LAWS1702 – Contracts 2

University of Queensland Law Society Inc

TALBOTSAYER

Discharge

- Only exact and literal performance can discharge the contract, unless on its construction the contract provides for substantial performance
- Look @ cost of rectification: contract price, value of perf received, nature & class of terms
- When there are no further primary obligations by
  - o Performance – Luna Park
    - Exact performance for discharge – Cutter
    - Substantial performance for right to contract price – Hoenig
  - o Consent (subject to formalities & consid) – McDermott
  - o Election to terminate after serious breach or repudiation – Koompahtoo
  - o Non-fulfilment of a contingent condition – Perri, Grieve
  - o Operation of law due to a frustrating event – Codelfa

<u>Discharge by Performance</u>

- Cutter v Powell = contract required entire performance, no quantum meruit (bc C)
- Sumpter v Hedges = 'entire' contract => perf condition precedent, but Q.M. for materials left
- Gov of Newfoundland = payment obligations arise, and become enforceable, upon performance of each part of the contract, grant of land accrued w/ ea 5 mile section, 68^{th} of subsidy accrued w/ ea 5 mile section
- Hoenig v Isaacs = substantial performance, employee entitled to contract price minus defects/ omissions (cost of making them good), substantial for recovery of C price
- Bolton v Mahadeva = primary obligation had not been completed, defects went to root of contract, substantial performance doctrine did not apply
- Jacobs & Youngs (NY) = insignificant defect, measure of damages => dif in value

<u>Discharge by Abandonment & Consent</u>

- Abandonment => clear intention, objectively manifested intention

- McDermott v Black = consent, consideration from both parties
- DTR Nominees = mutually abandoned after months of inactivity

<u>Discharge for Non-Fulfilment of Contingent Condition of Performance</u>

- Perri v Coolangatta = purchasers didn't sell Lilli Pilli, open to purchasers to terminate when contingency wasn't fulfilled in reasonable time, exercise option of clause in time
- Grieve v Endge = co-operation was essential for the contingent condition to be completed

Termination

- Termination discharges a contract prospectively, unconditionally accrued rights and obligations are unaffected

<u>Three Grounds for Termination</u>

1. Breach of an essential term/condition – Luna Park, Associated Newspapers
2. Fundamental breach of an intermediate term – Koompahtoo

3. Repudiation – Progressive MH

Repudiation

- Koompahtoo = conduct evinces intention to no longer be bound by contract or to fulfil it only in a manner substantially inconsistent with party's obligations
- Test = whether conduct conveys to reasonable person renunciation of contract as whole or of fundamental obligation under it (Koompahtoo)
- Objective approach
    - Nature of D's conduct
    - Surrounding circumstances
    - Motives for conduct

- Foran v Wight = repudiation must be accepted, if not and aggrieved party does not perform repudiating party cannot claim breach, purchasers entitled to deposit (TFoC)
- Luna Park = did not perform obligations in way prescribed (52 at same time, 8 hours)
- Associated Newspapers v Bancks = 3 weeks of 3rd page comic strip, refusal to be bound
- Laurinda v Capabala = T only prepared to continue C w/ erroneous construction
- Progressive Mailing House = refusal to pay rent was basis of repudiation*
- DTR Nominees = incorrect interpretation of agreement, did not try to persuade purchaser of interpretation, vendor not repudiated due to misinterpretation but could not terminate due to purchaser's wrongful termination, neither party terminated => mutual abandonment (purchaser entitled to deposit)

<u>Repudiation by Wrongful Termination – NZ persuasive, not binding</u>

- Starlight Enterprises = good faith misinterpretation, intention to continue contract
- Oxborough = SP proceedings affirmed C, builders willing to continue
- DTR Nominees = one party relied on incorrect interpretation, other relied on term

<u>Repudiation in Instalment Contracts</u>

- SOGA s33 => p (1)24 => repudiate whole or severable

- Maple Flock = termination invalid, little ratio to contract as whole and low probability of repetition
- Hammer & Barrow v Coca-Cola = H&B repudiated, high ratio of breach to contract as whole (80% of 85,000 sent)

Breach of Essential Term / Condition

- Judged to be so important that the mere fact that the term has been breached entitled the innocent party to terminate the contract – Luna Park
- 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 substantial performance of the promise – Luna Park

- Luna Park = 'warranty' was a condition, required exact and literal performance of the contract
- Associated Newspapers = breach of condition of Banck's cartoon being on the front page of the cartoon section

- Bunge Corp = If a term is required to be performed before another party can perform their obligations => condition, time stipulation & sale of goods contract

Serious Beach of Intermediate Terms

- Deprive innocent party of substantially the whole benefit? – Hong Kong Fir
- If clause can be breached in many different ways, some trifling and others serious, it is contrary to common to sense to suppose that the parties intended that the Ps should be able to terminate for any breach whatsoever – Hong Kong Fir
- Courts have tendency to classify term as intermediate to achieve greater flexibility to facilitate just outcomes (when no express essentiality) – Koompahtoo
- Right to terminate will arise depends on nature and severity of breach
    - Innocent party's rights depend on consequences of breach
    - Not severe breach = right to damages, but not termination

- Hong Kong Fir = if the breach goes to root of the contract making further commercial performance impossible, the innocent party may treat the C as at an end
- Koompahtoo = deprived Koom of substantial part of the benefit to which they had contracted

Warranties

- Terms that are inessential & never be associated with termination rights upon breach
- Implied by legislation

Termination for Delay

- All performance must occur within a specified time or within a reasonable time (if no time stipulation)
- Delay can generate a right to terminate if
    - Delay in performance amounts to breach of an express or implied time stipulation
    - Delay arises due to substantive breach of an intermediate term (e.g. Hong Kong)
- Time stipulation delay => right to terminate
    - Breach of essential time stipulation – Foran, Tropical Traders, Bunge Corp
    - Breach of non-essential time stipulation
    - Sufficient to amount to repudiation
- Time stipulation is treated as inessential unless expressly or impliedly agreed, or if a notice has been issued providing for a reasonable period for performance (and such a period has expired)
    - Property Law Act s62 => p (1)35

<u>Breach of Essential Time Stipulations</u>

- Time is of the essence
    - Express
    - Implied

- Bunge Corp = time for notice is impliedly of the essence (default in mercantile contracts), notice was condition precedent of vendor's performance

Breach of Non-Essential Time Stipulations & Time for Performance Open

- Breach must be shown to amount to repudiation
- Mere delay is not repudiation
  - Must be gross and protracted
- No time stipulation => double delay requirement
  - Notice must be issued only after an unreasonable delay, the notice must then provide for a further reasonable, specified period in which performance can be provided

