiries or complaints about compliance with the APPs (APP1.2). APP entities must have a clearly expressed and up to date privacy policy (APP1.3) and must make that privacy policy available free of charge (APP1.4).

[14.70] **APP 2 – Anonymity and pseudonymity.** Individuals must have the option of not identifying themselves, or using a pseudonym, when dealing with an APP entity about a particular matter (APP2.1).

[14.80] **APP 3 – Collection of solicited personal information.** APP entities that are organisations must not collect personal information (except sensitive information) unless reasonably necessary for the entity's functions or activities (APP3.2). Sensitive information must not be collected unless there is individual consent and the information is reasonably necessary for an organisation's functions or activities (APP3.3).

14 https://www.oaic.gov.au/privacy/australian-privacy-principles/read-the-australian-privacy-principles.

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Personal information can only be collected via lawful and fair means (APP3.5). This APP only applies to collecting personal information that is solicited by an APP entity (APP3.7).

[14.90] APP 4 – Dealing with unsolicited personal information. Where an APP entity receives unsolicited personal information, they must determine whether they could have collected that information on a solicited basis under APP3 (APP4.1) and if not, they must destroy or deidentify the information (APP4.3).

[14.100] APP 5 – Notification of the collection of personal information. Individuals must be notified by APP entities at or before the time of collection (or as soon as practicable after) (APP5.1) of certain matters including the identity and contact details of the APP entity, that personal information has been collected, the circumstances of collection and the purposes of collection (APP5.2).

[14.110] APP 6 – Use or disclosure of personal information. With some exceptions, personal information collected for a particular purpose (a primary purpose) must not be used for a secondary purpose without an individual's consent (APP6.1). APP6 does not apply to the use or disclosure of personal information by an organisation for the purpose of direct marketing (APP6.7), which is dealt with by APP7 instead.

[14.120] APP 7 – Direct marketing. Organisations cannot use personal information held about individuals for the purpose of direct marketing (APP7.1). There is an exception, however, where the organisation collected the information from the individual, who would reasonably expect the organisation to use the personal information for direct marketing, and a simple means is provided to easily request not to receive direct marketing. In these circumstances, where the individual has not made such a request, the exception applies (APP7.2). Another exception applies to sensitive information where there is consent (APP7.4). The *Do Not Call Register Act 2006* (Cth) and the *Spam Act 2003* (Cth) take priority over APP7 (APP7.8).

[14.130] APP 8 – Cross-border disclosure of personal information. In order for an APP entity to disclose personal information about an individual to an overseas recipient, they must take reasonable steps to ensure that the overseas recipient does not breach the Australian Privacy Principles other than APP1 (APP8.1).

[14.140] APP 9 – Adoption, use or disclosure of government-related identifiers. This APP regulates when an APP entity is allowed to use a government-related identifier of an individual as its own identifier for that individual.

[14.150] APP 10 – Quality of personal information. APP entities must take reasonable steps to ensure that personal information collected is accurate, up to date and complete (APP10.1). A similar obligation applies where personal information is used or disclosed (APP10.2).

[14.160] APP 11 – Security of personal information. Where an APP entity holds personal information, it must take reasonable steps to protect that information from misuse, interference and loss, and from unauthorised access, modification or disclosure (APP11.1). Where personal information is no longer needed for a purpose for which it may be used or disclosed under the APPs, an APP entity must take reasonable steps to destroy or deidentify that information (APP11.2).

[14.170] APP 12 – Access to personal information. Subject to some exceptions for organisations (APP12.3), APP entities must give individuals access to personal information held about them, on request (APP12.1). Requests for access must be responded to by organisations within a reasonable period of time and access to the information must be granted if it is reasonable and if it is practicable to do so (APP12.4). Organisations may impose a charge that is not excessive, but that charge must not apply to the actual making of the request (APP12.8).

[14.180] APP 13 – Correction of Personal Information. APP entities must take reasonable steps to correct personal information held, to ensure that it is accurate, up to date, complete, relevant and not misleading.

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This is required if APP entities hold personal information about an individual and are satisfied that the information does not meet those standards or the individual requests correction (APP13.1). Reasonable steps must be taken to notify third parties of the correction if the individual requests (APP13.2).

[14.190] From the above summary, two further points emerge as being particularly important to understand. First, the *Privacy Act 1988* (Cth) and the APPs do not only apply to information stored in digital form: these rules apply to equally to digital and traditionally stored information. In this regard, their application is technology neutral.

Second, the APPs apply to personal information, which can include sensitive information. These terms are defined in the *Privacy Act 1988* (Cth). According to the *Privacy Act 1988* (Cth), s 6(1), "personal information" means information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether true or not and whether recorded in a material form or not. For example, personal information may include:

- an individual's name, signature, address, phone number or date of birth;
- credit information (including details of consumer credit, repayment history and financial hardship information);
- employee record information;
- photographs;
- IP addresses;
- voice print and facial recognition biometrics; and
- location information from a mobile device.

In a case addressing a previous version of the *Privacy Act 1988* (Cth) that nevertheless contained a similar definition of personal information, the Full Court of the Federal Court of Australia confirmed that personal information must be "about an individual", and that this requirement "direct[s] attention to the need for the individual to be a subject matter of the information or opinion": *Privacy Commissioner v Telstra Corporation Ltd* (2017) 249 FCR 24. In that case, an individual was not permitted to exercise rights under the then-National Privacy Principles (the predecessor to the current APPs) concerning mobile phone system metadata because it was not considered to be information about an individual.

According to the *Privacy Act 1988* (Cth), s 6(1), "sensitive information" is defined as a subset of personal information and means:

(a) information or an opinion about an individual's:
  (i) racial or ethnic origin; or
  (ii) political opinions; or
  (iii) membership of a political association; or
  (iv) religious beliefs or affiliations; or
  (v) philosophical beliefs; or
  (vi) membership of a professional or trade association; or
  (vii) membership of a trade union; or
  (viii) sexual orientation or practices; or
  (ix) criminal record;

that is also personal information; or

(b) health information about an individual; or

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(c) genetic information about an individual that is not otherwise health information; or

(d) biometric information that is to be used for the purpose of automated biometric verification or biometric identification; or

(e) biometric templates.

[14.200] The matter of "consent" is referred to at several points throughout the APPs. The *Privacy Act 1988* (Cth), s 6(1) defines "consent" only as express consent or implied consent, and those terms are not themselves further defined. According to OAIC guidance issued in December 2022,[15] there are four key elements of consent that include that the individual is adequately informed before giving consent, that the individual gives their consent voluntarily, that the individual's consent is current and specific, and that the individual has the capacity to understand and communicate their consent.

[14.210] Even if an APP would otherwise be breached, there remain a series of "general permitted situations" set out in the *Privacy Act 1988* (Cth), s 16A where APP entities will have a defence. That provision sets out those general permitted situations in a table, containing seven items, only five of which apply to APP entities in general (one applies only to agencies, not organisations, and one applies only to the defence force). Situations covered include the collection, use, or disclosure of personal information where obtaining consent is unreasonable or impracticable and where it is necessary to lessen or prevent a serious threat to life, health, or safety of an individual or to public health or safety (item 1); the collection, use, or disclosure of personal information necessary to take appropriate action regarding unlawful activity or serious misconduct relating to the APP entity's functions or activities (item 2); the collection, use or disclosure of personal information necessary to assist an APP entity, body, or person to locate a missing person (item 3); and the collection, use or disclosure of personal information necessary to establish, exercise, or defend a legal claim (item 4); or for the purposes of confidential alternative dispute resolution (item 5).

[14.220] As this discussion has shown, despite being labelled "Principles", the APPs are indeed legally binding, at least in particular circumstances.

Registered APP codes

[14.230] Where the *Privacy Act 1988* (Cth) applies, the APPs apply by default. However, it is possible for an organisation to elect to be bound by a customised set of privacy rules instead. Such rules are referred to as registered APP codes. An act or practice breaches a registered APP code if it is inconsistent with the code: *Privacy Act 1988* (Cth), s 6B(1). In turn, such an act or practice is an interference with privacy in the same way that acting inconsistently with the APPs would be an interference with privacy: *Privacy Act 1988* (Cth), s 13(1)(b).

Registered APP codes are not a means by which organisations can reduce their obligations under the *Privacy Act 1988* (Cth). In fact, a registered APP code must provide at least as much protection as the APPs would, and even then, it has to go through a registration and approval process with the OAIC that includes a public consultation period. As a result, there are not many registered APP codes currently in force. You can find out details of those codes that are currently registered on the OAIC website.[16]

15 https://www.oaic.gov.au/__data/assets/pdf_file/0030/40989/app-guidelines-combined-December-2022.pdf.
16 https://www.oaic.gov.au/privacy/privacy-registers/privacy-codes/privacy-codes-register.

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Remedies and the regulator: The role of the Office of the Australian Information Commissioner

[14.240] The OAIC (previously the Privacy Commissioner) was established to promote and uphold privacy rights. It is responsible for the privacy functions that are conferred by the *Privacy Act 1988* (Cth) and other laws.

Where there is a breach of the APPs, and when thinking about the role of the regulator, we need to distinguish between three different processes: the rights of individuals, the obligations of businesses and the role of the OAIC. These processes are now taken in turn.

[14.250] So far as individual rights are concerned, under the *Privacy Act 1988* (Cth), s 36(1), an individual can lodge a complaint with the OAIC about an act or practice that constitutes an interference with privacy. Such complaints must be in writing (*Privacy Act 1988* (Cth), s 36(3)), and the staff of the OAIC are required to give assistance in the making of the complaint if necessary (*Privacy Act 1988* (Cth), s 36(4)).

[14.260] Regarding the obligations on businesses, these concern eligible data breaches, which are defined in the *Privacy Act 1988* (Cth), s 26WE(2). According to that provision, an eligible data breach includes unauthorised access to or disclosure of information where a reasonable person would conclude there is a likely result of serious harm to any individual to whom the information relates; and also includes loss of information where unauthorised access or disclosure is likely to occur and (were it to occur) a reasonable person would conclude that there is a likely result of serious harm to any individual to whom the information relates.

Where an eligible data breach occurs, the *Privacy Act 1988* (Cth), s 26WL regulates how APP entities are required to notify impacted individuals, and the *Privacy Act 1988* (Cth), s 26WK sets out how the OAIC is to be notified.

It is important to note that, following amendments to the law in December 2022, the OAIC has been granted additional powers to request information about eligible data breaches even if there has been no report by the business itself.

[14.270] Finally, the role of the OAIC is established by the following framework of provisions:

The *Privacy Act 1988* (Cth), s 40 provides for the conduct of an investigation. Under s 40(1), an investigation must occur where a complaint has been made under s 36 and there may be an interference with privacy. However, under s 40(1A), there must not be an investigation where there was no complaint to the respondent first (although there may still be an investigation if taking that step was not appropriate).

The *Privacy Act 1988* (Cth), s 41 provides for circumstances where the OAIC may or must not investigate following a complaint under s 36. Relevant circumstances under s 41(1) where the OAIC may decline to investigate include where there is no interference with privacy, where the complaint was made more than 12 months after the relevant incident, and where a complaint is frivolous, vexatious, misconceived, lacking in substance, or not made in good faith.

The *Privacy Act 1988* (Cth), s 52 provides for the OAIC making a determination about a complaint made by an individual under s 36.

The *Privacy Act 1988* (Cth), s 30 then identifies circumstances where the OAIC may, following an investigation, provide a report to the Minister.

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[14.280] As with other areas of law covered in this text, civil pecuniary penalties are a remedy available for interferences with privacy, but only in particular circumstances. Civil pecuniary penalties for breaches of a "civil pecuniary penalty provision" are provided for in the *Privacy Act 1988* (Cth), s 80U. One such civil pecuniary penalty provision is the *Privacy Act 1988* (Cth), s 13G(1), which covers "a serious interference with the privacy of an individual" and also situations where "an entity repeatedly does an act, or engages in a practice, that is an interference with the privacy of one or more individuals". Civil pecuniary penalties are therefore not available for all breaches of privacy, but only those that are serious or repeated. Civil pecuniary penalties for persons other than bodies corporate may be up to $2.5 million (*Privacy Act 1988* (Cth), s 13G(2)) and for bodies corporate may be up to the greater of $50 million, three times the benefit of the contravention, or 30% of turnover (*Privacy Act 1988* (Cth), s 13G(2)). These maximum penalties reflect updates to the law effected in December 2022. At the time of writing, the OAIC had initiated civil pecuniary penalty proceedings against Medibank in relation to its data breach described earlier in this chapter, as well as against Medlab Pathology.

The Optus Data Breach of September 2022

[14.290] Among the many questions raised by the Optus data breach referred to earlier in this chapter is why the company was storing so much significant personal information (that included driver's licences, passport numbers and Medicare numbers) of 4 million former customers and of 5.8 million current customers for six years or more.

It is true that Optus is legally required to *collect* that data to verify the identity of their customers. The practical problem is that there is no clear rule on how long a company can or should retain such data. As noted above, APP11.2 merely indicates that where an APP entity holds personal information about an individual, it no longer needs that information for any permitted use or disclosure, and retention is not required by law, the APP entity must take reasonable steps to destroy or deidentify the information.

A company may argue that it "*needs*" to keep customer information for various reasons, such as defending against potential civil claims in court, for corporate record keeping purposes, or for marketing purposes. Furthermore, it is often the case that consumers "consent" to such uses when entering into contracts with companies. (Note that under APP6, giving such "consent" is permitted.)

What this massive data breach has revealed is that Australian telecommunications companies are *collecting and retaining* much more personal information than they may need without having a truly legitimate commercial or legal purpose for doing so. In the wake of the Optus data breach, the Federal Government has indicated that the rules around data retention will be tightened (and that penalties for breach will be substantially increased).

Data protection and privacy law and the Australian Consumer Law

[14.300] The *Privacy Act 1988* (Cth) and the APPs do not apply in a vacuum. Conduct that would be problematic under Australia's data protection and privacy laws may also breach other areas of the law, including the *Australian Consumer Law* and its prohibitions – in s 18(1) and s 29(1) – of misleading or deceptive conduct and the making of false or misleading representations relating to the supply of goods or services.

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In this regard, the Australian Competition and Consumer Commission – the public regulator overseeing the *Australian Consumer Law* – also has a practical role to play where data privacy issues are at stake, as the following cases demonstrate. In fact, consumer law has even been described as a "more powerful tool" than the *Privacy Act 1988* (Cth) in its current form.[17]

Australian Competition and Consumer Commission v Meta Platforms Inc

[14.310] *Australian Competition and Consumer Commission v Meta Platforms Inc* [2023] FCA 842. Two companies in the Meta group, Onavo Inc and Facebook Israel Ltd, provided a free VPN app through the Apple App Store and the Google Play Store. The app was advertised in both contexts, in its listings, as providing data security for its users. In reality, the app was collecting user data and sending it to Meta Platforms Inc which then used that data for its own commercial purposes.

That users' data would be collected in this way was disclosed in a relevant Terms of Service and Privacy Policy. However, "these disclosures were not sufficiently prominent or proximate to the Listings". For this reason, the Terms of Service and Privacy Policy were insufficient to counter the misleading or deceptive conduct otherwise found to breach the ACL s 18(1) and s 33. The Federal Court made declarations of breach and agreed with the parties' proposed pecuniary penalty of $20 million.

Australian Competition and Consumer Commission v Google LLC (No 4)

[14.320] *Australian Competition and Consumer Commission v Google LLC (No 4)* [2022] FCA 942. In the Australian Competition and Consumer Commission's first public enforcement outcome arising out of its Digital Platforms Inquiry, the Federal Court ordered Google to pay $60 million in civil pecuniary penalties for making misleading representations to consumers about the *collection and use of their personal location data* on Android phones between January 2017 and December 2018. In so doing, the Federal Court sent a strong message to digital platforms and other businesses that they must not mislead consumers about how their data is being collected and used.

The Court had previously found that Google breached the ACL (specifically ss 18(1), 29(1)(g), and 34) by representing to some Android users that the setting titled "Location History" was the only Google account setting that affected whether Google collected, kept and used personally identifiable data about user locations. In fact, another Google account setting titled "Web & App Activity" also enabled Google to collect, store, and use personally identifiable location data when it was turned on, and that setting was turned on *by default*.

Personal location data is sensitive to some consumers, and some Android users (the ACCC's best estimate, based on available data, was that 1.3 million Google user accounts in Australia

17 The Lawyers Weekly Show, "Misleading Data Usage Claims and Implications for Lawyers", https://podcasts.apple.com/au/podcast/misleading-data-usage-claims-and-implications-for-lawyers/id1112746831?i=1000633326715, 00:16:32–00:17:50.

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may have viewed a screen found by the Court to have breached the ACL) who were misled may have made different choices about the collection, storage and use of their location data if the misleading representations about that data had not been made by Google.

Other Australian data protection and privacy laws and potential future reforms

[14.330] In addition to the *Privacy Act 1988* (Cth), enacted by the Commonwealth Parliament, there are State and Territory *Privacy Acts* that may affect the conduct of business. There is, as noted in the text of APP7.7, also a factual overlap between conduct that might otherwise be captured by APP7 and the operation of the *Do Not Call Register Act 2006* (Cth) and the *Spam Act 2003* (Cth); those Acts are given priority of application.

Furthermore, the *Data Availability and Transparency Act 2022* (Cth) has recently been enacted to regulate access to data held by the government and by government-related bodies, for governmental purposes. According to the *Data Availability and Transparency Act 2022* (Cth), s 3, that Act has several objects. These are to serve the public interest by promoting better availability of public sector data, to enable the sharing of public sector data consistently with the *Privacy Act 1988* (Cth) and appropriate security safeguards, to enhance integrity and transparency in sharing public sector data, to build confidence in the use of public sector data and to establish institutional arrangements for sharing public sector data.

Australian Communications and Media Authority v Pizza Pan Group Pty Ltd

[14.340] *Australian Communications and Media Authority v Pizza Pan Group Pty Ltd* (2024) (administrative resolution). Pizza Pan Group operates Pizza Hut restaurants. The Australian Communications and Media Authority commenced an investigation into its compliance with the *Spam Act 2003* (Cth) over the period 1 January 2023 to 4 May 2023. Complaints alleged that Pizza Hut sent messages to customers without a functional unsubscribe option, and continued to send marketing messages to customers who had attempted to unsubscribe. Pizza Pan Group was issued with an infringement notice on 21 March 2024 containing a $2,502,500 penalty. That penalty was agreed to and then paid following Pizza Pan Group entering into an enforceable undertaking with the Australian Communications and Media Authority on 12–13 May 2024.

[14.350] There is a long-standing debate in Australia and elsewhere in the world as to whether the law should be reformed to introduce a statutory tort covering serious invasions of privacy. Unlike the rights granted to individuals under the *Privacy Act 1988* (Cth), such a statutory tort would confer upon individuals a right to take legal proceedings against someone who has interfered with their privacy, and a right to recover damages. More recently, there has also been debate in Australia as to whether Australian law (like European Union law) should incorporate a so-called "right to be forgotten". At the time of writing, there is no statutory invasion of privacy tort or right to be forgotten under Australian law.

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[14.360] It is also the case that the *Privacy Act 1988* (Cth) is subject to ongoing review. Most recently, at the time of writing, the government's response to the *Privacy Act 1988* (Cth) Review Report has accepted several recommendations for reform and has accepted other recommendations in-principle, subject to further stakeholder consultation.[18] Whilst legislation has not yet been introduced to give effect to any of these recommendations, some of the many relevant recommendations include:

- introducing/amending legislative definitions of the concepts of collection, disclosure, geolocation tracking data, deidentification and consent;
- amending the definition of personal information concerning IP addresses and other technical information (along with providing a non-exhaustive list of examples);
- amending the definition of sensitive information to include genomic information;
- requiring consent for collecting precise geolocation tracking data over time;
- removing the $3 million small business exemption;
- requiring that the collection, use and disclosure of personal information be fair and reasonable (irrespective of consent);
- requiring entities to establish minimum and maximum personal information retention periods;
- requiring notification of eligible data breaches within 72 hours;
- conferring greater rights on individuals (including more direct access to the courts); and
- creating civil penalty provisions for non-serious interferences with privacy and administrative breaches of the Act.

Furthermore, a working group may be convened with a view to harmonising aspects of the Commonwealth's and the States' and Territories' privacy laws. There is agreement in-principle to a further three-year review in relation to the recommendations for reform that have been made (some of which were described above).

Summary

[14.370] Given the frequency with which data hacks now happen in contemporary Australian business, and given the volumes of personal information now collected by Australian businesses as part of their ordinary everyday operations, it is essential that tomorrow's business leaders understand their obligations under Australia's data protection and privacy laws. This chapter has identified key obligations arising under the *Privacy Act 1988* (Cth). It has also identified other relevant privacy laws (as well as the importance of the *Australian Consumer Law* in the privacy context), and has identified recommended law reforms currently under consideration.

Further reading

Office of the Australian Information Commissioner: https://www.oaic.gov.au/.

The Australian Privacy Principles (a quick reference summary): https://www.oaic.gov.au/privacy/australian-privacy-principles/australian-privacy-principles-quick-reference.

18 https://www.ag.gov.au/sites/default/files/2023-09/government-response-privacy-act-review-report.PDF.

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The Australian Privacy Principles (full text): https://www.oaic.gov.au/privacy/australian-privacy-principles/read-the-australian-privacy-principles.

The Australian Privacy Principles (guidelines): https://www.oaic.gov.au/privacy/australian-privacy-principles/australian-privacy-principles-guidelines.

Tutorial activities

1. Why is data protection and privacy law such an important area of law?
2. Do Australia's data protection and privacy laws only protect information stored in digital form, or is their application technology neutral?
3. What is the definition of an organisation, for the purpose of identifying an APP entity?
4. What provisions of the *Privacy Act 1988* (Cth) require an APP entity to comply with the APPs? How are those Principles given statutory effect within the *Privacy Act 1988* (Cth)?
5. Can individuals seek damages under the *Privacy Act 1988* (Cth) where an APP entity engages in an interference with privacy?
6. Ingot Pty Ltd is a small family-run investment vehicle used by the Walliams family to buy and sell gold bars at a profit. In the last financial year, it had a turnover of $2.5 million. Is Ingot Pty Ltd bound by the APPs?
7. The next financial year, Ingot Pty Ltd liquidates all of its holdings of gold, and as a result, it has an unusually high turnover of $14 million. Is Ingot Pty Ltd bound by the APPs in these circumstances?
8. Ananya Pty Ltd, a business trading in collectable coins, is an APP entity. It holds personal information of its customers to facilitate its transactions. One of its employees, Sian, routinely accesses Ananya Pty Ltd's customer contact details to trade coins on her own personal account. Has Ananya Pty Ltd breached any of the APPs? Has Sian breached any of the APPs?
9. Crysalis Ltd is a financial institution that is an APP entity. It holds personal information of its customers. Crysalis Ltd is hacked in 2024, despite having robust cyber security systems in place, and its customer's personal information is leaked onto the dark web. Can the OAIC seek a pecuniary penalty in these circumstances? Would your answer differ if a director of Crysalis Ltd had deliberately leaked its customer data?
10. Fire and Ice Pty Ltd (a small business in terms of its number of employees, but a large financial enterprise having a turnover of $3.5 million in the last financial year) is an extreme weather glamping provider. Glamping is a more luxurious form of camping, where accommodation and facilities are provided. Fire and Ice's sister company, Cover It All Pty Ltd, is a travel insurance provider. Fire and Ice takes glamping bookings through its website, where it asks customers to input their names, the number of campers in their party, their email address and credit card details for payment purposes. Fire and Ice does not collect information relating to any of the other members of the booking customer's party. Two months after Carmel books a glamping trip with Fire and Ice, she receives an email from Cover It All containing an information pack about its travel insurance products. Carmel is

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sure that Fire and Ice must have provided her contact details to Cover It All, and she is unhappy about the prospect of that having occurred. Is Fire and Ice governed by the *Privacy Act 1988* (Cth) and the APPs? Assuming that it is, has Fire and Ice collected personal and/or sensitive information, and has it breached any of the APPs? If there are any breaches of the APPs, what remedies can Carmel pursue under the *Privacy Act 1988* (Cth)?

11. Sit and Sip is a café that was operating in Melbourne during that city's COVID-19 lockdowns. Sit and Sip's turnover, at the time, was modest – being around $50,000 in the relevant financial years. When the Victorian Government mandated that cafes record their customers' check-in details, Sit and Sip chose to implement a "pen and paper" recording system rather than using QR code check-ins, since its relatively older clientele were less likely to be comfortable using mobile technology. Sit and Sip left a clip board and a pen for recording customer details next to its front door. It removed filled-out pages containing customer check-in details only at the end of each day. Serlene, who has recently been reflecting on those past years of COVID-19 restrictions, had always been unhappy about Sit and Sip's practice, and the potential invasions of privacy it may have implicated. Was Sit and Sip governed by the *Privacy Act 1988* (Cth) and the APPs at the time it implemented its "pen and paper" check in process? Assuming that it was, would Sit and Sip have breached any of the APPs? Assuming finally that it did, what would happen if Serlene now (several years later) sought to lodge a complaint with the OAIC?

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PART 4: TORTS

Chapter 15: Introduction to Negligence, and Duty of Care

Chapter 16: Breach of Duty, Damages, and Defences

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Chapter 15

Introduction to Negligence and Duty of Care

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Introduction

[15.10] The word "tort" was originally a synonym for "wrong". It is used by lawyers to refer to certain types of conduct which give rise to a civil cause of action. The law of torts consists of a miscellaneous group of actions providing for compensation or other redress for unlawful interference with an individual's person, property and, in certain circumstances, economic interests. Indeed, most of the torts in current use can be categorised according to the *rights they protect*. For instance, there are a group of torts that have evolved to protect a person's physical and mental well-being (eg the torts of negligence, assault and false imprisonment being examples). Others are concerned with the protection of property rights (eg the torts of trespass, conversion, detinue and nuisance), the protection of a person's good reputation (eg the tort of defamation), or the protection of a person's economic interests (eg the torts of passing off, negligence, unlawful interference with a contract and fraud).

The law of torts, with its focus on rights and duties, is an important area of law for society generally. But for those involved in business, it is vital to appreciate the potential liability that they may have in tort – particularly in the tort of negligence – to their customers, consumers, employees, other businesses and to the general public.

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Although the law of torts is, historically, a creature of the common law courts, it is the legislature that is now also playing an important role in clarifying and reforming the law. As we shall see, this is particularly true of the tort of negligence. For that reason, we have to consider both the common law and legislation in this chapter (and in the next) – both are sources of law governing the law of negligence – remembering that where legislation modifies or replaces a common law rule, the legislation is the authoritative source of law on that issue and prevails in the event of a conflict between the old (common law) and new (legislative) rules. Of course, the common law still has a significant role to play. The courts are the interpreters of the legislation, and the common law continues to set negligence rules for issues not covered by legislation. In both respects, the courts continue to build up a body of important negligence case law.

It is useful to begin a study of the law of torts by distinguishing it from other branches of the law.

Comparing tort with criminal law and contract law

Liability in tort and criminal liability

[15.20] As the criminal law is also concerned with the wrongful interference with an individual's person or property, it is not surprising that there is an overlap between criminal liability and liability in tort. In some cases, the same conduct may actually be both a tort and a crime. However, there is an important difference between the two forms of liability. A crime is considered to be an offence against the state, and therefore criminal proceedings are conducted in the name of the state. For instance, in the case of a sexual assault, the culprit may be prosecuted and, if found guilty beyond reasonable doubt, will receive a criminal sanction (a fine or imprisonment or some other penalty provided under the criminal law). The victim is not involved in the prosecution (except as a witness) and will not generally receive any compensation from the defendant as a result of criminal proceedings.

On the contrary, the law of torts is concerned with the individual's right to compensation for the loss or injury caused by wrongful conduct. In the same assault scenario described above, it is the victim who is responsible for bringing an action in tort and, provided that they can prove their case on the balance of probabilities, they will receive a civil law remedy (usually damages). Therefore, we can see that the *objects* or *functions* of tort and criminal law are quite distinct: the primary object of tort law is providing compensation for victims, whereas the primary object of the criminal law is to deter crime and punish offenders.

The law of torts and contract law

[15.30] There are important differences between the rights protected by the law of torts and those protected by the law of contract. Contract law is concerned with voluntary agreements and the enforcement of those agreements. On the other hand, the law of torts protects general rights enjoyed by all individuals that derive not from an agreement between the parties but from the law itself. Liability under tort law is therefore not dependent upon a contract existing between the parties. In some cases, conduct that amounts to a breach of contract may also constitute a tort. For example, a contract for the provision of services between a professional person, such as a solicitor or an accountant, and their client includes an implied term that the services will be performed with reasonable care. A failure to perform services with reasonable care gives rise to an action for a breach of contract (for breaching that implied term), but also gives rise to a claim based on the tort of negligence.

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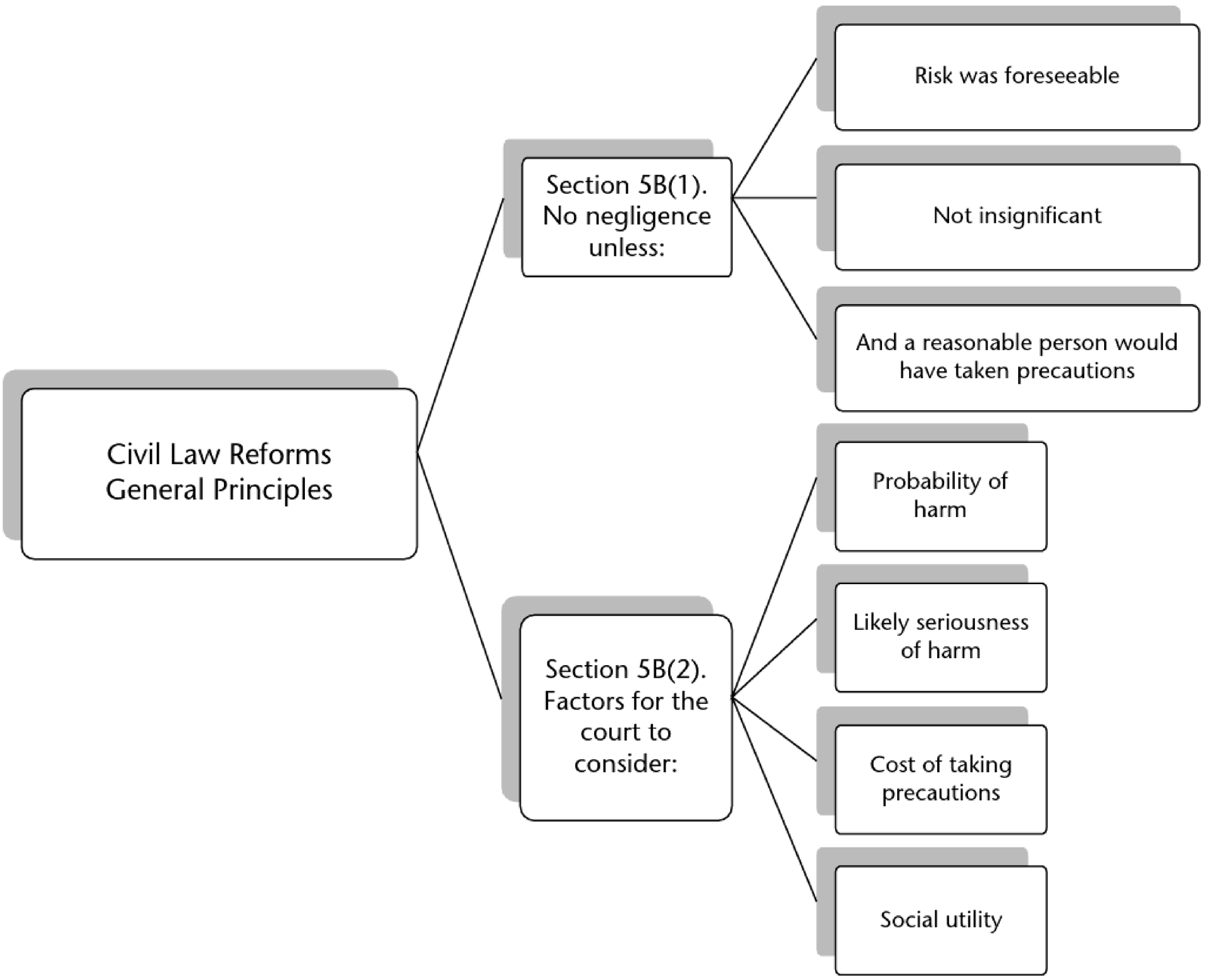
Negligence

Scope of the tort of negligence

[15.40] Whilst defamation cases (concerning the protection of one's reputation) seem to be reported in the news now more than ever, the dominant cause of action in tort today remains the tort of negligence. Negligence emerged as an independent tort following the landmark decision of the House of Lords in *Donoghue v Stevenson* [1932] AC 562, famously known as the "snail in the bottle case" for reasons that we will discover below. In the years following that decision, negligence assumed prime importance in the law of torts and has had a profound impact on society at large and on business in particular. Unlike other torts, for example, trespass, nuisance and defamation, negligence does not involve a specific form of conduct: an action for negligence is about careless behaviour in general and can, therefore, be applied to *any* form of human activity. Successful claims have been brought in a wide variety of circumstances including (but not limited to) traffic accidents, defective products, and the provision of professional services by doctors, solicitors, accountants and financial advisers.

Statutory reform

Figure 15.1 : Civil law reforms – general principles



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[15.50] As with the law of torts generally, the tort of negligence was originally a creature of the common law. However, some common law principles governing negligence liability have now been modified and enshrined in legislation (via the "civil liability reforms") in all Australian States and Territories.[1]

One aspect of the operation of these laws is to limit the scope of potential liability for negligence. Broadly speaking, this effect is achieved in two ways:

1. by modifying the common law principles governing the general ingredients of the cause of action in negligence such as breach, causation, and remoteness, as well as the circumstances in which a defendant can raise a defence to a plaintiff's negligence claim; and
2. by restricting the plaintiff's right to recover damages in a number of particular categories of negligence actions. For instance, liability is limited in circumstances where the plaintiff's injury arises from having been engaged in a "recreational activity".[2] Other examples include cases involving defendants who are professionals,[3] public authorities,[4] volunteers[5] and food donors.[6]

Another important objective of this legislation is to reduce the amount of damages that can be awarded to a plaintiff for personal injuries in a negligence action. The common law principle that aimed to provide the plaintiff with full compensation – "the plaintiff should be put in the position they were in before the tort occurred" – has been abandoned and replaced with a new system. For example, ss 28G, 28H and Pt VBA of the *Wrongs Act 1958* (Vic) place a cap on the amount that can be awarded to a plaintiff for general or non-economic damages.[7] Other measures include the abolition of exemplary, punitive and aggravated damages for personal injury,[8]

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1 *Civil Liability Act 2002* (NSW); *Wrongs Act 1958* (Vic); *Civil Liability Act 2003* (Qld); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (WA); *Civil Liability Act 2002* (Tas); *Civil Law (Wrongs) Act 2002* (ACT); *Personal Injuries (Liabilities and Damages) Act 2003* (NT).

2 *Civil Liability Act 2002* (NSW), Pt 1A Div 5; *Civil Liability Act 2003* (Qld), Ch 2 Pt 1 Div 4; *Civil Liability Act 2002* (WA), Pt 1A Div 4; *Civil Liability Act 2002* (Tas), Pt 6 Div 5. In South Australia, the *Recreational Services (Limitation of Liability) Act 2002* (SA) was later repealed by the *Statutes Amendment and Repeal (Fair Trading) Act 2009* (SA), s 60. Compare the *Wrongs Act 1958* (Vic), *Civil Law (Wrongs) Act 2002* (ACT), and the *Personal Injuries (Liabilities and Damages) Act 2003* (NT), which also do not deal with this issue.

3 *Civil Liability Act 2002* (NSW), ss 5O–5P; *Wrongs Act 1958* (Vic), ss 57–60; *Civil Liability Act 2003* (Qld), ss 20–22; *Civil Liability Act 1936* (SA), ss 40–41; *Civil Liability Act 2002* (Tas) ss 21–22. There are no corresponding provisions in the legislation enacted in Western Australia, the Northern Territory or the Australian Capital Territory.

4 *Civil Liability Act 2002* (NSW), Pt 5; *Wrongs Act 1958* (Vic), Pt XII; *Civil Liability Act 2003* (Qld), Ch 2 Pt 3; *Civil Liability Act 2002* (WA), Pt 1C; *Civil Liability Act 2002* (Tas), Pt 9; *Civil Law (Wrongs) Act 2002* (ACT), Ch 8. Compare the Northern Territory and South Australian laws which are silent on the matter.

5 *Civil Liability Act 2002* (NSW), Pt 9; *Wrongs Act 1958* (Vic), Pt IX; *Civil Liability Act 2003* (Qld), Ch 2 Pt 3 Div 2; *Civil Liability Act 2002* (Tas), Pt 10; *Civil Law (Wrongs) Act 2002* (ACT), Pt 2.2; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7. In Western Australia, see the *Volunteers (Protection from Liability) Act 2002* (WA) and in South Australia, the *Volunteers Protection Act 2001* (SA). See also the Commonwealth's *Volunteers Protection Act 2003* (Cth).

6 *Civil Liability Act 2002* (NSW) Pt 8A; *Wrongs Act 1958* (Vic) Pt VIB; *Civil Liability Act 2003* (Qld) Ch 2 Pt 3; *Civil Liability Act 1936* (SA), ss 74A–74B; *Civil Liability Act 2002* (Tas) Pt 8B; *Civil Law (Wrongs) Act 2002* (ACT) Pt 2.2A; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7A.

7 See also *Civil Liability Act 2002* (NSW) ss 16–17A; *Civil Liability Act 2003* (Qld), s 62; *Civil Liability Act 1936* (SA) s 52; *Civil Liability Act 2002* (WA) ss 9–10A; *Civil Liability Act 2002* (Tas) ss 27–28; *Civil Law (Wrongs) Act 2002* (ACT), s 99; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) ss 24–27. But note *Perisher Blue Pty Ltd v Nair-Smith* (2015) 90 NSWLR 1, 42 [195], where the NSW Court of Appeal upheld a decision that Pt 2 of the *Civil Liability Act 2002* (NSW) is invalid to the extent of its inconsistency with the former *Trade Practices Act 1974* (Cth), s 74(1) (now the *Australian Consumer Law*, s 60, contained in the *Competition and Consumer Act 2010* (Cth), Sch 2)). This means that damages recoverable under the due care and skill consumer guarantee contained in the *Australian Consumer Law*, s 60 are determined without reference to the statutory limitations imposed by the *Civil Liability Act 2002* (NSW).

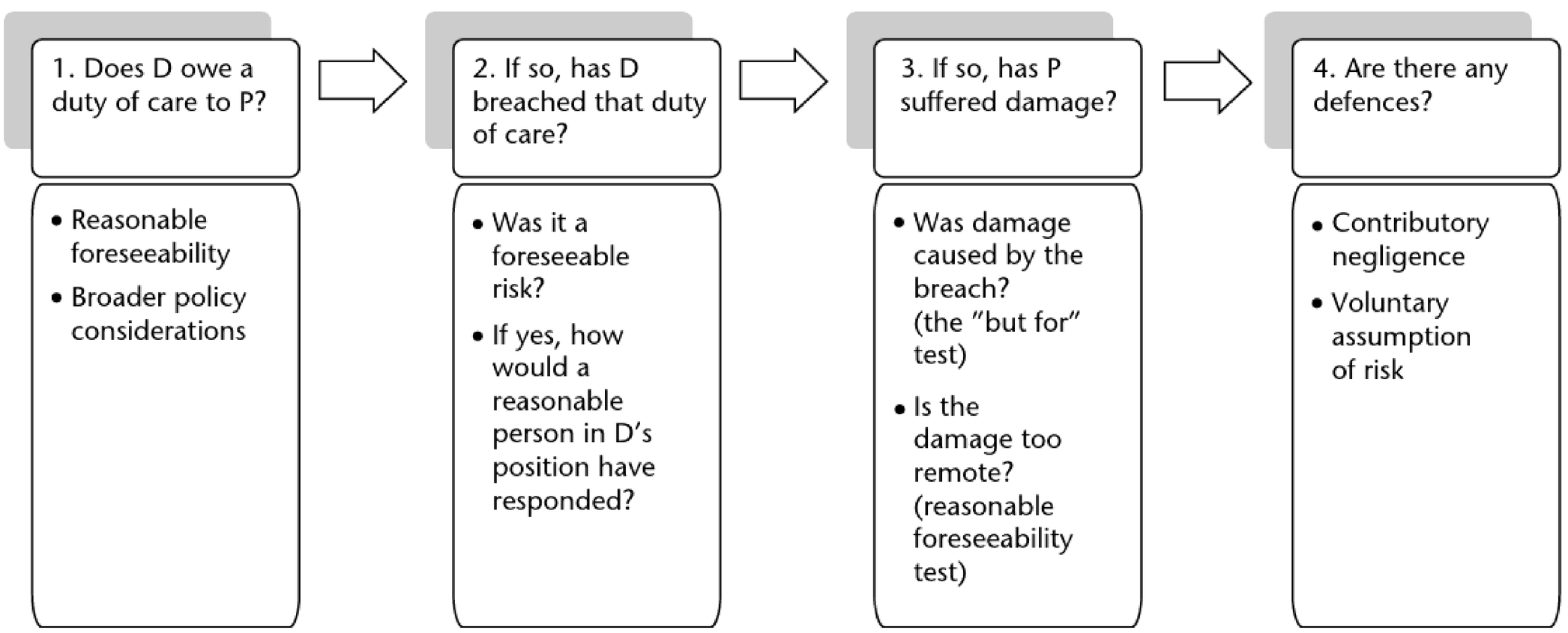
8 *Civil Liability Act 2002* (NSW), s 21; *Civil Liability Act 2003* (Qld), s 52; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 19. These provisions are not replicated in the other States or Territories.

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and a limitation on damages for past or future economic loss due to loss of earnings or impairment of earning capacity.[9]

Despite these legislative reforms, basic common law principles still underpin some aspects of the law of negligence. Legislation overrides the common law only to that legislation's extent, and the civil liability reforms did not result in a complete legislative codification of the law of negligence. For this reason, we need to consider both common law principles of negligence and also statutory provisions enacted via the civil liability reforms referred to above.

Figure 15.2 : Negligence criteria



The defendant, in an action based on negligence, will only be liable if the plaintiff can prove that:

1. the defendant owed the plaintiff a duty of care; and
2. the defendant was in breach of this duty of care; and
3. the defendant's breach of duty was the cause of the plaintiff's loss ("causation"); and
4. the damage suffered by the plaintiff was not too remote ("remoteness of damage").

There are two other considerations:

1. whether any defences or mitigating factors (including contributory negligence, voluntary assumption of risk and the peer professional opinion defence) are relevant; and
2. whether any other aspects of the civil liability reforms are relevant.

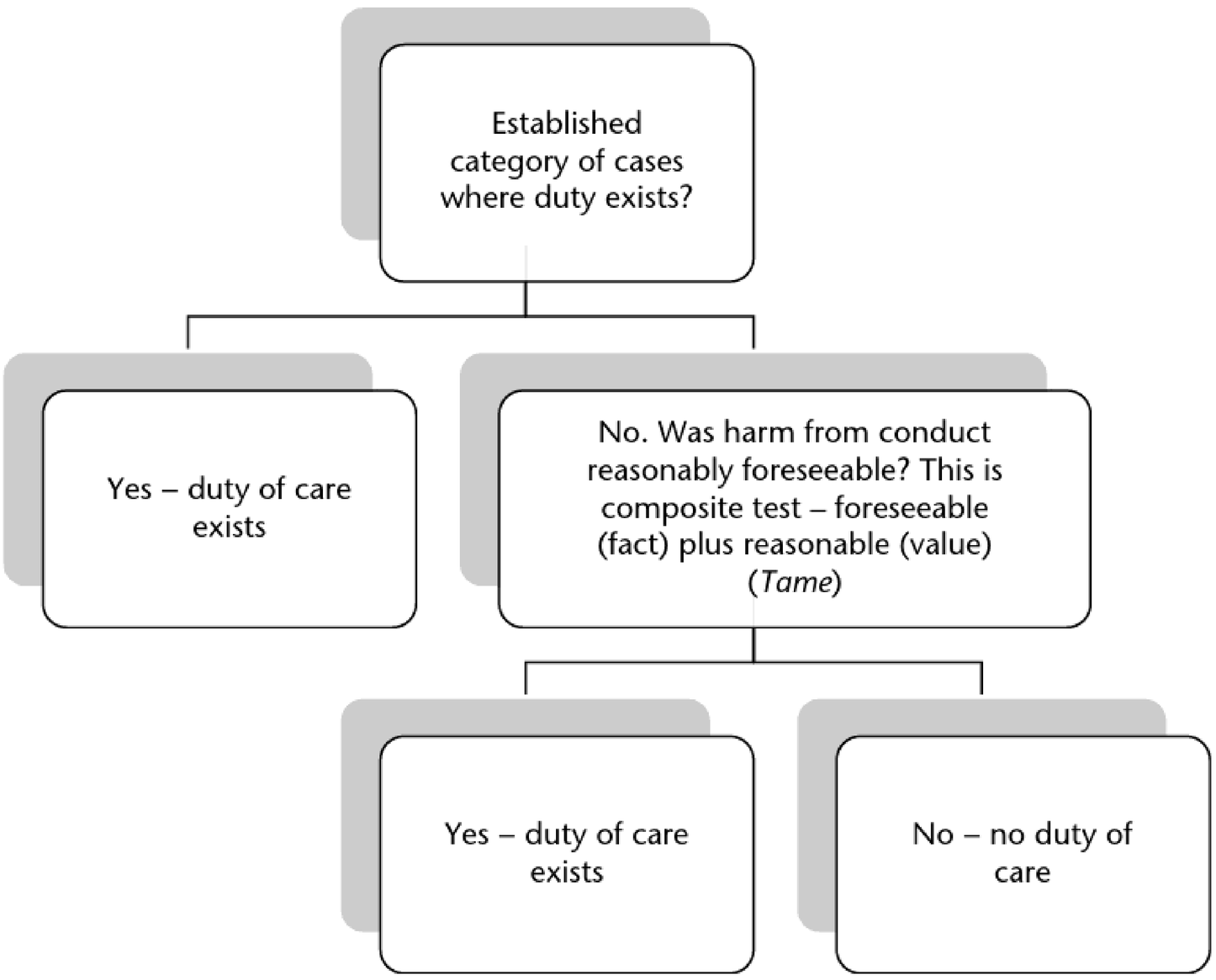
The duty of care requirement is the focus of the remainder of this chapter. The remaining elements of a negligence action are addressed in Chapter 16. As we will see, whether or not there is a duty of care owed in the law of negligence continues to be determined by the common law.

9 *Civil Liability Act 2002* (NSW), ss 12–15C; *Wrongs Act 1958* (Vic), s 28F; *Civil Liability Act 2003* (Qld), ss 54–55; *Civil Liability Act 1936* (SA), ss 54–55; *Civil Liability Act 2002* (WA), s 11; *Civil Liability Act 2002* (Tas), s 26; *Civil Law (Wrongs) Act 2002* (ACT), s 98; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), ss 20–22. In Queensland, these provisions must also be read in conjunction with the *Personal Injuries Proceedings Act 2002* (Qld), which aims to minimise the cost of claims. See also *Personal Injuries (Civil Claims) Act 2003* (NT).

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Duty of care

Figure 15.3 : Is there a duty of care?



[15.60] The first step to establishing liability in negligence is identifying the existence of a duty of care. There can be no liability in negligence where no duty of care is owed. In the following landmark decision, the test for a duty of care was established and the modern law of negligence was born.

Donoghue v Stevenson

[15.70] *Donoghue v Stevenson* [1932] AC 562. On the evening of Sunday, 26 August 1928, May Donoghue and an unnamed friend went to the Wellmeadow Cafe in Paisley, Scotland. The friend ordered and paid for an "ice-cream drink" (ginger beer and ice cream). The owner, Mr. Minchella, brought out the order and poured the ginger beer from an opaque bottle into the glass containing ice cream. May Donoghue drank some of the contents and her friend lifted the bottle to pour the remainder of the ginger beer into the glass. The remains of a decomposed snail dropped out of the bottle and into the glass. May Donoghue later complained of stomach pain and her doctor diagnosed her as having gastroenteritis and as being in a state of nervous shock (an unfortunate term used in older negligence cases to refer to the suffering of mental harm).

As there was no contract between herself and the café owner (because she was not the purchaser of the drink), May Donoghue could not sue the café in contract law for breach of an implied term that the goods (the drink) be of merchantable quality (ie, fit for human consumption). For this reason, she decided to sue the *manufacturer*, David Stevenson, in tort for negligence. She argued that the manufacturer "owed a duty … to take care that the ginger-beer

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which he manufactured, bottled, labelled and sealed … contained nothing which would cause her injury". Such a writ (type of legal action) had never been issued before: up to this point, a manufacturer was not, in the absence of a contract or fraudulent conduct, liable to a consumer in negligence.

The House of Lords upheld May Donoghue's appeal. In the course of his judgment, Lord Atkin explained his famous "neighbour principle" that has become the key conceptual tool when deciding whether a duty of care is owed by one person to another. Having referenced Jesus' parable of the Good Samaritan (see the Bible's Luke 10:25–37)[10] and its aspirational direction to "love thy neighbour as thyself", Lord Atkin articulated a restricted view of when and how a Good Samaritan should act:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question [*because it was a lawyer who had asked the original question that triggered the parable*], Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

In endorsing the common law view that the duty is merely to avoid, and not prevent, damage or injury to others, Lord Atkin effectively validated the actions of the Levite and the priest in crossing to the other side of the road: the Good Samaritan went too far and may even have exposed himself to the risk of litigation.[11]

Lord Atkin then applied his limited principle to the specific facts of the case:

> [A] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

The case was returned to Scotland for the Court of Session to apply the ruling to the facts of the case. In the event, David Stevenson died within a year of the decision and the executors of his estate settled the dispute out of court for £200.

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10 A man was going down from Jerusalem to Jericho when he was attacked by robbers. They stripped him of his clothes, beat him and went away, leaving him half dead. A priest happened to be going down the same road, and when he saw the man, he passed by on the other side. So too a Levite, when he came to the place and saw him, passed by on the other side. But a Samaritan (mainstream Jews, for historical reasons, held Samarian Jews in very low esteem) as he travelled came where the man was, and when he saw him, he took pity on him. He went to him and bandaged his wounds, pouring on oil and wine. Then, he put the man on his own donkey, brought him to an inn and took care of him.

11 There has long been anxiety that Good Samaritan rescuers or volunteers, particularly doctors and other health professionals, may owe a duty of care to the rescued. The civil liability reform legislation specifically exempts Good Samaritan rescuers and volunteers from liability provided they act in good faith: *Civil Liability Act 2002* (NSW), s 57; *Wrongs Act 1958* (Vic), s 31B; *Civil Liability Act 1936* (SA), s 74; *Civil Liability Act 2002* (WA), s 5AD; *Civil Liability Act 2002* (Tas), s 35B; *Civil Laws (Wrongs) Act 2002* (ACT), s 5; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 8.

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[15.80] Shortly after *Donoghue v Stevenson*, Lord Atkin's duty of care principle was extended to other equally ordinary, everyday consumer goods – this time, underwear – in *Grant v Australian Knitting Mills Ltd*.

Grant v Australian Knitting Mills Ltd

[15.90] *Grant v Australian Knitting Mills Ltd* [1936] AC 85. Dr Grant, a medical practitioner, purchased two pairs of woollen underwear from a retailer. There was no instruction to wash the underwear before wearing and Dr Grant did not do so. He suffered a skin irritation within nine hours of first wearing them. Dr Grant continued to wear the underwear for the rest of the week. He then wore the second pair for the next week and washed the first pair. This was in an era when changing underwear only once a week was the ordinary custom of ordinary people. The skin irritation got worse, and it developed into a severe case of dermatitis that left Dr Grant in hospital for weeks. He almost died. As excessive sulphides in the underwear were the cause of the dermatitis, Dr Grant sued the retailer (for breach of the implied terms that the goods were fit for purpose and were of merchantable quality) and the manufacturer, the Australian Knitting Mills, alleging that it had been negligent in failing to take reasonable care in the preparation of the garments. In finding that the manufacturer owed a duty of care to Dr Grant as the consumer, the Privy Council looked to the then-recently decided case of *Donoghue v Stevenson* in the House of Lords and applied the statement of Lord Atkin (see the quotation extracted at [15.70] in relation to *Donoghue v Stevenson* above).

Foreseeability of harm – "established" and "novel" scenarios

[15.100] The "neighbour principle" has often been regarded as no more than a simple test of reasonable foreseeability of harm, with a low threshold to meet. As such, it has been criticised as an inadequate *sole* determinant of the duty of care issue to be applied in all negligence cases. The courts have flirted with various other control mechanisms and theories of liability designed to protect against undue expansion of the law of negligence on the basis of foreseeability alone. Chief among these theories was the *proximity principle* that was first espoused in *Jaensch v Coffey* (1984) 155 CLR 549. While, at one time, this proximity theory represented the orthodox approach to negligence liability in Australia, the High Court has subsequently abandoned the concept without presenting a single alternative framework for determining the duty of care issue.

The decision in *Tame v New South Wales* (2002) 211 CLR 317 (see [15.140]) shows that the High Court is actively engaged in a fresh review of the basic principles of negligence liability. The Court's reasoning in that case, as will be made clear below, demonstrates that the *reasonable foreseeability test* remains the "touchstone" of liability for the tort of negligence.

Duty of care in established scenarios

[15.110] Satisfying the "reasonable foreseeability" test is relatively straightforward where the relationship between the plaintiff and the defendant is one that falls into one of the many *established categories* where

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a duty has already been recognised by the courts. In many cases, courts will not even need (as a matter of practicality) to engage with an analysis of the duty of care step at all. For example, although the precise nature and extent of the duty of care depends on the circumstances in any given case, it is clear that:

- manufacturers owe a duty of care to consumers;
- motorists owe a duty of care to other road users;
- doctors and other health professionals owe a duty of care to their patients or clients;
- lawyers, accountants, engineers and architects owe a duty of care to their clients;
- teachers owe a duty of care to their students;
- employers owe a duty of care to their employees;
- local councils owe a duty of care to people who use their facilities;
- banks and financial advisers owe a duty of care to their customers; and
- occupiers of property owe a duty of care to those who come onto their land or into their buildings.

[15.120] These are just some examples. The "reasonable foreseeability" test for establishing the existence of a duty of care is established for cases involving physical injury and/or property damage, as well as possible additional economic loss.

The duty of care in novel situations

[15.130] In novel circumstances, where the duty of care question is *not* established by precedent (or admitted by a defendant), the High Court reaffirmed in *Tame* that the reasonable foreseeability inquiry is *a composite test* involving:

1. *an issue of fact* (is it reasonably foreseeable that, if the defendant does not exercise reasonable care, the plaintiff would be injured?); and
2. *a question of value* (requiring an assessment of community standards – would the community regard it as reasonable for a duty of care to exist in these circumstances?).

Tame v New South Wales

[15.140] *Tame v New South Wales* (2002) 211 CLR 317. Mrs Tame was involved in a car accident in 1991. She was tested to determine her blood alcohol content. A police sergeant incorrectly reported her as having a blood alcohol content reading of 0.14, almost three times the legal limit of 0.05 in Australia. This error was soon corrected, and it was never acted upon by anybody. However, Mrs Tame, who had consumed very little alcohol for 20 years, became obsessed by the error when informed by her solicitor in 1992, and in 1995 she was diagnosed as having developed a psychotic depressive illness that was caused by her shame that the community would believe she had been drunk when the accident occurred. She sued the police in negligence.

The High Court dismissed the claim. The respondent did not owe a duty of care because:

1. *as a matter of fact*, the police officers were entitled to conclude that the risk of a normal person becoming mentally ill after reading an incorrect entry was so small that it could not reasonably be foreseen; and

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2. *as a reflection of community values*, the High Court said that the community would not regard it as reasonable for a duty of care to exist because it would have placed too great a burden on the police if they were liable for the consequences of every relatively minor administrative mistake.

[15.150] In *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649, Allsop J outlined the approach to be taken when considering the duty of care issue in a novel case, by reference to what is known as the "salient features" test. His Honour said:

> If the circumstances fall within an accepted category of duty, little or no difficulty arises. If, however, the posited duty is a novel one, the proper approach is to undertake a close analysis of the facts bearing on the relationship between [the parties] by reference to the "salient features" or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury … This approach requires not only an assessment of foreseeability but also attention to such considerations as control, vulnerability, assumption of responsibility and nearness or proximity.

In the following decision, the Western Australian Supreme Court of Appeal considered a store owner's liability for personal injury inflicted by a third party in circumstances where there was *no relevant established duty* to protect from harm.

Osborne Park Commercial Pty Ltd v Miloradovic

[15.160] *Osborne Park Commercial Pty Ltd v Miloradovic* (2019) 54 WAR 1. The plaintiff, a customer of the store owner (Harvey Norman), was – as a result of the negligence of a truck driver – crushed between his own car and the truck in an access way which serviced multiple stores and which was adjacent to the Harvey Norman store. The plaintiff had driven into the access way on the instruction of the store's reception staff to collect the goods that he had purchased from the Harvey Norman store's "pick-up bay".

After acknowledging that *mere foreseeability of harm is an insufficient basis* for liability for a failure to protect against harm inflicted by another person, the court went on to identify *additional factors which required the imposition of a duty of care* on the part of Harvey Norman to take reasonable steps to avoid customers being struck by other vehicles when collecting their goods from the pick-up area. These factors included the commercial and physical proximity between the parties, Harvey Norman's familiarity with the access bay, the reliance of its customers on the provision of a safe place to collect purchased goods and Harvey Norman's control over the manner and circumstances of the collection of goods. Taking these additional factors into account, the Court decided that Harvey Norman, as a third party, owed a duty of care to the plaintiff.

[15.170] More recently again, in a series of decisions attracting significant media (including international media) attention, the Federal Court of Australia (and then the Full Court of the Federal Court of Australia) was asked to determine whether the Federal Minister for the Environment owed Australian children a duty of care to protect them from physical injury, property damage, mental harm and economic loss when considering whether or not to approve an extension to a coal mine and undertaking other later action.

