

LEGALWISE SEMINAR

CONTRACTS LAW DISPUTES: KEY ISSUES AND HOTSPOTS

Friday, 8 March 2018
Parmelia Hilton Perth

CONSUMER V CORPORATION: COMMERCIAL CONTRACT LITIGATION

Geoffrey R Hancy

B.Juris (Hons), LLB (Hons), B.Ec (UWA), LLM (Melb)

geoff@hancy.net

www.hancy.net

www.cloudbrief.com

Australian Consumer Law

- 1 The Australian Consumer Law (ACL) commenced on 1 January 2011. It established a national scheme of consumer laws.

Application to matters within Commonwealth power

- 2 The ACL is found in Schedule 2 to the *Competition and Consumer Act 2010* (Cth). The genesis of the CCA was the *Trade Practices Act 1974* (TPA). The TPA was re-named and substantially amended.
- 3 The ACL applies to the conduct of corporations: CCA s131(1). Section 6 extends the application of the Act beyond corporations. It applies to natural persons, as if its provisions were confined in their operation to contracts for or relating to the use of postal, telegraphic and telephonic services or radio and television broadcasts: CCA s6(3) and (3A). It has the force it would have if references to trade and commerce were

confined to trade or commerce between Australia and places outside Australia, among the States, within a Territory, between a State and a Territory or between two Territories, or by way of supply of goods or services to the Commonwealth or an authority or instrumentality of the Commonwealth: CCA s6(2).

State matters

- 4 Each State has adopted the ACL as a law of the State for matters that may be outside the legislative power of the Commonwealth Parliament but are within the legislative power of the States. Accordingly, parallel sets of rules apply to consumer matters of the same kind irrespective of the source of legislative power.
- 5 The ACL has been adopted as a law of Western Australia by s19 of the *Fair Trading Act 2010* (WA) (**FTA 2010**). It adopts Schedule 2 of the CCA as in force on 1 January 2013, but as modified by s36 (permitted hours for negotiating unsolicited consumer agreement). For its application in Western Australia it is called the Australian Consumer Law (WA) (**ACL (WA)**): s17.
- 6 The ACL (WA) applies to and in relation to:
 - 6.1 Persons carrying on business within the jurisdiction of Western Australia;
 - 6.2 Bodies corporate incorporated or registered under the law of Western Australia;
 - 6.3 Persons ordinarily resident in Western Australia; or
 - 6.4 Persons otherwise connected with Western Australia: FTA 2010 s24.
- 7 If any of those connecting factors exists then the ACL (WA) will extend to conduct and other acts, matters and things, occurring or existing outside or partly outside Western Australia (and whether within or outside Australia): FTA 2010 s24(2).
- 8 The provisions of the ACL (WA) are to be construed by applying the *Acts Interpretation Act 1901* (Cth) rather than the *Interpretation Act 1984* (WA): s23.

- 9 The *Sale of Goods Act 1895* (WA) remains in force, but the ACL (WA) prevails where the application of Part 3-2 Division 1 (consumer guarantees) is inconsistent with a provision of the *Sale of Goods Act*: s35.

Categories of conduct

- 10 The ACL contains provisions addressing the following categories of conduct in transactions:
- 10.1 Misleading or deceptive conduct: s18, Part 2-1;
 - 10.2 Unconscionable conduct: ss20-22A, Part 2-2;
 - 10.3 Unfair contract terms: ss23-28, Part 2-3;
 - 10.4 Unfair practices (including particular forms of false or misleading representations, unsolicited supplies, period schemes, pricing): ss29-50, Part 3-1;
 - 10.5 Consumer transactions (including consumer guarantees relating to the supply of goods or services, unsolicited consumer agreements and lay-by agreements): ss51-103, Part 3-2;
 - 10.6 Safety of consumer goods and product related services: ss104-133, Part 3-3;
 - 10.7 Information standards: ss134-137, Part 3-4;
 - 10.8 Liability of manufacturers for goods with safety defects: ss138-150, Part 3-5.
- 11 The ACL does not apply as a law of the Commonwealth to the supply or possible supply of services that are financial services or are financial products, except to the extent that credit contracts are expressly referred to in Part 5-5: CCA s131A.