- Notice only after breach of non-essential time stipulation or unreasonable delay – Louinder
- Notice requirements (Louinder)
  - Can only be served following breach of a time stipulation, either delay past an express time set for performance or an unreasonable delay
  - Must require strict compliance with the relevant terms of the contract within a specified period (period specified must be reasonable)
    - Reasonable = question of fact, onus on innocent party
  - Breaching party must be advised that failure to comply with the notice may be treated as a basis for terminating the contract (Laurinda)
  - Party giving notice cannot be in breach at time of issuing notice

- Louinder v Leis = invalid termination, reasonable time had not elapsed, not entitled to send a notice requiring performance, one party cannot purport 'time is of the essence', when no time stipulation the purchaser is entitled to a reasonable time to complete C, equity treats time stipulation as non-essential so mere breach does not justify termination
  - Effect of notice to complete is not to make time of the essence but to lift the equitable restraint on terminating delay
- Laurinda v Capabala = defective notice (unreasonably short time for compliance, did not specify intent to terminate upon expiry), but repudiation by Capabala (vendor), factual inference

Election – Termination & Affirmation

- If grounds to terminate, innocent party must choose between 2 inconsistent rights
  - Affirmation (once done, must wait for new reason to terminate)
  - Termination (once done, cannot unilaterally revive)
- 2 restrictions to affirmation
  - Co-operation
  - Legitimate interest

- White & Carter v McGregor = W&C entitled to contract price (action for debt), no duty to accept a repudiation (as long as co-operation isn't necessary), legitimate interest restriction (onus on repudiating party)

Affirmation of Contract

- Where through words or conduct the innocent party unequivocally communicates a decision not to terminate the contract for that particular reason
- May be actually communicated or deemed to have occurred

Actual Election – Coastal Estates

- Requires knowledge of
    - o The facts giving rise to terminate
    - o The content of one's legal rights in relation to breach
- Must be unequivocally expressed through communication or conduct – Laurinda vacation of premise

Imputed Election – Coastal Estates

- Does not require knowledge of legal rights
- Can be explained as an application of principles of estoppel, or general considerations of justice

- Coastal Estates = CE had induced M w/ misrepresentations, M had not affirmed, onus on CE (D) to show election had affirmed, M's conduct was not adverse to CE, M's action would only have provided evidence to affirm with knowledge of right to rescind and recover his money, further payment could not affirm what has been disaffirmed

Timing of Election

- No duty to terminate immediately
- Must be made within a reasonable time of becoming aware of the existence of the right
- Delay should not be adversely prejudicial to the party in breach

- Tropical Traders = effective termination, acceptance of late payments did not waive cl 12 (time of the essence clause), granting of extension did not affirm contract (was an announcement of intention to refrain from election until payment arrived)

Mechanics of Election

- For election to be effective, must be clearly and unequivocally communicated or otherwise made known to the party against whom the election is made
- Termination = effective when notification occurs
- No particular form of words or conduct is required

- Vitol SA = sufficient that communication or conduct clearly conveys to repudiating party that aggrieved party is treating the contract at an end, notification need not come personally from aggrieved party

Effects of Termination

- Discharge
  - o Applies only to primary obligations
  - o Is prospective (only affect future obligations)
  - o Unconditionally accrued rights are not divested (does not affect rights already accrued)
- Secondary obligations survive termination

- Heyman v Darwins = termination brought contract to an end only so far as to obligations relating to future performance, contract remained on foot, arbitration clause still in affect

<u>Total Failure of Consideration</u>

- When the right has not accrued, the respective payment will be liable to restitution for a total failure of consideration
- Sale of land
  - o Where contract is terminated at fault of purchases = deposit forfeited
  - o Where contract is terminated at fault of vendor = deposit liable for restitution

- McDonald v Dennys = payment not recoverable, payment conditional on the subsequent completion of the contract by the vendor (which would not occur as contract had been terminated), 2 earlier payment could be recovered by purchaser on restitutionary basis for total failure of consid, subsequent discharge of contract relieved purchaser of obligation to pay final payment
  - o 'a deposit paid as security for the completion of the contract stands perhaps in an exceptional position, because the intent of the parties is that, if the contract goes off by default of the purchaser, the vendor shall retain it'
- Foran v Wight = vendors liable to return deposit because as of the time of consid the right to the deposit had not accrued to the vendors, consideration for deposit (completion of sale of land) had totally failed

Frustration

- Discharged automatically and immediately, by operation of law
- When supervening events make performance impossible or oppressive for one or both parties
- When risks have not been allocated to one of the parties under the contract
- David Contractors = definition p (1)48
- Criteria
  - o Frustrating event occurs after formation
  - o Event occurs without fault of either party
  - o Event renders performance impossible / radically different
  - o Neither party has assumed risk

- Codelfa = frustrated due to supervening illegality (injunction)

- Fibrosa = loss lies where falls BUT total failure of consid => unjust enrichment

Privity

- 3rd parties who benefit from perf of C but are not parties and did not provide consideration, cannot enforce the agreement
- Party can sue on behalf of 3rd party but if no loss => nominal damages
- Property Law Act 1974 (Qld) s55
  - Modifies privity rule

- Dunlop = Dunlop was 3rd party, could not enforce agreement
- Coulls = payments were revocable mandate, revoked by Mr Coull's death, joint promisee rule (both can enforce, consid from one applies to both)
- Beswick = wife could enforce as administratrix of husband's estate

<u>Himalaya Clauses – Exception to Privity</u>

- Protects 3rd parties through the creation of a collateral contract between 3rd party & consignor
- Requirements (Scruttons v Midland, New York Star)
  - Contract clearly provides protection to 3rd P
  - Promisee is clearly contracting as agent for 3rd P
  - Promisee authorised to act for 3rd P (either prior to formation or by later ratification)
  - 3rd P provided consideration for promise
- The New York Star = even though effective, at time loss occurred D was not covered by the clause => could not benefit from immunity, perf of existing duty already owed to carrier was sufficient consid between 3rd party and consignor *

Specific Performance

- Party in breach actually performs obligations in specie (contract as a whole)
- No automatic entitlement to specific performance (damages are primary remedy)
- Limitations of Actions Act 1974 (Qld) s10(1)(a)
  - Limitation period of 6 years for breach of contract

- Discretionary factors
  - Adequacy or inadequacy of damages – Dougan, Sky Petroleum
  - Mutuality or want of mutuality – Page One Records
  - Difficulty in supervision – JC Williamson
  - Personal nature – Lumley
  - Hardship to defendant if specific performance – Markholm, Patel
  - Delay in specific performance – Markholm
  - Unfairness or unconscionability in contract formation – Patel

- Types of specific performance
  - Compelling execution of final agreement in executory agreement (CH Giles)
  - Other obligations that do not call for the execution of an instrument regulating relations between parties

Inadequacy of Damages
- SP only decreed if damages are inadequate (rare/unique goods) & if nominal
- Inadequate for transfer of land (acquired for unique purposes, not fungible)
- Chattels are usually fungible except if rare/unique/personal (Dougan v Ley)