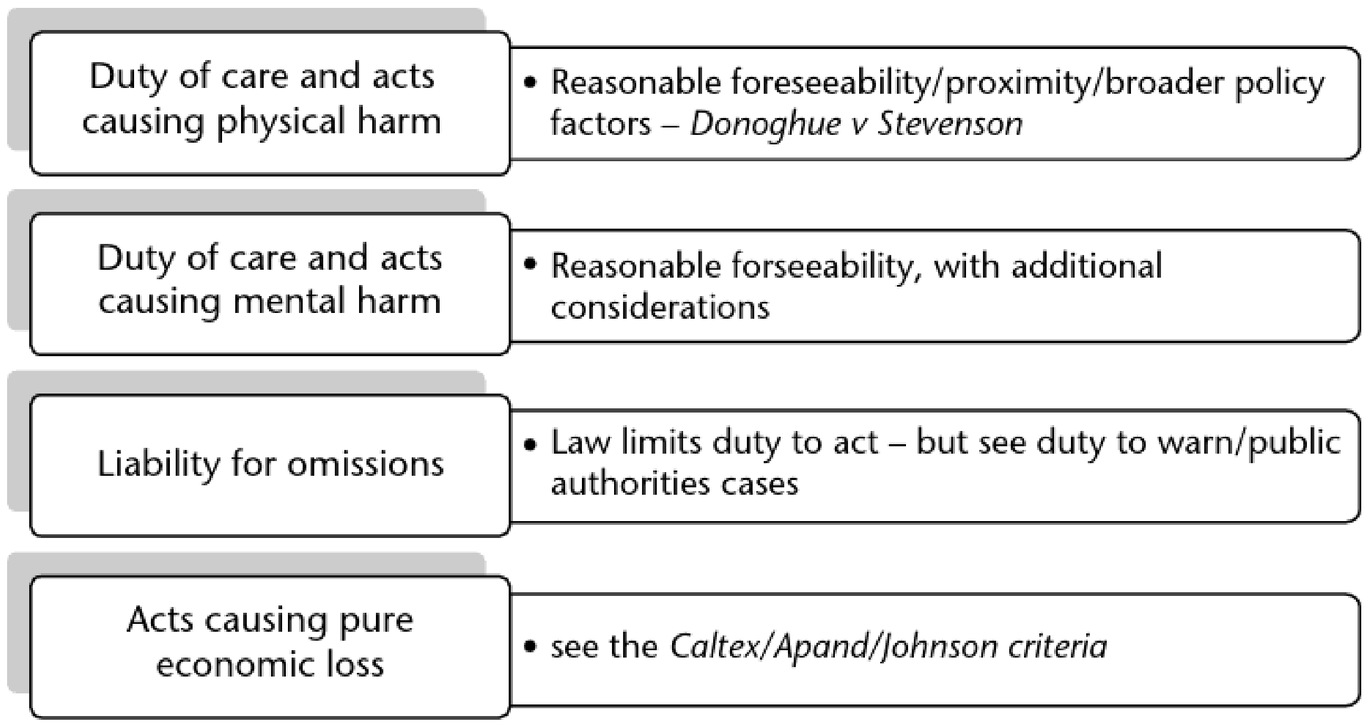
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Minister for Environment v Sharma

[15.175] *Minister for Environment v Sharma* (2022) 291 FCR 311. At first instance (see *Sharma v Minister for the Environment* (2021) 391 ALR 1), the Federal Court applied the salient features test from the *Caltex Refineries* case addressed at [15.150]. It found that the factors of control, vulnerability and reliance tended in favour of a duty of care, as did reasonable foreseeability, whilst coherence with environmental legislation and indeterminacy were "agnostic" factors. The Court, at first instance, held that a duty of care did exist, but restricted that duty of care to the prevention of physical injury and considered the immediate coal mine expansion decision only. On appeal, however, the Full Court rejected the imposition of a duty of care. It found that assessing breach of the duty would raise policy questions unsuitable for resolution in the courts, that imposition of the duty would be inconsistent with relevant environmental legislation, and that indeterminacy, lack of special vulnerability and control tended against the imposition of a duty of care. This is not to say that the law has no role to play in relation to climate change; but only that the law of negligence is not at play in these specific circumstances.

The duty of care in specific situations

Figure 15.4 : Nature of the duty of care



[15.180] We will now consider the relevant duty of care tests applying in five specific situations. There is clearly overlap between them, but it is nevertheless useful to examine how the courts have formulated different duty of care tests depending upon the type of act or omission and/or the kind of damage inflicted. The situations to be addressed are:

1. Negligent acts causing physical harm (personal injury and/or property damage), which may be accompanied by economic loss.
2. Negligent acts causing mental harm.
3. Liability for omissions.

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4. Negligent acts causing pure economic loss.
5. Negligent statements causing pure economic loss.

[15.190] From the outset, it can be noted that it is important to accurately identify which category of case is at play. If the type of case is misidentified, there is then a risk that the wrong duty of care rules might be applied, potentially leading to an incorrect assessment of whether or not a duty of care exists.

Negligent acts causing physical harm

[15.200] In the case of a positive infliction of physical harm – which includes personal injury and/or property damage, which may be accompanied by economic (monetary) loss – the existence of a duty of care is well established. As we have seen, the existence of a duty depends upon the "reasonable foreseeability" test from *Donoghue v Stevenson* – that is, whether the possibility of injury to the plaintiff was reasonably foreseeable. For example, in an action arising from a motor vehicle accident where the plaintiff passenger sues the defendant driver, the court would ask whether it was foreseeable that a passenger in the defendant's vehicle would suffer injury (not necessarily a specific type of injury) if the defendant drove carelessly (not necessarily carelessly in a specific type of way).

As we noted above (see [15.110]), there are many "physical injury" relationships that fall into duty of care categories already established by precedent. An example of a relationship that has generated significant case law (and that is highly relevant for business) is the situation where an occupier of property owes a duty to take positive steps to protect persons lawfully entering their property. Supermarkets, for example, have a duty to their customers and may be liable for the failure to prevent injuries sustained by customers. A common type of case arising in this context is colloquially known as "slip and trip", illustrated by *Australian Safeway Stores Pty Ltd v Zaluzna*.

Australian Safeway Stores Pty Ltd v Zaluzna

[15.210] *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479. On 20 January 1979, the respondent entered the "foyer area" of the appellant's supermarket intending to buy some cheese. It was a rainy day and the vinyl-tiled floor of the foyer area had become wet or moist. Unfortunately, before entering the area of the supermarket where the merchandise was displayed, the respondent slipped and fell heavily on the floor and was injured. At the trial, the Court held that there was no breach of the restricted duty of care owed by an occupier to an invitee. The plaintiff appealed and the Full Court ordered a new trial. The defendant appealed to the High Court.

The High Court denied the appeal and ordered a retrial. It held that the fact that the respondent was a lawful entrant upon the land of the appellant establishes a *relationship* between them, which of itself, suffices to give rise to a general duty on the part of the appellant to take *reasonable care to avoid a foreseeable risk* of injury to the respondent.

Note: At the retrial, the plaintiff lost (again) and appealed to the Full Court (again). The Full Court upheld her appeal (again) but, as it could not substitute its own judgment for the trial decision, it ordered a retrial in the Supreme Court (again). Unfortunately, there is no report of the final decision in the matter nor is there any information regarding the legal costs incurred by the parties over a dispute spanning more than a decade.

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[15.220] Although the "reasonable foreseeability" standard is usually easily met, as *Modbury Triangle Shopping Centre Pty Ltd v Anzil* shows, it is only in exceptional circumstances that a duty will arise to protect a person from the criminal conduct of third parties (even when that conduct occurs within the defendant's property).

Modbury Triangle Shopping Centre Pty Ltd v Anzil

[15.230] *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254. The appellant was the owner of the Modbury Triangle Shopping Centre. Anzil, the respondent, was the manager of a video shop owned by Focus Video Pty Ltd which leased premises in the Centre. The Centre had a large outdoor area for car parking. The video shop faced the car park. At night, the car park was dark (except for slight illumination from fluorescent lighting on the roof of the verandah facing the car park), unless the car park lights were turned on. An attack on Anzil causing physical injury occurred at around 10.30 pm. Anzil closed the video shop and walked to his car in the car park. The car park lights were not on at the time. He was attacked by the three men and was badly injured.

The High Court held that the appellant's duty as an occupier of land did not extend to taking reasonable care to prevent physical injury resulting from the *criminal behaviour of third parties* on that land (emphasis added):

> To impose such a burden upon occupiers of land, in the absence of contract or some special relationship … would be *contrary to principle; a principle which is based upon considerations of practicality and fairness*.

[15.240] Still, the position in the *Modbury Triangle* case is subject to qualification. A duty of care can be imposed upon an occupier of land to prevent injury by a third-party assailant where the occupier has control over the manner in which a worker moves across that land: *Karatjas v Deakin University*.

Karatjas v Deakin University

[15.245] *Karatjas v Deakin University* (2012) 35 VR 355. Karatjas was an employee of a contractor, working at the Deakin University Burwood Campus. Karatjas was required to park in a particular car park, and used a particular path to walk to and from her car when working. When that path was blocked as a result of temporary works being carried out, Karatjas needed to use a different path. One night she was injured when attacked while walking back to her car along that alternative path. Deakin University argued that, applying *Modbury Triangle*, it owed no duty of care to protect Karatjas against a third-party criminal act. However, a duty of care was held to exist here on the basis that Deakin University controlled the manner in which Karatjas moved around the campus.

Negligent acts causing mental harm

[15.250] In the early negligence cases addressing mental harm, such harm tended to be described as "nervous shock". By today's standards and understandings of mental harm, this choice of terminology is

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unfortunate. However, it also reflects the tendency of courts, in prior times and reflecting the community standards of the day, being reluctant to recognise mental harm as a kind of compensable damage *in its own right*.[12] Rather, courts required that the mental harm be a consequence of direct and contemporaneous *physical injury* or, later, at least required the plaintiff to be within the area of *possible* physical injury by impact. The principles for the recovery of damages for mental harm at common law were reconsidered by the High Court in *Tame v New South Wales* and in *Annetts v Australian Stations Pty Ltd*.[13] It should also be noted that the civil liability reforms affect liability for mental harm, as addressed in [15.280]. Amongst other things, these reforms now impose statutory duty of care tests for cases involving pure mental harm in some jurisdictions.

Annetts v Australian Stations Pty Ltd

[15.260] *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317. Mr and Mrs Annetts' son, James, went to work as a jackeroo for Australian Stations in Western Australia as a 16-year-old. A jackeroo is a young person who works on a livestock station as a way of obtaining practical experience working on the land. The Annetts only agreed to allow their son to work for Australian Stations after making enquiries as to the safety arrangements that would be put in place for James, and after being assured that he would be under constant supervision. However, despite those assurances, after only seven weeks, James was sent to work alone as a caretaker in a remote location. In December 1986, it was discovered that James was missing. Police informed the Annetts of this over the phone, and Mr Annetts subsequently collapsed. A prolonged search for James then ensued, leading to the discovery of his body in April. James had died as a result of dehydration, exhaustion, and hypothermia. The Annetts brought an action against the defendant claiming compensation for their psychiatric injury.

The High Court held that *reasonable foreseeability of risk* should be the fundamental test for the imposition of a duty of care in cases involving pure psychiatric injury, and opted for a simple test of reasonable foreseeability that considers:

1. the *relationship* between the parties;
2. the plaintiff's *physical and temporal proximity* to the event that causes the mental harm; and
3. what the *reasonable response of a person of normal fortitude* might be.

The Court thus decided that the question to be asked is the one that was asked in *Donoghue v Stevenson*: whether it is reasonable to require one person to have in contemplation injury of the kind that has been suffered by another and to take reasonable care to guard against such injury? The Court:

- accepted that the "ordinary fortitude" of a person is relevant, not as a separate test, but in relation to whether or not psychiatric injury is reasonably foreseeable. Kirby and Gummow JJ said:

12 To see how far we have come in relation to understanding mental illness, see *Chester v Municipality of Waverley* (1939) 62 CLR 1. For a brilliant discussion of *Chester* (and an insight into the only empathetic judge on the High Court, Dr H V Evatt), see Gideon Haigh's article in the Bar News at https://barnews.nswbar.asn.au/winter-2021/99-doc-evatt-and-chester-v-waverley-corporation/.

13 The High Court heard the two cases together because of their common elements – the harm suffered by the plaintiffs was "pure" psychiatric injury resulting from negligent conduct.

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> [T]he concept of "normal fortitude" should not distract attention from the central inquiry, which is whether, in all the circumstances, the risk of the plaintiff sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful.

- rejected the proposition that only psychiatric injury suffered as a result of "nervous shock" creates an entitlement to compensation. Gleeson CJ said:

> The process by which the applicants became aware of their son's disappearance, and then his death, was agonisingly protracted, rather than sudden … a rigid distinction between psychiatric injury suffered by parents in those circumstances, and similar injury suffered by parents who see their son being run down by a motor car, is indefensible.

- rejected the rule that a person must witness at the scene of an accident the victim being harmed or killed. Gaudron J said:

> To treat those who directly perceive some distressing phenomenon or its aftermath … as the only persons who may recover for negligently caused psychiatric harm is … productive of anomalous and illogical consequences.

It will be recalled that the High Court came to a different conclusion on the facts (though applying the same legal test) in *Tame* (see [15.140]). The High Court concluded that, on the facts of that case, mental harm to Mrs Tame was not reasonably foreseeable. The police officers were entitled to conclude that the risk of a normal person becoming mentally ill after reading an incorrect blood alcohol content entry was so small that it could reasonably be disregarded.

[15.270] As the different outcomes in *Annetts* and *Tame* demonstrate, whether or not the reasonable foreseeability test is satisfied (and thus whether or not a duty of care to prevent mental harm will be imposed) will depend upon the facts. In a recent decision of the High Court, *Kozarov v Victoria* (2022) 273 CLR 115, it was held that the State of Victoria owed a duty of care to prevent mental harm to an employee of the Office of Public Prosecutions in circumstances where the Office had a vicarious trauma policy in place from the time that the employee was engaged. The very existence of the policy showed that the risk of mental harm to the employee was reasonably foreseeable.

[15.280] Liability for "mental harm" is now, in some Australian jurisdictions, limited by the reform legislation.[14] Statutory tests for the imposition of a duty of care are now imposed by legislation in New South Wales, Victoria, South Australia, Tasmania, Western Australia and the ACT. A person does not owe a duty to take care not to cause another person mental harm unless a reasonable person in the defendant's position would foresee that a person of normal fortitude in the plaintiff's position might (in the circumstances of the case) suffer a recognised psychiatric illness if care was not taken. In Victoria, this rule applies only to cases involving pure mental harm.[15] In the other jurisdictions, the rule applies to any case involving mental harm, including cases of consequential mental harm suffered in addition to other loss.[16] Relevant circumstances to consider are identified in the legislation including whether or not the mental

14 Liability for mental harm is dealt with by legislation in all States except Queensland and the Northern Territory: *Civil Liability Act 2002* (NSW), Pt 3; *Wrongs Act 1958* (Vic), Pt XI; *Civil Liability Act 1936* (SA), s 53; *Civil Liability Act 2002* (WA), Pt 1B; *Civil Liability Act 2002* (Tas), Pt 8; *Civil Law (Wrongs) Act 2002* (ACT), Pt 3.2.

15 *Wrongs Act 1958* (Vic), s 72(1).

16 *Civil Liability Act 2002* (NSW), s 32(1), (3); *Civil Liability Act 1936* (SA), s 33(1), (2)(b); *Civil Liability Act 2002* (Tas), s 34(1), (3); *Civil Liability Act 2002* (WA), s 5S(1), (3); *Civil Law (Wrongs) Act 2002* (ACT), s 34(1), (3).

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harm was the result of a sudden shock, whether the plaintiff witnessed a person being killed, injured, or put in peril at the scene, the nature of the plaintiff's relationship with any such person and whether or not there was any pre-existing relationship.[17]

Other provisions also affect mental harm cases. For example, in *King v Philcox* (2015) 255 CLR 304, the High Court considered the operation of s 53(1) of the *Civil Liability Act 1936* (SA), which provides that damages may only be awarded for mental harm if the injured person was "present at the scene of the accident when the accident occurred" or "is a parent, spouse, domestic partner or child of a person killed, injured or endangered in the accident". The High Court held that the plaintiff (the brother of a person killed as a result of the defendant's negligent driving) could not recover damages for a major depressive illness in circumstances where he heard of his deceased brother's accident a few hours after it happened and realised that he had driven past the location of the accident earlier in the day when his brother had been trapped and was dying in the car.

By contrast, in *Wicks v State Rail Authority of New South Wales* (2010) 241 CLR 60, the High Court held that s 30(2) of the *Civil Liability Act 2002* (NSW) (a largely equivalent provision) did not operate to prevent recovery by two police officers who were among the first upon the scene of a train derailment. Section 30(2) provides that a plaintiff who suffers pure mental harm in connection with another person being killed, injured or put in peril by the defendant's negligence is not entitled to recover damages unless the plaintiff "witnessed, at the scene" the incident or "is a close member of the family of the victim". The High Court took the view that in this case the injuries of the derailment victims and their being put in peril continued for an extended period during which these events were witnessed by the plaintiff rescuers.

Liability for omissions

[15.290] Generally, the common law imposes no liability for omissions – in other words, for failing to act. The classic example, though fortunately not one that we encounter commonly in our lives, concerns a child drowning in a shallow swimming pool. As morally confronting as it may be, unless the onlooker is a parent or a lifeguard or has some close relationship with the child, the common law imposes no duty to rescue the child.

The only circumstance in which a person may be liable for omissions is where they have a positive duty to act. Positive duties may be imposed where:

- the parties are in a pre-existing relationship that contains elements of reliance or dependence; or
- the defendant is in a position of control.

Examples include parent and child, doctor and patient, school authority or teacher and student, employer and employee and occupier and visitor.

[15.300] In *CAL No 14 Pty Ltd v Motor Accidents Insurance Board*, the High Court considered the extent to which licensees or publicans have a duty of care to look after their customers' health and welfare. The omission in this case was the failure to prevent a customer, who was under the influence of alcohol, from driving home.

17 *Civil Liability Act 2002* (NSW), s 32(2); *Wrongs Act 1958* (Vic), s 72(2); *Civil Liability Act 1936* (SA), s 33(2)(a); *Civil Liability Act 2002* (Tas), s 34(2) (addressing the first and fourth matters only); *Civil Liability Act 2002* (WA), s 5S(2); *Civil Law (Wrongs) Act 2002* (ACT), s 34(2).

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CAL No 14 Pty Ltd v Motor Accidents Insurance Board

[15.310] *CAL No 14 Pty Ltd v Motor Accidents Board* (2009) 239 CLR 390. In January 2002, Shane Scott went to the Tandara Motor Inn in Triabunna, Tasmania, for a drink after work. Scott gave the keys to his motorbike to Kirkpatrick, the licensee, and told Kirkpatrick not to allow him to ride home. He remained there drinking for about three hours. Kirkpatrick knew Scott was so drunk that he should refuse him service and that Scott would endanger himself if he left on his motorcycle. Nevertheless, he handed Scott the keys to his motorbike when Scott aggressively demanded them. Scott then left the hotel and, soon after, lost control of the bike, collided with a bridge, and was killed. At the time of his death, Scott had a blood alcohol level of 0.253 (significantly higher than the maximum allowed under Australian law, for driving purposes, of 0.05). His widow, Sandra Scott, sued the owner and licensee of the motor inn, alleging that they owed her husband a duty of care.

The High Court held that a publican owed no duty to prevent a patron from driving his motorcycle home from the premises where he had been drinking. Although the actual outcome in this case was decided on a narrower basis, the High Court took the unusual step of "explicitly stating" the following "fundamental reason" why the lower court's determination on the duty of care was incorrect (emphasis added):

> The reason is that outside exceptional cases … persons in the position of the Proprietor and the Licensee … owe no general duty of care at common law to customers *which requires them to monitor and minimise the service of alcohol or to protect customers from the consequences of the alcohol they choose to consume*.

Public authorities and omissions

[15.320] In *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, the High Court set out the following test for determining whether a public or statutory authority (like a council) owes a common law duty to take positive action:

1. Was it reasonably foreseeable that an act or omission of the defendant, including a failure to exercise its statutory powers, would result in injury to the plaintiff or to the plaintiff's interests? If no, then there is no duty.
2. By reason of the defendant's statutory or assumed obligations or control, did the defendant have the power to protect a specific class including the plaintiff (rather than the public at large) from a risk of harm? If no, then there is no duty.
3. Was the plaintiff or were the plaintiff's interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard themselves or those interests from harm? If no, then there is no duty.
4. Did the defendant know, or ought the defendant to have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers? If no, then there is no duty.
5. Would such a duty impose liability with respect to the defendant's core policy-making functions? If yes, then there is no duty.
6. Are there any other supervening reasons in policy to deny the existence of a duty of care? If yes, then there is no duty.

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In *Crimmins*, the High Court held that the Australian Stevedoring Industry Authority owed a duty of care to Crimmins, a waterside worker employed at Port Melbourne, to take positive steps to protect him against the harmful effects of asbestos.

As indicated earlier, there is now also legislation dealing with the liability of public authorities. Under the civil liability reforms in all states and territories other than South Australia and the Northern Territory, there are principles set out that are to be applied in determining whether a public authority owes a duty of care or has breached its duty of care.[18] One factor that is required to be taken into account by the legislation is whether the authority's functions are limited by the availability of resources.[19]

Negligent acts causing pure economic loss

[15.330] Pure economic loss is *financial loss* that occurs independent of any personal injury or damage to property. Traditionally, the distinction between the two categories of case – pure economic loss and physical injury – has been important because the basis for pure economic loss claims has been far more restricted.[20] Thus, whilst the ordinary *Donoghue v Stevenson* rules will apply to determine whether there is a duty of care to protect against physical injury (personal injury and/or property damage) which may be accompanied by economic loss, stricter rules apply where *pure* economic loss – economic loss on its own – is at issue.

In *Perre v Apand*, the High Court recognised that the law in this area is developing and expressed concern for the twin policy factors that are at play in pure economic loss cases of this kind – avoiding the "indeterminancy" problem, and avoiding interference with legitimate commercial conduct. The indeterminacy problem refers to the idea that if a duty of care is readily imposed in relation to pure economic loss, defendants might find themselves liable to an indeterminate amount of people, for an indeterminate amount of loss, for an indeterminate amount of time. This is a problem as defendants should, at least in theory, be able to estimate the risks of a particular course of conduct before engaging in that conduct. The High Court recognised that while reasonable foreseeability of loss was a necessary factor where pure economic loss is at issue, "other factors" (often referred to as the "salient features") have to be considered as well in order to identify whether a duty of care to prevent pure economic loss arises.

Perre v Apand Pty Ltd

[15.340] *Perre v Apand Pty Ltd* (1999) 198 CLR 180. Perre was a potato farmer who suffered economic loss when the defendant supplied diseased potato seeds to a farm 20 km from the plaintiff's property. The diseased seeds resulted in the growth of a crop with bacterial wilt. The plaintiff's economic loss arose because they were unable to export their potato crop to Western Australia, owing to a legislative prohibition on the importation of potatoes grown within a 20 km radius of a disease outbreak.

The High Court considered the following five criteria in deciding that a duty of care was owed. First, reasonable foreseeability was recognised as the cornerstone of any action.

18 *Civil Liability Act 2002* (NSW), Pt 5; *Wrongs Act 1958* (Vic), Pt XII; *Civil Liability Act 2003* (Qld), Ch 2 Pt 3; *Civil Liability Act 2002* (WA), Pt 1C; *Civil Liability Act 2002* (Tas), Pt 9; *Civil Law (Wrongs) Act 2002* (ACT), Ch 8.

19 *Civil Liability Act 2002* (NSW), s 42; Wrongs Act 1958 (Vic), s 83; *Civil Liability Act 2003* (Qld), s 35; *Civil Liability Act 2002* (WA), s 5W; *Civil Liability Act 2002* (Tas), s 38; *Civil Law (Wrongs) Act 2002* (ACT), s 110.

20 Indeed, it was not until 1976 (in *Caltex Oil*) that any general rule precluding recovery for pure economic loss was rejected by the High Court.

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Thereafter, the justices, although expressing themselves differently, were concerned with the issues of indeterminacy of liability, respecting the autonomy of the individual, the plaintiff's vulnerability, and the defendant's knowledge of the risk.

1. *Reasonable foreseeability*: The Court was unanimous on the requirement that the loss must be reasonably foreseeable. The pivotal question is whether a person in the defendant's position could reasonably have foreseen that their behaviour could result in the plaintiff (either individually or as a member of an identifiable class) suffering economic loss. In this case, the loss was clearly reasonably foreseeable. However, all justices agreed that, on its own, reasonable foreseeability is insufficient to establish a duty of care for pure economic loss.

2. *Indeterminacy of liability*: A major concern in cases where acts cause pure economic loss is the issue of indeterminacy. The courts have been reluctant to recognise a duty of care where it would lead to liability that is "in an indeterminate amount for an indeterminate time to an indeterminate class" of plaintiffs: *Ultramares Corp v Touche* (1931) 255 NY 170. Imposing the duty on Apand did not expose it to the risk of indeterminate liability because there were a finite number of growers within the 20 km radius who may have been affected by its careless conduct.

3. *The individual autonomy factor*: The essence of the competitive market economy is that parties have autonomy, that is, the right to act in any legitimate way even where it economically damages another person or business. Indeed, being a successful business actually requires one to cause harm to competitors, in a purely economic sense: as where massive corporations such as the Bunnings hardware store chain virtually put family-owned corner hardware stores out of business. In this case, the Court said that the imposition of a duty of care did not interfere with Apand's commercial freedom. Perre would have had no legal rights, on the other hand, if Apand had simply developed a line of potatoes that competed with Perre's business.

4. *The vulnerability to risk*: It is clear that the plaintiff's vulnerability and ability to protect themselves from the risk resulting from the defendant's conduct is a vital element in establishing a duty of care in pure economic loss cases. Whilst self-insurance may be a factor (see *Johnson Tiles v Esso* at [15.350]), it is irrelevant where, as here, the plaintiff did not, and could not, appreciate that the risk even exists.

5. *The defendant's knowledge of the risk and its magnitude*: Whether the defendant knew (or could reasonably foresee) that their conduct could cause the particular plaintiff (or the plaintiff as a member of an ascertainable class) to suffer economic loss is an important criterion in determining whether a duty of care arises. Apand was aware of the risk that the bacterial wilt disease could break out and was aware of the potential repercussions of that event occurring.

Johnson Tiles Pty Ltd v Esso Australia Pty Ltd

[15.350] *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 27. In 1998, there was a huge explosion at Esso's natural gas plant at Longford in Victoria. Esso was the sole supplier of natural gas to Gascor, which was the sole distributor of gas in Victoria. The explosion shut

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down the Longford plant and, as a result, Melbourne was without any gas supply for a number of weeks. The explosion was the result of the negligence of Esso in maintaining its plant. As a result of the lack of gas supply, a number of gas customers (both business and private) and workers claimed that they had suffered losses. Although the Court held that Esso owed a duty of care to gas customers to avoid a stoppage of gas causing *property* damage, it decided that Esso did not owe a duty of care to its employees (indeed Esso attempted to blame its workers for the explosion!) nor to the private customers who relied on Esso's gas for their businesses and who suffered pure economic loss as a result of its negligent actions. Its reasons were as follows:

- The indeterminacy issue. Unlike in *Perre v Apand*, where there were relatively few potato farmers in the relevant zone, there were literally hundreds of businesses to whom Esso could be liable.
- The foreseeability issue. Gas supply interruptions were not completely unknown or unexpected and the customers were not completely dependent on Esso. The business customers could have, and many had, taken out back-up precautions or insurance. Compare the position in *Perre v Apand* where Apand's actions were unforeseeable, leaving Perre exposed and vulnerable, with there also being no possibility of taking out insurance.
- The assumption of risk issue. Esso's contracts showed that it had not assumed the risk for losses suffered as a result of a gas stoppage. All of the supply contracts contained a term stating that the supplier would not be responsible for losses suffered as a result of a gas stoppage. There was no parallel to these circumstances in *Perre v Apand*.

In concluding that Esso owed no duty of care to its customers for pure economic loss, Gillard J said:

> The gas customers are aware that there is no guarantee of uninterrupted supply, they know what steps can be taken to avoid or minimise the risk of harm to their particular business or interest and it is their choice as to what they should do. Gas customers are in a far better position than anyone else to assess their likely loss due to interruption of supply and if insurance is the preferred means of minimising the loss, they can take out insurance based upon a reasonable assessment of the likely harm and factor the expense of the premium into the price of their products or services.

Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288

[15.360] *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288* (2014) 254 CLR 185. The plaintiff Owners Corporation sought to recover economic loss arising from latent defects in the common property of a commercial apartment complex which had been constructed by the defendant builder. The Court held that there was no vulnerability on the part of the Owners Corporation owing to provisions contained in the contracts between the developer and subsequent purchasers dealing with construction and repair of building defects. According to Hayne and Kiefel JJ, there was no need to define what would or would not constitute

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vulnerability; it was enough to "observe" these contracts which gave the purchasers the right to have the defects remedied. Their Honours added:

> The making of contracts which expressly provided for what quality of work was promised demonstrates the ability of the parties to protect against, and denies their vulnerability to, any lack of care by the builder in performance of its contractual obligations.

Marsh v Baxter

[15.370] *Marsh v Baxter* (2015) 49 WAR 1. The plaintiffs sought to recover the economic loss suffered as a result of their decertification as organic farmers owing to the incursion of genetically modified material onto their property. They claimed that this loss arose from the negligence of the defendant who grew and harvested genetically modified canola nearby. However, the Western Australian Court of Appeal, distinguishing *Apand*, held that the plaintiffs, who knew and appreciated the risk of incursion, could have taken steps to guard against it such as building buffers and barriers. In other words, the plaintiffs were not exposed and vulnerable to the relevant risk.

Caltex Oil (Aust) Pty Ltd v The Dredge "Willemstad"

[15.380] *Caltex Oil (Aust) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529. The respondent's dredger (a type of ship) damaged a pipeline owned and operated by Australian Oil Refinery Pty Ltd. The respondents knew of the existence of the pipeline and the charts showed it went from an oil refinery on one side of Botany Bay to the Caltex Oil terminal on the opposite shore. Owing to the damage, the pipeline could not be used for some time. The respondents admitted liability for the loss of the oil in the pipeline but denied liability for the considerable additional expense incurred by Caltex in transporting the oil by alternative means to its terminal.

> The High Court decided that Caltex could recover the economic loss that it suffered. The Court, in addressing the "indeterminacy issue", said that there were exceptions to the indeterminacy obstacle where the respondent has the knowledge, or means of knowledge, that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer loss.

[15.385] At the time of writing, the High Court has recently revisited this duty of care category in *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* [2024] HCA 25. There, planting a producer's contaminated seed caused pure economic loss for end user farmers. The seed packaging made clear that there was 99% minimum purity and 0.1% maximum other seeds. In addition to the salient features test not supporting the existence of a duty of care in this case, the packaging's disclaimer had the same effect: not because it was a binding contractual term (it was not), but because it made clear to the farmers that contamination was possible, and that using the seeds was at their own risk in that regard.

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Negligent statements causing pure economic loss

[15.390] Liability for statements (including professional advice) causing pure economic loss is subject to different rules again as compared to acts causing pure economic loss. Such liability was traditionally considered to be either a matter for the law of contract (where the statement was a contractual term) or for the torts of deceit or fraud (where the person intentionally made a false statement). But the situation was difficult if the statement was *negligently* made. The courts eventually drew a distinction between negligent words and negligent acts (where both cause pure economic loss), because the courts recognised that words may have far wider repercussions than physical acts. Thus, for some time after *Donoghue v Stevenson*, the courts refused to apply the principles of negligence to misstatements. The breakthrough in recognising that negligence liability might arise where negligent statements cause pure economic loss came in 1964, with the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*. In that case, although the House of Lords did not recognise that a duty of care arose on the facts, it nevertheless held that a negligent, though honest, statement may (in principle) give rise to a duty of care.

Hedley Byrne & Co Ltd v Heller & Partners Ltd

[15.400] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. The plaintiff was an advertising agency that was to place television and newspaper advertisements on behalf of a company called Easipower. As the plaintiff was to personally guarantee the payment of these advertising accounts, it sought credit references from the defendant, Easipower's bank. The defendant's written response indicated that Easipower was creditworthy. In its reply, the defendant had also disclaimed responsibility for its credit reference. Easipower was not creditworthy, and the plaintiff agency was unable to recover the amount paid for the advertisements: this represented its pure economic loss flowing from a potentially negligent statement. The House of Lords decided that a duty of care in making statements could arise in circumstances where a "special relationship" existed between the parties. The Court did not detail the precise nature of this required "special relationship", although it is clear that it would involve some element of *reliance*. Although the Court recognised (in principle) that a duty of care could arise in circumstances like those before it, the plaintiff's action actually failed on the facts because the defendant bank had effectively disclaimed responsibility for the credit reference that it had given.

[15.410] In *Mutual Life and Citizens' Assurance Co Ltd v Evatt*, the High Court of Australia gave content to the notion of a "special relationship" by confirming that a person could owe a duty of care for negligent statements causing pure economic loss provided that:

1. the advice was given in respect of a serious or a business matter;
2. the adviser should have realised they were being relied upon to give correct advice; and
3. it was reasonable for the other person to have relied on the advice.

Mutual Life and Citizens' Assurance Co Ltd v Evatt

[15.420] *Mutual Life and Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556. The officers of a life assurance company (Mutual Life and Citizens' Assurance Co Ltd (MLC)) made statements to a policy holder (Evatt) about the financial affairs of another company, Palmer.

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As a result of acting on the advice, Evatt suffered pure economic loss. The Privy Council held that MLC owed no duty of care because the duty of care arose only where the advice was given in the exercise of business or professional skill possessed or claimed by the adviser or possibly where the adviser had a financial interest in the advice being acted upon. However, when the case had come on appeal before the High Court of Australia (on its way to the Privy Council – as could happen until the abolition of the right to appeal to the Privy Council in 1986), Barwick CJ expanded on the nature of the "special relationship" that must exist before a duty of care can arise in cases of negligent misstatements causing pure economic loss:

> It seems to me, therefore, that whenever a person gives information or advice to another, whether that information is actively sought or merely accepted by that other upon a serious matter, and particularly a matter of business, and the relationship of the parties arising out of the circumstances is such that on the one hand the speaker realizes or ought to realize that [they are] being trusted, particularly if [they are] thought by the other to have, or to have particular access to, information or to have a capacity or opportunity to exercise judgment or both as to the matter in hand, to give the best of [their] information or advice as a basis for action on the part of the other party and it is reasonable in the circumstances for the other party to seek or accept and in either case to act upon that information and advice the speaker, choosing to give the information or advice in such circumstances, comes under a duty of care both to utilize with reasonable care the information and sources of information at [their] disposal and to employ with reasonable care what capacity [they have] for judgment in relation to the matter and to exercise reasonable care in the expression of what [they are] prepared to convey by way of information or advice.

[15.430] The High Court's decision in *L Shaddock & Associates Pty Ltd v Parramatta City Council (No 1)* establishes that the duty extends to the *supply of information* as well as the *provision of advice*. The case also demonstrates that there is no necessity for the defendant to be in the business or profession of giving advice (as previously held by the Privy Council).

L Shaddock & Associates Pty Ltd v Parramatta City Council (No 1)

[15.440] L *Shaddock & Associates Pty Ltd v Parramatta City Council (No 1)* (1981) 150 CLR 225. The plaintiff company was a property developer and owned land in Parramatta, Sydney. It intended to redevelop the land by erecting a commercial building on the property. Its solicitor made inquiries to the Council about the property. In answers to oral inquiries and later written inquiries by the solicitor, the Parramatta City Council did not reveal that there were proposals for road-widening that affected the property. In actual fact, the proposals were, at the time of the solicitor's inquiries, already adopted in principle by the Council. The plaintiff claimed that the remaining parts of the property would be unsuitable for its proposed redevelopment. It also alleged that it would not have bought the property if it had been aware of the proposal to reduce the size of the property to widen the adjacent streets. The plaintiff argued that the Council owed it a duty of care to inform it about the road-widening proposal.

The High Court held that the Council committed the tort of negligence causing pure economic loss and was liable to the plaintiff for its losses. The Council was under a duty of care in relation

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to the provision of advice or information (the Court held that no distinction should be drawn between "advice" and the "giving of information") because it was of a kind that called for skill and competence that the Council professed to possess. Further, the Council knew or ought to have known that the plaintiff intended to act or rely on the information.

[15.450] It is clear from *San Sebastian Pty Ltd v Minister Administering Environmental Planning and Assessment Act 1979 (NSW)* that the High Court has accepted Barwick CJ's formulation of the "special relationship" test, set out at [15.410]–[15.420].

San Sebastian Pty Ltd v Minister Administering Environmental Planning and Assessment Act 1979 (NSW)

[15.460] *San Sebastian Pty Ltd v Minister Administering Environmental Planning and Assessment Act 1979 (NSW)* (1986) 162 CLR 340. A redevelopment plan was published by the State Planning Authority and the Sydney City Council. The plan encouraged private developers to buy land sites and to construct high density office blocks there. On the faith of the plan, the plaintiff company bought up land with a view to its redevelopment. When the plan was abandoned, because it was found not to be feasible, the plaintiffs suffered a financial loss. The plaintiff argued that the defendant had falsely represented that the plan was feasible.

The High Court held that the plaintiff could not succeed unless it could establish "at least, amongst other things, (1) that the alleged representation was made, and (2) that the Authority and the Council made the representation with the intention of inducing members of the class of developers to act in reliance on the representation". The High Court concluded that the plaintiff failed to establish the first matter and therefore the second did not arise, and no duty of care was imposed.

While the Court pointed out that in the usual case of negligent misstatement, a *request* for information or advice demonstrates *reliance* (which is a key determinant of the existence of a duty of care), such a request is not essential and a defendant volunteering information or advice can still (in appropriate circumstances) be held liable for a negligent misstatement causing pure economic loss.

[15.470] The establishment of liability for negligent misstatement has also led to an increasing number of actions against solicitors, accountants, auditors and other financial advisers for the recoupment of financial losses allegedly suffered by third parties as a result of their reliance on advice that was initially prepared for others. As we will now see, the rules governing the imposition of a duty of care in relation to these third-party situations are stricter again.

Liability to third parties for negligent misstatements causing pure economic loss

[15.480] It must be noted at the outset that auditors are potentially liable for both criminal and civil offences. Our focus in this part is obviously on liability under the tort of negligence, though auditors are also subject to *criminal liability* under various sections of the *Corporations Act 2001* (Cth). Of particular relevance, recently, is the *Corporations Act 2001* (Cth), ss 307A(1) and (2). These provisions make it a criminal offence for an audit not to be conducted in accordance with Australian Auditing Standards (AAS). The Australian Securities and Investments Commission (ASIC) has initiated numerous prosecutions for breach of these provisions in recent years, including recently where the former auditor of Big Un Limited

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was convicted for breaching the *Corporations Act 2001* (Cth), s 307A(2).[21] By doing so, ASIC has signalled its intent to ensure auditor compliance with AAS requirements.

In relation to *civil* liability, both contract and tort laws are of significance to auditors, for establishing the principles of auditor liability to clients and third parties, respectively. Under contract law, a corporation may seek a remedy from an auditor if the auditor is in breach of the terms of an engagement letter. And under tort law, auditors can be sued in negligence if they breach a duty of care towards a client (according to the principles set out above) or a third party who consequently suffers some form of loss (the alternative third-party scenario referred to above).

As to that third-party scenario, in the United Kingdom, *Caparo Industries Plc v Dickman* held that the liability of an auditor does not extend to such third parties.

Caparo Industries Plc v Dickman

[15.490] *Caparo Industries Plc v Dickman* [1990] 2 AC 605. Caparo made a series of share purchases of Fidelity Plc, based upon inaccurate accounts prepared by Touche Ross that overvalued the company. They claimed that, as auditors of Fidelity, Touche Ross owed potential investors a duty of care. The House of Lords concluded that the accounts were prepared for the existing shareholders as a class for the purposes of exercising their class rights and that the auditor had no knowledge of Caparo's intention to rely upon the audited financial statements. Under the House of Lords' ruling, liability to third parties only occurs when:

the loss suffered is a reasonably foreseeable consequence of the auditor's conduct;

there is sufficient "proximity" of relationship between the auditor and third party; and

it is "fair, just and reasonable" to impose liability on the defendant.

The decision of the High Court in *Esanda Finance Corp Ltd v Peat Marwick Hungerfords* demonstrates that Australian courts are also reluctant to impose a duty of care in a situation where negligent advice or information provided to one person is used by an unintended or unknown third party who suffers pure economic loss as a result.

Esanda Finance Corp Ltd v Peat Marwick Hungerfords

[15.500] *Esanda Finance Corp Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241. The plaintiff (Esanda) was a financier who, in reliance on the audited accounts of a company (Excel), lent money to various companies associated with Excel, accepting a guarantee of repayment from Excel. Peat Marwick Hungerfords (PMH), a firm of chartered accountants, was Excel's auditor. Excel went bankrupt and Esanda lost considerable amounts of money. Esanda claimed that PMH owed it a duty of care, as Esanda relied on PMH's audited accounts and belonged to a class of persons who might reasonably have done so.

The High Court held that PMH did not owe Esanda a duty of care. The decision clearly shows that the court does not regard foreseeability of the third party's reliance as a sufficient

21 https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-198mr-former-auditor-of-big-un-limited-convicted-for-failing-to-comply-with-auditing-standards.

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basis for imposing liability on an auditor. The question that remains to be determined in this context is whether the "*reasonableness of reliance*" element of the test formulated by Barwick CJ in *Mutual Life and Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 could be satisfied in circumstances where a third party uses an audit statement for purposes such as investment. After pointing out that PMH was in a "particularly advantageous position to know or ascertain Excel's true financial position", the Court made the following remark about the reasonableness of Esanda's conduct:

> However, there is nothing to suggest Esanda was not itself able to have accountants undertake the same task on its behalf as a condition of its entertaining the possibility of entering into financial transactions with Excel. And, which is much the same thing in the circumstances of this case, there is nothing to suggest that it was reasonable for Esanda to act on the audited reports without further inquiry.

[15.510] The very limited circumstances in which a third party will be owed a duty of care with respect to negligent statements causing pure economic loss means that, depending upon the particular circumstances, it may be preferable to sue under the misleading and deceptive conduct provisions of the *Australian Consumer Law*, s 18(1) instead. As we saw in Chapter 13, liability under s 18(1) does not require any element of fault, it clearly encompasses omissions and silence as well as positive statements, and there is a much wider range of remedies available under the *Australian Consumer Law* as compared to the common law. For these reasons, plaintiffs are increasingly relying on this statutory regime (often in conjunction with a common law claim) when suing for negligent misstatement.

Summary

[15.520] Negligence liability is an important form of civil law liability having a significant impact on the conduct of business. In this chapter, we have introduced the notions of tort law and negligence law, and we have examined the rules determining when a duty of care will be owed in five different scenarios.

Further reading

Books

H Luntz, *et al.*, *Luntz & Hambly's Torts: Cases, Legislation and Commentary* (9th ed, LexisNexis, 2021).

P Crossley, *et al.*, *Balkin & Davis Law of Torts* (6th ed, LexisNexis, 2021).

A Clarke, *et al.*, *Torts: Principles, Skills & Application* (LexisNexis, 2019).

Blogs

Katy Barnett, "Snails in Bottles and the Law of Negligence", https://www.whatkatydid.net/p/snails-in-bottles-and-the-law-of

Podcasts

The Law Report, "How Itchy Underpants Created Australia's Consumer Laws", https://www.abc.net.au/listen/programs/lawreport/itchy-underpants-consumer-laws/13662386.

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Lawyers Weekly, "The Boutique Lawyer Show: Wellness Reflections Following a Landmark High Court Case", https://www.lawyersweekly.com.au/podcast/35224-the-boutique-lawyer-show-wellness-reflections-following-a-landmark-high-court-case.

Tutorial activities

1. What is the primary object or function of the law of tort?
2. Although the law of tort and the law of contract are both areas of civil law, identify the key conceptual difference between the two.
3. Although there may be overlap between a tortious action and a criminal action, what is the key distinction between the two, in relation to the sanctions following breach of the law?
4. Farrad agrees to buy a laptop from Jez and pays $2,000 into her bank account. However, when he arrives at her flat to pick it up, she says she has changed her mind. Farrad is furious and pushes Jez to the ground, causing her to hit her head and to suffer severe physical injury. Identify any contractual, criminal and/or tort issues arising in this scenario.
5. What are the four main elements of a negligence action?
6. Explain how common law and statutory law relate to each other as sources of law governing the tort of negligence. Which of these sources of law govern the duty of care issue?
7. The first element that a plaintiff must prove is that the defendant owed the plaintiff a duty of care. Lord Atkin, in *Donoghue v Stevenson* (see [15.70]), used (for the first time) the concept of the "neighbour" as a *general* limiting principle. Who, according to Lord Atkin, is our neighbour, at least according to tort law? What specific duty of care was owed by a manufacturer to a consumer in *Donoghue v Stevenson*?
8. In *Donoghue v Stevenson* (see [15.70]), why did May Donoghue not sue the shop owner under the law of contract?
9. In novel situations, where the duty of care question has not been settled by case law, what twofold or composite test is outlined by the High Court in *Tame* (see [15.140])? Why did the plaintiffs in *Sharma* fail that test?
10. Explain why the courts have been historically reluctant to find that a duty of care exists in cases where the plaintiff's damage is psychological.
11. The High Court in *Annetts* (see [15.260]) rejected the proposition that a plaintiff is only entitled to compensation if: (a) the psychiatric injury suffered was as a result of a "nervous shock"; or (b) the plaintiff was a witness to the incident (or its immediate aftermath). Do you agree with the decision? Can you appreciate why Mrs Tame failed in her mental harm claim and why the Annetts' equivalent claim succeeded?
12. What is "pure economic loss", and why have the courts limited the scope of the duty of care where such a loss occurs? Are all cases involving monetary loss cases of "pure economic loss"? And are all cases involving pure economic loss governed by the same duty of care rules?
13. Where a negligent act causes pure economic loss – as it did in *Perre v Apand* (see [15.340]) and in *Johnson* (see [15.350]) – what are the factors that the High Court said should be

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considered in determining whether a duty of care exists? Why does the regular *Donoghue v Stevenson* test not apply?

14. Considering the *Perre v Apand* (see [15.340]) salient features test, explain why you believe that Perre succeeded in his action but Johnson failed in his claim in *Johnson Tiles v Esso* (see [15.350])?

15. What are the criteria established in *Evatt* (see [15.420]) that the High Court of Australia said had to be proved in order for a duty of care to arise in cases where pure economic loss is caused by negligent advice? Why does the regular *Donoghue v Stevenson* test not apply? How did *Shaddock* (see [15.440]) expand the circumstances in which a duty of care could arise? Why did the plaintiff in *San Sebastian* (see [15.460]) not succeed in establishing a duty of care?

16. Where a third party relies on advice provided to someone else, and suffers loss, in what circumstances may a duty of care arise? Refer to *Esanda* (see [15.500]).

17. Carolin is the proprietor of Super Sneakers, a retail shoe store. She purchases a new consignment of stock from Sneaker Supplies, a wholesaler, which is currently stored in Sneaker Supplies' warehouse. Carolin engages Fast Feet Freight Company to transport the stock from that warehouse to her store.

    Melody, the freight company's driver, picked up the stock of sneakers and proceeded towards the Super Sneakers store. On her way, however, she stopped for lunch and left her delivery truck illegally parked on a dangerous bend in the road. While Melody was having lunch, a car collided with her delivery truck, destroying Carolin's stock.

    Advise Carolin whether Fast Feet Freight Company owes her a duty of care in these circumstances.

18. Anish is a university lecturer. Part of her job involves teaching students, and part of her job involves conducting research. Anish publishes a paper in a scholarly journal and lodges it with her university research office for recognition. The research office accidentally categorises the paper as not being a recognisable research paper. The error is soon corrected, and Anish's performance evaluations are not affected. However, she becomes very worried that some of her colleagues might think less of her because of the error. Her worry escalates into psychological injury. Does Anish's university owe her a duty of care to prevent mental harm in these circumstances?

19. Jack is using a grader to excavate his backyard in preparation for a tennis court when he slices through an electrical cable. This affects the electricity supply to Kevin's factory located nearby. Jack is aware of the factory but has no idea the cable runs through his block. As a result of the disruption, Kevin suffers a financial loss until the cable is repaired. Advise Jack whether he owes a duty of care to Kevin.

20. Immi is an accountant who manages the tax affairs of Shannon. As a result of Immi's negligent advice, Shannon misses out on the opportunity to claim a tax benefit and suffers financial loss as a result. Did Immi owe a duty of care to Shannon?

21. Ammara Pty Ltd is a company providing emergency vet treatment to injured animals. Its accounts are audited, and it provides its audited accounts to Local Bank in support of a loan application. Local Bank, relying on the audited accounts, approves the loan. The accounts had been negligently audited, Ammara Pty Ltd's business fails, and Local Bank suffers financial loss when the loan it had given cannot be repaid. Did Ammara Pty Ltd's auditor owe a duty of care to Local Bank?

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Chapter 16

Breach of Duty, Damages and Defences

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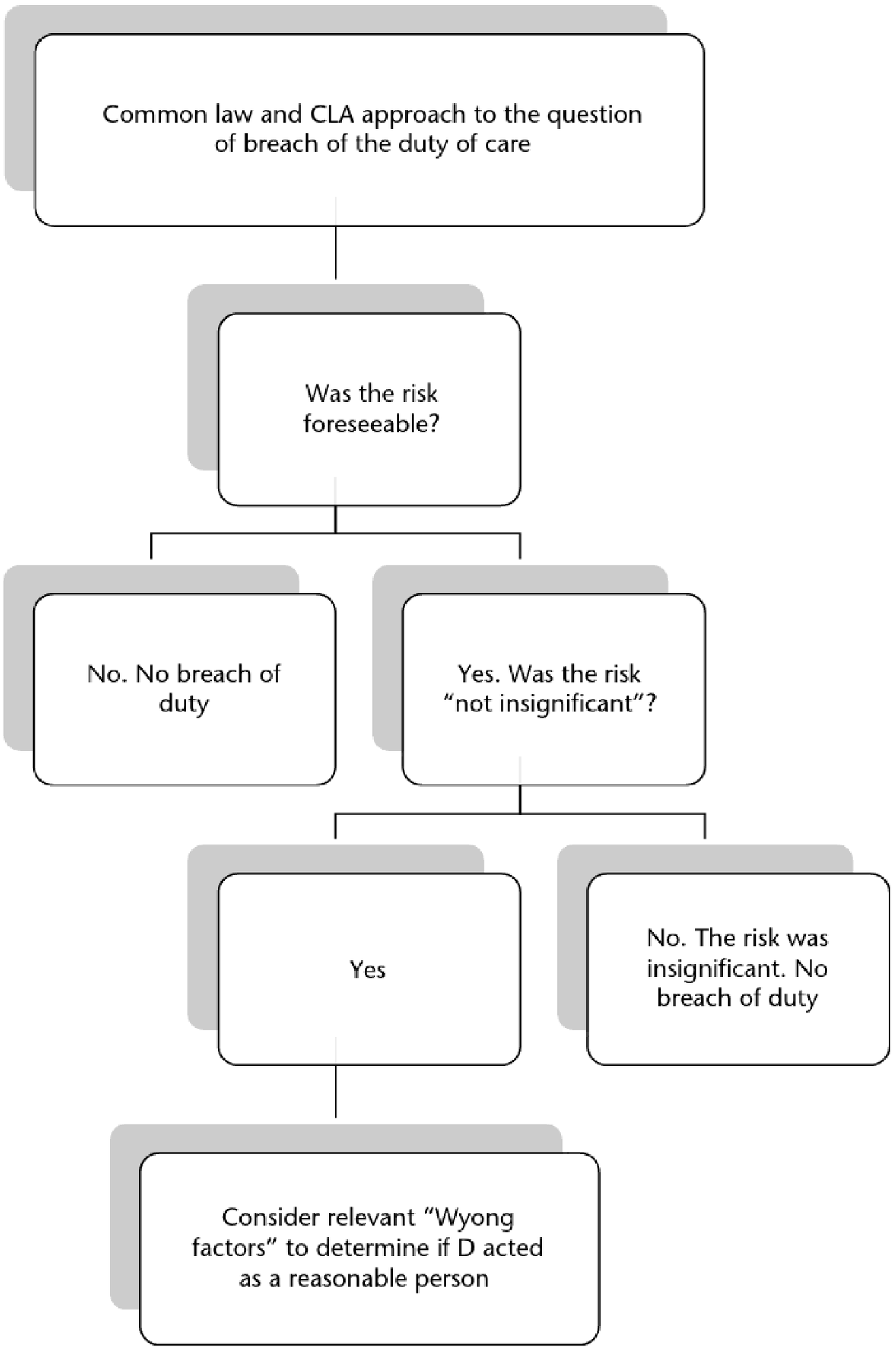
Introduction

[16.10] For liability in negligence to be imposed, there must first be a duty of care in existence, as analysed in Chapter 15. However, the existence of a duty of care is necessary but not sufficient in itself for there to be liability in negligence. A defendant will only be liable in negligence where there is a breach of that duty, where there is compensable damage, and where no defences apply. These additional requirements are now analysed here in Chapter 16, in order to complete our study of the tort of negligence.

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Breach of the duty of care

Figure 16.1 : How to approach the breach of duty issue



[16.20] Once a plaintiff has established that the defendant owed them a duty of care, based upon the principles addressed in Chapter 15, they must then establish that the defendant breached that duty of care. Whether there has been a breach of the duty of care in the particular circumstances of a case involves consideration of whether the defendant met the standard of care required by the law of negligence. In general terms, the standard expected is that of the "reasonable person". Thus, from the outset, we can see that negligence law requires us to exercise reasonable care only. It does not require defendants to attain a standard of perfection and to completely eliminate risks in all circumstances. As the English courts explained in *Dalborn v Bath Tramways Motor Co Ltd* [1946] 2 All ER 333, "if all the trains in this country

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were restricted to a speed of 5 miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down".

With the relationships giving rise to a duty of care largely now established by precedent, the breach of duty issue is now, in many ways, the most interesting and contentious. As each case is decided on its own facts, there is often a contest as to whether the defendant has met the standard of care required in the particular circumstances. No two cases will be exactly alike.

Before we consider the specific rules governing this reasonable person enquiry, we can consider the following illustrative decision of the High Court addressing whether or not an intensive care paramedic breached the standard of care expected of such a person in the midst of an emergency.

Queensland v Masson

[16.30] *Queensland v Masson* (2020) 381 ALR 560. On 21 July 2002[1] Jennifer Masson, a 25- year-old chronic asthmatic, suffered a severe asthma attack. Four paramedics attended, including Peters, an intensive care paramedic. Peters assessed Masson and found that, in addition to being in respiratory arrest, her heart rate was high and she had extremely high blood pressure. He administered salbutamol, a drug which facilitates breathing by dilating the bronchial passages. Masson's condition began to improve and a transfer to hospital was arranged. During that transfer to hospital, Masson's heart rate unexpectedly dropped and Mr Peters administered adrenaline with limited effect. Unfortunately, Masson sustained severe, irreversible brain damage as the result of deprivation of oxygen before she arrived at the hospital. She lived in a vegetative state for the next thirteen and a half years. Masson's estate sued the State of Queensland, alleging that it was vicariously liable for Peters' negligence in administering salbutamol instead of adrenaline. Damages were agreed at $3 million.

At the trial, the judge found that there was no breach of the duty of care. The treatment did not fall below the standard of care of an *ordinary skilled intensive care paramedic*. In particular, the decision by the paramedic to administer salbutamol instead of adrenaline was the result of an exercise of clinical judgment and was supported by a responsible body of medical opinion. Indeed, after hearing evidence from both sides of the debate, the trial judge found that there was no evidence that adrenaline was superior to salbutamol in achieving fast and effective dilation. On appeal, the Court of Appeal overturned the decision. It found that the administration of salbutamol did not accord with the flowchart in the Clinical Practice Manual (CPM) and concluded that the decision to administer salbutamol did not meet the reasonable person standard of care.

On appeal, the High Court was asked to decide whether the decision to administer salbutamol was a clinical judgment and, if so, whether the exercise of the clinical judgment in this particular situation was consistent with the standard of care expected of a reasonable paramedic *at that time, in those circumstances*.

The majority of the High Court decided that an appellate court must respect the advantages of a trial judge when considering witness evidence.[2] The trial judge's finding that the paramedic

1 That is, prior to the enactment of the *Civil Liability Act 2003* (Qld), meaning that the common law applied.

2 Witnesses do not give evidence (and cannot be cross-examined) in an appeal court. The significance of this was recognised by the High Court when it decided that the Court of Appeal was wrong to overrule the trial judge's finding that Peters' decision was a clinical judgment and did not proceed from a mistaken understanding of the CPM.

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made a clinical judgment was neither contrary to compelling inferences nor glaringly improbable and should not have been overturned. Kiefel CJ, Bell and Keane JJ stated:

> The standard of care expected of Mr Peters was that of the ordinary skilled intensive care paramedic operating in the field in circumstances of urgency. Self-evidently, this is a less exacting standard than that expected of specialists in emergency medicine. The Court of Appeal correctly observed that intensive care paramedics cannot be expected to make fine professional judgments of a kind that require the education, training and experience of a medical specialist. This is not to say, however, that an intensive care paramedic is not expected to exercise clinical judgment. The guidance in the CPM is posited upon the assumption that ambulance officers will exercise clinical judgment and that officers may depart from its guidelines where the departure is justified and is in the best interests of the patient.

Nettle and Gordon JJ came to the same conclusions. Their Honours stated:

> the fact that the majority of specialist emergency practitioners may have chosen adrenaline from the outset does not mean that the minority who would have chosen salbutamol as first preference would have been regarded as negligent; still less that an emergency paramedic operating in the field without the assistance and certitude of the facilities of an emergency room would be so regarded … Evidence as to common practices or professional opinion among emergency paramedics may have assisted, but such evidence of that kind as the Estate produced was scant.

Breach of duty: The test

[16.40] Chapter 15 discussed the civil liability reform legislation's effect on common law negligence principles. That legislation regulates the breach of duty issue. Section 48 of the *Wrongs Act 1958* (Vic), as an example, restates (with only minor variation) the common law two-stage inquiry for determining whether there has been a breach of duty, otherwise established at common law in *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

[16.50] At the first stage, we consider issues of foreseeability and the significance of a risk. Section 48(1) of the *Wrongs Act 1958* (Vic), akin to other equivalent State and Territory provisions,[3] states:

> (1) A person is not negligent in failing to take precautions against a risk of harm unless:
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
>
> (b) the risk was not insignificant; and
>
> (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

3 *Civil Liability Act 2002* (NSW), s 5B(1); *Civil Liability Act 2003* (Qld), s 9(1); *Civil Liability Act 1936* (SA), s 32(1); *Civil Liability Act 2002* (WA), s 5B(1); *Civil Liability Act 2002* (Tas), s 11(1); *Civil Law (Wrongs) Act 2002* (ACT), s 43(1). The Northern Territory legislation does not deal with this issue (thus equivalent common law principles would apply).

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Putting aside the response of the reasonable person, addressed as the second stage of inquiry below, this provision (and the other State and Territory equivalents) reflects the intent of the civil liability reforms to limit the scope of potential liability for negligence. At common law, according to *Wyong Shire Council v Shirt* (1980) 146 CLR 40, where there is a foreseeable risk of harm there is no liability in negligence if the relevant risk was "far-fetched or fanciful". Under the legislation, a defendant will only breach their duty of care if the relevant risk of harm is "foreseeable and not insignificant". It may be possible to find an example of a foreseeable risk that is "insignificant", even though it is not "far-fetched" at common law (ie a risk that would have satisfied the common law test but would now fail the statutory test), though this is not an easy task. *Whitton v Dexus Funds Management Ltd* is an illustrative case concerning these requirements at work.

Whitton v Dexus Funds Management Ltd

[16.60] *Whitton v Dexus Funds Management Ltd* [2019] NSWDC 579. On 17 July 2016, the plaintiff was exiting an amenities corridor at the shopping centre managed by Dexus when she was struck by a mobility scooter travelling along the main thoroughfare. She alleged that a shopfront hoarding restricted her view when re-entering the thoroughfare. She argued that Dexus had breached its duty of care owed to her by failing to undertake a proper safety management plan in relation to mobility scooters in the shopping centre. She outlined a range of options open to management that may have averted the accident, including restricting the speed of such scooters and placing safety warning signage at each end of the protruding hoarding.

The Court decided that there was no breach of the duty of care. The Court said that although it was *foreseeable* that a patron of the shopping centre might be struck and injured by a mobility scooter in the shopping centre (the first requirement), the plaintiff failed to establish that the risk of a patron being injured by a mobility scooter was "*not insignificant*" (the second). In reaching this conclusion, the Court noted that the operator of the shopping centre was entitled to expect that users of the centre would exercise *reasonable care for their own safety*; there was no evidence that the driver was a dangerous driver; the blind corners in question were an obvious risk; and erecting signs or mirrors where there were blind corners or obscured vision would impose *a significant and unreasonable and costly burden* on centre owners.