General protections

- 12 Chapter 2 of the ACL provides general protections for:
- 12.1 Misleading or deceptive conduct: Part 2-1;
 - 12.2 Unconscionable conduct: Part 2-2; and
 - 12.3 Unfair contract terms: Part 2-3 of Chapter 2.

13 Specific protections are provided under Chapter 3.

Misleading conduct – Part 2-1 of Chapter 2

- 14 The prohibition against conduct that is likely to mislead is found in ACL s18. It 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. The focus of (the repealed) s52 of the TPA was on a “corporation” rather than a “person”.
- 15 The right to recover damages for a contravention of a provision of Chapter 2 (as well as Chapter 3) is found in s236. It differs slightly from s82 of the TPA. Section 236(1) provides that if a person (*the claimant*) suffers loss or damages because of the conduct of another person, and the conduct contravened a provision of Chapters 2 or 3, the claimant may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention. The expression “because of” (ACL s236) has replaced “by” (former TPA s82).
- 16 Apart from death or injury resulting from smoking or using tobacco products s236 does not apply to claims for death or personal injury under a provision of Part 2-1 (misleading conduct) or Part 3-1 (unfair practices) of the ACL. It applies to claims for death or personal injury taken under Part 2-2 (unconscionable conduct), 3-3 (safety of consumer goods and product related services), 3-4 (information standards), or 3-5 (liability of manufacturers for goods with safety defects) or Division 2 of Part 5-4 (remedies relating to guarantees and manufactures) of the ACL.
- 17 The action under s236(1) may be commenced at any time within 6 years after the day on which the cause of action accrued. In a claim for damages for death or personal injury, where available, the limitation period is the earlier of 3 years after the “date of discoverability” for the death or injury or the end of the “long-stop period”: CCA 87F.

Unconscionable conduct Chapter 2 Part 2-2

- 18 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: s20. Presumably the “unwritten law” is the law of equity.
- 19 Section 21 prohibits unconscionable conduct in connection with the supply or acquisition of goods or services by or from a person (other than a listed public company). The section is not “limited by the unwritten law relating to unconscionable conduct” and relevant factors extend beyond “consideration of the circumstances relating to formation of the contract” to the terms of the contract themselves. Section 22 provides a non-exhaustive list of factors a court may consider when determining whether a person has contravened s21.

Unfair contract terms – Chapter 2 Part 2-3

- 20 The unfair contract terms provisions of Chapter 2 Part 2-3 were new to Western Australia. Initially they applied to consumer contracts. The provisions were amended to extend their operation to certain small business contracts, with effect from 12 November 2016.
- 21 ACL s23 provides that a term of a consumer contract or a small business contract is void if it is a standard form contract and it is unfair.
- 22 A consumer contract is a contract for supply of goods or services or sale or grant of an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption: s23(3).
- 23 A small business contract is defined as a contract for supply of goods or services or sale or grant of an interest in land and at least one party employs less than 20 persons and the

upfront price is not more than \$300,000 or, for a contract with a duration of more than 12 months, not more than \$1,000,000: s22(4).

- 24 In a proceeding if a contract is alleged to be a standard form contract then it is presumed to be a standard form contract unless the other party proves otherwise: s27(1).
- 25 In determining whether a contract is a standard form contract the court may take into account such matters as it thinks relevant but must take into account:
 - 25.1 Whether one of the parties has all or most of the bargaining power relating to the transaction;
 - 25.2 Whether the contract was prepared by one party before any discussion occurred between the parties;
 - 25.3 Whether a party was in effect required either to accept or reject the terms of the contract in the form in which they were presented;
 - 25.4 Whether a party was given an effective opportunity to negotiate the terms of the contract;
 - 25.5 Whether the terms of the contract take into account the specific characteristics of a party or the particular transaction;
 - 25.6 Any other matter prescribed by the regulations: s27.
- 26 The unfair contract terms provisions do not apply to:
 - 26.1 A contract of marine salvage or towing, a charterparty of a ship or a contract for the carriage of goods by ship: s28(1);
 - 26.2 Provisions in the constitution of a company, managed investment scheme, or other kind of body: s28(3);
 - 26.3 A small business contract to which a prescribed law of the Commonwealth, a State or a Territory applies.