- Sky Petroleum = non-specific good => inadequate damages, assumption of unusual state of the market, risk that if D didn't supply P would be forced out of business, interlocutory injunction granted to prevent D from cutting off fuel supply, preserves position until a later date
- Beswick = nominal damages are inadequate (because perf mainly benefits 3rd party & payment of annuity, not a one-off payment), SP was decreed
- Dougan v Ley = SP granted, contract for registered vehicle w/ license as taxi-cab, chattel of cab was a numerically restricted special right or privilege, P buying another taxi was immaterial

Mutuality
- D compelled to perform must be able to rely on P doing likewise
- Both parties must be fully protected by decree of SP
- If SP would not be avail to D, then should not be avail to the P

- Dougan = no want of mutuality, just had to transfer relevant material for license board, licensing board's cooperation was no required
- Page One Records = negative stipulation was intended to tie parties together in a relationship of mutual confidence, mutual endeavour and reciprocal obligations => failed for lack of mutuality

Difficulty in Supervision
- If constant superintendence is required to ensure D's obedience, courts are unlikely to grant SP

- Cooperative Insurance v Argyll = distinguish between orders which require a defendant to carry on an activity OR orders requiring to achieve a result (court only have to examine finished work to test compliance)
- JC Williamson = SP not avail, required cooperation and superintendence of acts and services, also not injunction

Personal Services Contracts
- Preference to not enforce an ongoing, cooperative relationship
- Reluctant to enforce negative covenants when the effect of such a decree would be to force the D to either remain idle or perform their obligations to P

- CH Giles = managing director contract, SP ordered to execute agreement containing provisions for personal services
- Lumley = can't make singer sing, but can prevent from singing for others as agreed
- Warner Bros = won't enforce negative promise if drive D either to starve or perform
- Page One Records = personal services in nature of trust and confidence

Hardship to the Defendant

- Order will not be decreed where it would impose excessive hardship on the D
- Courts look for proportionality between hardship imposed on the D and benefit apportioned to P
- Aim to satisfy the expectations of P rather than punish D

- Markholm Construction = expense of ballot would have caused detriment to the D outweighed Ps compensable loss & significant delay
- Cooperative Insurance v Argyll = keeping premise open for trade at a loss

Delay

- Not on its own, but may be a factor affecting balance of justice (Markholm)

Unfairness or Unconscionability

- Patel v Ali = D got bone cancer & leg amputated, SP would impose undue hardship on D as she depended on nearby friends and relatives

Injunctions

- Not available where damages would be adequate
- Civil Proceedings Act 2011 (Qld) s9
  - Courts may order an injunction to restrain a threatened or apprehend breach of contract or other wrongful conduct
- Civil Proceedings Act 2011 (Qld) s8
  - Court may award damages as well as injunction or SP

Prohibitory

- Restrains a breach
- Negative promises
- = to SP of negative bargain

- Lumley = injunction of exclusivity clause
- Warner Bros = courts will not enforce a negative promise through injunction in the context of personal services where the effect would be to drive D either to starvation or to performance of the agreement, no evidence D would be driven to remain idle or starve if injunction was granted
- Page One Records = injunction refused, Troggs would have been compelled to continue to employ P as manager and agent

Mandatory

- Restorative
- Directs D to take positive steps to undo actions that constitute breach
- Can be used to enforce a specific term in isolation

- Cooperative Insurance v Argyll = cl 4(19) not precise to be capable of SP thus insufficient to be capable of injunction + superintendence
- Sky petroleum = mandatory injunction to contrinue supply

CL Damages

- Definition – Robinson v Harman
    - Put the parties in the same position they would have been if the contract was performed

- Contract measure – expectation
    - Estimates the benefit of the bargain
    - = Expected value – value of good received (actual)
- Tort measure – reliance
    - Allows innocent party to recover reliance losses (reflects loss incurred)
    - = Price paid – value of good received

- 3 interrelated questions
    - What is the P's loss?
    - Is it recoverable?
    - How is it to be measured?
- Gross / net
    - Expended everything but yet to receive profit => gross (reimbursement + expected profit)
    - Not expended => net (expected revenue – costs of earning)

- McRae = difficulty in calculating does not relieve courts from assessing damages, measured by wasted expenditure
- Cth v Amann Aviation = reliance losses part of expectation interest, P recovered reliance losses, could reflect loss of chance of renewal
- Anglia Television v Reed = all reliance loss and indemnity loss were recoverable

<u>Causation & Remoteness – Limit to Damages (step 3)</u>

- Causation (would loss have occurred but for D's breach) (Anglia), AND
- Not too remote (Hadley v Baxendale)
    - Natural consequence of breach – arising naturally (imputed), OR
    - Reasonably within contemplation at formation (actual)
- Loss need not have been 'probable', may have been <50% chance of occurring
    - Must have been within reasonable contemplation, reasonable foreseeability is not sufficient

- Hadley v Baxendale = D did not know stoppage of the mill and loss of profits from ceased production => not reasonably contemplated thus not liable & not natural consequence of breach (unreasonable delay)
- Victoria Laundry = only entitled to recover loss reasonably foreseeable at formation, depends on knowledge possessed by parties (imputed or actual), D knew boiler was used in running of P's business => should have contemplated some loss of profits for delay, but not for special contracts that were not actually known
- Cornwell Gravel = D knew delivery was tender and required on time delivery => not too remote

Mitigation of Damages – Limit to Damages (step 3)

- Rule => P must take all reasonable steps to avoid or mitigate loss
    - Damages will be reduced to the extent that the losses could have been avoided through said steps
- D bears onus of showing P failed to mitigate
- Credit for betterment = any consequential gains in profits and saved expenses resulting from breach of successful mitigation must be brought into account
- Mitigation may require P to accept an offer of alternative performance from D

- Burns v MAN Automotive = un-reconditioned engine, D cannot rely on P failure to mitigate for D's wrongful when wrongful act made it impossible to take necessary steps in mitigation, P still did not do all reasonably could to mitigate damages, losses were too remote
- Payzu = in commercial contracts it's reasonable to accept offer from defaulting party

Damages Measurement (step 1)

Cost of Cure vs Diminution of Value

- Loss of bargain measured in 3 ways
    - Cost of curing breach
    - Different in value between contracted for and received
    - Loss of amenity caused by breach
- Adopt different measure if rectification damages would be manifestly disproportionate to the attaining of contractual benefit (Stone v Chappel)

- Ruxley = defective building work of pool, reinstatement is normal measure, but cost is disproportionate to good obtained, diminution in value used but P suffered 0 loss, but was awarded for loss of amenity
- Tabcorp = clause forbade tenant to alter premises, P to be placed in same position if C performed => reinstatement damages

Contract Price or Market Value

- = price – value
- SOGA 1896 (Qld) ss51(3) and 52(3)
    - Damages for non-acceptance => contract price – market/current price
    - Damages for non-delivery => market/current price – contract price