[16.70] Assuming that a risk is "foreseeable" and "not insignificant", at a second stage we ask how a reasonable person would have responded to the risk. The *standard of care* demanded of the reasonable person is therefore an objective test. The personal idiosyncrasies of the defendant, such as a quick temper or low intelligence, are not considered. The reasonable person is equipped with the same skills and expertise expected of a person exercising a particular trade or profession, where that is relevant. For example, in an action against a doctor for professional negligence, the relevant standard is that of an ordinary, competent doctor exercising ordinary professional skill. An incompetent doctor cannot argue that "I did a reasonable job, for me".

[16.80] When assessing reasonableness, the courts consider what a reasonable person *would have done* in the circumstances, at that time; they do not look in the rear vision mirror and ask *what more could have been done* to avoid the injury, loss, or damage. A decision of the New South Wales Court of Appeal, addressed below and concerning a shopping centre slipping accident, affirms that the defendant is not the guarantor of the plaintiff's complete safety or well-being. Once again, defendants are only expected to do what a reasonable person would do in the same circumstances.

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Argo Managing Agency Ltd v Al Kammessy

[16.90] *Argo Managing Agency Ltd v Al Kammessy* [2018] NSWCA 176. Mr Al Kammessy was shopping with his daughter at a Westfield Shopping Centre in Sydney. At 10.44 am, he slipped and fell on liquid that had been spilt on the tiled floor. Atlantic Cleaning & Security Pty Ltd ("Atlantic") was the cleaning company contracted to provide cleaning services at the shopping centre, which included regular "loops" by cleaners walking with cleaning trolleys. The evidence was that the spill extended over a small area that had a lot of pedestrian traffic and was difficult to detect because of the design of the tiled floor. An employee had conducted an inspection of the relevant area nine minutes before the fall, and it was common ground between the parties that this inspection had been conducted with reasonable care but that the employee had still failed to detect the spill. The Court decided that there had been no breach of the duty of care:

> [T]he duty owed by Atlantic … to the respondent and other patrons was to exercise reasonable care to identify and remove potential hazards to their safety. It was not to guarantee that all hazards would be removed. And it is not permissible to conclude with the benefit of hindsight that by reason of [the employee's] failure to detect a particular hazard that he and Atlantic breached the duty of care they owed to the respondent.

[16.100] More specific guidance as to how a reasonable person would respond to a risk is provided for by s 48(2) of the *Wrongs Act 1958*, (Vic) and other State and Territory equivalents.[4] That provision adopts the common law approach of considering various factors (known as the "*Wyong* factors", in reference to *Wyong Shire Council v Shirt* (1980) 146 CLR 40, and sometimes also the "negligence calculus") in deciding *whether, and if so how, a reasonable person would have responded to a risk*. These factors are not to be considered in isolation and are not to be tallied mathematically. Instead, they are *balanced* against one another in order to determine what a reasonable person would have done, and therefore whether a defendant has been negligent.

[16.110] The four factors are as follows:

1. the probability (likelihood) of the risk of injury;
2. the gravity (seriousness) of the potential harm;
3. the burden (cost and difficulty) of eliminating the risk; and
4. the social utility of the defendant's conduct.

[16.120] In the passages that follow, we address each of these factors in turn, noting again that it is impossible to isolate any one factor in our analysis and that each case requires an assessment of all, balanced against each other. The case examples that follow are cases where each respective factor has been particularly weighty (or not weighty) in undertaking that balancing exercise.

4 *Civil Liability Act 2002* (NSW), s 5B(2); *Civil Liability Act 2003* (Qld), s 9(2); *Civil Liability Act 1936* (SA), s 32(2); *Civil Liability Act 2002* (WA), s 5B(2); *Civil Liability Act 2002* (Tas), s 11(2); *Civil Law (Wrongs) Act 2002* (ACT), s 43(2). The Northern Territory legislation does not deal with this issue (again leaving it to be determined according to common law principles, which are relevantly the same).

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Probability of the risk of injury

[16.130] When balancing the four factors, the more probable the risk of injury, the more likely it is that a reasonable person would be expected to take precautions against it.

Bolton v Stone

[16.140] *Bolton v Stone* [1951] AC 850. The plaintiff brought an action against the defendant cricket club after being injured by a ball that was hit out of the cricket ground during a match. The evidence showed that the risk of a person being struck by a ball hit out of the cricket ground was negligible (that is, extremely low). The Court weighed this factor against the reality that the only sensible way to entirely eliminate the risk of a person being hit by a ball would be to cease playing cricket on the ground altogether.

The House of Lords held that in these circumstances a reasonable person would have thought it right to ignore the risk. A defendant may be justified in disregarding a foreseeable risk of injury, where the probability of that risk occurring is small and the circumstances are such that a reasonable person would think it right to neglect the risk.

Roads and Traffic Authority of NSW v Dederer

[16.150] *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330. The plaintiff, a 14-year-old boy, suffered catastrophic injuries when he dived off a bridge and into a river (about nine metres below) and struck his head on a submerged sandbar. Although there were signs on the approach to the bridge (that the plaintiff was aware of) prohibiting diving, there was evidence that people had been diving off the bridge for 40 years and that this was the first reported diving accident. The High Court found that there was no breach of the duty of care:

> What *Shirt* requires [that is, the *Wyong* factors, and now their statutory restatement] is a contextual and balanced assessment of the reasonable response to a foreseeable risk. Ultimately, the criterion is reasonableness, not some more stringent requirement of prevention. Here, the risk of injury consequent upon jumping or diving from the bridge into water of variable depth was reasonably foreseeable … The magnitude of the risk was self-evidently grave … The probability of that injury occurring was, however, low. Despite the frequency of jumping and diving from the bridge, no-one was injured until Mr Dederer's unfortunate dive … and a reasonable response to that risk did not demand the measures suggested by him … This was not a case in which the defendant had done nothing in response to a foreseeable risk. To the contrary, the RTA had erected signs warning of, and prohibiting, the very conduct engaged in by Mr Dederer … In the circumstances, that was a reasonable response, and the law demands no more and no less.

Shaw v Thomas

[16.160] *Shaw v Thomas* [2010] NSWCA 169. While staying at a friend's house, a 10-year-old boy fell from the top bunk of a bunk bed and seriously injured himself. The New South Wales

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Court of Appeal held that: (a) the low probability of a risk that a normal 10-year-old boy would not descend safely from the top level of a double bunk, and (b) the remoteness of the possibility that such a child would suffer serious injuries in falling, meant that the defendant was not required to install a ladder and a guard rail.

Gravity of the harm

[16.170] The more serious the potential harm that might flow from a risk, the greater the demand for precautions on the part of a reasonable person. There are two particular ways in which this factor can be relevant:

1. Where the defendant's activity is dangerous. As explained in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, in the case of dangerous substances or activities, "a reasonably prudent person would exercise a higher degree of care"; and
2. Where the plaintiff, to the defendant's knowledge, has a particular susceptibility which increases the seriousness or gravity of the risk for them (addressed in the case below).

Paris v Stepney Borough Council

[16.180] *Paris v Stepney Borough Council* [1951] AC 367. The defendant employer knew that the plaintiff, his employee, was blind in one eye. Consequently, the plaintiff's condition was considered in determining whether the defendant was negligent in failing to provide the plaintiff with goggles that would have protected him against injury to his good eye.

The House of Lords held that whatever the defendant's duty of care was to his other workers, the gravity of the consequences of an injury to the particular plaintiff's one good eye (ie complete blindness) meant that the defendant employer was in breach of the duty of care owed to the particular plaintiff employee.

Burden of eliminating the risk

[16.190] As Denning LJ pointed out in *Watt v Hertfordshire County Council* [1954] 1 WLR 835 "in measuring due care you must balance the risk against the measures necessary to eliminate the risk". In other words, the easier it is (in terms of cost and inconvenience) to eliminate a risk, the less likely a defendant's failure to take precautionary steps will be justifiable. On the other hand, the more difficult it is to eliminate a risk, the more likely it is that it is reasonable to disregard the risk. In considering this factor, the court can consider not only the cost and inconvenience involved in taking precautionary measures, but also any further risk that these steps may themselves involve. For example, in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, the High Court found that the precaution of ceasing sale of contaminated Wallis Lake oysters (or removing operations to another area) constituted "alleviating action of the most difficult, expensive and inconvenient type".

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Woods v Multi-Sport Holdings Pty Ltd

[16.200] *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460. The plaintiff suffered a head injury when participating in a game of indoor cricket. The organisers did not provide protective headgear. The market availability of a protective helmet was a critical issue in determining whether it was reasonable to expect the defendant indoor cricket game organiser to provide the player with such protective gear. In circumstances where such headgear had yet to be designed and manufactured, and where the rules of the game did not allow for the use of such helmets, the High Court held that it was open for the trial judge to find that the defendant was not negligent in failing to provide the plaintiff with a helmet. In context, in this case, the means by which to eliminate the risk were not just costly and difficult to implement, but were in practical terms non-existent.

[16.210] Legislation in some jurisdictions[5] restates three common law principles relating to the reasonableness of a defendant's response to a risk that intersect with the matter of the burden of taking precautions:

1. the burden of taking precautions to avoid risk of harm includes the burden of taking precautions to avoid similar risks;
2. the fact that the risk could have been avoided by doing something a different way does not of itself give rise to liability; and
3. the subsequent taking of action does not constitute an admission of liability.

The social utility of the conduct

[16.220] The three factors identified above are weighed against each other and also the social utility (or social value) of the defendant's conduct. There may be cases where the social utility of an activity is sufficiently high as to justify, notwithstanding the other three factors, finding that a reasonable person would not have taken necessary precautions. It is important to recognise that activities involving social utility include things like rescuing people from the impact of floods, cyclones and earthquakes. The social utility factor does not come into consideration where activities (including business activities) involve some kind of benefit to society in a very broad or abstract sense. For example, whilst some people might consider coffee or chocolate to be very important to their everyday lives, it could not be said that producing coffee or chocolate involves social utility relevant to the assessment of a breach of the duty of care. Firefighting activities, on the other hand, would qualify, as *Watt v Hertfordshire County Council* demonstrates.

5 *Civil Liability Act 2002* (NSW), s 5C; *Wrongs Act 1958* (Vic), s 49; *Civil Liability Act 2003* (Qld), s 10; *Civil Liability Act 2002* (Tas) (reflecting points 2 and 3 in the numbered list only); *Civil Law (Wrongs) Act 2002* (ACT), s 44. The South Australian, Western Australian and Northern Territory legislation does not contain an equivalent provision.

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Watt v Hertfordshire County Council

[16.230] *Watt v Hertfordshire County Council* [1954] 1 WLR 835. The claimant was a fireman. A woman had been involved in a traffic accident and was trapped underneath a truck. This was 200–300 yards away from the fire station. The fire services were called to assist and release the woman. They needed to transport a heavy jack to the scene of the accident. The jack could not go on the fire engine and the normal vehicle for carrying the jack was not available. The fire chief ordered the claimant and other firemen to lift the jack onto the back of a truck. There was no means for securing the jack on the truck and the firemen were instructed to hold it on the short journey. During the trip, the truck braked and the jack fell onto the claimant's leg, causing severe injuries. The Court decided that there was no breach of the duty of care. The emergency of the situation and the social utility of the defendant's conduct in undertaking life-saving duties outweighed the need to take precautions against this injury.

Wilson v Nilepac Pty Ltd t/as Vision Personal Training (Crows Nest)

[16.240] *Wilson v Nilepac Pty Ltd t/as Vision Personal Training (Crows Nest)* [2011] NSWCA 63. In March 2008, Wilson, a 40-year-old, decided to lose weight and get fit. He consulted Vision Personal Training Studio (Vision) and underwent a pre-exercise screening assessment. During the assessment, he was prescribed an exercise programme that was divided into phases, with each new phase facilitating a gradual progression to more difficult exercises. Draffin, a personal trainer at Vision who was a 20-year-old graduate from the Australian Institute of Fitness, was allocated to train the plaintiff. The plaintiff was one of his first 10 clients. In April 2008, during a session, Draffin required the plaintiff to perform a "crunch exercise" involving the use of a 5.4 kg medicine ball and a twist motion of the torso. As a result of this exercise, the plaintiff sustained a prolapse of the lumbar spine. At the time of the accident, the plaintiff's programme included an exercise called a "supine floor crunch" that did not involve the use of a medicine ball or twisting of the torso. The plaintiff brought proceedings against Draffin in negligence (based on the crunch exercise being dangerous).

The Court of Appeal found that Draffin breached his duty of care owed to the plaintiff in that he:

- failed to appreciate the consequences of prescribing the crunch exercise (an advanced exercise) to a client who was not at the appropriate level of fitness; and
- failed to consider the appropriateness of the crunch exercise for the plaintiff.

The civil liability reform legislation does not "assume that it might be reasonable to take fewer precautions against the risk of harm created by an activity of high social utility". While it can be said that physical activity is of social utility, what is required to be taken into account is "the social utility of the activity that creates the risk of harm". In this case, the activity was the crunch exercise, which of itself had no relevant social utility, rather than physical activity in general.

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Balancing the four factors

[16.250] The following recent decision of the High Court of Australia illustrates the fact that the four factors addressed above have to be considered collectively and balanced against each other, rather than being considered in isolation or in a mathematical fashion.

Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd

[16.260] *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* (2022) 273 CLR 454. Ms Tapp was only 19 but was an experienced campdraft competitor (campdraft being a competitive sport involving riding and steering a horse at high speed around a course that has pegs). In 2011, she competed in a campdrafting event organised by the Association. On that day, three experienced contestants fell while competing after their horses slipped on the arena surface. Another experienced contestant told the organisers that the competition should be stopped because the ground was too slippery to compete on. The event organisers ignored the warning, even after a fourth fall, and decided to continue with the event. When it was Tapp's turn, she fell when her horse slipped and she suffered a catastrophic spinal injury. Tapp sued the Association in negligence.

The trial judge dismissed her claim and a majority of the New South Wales Court of Appeal upheld that decision. In allowing the appeal, the High Court held that the respondent breached its duty of care in failing to stop the event, that the breach of duty caused Tapp's injuries, and that the "obvious risk" of a dangerous recreational activity defence in the *Civil Liability Act 2002* (NSW), s 5L was not made out.

So far as the breach of the duty of care was concerned, the High Court considered and balanced the four factors as follows:

1. The relevant risk was substantially elevated, so that a reasonable person in the position of the Association could have foreseen a *probability* that harm would occur if the competition were not stopped until proper precautions were taken.
2. The likely *seriousness* of the harm was at the level of physical injury that could be catastrophic.
3. The *burden* of taking precautions to avoid the risk of harm was the simple act of stopping the event to inspect the arena and consider the safety of the ground conditions.
4. These matters could not be outweighed by the *social utility* of continuing the event to maintain competitive integrity.

The Association therefore should not have proceeded with the event in the potentially dangerous conditions just so that it could provide "fair competition" to all competitors who had had to deal with a difficult surface.

Another High Court of Australia case illustrating the balancing test involved in determining whether or not there is a breach of the duty of care is *Nagle v Rottnest Island Authority*. That case involved a swimming accident at "the Basin" at Rottnest Island, near Perth in Western Australia.

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Nagle v Rottnest Island Authority

[16.270] *Nagle v Rottnest Island Authority* (1993) 177 CLR 423. The appellant was an employee of the Rottnest Island Board (a predecessor body to the Rottnest Island Authority), who had not previously visited a public reserve at Rottnest Island nor swum at the Basin there. The appellant dived into the water from a partially submerged rock ledge, hit a fully submerged rock with his head, and suffered serious injury, becoming a quadriplegic. In a negligence claim, the appellant argued that the Board should have provided a warning that the ledge was unsafe to drive from.

The High Court held that the Board had breached its duty of care in failing to provide such a warning sign. Relevant considerations taken into account included evidence of an Australian standard for safety signs (the relevant sign being recognisable by 97% of people to whom it was shown), and the fact that the Board had the power to erect signs at the relevant area. The relevant type of sign was described as "but one form of notice – perhaps the most effective form of notice – warning of the danger of diving", and the High Court explained that "[t]here was no reason why the Board could not erect signs on the wave platform warning of the danger which existed immediately beyond the boundaries of the Reserve, that being a danger to which swimmers encouraged by the Board would be exposed".

[16.280] The *Tapp* case addressed, as the summary in [16.260] above indicates, legislation relating to obvious risks. This legislation also needs to be taken into account when determining whether or not there has been a breach of a duty of care. Under the *Civil Liability Act 2002* (NSW), s 5H(1), *Civil Liability Act 2003* (Qld), s 15(1), *Civil Liability Act 1936* (SA), s 38(1), *Civil Liability Act 2002* (WA), s 5O(1), and *Civil Liability Act 2002* (Tas), s 17(1), there is no duty to warn a plaintiff of an obvious risk. In addition, under the *Civil Liability Act 2002* (NSW), s 5L, *Civil Liability Act 2003* (Qld), s 19, *Civil Liability Act 2002* (WA), s 5H, and *Civil Liability Act 2002* (Tas), s 20, there is no liability for harm suffered as a result of the materialisation of an obvious risk of a dangerous recreational activity. There may still be scope to argue, depending upon the circumstances of a case, whether or not a risk is an obvious risk (and therefore whether or not these provisions apply): see *Queensland v Kelly* [2015] 1 Qd R 577.

The standard of care and professionals

[16.290] Of significant relevance to the careers of future professionals are the standard of care rules applicable in professional contexts. Both the common law and the civil liability reforms are relevant here. For contextual purposes, it is useful to start with the common law professional standard of care, followed by analysis of how that has changed following statutory intervention.

As we saw with *Queensland v Masson* (see [16.30]), in professional contexts, we ask whether the professional has met the standard expected of a competent professional in their circumstances. This is illustrated well by *Rogers v Whitaker*, where the High Court assessed the conduct of a medical specialist in failing to warn a patient of a particular risk of surgery.

Rogers v Whitaker

[16.300] *Rogers v Whitaker* (1992) 175 CLR 479. The respondent, Maree Whitaker, had been almost totally blind in her right eye for nearly 40 years. Nevertheless, she had lived a normal life. She consulted the appellant, Rogers, an ophthalmic surgeon, who advised her that

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an operation on the injured eye would not only improve its appearance but would probably restore sight to it. Following the surgery, the respondent developed a condition known as "sympathetic ophthalmia" in her left eye, which resulted in her losing her sight in that eye. Despite the fact that the operation was conducted with due care and skill, it failed to restore her sight. As a result, Whitaker became almost totally blind. She sued the appellant, alleging that his failure to warn her of the risk of sympathetic ophthalmia was negligent. She had not specifically asked whether the operation to her right eye could affect her left eye but she had incessantly questioned the appellant as to possible complications. Evidence given at the trial was that the risk of sympathetic ophthalmia was about one in 14,000 but, even then, not all cases lead to blindness in the affected eye. The appellant relied on the principle that the standard of care owed to a patient is determined by medical judgment.

The High Court rejected that argument. It held that, except in cases of emergency or necessity, doctors have a duty to warn patients of the risks associated with a surgical procedure.

> [A] doctor has a duty to warn a patient of a material risk inherent in the proposed treatment; a risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it.

There was a breach of the duty of care by Rogers in this case, which the High Court explained in the following terms:

> The standard of reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill, in this case the skill of an ophthalmic surgeon specializing in corneal and anterior segment surgery. As we have stated, the failure of the appellant to observe this standard … consisted of the appellant's failure to acquaint the respondent with the danger of sympathetic ophthalmia as a possible result of the surgical procedure to be carried out.

[16.310] As a result of the civil liability reforms, statutory provisions apply instead of the common law in some jurisdictions. The *Wrongs Act 1958* (Vic), s 58 and the *Civil Liability Act 1936* (SA), s 40 both statutorily define the standard of care owed by professionals, noting that there are not equivalent provisions in the other States and Territories. Taking the *Wrongs Act 1958* (Vic), s 58 as an example:

> In a case involving an allegation of negligence against a person (the defendant) who holds himself or herself out as possessing a particular skill, the standard to be applied by a court in determining whether the defendant acted with due care is, subject to this Division, to be determined by reference to –
>
> (a) what could reasonably be expected of a person possessing that skill; and
>
> (b) the relevant circumstances as at the date of the alleged negligence and not a later date.

[16.320] In some States, there is an additional consideration impacting upon the professional standard of care, which is known as the peer professional opinion defence.[6] Taking the *Wrongs Act 1958* (Vic), s 59 as an example:

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6 *Civil Liability Act 2002* (NSW), s 5O; *Wrongs Act 1958* (Vic), s 59; *Civil Liability Act 2003* (Qld), s 22; *Civil Liability Act 1936* (SA), s 41; *Civil Liability Act 2002* (Tas), s 22. There is no equivalent provision in the legislation of Western Australia, the ACT, and the Northern Territory.

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> (1) A professional is not negligent in providing a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by a significant number of respected practitioners in the field (peer professional opinion) as competent professional practice in the circumstances.
>
> (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court determines that the opinion is unreasonable.
>
> (3) The fact that there are differing peer professional opinions widely accepted in Australia by a significant number of respected practitioners in the field concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.
>
> (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted …

In Western Australia, there is a version of the peer professional opinion defence that applies specifically to health professionals, set out in the *Civil Liability Act 2002* (WA), s 5PB:

> (1) An act or omission of a health professional is not a negligent act or omission if it is in accordance with a practice that, at the time of the act or omission, is widely accepted by the health professional's peers as competent professional practice …
>
> (3) Subsection (1) applies even if another practice that is widely accepted by the health professional's peers as competent professional practice differs from or conflicts with the practice in accordance with which the health professional acted or omitted to do something.
>
> (4) Nothing in subsection (1) prevents a health professional from being liable for negligence if the practice in accordance with which the health professional acted or omitted to do something is, in the circumstances of the particular case, so unreasonable that no reasonable health professional in the health professional's position could have acted or omitted to do something in accordance with the practice.
>
> (5) A practice does not have to be universally accepted as competent professional practice to be considered widely accepted as competent professional practice …

The label "peer professional opinion defence" is a slight misnomer, however, as it misdescribes the relationship of peer professional opinion with the regular rules determining a professional's standard of care. As *Polsen v Harrison (No 8)* explains, as a matter of statutory interpretation, the peer professional opinion defence rules actually displace the relevant standard of care test where peer professional opinion is relied upon. Thus, instead of asking whether the defendant breached their duty of care and *then* considering whether the "peer professional opinion defence" is made out, courts only address the peer professional opinion rules as a single step.

Polsen v Harrison (No 8)

[16.330] *Polsen v Harrison (No 8)* [2023] NSWSC 764. Katrina Polsen, the plaintiff, underwent a surgical procedure conducted by Dr Harrison to manage morbid obesity. Polsen argued that Dr Harrison was negligent in performing the operation and in relation to treatment afterwards, and argued that Dr Harrison should never have considered her for the surgery in the first place. The Court found, based upon the evidence placed before it, that Polsen was insistent on having the surgery and also found that Dr Harrison had acted in a manner consistent with peer professional opinion in accordance with the *Civil Liability Act 2002* (NSW), s 5O. The Court explained that it was not necessary to consider whether Dr Harrison was negligent according to

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the regular statutory tests in the *Civil Liability Act 2002* (NSW), s 5B and 5C since, as a matter of statutory interpretation, establishing the peer professional opinion defence shows that there was no negligence. It was not necessary to consider the regular test for negligence first and then the peer professional opinion defence after that. Although it was not necessary for the Court to reach a conclusion on causation, given that there was no negligence, it was also observed that Polsen's determination to have the surgery showed that causation would also not have been established in any event.

[16.340] In order for the peer professional opinion defence to be made out, evidence of peer professional opinion led must be based upon facts that match those established before the court. In *Mules v Ferguson*, this was not the case, and the defendant's peer professional opinion argument failed.

Mules v Ferguson

[16.350] *Mules v Ferguson* [2015] QCA 5. Nancy Mules sought treatment for neck pain from her general practitioner on a number of occasions in early September 2008. The doctor advised her to continue taking her pain relief medication and to continue seeing her chiropractor. She did so. On 18 September, the doctor ordered a CT scan and after examining the photos said she had some curvature of the spine. She continued to decline until, on 25 September 2008, she was admitted to Cairns Private Hospital and the following day was diagnosed with cryptococcal meningitis. Although the diagnosis came just in time to save her life, the treatment was too late to prevent irreversible brain damage, leaving the plaintiff blind and deaf. Mules sued her general practitioner, alleging that her illness should have been diagnosed earlier, and, if this had happened, that this would have allowed her to avoid the resulting injuries.

The trial judge agreed but said that the breach did not cause her injuries and also found that, based on the evidence of the experienced general practitioners who gave evidence at the hearing, Dr Ferguson had established the peer professional opinion defence under the *Civil Liability Act 2003* (Qld), s 22. The Court of Appeal took a different view on both causation and the peer professional opinion defence. As to the *peer professional opinion defence*, the Court found that although there was evidence that two experienced general practitioners considered Dr Ferguson's approach was consistent with a reasonable standard of general practice, they had based their opinions on assumptions that were consistent with Dr Ferguson's version of events and not, as they should have, with the facts as found by the trial judge. For that reason, the defence failed.

Damages

[16.360] The final element that a plaintiff must prove for an action in negligence to succeed concerns damages. There are, in fact, two damages considerations, being causation and remoteness. It must be shown that:

1. the plaintiff's damages were *caused* by the defendant's negligence ("causation"); and
2. it is *appropriate for the* "*scope of the defendant's liability*" to extend to the loss or damage or injury ("remoteness").

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Causation

[16.370] It is not sufficient for the plaintiff to establish the existence of a duty of care and its breach by the defendant. The plaintiff must also be able to prove that the defendant's negligence caused the damage suffered. The civil liability reform legislation deals with the issue of causation. In Victoria, as in nearly all other jurisdictions,[7] s 51(1)(a) of the *Wrongs Act 1958* (Vic) provides that the decision as to whether a breach of duty caused the particular harm involves a test or element of "*factual causation*". The determination of factual causation under this provision is a statutory re-statement of the common law "but for" test of causation. Applying this test involves asking whether, "but for" the defendant's negligence, the damages suffered by the plaintiff would have occurred. If the answer is "no", that means that the defendant's negligence was the cause of the damage, and the causation requirement is satisfied. If the answer is "yes", that means that the damage would have arisen anyway, regardless of the defendant's negligence, and the causation requirement is not satisfied. Thus, in *McWilliams v Sir William Arrol & Co Ltd* [1962] 1 WLR 295, the plaintiff was unable to show that the deceased construction worker who fell to his death from a steel tower would have worn a safety belt if one had been provided. Accordingly, the plaintiff was unable to show that the defendant's failure to provide the equipment caused the accident. Applying the "but for" test, it was the case that the accident would have occurred anyway.

Strong v Woolworths Ltd

[16.380] *Strong v Woolworths Ltd* (2012) 246 CLR 182. Kathryn Strong, who was disabled and required the use of crutches, was injured when the tip of her crutch came into contact with a chip lying on the floor of an area occupied by Woolworths in a shopping centre in Taree, New South Wales. She sued Woolworths as the occupier. The High Court held that even though the plaintiff could not show exactly when the chip was dropped, by showing that the probability was that the chip was dropped more than 20 minutes before the fall, she could satisfy her onus of proof on the causation issue.

Chappel v Hart

[16.390] *Chappel v Hart* (1998) 195 CLR 232. Damage to the plaintiff patient's vocal cords and resultant voice loss were caused by the defendant specialist doctor's failure to warn the plaintiff patient of that risk. The High Court held that the surgeon performed the operation with reasonable care and skill, and that surgery would have been required at some later stage in any event. Nonetheless, had the plaintiff been made aware of the risk, she would have delayed the surgery and taken steps to have it performed by the most experienced surgeon in the field. Applying the "but for" test, the failure to warn was the cause of the plaintiff's loss.

7 *Civil Liability Act 2002* (NSW), s 5D(1)(a); *Civil Liability Act 2003* (Qld), s 11(1)(a); *Civil Liability Act 1936* (SA), s 34(1)(a); *Civil Liability Act 2002* (WA), s 5C(1)(a); *Civil Liability Act 2002* (Tas), s 13(1)(a); *Civil Law (Wrongs) Act 2002* (ACT), s 45(1)(a). The legislation in the Northern Territory does not deal with the matter.

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Compare the decision in *Chappel v Hart* with the decision in *Polsen* (see [16.330]) where the plaintiff's determination to go ahead with the relevant procedure meant that, in that case, the causation test was not satisfied.

In *Kozarov v Victoria* (see also [15.270]), the High Court reversed the decision of the Court of Appeal in Victoria on both the question of breach and also causation.

Kozarov v Victoria

[16.400] *Kozarov v Victoria* (2022) 273 CLR 115. A solicitor employed in the Specialist Sexual Offences Unit (SSOU) of the Victorian Office of Public Prosecutions (OPP) sued the State in negligence. The solicitor had been diagnosed with post-traumatic stress disorder (PTSD) and major depressive disorder (MDD) resulting from the trauma suffered in the course of her employment with the SSOU. She argued that her condition was caused by the failure of the Unit to offer her a rotation out of the SSOU when she gave notice of the risk to her mental health. The OPP actually had a policy that provided for such rotation, with a view to avoiding mental harm, but did not implement it in practice. The trial judge ruled in favour of the plaintiff. The Court of Appeal reversed that decision.

One of the questions for the High Court was whether the evidence allowed a finding that the solicitor would have accepted an offer of a "rotation" to another section of the OPP if it had been offered. The High Court rejected the Court of Appeal's finding that the solicitor would not have accepted a rotation (and that causation was therefore not satisfied). Relevant considerations for the High Court included: the appellant's cooperative conduct in liaising with the OPP about her future role; her preparedness to be assessed by a psychologist; and expert evidence that a very significant majority of people, if assessed as having a work-related psychiatric injury, and after having had the diagnosis and its relevant consequences explained to them, would accept the advice of a clinician in respect of that injury.

[16.410] *Nouri v Australian Capital Territory* illustrates how difficult it may be to clear the causation hurdle, given the plaintiff's burden of proof on this issue, even where there is a clear breach of duty.

Nouri v Australian Capital Territory

[16.420] *Nouri v Australian Capital Territory* [2020] ACTCA 1. The parents of a severely disabled child (one of twins) brought a negligence action against the Canberra Hospital. The child was born suffering from trachea-oesophageal fistula (TOF), which is an abnormal connection between the oesophagus and the trachea. The child's disabilities were so severe that she required 24-hour-a-day care. The plaintiff mother argued that the Canberra Hospital's failure to advise of the risk of TOF was a breach of its duty of care, and that had she been properly advised, she would have sought and secured a selective termination of the twin and thereby avoided significant costs. The trial judge found, and the Court of Appeal agreed, that 22 September 2011 was the date that a breach of the duty of care occurred by failure of the Hospital to warn of the risk of TOF. The question then became whether or not that breach caused the plaintiff's loss.

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The Court of Appeal agreed with the trial judge that causation could not be established. The plaintiff could not discharge their burden of proof of showing that they could and would have obtained a selective termination after 22 September 2011. At that stage of the pregnancy, a termination would not have been permitted in Australia, meaning that the plaintiffs needed to prove that they would have been able to obtain a termination in the United States of America. After reviewing the evidence and the trial judge's consideration of the causation question, the Court of Appeal explained that a number of factors contributed to its finding that causation was not made out:

> It is certainly theoretically possible that a person in Ms Nouri's position, with an extraordinary degree of determination, effort and organisation, could have achieved the outcome of a selective termination. However, in the absence of a firm diagnosis, the lack of encouragement that she would have received from her treating medical specialists, the need to locate and decide to be treated by a suitable practitioner in the United States, the risk of travel to the United States to both herself and the healthy twin, the logistical hurdles that would need to be overcome in getting to and from the United States, the significant expense that would be involved in such an exercise and the shortness of the time available means that the balance of probabilities is not in favour of her having achieved that outcome.

Remoteness of damage

[16.430] The civil liability reform legislation sets out an additional test for determining whether damages can be recovered.[8] This requirement relates to the "scope of liability", corresponding to what was called remoteness of damages at common law. The remoteness requirement involves a consideration of policy issues to determine whether, and to what extent, a defendant should have to answer for the consequences of their negligent conduct. Conceptually, this requirement means that even if there is a breach of a duty of care, and even if that breach causes a plaintiff's damages, a plaintiff still cannot recover losses that are deemed too remote.

The test for determining whether damage is too remote, and therefore not recoverable, is whether the type of damage was reasonably foreseeable by the defendant. This is a different type of reasonable foreseeability compared to the *Donoghue v Stevenson* test for a duty of care. There, reasonable foreseeability concerns the abstract potential to injure someone. In remoteness, the test is whether the particular type(s) of damages suffered were a foreseeable consequence of the breach of duty. A leading case on remoteness is the decision of the Privy Council in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound No 1)*.

8 *Civil Liability Act 2002* (NSW), s 5D(1)(b); *Wrongs Act 1958* (Vic), s 51(1)(b); *Civil Liability Act 2003* (Qld), s 11(1)(b); *Civil Liability Act 1936* (SA), s 34(1)(b); *Civil Liability Act 2002* (WA), s 5C(1)(b); *Civil Liability Act 2002* (Tas), s 13(1)(b); *Civil Law (Wrongs) Act 2002* (ACT), s 45(1)(b). The legislation in the Northern Territory does not deal with the matter.

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Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound No 1)

[16.440] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound No 1)* [1961] AC 388. The defendant charterer (hirer) of a ship negligently spilt a quantity of oil while the ship was being loaded. The oil floated on the surface of the water in Sydney Harbour. The oil was ignited by some molten metal falling from the plaintiffs' wharf, where welding operations were being carried out, onto cotton waste floating in the oil which acted as a wick. The ensuing fire extensively damaged the plaintiffs' wharf. The flashpoint of the oil was 170 degrees Fahrenheit and the oil would not normally have ignited on water. The Privy Council held that the defendant charterer was not liable to the plaintiffs for the damage caused to their wharf. Although there was a clear causal connection between the events that took place and the damage suffered, that was not enough. The defendant was only liable for the harm caused if the harm was of a kind that was reasonably foreseeable. The kind of damage resulting from the spillage of the oil here was not reasonably foreseeable in the circumstances.

[16.450] By way of contrast, in a later case relating to the same incident, the plaintiff owner of a ship which was damaged by the fire succeeded in an action against the negligent charterer (hirer) where the plaintiff shipowner proved that the charterer was aware that there was a real risk of fire damage as a result of the oil spill: *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd (The Wagon Mound No 2)* [1967] AC 617. The difference in result between these two cases arose because of what the respective plaintiffs in each case were able to prove, the same legal test for remoteness being applied in both.

The kind of damage suffered by the plaintiff must therefore have been reasonably foreseeable, or at least of the same kind as the foreseeable damage. It may be that in a single case, some sources of damage satisfy the remoteness test (and are recoverable), whilst other sources of damage do not satisfy the remoteness test (meaning that those particular sources of damage, rather than the whole claim, are not recoverable).

Rowe v McCartney

[16.460] *Rowe v McCartney* [1976] 2 NSWLR 72. The plaintiff, at the defendant's request, had allowed the defendant to drive her powerful car. The defendant drove negligently, struck a telegraph pole, and suffered severe injuries that resulted in him becoming a quadriplegic. The plaintiff, who was a passenger in the car, suffered only minor physical injury. However, the plaintiff suffered mental illness brought on by her sense of guilt in allowing the defendant to drive her car.

The New South Wales Court of Appeal held that the psychiatric illness suffered by the plaintiff was neither reasonably foreseeable, nor was it of the same type or kind of injury that was reasonably foreseeable in the circumstances. The type or kind of injury that would have been foreseeable was mental illness arising from nervous shock from seeing or hearing about the injury of another, or from shock or worry about her own injury.

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Defences to an action in negligence

[16.470] The principal defences to an action for negligence are:

1. contributory negligence; and
2. voluntary assumption of risk.

Note that the "peer professional opinion defence" is not considered here. As a matter of statutory interpretation, it has been held to replace the regular breach of duty rules rather than being a defence that is considered after a breach of duty has otherwise been established: see *Polsen* at [16.330].

Contributory negligence

[16.480] At common law, contributory negligence was a complete defence. No compensation could be recovered where the plaintiff suffered damage partly through their own negligence and partly through the negligence of another. However, the defence of contributory negligence is now governed by legislation that allows for an apportionment of damages between the plaintiff and the defendant based upon their respective responsibility for the plaintiff's loss.[9] For example, in Victoria, s 26(1) of the *Wrongs Act 1958* (Vic) provides:

> If a person (the claimant) suffers damage as the result partly of the claimant's failure to take reasonable care (contributory negligence) and partly of the wrong of any other person or persons –
>
> (a) except as provided in section 63, a claim in respect of the damage is not defeated by reason of the contributory negligence of the claimant; and
>
> (b) the damages recoverable in respect of the wrong must be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

Like actionable negligence, contributory negligence is the failure to take reasonable precautions against a foreseeable risk of injury, and the standard of care that applies to the plaintiff in looking after their own interests is the same standard of care that applies in a regular negligence claim.[10] Where reference is made to s 63 in the provision quoted above, that is a reference to the rule that a court can still reduce a claim by 100% if it is just and equitable to do so: *Wrongs Act 1958* (Vic), s 63.[11] The change from the common law here is that the complete elimination of a claim is not automatic, but only occurs if a 100% reduction in damages is justified in the circumstances. Note also that to be "contributory", the plaintiff's negligence must be causally relevant to the damage suffered.

In practical terms, where there is a defence of contributory negligence, an assessment is made of the damages that would have been awarded if there had been no fault on the plaintiff's part. This amount is then reduced by the percentage of the plaintiff's contribution. In the Northern Territory, the minimum level of contributory negligence is 25%: *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 17. The

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9 *Law Reform (Miscellaneous Provisions) Act 1965* (NSW), s 9; *Wrongs Act 1958* (Vic), s 26(1); *Law Reform Act 1995* (Qld), s 10; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), s 7; *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA), s 4; *Wrongs Act 1954* (Tas), s 4; *Civil Law (Wrongs) Act 2002* (ACT), s 102; *Law Reform (Miscellaneous Provisions) Act 1956* (NT), s 16.

10 *Civil Liability Act 2002* (NSW), s 5R; *Wrongs Act 1958* (Vic), s 62; *Civil Liability Act 2003* (Qld), s 23; *Civil Liability Act 1936* (SA), s 44; *Civil Liability Act 2002* (WA), s 5K; *Civil Liability Act 2002* (Tas), s 23. There is no corresponding legislation in either of the Territories.

11 See also *Civil Liability Act 2002* (NSW), s 5S; *Civil Liability Act 2003* (Qld), s 24; *Wrongs Act 1954* (Tas) s 4(1); *Civil Law (Wrongs) Act 2002* (ACT), s 47. There is no corresponding provision in the other Australian jurisdictions.

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apportionment is worked out by a comparison of the respective degrees of departure from the standard of a reasonable person: *Pennington v Norris* (1956) 96 CLR 10. In some cases, legislation affects the standard of care and the contributory negligence defence rules that apply where a plaintiff is intoxicated.[12]

March v E & MH Stramare Pty Ltd

[16.490] *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506. March sued to recover damages for personal injuries sustained when, at around 1.00 AM in the early hours of the morning, he collided with the tray of a truck, owned by Stramare, that was parked in the centre of the road for the purpose of loading it with large wooden bins containing fruit and vegetables. March was intoxicated to such an extent that his ability to judge speed and distance was impaired. The primary judge found that, although the parking and hazard lights of the truck were illuminated, the parked truck's driver should have appreciated that the parked vehicle might, in some circumstances, constitute a danger to oncoming vehicles.

The High Court recognised that the "but for" test for causation gives rise to a well-known difficulty in cases where there are two or more acts or events which would each be sufficient to bring about the plaintiff's injury. Courts now readily recognise that there can be concurrent and successive causes of damage, and that it is a commonsense approach that liability will be apportioned as between the wrongdoers.

Thus, Stramare's negligence was held to be a cause of the accident and of March's injuries. The wrongful act in parking the truck in the middle of the road created a situation of danger, the risk being that a careless driver would act in the way that the appellant acted. On the other hand, March was contributorily negligent to the degree of 70%. Ultimately, the Court concluded that March was responsible for 70% of his own losses, and Stramare the remaining 30%.

Alzawy v Coptic Orthodox Church Diocese of Sydney, St Mary and St Merkorious Church (No 2)

[16.500] *Alzawy v Coptic Orthodox Church Diocese of Sydney, St Mary and St Merkorious Church (No 2)* [2016] NSWSC 1123. Carolin Alzawy attended a Bible study group that met in a building on the grounds of the Church of St Mary and Merkorious in Sydney. After the meeting, she descended a flight of stairs as she had done many times before. The staircase consisted of tiled steps with "nose tiles" laid on the outer edge of each tread and a handrail along the entire length. The "nose tile" on one of the steps had been broken four years earlier but never fixed. Ms Alzawy did not use the handrail as she descended the stairs. Some way down the staircase, she fell forward, hitting her head forcefully on the metal handrail before falling down to the bottom of the stairs.

The trial judge was satisfied that the plaintiff had stepped on the broken tile when she slipped. As such, the broken tile itself, and the church's failure to fix it, had caused the damage

12 *Civil Liability Act 2002* (NSW) Pt 6; *Wrongs Act 1958* (Vic), s 14G; *Civil Liability Act 2003* (Qld) Ch 2 Pt 4 Div 2; *Civil Liability Act 1936* (SA), s 46; *Civil Liability Act 2002* (WA), s 5L; *Civil Liability Act 2002* (Tas) Pt 2; *Civil Law (Wrongs) Act 2002* (ACT), ss 95–96; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), ss 14–15.

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that the plaintiff had suffered. The defendant was therefore held liable for the plaintiff's injuries. However, the judge found that a person descending a flight of stairs ought to take reasonable care for their own safety. In this instance, that reasonable care included simple precautionary measures such as using the handrail and keeping a proper lookout. The plaintiff was found to have been 50% responsible for the injuries that she suffered on account of her own contributory negligence.

[16.510] In 1999, the High Court held that the apportionment legislation was concerned only with actions in tort, and did not affect actions based on breach of contract whether or not the plaintiff had or could have also sued in tort: *Astley v Austrust Ltd* (1999) 197 CLR 1. All jurisdictions have since amended their apportionment legislation to permit the apportionment of damages for breach of a contractual duty of care as a result of contributory negligence.[13]

Voluntary assumption of risk

[16.520] Unlike contributory negligence, a successful plea of voluntary assumption of risk (sometimes known by its Latin name *volenti non fit injuria*) is a complete defence. This is reflected in the Latin term's literal translation (and the defence's underlying rationale) – no injury is done to one who consents.

Over the years, the courts have limited the scope of this defence. It is not enough for the defendant to show that the plaintiff knew of the risk. The plaintiff must have also fully appreciated the risk and accepted it freely and willingly, in order to be treated as voluntarily assuming it. This is illustrated by the legal test set out in *Imbree v McNeilly* (2008) 236 CLR 510 which identified two requirements for the voluntary assumption of risk defence to be made out:

> Absent relevant statutory modification, the defence of voluntary assumption of risk requires proof that "the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk … impliedly agreed to incur it". In the absence of some express exclusion of liability or notice of exculpation, demonstrating that a plaintiff both knew of a risk and voluntarily agreed to incur that risk will often be difficult. But if both conditions are satisfied, the plaintiff's claim against the defendant will fail.

As the following case demonstrates, in order for the defence to apply, the plaintiff must be found to have consented to the specific risk causing damage, and not just risks in general that exist amongst the more general surrounding circumstances.

Kent v Scattini

[16.530] *Kent v Scattini* [1961] WAR 74. The plaintiff (a teenage girl) was involved in an incident where groups of young people in cars were seeking to spray each other with water whilst driving past each other. The plaintiff was a passenger in a car that was chasing another car, that had

13 See *Law Reform (Miscellaneous Provisions) Act 1965* (NSW), s 9; *Wrongs Act 1958* (Vic), s 26; *Law Reform Act 1995* (Qld), s 10; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), s 7; *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA), s 4; *Wrongs Act 1954* (Tas), s 4; *Civil Law (Wrongs) Act 2002* (ACT), s 102; *Law Reform (Miscellaneous Provisions) Act* (NT), s 16.

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> initiated the activity. The plaintiff's car was travelling at about 80 km/h and ran off the road at a corner, injuring the plaintiff. The plaintiff sued her car's driver in negligence. A defence of voluntary assumption of risk was raised by the driver, but failed. There was no voluntary assumption of risk in this case because although the plaintiff could be said to have consented to taking part in the overall "fun" of the activity and also to getting wet, she had not consented to the specific risk of the car she was in being driven off the road in a manner that would cause her injury.

[16.540] One example of a (rare) case where the voluntary assumption of risk defence was made out is the case of *Schuller v SJ Webb Nominees Pty Ltd* (2015) 124 SASR 152. There, the plaintiff had fallen from a chair on which she had been dancing whilst inebriated at the defendant's hotel. The hotel staff had given her three warnings to stop, and had also refused her further service of alcohol.

[16.550] It will be noted that *Imbree v McNeilly's* description of the test for voluntary assumption of risk applies "[a]bsent relevant statutory modification" (see [16.520]). One such statutory modification enacted via the civil liability reforms addresses situations involving obvious risks. Despite the defence's historically narrow nature, statute provides that plaintiffs are presumed to be aware of risks that are obvious risks, and that plaintiffs bear the onus of proving otherwise.[14] This makes it easier for a defendant to make out the defence's first requirement where obvious risks are involved. By way of example, the *Civil Liability Act 2002* (WA), s 5N(1) provides:

> In determining liability for damages for harm caused by the fault of a person, the person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.

Vicarious liability

[16.560] In certain circumstances, a person is regarded by the law as responsible for the acts or omissions of another person. Such liability is known as vicarious liability. It is a form of strict liability as the person held responsible for the acts or defaults of another may not themselves have been personally at fault. Vicarious liability arises where particular relationships exist between the person held responsible and the wrongdoer. The most common example, and also an example highly relevant in the commercial law context, is the relationship of employer and employee.

What this means is that employers are vicariously liable for the acts or omissions committed by their employees, which may include negligence. Whether or not the tort of negligence is made out is still assessed by reference to the employee's conduct. However, once it is shown that the employee was negligent, the employer will be vicariously liable too.

[16.570] Whilst the law will impose vicarious liability upon employers for the negligence of their employees, there will be no vicarious liability where a "worker" is actually an independent contractor. One of the most famous cases where this was at issue is *Hollis v Vabu Pty Ltd*.

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14 *Civil Liability Act 2002* (NSW), s 5G; *Wrongs Act 1958* (Vic), s 54; *Civil Liability Act 2003* (Qld), s 14; *Civil Liability Act 1936* (SA), s 37; *Civil Liability Act 2002* (WA), s 5N; *Civil Liability Act 2002* (Tas), s 16. Australian Capital Territory provisions apply only to equine activities: *Civil Law (Wrongs) Act 2002* (ACT) Sch 3. There are no relevant provisions in the Northern Territory.

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Hollis v Vabu Pty Ltd

[16.575] *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21. A plaintiff was injured by a bicycle courier who rode off and who could not be identified, but who was seen to be representing "Crisis Couriers". Because the courier could not be identified, the plaintiff pursued Crisis Couriers itself. The courier company could only be liable for their bicycle courier's negligence, however, if the courier was an employee rather than an independent contractor. The legal test for differentiating the two is the "control test". The "Crisis Couriers" couriers in this case were held to be employees because they were not providing skilled labour requiring special qualifications (it isn't possible to "freelance" as a bike rider); the couriers had little control over how they performed their work; they were publicly presented as emanations of the employer (eg, wearing uniforms); the employer superintended the couriers' finances; and there was overall considerable scope for the exercise of control over the couriers' duties.

[16.580] In recent times, the distinction between employees and independent contractors has become of particular importance in relation to the gig economy. Many cases have addressed the question of whether gig economy workers are employees or independent contractors for the purpose of determining their entitlements under employment law. However, the same principles also tell us, for our purposes, whether or not an employment relationship exists which can lead to an employer being vicariously liable for negligence. The Full Bench of the Fair Work Commission has held, for example, that Uber Eats drivers are not employees in legal proceedings brought with a view to establishing drivers' workplace rights: *Gupta v Portier Pacific Pty Ltd and Uber Australia Pty Ltd t/as Uber Eats* [2020] FWCFB 1698. Similarly, in the decision below, the High Court of Australia determined that two truck drivers were independent contractors in a dispute concerning employment rights which also clarifies that there would be no vicarious liability for the negligence of such drivers. These (and other similar) decisions effectively legitimise the gig economy work model – provided that businesses (and their lawyers) set up their operations and draft their contracts carefully and correctly.

ZG Operations Australia Pty Ltd v Jamsek

[16.590] *ZG Operations Australia Pty Ltd v Jamsek* (2022) 275 CLR 254. The plaintiffs commenced proceedings in the Federal Court claiming certain employment entitlements which they alleged were owed to them as employees under the *Fair Work Act 2009* (Cth), the *Superannuation Guarantee (Administration) Act 1992* (Cth), and the *Long Service Leave Act 1955* (NSW), and which had not been paid by the company.

The High Court unanimously decided that the two drivers were independent contractors and not employees, with the consequence that the drivers were not entitled to the various entitlements that they claimed. In its decision, the High Court placed particular weight on the fact that a written contract comprehensively set out the agreed terms of the relationship between parties, and the fact that the parties had acted consistently with the terms of that agreement. Provided that the efficacy of that relationship is not challenged as a sham or as otherwise being unlawful, the classification of whether that relationship is one of employment or whether it instead involves an independent contractor must be interpreted according to the actual rights and obligations agreed to by the parties under that contract. The decision emphasises the need to assess the true nature of the relationship in any given case.

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[16.600] The vicarious liability of an employer is limited, however, to acts or omissions that are committed *in the course of the employee's employment*. It is not always easy to determine whether an employee's act or omission took place in the course of their employment or not. It is clear that employers are vicariously liable for conduct that is an unauthorised mode of performing an authorised task. For example, the employer of a petrol-tanker driver was held vicariously liable for damage caused by a fire which ignited when the driver lit a cigarette when delivering petrol to an underground tank. The driver's action here was considered to be an unauthorised way of performing the authorised task of delivering petrol: *Century Insurance Co Ltd v Northern Ireland Road Transport Board* [1942] AC 509. However, an employer will not be vicariously liable for employee wrongdoing that is unrelated to their employment. In *Deatons Pty Ltd v Flew* (1949) 79 CLR 370, for example, a barmaid who threw a glass into the face of an inebriated customer (who then lost sight in an eye) was held to be acting in a personal capacity, unconnected with their duties as an employee. Whether or not an employee's negligence occurred in the course of their employment was recently considered by the High Court in relation to extremely unusual facts in *CCIG Investments Pty Ltd v Schokman*.

CCIG Investments Pty Ltd v Schokman

[16.610] *CCIG Investments Pty Ltd v Schokman* [2023] HCA 21. Schokman was employed by CCIG, working at a resort on Daydream Island in Queensland. Schokman lived in accommodation provided by CCIG, and later shared that accommodation with another worker. One night, the other worker returned to the accommodation very late after being out drinking. Apparently meaning to use the toilet, but perhaps affected by his alcohol consumption and also the darkness of the room, the other worker urinated in Schokman's face instead.

The High Court held that CCIG was not vicariously liable for the other employee's tort. The key issue was whether or not the tort occurred in the course of the other employee's employment, given that it took place in shared employer-provided accommodation. As explained by Gleeson J, it did not:

> Mr Hewett's employment created neither an "opportunity" nor an "occasion" for his drunken accident … Mr Hewett's employment in the restaurant was merely the reason why he needed a place to live on the Island when not performing the duties he was employed to perform. Neither the employment nor the accommodation created anything more than the context or the location in which the tort was committed.

[16.620] It is important to emphasise, however, that where there is no vicarious liability, this does not mean that there is no liability in negligence at all. The negligent party remains liable to the plaintiff. It is just the case that there is no other party who is automatically liable for that same negligence as well.

Summary

[16.630] In this chapter, we have completed our analysis of the elements of the tort of negligence, along with an assessment of the two main defences to a negligence action and the issue of vicarious liability. Taken together with Chapter 15, we can now identify when and why negligence liability will arise in business and in broader society.

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Further reading

A Clarke et al, *Torts: Principles, Skills & Application* (LexisNexis, 2019).

H Luntz et al, *Luntz & Hambly's Torts: Cases, Legislation and Commentary* (LexisNexis, 9th ed, 2021).

P Crossley et al, *Balkin & Davis Law of Torts* (LexisNexis, 6th ed, 2021).

Tutorial activities

1. What is the common law standard of care that a person who owes a duty of care must meet? The statutory "civil liability reforms" have refined the common law test – what is the statutory "two-stage" enquiry for determining whether the standard of care has been met?
2. Applying the two-stage enquiry for breach of the duty of care, explain why Ms Whitton did not succeed in her claim against the shopping centre management company in *Whitton v Dexus* (see [16.60]).
3. What are the factors that courts must balance, to determine the response expected of a reasonable person, at the second stage of the breach of duty enquiry?
4. How is a professional's breach of their duty of care assessed? In those jurisdictions with peer professional opinion legislation, how does that "defence" relate to a professional's standard of care? Is it really a "defence", in the traditional sense of that word?
5. Actual damage or injury is an essential element of a cause of action in negligence. But for what damage is a defendant who has breached their duty of care liable? Outline the two-step approach used to assess whether a negligent defendant is liable to compensate a plaintiff for their loss or damage, and in doing so, explain why loss caused by a breach of the duty of care still may not be recoverable.
6. What are the defences to a claim in negligence?
7. Explain the concept of vicarious liability for negligence, and how such liability is limited by the need for an employment relationship and also the need for conduct occurring in the course of employment.
8. Nemo Diving runs snorkelling tours at the Great Barrier Reef for tourists, some of whom have no prior snorkelling experience. Nemo Diving provides its customers with snorkels, but not wetsuits – customers bring their own swimming attire. On an otherwise lovely Thursday afternoon, Gerard (a customer) suffers a serious jellyfish sting and is taken to hospital. He is physically injured and also incurs medical expenses.

   Had Nemo Diving provided full body wetsuits for its customers, this kind of injury would be avoided. Nemo Diving has never had a customer injured in this way in its 10 years of operation. Providing wetsuits to customers would also significantly increase Nemo Diving's costs.

   Has Nemo Diving breached the duty of care that it owes to its customers?

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9. You are an accountant and a financial adviser. You provide financial advice to a client. However, you were severely distracted at the time, as a result of your favourite football team doing well, and your advice was wrong. Your client suffers monetary loss as a result.

   Despite your distraction, in relation to your advice, you believe that you only did what everyone else in your industry does. If your client sues you in negligence, what would you need to show to rely on the peer professional opinion defence? And would a court consider ordinary breach of duty rules first, followed by the peer professional opinion defence, or only the peer professional opinion rules?

10. Esther visited her favourite café, Hot Coffee, on her way to work. The café has an automatic door, which had been malfunctioning for the last week, and several other customers had let the café know. Esther walks through the door when it opens, but it suddenly closes on her, causing injury that requires her hospitalisation and that also leads to Esther losing wages. Esther had her mobile phone in her hand at the time of the incident, and dropped it when the door closed on her. It was destroyed and will cost $2,500 to replace.

    Hot Coffee owed Esther a duty of care, and breached that duty. Are Esther's losses recoverable under the law of negligence?

11. Arman owns a clothing retail store in the King Street fashion precinct in Perth. His store does not have a proper loading bay. He brings a mini-van full of new stock to the front of his store at 10 pm on a Thursday night, parks in the middle of the road, and starts unloading stock. He figures that there won't be any problems doing so at that time of night.

    Meanwhile, Sammy is driving along King St with his friend Chelsea, and they are speeding with a view to getting a "best time" driving along the strip. They are talking and laughing while they drive, and are not keeping a proper look-out. Sammy collides with Arman's mini-van, and both Sammy and Chelsea are injured.

    If Sammy sues Arman in negligence, are there any defences that Arman can rely upon? And if Chelsea sues Sammy in negligence, are there any defences that Sammy can rely upon?

12. Luisa and Ana-Maria both work as employees at The Silky Drip, a popular regional café. Ana-Maria regularly makes coffee for herself, during and after her shifts, although employees are (according to business policy) supposed to bring their own drinks to work. Ana-Maria makes her coffee exceptionally hot.

    (a) Assume that Ana-Maria spills her own coffee on Luisa during a shift, causing Luisa to suffer severe burns. Is The Silky Drip vicariously liable for Ana-Maria's negligence in these circumstances?

    (b) Assume now that Ana-Maria drives Luisa home after their shifts, and that Ana-Maria spills her own coffee on Luisa when they are both heading home, again causing Luisa to suffer severe burns. Is The Silky Drip vicariously liable for Ana-Maria's negligence in these circumstances?

Please answer the following questions with reference to the materials contained in both Chapters 15 and 16.

13. Kitchen Magician is a company that manufactures and sells kitchen appliances that have become very popular with the Australian public. The company's current and most popular

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model is the KM55, which is able to chop food, blend food, and cook food, amongst other features. Kitchen Magician has sold 100,000 KM55 appliances to both household and commercial users in Australia.

Most KM55 appliances work exactly as they should, but a small number of customers have had very bad experiences. In a small number of the appliances, the vibrations produced as the KM55 chops and blends food cause the lid to come off the appliance during operation. As a result, hot food sprays out – this has damaged other property in the homes of KM55 owners, and has also caused burns to people who were near the malfunctioning appliances. About 200 KM55 machines, out of the 100,000 sold in Australia, have been affected. The impacts on customers have ranged from minor (minor property damage) to major (extremely severe burns).

Kitchen Magician's investigations have shown that the issue arises due to a very small fault in production, appearing in only a small number of appliances. During the product development phase, Kitchen Magician had arranged for full testing of a sample of the KM55 appliances before releasing the KM55 for sale to the public and no faults were detected. However, if a larger number of appliances had been tested, the fault would have been identified. More extensive testing would have increased Kitchen Magician's costs significantly, however, and delayed the release of the product into the market. Advise Kitchen Magician as to whether it is liable, in the tort of negligence, for the property damage and physical injury caused by the faulty KM55 appliances.

14. Pauline graduates from the KL Horticultural College in 2023 with a major in floristry. Immediately after graduating, she sets up her own cut flower business ("Blossoms"). In early 2024, things are going well, and she contemplates expanding the business. She meets with Daniel Sloan, an accountant and a financial adviser. They discuss Pauline's expansion plans, and Daniel agrees to review her financial situation and prepare a business plan.

A month later, they meet again. After Daniel has examined her financial position and researched the cut flower market, he advises Pauline that she is in a sound position to expand and recommends that she borrow money to set up a store in an upmarket part of town. Pauline relies on him and decides to act on his advice. In March, she goes to Eastpac Bank and asks to borrow $30,000. After Eastpac Bank examines the financial statements prepared by Daniel, it agrees to lend Pauline $30,000. Pauline then signs a five-year lease for new and larger business premises, purchases some equipment, and hires a web design firm to design her new webpage.

Shortly after this, things turn sour. Daniel admits that he did not adequately factor in Pauline's pre-existing debts, and that he underestimated the significant establishment costs associated with setting up a business in the upmarket area as well as the extent to which online florists have eroded the traditional retail market. Pauline has to terminate her lease (and pay six months' rental for the early termination) and she defaults on the Eastpac Bank loan. She has already spent $7,500 of her own money on the Blossoms web page and other costs. Eastpac Bank is faced with significant losses too, on the loan, as much of the loan was unsecured. Advise Pauline and Eastpac Bank about their prospects of success in an action against Daniel in the tort of negligence.

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PART 5: BUSINESS RELATIONSHIPS

Chapter 17: Law of Agency

Chapter 18: Law of Partnerships

Chapter 19: Corporations Law

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An introduction to business relationships and organisations

[PT5.10] In this part of the book, we consider a common form of business relationship – the principal-agent relationship – and the two dominant forms of business organisation – partnerships and corporations. In this introduction, we also consider the sole trader and the trust.