- 27 A term of a consumer or small business contract is unfair if:
- 27.1 It would cause a significant imbalance in the parties' rights and obligations arising under the contract;
 - 27.2 It is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
 - 27.3 It would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on: ACL s24(1).
- 28 A term of a contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term unless that party proves otherwise: s24(4).
- 29 In determining whether a term of a consumer contract is unfair a court may take into account such matters as it thinks relevant but must take into account:
- 29.1 The extent to which the term is transparent; and
 - 29.2 The contract as a whole: s24(2).
- 30 Section 25 lists examples of the kinds of terms of a consumer contract that may be unfair. One example is a term that permits one party but not the other party to avoid or limit performance of the contract.
- 31 By virtue of ACL s250 on the application of a party to a consumer contract or on the application of the regulator a court may declare that a term of the contract is an unfair term. The court may grant an injunction against a person who does or purports to apply or rely on a term of a consumer contract that has been declared void: s232(3). In addition the court can make an order compensating the injured person in whole or in part for loss or damage caused or to prevent or reduce loss or damage: s238.
- 32 The contract continues to bind the parties if it is capable of operating without the unfair term: s23(2).

Specific protections

33 Specific protections under Chapter 3 include prohibitions against:

- 33.1 False or misleading representations or conduct – Division 1 of Part 3-1:
 - 33.1.1 about goods or services: ACL s29;
 - 33.1.2 in connection with the sale or grant of an interest in land: ACL s30;
 - 33.1.3 relating to employment: ACL s31;
 - 33.1.4 offering a rebate, gift, prize or other free item with the intention of not providing it as offered: ACL s32;
 - 33.1.5 as to the nature, manufacturing process, characteristics, suitability for purpose or quantity of goods: ACL s33;
 - 33.1.6 as to the nature, characteristics, suitability for purpose or quantity of any services: ACL s34;
 - 33.1.7 bait advertising: ACL s35;
 - 33.1.8 intending not to supply goods or services: ACL s36;
 - 33.1.9 concerning profitability, risk or other material aspects of a business activity that can, or to a considerable extent can, be carried on from a person's residence or that requires the performance of work: ACL s37;
- 33.2 Unsolicited supplies – Division 2 of Part 3-1:
 - 33.2.1 unsolicited debit or credit cards: ACL s39;
 - 33.2.2 asserting a right to payment for unsolicited goods: ACL s40;
 - 33.2.3 asserting a right to payment for unauthorised entries in a publication or advertisements: ACL s43;
- 33.3 Pyramid schemes – Division 3 of Part 3-1:
 - 33.3.1 participation in a pyramid scheme: ACL s44;
- 33.4 Pricing – Division 4 of Part 3-1

- 33.4.1 multiple pricing: ACL s47;
- 33.4.2 representation about part of the consideration for the supply of goods or services without specifying a single figure: ACL s48;
- 33.5 Other unfair practices – Division 4 of Part 3-1:
 - 33.5.1 referral selling: ACL s49; and
 - 33.5.2 harassment and coercion: ACL s50.
- 34 Many of these contraventions also constitute an offence under Chapter 4 of the ACL.

Consumer Guarantees – Chapter 3 Division 1

- 35 The statutory warranties and conditions that were implied into consumer contracts by the TPA and the *Fair Trading Act 1987* (WA) have been replaced by consumer guarantees. They apply where there is supply to a consumer.