- Lazenby Garages = prospect of 3rd sale was purely speculative and too remote

Notional Resale or Present Value of Future Loss – NZ Cases

- Current expected value of the asset is reflecting in the resale value

- Ware v Johnson = D told P vines would produce crop, neither aware that vines were dying, estimate loss of profits preferred
- Herbison = bought store on warranty of weekly turnover, may recover either value of business promised less actual value OR unachieved profit return, right to choose higher

Timing of Damages (step 2)

- Damages assessed as of date of breach (breach date rule)
- Supervening events may become relevant where event that justified termination of the contract was an anticipatory breach of an executory contract
    - o Right to claim was when repudiation was accepted BUT value of what was lost must be quantified when performance was due

- The Golden Victory = right to claim arise at Nippon's repudiation, value had to quantified when performance was due

Damages for Loss of Chance (step 1)

- P must prove existence of chance on the balance of possibilities
- Damages are quantified by degree of likelihood of event

- Cth v Amann Aviation = opportunity of contract renewal => considered, 20% chance of legally terminated, damages awarded reduced by 20%
- Chaplin v Hicks = model lost 1/12 chance of winning
- Howe v Teefy = race-horse, D wrongfully repossessed, P was deprived of something of value, object of agreement was to give Teefy (P) chance to make money from racing the horse
- Markholm Construction = 9.3% chance of gaining section @ $10,000 => $934

Non-Pecuniary Damages (step 1)

- Not liable to pay damages for mental upset even if they were foreseeable or contemplable, UNLESS contact has as its object the provision of enjoyment or prevention of distress or physical injury caused by breach
- Exceptions for recovery
    - o Pain & suffering (inclu mental injury) to P consequent upon physical injury caused by breach
    - o Mental suffering directly related to physical inconvenience caused by breach
        - Damages must flow directly and naturally
    - o Distress, vexation & frustration where very object of contract is to provide pleasure, relaxation or freedom from molestation

- Jarvis v Swans Tours = brochure promised a lot, damages awarded for loss of enjoyment (including lack of facilities)
- Baltic Shipping = P entitled to damages for disappointed and distress but not restitution of fare (as there was no total failure of consid)
    - o Physical inconvenience caused by breach, OR
    - o Lack of enjoyment / distress

Liquidated Damages & Penalties

- LD => recoverable as debt (not damages) without proof of actual loss provided that they do not constitute an unenforceable penalty
- Penalty => provision in terrorem of offending party
- Onus of showing stipulation is a penalty rests on party resisting enforcement
  - Onus shifts to D of clause to justify it
- Clause found to be a penalty will be unenforceable to the extent that it exceeds the greatest loss that could conceivably be proved to have been sustained by the breach
- Steps (Paciocco v ANZ / Ryan)
  - Imposes detriment at breach
  - Legitimate interest
  - Proportionality (date of contract)
    - Not just damages
    - Other costs and losses associated with the breach

- Dunlop Pneumatic = cl5 not a penalty by a bona fide attempt to estimate appellant's loss likely to flow from breach, Lord Dunedin's guidelines p97 (Ryan no likey)
- Paciocco v ANZ = not intended to compensate losses arising from breach, protects legitimate interest, consider other fees (operation costs, loss provisioning, increases in regulatory costs), late fee => purpose of ensuring revenues is maintained at level of profitability required by shareholders
  - 'genuine pre-estiamte' standard NOT applicable when purpose of charge is to secure performance
    - Will apply where challenged clause is clearly compensatory

Vitiating Factors

- Conduct by a party that undermines the consent underpinning a contract such that the contract is unjust
- Misrepresentation
- Misleading / deceptive conduct
- Mistake
- Duress
- Undue influence
- Unconscionable dealing
- Incapacity
- Illegality

Recession

- Victim entitled at min to elect to rescind once aware (Coast Estates)
- The effect of rescission is to restore the parties to their original position, ie, put the parties in the position as if the contract had never been formed
- Restores parties to status quo ante (precontractual position), if contract never entered into
- May require other party's cooperation

- Caldwell = taken all possible steps to recover car sold to rogue before sold to 3rd party purchaser, overtly evinces intention to rescind

Bars to Rescission

- Prior affirmation of contract
- Unreasonable delay in rescinding
- If innocent party has acquired rights under the contract
- Contract has been fully performed by both parties
- Impossibility of achieving restitution in integrum (Alati, Vadasz)
  - Equity allows recession where parties can be substantially restored

- Alati v Kruger = weekly takings of business, restitution in integrum was not possible BUT equity as long as substantial restitution is possible
- Vadasz = Court may choose to rescind only that part of the contract that is inconsistent with misrepresentation

Mistake

- If mistake results from party's own reasoning or assumptions => spontaneous mistake
- If mistake was induced by another party's false assertions or conduct => misrep
- Legal effects on a contract – start @ no impact
  - Void ab initio (CL effect, discharge obligations, restitution of money paid)
  - Voidable at election of one or both parties
    - Valid at CL, mistake is serious, relief-seeking party not at fault
  - Ground for defence against SP
  - Basis for equitable claim of rectification
- Mistake must be fundamental to contract
  - Identity of one of the parties
  - Substance or existence of subject matter
  - Nature of transaction as a whole
- Mistakes
  - Common mistake (same mistaken assumption about same matter)
  - Unilateral mistake
  - Mutual mistake (different mistakes about same thing)

Mutual Mistake – Dif mistake, same term

- No contract because no meeting of minds => void
  - Only if a 3rd=party observer would not have been able to assign an objective meaning to the agreement

- Raffles v Michelhaus = two ships @ different months, irresolvable latent ambiguity (no objective evidence existed to demonstrate which understanding was correct), no consensus ad idem => no contract

Common Mistake at CL – Shared mistake

- Void => must relate to fundamental matter that parties regarded it as implied condition precedent to contract coming into existence
- Great Peace Shipping
    - common assumption as to existence of state of affairs;
    - no warranty by either party that state of affairs exists;
    - non-existence of state of affairs is not attributable to fault of either party;
    - non-existence of state of affairs renders performance impossible; and
    - state of affairs may be existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible
- Operative common mistake arises when
    - Res extincta
        - At time of contract, subject matter has, unknown to parties, and without fault of either party, ceased to exist
        - Total failure of consid has occurred
    - Res sua
        - Mistake about ownership of subject matter

- McRae = prima facie there would be no implied condition precedent, the usual position being that the vendor promised goods were in existence, seller expressly promised buyer => not void, CDC could not rely on own mistake