Agency

[PT5.20] Virtually all commercial activity relies on agency. In fact, it is not an exaggeration to say that agency is one of the genuine cornerstones of business activity. So what is an agent? An agent is simply a person who acts in the name of and on behalf of another. As such, agency covers a vast range of activities and relationships. It includes the real estate agent acting for a vendor, a sports or theatrical agent acting for sportspeople or actors, a person who buys goods or services on behalf of another person and a sales assistant in McDonalds who sells burgers to customers. The list is endless. We will examine the general concept in Chapter 17 but with a particular eye on how agency principles affect the two business organisations that we study in Chapters 18 and 19 – partnerships and corporations.

The key questions in agency law – often occurring both in relation to corporations and partnerships – include whether an "agent" is actually an agent, what the scope of the agent's authority is, and the rights and duties among the parties. To answer these questions, we must look to the general law of agency including the relevant cases and, in relation to corporations and partnerships, specific sections of the *Corporations Act* and the *Partnership Act* respectively.

In relation to partnerships, agency principles are so much a part of the way that partnerships work that they are actually regarded as a branch of agency law, with one significant difference: each partner is both an agent and a principal of the others. Partners can bind each other (as agents do) and be bound by the actions of their partners (as principals are). In this sense, the fiduciary obligations that characterise the duty an agent owes to a principal (a duty of good faith) flow both ways.

As we will see, a corporation, unlike a partnership, is a legal entity. But, because it is only a legal entity – it is a creation of the law, a fiction, and not a natural person – it inevitably has to work through agents such as its directors, officers and employees.

A range of factors will determine the most appropriate organization for a business to adopt. They include the size of the business, the degree of risk associated with the business, the need for capital or loans, the need for privacy, the intended longevity of the business, the establishment costs and regulatory requirements, the taxation implications, management and control issues, ease of change in ownership and individual lifestyle concerns. In this introduction, we can only present a brief comparative overview.

Sole trader

[PT5.30] A sole trader is the simplest form of business organisation: one individual doing business on their own. Despite the sole trader being the most common form of business organisation, they do not generate the revenue of the other organisations.

Advantages: Setting up as a sole trader can be as simple and inexpensive as hanging out a shingle and setting up as a private tutor, plumber or solicitor (subject to the necessary licences or certificates being granted). It is also easy to dissolve the business – simply pay the debts and bring in the shingle. There are usually lower compliance costs and regulatory considerations. Taxation is personal – the income of the

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business is the income of the trader (which may be an advantage for lower incomes). The other advantage is that the sole trader has total control and management rights and is entitled to all the net profits.

Disadvantages: The greatest disadvantage is that sole traders have unlimited personal liability for the debts of the business. This risk can be reduced by adequate insurance but the sole trader is nevertheless exposed. There is no inherent continuity or succession. If the sole trader dies or cannot carry on the business because of death or injury, the business cannot carry on (in that form). In the absence of security, it is often difficult for a sole trader to borrow money.

Trust

[PT5.40] A trust is created when one person (the settlor) transfers the legal ownership of property to another person (the trustee) with instructions that the property is to be administered for the benefit of another (the beneficiary). There are a number of different kinds of trusts but the essence of a trust is constant – that of a person holding property for the benefit of another. For the purpose of running a business, the trading trust is most relevant. In a trading trust, the property of the trust is used in the conduct of a business. The trustee of a trading trust is often a limited liability private company, the effect of which is to afford the advantages of limited liability protection to the trading trust. The trustee distributes income generated by the business to the beneficiaries, and because the trustee has a discretion, it can distribute the income in a way that creates taxation advantages.

Advantages: A trust, like a partnership, is not a separate legal entity. However, the use of a corporate trustee enables the business to trade under conditions of limited liability. In other words, the beneficiaries will not be personally liable for the debts of the business. The creditors can look only to the corporate trustee that has limited liability. In this way, the risk (for the beneficiaries and the trustee) is minimised.

Disadvantages: It can be a complex structure that requires considerable work when created and there are ongoing accounting and taxation complexities. The trust is taxed if the profits generated by the business are not distributed. The trustee has significant responsibilities and can be held to account by the beneficiaries.

Partnership

[PT5.50] A partnership consists of two or more individuals in business together. Partnerships may be as small as a family cafe business or as large as some of the big legal or accounting firms.

Advantages: There is the advantage that comes from two or more individuals combining strengths and assets. Partnerships can be inexpensive to establish and dissolve. However, more complex professional partnerships inevitably have partnership agreements. Partnerships have less regulatory and compliance costs than corporations. Depending on the partnership, there is greater potential to obtain loans.

Disadvantages: Some of the disadvantages are similar to those experienced by sole traders: partners are at risk of personal liability for the debts of the firm and the life of a partnership (absent a partnership agreement) is limited.

Corporation

[PT5.60] Corporations are the most powerful and valuable form of business organisation. There are many forms of corporate entities with a vast range in value and complexity, from private $2 shelf corporations

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(a term used to describe a corporation that has been pre-formed – and its documents "put on the shelf" – with two $1 shares issued) to publicly listed corporations worth over a trillion dollars. In this part of the book, we are only concerned with limited liability public and private corporations.

Advantages: Limited liability of the owners (shareholders). This is the biggest advantage to incorporation and has been responsible for the rise and rise of the corporation. Perpetual succession is another advantage: the ownership of the (public) company can change but the corporation goes on until it is deregistered. There is far greater opportunity to raise capital, particularly with a public corporation.

Disadvantages: Corporations are typically more closely regulated with much greater disclosure rules and greater organisational responsibilities. The management has significant statutory duties with serious sanctions for a failure to comply.

Table PT5.1: Main Differences between a Limited Liability Company and a Partnership

	Company	Partnership
Number of Members	Minimum of one but no maximum except in certain cases such as a proprietary company.	Minimum two; maximum number restricted by provisions of the *Corporations Act 2001* (Cth).
Liability of Members	Limited to the amount unpaid on the shares held.	Unlimited and extends to private property.
Formation	Mainly under the *Corporations Act 2001* (Cth).	By private partnership agreement or may be implied.
Property and Assets	Belong to the company as such and not the members.	Vests in the partners.
Capital	Small parcels of shares may be held by an individual member.	Partners may be required to contribute substantial amounts.
Management	Vested in the directors and exercised under the provisions of the articles of association, constitution or replaceable rules.	Each individual partner is entitled to share in the management subject to the terms of the partnership agreement.
Legal Action	Company must sue and be sued in its own name.	Partners may sue and be sued personally but, except in New South Wales, actions may be commenced or defended in the firm name.
Agency	A member as such is not an agent of the company and has no authority to bind the company.	Each partner is, unless restricted, an agent of the partnership.
Alteration of Constitution	Must be carried out under the provisions of the *Corporations Act 2001* (Cth).	A matter of mutual consent between partners.
Continuity of Existence	Death or bankruptcy of a member or members does not affect the company.	Dissolution occurs upon any change in the composition of the partnership.
Transfer of Interest	Transfer is made under the provisions of the articles of association, constitution or replaceable rules.	Partner may assign all or part of her or his interest in the partnership but the consent of the remaining partners must be obtained if assignee is to be accepted as a partner in substitution for the vendor.
Status	A separate legal entity apart from members forming it.	Does not have a separate legal existence apart from its members.

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Chapter 17

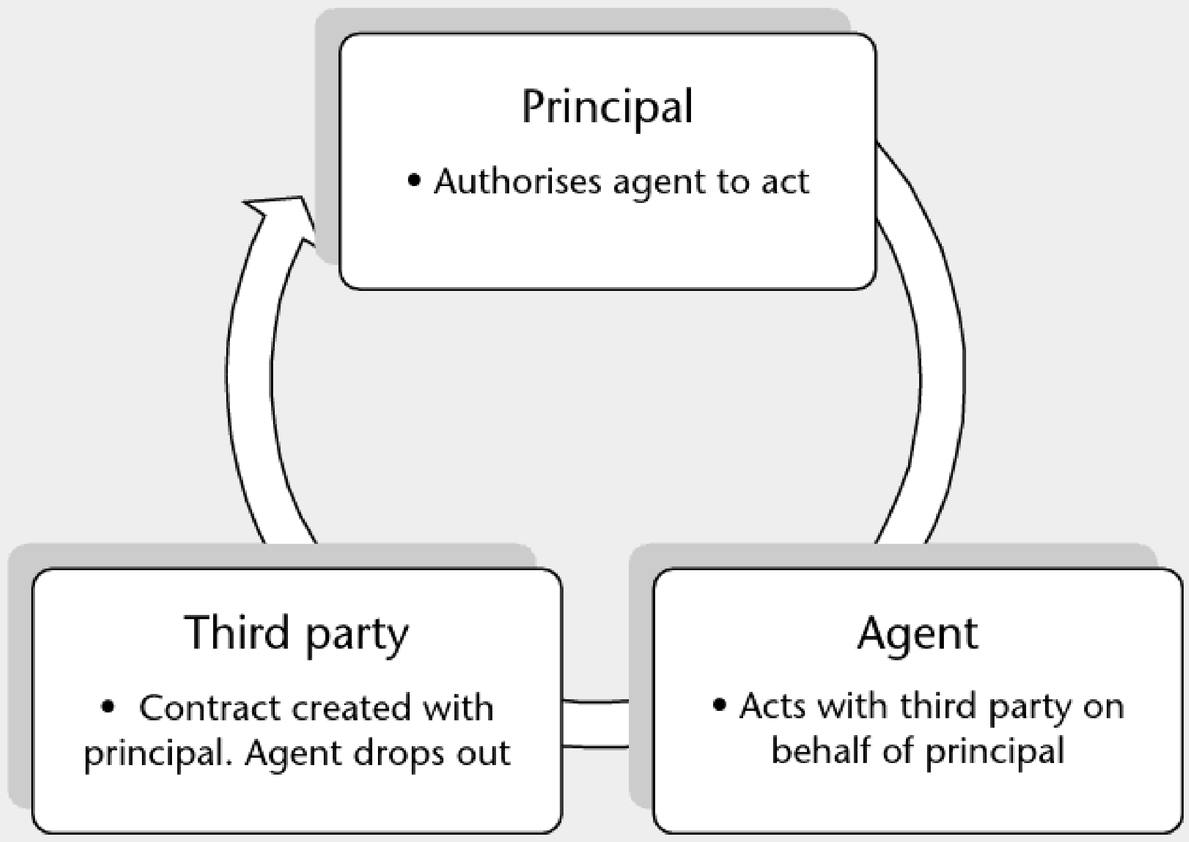
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Introduction

Figure 17.1 : The agency matrix



[17.10] An increasingly important concept in the commercial world is the concept of agency. Although we usually act for ourselves and are responsible for our own actions when we do so, it is also clear that for various reasons – lack of time, lack of expertise, inability to be personally present, to name just a few – we also often rely upon or engage others to act on our behalf. We only need to think about real estate agents, sports, theatrical, and literary agents, stockbrokers, employees, travel agents and directors of corporations to appreciate that agency – the legal construct underpinning those and many other representative roles – is crucial to many aspects of commercial life.

Definition of agency

[17.20] Agency is the relationship existing between two parties whereby the agent (the person acting on behalf of another) is authorised by the principal (the person being represented) to do, on the principal's behalf, certain acts which affect the principal's rights and duties in relation to third parties (parties with whom the principal is not interacting personally). An agent has certain authority to act for a principal, with the general object of bringing the principal into legal relations with a third party.

Agency distinguished from other relationships

[17.30] Agency overlaps with two other types of relationship which appear, at first sight, to be similar: namely, that of employer and employee, and that between an independent contractor and the person with whom they contract. Employment and independent contractor relationships are mutually exclusive classes of relationship. Employees are subject to control regarding the manner in which their work is to be carried out. Independent contractors, on the other hand, exercise their own discretion as to the manner in which they carry out the work that they undertake to perform.

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Some independent contractors are agents for those who employ them, and some employees are general agents for their employers, but it is not true to say that all employees or all independent contractors are agents for their employers or those who engage them (respectively). The essence of agency is that an agent has authority to affect a principal's relationship with third parties. With some types of employees and independent contractors this will be readily implied. For example, a retail assistant employed to sell goods is an agent. On the other hand, a domestic servant may be an employee but is not generally an agent of their employer. An auctioneer retained to sell goods, however, is an agent, but is actually not an employee.

[17.40] An agent should also be distinguished from a trustee. Both agents and trustees act in a similar conceptual manner, that is, on behalf of other persons. However, although a trustee exercises their powers on behalf of the trust's beneficiaries, a trustee is not the agent of the beneficiaries. This is because a trustee does not bring their beneficiaries into contractual relationships with third parties. In dealing with matters relating to the trust, the trustee is actually considered a principal, and not an agent.

Capacity to act as principal and agent

[17.50] There is a marked distinction between a person's capacity to act as a principal and their capacity to act as an agent. Generally speaking, only those persons with full contractual capacity may appoint an agent. Any person can be appointed as an agent, however, and can exercise any of the rights and powers conferred by their contract of agency, even though they may not have the necessary contractual capacity to bind themselves in similar negotiations. This is why, for example, people under the age of 18 (who may not have full contractual capacity, being minors) can act as agents in the course of their employment in retail settings. Since they do not have full contractual capacity, however, they cannot themselves be a principal.

An agent cannot have greater powers conferred upon them than the principal has; if the principal is under some disability with respect to the exercise of their legal powers, the powers of the agent are equally limited. Where the alleged principal is in fact incapable of giving authority to an agent to act on their behalf, an agent who represents that they have such authority (which does not exist) is liable to the third party for breach of warranty of authority.

Creation of agency

[17.60] The relationship of principal and agent (an agency relationship) may be created in the following four ways:

1. expressly (ie by agreement):
   - (a) by deed;
   - (b) by writing; or
   - (c) by word of mouth;
2. "holding out" or estoppel;
3. ratification; or
4. operation of law:
   - (a) agency of necessity; or
   - (b) agency arising by cohabitation.

These four ways of creating an agency relationship are now analysed in turn.

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Expressly (by agreement)

[17.70] An agency relationship can be created expressly: that is, by the agreement of the principal and the agent. That agreement may take the form of a deed, a written agreement, or an oral agreement.

By deed

[17.80] The appointment of an agent by a deed (ie an instrument under seal) is necessary where the agent is required to execute any instrument also under seal on behalf of their principal. In this case, the document creating the agency relationship is termed a power of attorney.

A deed could, in principle, be used to create an agency relationship where there is no need for an agent to themselves execute a deed. However, in those circumstances, it would likely be much more practical to create an express agency by way of a written or an oral agreement.

By writing

[17.90] An agent is often appointed in writing. In some cases, an agent's appointment is required by statute to be in writing. For example, in most States, agents employed to sell or buy land and agents employed to sell or buy businesses cannot sue for their remuneration, that is, their commission, unless their appointment as an agent is in writing.

By word of mouth

[17.100] An oral offer for appointment as an agent, followed by either a written or oral acceptance, is sufficient to conclude a contract of agency for most purposes other than those mentioned in [17.80] and [17.90]. Still, it is usually desirable that the appointment of an agent be in writing for practical (rather than legal) purposes.

The desirability of having a written agency agreement became evident in the criminal trial of Titus Day, a former agent/manager of Guy Sebastian. Guy Sebastian is one of Australia's most successful singer-songwriters, being of The Voice and also of Australian Idol fame (amongst many other accolades to his name). In 2022, Day was convicted by a New South Wales District Court of 34 charges of embezzling about $600,000 from Sebastian. In 2023, Day successfully appealed his conviction to the Court of Criminal Appeal, which ordered a retrial. At the time of writing, that retrial had not yet occurred, and is expected to be held in May 2025. Regardless of the outcome of these criminal proceedings, what is of most interest for present purposes is the fact that Day was earning approximately $500,000 a year in commissions *without ever having signed a contract*.[1]

Agency by holding out or estoppel

[17.110] The relationship of principal and agent may arise (without express agreement) where one party (the principal), either by words or by conduct, leads others (the third parties) to believe that the agent is in

1 At the initial trial, the court heard that a draft written contract was prepared but was never signed. Sebastian gave evidence that Day took over control of almost every aspect of his professional affairs, including the execution of contracts. There were two areas of dispute at the initial trial that a written contract may have clarified. First, Day purchased shares totalling $578,000 (allegedly) without Sebastian's authorisation or knowledge. And secondly, Day said that he was entitled under the (oral) agency to "trailing commissions" (commissions on fees that were made even after the (oral) agency agreement was terminated). In what was obviously a gross (but common) error of judgment, Sebastian said that he didn't read through every document presented to him to sign, because he knew Day was a contract lawyer *and* because he trusted him.

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fact the principal's agent. In such a case, the principal is "estopped" (prevented) from denying the authority of the agent when a third person has entered into an agreement with the agent because of the principal's representation. Whether a principal has "held out" to third parties that the agent is their agent is a question of fact, to be decided in the circumstances of each particular case. However, it is important to note that an agent cannot create an agency relationship by *themselves* holding out to third parties that they have authority which does not in fact exist. The representation must come from the principal.

Ratification

[17.120] The relationship of agency may also arise as a result of "ratification". Where one person acts on behalf of another, without having authority to do the particular act, the person on whose behalf the act is done may, by "ratifying" it, render the act as valid and effectual as if it had been done with authority at the time by their duly authorised agent.

Ratification may arise as an issue where an agent has certain authority but has exceeded that authority. For example, where an estate agent enters into a contract for a lease for a term that is longer than the term that their principal had authorised, the principal may still adopt the transaction and thus bind themselves to what would otherwise be the unauthorised act of the agent.

In order for a ratification to be effective, the following rules should be observed:

1. The acts must have been done as agent for and on behalf of the supposed principal. For the legal position where an agent does *not* disclose to the third party that they are acting as an agent, see [17.500].
2. The ratification may only be done by a principal who was in existence at the time of the making of the contract. This means that a company cannot ratify acts done on its behalf that occurred pre-incorporation.
3. The principal must have the capacity to make the contract both at the date of the contract and at the date of ratification.
4. Ratification must be of the whole contract. A principal cannot ratify parts of a contract that are seen to be beneficial, and reject the remainder.
5. Ratification must be undertaken with full knowledge of what has been done, so that the inference may properly be drawn that the principal intended to take upon themselves the responsibility for the agent's acts.

Provided that a principal's ratification complies with these above rules, it operates *retrospectively* to validate a previously unauthorised act. As a result, it is as if the agent had been vested with authority at the outset.

Operation of law

[17.130] An agency can also arise, in rare circumstances, by the operation of law. That is, in the absence of any actual agreement or intention to create an agency relationship, the law itself may cause such an agency to exist. This has historically occurred in two situations, arising out of:

1. necessity; and
2. cohabitation.

Agency of necessity

[17.140] The common law recognises that in certain emergency situations, one person may be allowed to bind another without the authority of the other. In these cases, an agency of necessity arises: not

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through agreement, holding out, or ratification, but from the relationship of the parties in the particular circumstances. However, because of the potential consequences of an agent binding a principal in the absence of an agreement, the following four criteria must be met:

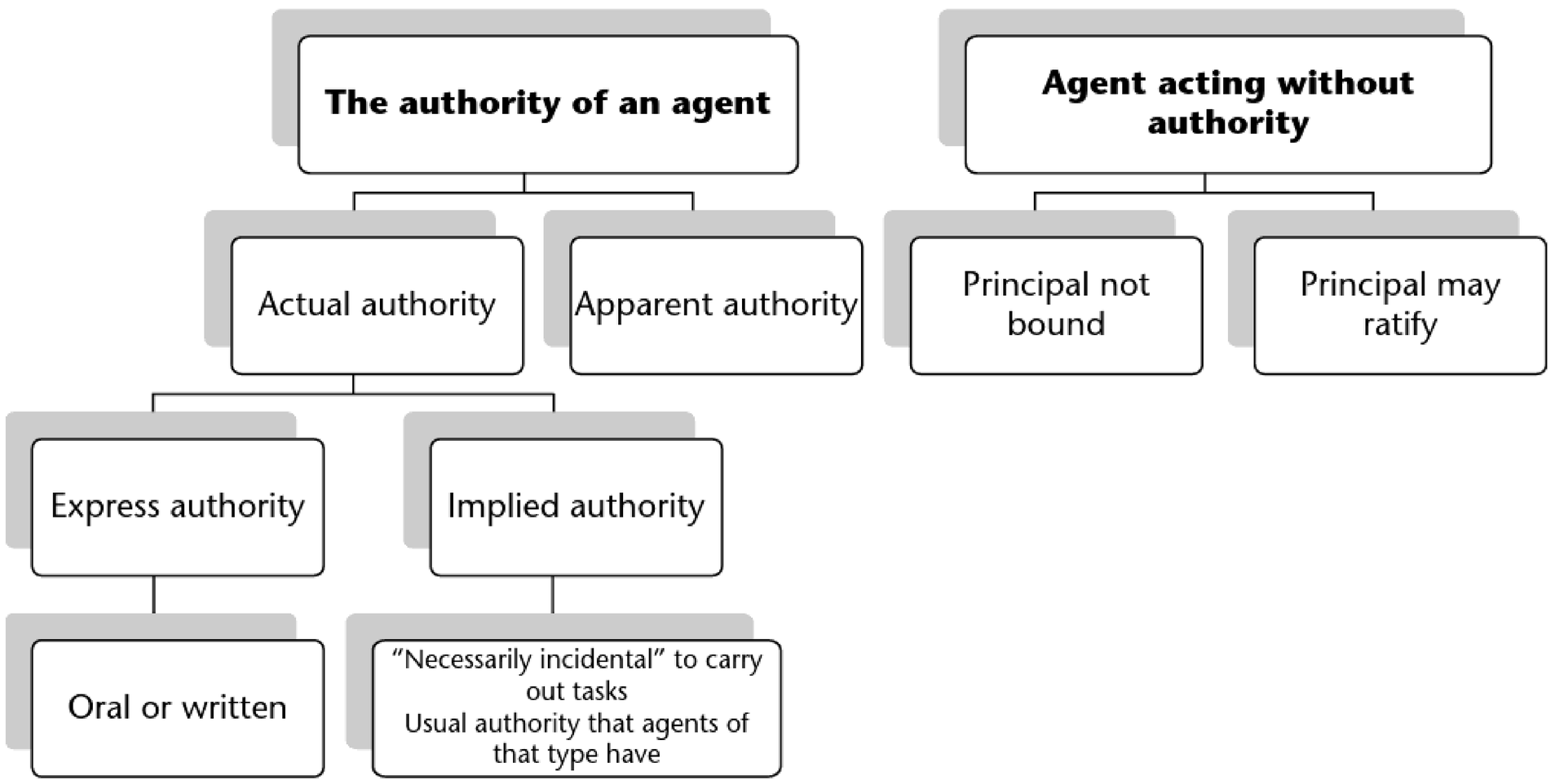
1. A person must have been entrusted with another's property.
2. There must be some commercial necessity for the agent's action or expense.
3. It must be impossible or extraordinarily difficult to contact the owner of the property.
4. The agent must act bona fide (that is, genuinely) in the interests of the principal.

Agency arising by cohabitation

[17.150] Reflecting the social structures of a very different time, the common law presumed that, when a husband and wife were living together, the wife had the authority to pledge her husband's credit for all necessaries suitable to their particular station in life. Unsurprisingly, given the very different social environment in which we now live, this common law doctrine has been abolished by legislation in New South Wales, South Australia, the Australian Capital Territory and the Northern Territory.[2]

Nature and scope of an agent's authority

Figure 17.2 : Agent's authority



[17.160] Separate to the issue of the existence of an agency relationship is the issue of an agent's authority. Even if an agency relationship exists, the principal will only be bound by those acts of the agent that fall *within the scope of the agent's authority*. Conversely, the principal will not be bound by what the agent does in excess of their authority (unless the principal subsequently ratifies the unauthorised act). Furthermore, and significantly, if the agent acts outside of their authority, the agent may be liable to the *principal* for *breach of the contract of agency* and/or to the *third parties* for *breach of the implied warranty*

2 *Married Persons (Equality of Status) Act 1996* (NSW), s 7; *Married Persons (Separate Legal Status) Act 2019* (SA), s 5; *Married Persons Property Act 1986* (ACT), s 5; *Married Persons (Equality of Status) Act 1989* (NT), s 5.

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of authority. And, as footnote 1 (and its accompanying text) indicates, an agent may even be prosecuted under the criminal law if the actions of the agent also constitute criminal offences.

Case law demonstrates the importance of determining the scope of an agent's authority. In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 (at [9.60]), the main issue was whether the principle in *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 (that you are bound by a contract you sign, even if you haven't read its contents) applied. Alphapharm, in addition, submitted that Richard Thomson Pty Ltd was not acting within its authority when its employee signed the relevant contract. If that was the case, the Conditions of Contract (that included the exclusion clause) would not bind Alphapharm. The High Court rejected that argument, and concluded that Thomson was acting as an agent for Alphapharm and was acting within its authority. The Court said:

> The evidence compels the conclusion that Alphapharm authorised Richard Thomson to contract with Finemores and to agree upon rates of freight, terms of payment, and such other standard terms and conditions of the contract of storage and transportation as were required by Finemores. So long as the terms and conditions to which Richard Thomson agreed were Finemores' standard terms and conditions then Richard Thomson was acting within its authority.

The authority of an agent

[17.170] Just as there are different ways that an agency relationship can be created, there are also different types of authority. Here, we explore the concepts of actual and apparent authority. Both types of authority are sufficient to bind a principal to contracts with third parties.

Actual authority

[17.180] The actual authority of an agent can be thought of as the authority that is *actually* given by the principal. There is nuance here, however, as actual authority can be either actual *express* authority or actual *implied* authority. The general nature and effect of the actual authority of an agent was explained by Diplock LJ in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 as follows (emphasis added):

> An "actual" authority is a legal relationship between principal and agent *created by a consensual agreement to which they alone are parties*. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement the contractor [ie the third party] is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the "actual" authority, it does create contractual rights and liabilities between the principal and the contractor.

Actual express authority

[17.190] The actual express authority of an agent is the authority that the principal has expressly given the agent in words or in writing. An example is where the principal gives the agent specific instructions to enter into a contract on the principal's behalf to purchase a particular piece of land at a stipulated price. Here, and in other like circumstances, the agent's authority is created by the principal's express agreement and is limited by the terms of that agreement. And as explained in [17.180], contractual interpretation is the tool used to determine the extent of an agent's actual express authority and the limits of that authority.

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Actual implied authority

[17.200] The agent may have further actual *implied* authority to do whatever is necessarily incidental to carrying out the principal's express instructions. For example, where an agent is expressly authorised to buy certain shares, the agent will also have implied authority to do everything in the usual course of business to complete the transaction.

Furthermore, where a person employs a particular type of agent to carry out some act on behalf of the principal, the agent will have such implied authority *as agents of that class normally have to carry out their functions*. For example, when the board of directors of a company appoints one of the directors to be the company's managing director, "[t]hey thereby impliedly authorise [them] to do all such things as fall within the usual scope of that office": *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549.

[17.210] Implied authority is regarded as an aspect of an agent's actual authority because implied authority can only arise where the principal has consented to the agent having authority to act in a particular manner. If there is evidence that the principal has not so consented, then it cannot be said that there is any implied authority. However, as we shall see in [17.220], it may well be that in such a case a third party can still rely upon the agent's apparent authority to enter into the particular transaction.

Apparent authority

[17.220] As we have seen, actual authority arises from the relationship that exists between the principal and the agent. Provided that the agent acts within the scope of their actual authority, whether express or implied, the principal will be bound by the acts of the agent. On the other hand, *apparent authority arises from the relationship between the principal and the third party*. In cases of apparent authority, *the agent does not affect the extent of that authority*. Instead, the extent of the authority depends upon what the principal represents to the third party (expressly or impliedly, by words or conduct) about the authority of the agent. Here, the law effectively holds a principal to their representations. Even if an agent does not have actual authority, they will still have the authority that their principal represents to third parties that they have. As with the *creation* of an agency relationship by holding out or estoppel, the agent cannot themselves create apparent authority by their own representations: the representations need to come from the principal.

Thus, if a principal allows an agent to occupy a particular position, such as where the board of directors of a company permits one of the directors to act as a managing director of the company without having been formally appointed as a managing director, the agent will have apparent authority to deal with third parties in a manner consistent with the functions *normally falling within the usual authority of the holder of that position*. Again, this is not because of what the agent has represented, but because of what the principal has represented, by putting the agent in that position. *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* is the leading authority on this point.

Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd

[17.230] *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480. Kapoor and Hoon formed the defendant company to purchase, develop, and then resell the Buckhurst Park Estate in Berkshire, UK. The board of directors comprised Kapoor, Hoon and a nominee of each. The Articles of the company (which would now be called its corporate constitution, a topic explored in Chapter 19) contained a power to appoint a managing director,

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but none had been appointed. The development of the land was left to Kapoor who, with the knowledge of the board of directors, acted as if he was the managing director even though he had never been formally appointed to the position. Kapoor employed Freeman and Lockyer, the plaintiff firm of architects. Kapoor had no specific authority to do this, either in the Articles or from the Board. When the architects claimed their fees from the company, the company refused to pay, arguing that Kapoor had no authority to employ the architects. If there was no authority, there would be no contract, and thus no contractual entitlement to fees. The plaintiffs sued the company for payment of their fees.

The Court rejected the submission that Kapoor had actual authority. There was no express authority to engage the architects and there was no implied actual authority, which might have existed had Kapoor actually been appointed as the managing director. However, the Court of Appeal unanimously agreed that Kapoor had apparent authority to engage the plaintiffs. Kapoor was the driving force behind the venture (Hoon was absent for most of the time) and evidence from the Board meetings indicated that Kapoor should carry out all of the acts necessary to make the venture a success. However, before such authority exists, Diplock LJ set out four criteria that must be met:

(1) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;

(2) that such representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates;

(3) that [they] (the contractor) was induced by such representation to enter into the contract, that is, that [they] in fact relied upon it; and

(4) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

[17.240] Where a person is appointed to a particular position, such person will have as part of their apparent authority all the usual authority of a person occupying that position. This is demonstrated by the case of *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd*.

Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd

[17.250] *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711. The secretary of a company (Fidelis) contracted with a hire-car company (Panorama) to hire expensive cars, apparently to transport Fidelis' clients from Heathrow airport to the company's offices. In fact, the secretary had no actual authority to enter into such agreements and was using the cars for his own purposes. The hire-car company sued Fidelis to recover the hiring charges. It succeeded.

The Court of Appeal held that entering into a contract of this kind was within the usual authority of company secretaries and was therefore within the apparent authority of this

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> particular secretary. The Court said that a company secretary is an officer of the company with wide responsibilities. They may be seen to have authority to make representations and to enter into contracts on behalf of the company in respect of the day-to-day administration of the company. This would include such routine matters as hiring cars.

[17.260] An employer may hold out that an employee has authority if the employer permits the employee to act in a particular way without taking appropriate precautions. To be clear, once again, it is not the employee's actions that are critical for apparent authority purposes, but the fact that the employer allows the employee to act in that particular way. In *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, the High Court said that: "A kind of representation that often arises … is one which flows from equipping an officer of a company with a certain title, status and facilities … The holding out might result from permitting a person to act in a certain manner without taking proper safeguards against misrepresentation." In those circumstances, it may be unjust to permit the employer to depart from a reasonable assumption based upon that misrepresentation; hence apparent authority will bind them to transactions that their agent enters into that are within the scope of the agent's apparent authority.

Duties of an agent

[17.270] Every agent owes certain duties to their principal, which vary in degree according to the nature of the agency and according to the express terms of the contract of agency.

Duty to follow the principal's instructions

[17.280] The primary duty of every agent is to follow their principal's instructions. An agent must therefore comply with the contract of agency before they will be entitled to remuneration. Failure to comply with the principal's instructions, except where they are illegal, will render the agent liable for the loss suffered by the principal as a result of the breach.

Duty to act in person

[17.290] Every agent must act in person and, apart from any express or implied authority conferred by the principal to do so, or from a particular usage, an agent has no authority to further delegate their duties as agent to another. Owing to the realities of business, this rule is relaxed in order to enable the agent, in certain cases, to delegate their powers and appoint a sub-agent. For example, a country solicitor (themselves an agent for their client, the principal) may employ a city agent whose acts will still bind the solicitor's client. An agent may also delegate where the duties to be performed by the agent do not involve the exercise of any discretion or skill on the part of the agent in person.

Duty to act in good faith

[17.300] An agent occupies a fiduciary position. The law recognises a fiduciary relationship where one party has a significant degree of vulnerability: in this case, the principal. As a result, an agent is bound to exercise their rights and their powers in good faith and for the benefit of the principal. The agent is under a duty in all cases to act in the interests of the principal, and they must not allow their own interests to conflict with those of the principal.

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Lintrose Nominees Pty Ltd v King

[17.310] *Lintrose Nominees Pty Ltd v King* [1995] 1 VR 574. A purchaser bought property from a vendor on the advice of an agent to whom the purchaser had paid a fee for the advice. Unknown to the purchaser, the agent had been retained by the vendor to market the property. It was held that the purchaser was entitled to rescind the contract of sale with the vendor. It was stated: "the vendor could not properly sell its property through its agent, knowing that the agent was retained to advise the purchaser on the purchase, without knowing also that the dual allegiance of the agent was disclosed to the purchaser."

Duty to make full disclosure of any personal interest

[17.320] An agent must disclose to the principal all of the material circumstances of which they are aware which might influence the principal in entering into any negotiation. If the agent fails to make such disclosure, they are not entitled to their commission. Any profit received by the agent resulting from such non-disclosure is recoverable by the principal on learning the true facts.

Duty not to make a secret profit

[17.330] A fundamental duty of an agent is not to use their position to make a gain for themselves without the knowledge and assent of the principal. In the case of *Parker v McKenna* (1874) 10 Ch App 96, James LJ said:

> No agent in the course of his agency, in the matters of his agency can be allowed to make any profit without the knowledge of his principal; … that rule is an inflexible rule and must be applied inexorably by this court, which is not entitled, in my judgment, to receive evidence, or suggestion or argument as to whether the principal did or did not suffer any injury in fact, by reason of the dealing of the agent.

Thus, an agent cannot make a secret profit by use of their position even if their principal does not suffer any loss as a result of their actions. *Regal (Hastings) Ltd v Gulliver* illustrates this point. Note, in particular, the words of Lord Wright on the ethical responsibilities of agents vis-à-vis their principals.

Regal (Hastings) Ltd v Gulliver

[17.340] *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134. The defendants were the directors of Regal, a company which operated a cinema. It created another company, HAC, intending it to be a subsidiary and to acquire the leases on two cinemas nearby. However, because the company itself did not have sufficient money, the directors and the company solicitor personally paid for 60% of the shares in HAC. HAC acquired the cinemas, and then both were sold off to the plaintiff (Gulliver) for a profit. The plaintiff, as the new management of Regal, sued the ex-directors and solicitor, seeking an account of profits that they made on the sale of their personal shares in HAC, saying that this profit was earned in breach of their fiduciary duties owed to the company. The four directors were ordered to disgorge (pay over) the profits that they had made from the sale of the shares because they had acquired the shares through their positions

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as directors. The House of Lords said that the rule of equity, which insists on those who by use of a fiduciary position make a profit being liable to account for that profit, in no way depends on fraud, or the absence of bona fides (good faith), or considerations as to whether the property would or should otherwise have gone to the plaintiff. The liability arises from the mere fact of a profit having been made.

Lord Wright put the ethical responsibilities of fiduciaries well in the following statement (emphasis added):

> Once, it was said, they came to a bona fide decision that the appellant company could not provide the money to take up the shares, their obligation to refrain from acquiring those shares for themselves came to an end. With the greatest respect, I feel bound to regard such a conclusion as dead in the teeth of the wise and salutary rule so stringently enforced in the authorities. *It is suggested that it would have been mere quixotic folly for the four respondents to let such an occasion pass when the appellant company could not avail itself of it … [however] the person in the fiduciary position may be the only person in the world who could not avail himself of the opportunity.*

Should the agent receive a secret commission or profit, the principal may recover it and may also dismiss the agent without notice. Where the agent desires to act for both a vendor and a purchaser and to obtain commissions from both, the agent must make full disclosure to each party and must obtain the agreement of each party for them to act in that way.

Duty to exercise reasonable care and skill

[17.350] An agent who is employed for remuneration is bound to exercise such skill, care and diligence in the performance of their undertaking as is usual or necessary for the ordinary or proper conduct of the profession or business in which the agent is employed. If the agent fails to exercise the requisite care and skill, the agent will be liable to their principal for the loss sustained by the principal as a result of the agent's breach of duty.

Mitor Investments Pty Ltd v General Accident Fire & Life Assurance Corporation Ltd

[17.360] *Mitor Investments Pty Ltd v General Accident Fire & Life Assurance Corporation Ltd* [1984] WAR 365. An insurance broker was instructed by a client to obtain unqualified insurance cover against damage caused by flood. Unknown to the client, the broker obtained insurance cover excluding flood caused by the sea. Subsequently, the client suffered loss as a result of flooding by the sea, and the insurance company avoided liability by virtue of the exclusion. The broker was held liable because of his failure to exercise reasonable care and skill in obtaining the insurance.

[17.370] Though directors are agents of the companies that they represent, the duties of the directors of companies are also the subject of separate statutory provisions under the *Corporations Act 2001* (Cth). As will be seen in Chapter 19, under the *Corporations Act 2001* (Cth), s 180(1), directors must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would

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exercise if they were a director of a corporation in the same circumstances, and had the same position and responsibilities as the director. A range of other statutory directors' duties also apply, including those contained in the *Corporations Act 2001* (Cth), ss 181–184, which are addressed in Chapter 19.

Further duties

[17.380] An agent must take such care of the property of the principal as a reasonably prudent person would take in caring for their own property. They must keep all moneys and property of the principal separate from their own. An agent must keep separate accounts of all dealings on behalf of the principal, and must have such accounts ready for inspection by the principal. They must also preserve confidentiality regarding all matters coming to their knowledge while acting as an agent.

Rights of agents

[17.390] Whilst agents have the duties set out above, they also have particular rights, which we consider here. These rights include the right to remuneration, the right to indemnity and reimbursement, and the right of lien.

Right to remuneration

[17.400] In order to determine the agent's right to remuneration, which will often be a commission, the terms and circumstances of the agent's appointment must be examined. The agent may be entitled to remuneration only if they complete a sale, or in special cases, a commission may be payable if the agent simply brings the parties together. Further, there may exist a time limit for the completion of the contract, or the remuneration may be of a continuous nature payable on all further business arising from the same source. The terms of the agency agreement between the principal and the agent, as interpreted according to ordinary contract interpretation rules, will settle these questions.

Agent must be the effective cause of the sale

[17.410] In order for an agent to claim their remuneration, the transaction in relation to which the remuneration is claimed must not only come within the scope of the agent's authority, but must have also resulted from the agent's services. The agent must have been the means whereby the two contracting parties were brought together and then entered into a legally binding contract. That is, the agent must have been the effective cause of the sale, to be entitled to remuneration.

LJ Hooker Ltd v WJ Adams Estates Pty Ltd

[17.420] *LJ Hooker Ltd v WJ Adams Estates Pty Ltd* (1977) 138 CLR 52. A company was the owner of a property and it engaged a real estate agent to find a purchaser. The agent introduced the property to Company A which made unsuccessful offers to purchase. Meanwhile, the owner was negotiating to sell the property to Company B, which was a party that the agent had not introduced. When the two companies learned of each other's interest in the property, they entered into a joint venture agreement to avoid forcing up the price by their competing bids. The joint venture agreement provided that each company would continue to negotiate with the owner. If one of the companies became the purchaser, that party would complete the purchase, and redevelop the site with the other on an equal basis. The property was eventually sold by

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the owner to Company B. The agent sued the respondent to recover its commission. It was held that the estate agent was not entitled to recover any commission, as it had not been an effective cause of the sale to Company B, and there had been no sale of any interest in the property to Company A.

Right to indemnity and reimbursement

[17.430] Every agent is entitled to be indemnified against all losses and liabilities sustained, and to be reimbursed for all expenses lawfully incurred, in the carrying out of the principal's instructions. Attention is drawn to the word "lawfully", here, for where an agent has acted outside of the scope of their authority, or has engaged in an unlawful act, or has suffered loss through their own negligence or default, the agent has no claim to be reimbursed or indemnified.

Right of lien

[17.440] A lien is a right to retain possession of the property of another until the happening of a particular event. An agent has a lien on such property of the principal as comes into the agent's hands, pending the due payment of all expenses incurred by and all remuneration due to the agent in transacting the principal's affairs. However, the transactions must relate to the property over which the agent desires to exercise a lien. The agent may have a general lien extending to all claims arising out of the agency, either by express contract or by usage.

Liabilities of agents

[17.450] An agent may incur liability to the principal, and also to third parties.

Liability of the agent to the principal

[17.460] Generally, the agent incurs no liability to the principal in regard to the contracts that they enter into on behalf of the principal. This makes commercial sense. To take just one example, when we transact with an employee who is acting on behalf of a retailer, we (as third parties) expect that the individual acting as the agent will fall out of the picture once the transaction is completed, and that our contractual relationship will be with the principal (the retailer) only. However, where the agent disobeys the principal's instructions, the agent will be liable for the loss suffered by the principal as a result of the breach of the contract of agency. Furthermore, where the agent is negligent in carrying out their duties, the agent will be liable to make good the damage suffered by the principal as a consequence of the agent's negligence. Any confidential knowledge acquired by an agent during the course of the agency should also not be used by the agent or made available to third parties, and should the agent breach this requirement, they may be liable to their principal in an action for damages.

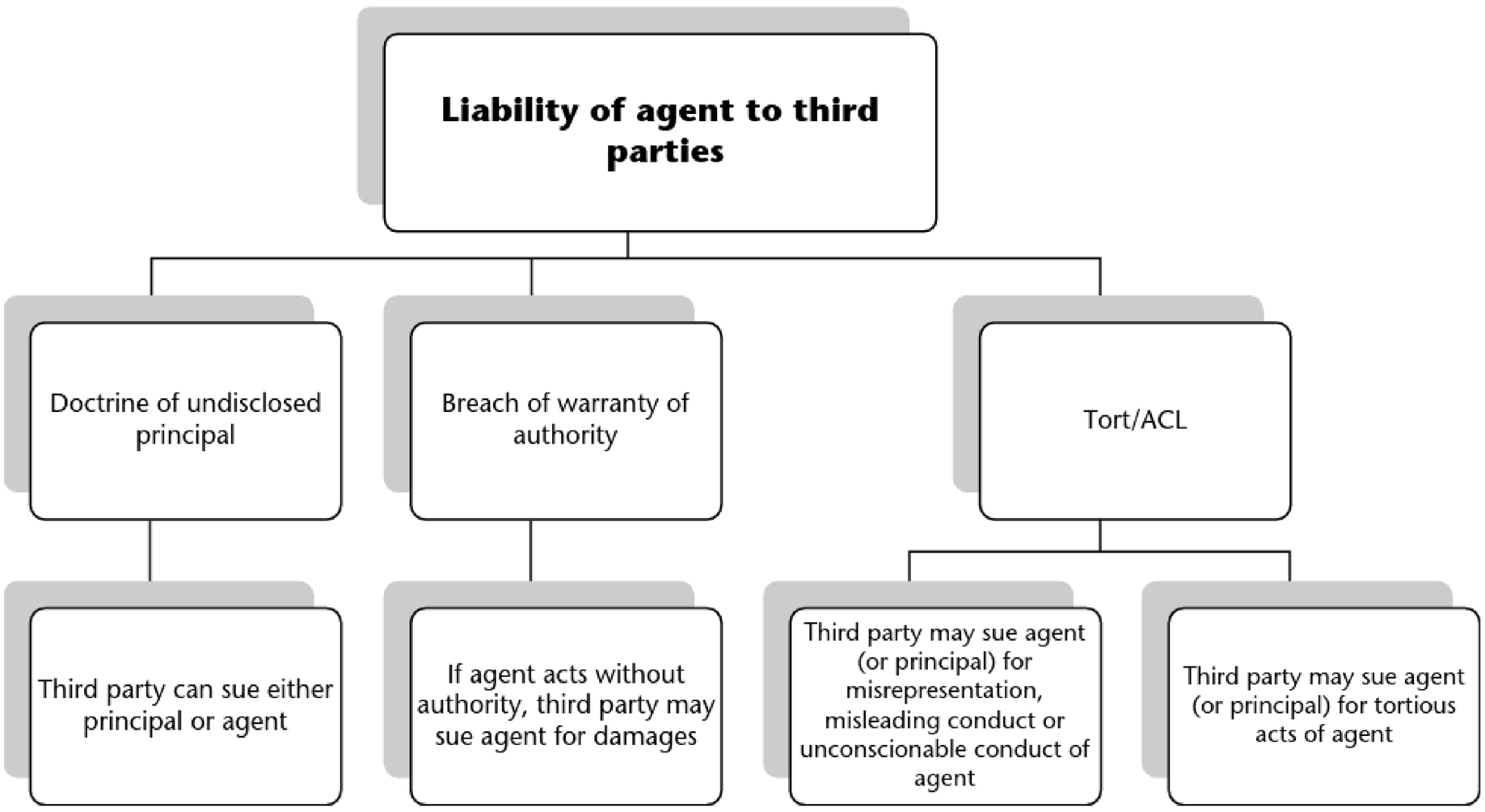
Liability of the agent to third parties

[17.470] As described above, in normal circumstances, the agent will not have any liability to the third party concerning the contract that they enter into on behalf of their principal. Returning to the retail example above, as the third party, we expect that our contract is with the retailer (the business) and not the agent (the employee) personally. However, there is some nuance here. The agent's liability towards third

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parties actually depends upon whether the agent discloses the name of the principal, whether the agent does not disclose the name of the principal but does disclose the existence of the principal, or whether the agent does not disclose the existence of any agency.

Figure 17.3 : Liability of agent to third parties



Name of the principal disclosed

[17.480] Where the agent discloses the name of the principal, the contract is (as summarised above) deemed to be that of the principal. The agent is not liable on the contract *except* where the agent contracts outside of the scope of their actual or apparent authority; the agent agrees to be liable; usage or custom makes the agent liable; the agent contracts by deed in their own name; or where the principal does not exist.

Where a person professes to contract on behalf of a principal who does not exist, the person so professing is presumed to have intended to contract personally, unless a contrary intention is proved. The words "professes to contract on behalf of a principal" are the critical ones, for if the person were to sign a document, not as an agent but as the principal, the rule would have no operation and the agent would be liable as the actual contracting party under ordinary common law contract rules.

Existence but not the name of the principal disclosed

[17.490] Where the agent discloses the fact that a principal exists but not the name of the principal, the agent's liability, *provided that they contract as an agent*, is similar to the cases where the name of the principal is disclosed. If the third party enters into the contract, knowing that there is a principal but not knowing the principal's name, the third party cannot sue the agent. In other words, the agent's liability is the same, *provided that they contract as an agent*, whether or not the principal's name is disclosed.

However, the particular circumstances may disclose an intention that the agent alone was to be a party to the contract. For example, where a principal would be drawn from a known class (the agent's clients) but the agent has not yet selected any particular client at the time that the contract was made, the agent would be held to have contracted as a principal (ie as themselves personally).

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Existence of principal not disclosed

[17.500] Sometimes an agent does not disclose to the third party that they are acting as an agent. Accordingly, the third party believes that the person they have been negotiating with is actually the other party to the contract. In such a case, either the undisclosed principal or the agent can sue or be sued on the contract, unless the contract between the agent and the third party expressly or impliedly excludes the rights of persons other than the agent to be a party to the contract.

However, the legal rights and obligations of the undisclosed principal only arise where the agent had actual authority from the principal to enter into the contract. An undisclosed principal cannot ratify a transaction entered into without the agent having actual authority. (Note that, by definition, no apparent authority can exist if the third party does not know of the principal's existence.)

While at the outset it is open to the third party to hold either the agent or the undisclosed principal liable on the contract, the third party is irrevocably bound by their election to hold either the agent or the principal liable. Where the third party sues and recovers judgment against the agent on the contract, the third party is conclusively deemed to have elected to hold the agent liable, and cannot then sue the undisclosed principal at a later date.

Breach of warranty of authority

[17.510] So long as the agent does not exceed their authority, the agent will not be *personally* liable to the persons with whom they deal. Where an agent represents, either expressly or impliedly, that they have authority to enter into a particular transaction and a third party relies on that representation, the agent is taken to warrant (confirm) that the representation is true. If the representation is untrue, the agent is liable in damages for breach of warranty of authority. The measure of damages is the actual loss sustained by the third party.

It will be no defence that the agent acted innocently, or that they were mistaken as to the precise extent of their authority. A person who purports to act as an agent impliedly warrants that they have authority and is therefore liable for any breach of that warranty even though their authority has come to an end by reason of facts of which they have no knowledge or even no means of knowledge. However, the agent is not liable where the other party knew of the agent's lack of authority.

Liability of the principal and agent for misrepresentation

[17.520] Where an agent is engaged to sell property, it will normally be within the scope of the agent's apparent authority to describe the nature and quality of the property that the agent is selling on behalf of the principal. Accordingly, if the agent's representations are untrue, the vendor will be liable to the purchaser for the loss suffered by the purchaser as a result of relying on the agent's representations.

A principal is vicariously liable for a *tort* committed by their agent where the agent has acted within the scope of their actual or apparent authority. This liability of the principal includes liability for the negligent misrepresentations of their agent. The representations of an agent may also constitute misleading or deceptive conduct in contravention of s 18(1) of the *Australian Consumer Law*.[3]

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3 But see *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 (at [13.420]) and *Hyder v McGrath Sales Pty Ltd* [2018] NSWCA 223 (at [13.100]) where the courts held that the respective agents were not liable for misleading representations to purchasers under consumer law because they were deemed (in the circumstances) to be mere conduits of the information, passing it on for what it was worth, without making any claims as to its accuracy or otherwise.

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Liability of the principal and agent for tortious acts

[17.530] An agent is liable for their own tortious acts. The principal will also be liable for any tort committed by the agent where the agent has acted within the scope of their actual or apparent authority, whether that tort was committed for the benefit of the principal or for the benefit of the agent. For example, the principal will be liable for the fraudulent conduct of their agent, where that fraud was committed within the scope of the agent's apparent authority.

Royal Globe Life Assurance Co Ltd v Kovacevic

[17.540] *Royal Globe Life Assurance Co Ltd v Kovacevic* (1979) 22 SASR 78. An insurance agent persuaded Kovacevic to enter into a life insurance contract. Kovacevic paid the agent an initial premium. The agent gave him a receipt using a receipt book provided by the insurance company. Some months later, the agent invited Kovacevic to invest moneys on loan with the insurance company. The agent told him that a deposit of moneys with the company would return a higher rate of interest and would give him the right to obtain from the company a mortgage for the purchase of a house. Kovacevic paid the agent $2,000 and was given a receipt from the agent's receipt book. The agent disappeared with the money. Kovacevic sued the insurance company for the $2,000. It was held that the agent had received the money from Kovacevic in the course of his employment by the insurance company, which was accordingly liable to Kovacevic for its agent's fraud.

[17.550] A principal is liable for torts (eg negligence, defamation) committed by their agent where the agent is authorised to do the act, or where the act is within the class of acts that an agent is usually authorised to do or that the principal has represented that the agent has the authority to do. Conversely, a principal will not be liable for the wrongful acts of an agent which are outside of the agent's actual or apparent authority, such as where an agent commits an unauthorised assault upon a third party. A principal will also not be liable for the negligence of an agent who acts without any authority and in their own interests, and not on behalf of the principal.

Termination of agency

[17.560] The circumstances in which the relationship of principal and agent will end depend upon the terms of the original contract of agency.

Performance or completion of agency

[17.570] Where the agent is appointed either for the performance of one specific act or for the duration of a definite period, then the authority of the agent will extend only until such act has been done, or until the specified period has ended.

Impossibility of performance

[17.580] Where it becomes impossible for the agent to carry out their obligations, the agency and the agent's authority immediately cease.

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Agreement

[17.590] While the agency is still current, both the principal and the agent may mutually agree to terminate their agency relationship, bringing that agency to an end.

Revocation

[17.600] In any contract of agency, unless some express stipulation has been made to the contrary, there is an implied term that either party may terminate the agency relationship upon notice. However, neither notice of revocation nor notice of renunciation will affect any rights or liabilities which may have been created between the principal and third parties prior to the notice. In other words, termination of the agency agreement does not have retrospective effect.

The right of the principal to revoke the agent's authority may be limited by the rights of third parties and the agent. The principal may be liable to third parties, for example, even after the principal has validly revoked the authority of the agent, where such parties have had previous dealings with the agent and continue to deal with the agent without notice of the withdrawal of the agent's authority.

The right of the principal to revoke the authority of their agent may be limited by the principal's obligation to indemnify the agent against any loss or damage that the agent may have suffered as a result of their employment. Further, the agent may still be entitled to claim for loss of commission. For example, the principal cannot capriciously refuse to enter into a contract and revoke an agency, when the agent has found and introduced a purchaser who is ready, willing, and able to buy at the stipulated price.

By death

[17.610] The death of either the principal or the agent immediately puts an end to the agency. The death of the principal terminates the authority of the agent, even though the agent is unaware of the death and had no means of ascertaining that fact.[4] Consequently, the agent becomes personally liable to third parties for having made any contract on behalf of the deceased principal and may also be sued for breach of warranty of authority, even though the agent was ignorant of the principal's death. The estate of the principal is not liable under such a contract, though the executor may confirm the contract.

By insanity

[17.620] Once insanity has affected either the principal or the agent, the agency is at an end. However, a third party is entitled to treat the authority of the agent as subsisting until they receive notice of the insanity where the principal, before becoming insane, had held out the agent as having authority.

Bankruptcy

[17.630] The bankruptcy of the agent terminates their authority, except where the bankruptcy does not affect their capacity to contract as agent. Thus, where the duties of the agent are merely formal, the agent's bankruptcy would not necessarily affect their authority. The bankruptcy of the principal also terminates

4 In some States, every act done in good faith within the scope of a power of attorney *after* the death of the donor and *before* the receipt of notice of the death is valid and the donee of such power is not liable: *Powers of Attorney Act 2014* (Vic) ss 14–15, 75; *Powers of Attorney and Agency Act 1984* (SA), s 12; *Property Law Act 1969* (WA), s 85(2); *Powers of Attorney Act 2000* (Tas), s 52.

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the agency. However, even after notice of the principal's bankruptcy, an agent may do whatever is necessary to complete a transaction which was already binding on the principal before the bankruptcy.

Renunciation by the agent

[17.640] The agent may renounce their agency at any time but must compensate the principal for any loss caused by their renunciation.

Summary: Agency law, and the law of business organisations

[17.650] Earlier in this chapter, in [17.30]–[17.40], we differentiated agency from other types of legal relationships. At the conclusion of this chapter, it is now helpful to look ahead and understand how agency law interfaces with the law of partnerships (covered next in Chapter 18) and corporations law (addressed in Chapter 19).

As we will see, partnerships are a business structure whereby partners carry on a business, in common, with a view to profit. Partnerships are not separate legal entities; in law, partnerships are a combination of the individual partners. Agency law is key to the operation of partnerships as partners are both agents and principals with respect to each other. Partnerships therefore work, in a practical and in a legal sense, because of agency law. As we will also see, via our detailed study in Chapter 18, the Partnership Act provides a suite of statutory rules that complement the common law.

Regarding corporations, as we will see in Chapter 19, these business structures have their own separate legal identity. The law treats them as legal persons, with legal capacity separate to their management and their owners. However, since corporate legal personality is a legal fiction, companies necessarily act through others. Thus, agency law has a critical role to play in the corporations law context, too. Directors, managers, employees and others act as agents of companies so that those companies can carry out the activities that they were created to do.

Further reading

G Dal Pont, *Law of Agency* (4th ed, LexisNexis Butterworths, 2020).

P G Watts, *Bowstead & Reynolds on Agency* (23rd ed, Sweet & Maxwell, 2024).

Tutorial activities

1. What is the basic concept that lies at the heart of the law of agency? What is the role of the principal, the agent and the third party in an agency relationship?
2. What is the difference between express and implied actual authority?
3. What is the difference between actual authority and apparent authority?
4. Explain, with reference to *Freeman* (see [17.230]), the circumstances in which a person without actual authority can have apparent authority. Why did Buckhurst Park have to pay the architects for their work in this case?

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5. Explain, with reference to *Panorama* (see [17.250]), how we determine the extent of an agent's apparent authority.
6. What are the duties, rights and liabilities of an agent? With reference to breach of warranty of authority, comment on the circumstances in which an agent will be liable to a third party.
7. When is ratification of an agent's otherwise unauthorised action possible?
8. Anwar was appointed to be the stationery purchasing agent during his time as an intern at Awesome Accountants. He regularly purchased stationery on Awesome Accountants' credit account from Stationery Express Ltd, with Awesome Accountants' knowledge and acquiescence. Anwar's purchasing limit was $500 per week, although he never needed to order stationery worth more than $300 in any one week period.

   After the end of his internship with Awesome Accountants, Anwar placed a $250 stationery order with Stationery Express. Anwar picked up this stationery and took it home for his own use. Awesome Accountants has received the invoice for the stationery and does not wish to pay.

   (a) Is there an agency relationship between Awesome Accountants and Anwar?

   (b) Assuming that there is, is this final purchase of stationery within Anwar's authority?
9. Ricardo is the senior curator and the ground manager at Noora Golf Club Resort, a luxury facility in North Queensland owned by Gabba Pty Ltd. Noora has been under financial pressure since the COVID-19 pandemic affected the flow of international tourists. The Board cut budgets and informed Ricardo that he could no longer enter into any contracts valued at over $10,000. Despite this instruction, Ricardo proceeded to negotiate a landscaping contract with Willow Landscaping that was valued at $13,000. An associated water feature cost an extra $4,000. When work commenced, the CEO asked Ricardo what was happening. Ricardo informed him of the landscaping project but did not mention the water feature. After considering the circumstances known to the CEO at that time, the CEO tells Willow to proceed. Soon after, the Board understands the totality of the commitment. Advise the Board of its rights and obligations.
10. Jeanne is an estate agent in Perth, Western Australia. She is selling high-rise units "off the plan" for Aspirational Developments Pty Ltd. She has friends who work for other developers and she becomes aware of a competing high-rise development that is also selling "off the plan" that has run into difficulties, and is now unlikely to go ahead. The result is that the units she is selling are likely to be more valuable than previously thought. Being an opportunist, Jeanne assists a friend to arrange finance so that her friend can buy three of the units, with a view to selling them all later at a profit that Jeanne and her friend will split on a 50–50 basis (ie they intend to share the profits equally).

    Has Jeanne breached her duties owed to Aspirational Developments Pty Ltd? What are the consequences of any breaches of her duties?

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Chapter 18

Law of Partnerships

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Introduction

[18.10] Although the use of partnerships as business structures has been eclipsed by the rise of the limited liability company, partnerships are still an important form of business association and some knowledge of this area of commercial law is therefore essential.

There are several reasons why partnerships remain an important form of business structure. Partnerships provide a cheap means of income splitting for family businesses; they are the chosen or the only permitted form of joint activity allowed in many professions, for example many firms of public accountants are partnerships; and partnerships are a way of raising funds for major projects and complex investments. There are yet other reasons still why partnerships may be formed: partners may not wish to take on the formality and expense that is a necessary part of the incorporation of a company; they may complement each other by bringing new or different skills to the business; and new partners may bring new capital or broader funding options.

In addition, partnerships are a default business structure in that (unlike with corporations) creating a partnership requires no particular formalities. Simply put, a partnership exists when business activities satisfy the legal definition of a partnership: two or more persons carrying on business together with a view to making a profit. Thus, while professional firms have detailed and complex partnership agreements that cover every aspect of the firm's partnership relationship, the extended family that opens up a cafe or a fruit shop (with no written agreement of any kind) may also in law be a partnership.