Consumer

- 36 The notion of “consumer” extends beyond that of a householder. The determining questions relate to price or nature of the goods or services. A person is taken to have acquired particular goods as a consumer if, and only if:
 - 36.1 The amount paid or payable for the goods did not exceed \$40,000;
 - 36.2 The goods are of a kind ordinarily acquired for personal, domestic or household use or consumption; or
 - 36.3 The goods consist of a vehicle or trailer acquired for use, principally in the transport of goods on public roads; and
 - 36.4 The goods were not acquired for the purpose of resupply or for the purpose of using them up or transforming them in trade or commerce in the course of a process of production or manufacture or in the course of repairing or treating other goods or fixtures on land: ACL s3(1) & (2).

37 A person is taken to have acquired particular services as a consumer if, and only if:

37.1 The amount paid or payable for the services did not exceed \$40,000; or

37.2 The services were of a kind ordinarily acquired for personal, domestic or household use or consumption: ACL s3(3).

38 The consumer's remedies are also available to a person to whom goods have been given as a gift: ACL s266.

Supplier

39 The term "supply" when used as a verb includes in relation to goods supply (including resupply) by way of sale, exchange, lease, hire or hire-purchase, and in relation to services includes provide, grant or confer. When used as a noun supply has a corresponding meaning and "supplied" and "supplier" have corresponding meanings: ACL s2(1).

The guarantees – Goods

40 The guarantees relating to the supply of goods are:

40.1 The supplier will have a right to dispose of the property and the goods when property is to pass: ACL s51;

40.2 The consumer has the right to undisturbed possession of the goods: ACL s52;

40.3 If the supply is not a supply of limited title, that the goods are free from any security, charge or encumbrance that was not disclosed to the consumer or not created with the express consent of the consumer and will remain free from the security, charge or encumbrance until property in the goods passes to the consumer: ACL s53;

40.4 If the supply is not by auction, the goods are of acceptable quality: ACL s54;

40.5 If the supply is not by auction, the goods are reasonably fit for any disclosed purpose and for any purpose for which the supplier represents they are reasonably fit: ACL s55;

- 40.6 If the goods were supplied by description that the goods correspond with that description: ACL s56;
- 40.7 If the goods were supplied by reference to a sample or demonstration model that the goods correspond with the sample or demonstration model in quality, state or condition, the consumer will have a reasonable opportunity to compare the goods with the sample, and the goods are free from any defect that will not be apparent on reasonable examination of the sample or demonstration model and would cause the goods not to be of acceptable quality: ACL s57;
- 40.8 The manufacturer will take reasonable action to ensure that facilities for the repair of the goods and parts for the goods are reasonably available for a reasonable period after the goods are supplied: ACL s58;
- 40.9 The manufacturer of the goods will comply with any express warranty given or made by the manufacturer in relation to the goods: ACL s59.
- 41 The guarantee of acceptable quality may be a departure from the previous concept of merchantable quality. Under s54(2) goods are defined to be of “acceptable quality” if they are as:
- 41.1 Fit for all the purposes for which goods of that kind are commonly supplied;
- 41.2 Acceptable in appearance and finish;
- 41.3 Free from defects;
- 41.4 Safe; and
- 41.5 Durable
- as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects in the goods) would regard as acceptable having regard to the matters in subsection (3): s54(2).
- 42 By s54(3) the matters for the purposes of subsection (2) are:

- 42.1 The nature of the goods;
- 42.2 The price of the goods (if relevant);
- 42.3 Any statements made about the goods on any packaging or label on the goods;
- 42.4 Any representation made about the goods by the supplier or manufacturer of the goods; and
- 42.5 Any other relevant circumstances relating to the supply of the goods.

The guarantees – Services

- 43 The guarantees relating to the supply of services are:
 - 43.1 That the services will be rendered with due care and skill: ACL s60;
 - 43.2 If the consumer made known to the supplier any particular purpose for which the services were being acquired by the consumer the services and any product resulting from the services will be reasonably fit for the particular purpose for which the services are being acquired: ACL s61;
 - 43.3 The services will be supplied within a reasonable time: ACL s62.
- 44 The services guarantees do not apply to contracts of insurance or contracts for transporting or storing goods for the purposes of the business, trade, profession or occupation of the person from the goods are transported or stored: s63.