Common Mistake in Equity

- Void (CL), potentially voidable (E) => debate in Aus
- Might be voidable in E, with 5 criteria
    - common and fundamental misapprehension as to existence of fact or relative/respective rights (ancillary matter);
    - party seeking relief not at fault;
    - unconscionable for other party to benefit; and
    - no unjust prejudice 3rd P
- Solle v Butcher (HCA) = lease valid, not void for common mistake (no mistake about subject matter), voidable in equity as there had been a fundamental mistake about an ancillary matter
- Great Peace Shipping (UK) = the distance of tugboat did not render performance impossible or radically different, no power to set aside for common mistake in equity

Unilateral Mistake – voidable

- Contracting party cannot rely on their own mistakes of fact in order to avoid liability
- Limited exception at CL, mistake sufficiently fundamental
    - Terms
    - Identity
    - Nature of contractual document

- Smith v Hughes = unknown unilateral mistake, unless a warranty is given about a quality, buyer must take article he or she has bought even if doesn’t have quality

Unilateral Mistake as to Terms

- If the parties appear externally to have agreed, the contract will be enforced at CL, unless it can be avoided for some other basis (equitable)
- Mistake is not ground for rescission
  - Must be a serious mistake, knowledge of that mistake from other party and unconscionable conduct

- Taylor v Johnson = contract set aside in equity, equitable relief may be available where one party labours under a mistake as to a fundamental term(s) and the other N-M party knew or was wilfully ignorant as to the mistake and deliberately sought to ensure that it was not discovered or corrected

Unilateral Mistake as to Personal Identity

- CL => void for unilateral mistake as to PI if 3 conditions are met
  - Offer was intended for B (C rep'd as) and B's identity was vital importance to A
  - A had taken reasonable steps to ensure B was person dealt with
  - C was aware of A's true intentions
- Mistake always operative that unmistaken party inevitably knows of other party's mistake, induced by fraudulent misrepresentation BUT mistaken party has lost property => advs void over relying on voidability
  - Virtue of the nemo dat rule
    - Void ab initio => title never transferred and cannot sell on
    - Voidable => title is transferred and innocent 3rd party can acquire legal rights
- Sale of Goods Act 1896 (Qld)
  - s24 = when goods sold by not owner, buyer acquires no better title to the goods than the seller
  - s25 = seller has voidable title, but not avoided at time of sale, buyer acquires title to the goods (if bona fide & w/out notice of seller's defect of title)
- Contracts void ab initio when evidence establishes
  - Supplier intended to deal with well-known business firm
  - Supplier intended to deal only with a particular reputable businessman identified by reference to a phone directory
- Contracts found voidable
  - Supplier did intend to deal with firm established by the rogue for purpose of fraud (supplier mistaken as to size and creditworthiness, not identity)
  - Supplier did not regard identity of rogue as matter of vital importance
  - => title passes to innocent purchaser & mistaken party unable to recover

- Shogun Finance = contract nulled as no consensus ad idem, identity of customer is fundamental to whole transaction, correctly identifying customer is essential precondition of willingness of finance company

Rectification

- When parties make a mistake in recording their agreement in writing
- Courts may rectify a document if it does not accurate reflect or express true agreement
- Onus of proof on party seeking rectification
- Applies retrospectively
- Law requires
    - Parties hold a single corresponding intention
    - Intention continued to exist in minds of both or all parties
    - Must be objectively apparent that each party held and continued to hold intention
    - Document does not reflect that matching intention but would do so if rectified
- Not available for unilateral mistake except where non-mistake party acts unconscientiously
    - Mistaken party must show
        - Erroneously believed written document contains particular term or does not contain
        - Other party was aware of erroneous belief
        - Other party said nothing to correct erroneous belief
        - Mistake is to the advantage of the other party or to the detriment of mistaken party

Misrepresentation

- Concerns false pre-contractual representations of fact that influence another party's decision to enter into a contractual arrangement
- Misrepresentation are false or incorrect statements about past or present facts
    - Not terms or warranties, or collateral contracts, contractual remedies are not available

Fraudulent

- Statement-maker knew of the falsity of the statement
- Made it with the intention of deceiving the represnetee into entering into the impugned contract, or was recklessly indifferent
- Common law fraud => effect is to vitiate contract at CL or in E
    - May be actionable to the tort of deceit
- Damages at CL

- Krakowski = -ee must prove -or had no honest belief in truth of rep in sense -or intended it to be understood

Negligent

- Statement-maker should have known better
- Under a duty to take reasonable care when formulating and communication statements to the other party
- Common law negligence
    - Same effect and actions ^

- Damages at CL

Innocent

- Honestly mistaken but by communicating the information, caused other party to be commonly mistaken about a material fact when entering into the impugned contract
- No knowledge about falsity or intention to deceive
- Rescission in E only
- No damages at CL

Misrepresentation Elements (grounds for rescission)

1. Statement of fact, and
2. Statement was false or misleading, and
3. Statement induced entry into the contract

Statements of Fact

- Must be positively made, by words or conduct
- Mere silence is insufficient for an actionable misrepresentation => caveat emptor rule
    - Before silence is held to amount to misrep there must be some form of underlying 'duty to speak' or 'duty to disclose' => if so, then failure to speak will constitute implied positive representation
- Half-truths (Dimmock, Wakelin)
    - Literally true, practically false
    - Distortion of some positive representation
- Supervening falsification (With v O'Flananagan)
    - True when made, became false by time it induced entry into contract
    - Representor comes under duty to disclose developments affecting truth of earlier statement

- Horsfall v Thomas = was misrepresentation through conduct BUT did not induce entry into the contract, had not been seen by the purchaser
- Dimmock v Hallett = half-truth, purchase of farms, material misrep as D had let the farm for much less and must have known that amount could not be obtained
- Wakelin v RH & EA Jackson = half-truth, knew competition was important, had to disclose the full position, misrep did not indicate true position, agent was acting within authority on the vendors behalf => vendor liable
- Krakowski = half-turth, failure to disclose terms of separate agreement was fraudulent misrep
- With v O'Flanagan = value of practice dropped significantly after negotiations started, duty to disclose information arises when supervening falsification has occurred

Falsity – Past or Existing

- Any form of representation can be actionable where it is held to entail or imply another, factual statement
- Question of fact @ time of reliance
- Presumption that representations have continuing validity/effect down to the time of contract formation

- Implied rep of fact, false if statement maker doesn't hold intention, opinion or prediction

Statement of Intention
- Implies the speaker holds the relevant intention

- Edgington v Fitzmaurice = fraudulent misrepresentations, misstatement of man's mind is a misstatement of fact

Future Statements
- Statements of future will be actionable where they imply that there is nothing based on present facts to the contrary, that there are reasonable grounds for the prediction, or that the expectation is actually held

- Ware v Johnson = misrep as to sprays used on kiwifruit orchards, nature of statement was about present condition or quality, rep about present state of the orchard

Statements of Opinion
- Actionable where they imply
    - Opinion is actually held
    - Statement maker has greater knowledge or means of knowledge, factual basis for the opinion
    - No facts are known to show the opinion to be unjustified