As we shall see throughout this chapter, there are important reasons why it may be necessary to decide whether or not a partnership relationship exists. A number of significant rights and obligations – of both the parties involved in the relationship, as well as third parties – are affected by that decision.

The legal relationship arising out of a partnership is similar to the relationship between principal and agent, addressed in Chapter 17, except that a partner is *both* a principal to and agent for the other partners. That is, a partner is able to *bind* the other partners (as an agent) *and be bound* by the actions of the other partners (as a principal). Partnerships, therefore, involve a *fiduciary* relationship:

> Ordinary partnerships are by the law assumed and presumed to be based on the mutual trust and confidence of each partner in the skill, knowledge and integrity of every other partner. As between the partners and the outside world (whatever may be their private arrangements between themselves), each partner is the unlimited agent of every other in every manner connected with the partnership business, and not being in its nature beyond the scope of the partnership: *Re Agriculturist Cattle Insurance Co* (1870) LR 5 Ch App 725.

Partnership law is partially underpinned by the law of agency; however, there is also partnership legislation in each State and Territory, which is the focus of our study in this chapter. The legislation in each Australian jurisdiction is basically uniform and, as a result, the Acts collectively will be referred to in this chapter as the "Partnership Act".[1] However, some differences remain.

1 The various Partnership Acts are: *Partnership Act 1892* (NSW); *Partnership Act 1958* (Vic); *Partnership Act 1891* (Qld); *Partnership Act 1891* (SA); *Partnership Act 1895* (WA); *Partnership Act 1891* (Tas); *Partnership Act 1963* (ACT); *Partnership Act 1997* (NT).

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In New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania, provision is made for limited partnerships.[2] The Australian Capital Territory, Northern Territory, New South Wales, Queensland, South Australia, Tasmania and Victoria have also introduced incorporated limited partnerships.[3] These specialised partnership forms are discussed separately at the end of this chapter.

The principles of partnership law contained in the Partnership Act are essentially declaratory of the pre-existing common law and are not to be taken as an exhaustive exposition of the law on the topic. Most provisions of the Partnership Act may be supplemented, amended or excluded by agreement between the parties, and the Act specifically provides that the rules of the common law and of equity are to continue in force except insofar as they are inconsistent with the Act.[4] This means that, as was the case with negligence law and the civil liability reforms addressed in Chapters 15 and 16, the Partnership Act regulates certain partnership law issues as statutory law and is complemented by the application of judge-made law for those partnership law issues that the Partnership Act does not cover: *Cameron v Murdoch* (1986) 63 ALR 575, 585–586.

Partnerships

Formation of partnership

[18.20] A partnership is created by agreement. The agreement may be oral, written, under seal (ie in a deed) or inferred from a course of dealing adopted or agreed upon by all of the partners.[5] Capacity to enter into a contract of partnership is governed by the general law of contract, but minors are in a special position: see [18.60].

Number in partnership

[18.30] Under s 115 of the *Corporations Act 2001* (Cth), the maximum number of persons who may form a partnership for the acquisition of gain is 20, except where partnerships are formed to carry on certain professions or callings,[6] or incorporated or formed under another Australian law. A person who takes part in the formation of a business association with more than the allowed number of members, known as an "outsize partnership", becomes liable to a criminal penalty (20 penalty units, currently $5,500), but the agreement is not invalid and this does not affect the enforceability of contracts or other arrangements

2 *Partnership Act 1892* (NSW) Pt 3; *Partnership Act 1958* (Vic) Pt 3; *Partnership Act 1891* (Qld) Ch 3; *Partnership Act 1891* (SA) Pt 3; *Limited Partnerships Act 1909* (WA); *Partnership Act 1891* (Tas) Pt 3.

3 *Partnership Act 1963* (ACT) Pt 6; *Partnership Act 1997* (NT) Pt 3; *Partnership Act 1892* (NSW) Pt 3; *Partnership Act 1958* (Vic) Pt 5; *Partnership Act 1891* (Qld) Ch 4; *Partnership Act 1891* (SA) Pt 3; *Partnership Act 1891* (Tas) Pt 3.

4 *Partnership Act 1892* (NSW), s 46; *Partnership Act 1958* (Vic), s 4; *Partnership Act 1891* (Qld), s 121; *Partnership Act 1891* (SA), s 1C(1); *Partnership Act 1895* (WA), s 6; *Partnership Act 1891* (Tas), s 5; *Partnership Act 1963* (ACT), s 5(1); *Partnership Act 1997* (NT), s 4(1).

5 Formerly, if the partnership was to continue for more than one year, the agreement had to be evidenced in writing to be enforceable under the *Statute of Frauds 1677* (Imp). However, this particular requirement of the *Statute of Frauds 1677* (Imp) has been repealed in all States and Territories with the exception of *Tasmania*: see the *Mercantile Law Act 1935* (Tas), s 6.

6 The *Corporations Regulations 2001* (Cth) reg 2A.1.01 sets a maximum of 50 partners for actuaries, medical practitioners, patent attorneys, sharebrokers and stockbrokers and trademark attorneys; 100 for architects, pharmaceutical chemists and veterinary surgeons; 400 for legal practitioners; and 1,000 for accountants.

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made.[7] Both partners and outsiders should be able to implement the transactions of outsize partnerships to the same extent as those of ordinary partnerships.

Capacity to be a partner

[18.40] Certain types of persons have restricted capacity to enter into partnership agreements. The most important of these are persons of unsound mind and minors.

Persons of unsound mind as partners

[18.50] A person of unsound mind is capable of entering into partnership during a period of sanity. To escape liability as a partner, it must be proved that they were of unsound mind when they entered into the partnership, and that the party with whom they entered into the partnership knew this. Otherwise, the partner who is of unsound mind is capable of both binding the firm as a partner and being bound by their co-partners.

Minors as partners

[18.60] A minor (ie a person under 18 years of age) may be a partner, although generally it is not a satisfactory arrangement for the other partners.

If a partner who is a minor enters into contracts with third parties on behalf of the firm, such contracts bind the adult partners, but the minor is not liable for partnership debts so far as their private assets are concerned. The adult partners, however, have the right to apply the whole of the partnership assets (including the capital contributed by the minor) to pay all partnership debts. A creditor who has obtained a judgment against the firm may seize *all* partnership property but not the minor's separate property.

On or before attaining majority, the minor may repudiate the partnership agreement but unless the minor repudiates it within a reasonable time after attaining the age of majority (being 18), they will become liable as an ordinary partner.[8]

Firm name

[18.70] Those who have entered into a partnership with one another are called, collectively, a firm, and the name under which a partnership business is carried on is called the firm name.[9] Thus, unlike the norms in some other business disciplines, such as economics, the term "firm" in law refers to partnerships as a specific type of business structure (and not to sole traders, companies and trusts). The firm name may be the name of one or more members of the partnership or it may be an assumed name, for example, Excelsior Estate Agency. A partnership may include the word "company" in its name, for example, Weir & Co, but it must not use the word "limited" as the last word in its name.

There is separate legislation that controls the actual registration of the firm name.[10]

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7 *Corporations Act 2001* (Cth), s 103.

8 However, in New South Wales, the legal position of minors differs markedly from that in the other States as a result of the *Minors (Property and Contracts) Act 1970* (NSW). On the other hand, in South Australia, the *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA) provides both a way of validating minors' contracts and the possibility of minors avoiding some common law liabilities.

9 *Partnership Act 1892* (NSW), s 4; *Partnership Act 1958* (Vic), s 8; *Partnership Act 1891* (Qld), s 4(1); *Partnership Act 1891* (SA), s 4; *Partnership Act 1895* (WA), s 10; *Partnership Act 1891* (Tas), s 9; *Partnership Act 1963* (ACT), s 2; *Partnership Act 1997* (NT), s 8(1).

10 The *Business Names Registration Act 2011* (Cth) replaced State and Territory Acts on 28 May 2012.

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Registration of the firm name as a business name is required, unless the firm name consists only of the full names or surnames and initials of all partners. For instance, it would be necessary to register the firm name of the following partnerships:

Brown & Co Wilson & Smith Apex Motor Garage

The particulars requiring registration include the business name, the general nature of and principal place of the business, and in respect of every individual partner there must be disclosed:

1. their given names and surnames;
2. their usual residence; and
3. any other business occupation that they follow.

A change or alteration in the constitution of the firm must be registered. The legislation also prohibits the inclusion of certain words in a trade or business name, for example, *Royal, Crown*.

Keep in mind, however, that these registration requirements concern the firm's name, and not the existence of a partnership. As identified above, a partnership is treated as automatically existing, without any registration requirements or any other formalities required, wherever the Partnership Act's legal definition of a partnership is satisfied. It is to this legal definition of a partnership that we now turn.

Nature of partnership

Definition of a partnership: The Partnership Act

[18.80] The first question often considered when a partnership dispute arises is whether or not a partnership actually exists.[11] It is often a difficult question to answer. The Partnership Act defines a partnership as "the relation [which exists/subsists] between persons carrying on a business in common with a view of profit".[12] Business includes every trade, occupation or profession.[13] A partnership's legal definition, therefore, has three elements which are all required to be satisfied:

1. carrying on a business;
2. in common; and
3. with a view to profit.

We will consider each of these elements in turn.

Carrying on a business

[18.90] The tests to determine if people are "*carrying on a business*" generally involve an assessment as to whether their activities have a commercial "look and feel" and are of an ongoing or repetitious kind. An

11 The question usually arises when one (alleged) partner denies that a partnership exists in order to avoid liability to another (alleged) partner or to a third party, or where an (alleged) partner asserts that a partnership exists in order to share in the profits of a business activity.

12 *Partnership Act 1892* (NSW), s 1(1); *Partnership Act 1958* (Vic), s 5(1); *Partnership Act 1891* (Qld), s 5(1); *Partnership Act 1891* (SA), s 1(1); *Partnership Act 1895* (WA), s 7(1); *Partnership Act 1891* (Tas), s 6(1); *Partnership Act 1963* (ACT), s 6(1); *Partnership Act 1997* (NT), s 5. The word "exists" is used in New South Wales, whilst "subsists" is used in Victoria, Queensland, South Australia, Western Australia and Tasmania, with the entire bracketed phrase being omitted (and the word "people" used instead of "persons") in the ACT and in the NT.

13 *Partnership Act 1892* (NSW), s 1B(1); *Partnership Act 1958* (Vic), s 3(1); *Partnership Act 1891* (Qld), s 3; *Partnership Act 1891* (SA), s 1B(1); *Partnership Act 1895* (WA), s 3; *Partnership Act 1891* (Tas), s 4(1); *Partnership Act 1963* (ACT), s 2; *Partnership Act 1997* (NT), s 3.

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association formed for doing one particular act that is never then to be repeated may be a joint venture, but would not usually be a partnership and therefore would not be regulated by the Partnership Act.

[18.100] In addition to identifying *whether* people are carrying on a business, it might also be necessary to know *when* the carrying on of that business began, in order to determine *when* the rights and obligations imposed by the Partnership Act start to apply. In *Khan v Miah*, the issue concerned the time at which the parties began "carrying on a business".

Khan v Miah

[18.110] *Khan v Miah* [2000] 1 WLR 2123. In May 1993, Miah and his colleague were the head waiter and chef, respectively, at an Indian restaurant. They wanted to open a restaurant of their own, but they were not in a position to put up any significant amount of money in order to do so. For this reason, they asked the appellant, Khan, to invest in the venture. It was agreed that they would be partners, that Khan would provide most of the initial capital, and that Miah would manage the restaurant and his colleague would be the chef.

The relationship broke down in January 1994. At this time, the restaurant was still not open for business. However, the parties had acquired the freehold rights to their premises, had taken delivery of furniture and equipment, and had arranged for the purchase of carpets and advertised the restaurant in the local press. Khan deposited virtually all the money in the partnership bank account that was used to make payments for work done in preparation for the opening of the restaurant. The restaurant opened for business in February 1994. The respondents carried on the business on their own account but without any settling of accounts with Khan.

The House of Lords said that the correct question in determining whether the parties had been "carrying on a business" was not whether the restaurant had *commenced* trading, but whether the parties had *embarked* on the venture. By acquiring and fitting out the premises, buying furniture and equipment, establishing accounts, etc., the parties had, indeed, embarked on their venture. A partnership was therefore formed at that time, and Khan was thus entitled (as a partner) to a share of the capital and the profits generated by the partnership until it ended.

[18.120] In *Goudberg v Herniman Associates Pty Ltd*, the Court was concerned with a similar question, but decided (on the facts) that the parties had never begun "carrying on" a business.

Goudberg v Herniman Associates Pty Ltd

[18.130] *Goudberg v Herniman Associates Pty Ltd* [2007] VSCA 12. In September 2000, Herniman Associates, a firm of architects, entered into a contract with Williams for the provision of architectural services and advice regarding a project that Williams was involved with. At the trial it was decided that at the time that the contract was made, Williams was in partnership with Goudberg, and on that basis Goudberg was held to be jointly liable with Williams for unpaid fees due to Herniman Associates under the contract. Goudberg appealed. The Court of Appeal unanimously decided that although Goudberg and Williams were clearly acting "in common with a view of profit", nothing done by them in the period leading up to

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September 2000 constituted the "carrying on of a business". Nor was what they had done "preparatory" in the sense that the activities were in *Khan v Miah* [2000] 1 WLR 2123. It was true that Williams had developed a plan for the establishment of a business and had involved Goudberg in the furtherance of that plan. However, by September 2000, when Herniman Associates was engaged, all that Williams and Goudberg had done together was some market research and demographic surveys, and they had made two trips to the United States to explore potential franchise models and a potential franchisor. As Goudberg was not a partner, he was not jointly responsible for the fees owed to Herniman Associates.

In common

[18.140] To be a partnership, there must be a "*mutuality* or *sharing of rights and obligations*". That is, the business must be carried on by (or on behalf of) all of the partners. This does not mean that each of the alleged partners must or even should take an active part in the direction and management of the firm: the important question is whether there is a sense that each is acting for and on behalf of the others.

Businesspeople sometimes refer to participants in their businesses as "silent partners", in the sense that those people might financially contribute to the business, but they do not actively take part in the management of the business. Outside of limited partners in the context of limited partnerships, however, there is no legal concept of a "silent partner" in Australian partnership law. Provided that there is a business carried on "in common" in the sense described above, a "silent partner" will still be treated as a "partner" in the partnership business.

Degiorgio v Dunn

[18.150] *Degiorgio v Dunn* [2004] NSWSC 767. The plaintiff and the defendant were members of a rock band. The four members of the band operated as a partnership, the business of which consisted of doing cover versions of AC/DC songs. Shortly after the group disbanded, the defendant took steps to put together another group to also perform AC/DC music. He discussed his plans with the plaintiff and invited him to join up. The plaintiff argued that upon the formation of the second band, the plaintiff and the defendant carried on the business (of the new band) in common and, therefore, that he was entitled to a share of the profits.

The NSW Supreme Court held that the business was run with a view of profit but was not run "in common" with reciprocal rights and obligations. Some of the factors that persuaded the Court that no partnership existed in this case were that:

- the plaintiff did not share the establishment costs with the defendant;
- the plaintiff chose to be paid a fixed fee ($150) for each performance;
- the plaintiff did not mention the partnership in his tax returns (the plaintiff returned as income "professional fees" of $6,550);
- just after the partnership was allegedly formed, the plaintiff went to Canada for 17 months and during this time he did not involve himself in any way in the business; and
- the plaintiff approached performers in the band and tried to persuade them to join him in a new band called "High Voltage", which was also to be an AC/DC tribute band.

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With a view to profit

[18.160] Partnerships must be created with a view to profit. Obviously, they do not always make a profit, but that must be the purpose. Sports associations or charities or religious associations are not partnerships for this reason: although they may make a profit through their ancillary fundraising activities (such as selling pies or raffle tickets), they reinvest those profits into their primary activities and, critically, do not distribute them as dividends to their members.

Evidence of a partnership: The statutory rules

[18.170] As we have seen from the cases in the previous section, it is not always easy to apply the statutory definition of a partnership to the particular facts of a case. To assist in determining whether a business is being carried on in common with a view of profit, the Partnership Act[14] contains a number of statutory rules to which "regard shall be had", "regard must be had" or "regard is to be had" (the specific phrase varies across the States and Territories) in determining whether a partnership exists. These rules have been included in the Act to supplement, but not to replace, the statutory definition of a partnership. To that end, note that each rule simply states a negative: that a certain fact does *not* of itself create a partnership, but is only indicative of a partnership. The legal test remains that which we addressed above; the statutory rules covered here help us apply that test.

The correct question is therefore always simply whether, by their words and conduct, the parties intended to create a partnership. A partner need not contribute capital, and need not receive a share of the profits, although those may be factors indicating that a partnership has not been created.

[18.180] The Partnership Act provides that in determining whether or not a partnership exists, regard shall be had to the following rules:

1. Joint tenancy, tenancy in common, joint property or part ownership, whether or not the owners or tenants share the profits, does not of itself create a partnership as to anything so held or owned.[15]
2. The sharing of gross returns, whether the persons sharing in such returns have or do not have a joint or common right or interest in any property from which the returns are derived, does not of itself create a partnership.[16]

Cribb v Korn

[18.190] *Cribb v Korn* (1911) 12 CLR 205. A farmer entered into an agreement with Cribb under which he had the exclusive use and occupation of a certain area of Cribb's land. As part of the agreement, the farmer would pay Cribb half of the proceeds of sale of the produce of the land and stock. Korn, a farmworker employed by the farmer, was injured while working

14 *Partnership Act 1892* (NSW), s 2; *Partnership Act 1958* (Vic), s 6; *Partnership Act 1891* (Qld), s 6; *Partnership Act 1891* (SA), s 2; *Partnership Act 1895* (WA), s 8; *Partnership Act 1891* (Tas), s 7; *Partnership Act 1963* (ACT), s 7; *Partnership Act 1997* (NT), s 6.

15 *Partnership Act 1892* (NSW), s 2(1)(1); *Partnership Act 1958* (Vic), s 6(1); *Partnership Act 1891* (Qld), s 6(1)(a); *Partnership Act 1891* (SA), s 2(1)(a); *Partnership Act 1895* (WA), s 8(1); *Partnership Act 1891* (Tas), s 7(a); *Partnership Act 1963* (ACT), s 7(2); *Partnership Act 1997* (NT), s 6(1)(a).

16 *Partnership Act 1892* (NSW), s 2(1)(2); *Partnership Act 1958* (Vic), s 6(2); *Partnership Act 1891* (Qld), s 6(1)(b); *Partnership Act 1891* (SA), s 2(1)(b); *Partnership Act 1895* (WA), s 8(2); *Partnership Act 1891* (Tas), s 7(b); *Partnership Act 1963* (ACT), s 7(3); *Partnership Act 1997* (NT), s 6(1)(b).

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and claimed worker's compensation from Cribb on the basis that Cribb and his employer were partners.

The High Court held that, as the farmer had the exclusive right to occupy the land and Cribb had no right to direct or control the farmer's working of the land, there could be no partnership and the sharing of gross returns was not enough to establish a partnership. It was a tenancy agreement, and the payments were tantamount to rent. The Court said:

> To be partners, they must be shown to have agreed to carry on some business – in this case the business of farming – in common with a view of making profits and afterwards of dividing them, or of applying them to some agreed object. There is nothing to show that the appellant intended to engage in farming at all, or to be concerned in the transaction beyond his right to compensation.

3. The receipt by a person of a share of the profits of a business is prima facie evidence that they are a partner in the business, but the receipt of such a share, or of an amount of money varying with the profits of the business, does not itself make that person a partner in the business, and in particular the following circumstances do not of themselves make such person a partner:[17]

   (a) the receipt of a debt by instalments or otherwise from the profits;

Cox v Hickman

[18.200] *Cox v Hickman* (1860) 11 ER 431. B and J Smith carried on business as ironworkers and corn merchants under the name of B Smith & Son. They owed a lot of money to their creditors, including Cox. A deed of arrangement was executed. The creditors were to carry on the business until the debts were paid off, at which time ownership would revert to the partners. Until that time, all profits from the business were to be shared by the creditors. The question was whether the creditors were partners in the business (and thereby liable for the debts of the partnership). The Court held that they were not, even though they had a right to share in the profits.

   (b) the receipt of remuneration by a servant or agent of a person engaged in business, by a share of the profits of that business.

- Employees are often offered a share of the profits of a business as part of an incentive package. This, alone, does not make the employee a partner in the firm. In *Plummer v Thomas* [2002] NSWSC 1185, there was an agreement between two parties to split profits equally. In every other sense, Thomas did everything including arranging a lease, paying the bond, registering the name of the business, and hiring and firing workers. Despite the agreement on splitting profits, there was no partnership;

17 *Partnership Act 1892* (NSW), s 2(1)(3); *Partnership Act 1958* (Vic), s 6(3); *Partnership Act 1891* (Qld), s 6(1)(c); *Partnership Act 1891* (SA), s 2(1)(c); *Partnership Act 1895* (WA), ss 8(3)–(8); *Partnership Act 1891* (Tas), s 7(c); *Partnership Act 1963* (ACT), s 7(4); *Partnership Act 1997* (NT), s 6(1)(c). Note that the *Partnership Act 1891* (Tas), s 7(c)(iiia) also includes a rule to the effect that a person in a caring relationship with a deceased partner registered under the *Relationships Act 2003* (Tas) Pt 2 who receives an annuity as a portion of the profits is not a partner only by such receipt.

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(c) the receipt by a spouse or child of a deceased partner of an annuity out of the profits made in the business in which the deceased person was a partner.

- This protects the family of a deceased partner that receives a payment based on profits, by ensuring that they are not treated as partners for only that reason;

(d) the receipt of loan interest varying with the profits, or of a share of the profits in consideration of an advance. However, a contract providing for such interest or profit must be in writing and signed by all the parties, otherwise a partnership may exist;

Re Megevand; Ex parte Delhasse

[18.210] *Re Megevand; Ex parte Delhasse* (1878) 7 Ch D 511. Delhasse agreed to lend money to two others. He stressed that the advance was a loan only, and that it did not make the lender a partner. However, provision was made for him to share in the profits of the business, to have a right to inspect the accounts, and to have the option of dissolving the partnership in specified circumstances. Further, the loan was not to be repayable until after the dissolution of the firm, and the loan represented the entire capital of the firm. The Court held that this was a partnership. In substance, the relationship went further than a mere lender–creditor relationship.

(e) the receipt by way of annuity or otherwise of a portion of the profits of a business in consideration of the sale by that person of the goodwill of such business.

- This subsection protects a person who sells a business and then receives an annuity based upon a percentage of the profits, until the purchase price of the business has been paid in full. The courts will look at the agreement but, without more, the purchaser and the vendor are not partners in the business only because of these circumstances.

[18.220] It is possible for a person to be a partner in a business, even though they do not have a direct claim to a share of the profits of the business. In *M Young Legal Associates Ltd v Zahid* [2006] 1 WLR 2562, Young, a litigation funder,[18] sued the dissolved firm of Zahid for unpaid commissions. Lees, a retired solicitor, had agreed to become a principal in Zahid on the understanding that he would contribute no capital and take no share of the profits and would instead accept an annual retainer for his supervisory role in the firm. Lees denied that he was a partner. His name appeared on the letterhead of Zahid until the firm failed, but this had not been noticed by Young. The Court recognised that under the Partnership Act the recipients of fixed sum payments could be partners in the firm.

Joint venture and partnership

[18.230] A "joint venture" is created whenever two or more people (which may be companies – ie legal persons, as we will see in Chapter 19) enter into an agreement to exploit a business opportunity with respect to a particular project or undertaking. Such a particular project or undertaking might include the development of land, or the exploitation of some asset such as minerals or patent rights.

18 A litigation funder is an investment vehicle that lends money to a party that is involved in litigation, in return for a share of that party's recovery (if successful). Litigation funding allows businesses to pursue legal claims when they would not otherwise be able to afford to. However, it is also commonly used by businesses who can afford to litigate but who would prefer, for business reasons, to keep the costs of litigation off their books (and who are prepared to pay a litigation funder a portion of their recovery for the privilege of doing so).

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Joint ventures are a popular way of gathering together resources, experience and funds to undertake a commercial venture. Some venturers do not mind whether their joint venture is a partnership or not, but many seek to enter non-partnership joint ventures. They want the benefits of joint involvement without the unlimited liability that is (as we will see later in this chapter) a characteristic of partnerships. They can achieve this if they structure their venture so that it avoids taking on the features of a partnership: that is, ensuring that their venture does not involve the carrying on of a business, in common, with a view of profit.

Cox v Coulson

[18.235] *Cox v Coulson* [1916] 2 KB 177. Two persons agreed to hire a theatre, to put on a show and to divide the proceeds between them on a 60/40 basis. One party had to pay the expenses of the hall, whilst the other paid the actors. Swinfen Eady LJ explained that this arrangement did not constitute a partnership:

> Although the gross takings were divided between them, there was not any partnership; each had to discharge his own separate liabilities in respect of the venture. The travelling expenses, the remuneration of the actors, the cost of the appliances had to be borne entirely by [one party]. The theatre rent and outgoings, the cost of lighting, and the cost of the playbills were wholly to be borne by the [other party]. One of them might have made a profit out of the venture, and the other might have made a loss. Neither of them had authority to bind the other in any way; there was no agency between them. The sharing of gross returns does not of itself create a partnership …

However, where there is profit sharing, and a more integrated business structure, there is a greater likelihood that a joint venture will also be a partnership.

United Dominion Corp Ltd v Brian Pty Ltd

[18.240] *United Dominion Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1. Three joint venturers – a property owner (Special Projects Ltd (SPL)), a finance company (United Dominion Corp Ltd (UDC)) and an investor (Brian Pty Ltd (B)) – began negotiating an agreement to build a shopping centre on land owned by SPL. They intended that SPL would be registered on the title as the owner, with most of the finance to be provided by UDC, secured by a mortgage over the land, with the balance being provided by each of the parties in proportion to their interests. The parties would share the profits. On 24 October 1983, nine months *before* the written partnership agreement was executed, SPL executed a mortgage in favour of UDC to secure loans that UDC had made to SPL for this development *as well as for other ventures*. Without B's knowledge, the mortgage included a clause stating that no share of the joint venture profits would be distributed to B until the loan monies were repaid to UDC in full. The joint venture made a substantial profit but because of the effect of the clause, B received nothing. B sued UDC arguing that the joint venture was a partnership and, as such, B was owed a fiduciary duty that was breached when SPL and UDC failed to give it notice of the clause.

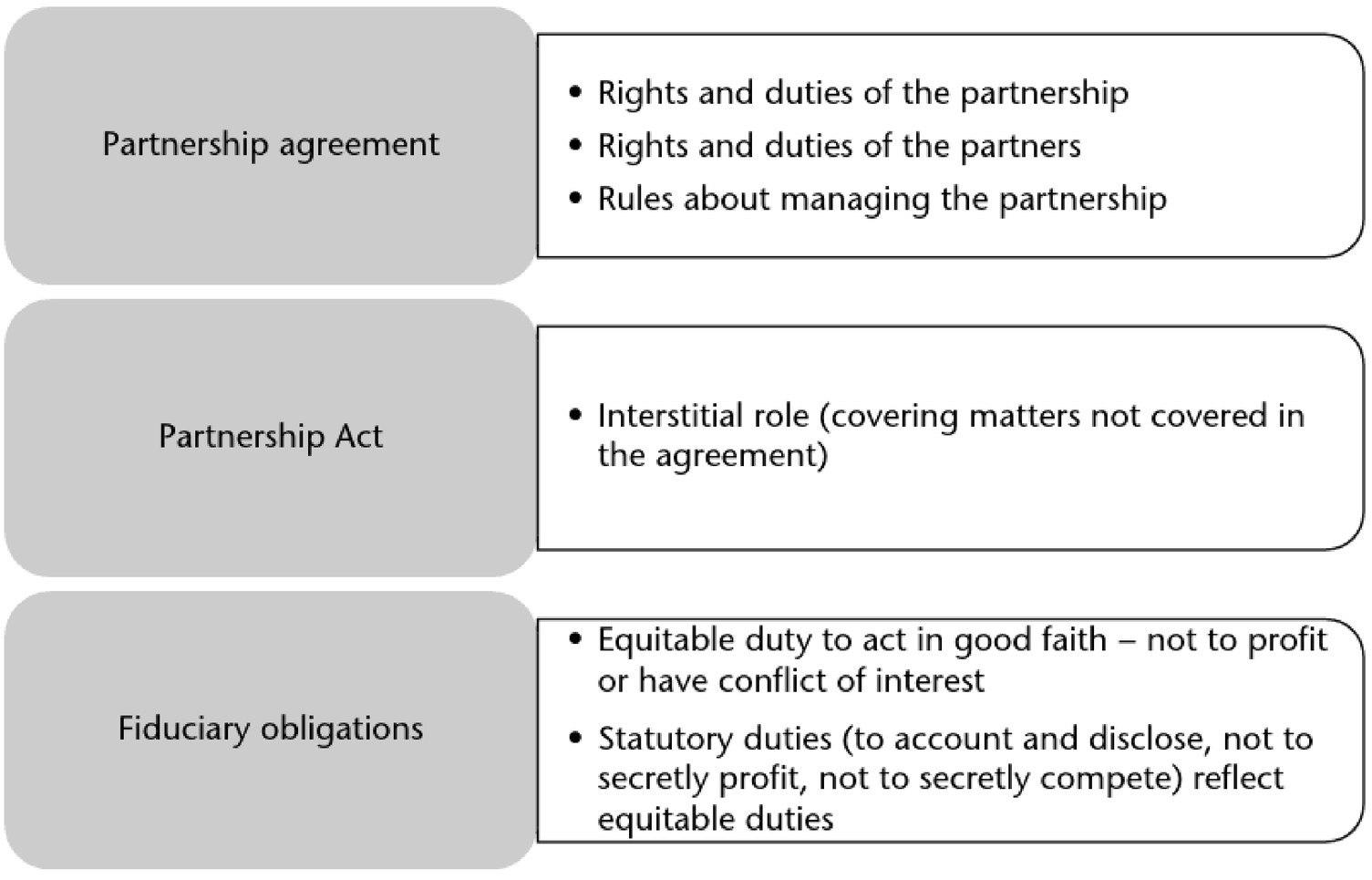
The High Court held that the joint venturers were "intending partners" after the agreement of 24 October 1983 was signed and became "partners" on 23 July 1984 when the joint venture agreement was executed. The Court said (emphasis added):

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> [A] fiduciary relationship with attendant fiduciary obligations may, and ordinarily will, exist between prospective partners who have *embarked upon the conduct* of the partnership business or venture before the precise terms of any partnership agreement have been settled.

Relationship of partners with each other

Figure 18.1 : Three aspects of partners' relationship with each other



[18.250] The rights and obligations of the partners to each other arise from three distinct areas of law – the partnership agreement, the statute and the equitable concept of the fiduciary.

Partnerships arise by *agreement* and partnership law affords partners great latitude to establish the terms of their own relationship. In most partnerships, an agreement, usually written, details the major terms of the partnership relationship. However, to the extent that the agreement does not cover aspects of the relationship and does not exclude the statutory terms, the relationship will be governed by the default rules contained in the *statute*. Superimposed upon the contractual arrangements are the *fiduciary obligations* that require partners to deal openly, and in good faith with each other, in all matters concerning the partnership. The agreement establishes the nature and extent of the partnership business, but the fiduciary obligations are the prime regulator of partners' conduct between themselves.

The partnership agreement

[18.260] Although an agreement can be reached orally or by a course of conduct, it is good practice for the rights, duties and liabilities of the partners amongst themselves to be set out in a written partnership agreement. As with any simple contract, oral arrangements may be subsequently denied, and it is difficult to prove a course of conduct, whilst a written agreement places on record the intention of the partners to

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create a partnership and their agreed terms. It is desirable that, at least, the following matters should be covered in a partnership agreement:

1. the names of the partners and the firm name;
2. the nature of the business;
3. the term (duration) of the partnership;
4. the capital to be introduced by each partner;
5. provisions for proper accounts and their audit;
6. the authority of partners;
7. provision as to the division of the profits;
8. arrangements as to partners' drawings;
9. arrangements as to partners' salaries;
10. provision regarding interest on capital;
11. arrangements as to interest on advances;
12. arrangements as to interest on drawings;
13. provisions regarding the death or bankruptcy of a partner;
14. details regarding the retirement of a partner;
15. the amount to be paid to an outgoing partner;
16. the method of valuing goodwill upon the death or the retirement of a partner; and
17. any special restraints to be observed by partners.

The rights and duties of partners may be varied during the partnership with the consent of all partners (such consent being either express or implied), or in any manner specifically provided for by the partnership agreement. For instance, it may be provided in the agreement that the senior partner is solely responsible for hiring and firing the practice manager.

Further, because the law of contract applies in addition to the Partnership Act, there may be terms implied into the partnership agreement, provided that there is no agreement on the relevant matter in the agreement itself.

The Partnership Act

[18.270] The partnership agreement may be silent on a particular issue (eg How are profits and losses to be shared? Can a partner be paid a wage? Can a majority of partners expel a partner? Can a partner be excluded from management?) or new issues may arise (not previously addressed in the partnership agreement) after the partnership began. When the partnership agreement does not cover the issue, then the Partnership Act has rules that apply by default, determining the rights, duties and interests of the partners:[19]

1. All the partners are entitled to share equally in the capital and profits of the business and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm.
   The Partnership Act provides for equality of profits notwithstanding that capital has been contributed unequally. This recognises the fact that partners may contribute a personal value to the firm apart from the monetary value of any capital paid in.

19 *Partnership Act 1892* (NSW), s 24(1); *Partnership Act 1958* (Vic), s 28; *Partnership Act 1891* (Qld), s 27(1); *Partnership Act 1891* (SA), s 24(1); *Partnership Act 1895* (WA), s 34; *Partnership Act 1891* (Tas), s 29(1); *Partnership Act 1963* (ACT), s 29; *Partnership Act 1997* (NT), s 28(1).

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2. The firm must indemnify every partner in respect of payments made and personal liabilities incurred by those partners:
   (a) in the ordinary and proper conduct of the business of the firm; or
   (b) in or about anything necessarily done for the preservation of the business or property of the firm.
3. A partner making for the purpose of the partnership any actual payment or advance beyond the amount of capital which they have agreed to subscribe is entitled to interest at the rate of 7% per annum in New South Wales, Victoria, South Australia, the Australian Capital Territory and the Northern Territory and to 6% in Queensland, Western Australia and Tasmania, from the date of the payment or advance.
4. A partner is not entitled before the ascertainment of profits to interest on the capital subscribed by them.
5. Every partner may take part in the management of the partnership business.
   Unless specifically provided by agreement between the parties, no one partner has more authority than another.
6. No partner is entitled to remuneration for acting in the partnership business.
   This provision is often varied by the partnership agreement, but unless so provided, the partners must give their services to the partnership's affairs gratuitously. This means that the partners would not draw a salary from the partnership but would of course be entitled to a share of the partnership's profits. Where one of the partners has neglected to meet their commitments to the partnership business and has thus placed extra burdens on their co-partner(s), then the partner(s) not in default may be entitled to claim *compensation* for the extra work done by them.
7. No person may be introduced as a partner without the consent of all existing partners.
   This is recognised as one of the fundamental principles of partnership. If two or more persons have sufficient faith in one another to enter into a partnership agreement, they are entitled to have the right to determine if others are to be admitted as well. However, it is not uncommon to find partnership agreements stipulating to the contrary, and providing for a majority of the partners to have the right to introduce another person into the partnership.
8. Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of partners. However, no change may be made to the nature of the partnership business without the consent of all existing partners. In Western Australia specifically, it is provided that majority decisions "must be arrived at in good faith for the interest of the firm as a whole, and every partner must have an opportunity of being heard in the matter".[20]
9. The partnership books are to be kept at the place of business of the partnership (or the principal place if there is more than one) and every partner may have access to inspect and copy any of them when he or she thinks fit.
10. Further, a majority of the partners cannot expel a partner unless the power to do so has been conferred by express agreement between the partners.[21] If such a power of expulsion is conferred by the partnership agreement, it must be exercised in the utmost good faith by all of the partners whose concurrence is necessary.
    In general, a partner, whom the others propose to expel, is entitled to natural justice: they must be given notice of the charge and a reasonable opportunity of meeting the case against them before

20 *Partnership Act 1895* (WA), s 34(7A).
21 *Partnership Act 1892* (NSW), s 25; *Partnership Act 1958* (Vic), s 29; *Partnership Act 1891* (Qld), s 28; *Partnership Act 1891* (SA), s 25; *Partnership Act 1895* (WA), s 35(1); *Partnership Act 1891* (Tas), s 30; *Partnership Act 1963* (ACT), s 30; *Partnership Act 1997* (NT), s 29.

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receiving notice of expulsion. However, except in Western Australia,[22] partnership agreements may dispense with the need for notice or a hearing. Provided that the partners exercise their power of expulsion in good faith with a view to the benefit of the firm and strictly in accordance with the terms of the partnership agreement, the court will not interfere.

Popat v Schonchhatra provides an excellent example of the effect of the first default rule set out above, contained in the *Partnership Act 1958* (Vic), s 28(1) and other State and Territory equivalents, and the benefit of a prompt settlement of accounts after a partnership is wound up.

Popat v Schonchhatra

[18.280] *Popat v Schonchhatra* [1997] 1 WLR 1367. The plaintiff and the defendant were partners in a newsagency business. After the partnership was terminated, the defendant continued to operate the business himself, but did not settle the accounts between himself and the plaintiff. Two-and-a-half years later, the defendant sold the business and made a capital profit of £12,000. Although he had contributed only a small part of the capital at the outset, and had not played any part in the business since the termination of the partnership, the plaintiff claimed (amongst other things) half of the capital profits, including the profits that had accrued after the partnership had ended.

The Court decided that Popat, the plaintiff, was entitled to half of the profits on the sale of the business. In the absence of an agreement to the contrary, partners are entitled to an equal share of the capital profits. In this case, there was no contrary agreement. The Court also held that Popat was entitled to a share of the profits that had accrued *after* the dissolution of the partnership, but *before* the final settlement of accounts.

Fiduciary obligations

[18.290] The partnership agreement is not only a contract but is a class of contract founded on mutual trust. Because of this, a fiduciary relationship of trust and confidence exists between partners, giving rise to a fiduciary duty of full disclosure towards each other for all matters concerning the firm. The fiduciary duties of partners owed to each other have been expressly incorporated into the Partnership Acts as follows:

1. Duty of partners to render accounts, etc.
   - Partners are to render true accounts and full information of all things affecting the partnership to any partner or their legal representative.[23] In the event that a partner does not reveal the accounts to the other partner or partners, a court order may be sought.
2. Accountability of partners for private profits.
   (a) Every partner must account to the firm for any benefit derived by them without the consent of the other partners from any transaction concerning the partnership or from any use by them of the partnership property, name, or business connection.[24]

22 *Partnership Act 1895* (WA), s 35(2).

23 *Partnership Act 1892* (NSW), s 28(1); *Partnership Act 1958* (Vic), s 32; *Partnership Act 1891* (Qld), s 31(1); *Partnership Act 1891* (SA), s 28(1); *Partnership Act 1895* (WA), s 39; *Partnership Act 1891* (Tas), s 33(1); *Partnership Act 1963* (ACT), s 33(1); *Partnership Act 1997* (NT), s 32(1).

24 *Partnership Act 1892* (NSW), s 29(1); *Partnership Act 1958* (Vic), s 33(1); *Partnership Act 1891* (Qld), s 32(1); *Partnership Act 1891* (SA), s 29(1); *Partnership Act 1895* (WA), s 40(1); *Partnership Act 1891* (Tas), s 34(1); *Partnership Act 1963* (ACT), s 34(1); *Partnership Act 1997* (NT), s 33(1).

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(b) This applies also to transactions undertaken after a partnership has been dissolved by the death of a partner and before the affairs thereof have been completely wound up either by any surviving partner or by the representatives of the deceased partner.[25]

- Thus, where A and B are in a legal partnership and, as a result of work done for a client corporation, A receives an additional annual fee to be "on call" for that client, that fee belongs to the partnership. Similarly, if A submits (and wins) a tender in their own name to perform legal work on an infrastructure project, any moneys received by them would belong to the partnership.

3. Duty of partner not to compete with firm.

- If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, they must account for and pay over to the firm all profits made by them in that business.[26]

[18.300] In essence, the partners are bound to exercise the utmost good faith in their dealings with one another. This obligation continues throughout the term of the partnership. It does not conclude with dissolution but continues up until the final settlement of accounts on winding-up.

Chan v Zacharia

[18.310] *Chan v Zacharia* (1984) 154 CLR 178. Chan and Zacharia were partners in a medical practice which they conducted from leased premises. The lease had an option to renew that had to be exercised by both partners. On the dissolution of the medical partnership, one of its more valuable assets was the lease of surgery premises, with rights of renewal. One of the partners suggested to the other that the option to renew should be exercised but the other negotiated a new lease of the premises in his own name instead.

Zacharia sued for a declaration that Chan held the lease as a constructive trustee for himself and Zacharia. The Court decided that that the fiduciary relationship continued until the partnership had finally been wound up. Therefore, Chan was not permitted to put his interests ahead of those of the partnership and he had to account to the partnership for any profit he obtained from the lease. As Deane J put it:

> Dr. Chan abused his fiduciary position as a trustee and former partner to seek an advantage for himself and … He holds and will hold any fruits of that abuse … upon constructive trust for those entitled to the property of the dissolved partnership.

Retirement of partner

[18.320] Where no fixed term has been agreed upon for the duration of the partnership (ie in the case of a partnership at will), any partner may determine the partnership at any time by giving notice of their

25 *Partnership Act 1892* (NSW), s 29(2); *Partnership Act 1958* (Vic), s 33(2); *Partnership Act 1891* (Qld), s 32(2); *Partnership Act 1891* (SA), s 29(2); *Partnership Act 1895* (WA), s 40(2); *Partnership Act 1891* (Tas), s 34(2); *Partnership Act 1963* (ACT), s 34(2); *Partnership Act 1997* (NT), s 33(2).

26 *Partnership Act 1892* (NSW), s 30(1); *Partnership Act 1958* (Vic), s 34; *Partnership Act 1891* (Qld), s 33(1); *Partnership Act 1891* (SA), s 30(1); *Partnership Act 1895* (WA), s 41; *Partnership Act 1891* (Tas), s 35(1); *Partnership Act 1963* (ACT), s 35; *Partnership Act 1997* (NT), s 34(1).

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intention to do so to all the other partners.[27] The dissolution takes place from the date mentioned in the notice or, if none is specified, then from the date when the notice is communicated.

If a partnership has been constituted by deed, written notice, signed by the partner giving it, is sufficient notice.[28]

Revocation of guarantee by change in firm

[18.330] A continuing guarantee given by or to a partnership, subject to any agreement to the contrary, is revoked as to future transactions by any change in the constitution of the partnership.[29] Should one partnership give such a guarantee for another partnership, the guarantee would be revoked by a change in the constitution of either partnership.

Continuance of business after expiration of term

[18.340] Where a partnership which has been entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, but the partnership becomes a partnership at will.[30]

Partnership property

[18.350] Partnership property must be used exclusively for the purposes of the partnership and in the manner set out in the partnership agreement.[31] Partnership property consists of:

1. property originally brought into the partnership;
2. property acquired whether by purchase or otherwise on account of the firm or for the purposes and in the course of the partnership business;
3. property acquired with the firm's money unless the contrary intention of the parties appears from the transactions; and
4. the goodwill of the business.

Whether the separate property of one partner used in a partnership becomes part of the assets of the partnership or remains the separate property of the partner ultimately depends upon the *agreement between the partners*. Where no express agreement has been reached between the partners, agreement may be *inferred from the manner in which the affairs of the partnership have been conducted*. However, to infer that the parties intended that the separate property of one partner was to become part of the assets of the partnership, their conduct must plainly lead to that result. In *Harvey v Harvey*, the Court (in the context of a family business dispute) decided that it did not.

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27 *Partnership Act 1892* (NSW), s 26(1); *Partnership Act 1958* (Vic), s 30(1); *Partnership Act 1891* (Qld), s 29(1); *Partnership Act 1891* (SA), s 26(1); *Partnership Act 1895* (WA), s 37(1); *Partnership Act 1891* (Tas), s 31(1); *Partnership Act 1963* (ACT), s 31(1); *Partnership Act 1997* (NT), s 30(1).

28 *Partnership Act 1892* (NSW), s 26(2); *Partnership Act 1958* (Vic), s 30(2); *Partnership Act 1891* (Qld), s 29(2); *Partnership Act 1891* (SA), s 26(2); *Partnership Act 1895* (WA), s 37(2); *Partnership Act 1891* (Tas), s 31(2); *Partnership Act 1997* (NT), s 30(2). The ACT legislation does not have a specific provision on point.

29 *Partnership Act 1892* (NSW), s 18(1); *Partnership Act 1958* (Vic), s 22; *Partnership Act 1891* (Qld), s 21(1); *Partnership Act 1891* (SA), s 18(1); *Partnership Act 1895* (WA), s 25; *Partnership Act 1891* (Tas), s 23(1); *Partnership Act 1963* (ACT), s 22(1); *Partnership Act 1997* (NT), s 22(1).

30 *Partnership Act 1892* (NSW), s 27; *Partnership Act 1958* (Vic), s 31; *Partnership Act 1891* (Qld), s 30; *Partnership Act 1891* (SA), s 27; *Partnership Act 1895* (WA), s 38; *Partnership Act 1891* (Tas), s 32; *Partnership Act 1963* (ACT), s 32; *Partnership Act 1997* (NT), s 31.

31 *Partnership Act 1892* (NSW), s 20(1); *Partnership Act 1958* (Vic), s 24(1); *Partnership Act 1891* (Qld), s 23(1); *Partnership Act 1891* (SA), s 20(1); *Partnership Act 1895* (WA) s 30(1); *Partnership Act 1891* (Tas), s 25(1); *Partnership Act 1963* (ACT), ss 24(1)–(2); *Partnership Act 1997* (NT), s 24(1)–(2).

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Harvey v Harvey

[18.360] *Harvey v Harvey* (1970) 120 CLR 529. Harvey owned a property that he was considering selling. When his brother suggested that he and his sons would work the land, Harvey agreed. There were mutual benefits for both families – for Harvey, it would mean that the property could one day be available for his son, who was then only 6; for his brother, it would mean his own sons could get valuable experience running a farm. They agreed that Harvey would provide stock and machinery but would not take part in the management of the farm. His brother and his sons would provide skill and labour but no capital. Profits and expenses, including the cost of capital improvements, would be shared equally. The partnership lasted for 20 years. During this time, improvements, like farm buildings, fences, dams, as well as extensive land clearing, were made that increased the value of the property. When the partnership ended, the question arose as to whether the land (and its improvements) was partnership property.

The High Court decided that the land did not become partnership property. The evidence supported the view that both parties to the agreement recognised that Harvey intended that his son would take over the land one day, and this would not have been possible if the land had become part of the partnership property. Furthermore, the Court decided that, in the absence of agreement to the contrary, there is no general principle that an appreciation in the capital value of a partner's personal property (as a result of the expenditure of partnership money) makes that property part of the final accounts of the partnership and thereby available for distribution among the partners.

What is the nature of a partner's interest in the partnership property?

[18.370] A partner has an interest in all partnership property. But what is the nature of that interest? Business partners own between them the whole of the partnership assets, and *each has a proprietary interest in each and every item*. But this interest is *not a fixed proportion* of each item – it is an indefinite and fluctuating interest, which at any given moment is in proportion to their share in the ultimate surplus coming to them if at that moment the partnership were to be wound up and have its accounts taken.

Goodwill

[18.380] Associated with professions, trade and commerce is an intangible asset commonly known as "goodwill". Goodwill has been defined as "the probability that the old customers will resort to the old place": *Cruttwell v Lye* (1810) 34 ER 129. It consists of the advantages that a business has in connection with its customers. Lord Macnaghten in *Trego v Hunt* [1896] AC 7 described goodwill as follows:

> Often it happens that the goodwill is the very sap and life of the business, without which the business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money.

The goodwill of a partnership business (like any other partnership asset) is, in the absence of any agreement to the contrary, to be sold upon the dissolution of a partnership for the benefit of all of the partners.

[18.390] A deceased partner's representative or a retiring partner is entitled to a share of the goodwill at the date of death or retirement. To avoid disputes or the necessity of selling the business to determine the

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value of the goodwill, provision should be made in the partnership agreement as to the basis upon which the value of the goodwill is to be estimated. The agreement, for instance, may provide that the goodwill upon the death or the retirement of a partner is to be calculated as worth, say, two years' purchase of the average profits over the last five preceding years, and that the retiring or the deceased partner is to be entitled to their share of the total value of the goodwill according to the proportion in which they shared in the partnership's profits. In some agreements, it is provided that the goodwill is to be valued as at the date of death or retirement by a public accountant.

Charging a partner's share

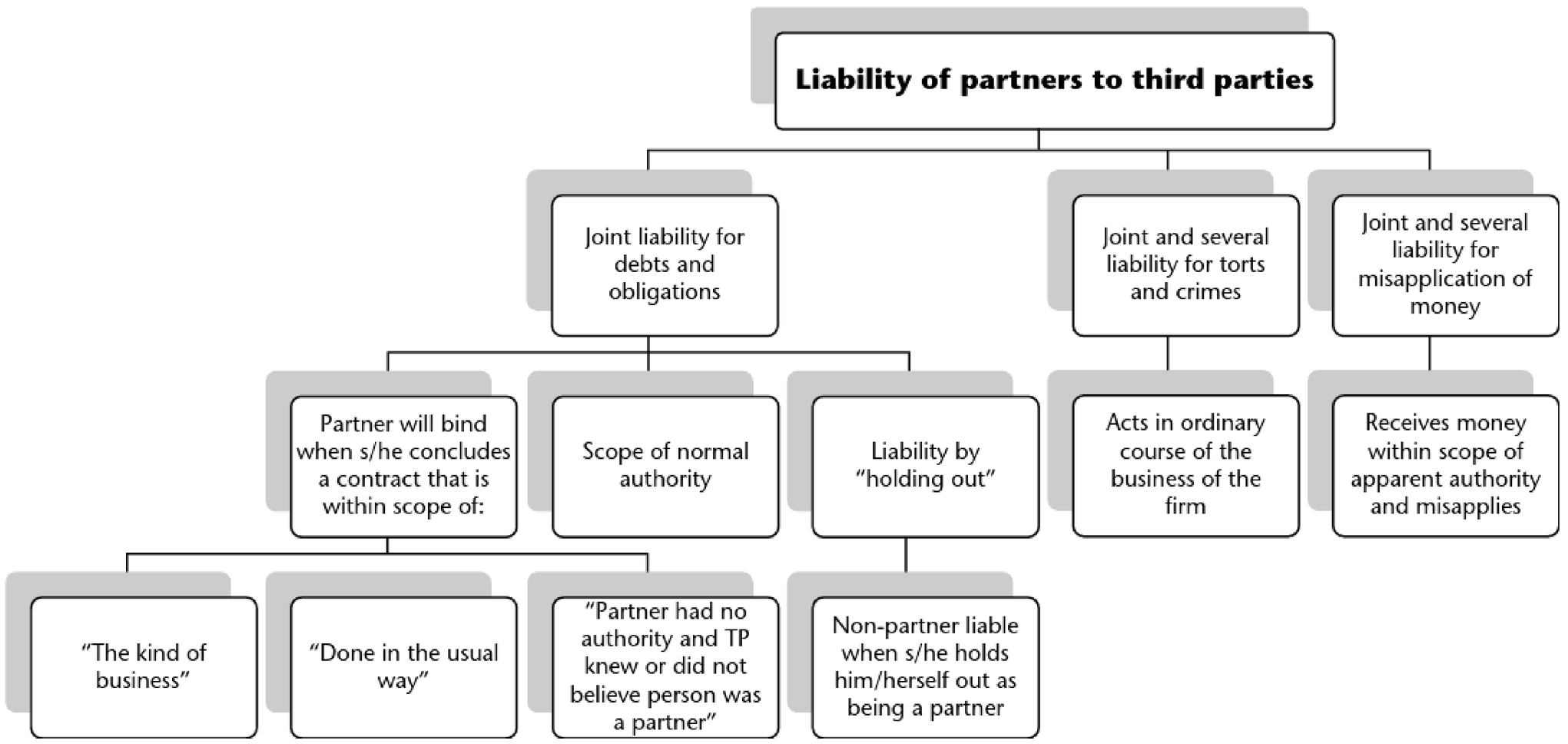
[18.400] Provisions in the Partnership Act (and in some cases, other legislation or court rules) address how partnership property relates to a partner's own (private, individual) debts.[32] Partnership property is not liable to be seized for the private debt of a partner and may only be made liable on a judgment against the partnership.

A creditor who has obtained judgment in respect of the separate debt of a partner, however, may obtain an order charging that partner's interest in the partnership property and profits with the amount of the debt and interest. In addition, the creditor may obtain by the same or by a subsequent order the appointment of a receiver of that partner's share of profits and of any other money which may be coming to the partner in respect of the partnership. The other partner or partners may at any time redeem the interest charged, or, in the case of a sale being directed, purchase the same.

If a partner allows their share of a partnership to be so charged for their separate debt, the other partners may dissolve the partnership.

Relationship of partners to third parties

Figure 18.2 : Liability of partners to third parties



32 *Partnership Act 1892* (NSW), s 23; *Partnership Act 1958* (Vic), s 27; *Partnership Act 1891* (Qld), s 26; *Partnership Act 1891* (SA), s 23; *Civil Judgments Enforcement Act 2004* (WA), s 14; *Partnership Act 1891* (Tas), s 28; *Civil Procedure Rules 2006* (ACT); *Partnership Act 1997* (NT), s 27.

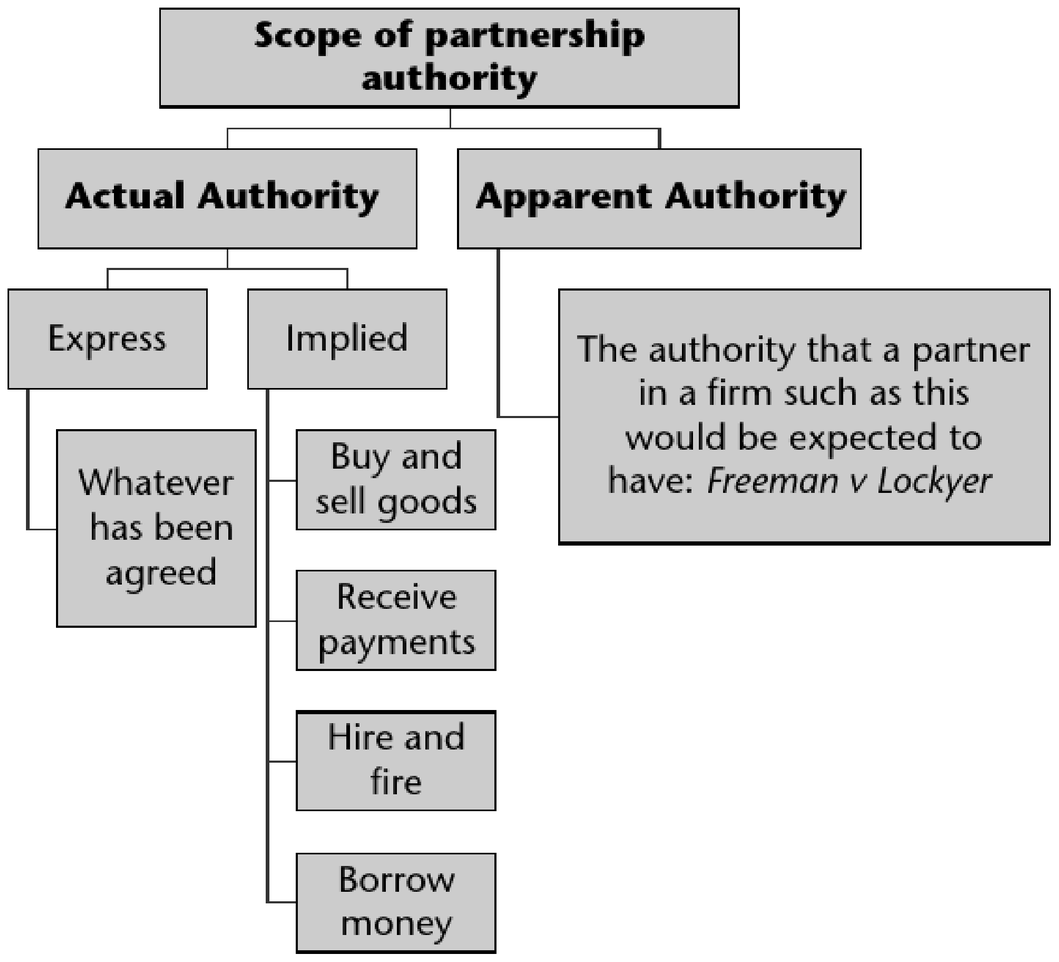
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[18.410] There are two sources of law that are relevant when considering how partners bind their other partners (or share their liability for wrongs with other partners) when dealing with third parties: the common law of agency, and the Partnership Act. The common law complements the provisions of the Partnership Act in relation to the authority that an agent has.

Assuming that the common law of agency does not provide an answer in the case of liability under a contract, the Partnership Act addresses two situations concerning the relationship of partners to third parties: first, when partners will otherwise be liable under *contracts* (for debts and obligations) entered into by another partner; and second, when partners will be liable for *wrongs* committed by another partner.

Actual express and actual implied authority

Figure 18.3 : Scope of partnership authority



[18.420] A partner will have *express actual* as well as *implied actual* authority to engage in particular activities with third parties, and provided that they act within this actual authority, they will bind the other partners. This is a consequence of the common law of agency; resort to the Partnership Act is not required. A partner may be granted express actual authority orally or in writing. The implied actual authority of a partner extends to all matters necessary for carrying on the business of the firm *in the usual way in which businesses of a like kind are carried on.*

The *implied actual authority* of partners only extends to transactions in *the usual course of the partnership business*. There are certain acts which partners are entitled to perform and for which the partner will have implied actual authority (even if they have no express actual authority):

1. to sell any goods or personal chattels of the firm;
2. to purchase on account of the firm any goods of a kind necessary for or usually employed in the business carried on by it. For example, a member of a partnership conducting the business of farming was deemed to have implied authority to purchase farming machinery;

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3. to receive payment of debts due to the firm, and to give receipts or releases for them; and
4. to engage employees for the partnership business.

If the partnership is a trading one (eg if it is engaged in the buying and selling of goods), every partner may also bind the firm by any of the following acts:

1. accepting, making and issuing bills and other negotiable instruments in the name of the firm;
2. borrowing money on the credit of the firm;
3. pledging any goods or personal chattels belonging to the firm; and
4. giving an equitable mortgage, by deposit of deeds or otherwise, of real estate or chattels real belonging to the firm, but they cannot give a legal mortgage of land.

Authority not implied

[18.430] A partner has no implied authority to bind the firm by deed. This is because such authority must be expressly given to that partner by deed. Furthermore, a partner has no implied authority to give a guarantee in the name of the firm or to bind the firm by a submission to arbitration.

A partner cannot pledge the firm's credit for a purpose that is not apparently connected with its ordinary course of business without express authority,[33] nor can they pledge the firm's assets for private debts where the other party knows that they are not that partner's own assets.

If it has been agreed between the partners that any restrictions are to be placed upon the power of any one or more of them to bind the firm, an act done in contravention of the agreement is not binding on the firm where a third person has notice of the agreement.[34]

Apparent authority

[18.440] Chapter 17 identified when apparent authority exists, and such authority depends upon a principal holding another out as having authority that they do not (actually) have. The existence of a partner's apparent authority therefore depends upon the circumstances of each case. Where there is no actual or apparent authority, the firm will not be liable for a partner's acts (under common law), even though the partnership derives a benefit from those acts.