Modifying the guarantees

- 45 For the most part the consumer guarantee terms cannot be excluded, restricted or modified by a contract: ACL s64.
- 46 There are limited exceptions for contracts for the supply of goods or services other than of a kind ordinarily acquired for personal, domestic or household use or consumption. A term is not void under s64 merely because it limits liability for failure to comply with a guarantee to one or more of:
 - 46.1 Replacement of or supply of equivalent goods;

- 46.2 Repair of the goods;
 - 46.3 Payment of the cost of replacing the goods or of acquiring equivalent goods;
 - 46.4 Payment of the cost of having the goods repaired;
 - 46.5 Supplying the services again or payment of the cost of having the services supplied again: s64A(1) and (2).
- 47 An exemption is provided for a term of a contract for the supply of recreational services where the term limits liability for death or personal injury: CCA s139A.

Consumer's remedies – potential defendants

- 48 The remedy for non-compliance with a consumer guarantee is against a supplier: ACL s259. In some instances there may be a remedy against a credit provider or a manufacturer.
- 49 An affected person may recover damages from the manufacturer of goods for failure to comply with the guarantee under s54 (acceptable quality), s56 (supply by description), or s58 or 59(1) (repairs and spare parts and express manufacturer's warranty): s271. The term "manufacturer" extends to a person who holds himself or herself out to the public as manufacturer, or permits his or her name, brand or mark to be applied to the goods: ACL s7.
- 50 Chapter 3 Part 3-5 of the ACL deals with liability of manufacturers for goods with safety defects. In this paper I have not addressed the detail of these provisions.

Remedies – Goods

- 51 The range of remedies against a supplier of goods for failure to comply with a consumer guarantee depends on whether the failure was a major failure: ACL s259(2), (3) & (4). For a major failure the consumer can reject the goods or recover compensation for reduction in value as well as damages for loss that was reasonably foreseeable. There is a major failure where a reasonable consumer would not have acquired the goods if fully

acquainted with the nature and extent of the failure, the goods depart in a significant respect from the description or supplied sample, the goods are substantially unfit for purpose or unfit for a disclosed purpose or are not of acceptable quality because they are unsafe: ACL s260.

52 Section 259(3) provides that if the failure to comply with the guarantee cannot be remedied or is a major failure the consumer may, subject to s262:

52.1 Notify the supplier that the consumer rejects the goods and the ground or grounds for the rejection or by action against the supplier; and

52.2 Recover compensation for any reduction in the value of the goods below the price paid or payable by the consumer for the goods.

53 If the failure to comply with the guarantee can be remedied and is not a major failure the consumer may:

53.1 Require the supplier to remedy the failure within a reasonable time; or,

53.2 If such a requirement is made, but the supplier refuses or fails to comply within a reasonable time, the consumer may:

53.2.1 otherwise have the failure remedied and by action against the supplier recover all reasonable costs incurred in having the failure remedied; or

53.2.2 subject to s262, notify the supplier that the consumer rejects the goods and of the ground or grounds for the rejection: s259(2).

54 By s262 a consumer is not entitled to notify a supplier of rejection of the goods if:

54.1 The rejection period for the goods has ended. The rejection period is the period from the time of supply within which it would be reasonable to expect the failure to comply with the guarantee to become apparent;

54.2 The goods have been lost, destroyed or disposed of by the consumer;

- 54.3 The goods were damaged after they were delivered for reasons not related to their state or condition at the time of supply;
- 54.4 The goods have been attached to or incorporated in any real or personal property and cannot be detached or isolated without damaging them.
- 55 Where a consumer notifies a supplier that the consumer rejects the goods the consumer must return the goods to the supplier unless they have already been returned to or retrieved by the supplier or cannot be returned without significant cost because of the nature of the failure to comply with the guarantee or the size, height or method of attachment of the goods: s263(1) and (2). The supplier must, in accordance with an election made by the consumer:
- 55.1 Refund any amount paid by the consumer for the goods and an amount equal to the value of any other consideration provided by the consumer for the goods; or
- 55.2 Replace the rejected goods with goods of the same type and of similar value if such goods are reasonably available to the supplier: s263(4).
- 56 Where there is a linked credit contract associated with the contract of supply of the goods or services the linked credit provider may be liable jointly and severally with the supplier for any loss or damages suffered by the consumer as a result of failure to comply with the consumer guarantee: ACL s278. The right to claim against the linked credit provider does not extend to the guarantee as to repairs in parts (ACL s58) or the guarantee as to express warranties (ACL s59). The credit provider's liability is limited to the amount financed under the credit contract, plus any interest or damages in the nature of interest and costs awarded against the credit provider or supplier or both: ACL s281.