- Smith v Land and House Property Corp = where the statement-maker knows facts best, implied statement of material fact, knows facts that justify opinion
- Bisset v Wilkinson = usually statement about own land would be fact, but given knowledge it was not justified, was just an expression of honest opinion
- Brown v Raphael = had grounds to support represented belief, but was false (no basis)

Statements of Law
- Legal opinion can be analysed in the same way as other opinion statements

Inducement
- If misrep material => P rely on presumption of inducement
    - Did false rep induce representee to alter position by entering into contract (i.e. factual causation) AND
    - Did representor intent to induce action in that particular way

Factual Causation
- Gould v Vaggelas
    - Even if rep is false & fraudulent, if representee needs to rely upon it,
    - If material rep is calculated to induce representee and person enters => fair inference of fact, they were induced by rep (doesn't have to be sole)
    - Inference may be rebutted by showing that representee was possessed with actual knowledge of true facts or made it plain he did not rely on rep

- Representation need not be the sole inducement
- Redgrave v Hurd = despite being given documents that show misrep was wrong, still relied on representation, carelessness is no bar to recovery

Intention to Induce

- Intention may be actual or constructive (i.e. representor wilfully used language calculated to induce a normal person in circumstances to act as the representee did)
- An inference of an intention to induce will be drawn whereby it would influence an ordinary, reasonable person

Misleading or Deceptive Conduct

- s18
  - (1) a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive
- Not necessary to show that anyone was actually misled => no causation requirement
- Strict liability provision
  - Immaterial whether conduct was innocent or unintentional or if there was some reasonable justification for conduct

Elements of s18

- Must be in trade or commerce
- Party must have engaged in conduct
- Conduct must be misleading or deceptive or be likely to mislead of deceive

Trade or Commerce

- s2(1) of ACL – definition
- Any sort of business activity, especially as it relates to contracts between businesses or between businesses and their consumers
- Occurs in, or relates directly to normal business activity
- Includes sale of sole or principal asset of a business

- Concrete Constructions = WHS, outside trade or commerce, did not have trading or commercial nature, s18 did not apply
- Bevanere = sale of clinic was part of totality of vendor's commercial activities, fact sale was of capital asset did not deprive it of its character as transaction in ToC
- O'Brien v Smolonogov = private sale of property by an indiv is not conduct in ToC

Conduct

- s2(2) of ACL – definition
- Includes
  - Silence
    - Unlikely that pure silence will be deemed misleading or deceptive
    - Courts look for reasonable expectation that information would be disclosed
    - Silence must be deliberate
    - If silence is included with other acts or omissions, or is seen as part of wider factual matrix => misleading overall

        - s18 does not require party to commercial negotiations to volunteer info which will assist decision-making of another party of equal bargaining power and competence

    - Opinions
        - Amounts to conduct where they make an implied factual rep about existence of belief or existence of reasonable grounds for belief
    - Statements as to future
        - Amounts to conduct where they make an implied factual rep about existence of belief or existence of reasonable grounds for belief
        - s4(1)(b) of ACL
            - Taken to be misleading if person does not have reasonable grounds for making the rep
        - s4(2)
            - Representor is taken not to have had reasonable grounds unless evidence is adduced to the contrary
            - Onus only to produce evidence, not prove reasonable grounds
    - Advertising & mere puffery

- Miller v BMW = not misleading/deceptive, BMW was experienced premium lender, has experience and was commercially sophisticated, Miller had no obligation to disclose information

<u>Misleading or Deceptive</u>

- Provision applies even to cases where no one has been misled (for rescission)
    - But damages, P needs to prove causal connection between conduct & loss suffered
    - Deceptive => intent to deceive
    - Misleading => neutral, intent is irrelevant

- Conduct must objectively lead the representee into error => objective Q of fact
    - Aimed at public at large => likely reasonable member of class would be misled
    - Aimed at particular indiv => chara of trans + nature of indivs + knowledge of other
- Exceptions to strictness
    - Non-disclosure => must be otherwise than inadvertently s4(c)(ii) OR
    - D acts as mere conduit of erroneous info conveyed by another (Butcher)
- Likely
    - Real or not remote chance or possibility of someone being misled
    - Regardless of whether it is less or more than 50%

- Bevanere = despite being aware of employee's intentions, vendor allowed purchaser to buy business in false belief that employee would be staying on indefinitely
- Henjo = half-truth, restaurant was licensed, had 128 seats and licensed to serve 128 people, but remained silent on true position to legal limitations on seating capacity, irrelevant P had op to discover true position, did not negate the duty to disclose
    - Replicated Redgrave v Hurd for ACL

- Butcher v Lachlan = agent did not purport to do another more than pass on information supplied by others

Effect of Disclaimers, Acknowledgements, Exclusion Clauses

- Not possible to exclude operation of s18 ACL
  - Well-drafted and fairly presented acknowledgement clause or disclaimer might be effective to neutralise conduct that would be misleading or deceptive by preventing party from being misled by offending conduct or from being able to successfully argue that they relied on it

- Butcher = brochure included disclaimer, everything relevant agent did up to time of contract must be considered, disclaimers communicated clear message of not making reps about accuracy of information, irrelevant P did not read/notice disclaimer

Duress

- CL doctrine
- Unacceptable coercive pressure being brought to bear on one contracting party by another
- D attempts to motivate P's contractual D-M through feat of unwanted consequences
- P misplaces trust in the ascendant party & is deprived of their free agency
- Contract may be rescinded if it is procured by unacceptable pressure
- Regular duress
  - D proposes to violate P's existing legal entitlements
- Lawful-act duress
  - D exercises his own lawful rights, liberties or powers in a manner unwelcome to P or to P's disadvantage

Contractual Duress

1. Illegitimate pressure applied through mechanism of credible interpersonal threat (implied or express) of improper action, which is in support of a specified demand that compels the will of its victim
2. 'Compulsion of the will' => result of IP was to leave victim w/ no reasonable alternative

1. Illegitimate Pressure – Universe Tankships (2 independent tests)

- An application of physical, economic or psychological pressure in order to compel the other party to enter into the transaction
  - Duress to the person
  - Duress of goods
  - Commercial pressure / economic duress
    - Withholding or threatening to withhold contractual performance can constitute economic duress – North Ocean, Universe Tankships
- Intrinsically illegitimate = what is threatened is wrong
- Extrinsically illegitimate = wrongful purpose = lawful act duress

- Whether that pressure went beyond what the law is prepared to countenance as legit (Crescendo v Westpac)

- Consider
  - o Nature of pressure applied
    - ▪ Actual or threatened unlawful => prima facie illegitimate (Woodside)
  - o Nature of demand – if lawful
    - ▪ One has to justify demand, not threat (Thorne v Motor Trade)
    - ▪ If lawful act duress => whether the nature of the demand is reasonably necessary for the protection of the legitimate interests of the stronger party (ANZ v Karam)
    - ▪ Lawful, may be illegitimate if no reasonable or justifiable connection between pressure being applied and demand which that pressure supports (Woodside)