Liability of partners to third parties

[18.450] As we have seen, a partnership, unlike a corporation, is not a separate legal person. It is nothing more than a relationship between individual partners, and as a result, it may be those partners who are: (a) jointly liable for contracts entered into (debts and obligations) by another partner; (b) jointly and severally liable for the wrongful acts of another partner; and (c) jointly and severally liable for the

33 *Partnership Act 1892* (NSW), s 7(1); *Partnership Act 1958* (Vic), s 11; *Partnership Act 1891* (Qld), s 10(1); *Partnership Act 1891* (SA), s 7(1); *Partnership Act 1895* (WA), s 14; *Partnership Act 1891* (Tas), s 12(1); *Partnership Act 1963* (ACT), s 11(1); *Partnership Act 1997* (NT), s 11(1).

34 *Partnership Act 1892* (NSW), s 8(1); *Partnership Act 1958* (Vic), s 12; *Partnership Act 1891* (Qld), s 11(1); *Partnership Act 1891* (SA), s 8(1); *Partnership Act 1895* (WA), s 15; *Partnership Act 1891* (Tas), s 13(1); *Partnership Act 1963* (ACT), s 12(1); *Partnership Act 1997* (NT), s 12.

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misapplication of money or property. We will look at each of these third-party liability scenarios now in some detail.

Third-party liability under contracts: Liability for debts and obligations

[18.460] The Partnership Act contains rules that determine when partners are liable for debts and obligations under contracts entered into by another partner, separate to the common law of agency.[35] The rules across the States and Territories are equivalent in substance but differ slightly in their wording. For the purpose of understanding these requirements, we can look to Victoria's provision in the *Partnership Act 1958* (Vic), s 9 as an example, which states that:

> Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership, and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.

Thus, breaking this provision down into its elements, we can see that partners may be bound by the contracts entered into by another partner:

1. when the partners have authorised a partner to enter into a transaction on their behalf, with the outsider. Here, the normal rules of agency apply so that if the partner (as an agent) has acted within the scope of their actual or apparent authority, the other partners will be bound to the transaction;
2. when one of the partners has acted, without common law authority, in circumstances where the following requirements of the Partnership Act have been met:
   - ▷ the act or transaction was entered into by a partner;
   - ▷ the act or transaction entered into was within the scope of the kind of business carried on by the firm;
   - ▷ the act or transaction was carried out in the usual way; and
   - ▷ it is not the case that the other party to the transaction knows (or believes) the person lacks authority or does not believe that they are a partner.

We consider each element now in turn. But first we should note that in a commercial partnership, the following acts will come within the scope of a partner's normal authority, meaning that recourse to this rule in the Partnership Act may not be necessary: they may pledge or sell the partnership's property, buy goods on account of the partnership, borrow money, incur and pay debts on account of the partnership, sign cheques and hire employees.

The act or transaction was entered into by a partner

[18.470] The partners will only be bound to a transaction made with a third party when that transaction was made by one or more of their other partners. If the person entering into the contract was not a partner, the other partners would not be liable under this Partnership Act rule and the situation would then have to be analysed in accordance with normal common law agency rules.

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35 *Partnership Act 1892* (NSW), s 5(1); *Partnership Act 1958* (Vic), s 9; *Partnership Act 1891* (Qld), s 8(1); *Partnership Act 1891* (SA), s 5(1); *Partnership Act 1895* (WA), s 26; *Partnership Act 1891* (Tas), ss 10(1)–(2); *Partnership Act 1963* (ACT), ss 9(1)–(2); *Partnership Act 1997* (NT), ss 9(1)–(2).

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The act or transaction entered into must be within the scope of the kind of business carried on by the firm

[18.480] Whether an act or transaction is within the scope of the kind of business that is carried on by the firm is a question of fact. Although *Mercantile Credit Co Ltd v Garrod* involved the liability of the partners for a civil wrong, the issue concerning the scope of the partnership's business is still relevant here.

It should be noted that the partners may be liable for a contract entered into by one of the partners, even though it is outside the scope of this particular firm's business, where the business transaction is of a kind that is *usually* entered into by *other* firms in the same kind of business.

Mercantile Credit Co Ltd v Garrod

[18.490] *Mercantile Credit Co Ltd v Garrod* [1962] 3 All ER 1103. Two partners were in a partnership that leased out garages. Both were prohibited, under their partnership agreement, from selling motor vehicles. Despite this, Parkin, one of the two partners, sold a car which he did not own. He had done this in the past. The plaintiff sued the partnership and recovered damages. The Court looked at the transaction *as it would have appeared to the plaintiff* and concluded that from the plaintiff's point of view, the sale was within the usual course of business of the partnership. The Court held that when Parkin entered into the sale of the Mercedes Benz car to the plaintiff, "he was doing an act of a like kind to the business carried on by the persons trading as a garage". Further:

> [W]hatever express restrictions there might earlier have been on Mr Parkin's authority, the defendant had known … that Mr Parkin had been selling cars in the firm's name and that he intended to continue doing so, and … the defendant, having taken no steps to prevent such sales, was liable for his partner's actions.

The act or transaction must be carried out in the usual way

[18.500] Notwithstanding that a partner has entered into a transaction that is within the scope of the kind of business carried on by the partnership, the third party will be put "on notice" that the partner may lack authority if the transaction is carried out in an unusual way. Where the transaction is not carried out in the usual way, it will not bind the other partners, for this reason. Note that a transaction is not carried out in an unusual way only because the partner entering into the transaction lacked authority. In fact, the Partnership Act rule that we are considering here presupposes that the partner does not have authority. If the partner did have authority, then their other partners would be bound under ordinary common law agency rules, and recourse to the Partnership Act rule that we are considering here would not be necessary.

Goldberg v Jenkins

[18.510] *Goldberg v Jenkins* (1889) 15 VLR 36. A partner purported to borrow money on behalf of the firm at over 60% interest when, at the time, the comparable rates were between 6% and 10%. It was held that such borrowing was beyond "the usual way" of the firm and thus the firm was not bound to the transaction. According to Hodges J:

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> A person conducting his transactions in the ordinary way … would have been able to obtain all the advances which he could reasonably require at rates varying from 6 to 10 per cent; but in this case, referring to the last transaction, the interest was something over 60 per cent and the person lending money on those terms knows that the person borrowing is not conducting an ordinary business transaction, and that, therefore the partner borrowing would have no power to bind his co-partners.

The other party to the transaction must either know or believe that the person acting is a partner or must not know of their lack of authority to act

[18.520] Where a partner, without actual authority, enters a contract that is within the scope of the kind of business carried on by the firm and that contract is entered into in the usual way, that contract will still not be binding on the other partners if the third party knows of the lack of authority of the partner *or* does not know or believe that the partner with whom they acted was a partner.

Construction Engineering (Aust) Pty Ltd v Hexyl Pty Ltd

[18.530] *Construction Engineering (Aust) Pty Ltd v Hexyl Pty Ltd* (1985) 155 CLR 541. Tembel Pty Ltd and Hexyl formed a partnership in order to develop some property. The partnership agreement expressly stated that Tembel would enter into the construction contract on its own behalf and not on behalf of the partnership and, in fact, when Tembel signed a contract with Construction Engineering to construct the building, it did so under its own name. After a dispute arose, Construction Engineering sued both Tembel and Hexyl for breach of the contract. Hexyl denied liability.

The High Court held that Hexyl had no liability. The construction contract was between Construction Engineering and Tembel. There was no liability under the section because: (a) there was no actual authority (the partnership agreement expressly limited Tembel's authority to bind the firm); and (b) Construction Engineering, at the time of making the contract with Tembel, was unaware of Hexyl – it had assumed that Tembel was acting on its own behalf only.

Joint liability for debts

[18.540] Consistent with the mutuality principle that underpins partnership law, partners are "jointly" liable for the whole of the debts of the firm.[36] This means that a creditor can bring one action, and one action only, against the members of a partnership and any partner can insist that the action be stayed (effectively, put on hold) until all other partners are joined as parties. If judgment is obtained against one or more partners of a firm, no further legal action may be taken against the others, even if satisfaction cannot be obtained from the partner(s) sued.

36 *Partnership Act 1892* (NSW), s 9(1); *Partnership Act 1958* (Vic), s 13; *Partnership Act 1891* (Qld), s 12(1); *Partnership Act 1891* (SA), s 9(1); *Partnership Act 1895* (WA), s 16; *Partnership Act 1891* (Tas), s 14(1); *Partnership Act 1963* (ACT), s 13(1); *Partnership Act 1997* (NT), s 13(1).

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Liability of incoming partner

[18.550] A person admitted into an existing firm does not become liable for debts or obligations contracted for *before* they became a partner.[37] However, liability may be incurred where it is specifically agreed upon, for example, where it is agreed to release a retiring partner from the firm's debts and to substitute an incoming partner. Such a contract, however, cannot be enforced by a third party (ie a creditor) against the incoming partner unless the third party was also a party to that contract.

Liability of retiring partner

[18.560] A partner who retires from a firm does not thereby cease to be liable for partnership debts incurred before their retirement.[38]

However, a retiring partner may be discharged from any existing liabilities by an agreement to that effect between themselves, the firm (as newly constituted) and the partnership's creditors: that agreement being either express or inferred from the course of dealing between the creditors and the firm as newly constituted.[39] Such an agreement is called a tripartite agreement. The creditors (first party) will agree to release the retired partner (second party) and the continuing (and new) partners (third party) will agree to accept liability.

The position in relation to debts subsequently incurred is different. When a person deals with a firm after a change in its constitution, they are entitled to treat all apparent members of the old firm as still being members of the firm until they have notice of the change.[40]

In such a case, the person dealing with the firm has two potential but alternative courses of action. They may sue the members of the firm either as they were prior to the change or after the change, but they cannot in the one action sue both the partners prior to the change and the partners after the change.

In order to avoid being made liable for debts incurred *after* their retirement, a retiring partner should give specific notice of their retirement to those persons with whom the firm has had dealings. Perhaps reflecting the Partnership Act's age and the fact that it has not quite kept up with the realities of modern business, the Partnership Act (except in the ACT) provides that various types of notices published in newspapers and/or in the Government Gazette (neither being commonly read sources today) will be deemed sufficient, but this means of notice is not mandated.[41] The mere alteration of the names on the letterhead of a firm and receipt of communications by third parties on the changed letterhead is insufficient notice, unless the letterhead or the body of a letter spells out in clear terms what alteration there has been to the partnership.

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37 *Partnership Act 1892* (NSW), s 17(1); *Partnership Act 1958* (Vic), s 21(1); *Partnership Act 1891* (Qld), s 20(1); *Partnership Act 1891* (SA), s 17(1); *Partnership Act 1895* (WA), s 24(1); *Partnership Act 1891* (Tas), s 22(1); *Partnership Act 1963* (ACT), s 21(1); *Partnership Act 1997* (NT), s 21(1).

38 *Partnership Act 1892* (NSW), s 17(3); *Partnership Act 1958* (Vic), s 21(2); *Partnership Act 1891* (Qld), s 20(3); *Partnership Act 1891* (SA), s 17(3); *Partnership Act 1895* (WA), s 24(2); *Partnership Act 1891* (Tas), s 22(3); *Partnership Act 1963* (ACT), s 21(3); *Partnership Act 1997* (NT), s 21(2).

39 *Partnership Act 1892* (NSW), s 17(5); *Partnership Act 1958* (Vic), s 21(3); *Partnership Act 1891* (Qld), s 20(5); *Partnership Act 1891* (SA), s 17(5); *Partnership Act 1895* (WA), s 24(3); *Partnership Act 1891* (Tas), s 22(5); *Partnership Act 1963* (ACT), s 21(5); *Partnership Act 1997* (NT), s 21(5).

40 *Partnership Act 1892* (NSW), s 36(1); *Partnership Act 1958* (Vic), s 40(1); *Partnership Act 1891* (Qld), s 39(1); *Partnership Act 1891* (SA), s 36(1); *Partnership Act 1895* (WA), s 47(1); *Partnership Act 1891* (Tas), s 41(1); *Partnership Act 1963* (ACT), s 41(1); *Partnership Act 1997* (NT), s 40(1).

41 *Partnership Act 1892* (NSW), s 36(2); *Partnership Act 1958* (Vic), s 40(2); *Partnership Act 1891* (Qld), s 39(2); *Partnership Act 1891* (SA), s 36(2); *Partnership Act 1895* (WA), s 47(2); *Partnership Act 1891* (Tas), s 41(2); *Partnership Act 1997* (NT), s 40(2).

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Hamerhaven Pty Ltd v Ogge

[18.570] *Hamerhaven Pty Ltd v Ogge* [1996] 2 VR 488. Ogge was a senior partner in a law firm in Melbourne. He retired in 1987. Two years later, the firm transferred Hamerhaven's funds to a finance company that promptly collapsed. Hamerhaven sued the firm, including all those who were partners in 1989. For one year after he retired, Ogge was retained as a consultant and his name appeared as such on the letterhead. After 1988, he retired completely and his name no longer appeared on the firm's letterhead. The issue was whether the removal of his name from the letterhead prior to 1989 was proper notice. The Court decided that the removal was not proper notice for the purposes of the *Partnership Act 1958* (Vic), s 40.

[18.580] On the dissolution of a partnership or on the retirement of a partner, any partner may publicly notify the fact of the dissolution or the retirement and may require the other partner or partners to concur in any necessary acts which cannot be done without their concurrence.[42]

The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner (ie a dormant partner), retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy or retirement, respectively.

Tower Cabinet Co Ltd v Ingram

[18.590] *Tower Cabinet Co Ltd v Ingram* [1949] 2 KB 397. Mr Christmas and Mr Ingram dissolved their partnership (running Merry's furniture store in Edmonton), but no notice was given or advertisement published. After the dissolution, Christmas ordered goods from Tower Cabinet using the firm's old notepaper that showed Ingram as a partner. The supplier failed in his action against Ingram because Ingram had not knowingly allowed himself to be represented as a partner and, indeed, the plaintiff was unaware that Ingram was a partner of the firm before its dissolution.

Liability for "holding out" as a partner

[18.600] A person who represents themselves, or who knowingly allows themselves to be represented, as a partner is liable as a partner to anyone who has, on the faith of any such representation, given credit to the firm (ie the "partner" is "estopped" from denying to third parties that they are a partner and liable as such).[43] This section makes it clear that it is the person who is represented as a partner or who represents themselves as a partner that is liable to outsiders who have on the faith of the representation given credit to the firm, even when they are not a partner in fact.

42 *Partnership Act 1892* (NSW), s 37; *Partnership Act 1958* (Vic), s 41; *Partnership Act 1891* (Qld), s 40; *Partnership Act 1891* (SA), s 37; *Partnership Act 1895* (WA), s 48; *Partnership Act 1891* (Tas), s 42; *Partnership Act 1963* (ACT), s 42; *Partnership Act 1997* (NT), s 41.

43 *Partnership Act 1892* (NSW), s 14(1); *Partnership Act 1958* (Vic), s 18(1); *Partnership Act 1891* (Qld), s 17(1); *Partnership Act 1891* (SA), s 14(1); *Partnership Act 1895* (WA), s 21(1); *Partnership Act 1891* (Tas), s 19(1); *Partnership Act 1963* (ACT), ss 18(1)–(2); *Partnership Act 1997* (NT), s 18(1), (3).

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As our study of agency law in Chapter 17 pointed out, one cannot confer apparent authority upon themselves as a result of their own representation. The rules addressed here are, despite first appearances, consistent with that notion. The concept of apparent authority holds a principal to their representations. Here, this rule holds a purported partner to their representations too.

Third-party liability for wrongs: Liability for crimes or civil wrongs

[18.610] Partners are not only potentially liable under contracts entered into by other partners. Partners are also potentially liable for the wrongful acts or omissions of other partners.

A wrongful act or omission may be a tort such as a negligent act, including negligent driving when engaged in the usual course of the partnership's business; a negligent misrepresentation, including giving negligently prepared financial or accounting advice; or defamation, where one partner damages a third-party's reputation. A wrongful act or omission may also include engaging in misleading or deceptive conduct under s 18(1) of the *Australian Consumer Law*; breaching a fiduciary duty (including acting in a way that involves a conflict of interest); and committing a crime (including the fraudulent misappropriation of funds). It does not, however, include a breach of contract.

The rules concerning liability to third parties for wrongful conduct are again substantively the same in each State or Territory but differ slightly in their wording.[44] This time, we will look to the *Partnership Act 1895* (WA) as an example. According to s 17(1) of that Act:

> Where by any wrongful act or omission any partner acting in the ordinary course of the business of the firm, or with the authority of his copartners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor [sic] to the same extent as the partner so acting or omitting to act.

In order for liability to be established under this provision, it must be shown that the wrongful act or omission of the partner:

1. occurred in the ordinary course of the business of the firm; or
2. was authorised by the co-partners.

[18.620] Deciding whether a wrongful act or omission was committed while the partner was acting in the ordinary course of business of the firm is a different question to whether, for the purpose of contract liability, a transaction is within the scope of the kind of business carried out by the firm. In the wrongs context, it is necessary to identify the nature and scope of the firm's business. This will be determined by reference to the agreement between the partners.

Walker v European Electronics Pty Ltd (in liq)

[18.630] *Walker v European Electronics Pty Ltd (in liq)* (1990) 23 NSWLR 1. There were three partners in a firm of chartered accountants. One specialised in receivership work, another specialised in tax and another specialised in bankruptcy and liquidations. Garrity misappropriated a large sum of money when acting as the receiver of a company (ie a company

44 *Partnership Act 1892* (NSW), s 10(1); *Partnership Act 1958* (Vic), s 14(1); *Partnership Act 1891* (Qld), s 13(1); *Partnership Act 1891* (SA), s 10(1); *Partnership Act 1895* (WA), s 17(1); *Partnership Act 1891* (Tas), s 15(1); *Partnership Act 1963* (ACT), s 14(1)–(2); *Partnership Act 1997* (NT), s 14(1).

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separate to the firm of chartered accountants). He was imprisoned for fraud and made bankrupt. The defrauded company then sued the other partners. They argued that, as Garrity was the only partner who did receivership work, the receivership practice was not part of "the ordinary course of the firm's business".

After examining the partnership agreement, and taking into account the fact that the fees earned from the receivership work went into the partnership, the New South Wales Court of Appeal disagreed. It said:

> If partners have agreed to carry on a certain kind of business and that business includes acting in a particular manner or capacity then conduct by one of them in pursuance of that agreement will attract the operation of s 10 [of the *Partnership Act 1892* (NSW)]. It is their agreement to go into that kind of business which is the foundation of their joint and several liability.

The Court held that the two other partners of the firm of chartered accountants were liable for the fraudulent misappropriation of $221,064 by the third partner who was acting as the receiver and manager of the other company.

[18.640] On the other hand, a partner will not be liable for the fraud of a co-partner who was not acting in the ordinary course of the firm's business.

National Commercial Banking Corp of Australia Ltd v Batty

[18.650] *National Commercial Banking Corp of Australia Ltd v Batty* (1986) 160 CLR 251. Batty and Davis were partners in a firm of accountants. Davis fraudulently deposited cheques of a separate company of which he was a director into the firm's trust account and misappropriated the proceeds. The company, on discovering the fraud, successfully sued the National Australia Bank (the collecting bank) in the tort of conversion. The bank then sought an indemnity from Batty (Davis died before the action was heard), arguing that he was liable for the fraud of his partner.

The High Court decided that in depositing the separate company's cheques to the firm's trust account, the partner had not been acting in the course of the firm's business and accordingly his co-partner was not liable for his fraudulent conduct.

Polkinghorne v Holland

[18.660] *Polkinghorne v Holland* (1934) 51 CLR 143. Florence Polkinghorne was a longstanding client of a firm of three solicitors that included Thomas Holland and his son, Harold. Florence received advice from Harold about the investment of her money which was generally in low-risk, low-yield government bonds and first mortgages. However, at one point, Harold advised her to invest in two risky companies run by his associates. When the companies failed, Florence sued the firm. The main issue was whether the two innocent partners were liable for her loss.

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The High Court, in upholding her appeal, found that the other partners were liable (emphasis added):

> The difficulty of the case really lies in determining what is *within the course of a solicitor's business*. By associating themselves in a partnership with Harold Holland, the respondents made themselves responsible, as principals are for an agent, for all his acts done in the course of his authority as a partner. That authority was to do on behalf of the firm all things that it is part of the business of a solicitor to do. If, in assuming to do what is within the course of that business, he is guilty of a wrongful act or default, his partners are responsible, notwithstanding that it is done fraudulently and for his own benefit … But, to make his co-partners answerable, it is not enough that a partner utilises information obtained in the course of his duties, or relies upon the personal confidence won or influence obtained in doing the firm's business. *Something actually done in the course of his duties must be the occasion of the wrongful act*.

The Court then held that the giving of financial or investment advice was within the usual course of business of *that* firm of solicitors:

> But it is one thing to say that a valuation or expression of his own judgment upon a commercial or financial question is *not* within the scope of a solicitor's duties, and another to say that when he is consulted upon the wisdom of investing in the shares of a company of which his client knows nothing, it is outside his province as a solicitor to inquire into the matter and to furnish his client with the information and assistance …

In other words, notwithstanding that a solicitor had no special skill regarding the investments, it was within the ordinary scope of the business to enquire on the client's behalf and to then give her relevant information and assistance.

Joint and several liability for wrongs

[18.670] Partners are liable jointly and severally for the wrongful act or omission of any partner acting in the ordinary course of business of the firm, or with the authority of their co-partners.[45] This means that the partners are both collectively (jointly) and individually (severally) liable. That is, the plaintiff can sue one, some or all of the partners and can sue them at different times until the debt is paid.

Third-party liability: Liability for misapplication of trust moneys

[18.680] The Partnership Act specifically provides for the liability of the firm where the money or property of a third person has been received and has been misapplied by a member of the partnership.[46] Again, the substance of the State and Territory provisions are the same, though their wording slightly differs. Taking the Victorian legislation as an example, according to the *Partnership Act 1958* (Vic), s 15:

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45 *Partnership Act 1892* (NSW), s 12(1); *Partnership Act 1958* (Vic), s 16; *Partnership Act 1891* (Qld), s 15(1); *Partnership Act 1891* (SA), s 12(1); *Partnership Act 1895* (WA), s 19; *Partnership Act 1891* (Tas), s 17(1); *Partnership Act 1963* (ACT), s 16(1); *Partnership Act 1997* (NT), s 16(1).

46 *Partnership Act 1892* (NSW), s 11(1); *Partnership Act 1958* (Vic), s 15; *Partnership Act 1891* (Qld), s 14(1); *Partnership Act 1891* (SA), s 11(1); *Partnership Act 1895* (WA), s 18(1); *Partnership Act 1891* (Tas), s 16(1); *Partnership Act 1963* (ACT), s 15(1); *Partnership Act 1997* (NT), s 15(1).

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In the following cases, namely –

(a) where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

(b) where a firm in the course of its business receives the money or property of a third person and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm –

the firm is liable to make good the loss.

Under (a) above, the liability of the firm depends upon whether the partner who misapplies the money had authority to receive it, whereas under (b), the liability of the firm depends upon the money being in the custody of the firm in the course of its business. For example, if a member of a firm of solicitors acting for a vendor in a sale of a property receives a deposit and then absconds with it, their partners are also liable to refund the money.

Lloyd v Grace, Smith & Co

[18.690] *Lloyd v Grace, Smith & Co* [1912] AC 716. Where a managing clerk of a firm of solicitors acting within the scope of his authority interviewed a client concerning an alteration in her investments and induced her to sign papers that enabled him to misappropriate property, it was held that the firm was responsible for the fraud committed by their representative in the course of his employment.

[18.700] If a partner, being a trustee, improperly employs trust property in the business or on account of the partnership, the other partners are not liable to the persons beneficially interested therein unless they were aware of the breach of trust; however, the trust money may be followed and recovered from the firm if still in its possession or under its control.[47]

This relates only to the private affairs of the partner, that is, where the partner is a trustee in a personal capacity and not as a member of the partnership.

Dissolution of partnership

[18.710] It is a fundamental principle of the law of partnership that any change in the membership of the partnership, whether occurring as a result of the retirement, expulsion, death or otherwise of a partner, effects a dissolution of the partnership. The addition of a new partner also effects the dissolution of the former partnership and the creation of a new partnership.

In the absence of other arrangements, the dissolution of a partnership should be followed by a winding-up, and a final settlement of accounts. However, many partnership agreements contain provisions to enable the transition from one firm to another to be effected without the disruption of a formal winding-up. A term is frequently included in partnership agreements to the effect that the other partners have the right to purchase the retiring or deceased partner's interest at a valuation, calculated according to an agreed

47 *Partnership Act 1892* (NSW), s 13(1); *Partnership Act 1958* (Vic), s 17; *Partnership Act 1891* (Qld), s 16(1)–(2); *Partnership Act 1891* (SA), s 13(1)–(1a); *Partnership Act 1895* (WA), s 20; *Partnership Act 1891* (Tas), s 18(1), (4); *Partnership Act 1963* (ACT), s 17; *Partnership Act 1997* (NT), s 17(1), (3).

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formula. These are essential in large firms, such as many accounting and legal practices, where there are regular changes in membership.

A partnership may be dissolved by operation of law, by agreement of the partners, in accordance with the provisions of the partnership agreement, or by the court upon application. If the partnership agreement contains any provisions for the dissolution of the partnership, these must be followed. The Partnership Act, however, also sets out certain specific circumstances which are grounds for the dissolution of a partnership.

Operation of law

[18.720] Apart from any agreement between the partners or any decision of the court, a partnership is dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on, or for the members of the firm to carry on in partnership,[48] for example where one member becomes – by the outbreak of war – a resident in an alien territory.

By partners

[18.730] Subject to any agreement between the partners, a partnership is dissolved:

1. if entered into for a fixed term, by the expiration of that term;
2. if entered into for a single adventure or undertaking, by the termination of that adventure or undertaking. For example, a partnership entered into for the purpose of salvaging a shipwreck would be terminated by the recovery and disposal of the wreck;
3. if entered into for an undefined time (ie a partnership at will), by any partner giving notice to the other or others of their intention to dissolve the partnership. The partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is mentioned, as from the date of the communication of the notice. A valid notice of dissolution once given cannot be withdrawn except by the consent of all parties. However, in a partnership where the agreement provided that the partnership could be terminated by "mutual agreement only", it was held that one of the partners could not determine the partnership by notice against the will of the other: *Moss v Elphick* [1910] 1 KB 846;
4. by the death, bankruptcy or insolvency of any partner. If a partner gives a valid notice of dissolution but dies before the expiration of the notice, the partnership is dissolved by the death and not by the notice; or
5. at the option of the other partners, if any partner allows their share of the partnership property to be charged for their separate debt.

By the court

[18.740] On application by a partner, the court may order a dissolution of the partnership in any of the following cases:

1. When a partner has been declared to be of unsound mind and incapable of managing their affairs, or is shown to the satisfaction of the court to be of permanently unsound mind.
2. When a partner, other than the partner suing, becomes in any other way permanently incapable of performing their part of the partnership contract.

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48 *Partnership Act 1892* (NSW), s 34; *Partnership Act 1958* (Vic), s 38; *Partnership Act 1891* (Qld), s 37; *Partnership Act 1891* (SA), s 34; *Partnership Act 1895* (WA), s 45; *Partnership Act 1891* (Tas), s 39; *Partnership Act 1963* (ACT), s 39; *Partnership Act 1997* (NT), s 38.

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3. When a partner, other than the partner suing, has been guilty of such conduct calculated to prejudicially affect the carrying on of the business (having regard to the nature of the business).
4. When a partner, other than the party suing, wilfully or persistently commits a breach of the partnership agreement or otherwise so conducts themselves in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with them. For example, the following have been held to be grounds for dissolution: continuous quarrelling or consistently keeping the accounts incorrectly, or such mutual incompatibility of temper of the partners as to make it impossible to carry on the business successfully or beneficially.
5. When the business of the partnership can only be carried on at a loss. Every partnership is entered into with a view to profit and, if it can only be carried on at a loss, the whole purpose of the partnership fails, and it may be dissolved.
6. Whenever in any case circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved.[49]

Continuing authority of partners for purposes of winding-up

[18.750] After the dissolution of a partnership, the authority of each partner to bind the firm and the other rights and obligations of the partners continue, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership and to complete transactions begun, but unfinished, at the time of the dissolution.

Application of partnership property on dissolution

[18.760] The Partnership Act provides for how partnership property is to be applied upon the dissolution of a partnership.[50] On dissolution, every partner is entitled to have the partnership property applied towards the payment of the partnership liabilities and thus to free themselves from these liabilities. A partner also has the right to have any surplus assets (remaining after paying the firm's liabilities) applied to pay what might be due to the partners (after deducting what those partners owe to the firm). For these purposes any partner or representative may, on the termination of the partnership, apply to the court for a decree dissolving the partnership and appointmenting a receiver to wind up the firm.

Final settlement of accounts on dissolution

[18.770] The Partnership Act provides a number of rules on the final settlement of accounts between partners in the event of the dissolution of a partnership. Subject to any agreement between the partners as to their rights and liabilities as between themselves, the following rules must be observed:

1. Losses, including losses and deficiencies of capital, must be met first out of profits, next out of capital and, lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits.
2. The assets of the firm, including the sums, if any, contributed by the partners to make up any losses or deficiencies of capital, must be applied in the following manner and order:

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49 *Partnership Act 1892* (NSW), s 35; *Partnership Act 1958* (Vic), s 39; *Partnership Act 1891* (Qld), s 38; *Partnership Act 1891* (SA), s 35; *Partnership Act 1895* (WA), s 46; *Partnership Act 1891* (Tas), s 40; *Partnership Act 1963* (ACT), s 40; *Partnership Act 1997* (NT), s 39.

50 *Partnership Act 1892* (NSW), s 39; *Partnership Act 1958* (Vic), s 43; *Partnership Act 1891* (Qld), s 42; *Partnership Act 1891* (SA), s 39; *Partnership Act 1895* (WA), s 50; *Partnership Act 1891* (Tas), s 44; *Partnership Act 1963* (ACT), s 45; *Partnership Act 1997* (NT), s 43.

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(a) in paying the debts and liabilities of the firm to persons who are not partners in the firm;

(b) in paying to each partner rateably what is due by the firm to them for advances as distinguished from capital;

(c) in paying to each partner rateably what is due from the firm to them in respect of capital; and

(d) the ultimate residue, if any, is to be divided among the partners in the proportion in which profits are divisible.[51]

Limited partnerships

[18.780] In the States, but not in the Territories, provision is made for limited partnerships.[52] The basic scheme of the legislation is to enable the formation of a partnership in which there is at least one general partner with unlimited liability, and one or more limited partners whose liability for the debts and obligations of the partnership is limited. Limited partnerships thus allow firms to bring in partners who provide capital for the firm effectively as investors in the firm. Like other passive investors, limited partners do not participate in management. If a limited partner takes part in the management of the business of the firm, they will be liable as if the partner was a general partner.

The commercial advantages, in certain circumstances, of a limited partnership over an ordinary partnership, corporation or a trust are seen to include:

1. the comparative simplicity of the formal requirements for the formation of a limited partnership;
2. the advantage of conferring limited liability on a limited partner without having to achieve this via the incorporation of a limited liability company under the *Corporations Act 2001* (Cth);
3. in New South Wales, Victoria, Queensland, South Australia and Tasmania, the absence of a limit on the maximum number of limited partners; and
4. the ability of the partners to utilise income tax losses incurred by the partnership.

Incidents of limited partnerships

[18.790] The limited partnership legislation in all States provides that a limited partner must not take part in the management of the business and does not have the power to bind the firm. If a limited partner does take part in the management of the business, they will be liable as a general partner. A limited partner has the right to inspect the books of the firm at any time.

Subject to the terms of any agreement to the contrary between the partners in a limited partnership:

1. any differences arising as to ordinary matters connected with the firm's business are to be decided by a majority of the general partners;
2. a limited partner may assign their share in the partnership with the consent of the general partners;
3. a person may be admitted as a partner without the consent of any limited partner;
4. the other partners are not entitled to dissolve the partnership because a limited partner has charged their share of the partnership property for their separate debt; and
5. a limited partner is not entitled to dissolve the partnership by notice.

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51 *Partnership Act 1892* (NSW), s 44; *Partnership Act 1958* (Vic), s 48; *Partnership Act 1891* (Qld), s 47; *Partnership Act 1891* (SA), s 44; *Partnership Act 1895* (WA), s 57; *Partnership Act 1891* (Tas), s 49; *Partnership Act 1963* (ACT), s 50; *Partnership Act 1997* (NT), s 48.

52 *Partnership Act 1892* (NSW), Pt 3; *Partnership Act 1958* (Vic), Pt 3; *Partnership Act 1891* (Qld), Ch 3; *Partnership Act 1891* (SA), Pt 3; *Limited Partnerships Act 1909* (WA); *Partnership Act 1891* (Tas) Pt 3.

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In New South Wales, Victoria, Queensland, South Australia and Tasmania, any document (eg letters, notices, contracts and cheques, etc.) issued on behalf of a limited partnership in connection with the conduct of the partnership's business must contain in legible letters the words "A Limited Partnership" immediately adjacent to the firm name.

A partnership ceases to be a limited partnership if there are no longer any limited partners or if the partners agree that they will carry on the business of the partnership otherwise than as a limited partnership.

Subject to the provisions of the limited partnership legislation, the ordinary rules of partnership as set out in the Partnership Act continue to apply.

Incorporated limited partnerships

[18.800] The *incorporated limited partnership* is common in the venture capital sector and is a variant of the limited partnership.[53] This category of limited partnership wraps a corporation around the basic limited partnership structure. In consequence, the general partner manages the business on behalf of the company and there is no risk that the limited partners will be vicariously liable for tortious or other breaches of duty by the general partner. Registration is limited to associations registered or registering under the *Venture Capital Act 2002* (Cth).

Summary

[18.810] Despite the advantages of limited liability companies, which will be addressed in Chapter 19, partnerships remain an important business structure: they are a default business structure, they are the norm in certain industries and they do not require partners to attend to the formalities involved in registering and running a corporation. Partnerships allow partners to conduct a business, in common, with a view of profit. In conjunction with the common law, including the common law of agency, the Partnership Act regulates (amongst other matters) partners' liabilities to each other, partners' liabilities to third parties for debts and obligations and partners' wrongs.

Further reading

K Fletcher, *The Law of Partnership in Australia* (9th ed, Thomson Reuters, 2007).

S Graw, *An Outline of the Law of Partnership* (5th ed, Thomson Reuters, 2018).

Tutorial activities

1. "The principles of partnership law contained in the Partnership Act are essentially declaratory of the pre-existing common law": see [18.10]. What is the relationship between the State and Territory Partnership Acts and the common law?

53 *Partnership Act 1892* (NSW) Pt 3; *Partnership Act 1958* (Vic) Pt 5; *Partnership Act 1891* (Qld) Ch 4; *Partnership Act 1891* (SA) Pt 3; *Partnership Act 1891* (Tas) Pt 3; *Partnership Act 1963* (ACT) Pt 6; *Partnership Act 1997* (NT) Pt 3.

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2. What are the three elements that must be satisfied in order for a partnership to exist, according to the Partnership Act?
3. What is the maximum number of partners that may be in a partnership (professional partnerships excluded)?
4. At what point in time did the Court say that the partnership began in *Khan* (see [18.110])? Why was it important for Khan to establish that the partnership began when the group "embarked on the venture" and not when they "opened for business"?
5. In *Goudberg* (see [18.130]), why did the Court conclude that there was no partnership between Goudberg and Williams when the latter entered into a contract with the architects? Why was this important for Goudberg?
6. To be a partnership, the group must be acting "in common". What does this mean? In *Degiorgio* (see [18.150]), why did Degiorgio fail to prove that he was acting "in common" with the rest of the band? Why was it important for him to try to do so?
7. The Partnership Acts provide a number of rules that are designed to supplement – but not to replace – the three-part legal definition of a partnership. What are these rules? Note particularly Rule 3, and explain why, in *Cox* (see [18.200]), Cox was keen *not* to be regarded as a partner?
8. The rights and obligations of the partners *to each other* primarily arise from the partnership agreement between the partners. What then is the role of the Partnership Act in this regard?
9. Partners are in a fiduciary relationship with each other. Explain what this means, with reference to the three fiduciary duties that are enshrined in the Partnership Act. Refer also to *Chan* (see [18.310]).
10. Explain, with reference to the three duties referred to in question 9, how the fiduciary obligations of partners have been incorporated into the Partnership Act.
11. What is partnership property, and why is it important to be able to identify it? How is that identification done? Explain, with reference to *Harvey* (see [18.360]). Why was it important for the (non-owning) brother to seek to establish that the farm was partnership property in that case? What was the consequence of his failure to do so? Does this decision seem fair?
12. The relationship of partners to third parties raises questions concerning the authority of one partner to bind the other partners to a transaction. What is the role of agency law in this situation, and what is the difference between actual and apparent authority?
13. In what circumstances, under the Partnership Act, are the partners of a firm liable for debts and obligations under a contract entered into by another partner? Refer to *Mercantile Credit* (see [18.490]) and *Goldberg* (see [18.510]), and explain why the partners were liable for the transaction in the former case but not in the latter case. What was the different reason for the transaction not being binding in *Hexyl* (see [18.530])?
14. In what circumstances, under the Partnership Act, are the partners of a firm liable for the crimes or civil wrongs committed by another partner? Explain with reference to *Walker* (see [18.630]) and *Polkinghorne* (see [18.660]), noting why it was vital that the victims in both cases establish that the partnership was responsible for the actions of the fraudulent partner. Why was the decision in *Batty* (see [18.650]) different?
15. In what circumstances may a partnership be dissolved?

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16. What are limited partnerships and what advantages do they offer over ordinary partnerships as business structures? What is the difference between a limited partnership and an incorporated limited partnership?

17. Reflecting on the entire content of our partnership law study, across this chapter, what are the main advantages and disadvantages of using a partnership as a business structure?

18. Bob, a property owner, gives Janine the right to use his premises to run a business. Janine pays Bob a weekly amount from the profits that she makes, in return for the right to use the premises. Bob is not involved in any activities related to running the business, and he has no right of entry into the premises whilst Janine is conducting her business. Is Bob a partner of Janine according to the rules in the Partnership Act?

19. Naya and Shazia operate a hair salon as partners. To set up the business, Naya contributed 70% of the money. All ongoing costs were contributed to equally by Naya and Shazia. In their written partnership agreement, it is stated that all profits, debts and liabilities are to be distributed equally between Naya and Shazia as partners. After operating the business for several years, Naya terminates the partnership. Naya then claims that she is entitled to 70% of the profits from the sale of the business. Shazia, however, argues that the partnership's capital profits are to be shared equally instead. Applying partnership law, who is correct?

20. Greg, Allan and George are partners in a small law firm specialising in family and property law and they share a large city office where they operate their business. Their partnership agreement states that all profits, debts and liabilities of the firm are to be shared equally amongst the partners. Greg sometimes conducts client meetings from his home office, in the evenings and on weekends. He also offers those clients additional legal services such as wills and estate planning, and he does not share the profits earned from these additional legal services with his business partners. Is Greg required to account for these profits under the Partnership Act?

21. Chen and Xiang are partners in a firm called Copythat, that leases photocopiers to commercial businesses. Their partnership agreement states that they are prohibited from selling toner to clients other than by arrangement with Feng's business, which sells toner. An important client asks Chen to supply them with toner, which Chen provides from a supplier in India. Chen does not inform either Xiang or Feng about this. The toner is of poor quality, and the client sues Copythat for damages for breach of contract. Xiang argues that, as a partner, he is not jointly liable since Chen acted contrary to their partnership agreement. Is Xiang liable for damages for breach of contract under Chen's toner supply contract with the important client?

22. Tae and Minjun are partners in a Perth-based firm of chartered accountants that specialises in tax management advice for wealthy clients connected with Western Australia's mining industry. Without Tae's knowledge, Minjun misappropriates millions of dollars from a key client over many years, secretly adding their name as a beneficiary to dividends distributed to the client by the firm. When this misappropriation is discovered, Minjun absconds (with the stolen money) to Mexico, and the client seeks compensation from Tae. Advise Tae as to whether he is liable to compensate the client for Minjun's fraud.

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Chapter 19

Corporations Law

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Introduction

[19.10] Corporations law is essentially concerned with the legal principles applying to corporations registered under the *Corporations Act 2001* (Cth). Once a corporation is incorporated, a new and separate legal entity is created. Corporations law is the body of rules and principles applying to such an incorporated entity. The word "corporation" (a synonym for "company") is used here to mean an incorporated entity, as opposed to partnerships and sole traders which are not incorporated and therefore do not have separate legal identity.

Although there are various sizes and types of corporate entities, the fundamentals are shared by the family business on Main St, the proprietary small to medium enterprises (SMEs), the trillion dollar Magnificent Seven (Apple, Microsoft, Alphabet (Google), Amazon, NVIDIA, Tesla, Meta Platforms), banks, energy, property and media companies – the corporation is a separate legal entity, with limited liability of the owners, who are (often) separate from the management. In essence, the corporate entity makes it possible to carry on a business, enter into contracts, acquire, hold and dispose of property, sue and be sued in the company's own name, raise (sometimes vast amounts of) capital and to do so (generally speaking) without the owners (shareholders) or managers (directors and other officers) being exposed to personal liability.

The *Corporations Act 2001* (Cth) is the key piece of legislation that regulates corporations in Australia. Unlike the case with partnerships law, there is a single Commonwealth-level Act governing corporations, instead of separate (but largely identical) State and Territory Acts. That is not to say, however, that understanding company law is easy. As the Act comprises over 1,700 sections, it is only possible to deal with the more significant of those provisions that affect the formation, management and operation of corporations. This chapter, therefore, does not discuss takeovers, mergers, fund-raising, financial services and financial markets. Section references that follow in the remainder of this chapter are to sections of the *Corporations Act 2001* (Cth), unless otherwise indicated.

Administration of the Corporations Act

[19.20] The Australian Securities and Investments Commission (ASIC) has sole responsibility for the administration and enforcement of the *Corporations Act 2001* (Cth) nationally. It is an independent statutory commission. In exercising its functions and powers, ASIC is subject only to a written direction by the responsible Commonwealth Minister about the policies that it should pursue or priorities to be followed under the national scheme.

[19.30] At the time of writing, ASIC's role as Australia's corporate regulator has been under some scrutiny and recommendations have been made to restructure ASIC into two separate regulators having different areas of responsibility.[1] It is unclear, at this time, whether that proposed restructure will be given effect.

1 For two ABC news reports addressing these matters: see https://www.youtube.com/watch?v=BeJHV6gkXjM; https://www.youtube.com/watch?v=5fmLlB8pNLg.

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Nature and formation of companies

Registration of companies

[19.40] To register a company, a person must lodge an application with ASIC and pay the required fees: s 117(1). The contents of the application are set out in s 117(2). The new company is entered in ASIC's register of companies and an Australian Company Number (ACN) is issued: s 118(1). A company comes into existence as a body corporate at the beginning of the day on which it is registered: s 119.

Figure 19.1 : Key features of a company

Separate legal personality	• Upon incorporation, a company is a legal person, separate from its members and its management • Can do most things a natural person can do, including sign contracts
Limited liability	• Of shareholders, extent depends on type of company
Flexible ownership	• Particularly in company limited by shares – can easily be bought and sold (although less so with pty ltd company)
Raising funds	• Companies can attract investors (usually as members)
Flexible governance	• Constitution or rules provide guidelines on governance
Tax rates and breaks	• Companies are taxed at a lower rate than individuals and have more tax breaks

Corporate personality

[19.50] As noted at [19.10], the basic principle underpinning company law is that a company, once registered, is a distinct legal entity. It has an existence separate from the holders of its shares who are its members and its ultimate owners. The acts of a company are its acts, not the acts of its members. Its assets and property belong to it, not to its members. Thus, in *Salomon v A Salomon & Co Ltd* [1897] AC 22, it was held that where Salomon registered a company in which he held 20,001 shares and where the remaining six shares issued were held by members of his family, the company so formed was nonetheless a separate legal person. This decision had serious consequences for the company's unsecured creditors: Salomon, as a secured creditor of the company, was entitled to repayment of his loan in priority to the unsecured creditors.

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Salomon v A Salomon & Co Ltd

[19.60] *Salomon v A Salomon & Co Ltd* [1897] AC 22. Aaron Salomon was the sole proprietor of a successful leather, shoe, and boot manufacturing business. He had five sons. The sons wanted to become partners in the business, so he turned the business into a limited company with the required seven shareholders that were necessary under the law at the time (him, his wife, and his five children). The two eldest sons were appointed directors. Salomon, himself, took 20,001 of the company's 20,007 shares. The purchase price was approximately £39,000. Salomon received the purchase price by way of 20,000 shares in the new company (valued at £1 each), a cash amount, and debentures (secured loans) worth £10,000. Shortly after the company was floated (that is, registered), its business was badly affected by strikes and a severe downturn in demand for its products. The company failed. On liquidation, its assets were not sufficient to discharge the debts owed to secured creditors (debenture holders), including Salomon himself, in full. The unsecured creditors (like employees and creditors) argued that Salomon and his company were, in essence, the same person and that he, far from being a secured creditor, should actually be personally liable for the debts of the company.

The Court of Appeal upheld the trial judge's decision that the company was a "sham". Salomon *was* the company, according to those initial decisions: the other shareholders were not active or independent of him. He was, therefore, in the Court of Appeal's view, *personally* liable for the company's debts (as he would have been prior to the incorporation). The House of Lords, on a final appeal, then reversed that decision. It held that, as the company was properly incorporated, it was a separate legal person and therefore there was no basis for holding Salomon personally liable for the debts of the company. Salomon was entitled to be paid as a secured creditor of the company.

A company, once formed, remains in existence until its name is removed from the register of companies (deregistration). Deregistration can occur at the request of the company (s 601AA), as a consequence of action initiated by ASIC for the removal of defunct companies (s 601AB) or, following the lodgement of the final report of a liquidator, at the conclusion of a winding-up process.

Features of a company

[19.70] To summarise, the main features resulting from the incorporation of a company limited by shares are as follows:

1. *A company is a separate legal entity.* It has an existence separate from the holders of its shares who are its members. Section 124(1) expresses this principle of separate legal identity, embodying in Australian statute law the common law principle from *Salomon's Case*: "A company has the legal capacity and powers of an individual".
2. *The liability of members is limited.* A person taking up shares in a company knows from the beginning the extent of their individual liability; and at any time during their membership of that company, the amount they may be called upon to pay is restricted to the unpaid portion, if any, of the issue price of their shares. For example, a shareholder with 100 shares issued at $1 each cannot be made to pay more than the $100 represented by their shares. Once the full $100 is paid for the shares, the member has no further liability to the company or to its creditors.
3. *A member may transfer their interest in the company by the comparatively simple procedure of executing a formal transfer of shares.* The transferee (the person to whom the shares are transferred)

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takes them subject to the same rights and liabilities as the transferor (the person by whom the shares are transferred).

4. *Permanent existence*. The company is unaffected by changes in or the status of its members and continues in existence until deregistration.
5. *Contracts*. The company may itself enter into contracts in any legal manner, and its capacity to contract does not depend upon the legal capacity of any individual member.
6. *As a separate legal person, the company may sue and be sued in its own name*. This is a consequence of the company having its own separate legal identity.
7. *Constitution*. Companies often have a key document called a corporate constitution. However, companies registered after 1 July 1998 are not required to have a constitution. A company's internal management may now be governed by provisions of the *Corporations Act 2001* (Cth) that are called replaceable rules. These effectively operate as a default corporate constitution unless they are replaced in whole or in part by an actual corporate constitution: s 134.

Types of companies that may be registered

Proprietary and public companies

[19.80] The most important method of company incorporation is that of formation under the *Corporations Act 2001* (Cth). Whilst we have identified a number of features of companies in general, above, there are actually a number of different types of company that may be registered under the *Corporations Act 2001* (Cth). The first distinction is between proprietary and public companies. Proprietary companies are identified by the word 'Pty' at the end of their name, whilst public companies do not have 'Pty' in their name. Proprietary companies are limited to 50 members and are also limited as to how they may raise funds. Proprietary companies are not permitted to raise funds from the public (eg by a public share offer). Public companies are not limited as to the number of members they may have, and they may raise funds from the public subject to compliance with other rules about raising funds and issuing shares. Generally speaking, public companies have significantly higher levels of accounting, reporting and disclosure obligations. To list on the stock exchange, a company must be a public company and must comply with the additional rules imposed by the Australian Stock Exchange (ASX Listing Rules). Proprietary companies are not listed on the stock exchange.

Small and large proprietary companies

[19.90] There are two types of "proprietary companies", namely:

1. small proprietary companies, and
2. large proprietary companies: *Corporations Act 2001* (Cth), s 45A.

A proprietary company is a small proprietary company for a financial year if the company and any entities it controls have at least two of the following characteristics:

1. a consolidated gross operating revenue for the financial year of less than $25 million;
2. consolidated gross assets at the end of the financial year of less than $12.5 million; and
3. fewer than 50 employees at the end of the financial year: s 45A(2).

A proprietary company that does not satisfy at least two of these requirements is a large proprietary company: s 45A(3).

Whilst all companies must keep sufficient accounting records to enable true and fair accounts to be prepared and audited, a small proprietary company is not generally required to prepare formal accounts

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(profit and loss account and balance sheet) or have them audited unless the company is requested to do so by the following:

1. shareholders holding at least 5% of the voting shares in the company; or
2. ASIC: ss 292–294.

Subject to certain exceptions, the financial reporting requirements of large proprietary companies parallel those of public companies, for example, they must appoint an auditor; lodge financial accounts and a directors' statement with ASIC on an annual basis; and send copies of these documents to persons entitled to receive notice of general meetings.

Proprietary companies with one director/one shareholder

[19.100] Unlike the rules applying when *Salomon's Case* was decided, a company need now only have one member: s 114. A number of the *Corporations Act 2001* (Cth) requirements relating to corporate management (eg shareholders' and directors' meetings) cannot be applied in the case of one-member proprietary companies. Accordingly, the Act makes special provision for the management of these companies. A number of these special provisions are as follows:

1. A member may pass a resolution by recording it in the company's minute books and signing it: ss 249B, 251A.
2. A quorum at a shareholders' meeting is constituted by one member: s 249B.
3. If a person who is the only director and the only shareholder of a proprietary company dies, cannot manage the company due to mental incapacity, or becomes bankrupt, thereby vacating the office of director, and a personal representative, trustee or trustee in bankruptcy is appointed to administer the person's estate or property, that representative or trustee may appoint a person as the director of the company: s 201F(2)–(3).
4. Where the only director of a proprietary company is also its only shareholder, the director may appoint another director by recording the appointment and signing the record: s 201F(1).

Privileges of proprietary companies

[19.110] The main privileges or concessions granted to proprietary companies compared with public companies are as follows:

1. A proprietary company only needs to have one director (s 201A(1)), whereas a public company must have at least three directors (s 201A(2)) and a company secretary (s 204A(2)).
2. There is no need for each director to be appointed by a separate resolution: compare s 201E.
3. There is a replaceable rule (s 203C) but no entrenched statutory right of members to remove a director in the case of a proprietary company, and directors may be made removable by other directors if power to do so is given in the constitution: compare s 203E.
4. If all members of a proprietary company sign a document stating that they are in favour of the resolution set out in the document, a resolution in those terms will be deemed to have been passed at a general meeting without an actual shareholders' meeting having been held. Passing of the resolution in this manner must be recorded in the company's minute books: ss 249A, 251A.
5. A proprietary company is not required to hold an annual general meeting: compare ss 250N, 250P.

Companies limited by shares

[19.120] Putting aside the difference between proprietary and public companies, the other key factor differentiating types of company is the extent to which members are liable for the debts of the company.

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Companies limited by shares are the most common type of corporate structure in Australia. The company issues shares[2] to raise capital. The *Corporations Act 2001* (Cth) defines a company limited by shares as a company formed on the principle of having the liability of its members limited to the amount unpaid on their shares: s 9. A company limited by shares may be either a public or a proprietary company. A company limited by shares has the word "Ltd" at the end of its name. A proprietary company limited by shares will therefore have "Pty Ltd" at the end of its name, whilst a public company limited by shares will only have "Ltd" at the end of its name. Proprietary companies must be companies limited by shares, or unlimited with a share capital.

Companies limited by guarantee

[19.130] Companies limited by guarantee are different to companies limited by shares in that they do not have share capital. Because of this, they have a restricted scope and are usually found in the non-profit sector. Examples are sporting clubs: to give a specific example, Australian Football League clubs are companies limited by guarantee. Companies limited by guarantee also have "Ltd" at the end of their name, and in this respect, they can look like they are public companies from their name alone: for example, North Melbourne Football Club Ltd. Such a company is formed on the principle that the original guarantors of the company undertake to guarantee the payment of a certain sum to be used to pay the company's debts in the event of the company being wound up: s 9. Their liability is limited to the extent of the amount guaranteed.

Unlimited companies

[19.140] Unlimited companies are a different type of company again. They are companies formed on the principle of there being no limit placed upon the liability of their members: s 9. The holders of shares in unlimited companies therefore have no limit on their liability to contribute to the assets of the company in the event of it being wound up and, consequently, they can be called upon to pay any amount necessary to discharge the liabilities of the company. Few companies of this type exist.

No-liability companies

[19.150] No-liability companies are a class of company that may be formed only for the purpose of mining, on the principle that their members incur no liability to pay calls (ie the acceptance of a share does not constitute a contract to pay calls in respect of money unpaid on such shares): s 9. There are special provisions in the *Corporations Act 2001* (Cth) relating to the liability of members, and the payment of calls and dividends, concerning no-liability companies. Claremont Petroleum NL, a company involved in a directors' duty case studied later in this chapter (see [19.620]), was a company of this type.

Company name

[19.160] When a company is registered, it must be given a name that distinguishes it from other companies and that is not already registered as a business name on the Business Names Register. As noted above, a public company with limited liability must include the abbreviation "Ltd" at the end of its name. A proprietary company with limited liability must have the word "Proprietary" or the abbreviation "Pty" as part of its name inserted immediately before the abbreviation "Ltd". An unlimited proprietary company must have the word "Proprietary" or "Pty" at the end of its name. A no-liability company must include the abbreviation "NL" at the end of its name.

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2 Shares are the parts into which the capital of a company is divided. The ownership of a share entitles the holder to receive a proportionate part of the profits distributed by a company as dividends and to take part in the management of the company (to the extent provided by the rules of the company).

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Australian Company Number

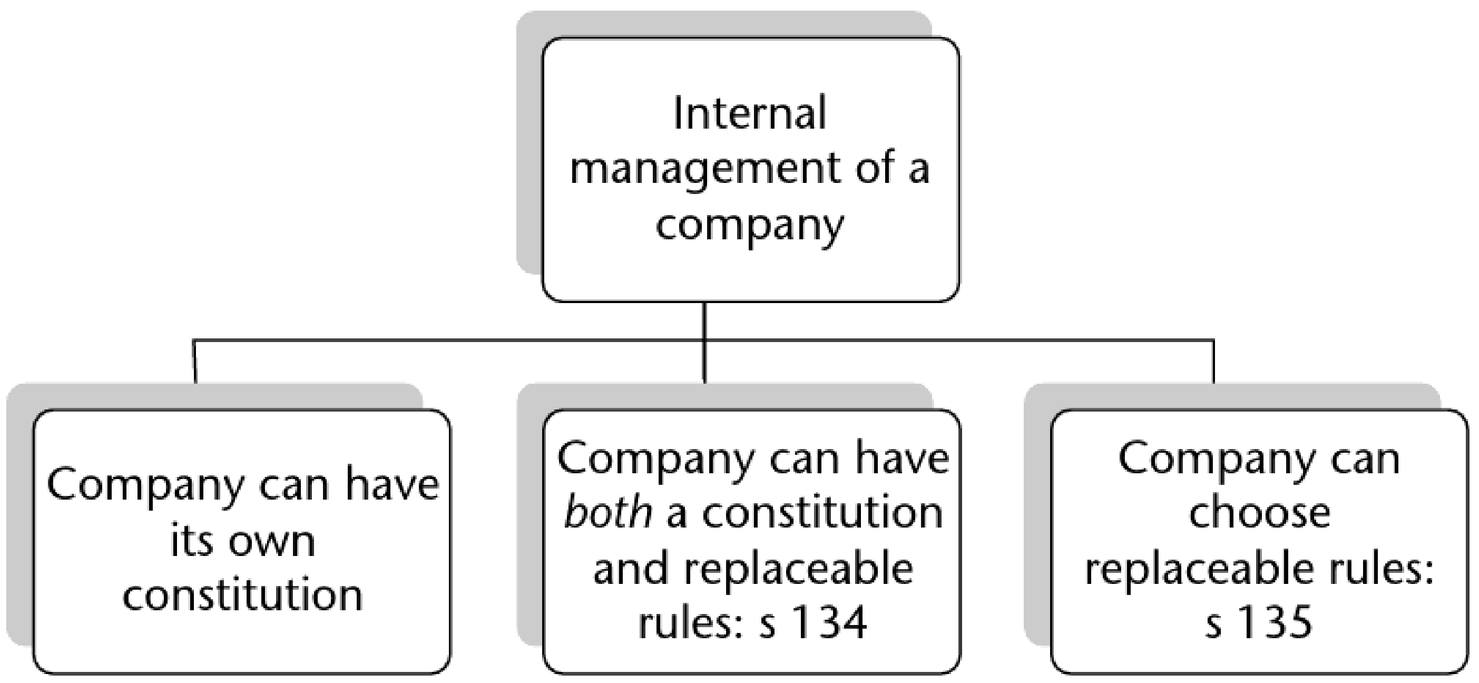
[19.170] On registration of a company, ASIC allots to the company a registration number that is distinctive to that company, known as its Australian Company Number or "ACN": *Corporations Act 2001* (Cth), s 118(1). Furthermore, an application for registration may state that the company's name on registration is to be its registration number. In the latter case, the company's name will be registered as, for example, "Australian Company Number 678 532 420 Ltd": s 148(1).

Company seal

[19.180] Company seals (also called common seals) have traditionally been used as a way for companies to enter into contracts or to otherwise finalise documents. However, under the current *Corporations Act 2001* (Cth), a company need not have a common seal. Even if it does, it need not use it in the execution of documents. If a company does adopt a common seal, it is required to set out in legible characters on its common seal the company's name followed by the expression "Australian Company Number" (or ACN) and its registration number, unless its name is also its registration number: s 123.

Constitution and replaceable rules

Figure 19.2 : Internal management of a company



Replaceable rules and a company's constitution

[19.190] A company's internal management is governed by the "replaceable rules" stated to apply to the company under the *Corporations Act 2001* (Cth), a corporate constitution if one is adopted, or a combination of both: s 134. A company's constitution (if any) and any replaceable rules that apply to the company have effect as a contract between the company and its members, the company and each director and secretary, and the members themselves: s 140(1).

The "replaceable rules" are basic rules relating to the internal management of a company. They provide for a default regime of internal company management in the event that a company does not have a corporate constitution, and they are "replaceable" in the sense that they can be displaced or modified by the company's constitution: s 135(2). The relevant provisions are stated to be replaceable rules in the

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headings of the provisions. A table of provisions that apply as replaceable rules also appears in s 141 of the *Corporations Act 2001* (Cth).

If a company does not want one or all of the replaceable rules to apply to its internal management, it may modify or replace them by adopting a constitution. This can occur on registration, by the written agreement of all persons consenting to become members of the company before lodgement of an application, or after registration by a special resolution (a vote by members requiring at least 75% approval): s 136(1).

Actions of the company

[19.200] Actions of the company will not be invalid notwithstanding that the company's constitution restricts or prohibits the exercise of certain powers: s 125(1). Nor will an act of the company be invalid merely because it is contrary to or beyond the company's objects that are stated in the company's constitution: s 125(2).

Furthermore, the fact that some act by a company (such as entering into a particular contract, or transferring property) is not in the best interests of the company does not affect its legal capacity to do the act: s 124(2).