Remedies – Services

- 57 An action against a supplier of services may be taken by a consumer under s267.
- 58 If the failure to render the services with due care and skill is not a major failure and can be remedied the consumer can require the supplier to remedy the failure within a reasonable time: s267(2)(a). If the supplier, having been required to remedy the failure, does not remedy the failure within a reasonable time the consumer may have the failure remedied and by action against the supplier recover all reasonable costs incurred or terminate the contract for supply of services: s267(2)(b). The consumer may also recover damages for reasonably foreseeable loss or damage: s267(4).
- 59 If the failure cannot be remedied or is a major failure the consumer can recover compensation for any reduction in the value of the services below the price paid or payable or terminate the contract for the supply of the services: s267(3). The consumer may also recover reasonably foreseeable loss or damage: s267(4)
- 60 A failure to comply with a guarantee that applies to a supply of services is a major failure if:
- 60.1 The services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure;
 - 60.2 The services are substantially unfit for purpose and they cannot within a reasonable time be remedied to make them fit for purpose;
 - 60.3 The services and any product resulting from them are unfit for purpose;
 - 60.4 The services and any product resulting from them are not of such nature, quality, state or condition to achieve a result desired by the consumer that was made known to the supplier; or
 - 60.5 The supply creates an unsafe situation: s268.

CCA limitations

- 61 Part VIA of the CCA sets out rules for proportionate liability for claims for damages for economic loss or damage to property caused by conduct that was done in contravention of s18 of the ACL. Damages can be reduced for contributory negligence: s137B.
- 62 Part VIB imposes limitations on claims for damages for death or personal injury. The limitations apply to proceedings taken under Part 2-2 (unconscionable conduct), 3-3 (safety of consumer goods and product related services), 3-4 (information standards), or 3-5 (liability of manufacturers for goods with safety defects) or Division 2 of Part 5-4 (remedies relating to guarantees and manufactures) of the ACL.

Conflict with other legislation

- 63 If there is a failure to comply with a guarantee that applies to a supply of services under Subdivision B of Division 1 of Part 3-2 (due care and skill, fitness for purpose, reasonable time for supply) and the law of a State or a Territory is the proper law of the contract that law applies to limit or preclude liability for the failure, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability, and recovery of any liability, for a breach of a term of the contract for the supply of the services: s275.

Sale of Goods Act 1895 (WA)

- 64 The *Sale of Goods Act 1895 (WA)* remains in force. Subject to contrary agreement between the parties, this Act it may imply into a contract for the sale of goods terms as to correspondence with description under a sale by description (s13), fitness or quality (s14) or compliance with sample under a sale by sample (s15). Its provisions are not confined to contracts that have a “consumer” element.
- 65 Where a provision of the ACL is inconsistent with a provision of the *Sale of Goods Act* the ACL provision prevails and the *Sale of Goods Act* provision is inoperative to the extent of the inconsistency: FTA 2010 s35.

Civil Liability Act 2002 (WA)

66 Part 1A of the *Civil Liability Act* applies to any claim for damages for harm caused by the fault of a person: s5A. The Act does not define the term “fault”. Part 1A includes rules that govern liability in failing to take precautions against a risk of harm (s5B), causation (s5C), recreational activities (Division 4), contributory negligence (Division 5), assumption of risk (Division 6), and professional negligence (Division 7). There are proportionate liability provisions (Part 1F) and Part 2 imposes constraints on damages awards in personal injuries cases. The FTA 2010 and the terms of the ACL (WA) do not expressly exclude the operation of the *Civil Liability Act* in a case where both the ACL and provisions of the *Civil Liability Act* would apply to the facts of the case.