2. <u>Compulsion of the Will</u>

- Assuming application of illegitimate pressure, court must address:
  - o Factual causation
    - ▪ Threat or pressure applied actually induced the victim's assent
    - ▪ IP need only contribute to victim's decision (not sole or predominant)
      - Barton v Armstrong & Crescendo v Westpac
      - In UK, significant cause => economic duress
    - ▪ Once established pressure was illegitimate => onus lies on pressuring party to show it made no contribution to victim's decision
      - But persuasive burden still on innocent party
  - o Normative causation
    - ▪ Threat/pressure must be sufficiently grave to justify assent from victim => left w/ no reasonable alternative (Pharmacy Care v A-G)
    - ▪ Important dimension for duress inquiry => may satisfy 'but for' test but still had reasonable alternative (thus no duress)

- North Ocean Shipping = threat of breaking contract is illegitimate BUT once affirmed, cannot rescind for economic duress
- ANZ v Karam = no unconscionable conduct means no economic duress, financial difficulties are not alone special disadvantage
- Electricity Generation Corp v Woodside = short-term supply was voidable, unlawful & no reasonable alternative, but P did not seek to rescind and thus could not obtain restitution of money paid for S-T agreement
- Universe Tankships = intentional submission arising from realisation that there is no other practical choice open to victim, consent was induced by pressure which law regards as illegitimate making consent revocable

ACL Duress

- s50(1) a person must not use physical force, undue harassment or coercion, in connection with
  - o (a) supply (or possible supply) of g/s
  - o (b) payment for g/s
  - o (c) sale or grant (or possible) of interest in land
  - o (d) Payment for interest in land
- Remedies = s236, s232, s243 (via s237)

Undue Influence

- Equitable doctrine
- "Undue influence" is the improper use by the ascendant person of such ascendancy for the benefit of himself or someone else, so that the acts of the person influenced are not, in the fullest sense of the word, his free, voluntary acts – Union Bank of Aus v Whitelaw
- When one contracting party is in special position to influence to an unacceptable or dangerous degree because one party has assumed a position of ascendancy or authority over the other AND that other part has reposed trust in or has become dependent on other party
- Two distinct forms
  - Actual – Class 1
    - Relationship-independent
    - Synonymous w/ coercion, deception, manipulation or naked exploitation
    - Burden lies on claimant to prove wrongful act
  - Presumed – Class 2
    - Relationship-dependent
    - Sui generis (unique)
    - Conflictual use of special influence inter-parties

- Thorne v Kennedy = undue influence was established from direct evidence about the character of the transaction, actual (class 1)

Class 2 Undue Influence

<u>Class 2A</u>

- Presumption based on common-experience that one party exercising special influence over dependent party
- E.g.
  - Solicitor-client
  - Doctor-patient
  - Parent-child
  - Religious advisor- disciple
- Not
  - Accountant-client
  - Husband-wife
  - Fiduciary relationships

Class 2B

- Special relation of influence is not presumed automatically, is proved as a matter of fact between the parties

Special Relationships of Presumed Influence

- One party that has entrusted or conceded his or her interests to ascendant party
- Equitable presumption that the ascendant party has exercised undue influence over the subservient party to procure their consent, so that their consent to the transaction is vitiated

- Johnson v Buttress = no direct proof transaction of land was procured by improper use of ascendency, BUT substantial gift threw upon beneficiary the persuasive burden of justifying transfer was result of free will

Unconscionable Dealing

- Equitable doctrine
- One party (weak or disadvantaged) was knowingly exploited by other party
- Not merely to relieve P from consequences of own foolishness, is to prevent victimisation => equitable fraud (Diprose)
    - Unconscientious use of power arising out of circumstances
    - Either active extortion of benefit or passive acceptance of benefit
- Party questioning gift to show it is the product of donee's exploitive conduct (Diprose)
- Ascendant party in unequal relationship unfairly exploited superior position to acquire contractual benefit

Proof of UD (CBA v Amadio)

1. P was by reason of some condition or circumstance, placed at a special disadvantage vis-à-vis D and
2. That unfair or unconscientious advantage was taken by D

Special Disadvantage/Disability

- Significant threshold
- Not in disadvantaged position simply because of inequality of bargaining power (ACCC v Berbatis)
- Unconscientious exploitation of another's inability is not to be confused with taking advantage of a superior bargaining position (Berbatis)
- Categories
    - Constitutional disadvantages (inherent in P)
        - E.g. illness, poverty, lack of education
    - Situational disadvantages
        - Disadvantages deriving from particular features of a relationship of the parties in the transaction
        - E.g. desperate need of rescue, emotional dependence

- Kakavas v Crown = P must point to D's conduct, beyond ordinary conduct of business, which makes it just to req D to restore P (rescind)

- ACCC v Berbatis = a person is not in a position of relevant disadvantage, constitutional or situational, simply because of inequality of bargaining power
- Blomley v Ryan = poverty, sickness, age, sex, infirmity of body/mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation
    - Repeated in CBA v Amadia

Unfair Advantage-Taking or Unconscionable Conduct

a. Knowledge of special disadvantage
   - Actual or aware of possibility that situation may exist (CBA v Amadio, Thorne)
   - Wilful ignorance or shut-eye knowledge => req proof of predatory state of mind (Kakavas v Crown)
b. Failure by D to correct for known SD / taking advantage
   - Where D fails to take any step to correct for P's known special disadvantage
   - D must deal with P that is appropriately sensitive to their disability
c. Role of substantive unfairness
   - Transaction itself is unbalanced or unfair (e.g. inadequate consideration)
   - Can support position of disadvantage existed & unfair use of disadv

- CBA v Amadio = SD of old & lack of business knowledge & limited English, unconscientious adv that bank took opportunity of SD because aware of disabilities, closed eyes to the vulnerability of elderly, failure to explain nature of transaction or procure independent advice for them
- Louth v Diprose = exploitation of emotional dependence, deliberately manufactured atmosphere of crisis to influence P, D aware of SD
- Thorne v Kennedy = husband exploited wife's SD (her inability to exercise judgemental capacities in relation to husband)

Statutory Unconscionability

- Regulated within ACL
- s20
  - Prohibits, within trade or commerce, engaging in conduct that is unconscionable, 'within the meaning of the unwritten law' (remedies for CL)
- s21
  - Concerns unconscionable conduct in connection with the supply or acquisition of goods or services in trade or commerce, judges have discretion (not CL)
- s22
  - Lists (non-exhaustively) the matters that a court may have regard to for the purpose of applying s21
- Unconscionable = something not done in good conscience based on societal norms (ACCC v Lux)