People are not taken to have information about a company (eg its constitution, and any limitations on the company's power that it may contain) merely because the information is available to the public through ASIC: s 130.

The company making contracts: liability for the acts of its agents

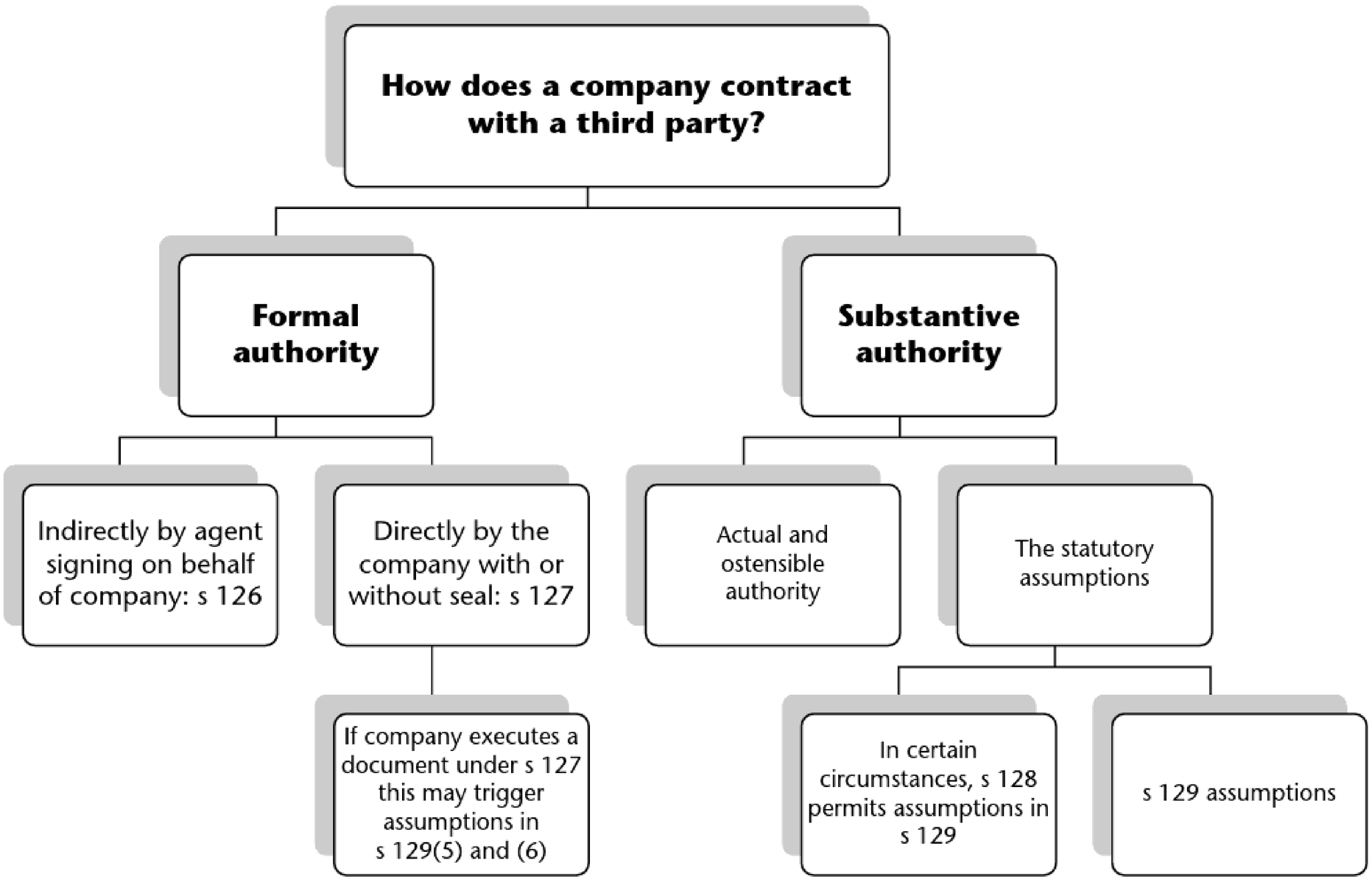
[19.210] As an artificial, *legal* person, one without a "beating heart" as a natural person would have, a company must necessarily act through its directors, officers and other agents. Accordingly, difficult questions may arise as to whether acts purported to have been done on behalf of the company by its directors and by its other agents are binding on the company. Applying ordinary common law agency rules, the common law was protective of companies, as companies could avoid liability under contracts where they had been entered into on the company's behalf without (or beyond the scope of) an agent's *actual or apparent* authority. After considerable amendments to the common law via statute, the position is now that a company (subject to certain important exceptions) will be bound by the acts of its directors, officers and other agents, and that persons dealing with a company are entitled to make certain *assumptions* about the company's powers and the authority of company representatives with which they deal.

Before addressing these statutory assumptions, however, it is important to recognise that the law is currently refining its understanding of how companies – with separate legal identity – act and form intentions. This follows from the recent decision in *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* [2024] HCA 27, a case involving unconscionable conduct under the Australian Consumer Law. In that case, two High Court justices – Gordon J and Edelman J – endorsed a theory of corporate systems liability. Pursuant to that theory, corporations can be said to intend the results of the systems they implement, even if that intention cannot be attributed to any one particular individual having the necessary authority to bind the corporation. Noting that only two of the High Court's seven justices in this case expressly endorsed this systems approach, the extent to which it will be accepted in future cases remains to be seen. However, even this first step was considered significant enough to attract the attention of Australia's mainstream media.[3]

3 See, eg, https://www.abc.net.au/news/2024-10-08/high-court-ruling-might-mean-corporate-executives-face-lower-bar/104438980.

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Figure 19.3 : How does a company contract with a third party?



The assumptions third parties are entitled to make

[19.220] There are a number of assumptions that third parties are entitled to make when dealing with those representing companies. These assumptions effectively impact the substantive authority that the company's agents have when contracting with third parties. In general terms, s 128 states that persons dealing with a company are entitled to make certain assumptions (that are then specified in s 129) as to the powers of the company and the authority of the officers and agents with whom they deal. The policy objective sitting behind these provisions is to increase protections for third parties by limiting the circumstances in which a company may argue that it is not bound by contracts entered into on its behalf because of a lack of authority. The assumptions are cumulative and may "cure" defects in the formal execution process (non-compliance with s 127, which sets out when a company can execute documents itself) and any defects in the substantive authority of agents who were ostensibly authorised to act on the company's behalf.

[19.230] The text of ss 128, 129, establishing this assumptions regime, appears below:

Section 128 – Entitlement to make assumptions

1. A person is entitled to make the assumptions in section 129 in relation to dealings with a company. The company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.
2. A person is entitled to make the assumptions in section 129 in relation to dealings with another person who has, or purports to have, directly or indirectly acquired title to property from a company. The company and the other person are not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.
3. The assumptions may be made even if an officer or agent of the company acts fraudulently, or forges a document, in connection with the dealings.

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4. A person is not entitled to make an assumption in section 129 if at the time of the dealings they knew or suspected that the assumption was incorrect.

Section 129 – Assumptions that can be made under section 128

1. A person may assume that the company's constitution (if any), and any provisions of this Act that apply to the company as replaceable rules, have been complied with.
2. A person may assume that anyone who appears, from information provided by the company that is available to the public from ASIC, to be a director or a company secretary of the company: (a) has been duly appointed; and (b) has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company.
3. A person may assume that anyone who is held out by the company to be an officer or agent of the company: (a) has been duly appointed; and (b) has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of officer or agent of a similar company.
4. A person may assume that the officers and agents of the company properly perform their duties to the company.
5. A person may assume that a document has been duly executed by the company if the document appears to have been signed in accordance with subsection 127(1). For the purposes of making the assumption, a person may also assume that, if any person who signs the document states next to their signature that: (a) they are a director of the company – that is the case; or (b) they are the company secretary of the company – that is the case; or (c) they are the sole director of the company and that the company does not have a company secretary – that is the case; or (d) they are the sole director and sole company secretary of the company – that is the case.
6. A person may assume that a document has been duly executed by the company if: (a) the company's common seal appears to have been fixed to the document in accordance with subsection 127(2); and (b) the fixing of the common seal appears to have been witnessed in accordance with that subsection and subsection 127(2A). For the purposes of making the assumption, a person may also assume that, if any person who witnesses the fixing of the common seal states next to their signature that: (c) they are a director of the company – that is the case; or (d) they are the company secretary of the company – that is the case; or (e) they are the sole director of the company and that the company does not have a company secretary – that is the case; or (f) they are the sole director and sole company secretary of the company – that is the case.
7. A person may assume that an officer or agent of the company who has authority to issue a document or a certified copy of a document on its behalf also has authority to warrant that the document is genuine or is a true copy.
8. Without limiting the generality of this section, the assumptions that may be made under this section apply for the purposes of this section.

[19.240] Note that s 128(3) provides that these assumptions may be made even if the officer or agent of the company had acted fraudulently or had forged a document in connection with the dealing. However, it is probable that knowledge of the fraud or forgery by persons dealing with the company would disentitle them from claiming the benefit of the relevant assumption.

[19.250] The concept of duties "customarily exercised or performed" under s 129(2) is equivalent to the implied or usual powers of an agent, discussed in *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711.

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Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd

[19.260] *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711. Fidelis' company secretary, Mr Bayne, hired cars from Panorama Development. Bayne used Fidelis' paper and represented that he wished to hire a number of Rolls Royce cars for the business while his managing director was away. He was in fact using them for his own purposes. Bayne was prosecuted under the criminal law and imprisoned, but Panorama had over £500 in unpaid bills for the hired cars that it wanted to recover from the company. Fidelis claimed that it was not bound to the hire contracts, because Bayne never had the authority to enter into contracts of this kind.

The Court of Appeal held that entering into contracts like this was within the usual authority of company secretaries and therefore was within the apparent authority of this particular secretary. Salmon LJ said the secretary "is the chief administrative officer of the company" so they have ostensible authority over administrative matters. Nothing is more natural than "ordering cars so that its servants may go and meet foreign customers at airports, nothing to my mind, is more natural than that the company should hire those cars through its secretary". So, whilst a company secretary may not have *actual* authority to do such things, they have *apparent* authority to do them because they are the usual or implied powers enjoyed by company secretaries.

[19.270] The one assumption that has generated significant case law is the assumption set out in s 129(3), concerning a person "who is held out by the company to be an officer or agent of the company".

Brick & Pipe Industries Ltd v Occidental Life Nominees Pty Ltd

[19.280] *Brick & Pipe Industries Ltd v Occidental Life Nominees Pty Ltd* [1992] 2 VR 279. Soon after being taken over by the Goldberg group of companies, Brick & Pipe Industries Ltd (Brick & Pipe) provided a third-party guarantee to Occidental. The guarantee had to be signed by a director and the secretary of Brick & Pipe or a person appointed for that purpose. Goldberg and Furst, who were both directors of Brick & Pipe, executed the deed without prior board approval. Furst, however, signed as secretary, a position to which he had not been appointed. When a solicitor, who had read the public documents, challenged Furst's capacity to act as secretary, another officer, in the presence of Goldberg, asserted that Furst had been appointed to that position. That officer had no *actual* authority to give that assurance. He may have had apparent authority but a person with apparent authority cannot hold out another as having actual authority. Only a person with actual authority can do so.

Three days later, the Goldberg group collapsed, and Brick & Pipe refused to honour the guarantee. The question was whether the company had held out Furst as being the company secretary. If there was a holding out by the company, it had to be done by someone with actual authority to do so. The Court of Appeal held that the guarantee was enforceable by Occidental. It recognised that Goldberg was the controller of all companies in the group and had implied actual authority to represent that Furst was the secretary of the company. By remaining silent, he had impliedly represented that Furst had been validly appointed to the position of secretary.

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Membership

Where membership exists

[19.290] A person is a member of a company if they are identified as a member of the company on its application for registration: s 120(1). Membership also extends to every other person who agrees to become a member of the company and whose name is entered in its register of members. The most usual ways by which persons become members are by the allotment of shares to them or the transfer of shares to them by a person who is already a member.

A company must set up and maintain a register of its members (eg its shareholders) containing details about the members and their shareholdings.

The register must be kept at the company's registered office, an office at the company's principal place of business or the office where the register is maintained, unless another office has been approved by ASIC: s 172. The office must be in Australia.

Shares

[19.300] Shares are an important source of capital for a company. A company may use the issue of shares as a means to raise capital throughout its life. There are a number of rules under the *Corporations Act 2001* (Cth) and under the ASX Listing Rules (for companies listed on the stock exchange) that regulate share issues so as to protect existing members' rights and also the prospective investors in shares. Offering shares on the stock exchange for the first time (often referred to as "listing") is an extremely complex and highly regulated event and the company will usually require advice from expert lawyers and corporate advisers.

Shares are a form of property. Members who subscribe for shares on registration or who acquire shares in subsequent issues may choose to sell their shares in the future. If a member sells their share, then the member retains the price they receive for selling the share.

Members' rights and remedies

[19.310] Members do not have any rights over the company property. This is an important consequence of the separate legal identity of the company. The company owns the company's property – not the members.

The members do have certain other rights that attach to their shares or membership in the company. As we have discussed, directors have the control of the day-to-day management of the company and its business. Members' rights in respect of the management of the company are essentially limited to voting for the directors. The general rights of members are as follows:

- The right to vote – to appoint or remove directors; on directors' remuneration (but this is limited); on any changes to the company's constitution; for any matters that are specified in the company's constitution as being matters for members to vote on; on financial benefits given by public companies to the directors and to other related parties.
- The right to distribution – to receive a dividend if the company makes a profit and the directors declare a dividend; to receive a share of any surplus if the company is wound up or if capital is returned.
- The right to information about the company – to inspect the company's books and to receive annual reports; to be notified about company meetings.
- The rights attached to their class of shares – class rights are special rights that are attached to a particular group of shares, for instance, the right to a priority dividend, or a right to appoint a director, or to veto a major business decision.

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[19.320] Members may sue the company if it breaches its duties to them, such as by failing to pay a declared dividend. However, where a wrong is done *to the company*, it is the company that is the proper person to take legal action to enforce *its* rights, rather than the members. There may be practical problems in the company taking legal action where the wrong is the result of a breach of duty owed by the company's directors, or the actions of a majority of the company's members. In those circumstances, minority members are unlikely to be able to persuade the company to take action to protect its interests but may be able to take advantage of some statutory remedies.

Management and control

Registered office

[19.330] Every company must have a registered office to which all communications and notices may be addressed. A company would be liable to a penalty if it carried on business without such an office. Notice of the full address of the registered office and of any change in address must be lodged with ASIC. A company must paint or affix its name in a conspicuous manner on the outside of every office or place in which its business is carried on, and in the case of the registered office of a public company it must add the words "registered office". The registered office of a public company must be open to the public for at least three hours on each business day. These requirements are set out across ss 121, 142–145.

Directors

[19.340] As a company is only a *legal* person, as we have mentioned earlier in this chapter, it must therefore act through the agency of others. Directors carry out the day-to-day management of a company and s 198A(1) provides that the business of the company is managed "by or under the direction of the directors". The directors are elected by the members or appointed according to the rules of the company. The number of directors depends upon the size of the company – a proprietary company must have at least one director; and public companies must have at least three: s 201A. If there is more than one director, they are collectively referred to as the "board of directors". The board will usually appoint a managing director or a chief executive officer who will run the company and who will report directly back to the board. Directors who are involved with managing the company (eg the chief financial officer) are called executive directors; those not involved with management are called non-executive directors.

Company secretary

[19.350] The *Corporations Act 2001* (Cth) requires that every public company must have at least one secretary: s 204A. The secretary is responsible for bookkeeping, drawing up agendas and providing notice of meetings, ensuring compliance with disclosure and reporting requirements and signing or authorising payments. The secretary is an important officer and the appointment of such an executive to handle the administrative affairs of the company has long been usual company practice. A secretary, as we saw in *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711 (at [19.260]) has implied authority to make contracts of an administrative nature on behalf of the company.

Officers

[19.360] The *Corporations Act 2001* (Cth) imposes a number of duties and obligations on "officers" of the company and ss 9, 9AD define officers to include (amongst certain other participants in company management) directors and secretaries, as well a person "who makes, or participates in making, decisions

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that affect the whole, or a substantial part, of the business of the corporation", or "who has the capacity to affect significantly the corporation's financial standing", or "in accordance with whose instructions or wishes the directors of the corporation are accustomed to act". This means that company secretaries and even people who are not directors or secretaries can also be liable for breach of certain duties such as the duty of care and diligence and the duty to act in the best interests of the company, in the same way as directors can be.

So far as directors are concerned, it is also important to understand that people can be liable as a director of a company under the *Corporations Act 2001* (Cth) even if they are not formally appointed as a director. Under ss 9, 9AC, a person is a director if they are appointed as a director, if they are appointed to be an alternate director and they are acting in that capacity, if they are not validly appointed as a director but they act in the position of a director (de facto directors), and if they are not validly appointed as a director but the directors are accustomed to act according to their instructions or wishes (shadow directors). In addition, s 9AC clarifies that a person is treated as a director if they are a director in substance, regardless of the name given to their position.

Validity of acts of a director

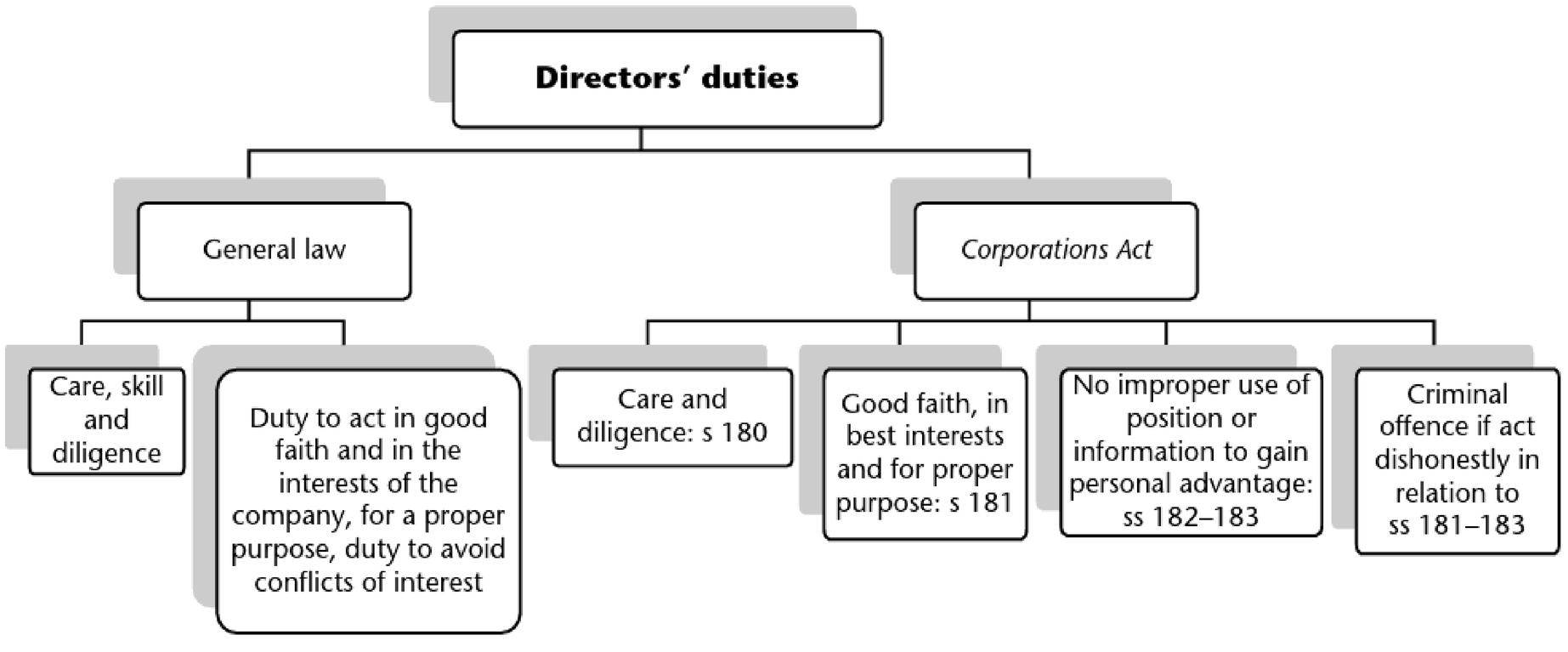
[19.370] The acts of a director are valid notwithstanding any defect that may afterwards be discovered in their appointment: s 201M(1). This rule does not deal with the question of whether a director's act binds the company or makes the company liable to other people: s 201M(2). Those questions are answered with reference to the statutory assumptions dealt with previously.

Powers of directors

[19.380] The directors of a company can exercise all the powers of the company, except for matters that require the authority of the shareholders. They can hire and fire people; authorise employees or agents to represent the company; take out loans; enter into contracts for the company; and buy, sell or lease goods or real property, to give just some examples.

Duties and liabilities of directors and other officers

Figure 19.4 : Director's duties



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Overview

[19.390] One of the most important areas of company law for the future professional careers of business law and commercial law students relates to the duties and liabilities of directors and other officers. Both common law and statutory law impose significant duties on the directors (and sometimes other "officers") of companies to act in certain ways with respect to their companies. The duties are varied and sometimes overlap, but at a general level it can be said that a director owes various fiduciary duties to their company which, if breached, may lead to personal liability of the director including civil and criminal penalties and liability for damages.

At the outset of our study of these duties, it is worth noting some of the comments from the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.*[4] The Royal Commissioner, in an Interim Report, offered some general observations on the role of directors (emphasis added):

> As commercial enterprises, each of the entities whose conduct was considered in the first round of hearings rightly pursues profit. Directors and other officers of the entities owe duties to shareholders to do that. But the duty to pursue profit is one that has a significant temporal dimension. The duty is to pursue the long term advantage of the enterprise. Pursuit of long-term advantage (as distinct from short-term gain) entails preserving and enhancing the reputation of the enterprise as engaging in the activities it pursues efficiently, honestly and fairly. And, lest there be any doubt, *it also entails obeying the law*. But to preserve and enhance a reputation for engaging in the enterprise's activities efficiently, honestly and fairly, the enterprise must do more than not break the law. It must seek to do "the right thing".
>
> The evidence that was led in the first round of hearings suggested that the entities examined had done, and were doing, as little as they thought they have needed to do to meet their legal obligations, offering no (or at best, next to no) encouragement to or reward for staff or third parties to pursue the interests of the consumer. Compliance appeared to have been relegated to a cost of doing business. And, the case studies undertaken in the first round of hearings showed, that there had been occasions when profit has been allowed to trump compliance with the law, and many more occasions where profit trumped doing the right thing by customers.

By considering here a number of cases where directors and other officers failed to comply with their duties, we can better equip ourselves to understand the standards of conduct to be expected of those occupying these roles.

Statutory duties of directors and other officers

Statutory definitions

[19.400] Before examining the duties of directors and other officers, it is important to remind ourselves of who it is that bears those duties and who therefore may be liable for their breach. As noted in [19.360], "officers" include directors and secretaries (as well as certain other classes of people), and "directors" include people formally appointed as directors or alternate directors, as well as de facto directors (people acting as directors, not validly appointed) and shadow directors (people whose wishes the directors would usually follow), regardless of what their position is actually called.

4 https://treasury.gov.au/publication/p2019-fsrc-final-report.

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[19.410] In the following decision, the High Court confirmed the broad scope of the definition of an "officer" under ss 9, 9AD.

Australian Securities and Investments Commission v King

[19.420] *Australian Securities and Investments Commission v King* (2020) 270 CLR 1. Michael King was the CEO of MFS Ltd, the parent company of the MFS Group. MFS Group's business included managing the Premium Income Fund (PIF), MFS Group's largest registered managed investment scheme. As a result of poor investment and security decisions, the MFS Group collapsed, leaving investors of the PIF with significant losses. The question for the High Court was whether King, the Group CEO, who acted as the "overall boss" of the group of companies (including its subsidiary) and who assumed "overall responsibility" for the subsidiary – but who was not listed as an "officer" of the subsidiary – was an "officer" within the s 9 definition (and thereby liable for breaches of directors' duties).

The High Court held that he was an officer of the subsidiary. It held that an "officer" is *not* limited to a person who holds a *named* office in a company or a "recognised position with rights and duties attached to it". In this case, King's functions within the subsidiary were sufficient to establish that he had the capacity to "affect significantly the corporation's financial standing" of the subsidiary as required by paragraph (b)(ii) of the definition: he actively intervened in its business.

Although the High Court said that the question of whether or not a person is an "officer" is a question of fact to be determined on a case-by-case basis, it identified a number of factors that may be considered, including:

- the identification of the role of a person in relation to the corporation;
- what they did or did not do to fulfil that role; and
- the relationship between their actions and the financial standing of the corporation.

In an interesting aside, three judges of the Court queried whether bankers, lawyers and other third parties could be included in the s 9 definition of "officer", particularly if they were responsible for advising/consulting a company in financial distress. They concluded that this would only be relevant where the advisor or lender is involved in the management of the corporation and can therefore ensure that the advice will be implemented.

The duties of directors and other officers

[19.430] The statutory duties of directors and other officers are primarily, but not exclusively, set out in ss 180–183. These sections, in a general sense, impose duties of trust and honesty on all officers of companies, including directors, company secretaries, executive officers and, in some circumstances, employees. Sections 180–183 cover different matters, but there is also significant overlap between them, in that circumstances breaching one of those sections may also breach another. They are also civil penalty provisions, though where directors act dishonestly or recklessly, a criminal offence may also be committed under s 184. The details of each will be addressed shortly, but for present purposes, the duties are as follows:

- Section 180: care and diligence;
- Section 181: good faith;

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- Section 182: use of position; and
- Section 183: use of information.

Duty of care and diligence: s 180

[19.440] The duty of care and diligence is set out in s 180(1) in the following terms:

> A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
>
> (a) were a director or officer of a corporation in the corporation's circumstances; and
>
> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Section 180(1) sets an objective standard of care and diligence that all directors and other officers of corporations must meet when exercising their powers or discharging their duties, taking into account the corporation and the officer's context.

As an example, it was held that the non-executive directors of James Hardie Ltd breached their obligations under s 180(1) by approving a misleading announcement to the Australian Stock Exchange concerning the adequacy of a fund established to meet asbestos claims: *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345.

By way of contrast, in *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486, the High Court determined that the chief executive of Fortescue Metals had not breached his duty in making company announcements, which described framework agreements for the construction and financing of a major Pilbara project as "binding contracts", when those agreements would *not be enforceable in Australian courts*. The announcements were not misleading or deceptive because the business audience, to whom the announcements were directed, would be aware that these commercial arrangements with foreign state-owned corporations were, nevertheless, intended by both parties to be implemented.

These cases demonstrate that the scope of the duty of care and diligence depends upon the particular circumstances of each case. Nevertheless, the duty also encompasses basic, irreducible standards of care and diligence. These emerge from *Daniels v Anderson*, a case that was decided under the common law duty of care and diligence that is also informative in understanding s 180(1)'s equivalent statutory requirements.

Daniels v Anderson

[19.450] *Daniels v Anderson* (1995) 37 NSWLR 438. AWA lost $49 million through unauthorised foreign exchange dealings by its employee, Koval. It sought to recover that amount from its auditors, DHS, which, in two audit reports, had failed to note the deficiency or report to the Board on weaknesses in the company's internal controls and records of foreign exchange dealings. DHS counterclaimed that AWA was contributorily negligent. In the course of reducing the award because of the chief executive's contributory negligence, the Court of Appeal found that, to exercise the common law duties of care and skill, directors need to:

1. be familiar with the fundamentals of the company's business;
2. keep informed about its activities on a continuing basis;
3. monitor corporate affairs and policies; and
4. keep informed about its financial status by regularly reviewing its financial statements.

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[19.460] *Australian Securities and Investments Commission v Healey* demonstrates the need for directors and officers to understand the company's accounts and financial position. Placing reliance solely on others, no matter how competent, is not sufficient; directors must themselves be familiar enough with current accounting standards to know what should be included in financial statements and whether there are any significant omissions. Neither ignorance nor honesty is a defence to an action under s 180(1).

Australian Securities and Investments Commission v Healey

[19.470] *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291. ASIC launched civil penalty proceedings against the current and former non-executive directors, the former CEO, and the former CFO of the Centro group of companies. It accused the defendant directors and officers of failing to act in accordance with their duties of care and diligence and of failing to take steps to ensure compliance with the financial reporting obligations under the *Corporations Act 2001* (Cth).

Mistakes were made in the financial statements. The mistakes were not inconsiderable: Centro Properties stated in its annual results released in August 2007 that it had no interest-bearing current liabilities on its balance sheet. Centro Properties later confirmed that the amount of interest-bearing current liabilities that should have appeared on its 30 June 2007 balance sheet was AU$2.7 billion and that it had entirely omitted a US$1.75 billion short-term liability guarantee. When the group eventually revealed the extent of its maturing debt obligations, and when it revealed that it had been unable to refinance billions of dollars of debt that had become payable, its share price fell dramatically. The critical question was whether, in the circumstances, the obligation to exercise care and diligence required the directors to personally examine the accounts looking for accounting errors or apparent inaccuracies.

Justice Middleton found that each of the directors and officers had breached their duty of care and diligence and had failed to take all reasonable steps to ensure compliance with the financial reporting obligations in the Act. The directors were aware of the guarantees and their current nature, and that they were significant to the accounts. A diligent director should have noticed the failure to include the guarantees as current liabilities in the accounts, or should have at least asked questions about them of the managers and corporate advisers.

[19.480] In *Cassimatis v Australian Securities and Investments Commission* (2020) 275 FCR 533, the Full Court of the Federal Court of Australia found that a director had breached s 180(1) by permitting or failing to prevent the company itself breaching provisions in the *Corporations Act 2001* (Cth) concerning the provision of financial advice. Recently, the Full Court of the Federal Court of Australia made a similar finding regarding a director's actions and a company's breaches of continuous disclosure obligations under the *Corporations Act 2001* (Cth) and the Australian Stock Exchange Listing Rules.

Cruickshank v Australian Securities and Investments Commission

[19.490] *Cruickshank v Australian Securities and Investments Commission* (2022) 292 FCR 627. Cruickshank was a director of Antares Energy Ltd, which had a share price of $0.09 and which was negotiating the sale of two key assets to Wade Energy Corporation. Antares made an announcement to the market regarding the sale of the two assets, but did not disclose the identity of Wade as the purchaser, did not disclose that it had not independently verified Wade's

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capacity to complete the purchases, and did not disclose that (at the time of the announcement) Wade's CEO had advised that financial approvals for one of the asset purchases had not yet been secured. After making the announcement, Antares' share price rose significantly.

The Federal Court, and the Full Court of the Federal Court of Australia on appeal, found that the information that was not disclosed was material to the market and by failing to disclose that information, Antares had breached ASX Listing Rule 3.1 and the *Corporations Act 2001* (Cth), s 674(2). In turn, Cruickshank was in breach of s 180(1) for failing to exercise reasonable care and diligence in considering whether Antares was required to disclose the information. Significant to that finding were several facts: (a) Cruickshank was aware of the significance of the sales to Antares' financial position; (b) he knew that the information withheld was not generally available; (c) Cruickshank knew of the obligation to disclose under ASX Listing Rule 3.1 unless an exception applied; and (d) a person in Cruickshank's position exercising reasonable care and diligence would have realised that the information would have likely influenced investors.

Essentially, Cruickshank breached s 180(1) by causing or permitting Antares to breach s 674(2). Cruickshank was ordered to pay a pecuniary penalty of $40,000 and was disqualified from managing corporations for four years.

[19.500] More recently, in *Australian Securities and Investments Commission v Blumenthal*, a director was found to have breached s 180(1) in several respects.

Australian Securities and Investments Commission v Blumenthal

[19.510] *Australian Securities and Investments Commission v Blumenthal* [2024] FCA 384. Blumenthal was a director of EverBlu Capital Pty Ltd and a non-executive director, chairman and substantial shareholder of Creso Pharma Ltd. He was also the sole director and sole shareholder of Anglo Menda Pty Ltd. EverBlu provided corporate advisory and stockbroking services. Creso was a customer of EverBlu.

Restrictions were placed on Blumenthal's capacity to act, through EverBlu, on Creso matters. A range of policies were disregarded and Blumenthal, through EverBlu, worked on several Creso transactions. One customer, Scholz, purchased Creso shares funded by a loan issued by Anglo Menda. Scholz and Sacco were also (individually) engaged by Creso, through Blumenthal, to provide that company with promotional and marketing services. The total value of those services was over $3 million, and it was not disputed that services were provided. However, Blumenthal did not carry out due diligence as to Scholz and Sacco's capacity to perform their contracted services, did not document the arrangements in writing, did not require measurable deliverables that could be objectively assessed, did not require detailed invoices, did not keep any record of the services provided and did not assess whether the services provided were value for money for Creso.

Blumenthal admitted breaching s 180(1), regarding his EverBlu directorship, by breaching EverBlu policies and by causing EverBlu to breach the *Corporations Act 2001* (Cth), s 912A, "which jeopardised EverBlu's interests including by creating a real risk of regulatory action". Blumenthal also admitted breaching s 180(1) regarding his Creso directorship "by causing it to engage Mr Scholz and Mr Sacco to provide consultancy, promotional and marketing services to it and, in the absence of sufficient due diligence, documentation and imposition of

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measurable deliverables, authorising and coordinating its payment of invoices totalling more than $3 million".

On the basis of these breaches, and also a contravention of s 181(1)(a) (see [19.590]), Blumenthal was ordered to pay a pecuniary penalty of $850,000, was disqualified from managing corporations for five years, and was ordered to pay ASIC's costs. Via a court enforceable undertaking entered into with ASIC, Blumenthal also agreed not to act as a responsible manager or an officer of a financial services business for five years, and agreed to contribute towards ASIC's investigation costs.

[19.520] As the following case shows, although ASIC's alleged breaches of s 180(1) were not made out on the facts, it is also possible for a director to breach s 180(1) where their conduct exposes a company to regulatory risk, even if it is not actually proven (and even if ASIC does not actually seek to prove) that a breach of the *Corporations Act 2001* (Cth) occurred.

Australian Securities and Investments Commission v Wilson (No 3)

[19.530] *Australian Securities and Investments Commission v Wilson (No 3)* [2023] FCA 1009. Wilson was a director and later the Managing Director of Quintis, which had a series of supply contracts that were important to its business known as the Galderma Agreements. It became evident that Galderma was interested in terminating those agreements. Later it did terminate those agreements, but this was not communicated by Wilson to the Board. ASIC argued that Wilson's failure to disclose to the Board the possibility of termination and then the actual termination of the Galderma Agreements constituted breaches of s 180(1). ASIC argued that Wilson's failure created a risk that: (a) Quintis would be in breach of its continuous disclosure obligations, and (b) that Quintis would have engaged in misleading or deceptive conduct concerning its statements to the market. Note that ASIC did not seek to prove that those breaches actually occurred.

The Court accepted, as a matter of principle, that creating a situation where there is a foreseeable risk of a company breaching the *Corporations Act 2001* (Cth), without it being shown that there actually *is* a breach, can cause a director to breach s 180(1). However, ASIC's alleged breaches of s 180(1) were not made out on the facts of this case. The Court found that Wilson did know that Galderma was considering terminating the Galderma Agreements. However, even though it would have been easy for Wilson to disclose this to the Board, there was no breach of s 180(1) as Wilson's failure to disclose did not cause harm to the company. There was no evidence that the Board could have actually done anything about that situation even if it had known. As to the actual termination, the Court found that Wilson did not know that the termination had occurred. Wilson therefore did not breach s 180(1) for failing to advise the Board of the actual termination of the contract.

The business judgment rule

[19.540] The business judgment rule provides a defence to a breach of both s 180(1) and also equivalent duties at common law and in equity, and it is contained in s 180(2). It recognises the inherent risks that directors and other officers take when making business decisions and acknowledges that poor outcomes do

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not necessarily mean that directors have breached their duty under s 180(1). In effect, the rule provides a "safe harbour" for directors when they make informed and honest decisions but when those decisions are ultimately proved (in hindsight) to be poor ones. According to s 180(2):

> A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
>
> (a) make the judgment in good faith for a proper purpose; and
>
> (b) do not have a material personal interest in the subject matter of the judgment; and
>
> (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
>
> (d) rationally believe that the judgment is in the best interests of the corporation.
>
> The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

As is evident from this provision, the business judgment rule requires there to be a business judgment before the defence can apply. Section 180(3) provides the following:

> In this section: "business judgment" means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

Australian Securities and Investments Commission v Rich

[19.550] *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1. One Tel was a large Australian telecommunications company that collapsed in 2001. ASIC initiated proceedings against two directors (Rich and Silberman) for breaches of their statutory duties of care and diligence. ASIC's case rested on the knowledge that the directors ought to have had about the companies' financial position at the crucial time and their failure to warn the Board. The Court decided that ASIC had failed to prove that the directors had breached their duty of care and diligence. They met the requirements of the business judgment rule because they held a rational belief that their actions were in the best interests of the company. Austin J said that the reasonableness of the belief should be assessed by reference to:

- the importance of the business judgment to be made;
- the time available for obtaining information;
- the costs related to obtaining information;
- the director's or officer's confidence in those exploring the matter;
- the state of the company's business at that time and the nature of competing demands on the board's attention; and
- whether or not material information is reasonably available to the director.

In *Australian Securities and Investments Commission v Mariner Corporation Limited*, three directors successfully raised the business judgment rule as a defence, with the Federal Court offering valuable insights regarding what constitutes "reasonable" risk-taking in the "real" commercial world.

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Australian Securities and Investments Commission v Mariner Corporation Ltd

[19.560] *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502. ASIC sought declarations that three directors of Mariner breached their duty to act with due care and diligence in contravention of s 180(1) by making a decision that Mariner would announce an off-market takeover bid for Austock without having secured funding. In considering whether the directors exercised reasonable care and diligence, the Court confirmed that it is *not* correct to say that if a director causes a company to breach the *Corporations Act 2001* (Cth) then, necessarily, the director has breached s 180(1). Importantly, Beach J said that the reasonableness of a director's belief (for the purposes of the business judgment rule) should be assessed by reference to the range of factors outlined in *Rich* (see [19.550]).

In refusing the application by ASIC, Beach J emphasised that the role of a director is essentially to balance the risk of foreseeable harm to the company against the potential benefits that could reasonably be expected to ensue as a result of their conduct. In this regard, *whether a particular risk is foreseeable in any given case should be judged by what the director knew or ought to have known at the time, and not with reference to hindsight*. His Honour said that even if one or more of the alleged risks of harm were reasonably foreseeable, the danger they posed was minimal, and the potential benefits for Mariner in pursuing the proposed takeover bid were significant and outweighed the risks. Beach J noted that ASIC invariably assesses decisions made by directors in the context of a paper-based analysis and with the benefit of hindsight. These assessments may not take into account the timeframe that directors are required to act within and the speed at which decisions have to be made as well as the various other external pressures that may be at play in the real world.

Duty of good faith: s 181

[19.570] The duty of good faith is set out in s 181(1) and is also reflected in the common law. According to s 181(1):

> A director or other officer of a corporation must exercise their powers and discharge their duties:
>
> (a) in good faith in the best interests of the corporation; and
>
> (b) for a proper purpose.

A director will breach this duty if they fail to give proper consideration to the separate interests of the company ahead of other interests. The best interests of the company are usually aligned with the best interests of the company's shareholders (and not, for example, its creditors or employees). Where they do not align, then the interests of the shareholders (as a group, not individually) take precedence over the interests of the company. Of course, there is often debate about what, in respect of a particular decision or strategy at a particular moment in time, is in the best interests of the company. For instance, a decision for a company to be a "carbon neutral" company may not be in the interests of the shareholders in the short term, but may be in the longer-term best interests of future shareholders.

A "proper purpose" is a purpose that benefits the company. The powers of a director must be used for the purpose for which they were given, not for a collateral purpose. An improper purpose would include where the director uses a power to obtain advantage for themselves or for someone else.

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Australian Securities and Investments Commission v Adler is a famous directors' duties case raising issues in relation to the duties set out under both ss 180, 181.

Australian Securities and Investments Commission v Adler

[19.580] *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253. Adler was a non-executive director of HIH, once Australia's largest insurance company. HIHC (a subsidiary of HIH) authorised a $10 million loan to Pacific Eagle Equity (PEE), which was half-owned by Adler. This money was used by PEE to purchase HIH shares worth nearly $4 million and the balance was used to buy shares in unlisted technology stocks from Adler Corporation and to make loans to entities that were associated with Adler. ASIC brought proceedings against three directors, alleging (amongst other things) that they had contravened ss 180–183.

Santow J concluded that Adler and the other directors had breached their statutory duty of care (s 180) and had contravened their duty to act in good faith (s 181) because of the personal involvement he had in the investment transactions that were entered into for his benefit and the benefit of others and not HIHC, the subsidiary in which he was a director.

Australian Securities and Investments Commission v Blumenthal, addressed above at [19.510] regarding s 180, also involved an admitted breach of s 181.

Australian Securities and Investments Commission v Blumenthal

[19.590] *Australian Securities and Investments Commission v Blumenthal* [2024] FCA 384. The facts are set out above at [19.510]. In addition to Blumenthal's admitted contraventions of s 180, Blumenthal admitted breaching s 181(1)(a). Blumenthal admitted, as a director, failing to exercise his powers and discharge his duties in good faith and in the best interests of the corporation, by failing to avoid a conflict of interest. This conflict of interest arose in relation to Blumenthal's directorship of Creso, and Creso's payments for Scholz's services. Causing Creso to make payments to Scholz enhanced Scholz's ability to repay his loan to Anglo Menda, a company of which Blumenthal was the sole director and sole shareholder.

The duties concerning use of position and use of information: ss 182–183

[19.600] At common law, officers have a duty to avoid conflicts of interest and this duty is reflected in the *Corporations Act 2001* (Cth) in two different statutory duties. Under s 182, there is a duty concerning use of position, and under s 183, there is a duty concerning use of information.

At common law, a conflict of interest occurs when the directors or officers of a company put themselves in a position where there is a conflict between their duties to the company and their personal interests. Under the common law, conflicts normally arise where a director or officer:

- makes an *undisclosed* profit from their position in the company;
- *competes* with the company;

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- takes up an actual or potential *opportunity* that properly belongs or might belong to the company; and
- *misuses* confidential information or company funds for their own benefit.

To ensure that directors are not conflicted in these ways, the basic rule is to regard all corporate property, opportunities and information that come into the possession of a director or officer as belonging solely to the company and thus unavailable for the director's or officer's use or benefit.

With regard to the statutory duties, s 182(1) provides:

> A director, secretary, other officer or employee of a corporation must not improperly use their position to:
>
> (a) gain advantage for themselves or someone else; or
>
> (b) cause detriment to the corporation.

Following on from this use of position duty, the use of information duty set out in s 183(1) states:

> A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:
>
> (a) gain an advantage for themselves or someone else; or
>
> (b) cause detriment to the corporation.

Australian Securities and Investments Commission v Adler, *Cummings v Claremont Petroleum NL* and *Australian Securities and Investments Commission v Vizard* raise issues in relation to ss 182–183.

Australian Securities and Investments Commission v Adler

[19.610] *Australian Securities and Investments Commissioner v Adler* (2002) 168 FLR 253. The facts of this case are set out in [19.580] above. In addition to finding that there had been breaches of ss 180, 181, Santow J concluded that Adler had breached s 182 due to the arrangement of the $10 million loan that was used to purchase HIH shares on the stock market. This transaction was done for the purpose of inflating the price of HIH shares and to allow Adler Corporation to sell the HIH shares it owned to HIH at a higher price.

Cummings v Claremont Petroleum NL

[19.620] *Cummings v Claremont Petroleum NL* (1992) 9 ACSR 583. Cummings and Fuller were directors of Claremont, a publicly listed mining company. They gained control of the board and passed resolutions to provide them (through a consulting firm that they also controlled) with luxury vehicles and very generous severance packages. When they were voted off the board, the new board cancelled the leases on the luxury cars and sought repayment of the severance payments. The company argued that both the former directors were in breach of their duty to act honestly and not to misuse their positions to gain an advantage or cause detriment. The Full Court of the Federal Court affirmed that the two directors had misused their positions and had conflicts of interest.

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Australian Securities and Investments Commission v Vizard

[19.630] *Australian Securities and Investments Commission v Vizard* (2005) 145 FCR 57. Steve Vizard, a qualified lawyer and a high-profile arts and entertainment personality and benefactor, was appointed as a non-executive director of Telstra Corporation Ltd in September 1996.

Telstra's CEO would provide all of the directors of Telstra with highly confidential information to help them make the right investment decisions. After having received such information, Vizard instructed his accountant to proceed with share transactions on behalf of a company that Vizard created for investment purposes. It was proven that each share transaction entered into happened because Vizard had obtained confidential information. ASIC commenced civil proceedings against Vizard for breaching his director's duties under s 183. Vizard admitted the contraventions, and agreed to the imposition of a $390,000 civil penalty and an order disqualifying him from acting as a company director for 10 years.

Criminal offences: s 184

[19.640] Under s 184, the directors' duties that are set out across ss 181–183 as civil penalty provisions are replicated, with additional dishonesty or recklessness requirements, as criminal offences. Thus, directors commit an offence if they are reckless or intentionally dishonest when they engage in conduct that would have breached any of the ss 181–183 duties. There are, therefore, three offences created by s 184. Section 184(1) creates a criminal offence corresponding to the duty of good faith; s 184(2)–(2A) correspond with the duty concerning use of position; and s 184(3) corresponds with the duty concerning use of information. It is important to note that there is *no criminal offence* that corresponds with the broad duty of care and diligence contained in s 180(1).

Since s 184 creates criminal offences rather than civil penalty provisions, breaches of these criminal laws are enforced via prosecution by the Commonwealth Director of Public Prosecutions instead of via ASIC legal action. Nevertheless, ASIC investigations are often the basis for a DPP prosecution. Criminal trials relating to breaches of s 184 are usually heard by lower-level courts in the States and Territories. A number of recent proceedings can be found summarised in ASIC press releases.[5]

On 13 March 2019, in response to the *Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, significant amendments to the *Corporations Act 2001* (Cth) were enacted having a bearing on the s 184 criminal offences. As well as increasing the penalties for certain civil penalty provisions and criminal offences in the *Corporations Act 2001* (Cth), the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2018* (Cth):

- includes a new definition of "dishonest" in s 9, that introduces an *objective test* to determine whether a director's conduct is dishonest or not. "Dishonest" is now specifically defined in s 9 as meaning "dishonest according to the standards of ordinary people"; and
- clarifies that a contravention of s 184 can occur even when the relevant corporation gains an advantage from the contravention.

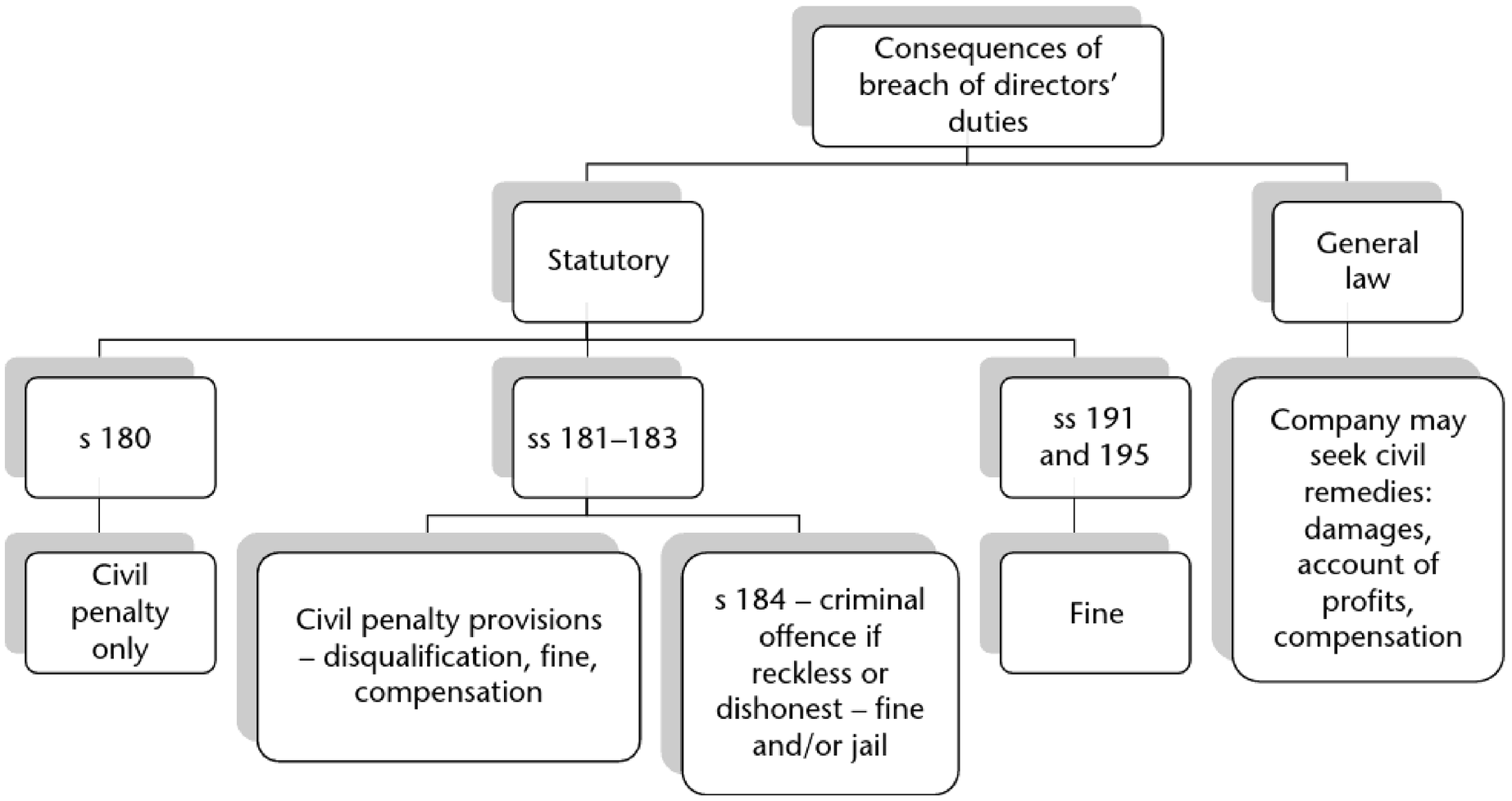
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5 For example, https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-146mr-director-duties-charge-proved-and-dismissed-against-former-victorian-director (where breach of s 184(2) was found proven but dismissed taking into account the defendant's good character, lack of prior offending and extenuating circumstances); https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-132mr-former-continental-coal-director-ashley-paul-d-sylva-sentenced (breach of s 184(1)(a)); https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-318mr-former-ceo-of-van-eyk-research-sentenced-for-breach-of-directors-duties (referencing s 184 generally); https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-119mr-former-queensland-company-director-sentenced-for-breaching-directors-duties (appearing to relate to s 184).

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Remedies and penalties for breach of duty

Figure 19.5 : Consequences of breach of directors' duties



[19.650] The provisions of the *Corporations Act 2001* (Cth) concerning the duties of directors and other officers of a company are "civil penalty provisions", with some of them also having criminal offence equivalents (carrying additional dishonesty or recklessness requirements). The effect is that a person involved in a contravention of the provisions is liable to civil or, except for a breach of s 180(1), possibly also criminal sanctions. On 13 March 2019, in response to the *Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* handing down its Final Report on 1 February 2019, major changes to the *Corporations Act 2001* (Cth) were enacted, including significant increases to the maximum penalties for these civil and criminal offences.

Civil pecuniary penalties

[19.660] A director who breaches any of ss 180–183 may be liable for civil pecuniary penalties. A court may order, for an individual, the payment of a pecuniary penalty up to the greater of 5,000 penalty units or three times the value of the benefit derived or the detriment avoided: s 1317G(3). Where a corporation breaches a civil penalty provision, it is liable to a civil penalty of up to the greater of 50,000 penalty units or three times the value of the benefit derived or the detriment avoided or 10% of corporate turnover (capped at 2.5 million penalty units): s 1317G(4). At the time of writing, under the *Crimes Act 1914* (Cth), s 4AA(1), a penalty unit is $275 (subject to indexation), making 5,000 penalty units equal to $1.375 million, 50,000 penalty units equal to $13.75 million and 2.5 million penalty units equal to $687.5 million.

In addition, a court may order a person to compensate a corporation as a result of contravening a civil penalty provision where damage has been suffered as a result of the contravention (including the contravener making profit): s 1317H.

ASIC may apply for any of these remedies: s 1317J(1). The corporation may apply for a compensation order: s 1317J(2). Proceedings for these remedies must be started no later than six years after the

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contravention: s 1317K. If a person has contravened a civil penalty provision, but it appears to the court that they acted honestly and ought fairly to be excused, the court may relieve them from liability: s 1317S.

Criminal sanctions

[19.670] We have so far been concerned with the remedies available for breach of the statutory duties of directors and other officers of a corporation under ss 180–183, which are civil penalty provisions. By contrast, the dishonesty and recklessness offences in s 184 are criminal offences rendering the offender liable to a term of imprisonment for up to 15 years and/or a substantial fine as calculated by the provisions ss 1311–1311E and Sch 3. In brief, under s 1311B(4), the maximum fine for individuals is the greater of 4,500 penalty units ($1,237,500) and three times the value of the benefit derived and detriment avoided. Under s 1311C(3), the maximum fine for a body corporate is the greater of 45,000 penalty units ($12,375,000), three times the value of the benefit derived and detriment avoided and 10% of annual turnover.

Disclosure of interests by directors

[19.680] In addition to the key duties owed by officers across ss 180–183, and associated criminal offences in s 184, there are further directors' duties owed under the *Corporations Act 2001* (Cth). One of these is the duty of directors to disclose material personal interests under s 191. Subject to certain exceptions set out in s 191(2), a director who has a *material personal interest* in a matter that relates to the affairs of the company must give the other directors notice of that interest: s 191(1). Notice must be given at a directors' meeting as soon as practicable after the director becomes aware of the interest: s 191(3). Contravention of this provision by a director does not affect the validity of any act, transaction, agreement, instrument or resolution: s 191(4). The duty does not apply to a proprietary company that has only one member: s 191(5).

Where the relevant company is a *public* company, in addition, a director who has a material personal interest in a matter that is being considered at a directors' meeting *must not vote* on the matter and must not be present while the matter is being considered by the board: s 195(1). An exception is made where the board has passed a resolution stating that the directors are satisfied that the interested director should not be disqualified: s 195(2). ASIC may also exempt a director from the disqualification in certain circumstances: ss 195(3), 196. Once again, a contravention by a director does not affect the validity of a resolution: s 195(5). By way of contrast, the director of a *proprietary* company (assuming that they have declared their interest or that they are not required to declare their interest) may participate in discussions, vote on a matter and keep any benefits that arise: s 194.

Unlike the duties set out across ss 180–183, which apply to officers, these provisions apply to directors only.

In some circumstances, disclosure of a conflict and abstaining from voting in accordance with these provisions will be insufficient to also satisfy the separate directors' duties arising under ss 180–183. In this case, the director may be under a positive duty to take steps to safeguard the company's interests. The action required will depend upon matters such as the extent of the conflict, the extent to which the director has been involved in the transaction, and the gravity of possible outcomes for the company. In some extreme cases, the only option available for a director will be for the director to resign.

Director's duty to prevent insolvent trading

[19.690] Also applicable to directors only are the provisions establishing a duty to prevent insolvent trading. All directors – including formally appointed directors, alternate directors, de facto directors, shadow directors and non-executive directors – are under a duty to prevent their company from trading whilst it

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is insolvent. The theory underpinning this duty is that when a company is insolvent (or when there are reasonable grounds to suspect this to be the case) directors must, unusually and importantly, exercise their duties by considering the best interests of *creditors as a whole, as opposed to shareholders*. Directors are, therefore, under a duty to prevent insolvent trading from occurring. This is a crucial obligation for directors because a breach of this duty has the potential to expose directors to *personal liability* for the company's debts: a type of liability usually precluded by the separate legal identity of companies recognised in s 124(1) and in *Salomon's Case* (see [19.60]). The duty can also lead to both civil and criminal liability for directors.

The starting points for assessing breach of this duty are the definitions of solvent and insolvent in s 95A. According to that provision, a company is solvent if (and only if) it is able to pay all of its debts as and when they fall due (s 95A(1)). In turn, a company that is not solvent according to this definition is treated as being insolvent (s 95A(2)). In practice, the key question is whether the company's "cash in the bank" and the value of any of the assets (including sales, loans and injections of shareholder capital) available to the company are sufficient to meet the debts of the company as and when they become due and payable. But it can be difficult to determine when a company is insolvent or likely to become insolvent, particularly with respect to debts falling due in the future. To assist directors, the courts have provided a number of key indicators that may create a "suspicion" of insolvency in the mind of a reasonable director. Those key "signs of insolvency" include the following:

- current liabilities significantly exceeding current assets;
- serious cash flow deficiencies;
- continuing losses;
- overdue tax liabilities;
- an inability to borrow or refinance existing loans;
- an inability to raise further shareholder capital;
- suppliers placing the company on "COD" terms (cash on delivery) or similar arrangement;
- special arrangements with selected creditors; and
- an inability to produce timely and accurate financial information.

Section 95A in itself is only a definitions provision, and for present purposes, it works in conjunction with the insolvent trading duty set out in s 588G. That section relevantly provides:

> (1) This section applies if: (a) a person is a director of a company at the time when a company incurs a debt; and (b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and (c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would become so insolvent, as the case may be; and (d) that time is at or after the commencement of this Act …
>
> (2) By failing to prevent the company from incurring the debt, the person contravenes this section if: (a) the person is aware at that time that there are such grounds for so suspecting; or (b) a reasonable person in a like position in a company in the company's circumstances would be so aware.
>
> (3) A person commits an offence if: (a) a company incurs a debt at a particular time; and (aa) at that time, a person is a director of the company; and (b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and (c) the person suspected at the time when the company incurred the debt that the company was insolvent or would become insolvent as a result of incurring that debt or other debts (as in paragraph (1)(b)); and (d) the person's failure to prevent the company incurring the debt was dishonest …

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Thus, in summary, the civil duty to prevent insolvent trading is breached where a person is a director when a company incurs a debt, that debt is incurred when the company is insolvent or causes the company to become insolvent, there are reasonable grounds to suspect the company was insolvent or would become insolvent, and the director is aware of those grounds or a reasonable person would have been aware. The criminal offence is committed where there is, in addition, dishonesty in failing to prevent the company incurring the debt.

Insolvent trading defences

[19.700] There are several defences available to a director in proceedings for contravention of the civil duty to prevent insolvent trading under s 588G(2). These are that, at the time the debt was incurred, the director:

1. had reasonable grounds to expect, and did expect, that the company was solvent and would remain solvent even if it incurred the debt: s 588H(2);
2. believed on reasonable grounds that a competent and reliable person was responsible for providing adequate information to the director about whether the company was solvent, and on the basis of that information the director expected that the company was solvent and would remain solvent even if it incurred the debt: s 588H(3);
3. did not take part in the management of the company because of illness or some other good reason: s 588H(4); or
4. took all reasonable steps to prevent the company from incurring the debt: s 588H(5). In this context, regard may be had to any action which the director took with a view to appointing an administrator of the company, when that action was taken, and the results of that action: s 588H(6).

In relation to non-executive directors, as *Australian Securities and Investments Commission v Plymin, Elliott and Harrison* and *Australian Securities and Investments Commission v Young* demonstrate, in order to defend an insolvent trading claim, directors must ensure that they are fully informed of the company's financial position. If it appears – or should appear – that the company is, or might become, insolvent, they must take swift action to appoint an administrator. If the non-executive director is unable to persuade the Board that the company should cease trading, the director should then resign. Obviously, the same applies but with even more force (in relation to penalties) to directors who are executive directors.