67 Case law on the interaction of the ACL (WA) and the *Civil Liability Act* is not well developed: see eg *Alameddine v Glenworth Valley Horse Riding Pty Ltd* [2015] NSWCA 219.

Misleading conduct

Miller & Associates Insurance Broking v BMW Australia Finance

68 For a contravention of s18 of the ACL (former s52 of the TPA) it is necessary to determine whether, in the light of all relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct which is or is likely to be misleading or deceptive. For conduct to be misleading or likely to mislead it is not necessary that it conveys an express or implied representation. It suffices that it leads or is likely to lead into error: *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31 [14], [15], (2010) 210 CLR 241.

Pleading a case of breach or contravention

69 In my view the better approach to pleading is to set out allegations of material fact, and conclusions from them, in the following order:

69.1 In time sequence the material facts of the conduct alleged to be misleading (including what was not said [ie silence], if relevant), the conduct constituting the contract, and any facts supporting the allegation of a consumer guarantee;

69.2 The allegation that the previously pleaded facts amount to a contract;

69.3 Any relevant express or implied term;

69.4 Any consumer guarantee;

69.5 Any express or implied representation;

69.6 Facts amounting to contravening conduct, breach of contract, or failure to comply with a consumer guarantee;

69.7 Conclusory allegations that there was contravening conduct, breach of contract, or failure to comply with a consumer guarantee;

69.8 Facts of loss and damage suffered by the plaintiff and any facts necessary to show a link between loss or damage and contravening conduct, breach of contract, or failure to comply with a consumer guarantee;

69.9 Conclusory allegations that the loss and damage were caused by contravening conduct, breach of contract, or failure to comply with a consumer guarantee.

Assessment of damages

Negligence

70 The basic compensatory principle for assessing damages in tort was enunciated by Lord Blackburn in *Livingstone v The Rawyards Coal Company* (1880) 5 App Cas 25, 39. The plaintiff is to be awarded “that sum of money which will put the party who has been

injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation”.

- 71 This rule is well established and has been accepted and repeated numerous times by the High Court: eg. *Butler v Egg & Egg Pulp Marketing Board* (1966) 114 CLR 185, 191; *Haines v Bendall* (1991) 172 CLR 60; *Manser v Spry* (1994) 181 CLR 428.

Contract

- 72 In contract “where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed”: *Robinson v Harman* (1848) 1 Ex 840, 855; *Haines v Bendall* (1991) 172 CLR 60, 63; *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.

- 73 The compensatory principles for contract and tort were expressed in a compendious formulation by the High Court in *Haines v Bendall* – the plaintiff is entitled to an award of damages that, so far as money can do, will put the plaintiff in the position it would have been in if the contract had been performed or the tort had not been committed.

Damages for misleading conduct

- 74 A person who suffers loss because of the conduct of another person in contravention of s18 of the ACL may recover the amount of that loss or damage from the other person or against any other person involved in the contravention: s236.

- 75 Where misleading conduct consists of false representations in most if not all cases the appropriate measure of damages is the measure in tort: *Gates v City Mutual Life Assurance Society Limited* (1986) 160 CLR 1, 14. However for claims for misleading conduct the statutory test for assessment of damages is not limited to analogies from the common law or equity: *Marks v GIO Australia Holdings* [1998] HCA 69, (1998) 196 CLR 494, 510 [38]. See also *Murphy v Overton Investments Pty Ltd* [2004] HCA 3, (2004) 216 CLR 388.

76 The statutory question to be answered (under TPA s82) was whether the plaintiff suffered loss by the contravening conduct of the defendant. It is now (ACL s236) whether the plaintiff suffered loss because of the contravening conduct of the defendant.

Consumer guarantees

77 Recoverable damages might be assessed according to contract principles, although the “guarantees” are statutory and not implied terms of the supply contract.

Geoffrey Hancy

geoff@hancy.net

www.hancy.net

8 March 2018