Australian Securities and Investments Commission v Plymin, Elliott and Harrison

[19.710] *Australian Securities and Investments Commission v Plymin, Elliott and Harrison* (2003) 175 FLR 124. The Victorian Supreme Court found that John Elliott, as a *non-executive* director of a company, had failed to prevent the company from incurring debts while it was insolvent. The Court was satisfied that the Water Wheel companies were insolvent at the time that relevant debts were incurred, and that the directors were, or should have been, aware that there were reasonable grounds for suspecting that the companies were, or would become, insolvent.

In relation to non-executive directors, the Court said:

> A non-executive director is expected to take steps to put [themselves] in a position to monitor the company and to exercise and form an independent judgment and to take "a diligent and intelligent interest in the information either available to [them] or

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> which [they] might with fairness demand from the executives or other employees and agents of the company" …
>
> The Court said that Elliott was aware of facts and matters that gave rise to reasonable grounds for suspecting insolvency. The Court said that it would not find a director guilty where they have acted honestly and ought fairly to be excused for the contravention. In this instance, Elliott had not acted dishonestly and in assessing whether he ought fairly to be excused, the Court considered all the circumstances including any action he took to appoint an administrator, the way in which the breach or breaches occurred, and Elliott's individual circumstances as the person seeking to be excused.
>
> In relation to the penalty to be imposed, the Court disqualified Elliott from managing a corporation for four years, ordered him to pay compensation of approximately $1.4 million, and imposed a pecuniary penalty of $15,000.
>
> On appeal, in *Elliott v Australian Securities and Investments Commission* (2004) 10 VR 369, the Victorian Court of Appeal said:
>
> > We agree with the judge's conclusions that Elliott's contraventions over a period of five months were serious and inexcusable and showed continuing disregard for the position of creditors. In his role as a member of the board of Water Wheel, albeit as a non-executive director, Elliott had stubbornly and tenaciously allowed Water Wheel to trade after 14 September 1999 and did nothing to protect the creditors from the inevitable insolvency of the company.

[19.720] In February 2020, Andrew Young (a shadow director of the Kleenmaid group of companies) became the first person to be sentenced to imprisonment for insolvent trading as a shadow director. In an interesting insight into the ways that the wheels of justice turn, the insolvent trading occurred in 2009, but it was not until 18 March 2022 that the matter was finally resolved when Young pleaded guilty to aggravated fraud and insolvent trading charges in connection with the collapse of the group.

Australian Securities and Investments Commission v Young

[19.730] *Australian Securities and Investments Commission v Young* (ASIC file no: 22-055MR). The Kleenmaid Group was an importer and retailer of whitegoods, operating through a chain of company-owned stores and franchises across Australia. Young was the founder of the business and was a former director of the Group. The Group encountered cashflow issues in 2007, and was placed into voluntary administration in April 2009, with debts of around $96 million which included $26 million owed to customers who had paid deposits for whitegoods that had not yet been delivered. ASIC investigated the Group's affairs and the conduct of Young, along with two other directors involved in the management of the Group.[6] ASIC, after concluding that the Group became insolvent in March 2008 but had continued to trade, referred the matter to the Commonwealth Department of Public Prosecutions. The Commonwealth DPP indicted

6 Similar prosecutions against two other Kleenmaid directors (including Young's brother) resulted in sentences of five and a half years' and nine years' imprisonment.

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> Young, in his capacity as a shadow director, on 17 counts of criminal insolvent trading in breach of s 588G(3) and two counts of fraud. A jury convicted him on all counts. Young was sentenced to three years imprisonment for insolvent trading and nine years imprisonment on the fraud charges.

Young appealed his conviction and sentence and, whilst awaiting the decision of the Court of Appeal of the Supreme Court of Queensland, he was imprisoned for 11 months. Although the Court of Appeal found that Mr Young's convictions were neither unreasonable nor unsupported by the evidence, it held that the trial judge had erred by not referring the question of whether Mr Young was fit to be tried to the jury to decide. A new trial was ordered on all counts.

On 18 March 2022, Young pleaded guilty to one count of aggravated fraud by dishonestly causing $330,000 to be withdrawn from a Kleenmaid company bank account two days prior to administrators being appointed. Young had transferred the funds to a bank account held by a company in which he held an interest and from which he and his wife would benefit. Young was sentenced to three years jail for fraud, to be suspended after 336 days which had already been served, and six months jail for insolvent trading with immediate release. Perhaps he was fortunate to be immediately released: on sentencing, Byrne J remarked that the timing of Mr Young's plea and his lack of prior offer to do so indicated his lack of remorse and that, despite character references, in the hour of need Mr Young had showed himself to be a man of greed.

The safe harbour defence

[19.740] In addition, there is a further defence available – the "safe harbour defence" – which provides (as its name suggests) a "safe harbour" from liability under s 588G for breach of the duty to prevent insolvent trading. It is provided for in s 588GA(1) in the following terms:

> Subsection 588G(2) does not apply in relation to a person and a debt … if:
>
> (a) at a particular time after the person starts to suspect the company may become or be insolvent, the person starts developing one or more courses of action that are reasonably likely to lead to a better outcome for the company; and
>
> (b) the debt is incurred … directly or indirectly in connection with any such course of action during the period starting at that time, and ending at the earliest of any of the following times:
>
> (i) if the person fails to take any such course of action within a reasonable period after that time – the end of that reasonable period;
>
> (ii) when the person ceases to take any such course of action;
>
> (iii) when any such course of action ceases to be reasonably likely to lead to a better outcome for the company;
>
> (iv) the appointment of an administrator, or liquidator, of the company.

Key to the safe harbour defence's application is the pursuit of a course of action that is reasonably likely to lead to a better outcome for the company. For this purpose, better outcome is defined as "an outcome that is better for the company than the immediate appointment of an administrator, or liquidator, of the company": s 588GA(7). In addition, according to s 588GA(2):

> For the purposes of (but without limiting) subsection (1), in working out whether a course of action is reasonably likely to lead to a better outcome for the company, regard may be had to whether the person:

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(a) is properly informing himself or herself of the company's financial position; or

(b) is taking appropriate steps to prevent any misconduct by officers or employees of the company that could adversely affect the company's ability to pay all its debts; or

(c) is taking appropriate steps to ensure that the company is keeping appropriate financial records consistent with the size and nature of the company; or

(d) is obtaining advice from an appropriately qualified entity who was given sufficient information to give appropriate advice; or

(e) is developing or implementing a plan for restructuring the company to improve its financial position.

It is furthermore the case that safe harbour defence is not available where, at the time that the debt is incurred, employee entitlements are not being paid or obligations under tax laws are not being complied with: s 588GA(4).

This safe harbour encourages directors to take reasonable steps to restructure their companies or trade their way out of difficulty, rather than immediately ceasing to trade. Where its requirements are satisfied, this defence means that the duty to prevent insolvent trading is not breached with respect to a particular (qualifying) debt, and it also means that a director will not incur personal liability for that debt. Significantly, the plan developed and implemented by the director does not need to succeed in order for safe harbour protection to apply, and it is even possible that the defence can succeed when the plan actually results in a worse outcome for the company than if an administrator or liquidator were appointed when insolvency was suspected. However, although the "safe harbour" defence offers some hope to a company in financial distress, it is not an open invitation to continue incurring debts amidst an insolvency situation. Where the defence's limited operation does not apply, directors may (subject to the regular statutory defences) still be personally liable for debts incurred by a company while insolvent (and may be prosecuted for the associated criminal offence where there is dishonesty).

[19.750] The following recent decision of the Victorian Supreme Court demonstrates that the legislation's safe harbour is not the easiest one to enter, especially for small to medium businesses that may not have the resources to seek the necessary professional advice and/or engage in a plan that is likely to produce a "better outcome".

Re Balmz Pty Ltd (in liq)

[19.760] *Re Balmz Pty Ltd (in liq)* [2020] VSC 652. This was an application to the Court by the liquidator of a company against the directors for failing to prevent the company from trading while insolvent. Prior to liquidation, the company owned two cafes, with debts in excess of $100,000. The company had been insolvent for several years, and seriously struggled when a software issue affected its accounting and bookkeeping processes. As a result, the directors sold personal assets and withdrew from their superannuation to pay suppliers and keep the business afloat. The directors argued that they were entitled to the safe harbour defence because the company engaged a business advisory firm and the directors had made personal contributions to the business. However, the Court rejected that argument because the company had outstanding tax lodgements, had not paid employee entitlements, and the directors had also failed to point out what action they had taken that was reasonably likely to lead to a "better outcome" for the company. The directors were thus ordered to pay compensation to the company for their failure to prevent it from trading whilst insolvent.

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Consequences for directors

[19.770] Directors can be held personally liable for the unpaid debts incurred by a company while it was insolvent. Compensation proceedings for amounts lost by creditors can be initiated by ASIC, a liquidator or a creditor against a director personally. Compensation may be ordered in the following circumstances:

- in civil pecuniary penalty proceedings, where a creditor has suffered loss or damage in relation to the debt because of the company's insolvency, the court may order the director personally to pay to the company compensation equal to the amount of that loss or damage: s 588J(1).
- in criminal proceedings, where a creditor has similarly suffered loss or damage, the court may order the director personally to pay to the company compensation equal to the amount of that loss or damage: s 588K(1).
- where the company is being wound up, the company's liquidator may bring proceedings to recover from the director personally such loss or damage as a debt due to the company: s 588M.

In addition, directors are liable to pay civil pecuniary penalties or, if they acted dishonestly, substantial criminal fines and/or periods of imprisonment of up to five years may be imposed on a criminal conviction. ASIC can also seek orders banning persons from being directors of companies for up to five years.

Prohibition of insider trading

[19.810] The *Corporations Act 2001* (Cth) contains another duty having particular relevance to directors: the duty to avoid trading with informational advantage or, as it is more commonly known, the duty to prevent "insider trading". This duty is not restricted to directors, and prohibits anyone in the possession of non-public, price-sensitive information from dealing in, or engaging others to deal in, the shares of a relevant company. It has particular relevance to directors, however, because directors may find themselves in possession of this kind of information. "Inside information" is defined as information that "is not generally available" and that if it were generally available, "a reasonable person would expect it to have a material effect on the price or value of … financial products": s 1042A. "Information" is defined as including "matters of supposition and other matters that are insufficiently definite to warrant being made known to the public" and "matters relating to the intentions, or likely intentions, of a person": s 1042A. In turn, s 1043A(1) creates a civil penalty provision and an offence for engaging in insider trading, and s 1043A(2) creates a civil penalty provision and an offence for communicating the inside information for others to then engage in insider trading.

Sections 1042A–1042H collectively give the prohibition in s 1043A an expansive meaning, but ss 1043B–1043K provide specific exceptions for vendors and purchasers, their agents, underwriters and companies or partnerships where adequate barriers separate the person with the information from the person engaging in the transaction.

Severe penalties, both civil and criminal, may be imposed for contraventions of these insider trading provisions. In addition, the "insider" is liable to compensate the other party to a dealing and to account for any profit to the company whose shares are traded: ss 1317HA, 1043L. However, in addition to the statutory defences (s 1043M) to a criminal prosecution, courts also have the power to relieve a party to a civil proceeding from liability where satisfied that the information was used innocently.

For many years, this prohibition seemed to be a "paper tiger", that is, a prohibition on paper but one without much practical force. Since the successful prosecution in *R v Hannes* in 2002, however, the

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provisions have been used more frequently. At least three successful insider trading prosecutions have been noted by ASIC in its press releases between just 2022 and mid-2024.[7]

R v Hannes

[19.820] *R v Hannes* (2002) 173 FLR 1. Hannes was an executive director of Macquarie Corporate Finance, an adviser to TNT Ltd. He bought TNT options in the name of "M Booth", making use of information held by Macquarie Corporate Finance. The purchase of the options realised a profit of $2 million when a takeover of TNT was announced during their currency. Hannes did not collect the moneys, was sentenced to imprisonment for two years and two months, and was fined $100,000.

Commonwealth Director of Public Prosecutions v Hill and Kamay

[19.830] *Commonwealth Director of Public Prosecutions v Hill and Kamay* [2015] VSC 86. The defendants, Hill and Kamay, met whilst studying economics and commerce at Monash University. On graduation, Hill became a Commonwealth public servant in the Australian Bureau of Statistics (ABS), and a major bank employed Kamay on its wholesale foreign exchange desk. Between August 2013 and May 2014, Hill provided Kamay with ABS's sensitive economic indicators information, which was used by Kamay to conduct trades of margin contracts on the foreign exchange derivatives market. Both defendants pleaded guilty, amongst other things, to insider trading under s 1043A. Hill was sentenced to imprisonment for three years and three months, and Kamay was sentenced to imprisonment for seven years and three months.

Removal of directors

[19.840] Directors may be removed from office by an ordinary resolution (50% approval) of members. This is a replaceable rule for proprietary companies (s 203C) but is not a replaceable rule (and therefore always applies) for public companies (s 203D).

Payments for retirement from office

[19.850] Payments to directors as compensation for their retirement from office, or in connection with the transfer of the whole or any part of the undertaking or property of a company, are prohibited unless particulars have been disclosed to the members of the company and the proposal has been approved by the company in a general meeting: ss 200A–200J.

7 See https://asic.gov.au/about-asic/news-centre/find-a-media-release/2024-releases/24-059mr-cameron-waugh-sentenced-to-two-years-imprisonment-for-insider-trading; https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-071mr-former-tesla-motors-australia-director-sentenced-for-insider-trading; https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-149mr-caloundra-man-sentenced-for-insider-trading.

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Certain persons not to manage corporations

[19.860] As we have seen in relation to our studies of directors' duties, a person can be disqualified from managing corporations in directors' duties proceedings. This is a result of s 206C: courts may disqualify persons from being directors where there is a breach of a civil penalty provision. Exceptions may be made to these orders. For example, in *Australian Securities and Investments Commission v Blumenthal* (see [19.510]), an exception was made allowing Blumenthal to continue acting as a director of two family companies.

[19.870] In addition, a person is disqualified from managing corporations if:

1. they are convicted of an indictable offence that concerns the making of decisions that affect the business of the corporation, or that concerns an act with the capacity to significantly affect the corporation's financial standing: s 206B(1)(a);
2. they are convicted under the *Corporations Act 2001* of an offence punishable by imprisonment for more than 12 months: s 206B(1)(b)(i);
3. they are convicted of an offence involving dishonesty which is punishable by imprisonment for at least three months: s 206B(1)(b)(ii);
4. they are convicted of an offence against the law of a foreign country that is punishable by imprisonment for more than 12 months: s 206B(1)(c);
5. they are an undischarged bankrupt: s 206B(3); or
6. they have executed a personal insolvency agreement under Pt X of the *Bankruptcy Act 1966* (Cth) or a similar law of an external territory or a foreign country that has not been fully complied with: s 206B(4).

A disqualified person may apply to the court for leave to manage corporations, a particular class of corporation, or a particular corporation. When granting leave, the court may impose such conditions or limitations as it thinks fit. A person intending to apply for leave of the court must give ASIC not less than 21 days' notice of their intention to apply. On an application by ASIC, the court may at any time revoke the leave which it had previously granted. These matters are provided for under s 206G.

In recent years, the court has been given wider powers to prohibit a person from taking part in the management of a company. Thus, a person may be prohibited from managing a corporation where: (a) they have at least twice been an officer of a corporation that has contravened the *Corporations Act 2001* (Cth) while they were an officer; and (b) on each occasion they failed to take reasonable steps to prevent the contravention.

A person may also be disqualified where they have at least twice contravened the *Corporations Act 2001* (Cth) while an officer (s 206E), or where they have been disqualified under the law of a foreign jurisdiction (s 206EAA), or where they have been banned from managing companies under the *Competition and Consumer Act 2010* (Cth) (s 206EA).

On an application by ASIC, the court may disqualify a person from managing corporations for up to 20 years if within the last seven years that person has been an officer of two or more corporations when they have failed, and the management of the corporations was wholly or partly responsible for their failure: s 206D.

ASIC may furthermore disqualify a person from managing corporations for up to five years if within the last seven years they have been an officer of two or more corporations, which were wound up while they were an officer, or within 12 months after they ceased to be an officer. ASIC must give the person a notice requiring them to demonstrate why they should not be disqualified and must give them an opportunity to be heard. These matters are provided for in s 206F.

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Companies in financial trouble

[19.880] As we know from our study of the duty of directors to prevent insolvent trading, a company is considered insolvent if it is unable to pay its debts as and when they fall due: s 95A. At that point, a number of options are available, depending upon a company's assets, its creditors' wishes and the possibilities of it trading out of its difficulties. A winding-up of the company involves selling the assets of the company, paying its debts, and then deregistration: it is effectively the death of the company as a legal person. However, depending upon the circumstances, it may be in the interests of the creditors to keep the company going, particularly if goodwill is the main asset. Directors might seek to take advantage of the "safe harbour defence" if the company is insolvent. Otherwise, in such a case, the company may also go into the hands of receivers or a voluntary administrator.

Company receivers

[19.890] When a company defaults on a debt or other financial obligation, an appointment of a receiver is usually made on the application of mortgagees or the holders of other security interests. When the mortgagees or other secured parties wish and are in a position (usually because of interest in arrears, principal payments being overdue, or their security being in danger) to enforce their security, they appoint a receiver whose duty it is to take possession of the property secured, to collect income from such property or sell it and to apply the money in accordance with the provisions of the instrument conferring the power to make the appointment or of the order of the court effecting the appointment.

In the case of companies, a receiver and manager is often appointed because the assets of the company generally retain their value better when the company remains a going concern (ie while it continues trading). However, a receiver and manager is not bound to continue the business of the company. In fact, the receiver and manager often finds that the finances of the company have degenerated to such a parlous state that there is no alternative but to realise the assets of the company by sale, and salvage as much revenue as possible from this phasing-out operation. The duty of a receiver of a company is to obtain control of the company's assets and to convert them into cash in order to pay the secured party or parties. These funds may be raised in the normal course of trade, but in practical terms will often come from the sale of particular assets or even the whole undertaking of the company.

Voluntary administration

[19.900] Where a company is unable to pay its debts as and when they become due, then, as an alternative to proceedings for winding up, the company may be placed under voluntary administration. The object of voluntary administration is to administer the business, property and affairs of the company in a way that maximises the chances of the company continuing in existence or, if this is not possible, to ensure a better return for the company's creditors and members than would result from an immediate winding-up of the company: s 435A. While a company is under voluntary administration, the administrator, who acts as the company's agent, has very extensive powers and almost total control of the management of the company. The officers of the company retain their office (unless removed by the administrator). While a company is in administration, directors and other officers of the company are prohibited from exercising the powers of their office except with the administrator's written approval: s 198G. Booktopia, an Australian online book retailer, is an example of a company that recently went through the process of voluntary administration: its business was sold and it has continued trading.

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Insolvency and deregistration – the end of the road

[19.910] The winding-up of a company (otherwise known as its "liquidation") is the process that brings the company to the end of its existence. The *Corporations Act 2001* sets out the steps that must be followed for winding-up to occur. There are two types of winding-up: (a) a compulsory winding-up (ordered by the court); and (b) a voluntary winding-up (initiated by the company's members or creditors). The methods by which winding-up may be effected differ depending on the type of winding-up but the object and purpose of winding-up is the same in each case, and a large number of the provisions of the *Corporations Act 2001* (Cth) apply to both methods of liquidation: ss 513–570.

The general object of and procedure in winding-up

[19.920] While voluntary winding-up is carried out with much less formal control by the court and much more autonomy of the liquidator than is the case where there is a winding-up by order of the court, the general basis is the same. As in the case of bankruptcy (a term that is not relevant to corporations, because it is used only for individuals), the aim is to realise (collect and sell) the assets of the company and distribute the proceeds to the creditors of the company in a certain order or priority.

The winding-up function is performed by a *liquidator* who is appointed by the court in a compulsory winding-up and by the members or creditors of the company in a voluntary winding-up. The authority of the directors is terminated and the business, if continued, is carried on only with a view to its efficient winding-up. The liquidator or the court, depending on the type of winding-up, may make calls on *contributories* (ie members or past members of the company are liable to contribute to the extent of the amount uncalled on their shares, keeping in mind that this is the extent of members' liability in limited liability companies). The liquidator then applies the assets of the company towards satisfaction of the claims of creditors and, if the assets so extend, towards satisfaction of the rights of members.

Winding-up by the court

[19.930] The court may order that an insolvent company be wound up in insolvency (usually) upon the application of an unsecured creditor, but also upon the application of the company, secured creditors, a contributory, a director, a liquidator or ASIC: ss 459A, 459P. The crucial requirement for an application for winding up in insolvency to be successful is that the company actually be insolvent. Again, a company is defined as being insolvent if it is unable to pay all its debts as and when they become due and payable: s 95A.

A common ground for application is that the company has failed to comply with a statutory demand. A statutory demand may be served on the company by a creditor of the company who is owed one or more debts that are due and payable and whose amounts total at least $2,000.

[19.940] On an order being made for the winding-up of a company, the court may appoint a registered liquidator to be the liquidator of the company. As soon as practicable after a winding-up order, the liquidator is to settle a list of contributories, rectify where necessary the register of members, and cause the property of the company to be collected and applied in discharge of its liabilities. A statement of the affairs of the company as at the date of the winding-up order must be submitted to the liquidator by the persons who were the directors and secretary or secretaries at the relevant time. Within two months after receiving a statement of the company's affairs, a liquidator of a company being wound up by the court must lodge a preliminary report with ASIC as to:

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1. the amount of capital issued, subscribed and paid up;
2. the estimated amount of assets and liabilities of the company;
3. if the company has failed, the causes of the failure; and
4. whether further inquiry into the promotion, formation or insolvency of the company, or the conduct of the business of the company, is desirable.

The liquidator, subject to the general control of the court, may exercise certain powers such as carrying on the business of the company so far as is necessary for its beneficial winding-up, making compromises or arrangements with creditors and compromising any calls and liabilities to calls, or any debts and liabilities as between contributories and the company.

The corporate existence of the company continues, notwithstanding a winding-up order being made, until an order is made by the court that it be deregistered. This order can be made when the liquidator has realised all of the property of the company, has distributed a final dividend (if any) to the creditors and has adjusted the rights of the contributories. When this stage is reached, the liquidator can apply for an order that they be released and that the company then be deregistered.

Voluntary winding-up

[19.950] A voluntary liquidation is initiated by a special resolution of the company that it be wound up voluntarily: s 491(1). A voluntary winding-up commences at the time of the passing of the resolution for voluntary winding-up.

Effect of voluntary winding-up

[19.960] From the passing of the resolution, the company must cease to carry on its business except so far as, in the opinion of the liquidator, carrying on the business is required for the winding-up of that business. However, the corporate state and the powers of the company continue until it is deregistered.

Summary

[19.970] Corporations are a common and attractive business structure under Australian law. As with partnerships, the law of agency remains relevant in the company law context. Unlike the case with partnerships, however, a single Commonwealth piece of legislation – the *Corporations Act 2001* (Cth) – governs company law.

That Act identifies how companies are to be created, how they are to be managed and how the existence of a company can be brought to an end. Some of the most important matters arising under the Act that we have addressed in this chapter include, amongst other things, the company's separate legal identity (vis-à-vis its management and its owners) and the duties owed to companies by directors, officers and others.

Further reading

A Herzberg et al, *Understanding Company Law* (22nd ed, Thomson Reuters, 2023).

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Tutorial activities

1. The *Corporations Act 2001* (Cth) is the key piece of legislation that regulates corporations in Australia. What body administers and enforces that Act?
2. A company is an artificial legal entity. What does that mean? How does an artificial legal entity compare to a natural person? How does a company come into existence?
3. Explain the legal consequences of a company, once registered, being a "separate and distinct legal person". What can companies, as separate legal entities, actually do? Refer to *Salomon* (see [19.60]) and s 124(1).
4. There are two main types of companies that can be registered in Australia – public companies and proprietary companies. What is the difference?
5. The concept of limited liability is important to both proprietary and public companies. Where companies are limited liability companies, whose liability is limited? What is the extent of that liability? To whom is the limited liability owed?
6. How are companies internally governed? In other words, what are the rules and procedures that guide the way that a company operates? Where do those rules come from? In your answer, discuss the relevance of replaceable rules and company constitutions.
7. What is the effect of s 125(1) on the acts of a company that are not in compliance with these rules?
8. As a company is only a legal person, it obviously must act through others, such as its directors, other officers and employees. What are the limitations of applying ordinary common law agency rules to this problem? What assumptions, under statute, are people who deal with the company entitled to now make as to the powers of the company and the authority of the officers, etc. with whom they are dealing? In your answer, refer to ss 128–129.
9. Of the assumptions referred to in the previous question, it is s 129(3) that is most contentious. Explain s 129(3), referring to *Brick & Pipe* (see [19.280]).
10. Who are the owners of a company? What rights and remedies do they have?
11. What is the role of the directors of a company? Refer to s 198A. What is the minimum number of directors, and how are directors (and the CEO) appointed? What is the difference between an executive and a non-executive director? What is the role of a company secretary? Refer to relevant definitions in s 9 and associated provisions.
12. What are de facto directors and shadow directors? How can these legal concepts be used to treat someone as a director when they are not formally appointed as a director? If someone is a de facto director or a shadow director, are they bound by the *Corporations Act 2001* (Cth)'s directors' duties?
13. What are the statutory duties of directors and other officers under ss 180–183?
14. What standard of "care and diligence" is required to satisfy the obligations placed upon directors and other officers under s 180(1)? Please refer to *Daniels* (see [19.450]), *Healey* (see [19.470]), *Cassimatis* (see [19.480]), *Cruickshank* (see [19.490]) and *Blumenthal* (see [19.510]).

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15. What is the "business judgment rule"? In what circumstances does the rule operate to protect a director who might otherwise be in breach of s 180(1)? Is it necessary to seek the business judgment rule's protection in every case where a bad business decision is made? Please refer to *Rich* [19.550] and *Mariner* [19.560] and explain why, in both cases, the defendant directors successfully argued that the business judgment rule operated.

16. Explain the concept of a fiduciary duty and outline the fiduciary obligations of directors and officers under ss 181-183. To whom are these duties owed and in what circumstances are they breached? Refer to *Adler* (see [19.580]) and (see [19.610]), *Blumenthal* (see [19.590]), *Cummings* (see [19.620]) and *Vizard* (see [19.630]).

17. What is the effect of s 184? How do the s 184 duties differ to those set out across ss 181-183?

18. What are the penalties for breaches of ss 180-183, 184?

19. What disclosure obligations do directors have under s 191?

20. What is the legal definition of insolvency? Refer to s 95A.

21. In what circumstances does a director engage in insolvent trading, and what are the penalties and sanctions for doing so?

22. What is the safe harbour defence? What is the rationale for providing this sanctuary from insolvent trading liability? What are the requirements that determine when this defence applies?

23. What are the four other defences that may protect a director against allegations of insolvent trading? Refer to *Plymin* (see [19.710]) and *Young* (see [19.730]) and explain why the directors in each case had engaged in insolvent trading.

24. What is the general object of winding-up? Distinguish voluntary winding-up from court ordered winding-up.

25. What is deregistration and what is its effect on a company? Answer with reference to the concept of a company's existence as a separate legal entity.

26. Tim and Neil Finn are partners in the firm "Finn Homes". They decide to incorporate the business. On incorporation, Tim and Neil become the directors and equal shareholders of Finn Homes Pty Ltd. At the time of the company's incorporation, each director had paid the company $50,000 to form its capital, and each director had been issued with 25,000 $2 fully paid ordinary shares.

    Finn Homes Pty Ltd purchases a large volume of timber on 90-day credit terms (ie, payment is due 90 days after the delivery of the timber). If Finn Homes Pty Ltd fails whilst this amount is outstanding, who is liable for the debt: Finn Homes Pty Ltd, Tim Finn, or Neil Finn?

27. Assume, in relation to the previous question, that Finn Homes Pty Ltd is incorporated but that Neil Finn is the company's sole shareholder and is appointed as its sole director. Nevertheless, Neil Finn continues to collaborate with Tim Finn in the conduct of the business, and in practice they both contribute equally to the management of the business. Will Tim Finn be treated as a director under the *Corporations Act 2001* (Cth), even though he has not been formally appointed as a director?

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28. Assume, once again in relation to the circumstances previously set out in Question 26, that Finn Homes Pty Ltd is incorporated and that Neil Finn is the company's sole shareholder and is appointed as its sole director. This time, assume that Neil Finn follows Tim Finn's instructions in relation to the management of the business. Will Tim Finn be treated as a director under the *Corporations Act 2001* (Cth) here, even though he has again not been formally appointed as a director?

29. Sian and Pimmy are the directors of Kids Club Pty Ltd, a company which runs school holiday programs for primary school students. Both have authority to enter into contracts worth up to $1,000 without consultation with the other. Whilst Pimmy is on holidays, Sian receives an opportunity to partner with the local museum, whereby for a $2,500 payment, primary school students taking part in Kids Club programs can visit the museum an unlimited number of times. Being unable to contact Pimmy, Sian enters into the contract despite its value exceeding her authority. Can the museum, in light of Sian's lack of common law authority, rely on any of the statutory assumptions in relation to this transaction?

30. H Pty Ltd is a property development company. It has three directors: Abe (the Chief Executive Officer), Bob (the Chief Financial Officer) and Connie (a non-executive director). Several months ago, there was an opportunity to acquire a vacant site in the Perth central business district from Lew Pty Ltd. Abe told the Board that, in his opinion, the site was suitable for a multi-storey apartment development. The Board also relied upon information provided by Bob in a short presentation outlining how the acquisition could be funded and offering an opinion that the project would be highly profitable. The directors were unaware that the Heritage Council had placed restrictions on the height of buildings in the central business district that would affect the proposed development. Further, Abe did not inform the Board that Abe and his family have a significant shareholding in Lew Pty Ltd.

    The project was a financial disaster for H Pty Ltd. It paid too much for the site (given the planning restrictions) and its costs of borrowing escalated dramatically after the date of purchasing the site.

    Please advise whether:

    (a) H Pty Ltd's directors, including Connie, the non-executive director, breached their common law or statutory duties in relation to the purchase of the site? Indicate if there are any relevant defences that any of the directors can rely upon.

    (b) Abe contravened any provisions of the *Corporations Act* in relation to the deal with Lew Pty Ltd? Identify the consequences of any contraventions.

31. Joe and Liz are the directors of BuzzMe Pty Ltd, a mobile phone company. Joe had known that the company was in financial difficulties in December 2022, but had assured his fellow director that it was just a temporary cashflow issue and that the company could trade out of its difficulties and pay all of its creditors by February 2023. However, it was unable to do so, and, by April 2023, Liz became concerned about the number of "final demand" notices from suppliers that were being received by BuzzMe. At that time, she asked to see the actual accounts of the company rather than continuing to rely on the assurances of Joe. It was only then that Liz realised that the company was insolvent. The company went into liquidation in May 2023, owing large sums of money to its creditors.

    (a) Are Joe and Liz in breach of the duty to prevent insolvent trading under s 588G of the *Corporations Act 2001* (Cth)?

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(b) Assuming that Joe and Liz are in breach, are they able to rely upon any defences?

(c) Assuming again that Joe and Liz are in breach, what are the legal consequences of that breach? To what extent are they personally liable for the company's debts, and what other legal penalties may apply?

(d) Assume that in April, in response to the insolvency problem, Joe and Liz, with the help of their accountant and a professional adviser, develop a plan to restructure the company in order to improve its financial position. The plan requires the company to incur debts whilst insolvent, but it is reasonably likely to lead to a better outcome for the company than the immediate appointment of an administrator or liquidator. In July, to reduce the financial pressure on the company, Joe and Liz decide to stop paying their employees' superannuation guarantee contributions, intending to pay them back when the company is on a more solid financial footing. Advise Joe and Liz whether they are able to rely upon the "safe harbour defence" in respect of debts incurred: (a) between April and July; and (b) after July.

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PART 6: BUSINESS ETHICS

Chapter 20: Business Ethics

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Chapter 20

Business Ethics

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Introduction

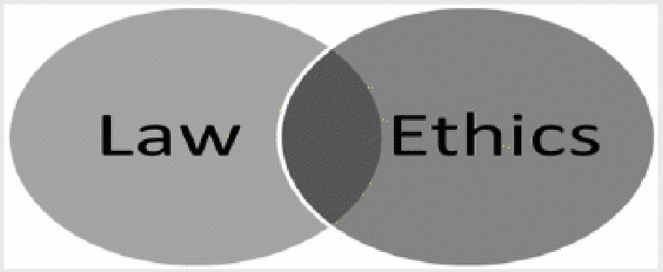
[20.10] Ethics is a branch of philosophy that aims to answer the basic questions, "What should I do? How should I act?" Ronald Francis defines ethics as "a highly explicit codified form of behaviour designed to produce particular ends … in accordance with particular individual values".[1] In this sense, an ethical choice or decision is shaped by our own values and our own principles, and it is these values or principles that serve as a reference point for all of the possible decisions that we make. In essence, we can say that ethics is the process of discovering and defending our *individual* values and principles, and an ethical decision is therefore one that is consistent with those individual values and principles.

Law, on the other hand, as we saw in Chapter 1, is the set of rules created and enforced by the courts and parliament. In general, laws intend to regulate human behaviour for the *common* good. Laws tend to reflect social norms, so as to regulate the way that we *all* live. However, the law is not necessarily the same as any one individual's personal values and principles. An important distinction therefore exists between the law and ethics, though the two concepts remain related in theory and in practice.

Knowing and appreciating the difference between and the relationship between the law and ethics are important in life and in business because these two concepts can be in conflict with, or can complement, one another. Certainly, the law is narrower in its focus than ethics. There are some matters about which the law is silent or neutral, but about which ethics has a lot to say. Such matters may include loyalty to friends, football clubs, political parties, and ethnic, cultural, or religious traditions; how we treat our grandparents; whether we offer sanctuary to a stranger; or, in recent years, whether we should wear a mask or get vaccinated against a virus (outside of situations where these actions are required by government mandates). Here, it is to ethics rather than the law that we turn for guidance.

1 RD Francis, *Business Ethics in Australia* (Centre for Professional Development, Melbourne, 1994), p 7.

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There are also many instances where laws, including commercial laws, have an ethical look and feel. In these instances, the law is clearly informed and influenced by ethical considerations. We saw in Chapter 15, for example, that Lord Atkin framed the imposition of a duty of care in negligence around the biblical parable of the highly ethical Good Samaritan. And we have also seen, in Chapter 13, that the *Australian Consumer Law* prohibits a range of unfair practices including unconscionable conduct – that prohibition having a distinctly ethical flavour. Another excellent example is seen in the law prohibiting the bribery of foreign public officials. A person commits an offence if they provide a benefit to a foreign public official which is not legitimately due, with the intention of influencing the official in the exercise of their duties, in order to obtain business or a business advantage that is not legitimately due: *Criminal Code Act 1995* (Cth) sch, s 70.2(1). In determining whether a benefit or a business advantage is not legitimately due, the following factors are to be disregarded: the fact that the benefit or advantage is customary, necessary or required in the situation; the value of the benefit or advantage; and official tolerance of the benefit or advantage: *Criminal Code Act 1995* (Cth) sch, s 70.2(2)–(3). It is not necessary that the briber intended to influence a specific foreign official, or for the prosecution to prove that business or a business advantage was obtained: *Criminal Code Act 1995* (Cth) sch, s 70.2(1A).

Still, whilst there is often an overlap between the law and ethics, it is a mistake to see them as one and the same, in the sense of assuming that if we fulfil our legal obligations we can also consider ourselves as behaving ethically. The implications of this distinction for the conduct of business are the focus of our studies in this chapter.

Ethics, the law and business

[20.20] What should we do, in business, where complying with the law is "not enough" from an ethical perspective?

There is increasing evidence that ethical considerations matter in a broad range of commercial decision-making processes. For example, ethical considerations have affected the sponsorship decisions of national sporting bodies. *The Age* newspaper, on 18 October 2022, contained two reports of elite sportspeople raising objections to sponsorship deals that their respective sports' governing bodies had entered into. In one case, the Australian test cricket captain Pat Cummins expressed ethical objections to the energy giant Alinta's sponsorship contract with the Australian team before the company and Cricket Australia agreed to end the sponsorship deal worth almost $40 million. Player concerns here related to the fact that Alinta's parent company, Pioneer Sail Holdings, is one of Australia's highest carbon emitters. At the same time, Netball Australia was seeking to resolve concerns about a lucrative sponsorship deal with the mining giant Hancock Prospecting. The deal had caused controversy, with an Indigenous Diamond player raising concerns over Hancock's record on Indigenous issues. Shortly after, Hancock Prospecting withdrew from its $15 million sponsorship deal with Netball Australia.

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Putting the question posed above into what is perhaps a more familiar business context, we have seen in Chapter 13 that the *Australian Consumer Law's* consumer guarantees do not require businesses to accept returns or to give refunds where consumers change their minds after purchasing goods. Here, the ethically "right thing to do" might require a supplier to go further than what the law requires and offer refunds in these circumstances, where consumers may not be legally entitled to them.

[20.30] In some business and professional contexts, on the other hand, the law might require us to act *contrary to* our ethical beliefs. Possible examples abound. A public servant might be required to implement government policy that is inconsistent with their personal beliefs. A businessperson might find themselves bound to keep certain information confidential, when there is a significant public interest in its disclosure. And a director might feel constrained, because of their directors' duties, in pursuing ethical goals. Whereas in [20.20] we saw that a business might choose to go beyond the law's requirements, the choice here is of a very different nature: law or ethics?

To that end, it is useful to consider some practical advice offered by the Royal Commissioner for the HIH Inquiry, situated specifically within the tertiary education context:

> [A]ll those who participate in the direction and management of public companies, as well as their professional advisers, need to identify and examine what they regard as the basic moral underpinning of their system of values. They must then apply those tenets in the decision-making process. The education system – particularly at tertiary level – should take seriously the responsibility it has to inculcate in students a sense of ethical method.

The Commissioner went on to explain:

> In an ideal world the protagonists would begin the process by asking: is this right? That would be the first question, rather than: how far can the prescriptive dictates be stretched? The end of the process must, of course, be in accord with the prescriptive dictates, but it will have been informed by a consideration of whether it is morally right. In corporate decision making, as elsewhere, we should at least aim for an ideal world.[2]

Judges have often complained about the lack of ethics of those appearing before them in cases involving business misconduct. In proceedings regarding a failed property investment group, a Federal Court judge stated that some of the evidence suggested "a ruthless disregard . . . of the interests of investors and other creditors in the way in which funds invested and assets of companies within the group have been dealt with".[3] In another case, the Federal Court imposed pecuniary penalties totalling $38 million for price fixing and market sharing; the judge commenting that "[t]he Visy Trade Practices Compliance manual might have been written in Sanskrit for all the notice anybody took of it".[4]

[20.40] Of course, the business world does not sit still, and the ethical challenges presenting in business contexts likewise evolve. This is particularly so with respect to the rise of new technologies including crypto assets and generative AI. There have already been large corporate failures in these contexts, including the collapse of the FTX crypto exchange (precipitated by the associated fraudulent conduct of its co-founder Sam Bankman-Fried).[5] Even in what might be thought of as more mundane business settings, tackling the ethical dimensions of these technologies can be difficult. Should employees be rewarded based on the

2 HIH Royal Commission, *The Failure of HIH Insurance* (Commonwealth of Australia, Canberra, 2003), Vol 1, p lxiii.
3 *Australian Securities and Investments Commission v Carey (No 3)* (2006) 232 ALR 577, 580 [4].
4 *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)* (2007) 244 ALR 673, 711 [319].
5 https://www.bbc.com/news/business-68677487.

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outputs they produce, meaning that an employee who uses generative AI to assist in their work is rewarded equally to one who produces the same output themselves? Or should they be rewarded differently? And if that is the case, should the employee using generative AI (and perhaps increasing their productivity) be rewarded more, or should greater rewards go to the employee using their own personal skill? We might even ask whether it is ethical to use generative AI in business at all, given that many models have been trained on intellectual property without compensation being paid to its owners. And we might also ponder what we would do, as a manager, if we discovered – as has happened in the real world – that an employee was using generative AI to cut down their working time in an effort to work multiple jobs at once? The ethical questions surrounding the use of just generative AI in business are endless and speak to the importance of ethics as a consideration in our future professional lives.

[20.50] Lapses of business ethics may have serious economic and social effects, even putting aside their potential legal consequences. For example, data collected in the fashion industry demonstrates that many workers in supply chains are not paid a "living wage".[6] A living wage, which varies by region and is measured by a number of internationally recognised standards, covers what a worker needs for their food, housing, healthcare and clothing, as well as some discretionary income. It is not a minimum wage, which can be as little as half of what a worker actually needs to survive. The law may not prohibit businesses operating further down the supply chain taking advantage of those workers' outputs. That there can be significant negative effects of doing so, however, is the reason for modern slavery legislation such as the *Modern Slavery Act 2018* (Cth) and the *Modern Slavery Act 2015* (UK).

The federal government has adopted a "market-based" approach with its enactment of the *Modern Slavery Act 2018* (Cth). "Modern slavery" is defined as including slavery, servitude, forced labour, human trafficking and the worst forms of child labour: *Modern Slavery Act 2018* (Cth), s 4. Business entities with an annual consolidated revenue of at least $100 million are required to produce annual reports on the risks of modern slavery in their operations and supply chains and the actions that they are taking in response: *Modern Slavery Act 2018* (Cth), ss 5(1), 13, 16. These reports will be publicly available on a government website: *Modern Slavery Act 2018* (Cth), s 18. The legislation prescribes no penalties for non-compliance with its reporting obligations; when introducing this legislation, the Minister suggested that "[b]usinesses that fail to take action will be penalised by the market and consumers and severely tarnish their reputations".[7]

Understanding the ethical aspects of general business law principles

[20.60] As noted in [20.10], it is even the case that there are ethical aspects of general business law principles. It is opportune, at this time, to reflect upon how this has been evidenced across the course of this book. Whilst it is not possible to be exhaustive here, the range of examples given will illustrate how pervasive ethical considerations are across the range of laws having an impact on business.

Starting with contract law, we saw in Chapter 2 that contracts are sets of legally binding promises. We might therefore say that contract law as a whole has an ethical underpinning, being concerned with holding people to their promises. The rules of contract formation – including agreement, consideration and intention to create legal relations – are concerned with ensuring that promises are only binding in appropriate circumstances. Many genuine consent rules – concerning mistake, misrepresentation, duress,

6 https://goodonyou.eco/the-impact-of-a-living-wage-for-garment-workers/.

7 *House of Representatives Hansard*, 28 June 2018, *Modern Slavery Bill 2018* (Cth) second reading speech (Mr Hawke, Assistant Minister for Home Affairs), 6755.

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undue influence and unconscionable conduct, for example – have ethical underpinnings, in the sense that they seek to address various types of unfairness. Even contractual interpretation has ethical dimensions – the *contra proferentum* rule, for example, places the responsibility for clear drafting on the drafter, the drafter being the party who has the capacity (and therefore the obligation) to address ambiguity before it later becomes a problem.

Looking to consumer protection law, the *Australian Consumer Law's* very existence reflects the fact that consumers are (very often) in a vulnerable position vis-à-vis suppliers of goods and services and therefore deserve protection. Prohibitions of misleading or deceptive conduct and false or misleading representations target the spread of false information, unfair contract terms provisions self-evidently target unfairness and unconscionability provisions target conduct that is considered morally unacceptable.

The *Australian Consumer Law*, as explored in Chapter 13, has a wide application and its protections extend beyond individuals who are consumers. This reflects the reality that businesses can be consumers, deserving of protections, too. The Australian Competition and Consumer Commission's active enforcement of the *Australian Consumer Law's* unfair contract terms provisions (and the Australian Securities and Investments Commission's enforcement of equivalent provisions in the *Australian Securities and Investments Commission Act 2001* (Cth)) means that business consumers do benefit from these fairness-based protections in practice, as a recent Federal Court decision involving PayPal Australia confirms.

Australian Securities and Investments Commission v PayPal Australia Pty Ltd

[20.70] *Australian Securities and Investments Commission v PayPal Australia Pty Ltd* [2024] FCA 762. As is almost universally known, PayPal is a banking intermediary that facilitates electronic funds transfers between, for example, customers and businesses that operate on eBay. PayPal's standard form contracts with Australian small business customers (of which there were some 600,000) included the following term:

> Once you have access to any account statement(s) or other account activity information made available to you by PayPal with respect to your business account(s), you will have 60 days to notify PayPal in writing of any errors or discrepancies with respect to the pricing or other fees applied by PayPal. If you do not notify PayPal within such timeframe, you accept such information as accurate, and PayPal shall have no obligation to make any corrections, unless otherwise required by applicable law. For the purposes of this provision, such pricing or fee errors or discrepancies are different than unauthorised transactions and other electronic transfer errors which are each subject to different notification timeframes as set forth herein.

The Court held that the term was an unfair contract term in a standard form small business contract and was declared void. PayPal was ordered not to use the term in their contracts. Interestingly, for the purposes of our study of business ethics in this chapter, the Court noted that "[a]s to the first criterion, the requirement of 'significant imbalance' directs attention to the substantive unfairness of the contract".

[20.80] Interestingly, in relation to the statutory liability of manufacturers for defective products under the *Australian Consumer Law* (see [13.1810]), a "state of the art" defence (see [13.1860]) was included in the legislation (s 142(c)) after intense and sustained lobbying from the pharmaceutical companies. They

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argued that they should not be liable for the loss or damage their products caused (think thalidomide and asbestos) if the loss or damage could not have been prevented by the state of knowledge (ie what the "state of the art" defence means) at the time the goods were produced. That may seem to be a reasonable argument: if there is no fault, there should be no liability. However, there remains the (ethical) question as to who, of two "innocent parties", should bear the loss? Should it be the victim who has been injured by the product? Or should it be the company whose products caused the loss, who presumably profited from the sale of the product, and who has the deeper pockets? Now there is a serious question that was resolved by the parliament in favour of the latter.

[20.90] Data protection and privacy law, on the other hand, provides some structure around modern commercial realities concerning the collection and use of personal (and sensitive) information. The *Privacy Act 1988* (Cth) does not prohibit the collection and use of personal information, but does seek to provide some safeguards, ensuring that such collection and use is appropriate.

Turning to the law of torts, and the tort of negligence in particular, we have mentioned already that the duty of care principle is grounded on biblical teachings. Whether or not that duty of care is breached depends upon what is expected of a reasonable person, ensuring that liability for negligent conduct is only imposed when someone is considered to be at fault.

Finally, we can address the law of business organisations. Agency relationships, partnership relationships and director–company relationships are all fiduciary relationships attracting fiduciary duties. These duties require the relevant person – an agent, a partner or a director – to act in the best interests of the principal, the other partners or the company, respectively. These duties are imposed in order to redress the relative vulnerability that those principals, partners and companies have, and they therefore also have an important ethical dimension.

[20.100] To conclude on this point, reference can be made to *Australian Competition and Consumer Commission v Ford Motor Company of Australia Limited* (2018) 360 ALR 124. In this case, Ford Australia acted in such an unconscionable manner when responding to customer complaints about faulty "PowerShift" transmissions that it triggered the following comments from a judge of the Federal Court (quoting earlier case law) on the place of ethical behaviour in the commercial world:

> [It] includes a recognition of the deep and abiding requirement of honesty in behaviour; a rejection of trickery or sharp practice; fairness when dealing with consumers; the central importance of the faithful performance of bargains and promises freely made; the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise … or take advantage; a recognition that inequality of bargaining power can (but not always) be used in a way that is contrary to fair dealing or conscience; the importance of a reasonable degree of certainty in commercial transactions; the reversibility of enrichments unjustly received; the importance of behaviour in a business and consumer context that exhibits good faith and fair dealing; and the conduct of an equitable and certain judicial system that is not a harbour for idiosyncratic or personal moral judgment and exercise of power and discretion based thereon.

The benefits of ethical business practices

[20.110] It is now widely believed that, over the long term, ethical business practices are more profitable than unethical methods. A company which observes ethical business practices is likely to achieve an enhanced business reputation, and overall better business results. Ronald Francis expressed the benefits of an ethical approach to the conduct of business well, in the following passage:

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> It takes many years to build up a good reputation, and is of enormous financial benefit to the companies that continue to maintain their good name. Although individual transactions may be foregone, other customers will continue to use such companies because they know that if a poor purchase has been made it is easy to exchange or get a refund. The basic issue here is whether or not one wishes to foster a continuing relationship; it would be as well to behave as if one had such a relationship in mind.[8]

What is beyond dispute is that poor business ethics very often make for very poor business. The single greatest cost of unethical behaviour remains a loss of trust and confidence in an organisation, and customer desertion is sure to follow widespread media exposure. The adverse publicity generated by poor-quality products, questionable production methods and inappropriate decision-making can be very damaging. For example, every year, the Australian consumer magazine *Choice* presents its "Shonky Awards" for especially bad products.[9] The Federal Court commented that this "award is not a badge of honour".[10] A company may also incur legally imposed negative publicity if it is ordered to publish corrective advertisements to remedy misleading conduct, that remedy being one of many available to Australian courts under the *Australian Consumer Law*.

Furthermore, the poor business ethics of individual companies are injurious to the interests of the business sector as a whole. Where unethical business conduct is seen to evidence a sector's incapacity to properly self-regulate, such unethical business conduct is likely to lead to more stringent government regulation. It has been well observed that in business today: "[E]thics is not an option. If a company or industry cares nothing for ethical requirements, it may expect from government a policy and legislative response which imposes standards and practices".[11] Laws are frequently enacted in response to, rather than in anticipation of, ethical breaches or problems.[12] The practices of social media companies, for example, are generating continuing discussion over whether further regulation of their activities is required. At the time of writing, it has been (controversially) suggested that Australian law might impose a minimum age of 16 for social media platform users.[13]

Alternatively, the response to unethical business conduct may be the more stringent enforcement of *existing* laws. In 2018, the Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry suggested that much of the unethical conduct it had identified was already unlawful, but that regulators had failed to vigorously enforce the law.[14] In the Commissioner's Final Report, it was emphasised that deterring business misconduct requires regulators to take effective enforcement action against perpetrators:

> Misconduct, especially misconduct that yields profit, is not deterred by requiring those who are found to have done wrong to do no more than pay compensation. And wrongdoing is not denounced by issuing a media release.[15]

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8 RD Francis, *Ethics and Corporate Governance* (UNSW Press, Sydney, 2000), p 9.
9 See https://www.choice.com.au/shonky-awards.
10 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 7)* (2016) 343 ALR 327, 345 [74].
11 D Grace and S Cohen, *Business Ethics: Australian Problems and Cases* (2nd ed, Oxford University Press, Melbourne, 1998), p xiii.
12 RT DeGeorge, *Competing with Integrity in International Business* (Oxford University Press, New York, 1993), p 26.
13 https://www.theguardian.com/australia-news/article/2024/may/23/australia-social-media-ban-under-16-age-verification-technology.
14 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report* (Commonwealth of Australia, Canberra, 2018), Vol 1, pp xix–xx.
15 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Commonwealth of Australia, Canberra, 2019), Vol 1, p 3.

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Socially responsible investing – the emergence of ESG standards

[20.120] So-called ESG standards have emerged as tools to screen companies for investment based upon their corporate policies, and to encourage them to act ethically and responsibly.

Making investment decisions based upon ESG standards is a rapidly growing investment trend whereby investment funds and other stakeholders have regard to a wide range of non-financial factors as part of their efforts to identify material risks and growth opportunities. ESG stands for environmental, social and governance considerations. Investors are increasingly applying these factors in their decision-making, as they have everything to do with what stakeholders "expect" from modern corporations. Investors are increasingly making their ESG expectations known to boards and will likely continue to use their voting power to hold companies accountable for failing to meet their self-imposed ESG targets.

That ESG considerations are important in today's investment market is evidenced by the fact that the law firm Herbert Smith Freehills publishes a podcast ("The Third Wheel Podcast Series: ESG in Australia") specifically on point.[16] Recent data from the Responsible Investment Association Australasia's 2024 report, titled "From Values to Riches 2024", shows that Australians increasingly expect ESG considerations to be taken into account in investment decisions: for example, 88% of Australians were found to expect their superannuation and other investments to be invested responsibly and ethically (up from 83% in 2022) and 78% of Australians were found to be concerned about greenwashing (up from 72% in 2022).[17]

Where businesses make ESG commitments, it is important for them to also have a plan setting out how those commitments will be met. Recall from Chapter 13 that under the *Australian Consumer Law*, where a statement is made about the future, misleading or deceptive conduct will be made out where there is no reasonable basis for making the statement: hence, the importance of ESG targets being supported by viable strategies. Publicly proclaiming environmentally friendliness or a commitment to human rights in a way that is false or misleading, practices known as greenwashing and bluewashing respectively, will likely breach the law. Regulators are increasingly using the law to hold companies to their ESG claims, as the following case shows. The *Australian Consumer Law* (administered by the Australian Competition and Consumer Commission) and the *Australian Securities and Investments Commission Act 2001* (Cth) (administered by the Australian Securities and Investments Commission) are particularly relevant legal tools in this regard.

Australian Securities and Investments Commission v LGSS Pty Ltd

[20.130] *Australian Securities and Investments Commission v LGSS Pty Ltd* [2024] FCA 587. LGSS operated the Active Super superannuation fund. LGSS publicly made a number of claims about its fund's investments concerning gambling, tobacco, Russian investments, oil tar sands and coal mining investments. These included representations that such investments were in a 'no way' category and were 'out' of the fund's investment plans. LGSS had an investment policy available on its website that, in some ways, qualified these representations. ASIC alleged that LGSS breached the misleading or deceptive conduct provisions contained in the *Australian Securities and Investments Commission Act 2001* (Cth), ss 12DB(1)(a) and 12DF(1), because it did, in fact, hold those kinds of investments. Sometimes they were held directly, and sometimes

16 https://www.herbertsmithfreehills.com/insights/2023-08/the-third-wheel-podcast-series-esg-in-australia.
17 https://responsibleinvestment.org/wp-content/uploads/2024/03/From-Values-to-Riches-2024_RIAA.pdf.

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indirectly, where LGSS invested in pooled funds that in turn held those kinds of investments. LGSS sought to defend the case on practically every possible basis, arguing that its conduct was not in trade or commerce, that it did not make the representations claimed, and that the representations were not misleading or deceptive. It (mostly) failed in each respect.

The Court held that LGSS, despite being a superannuation fund, was acting in trade or commerce because the representations were made via its promotional activities. For this reason, it was subject to the relevant prohibitions. The Court went on to find that LGSS had engaged in relevant misleading or deceptive conduct in relation to its gambling, Russian investments, oil tar sands and coal mining claims. The qualifications contained in LGSS's investments policy did not negate the misleading effect of the relevant representations which were conveyed in emphatic language. The Court held that there was also no difference, for misleading or deceptive conduct purposes, between directly held and indirectly held investments in this case. Applying the reasonable consumer test, the Court held that a reasonable consumer would not differentiate between the fund's direct holdings and its pooled fund investments.

ASIC's claim failed, however, with respect to representations concerning LGSS's tobacco industry investments. LGSS did not invest in tobacco manufacturers, but did invest in some companies that produced packaging used in the tobacco industry. The Court, again applying the reasonable consumer test, held that LGSS would be understood as representing only that it was not investing in tobacco producers, rather than companies that supplied the tobacco industry in any way.

At the time of writing, remedies issues concerning the imposition of pecuniary penalties, adverse publicity orders and injunctions were to be addressed in later proceedings.

The environmental criterion

[20.140] How does the environment affect corporate conduct and decisions? This may be by way of considerations related to corporate climate policies, energy use, waste, pollution, natural resource conservation and the treatment of animals. The environmental criterion can also help evaluate any environmental risks companies might face and how they deal with those risks. Here, considerations may include direct and indirect carbon emissions, management of toxic waste and compliance with environmental regulations.

The social criterion

[20.150] How corporations behave towards their employees, their consumers and the community at large is the focus of the social criterion. The social criterion looks at the company's relationships with its stakeholders. Does it hold its suppliers to its own ESG standards? Do workplace conditions reflect a high regard for employee health and safety? How does the corporation treat its customers?

The governance criterion

[20.160] How is the corporation being led? This is the key consideration here. The governance criterion deals with leadership, executive pay, audits, internal controls and shareholder rights. ESG governance standards ensure that corporations use accurate and transparent accounting methods, pursue integrity and diversity in selecting leadership, avoid conflicts of interest and are accountable to shareholders.

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Corporate ethics codes

[20.170] Many individual companies have ethics codes. An ethics code may be defined as a "written, distinct, and formal document which consists of moral standards used to guide employee or corporate behaviour".[18] An ethics code may adopt an aspirational or a prescriptive approach. An *aspirational* code sets out ideals of best practice but is generally unenforceable, whilst a *prescriptive* code is much more specific, and breaches are subject to punishment.[19] An aspirational code may be criticised as an exercise in symbolism over substance. A prescriptive code may be criticised for encouraging employees and management to observe the letter of the code while breaching its spirit.

Ronald Francis has set out a useful list of principles which may be appropriate for inclusion in a corporate ethics code. In summary, these principles include:

1. observance of the law;
2. companies should consider the effect that their actions may have upon others;
3. accounts should follow conventional procedures so as to provide an accurate reflection of the financial position of the company;
4. respect for personal privacy;
5. non-discrimination against employees on grounds such as race, gender or marital status;
6. employees should not be subject to arbitrary dismissal;
7. staff and management should declare potential conflicts of interest;
8. companies must not exploit the disadvantaged;
9. companies should not engage in bribery;
10. staff should not engage in misrepresentation or other deceptive conduct;
11. staff should not employ high-pressure sales techniques;
12. companies should not enter into anti-competitive contracts;
13. bills should be paid promptly;
14. cost savings from tax changes should be passed on to consumers;
15. companies should strive to minimise pollution; and
16. unnecessary cruelty to animals should be avoided.[20]

Some studies have suggested that ethics codes have little direct influence upon the behaviour of employees and management.[21] Moreover, a code is no more than "window dressing" if it is not observed in practice. The failed energy corporation, Enron, had a strong ethics code – on paper. The lofty ideals of the code provided endless material for comedians following that firm's accounting fraud. The code ultimately came to nothing because the board simply waived compliance when making a key decision.

Summary

[20.180] As we saw in Chapter 1, the law fulfils many functions in society. Whilst it broadly reflects social norms, it does not purport to reflect any particular individual's values and principles. Working out what those values and principles are, and identifying how those values and principles inform our actions, is the

18 M Schwarz, "The Nature of the Relationship between Corporate Codes of Ethics and Behaviour" (2001) 32(3) *Journal of Business Ethics* 247, 248.
19 RD Francis, *Business Ethics in Australia* (Centre for Professional Development, Melbourne, 1994), p 13.
20 RD Francis, *Ethics and Corporate Governance* (UNSW Press, Sydney, 2000), pp 155–174.
21 M Schwarz, "The Nature of the Relationship between Corporate Codes of Ethics and Behaviour" (2001) 32(3) *Journal of Business Ethics* 247, 253.

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realm of ethics. In this chapter, we have explored the relationship between law and ethics with reference to example scenarios and laws both within and beyond the scope of this book.

Further reading

Books

D Grace and S Cohen, *Business Ethics* (5th ed, Oxford University Press, 2013).

Internet sites

Illinois Tech Center for Study of Ethics in the Professions: https://www.iit.edu/center-ethics.

Principles for Responsible Investment: https://www.unpri.org.

Journals

Business and Human Rights Journal.

Journal of Business Ethics.

Tutorial activities

1. Sometimes following the law is consistent with ethical conduct. With reference to legal rules covered in this book, provide an example of a law having ethical underpinnings.
2. Sometimes merely following the law might not be "enough" to also act ethically. With reference to legal rules covered in this book, provide an example.
3. Sometimes the law and an individual's own sense of ethics might be in conflict. With reference to an example, explain how you would act in that kind of situation.

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