- ACCC v Simply No-Knead = s21, accumulation of incidents discloses an overwhelming case of unreasonable, unfair, bullying and thuggish behaviour (unconscionable)
- PT v Spuds = finding of UC under statute does not depend on presence of bad faith or conscious wrongdoing
- ACCC v Lux = s21, D exploited position that it had deceptively obtained

Remedies & Relief

- Breach of ss20,21 => s232 (injunctions), s236 (damages), s237 (compensation orders) + s243 (ancillary orders)
- s244

- Person who contravenes provision of Part 2-2 ACL may also be liable for civil pecuniary penalty of up to $1.1mil (body corp) or $220,000 (other persons)

Third Party Impropriety

- A (3rd party) commits wrongdoing or misconduct towards B which causes B to enter into a contract with C (e.g. bank)

Agency

- Financer may be liable bc wrongdoer's conduct is imputed to financer as principal under principles of agency
- Unlikely to succeed in Aus

Amadio-Style Unconscionability

- Lender is primary wrongdoer & not someone who merely has notice of earlier interest or notice of 3rd party fraud
- Possibility in Aus but difficult to establish when lender has no direct contract w/ surety

Notice Doctrine (Aus)

- Knowledge is required
- Law imposes no obligation on one party to a transaction to check ether other party's concurrence was obtained by undue influence
- Party may lose benefit of contract if he ought to have known that the other's concurrence had been procured by misconduct of 3rd party
    - RBS v Etridge (UK)

- Bank of NSW v Rogers = actual or constructive knowledge is required

Special Equity for Volunteer Wives

- Wife = volunteer & financer did not take reasonable precautions to protect wife

- Yerkey v Jones = if consent to become surety for debt is procured by spouse and without understanding its effect which creditor accepts without dealing directly with guarantor => prima facie right to have guarantee set aside
    - 1) if wife's consent is procured by actual undue influence, she will be entitled to relief unless lender can show she received independent advice before entry
        - Lender must show wife received independent legal advice
    - 2) if wife fails to understand effect of docs and significance, she will be entitled to relief unless lender took steps to inform her and reasonably believed she understood purport and effect of transaction (4 reqs below)
        - Wife did not understand transactions
        - Transaction was voluntary
        - Lender knew wife was married, expected trust & confidence in Hubby
        - Lender did not ensure transaction was explained to wife
- Garcia v NAB = no actual UI but still unconscionable for creditor to enforce guarantee due to lack of understanding, 2nd limb of Yerkey

Other

- Statutory remedies for sureties => ACL ss20-22
- Financial services => ASIC ss12CA, 12CB and 12cc (mirrors ss20-22)

Statutory Remedies – Breach of ACL (pp 51 – 54)

- Public enforcement
  - Regulators (ACCC) apply to court for orders against party in violation
- Private enforcement
  - Individuals who suffer losses have right to receive damages => s236 + one ancillary remedies => through s237(1) including s243

Damages

- s236
  - (1) recover amount of loss or damages against other person or any person involved in contravention of provision of Ch2 or 3
- Entry into contract followed misleading conduct => reliance inferred from materiality
  - Once causal connection established => avail stat rems are not to be constrained from law elsewhere (e.g. contract or equity) => limits clear words
- Failure to take reasonable care may reduce damages recoverable under s236
- Calculated under plain meaning of ss236, 237
- Courts often use tort measure, but can use contractual heads of damage
- Compare position party in once loss occurred and position would have been but for contravening conduct

- Marks v GIO = necessary to determine whether, objectively, that value of what was acquired is less than what was paid, contravening conduct has left misled party no worse off than before contravention occurred

Injunctions

- s232
  - (1) may grant injunction if court is satisfied that a person has engaged, or is proposing to engage, in conduct (a)-(f)
  - (3) applies to relying on a term of C that has been declared unfair under s250
  - (4) restrain person from engaging in conduct
  - (5) restrain person from carrying on business or supply goods or services
  - (6) requires person to (a)-(d)
  - (7) requiring person to do act or thing

Compensation Orders

- s237
  - (1)(a) court may on application of person who had suffered, or is likely to suffer, loss or damage because of conduct of another that
    - (i) contravened provision of Ch2,3or4
    - (ii) relied on term of contract declared unfair by s250
  - (b) against person engaged in conduct or person involved in conduct
  - (2) must be order that court considers will
    - (a) compensate injured person in whole or in part
    - (b) prevent or reduce loss or damage suffered
- For applications for an order(s) see s242
- For orders court may make include all or any set out in s243

Other Orders

- s243
  - (a) whole or any part of Contract
    - (i) to be void AND
    - (ii) void ab initio OR void at all times on and after date as specified
  - (b) (i) varying contract AND (ii) declaring had effect as varied on and after
  - (c) order refusing to enforce any or all provisions
  - (d) respondent to refund money or return property
    - (e) except if order under s239(1) made directing respondent to pay injured amount of loss or damage
  - (f) directing respondent to repair or provide parts for goods
  - (g) directing respondent to supply specified services
  - (h) direct resp to executive instrument (for creating/transferring an interest in land) that
    - (i) varies or has effect of varying first instrument OR
    - (ii) terminates/affects, or effect of terminating/affecting, the operation or effect of first instrument

CCA 2010 (Cth) – s137B

- (a) Economic loss by (b) contravention of s18, and (c) loss suffered is (i) partly claimant's failure to take reasonable care and (ii) partly conduct of other person, and (d) the other person did not intend to cause or damage, and did not fraudulently cause loss or damage
- The amount of the loss or damage that the claimant may recover under subsection 236(1) of the Australian Consumer Law is to be reduced to the extent to which a court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage

Misrepresentation and s18 of ACL

	Misrepresentation	ACL
Silence	Silence is not actionable without duty to disclose.	Silence may be misleading and deceptive. (s2(2))
Inducement	Inducement must be shown	Inducement must be shown for damages, but other orders may be available regardless.
Innocent Misrepresentation	No damages for innocent misrepresentation	Damages available for innocent misrepresentation. Culpability is irrelevant.
Puffery	Puffery not misrepresentation	Applies to puffery.
Exclusion Clauses	May create estoppel by convention.	Exclusion clauses cannot exempt from liability, but may be relevant to damages.
Time Limits	Equitable affirmation or *laches*	Limitation period of 6 years (s 236(2), s237(3))
Trade or Commerce	Applies to conduct outside of trade or commerce.	Does not apply to conduct outside of trade or commerce.

Misrepresentation	S 18 ACL
Reliance Damages	Damages for loss incurred; variety of other orders (s237, 243)
Rescission	Rescission-like orders under s 243
Rights of 3rd parties bar rescission	No strict bar to rescission, but guided by equitable principles.

1. **Nature of contract**
    - Divisible – Newfoundland, Maple Flock
    - Entire – Sumpter
    - Exact performance – Cutter, Sumpter
    - Substantial performance – Hoenig, Bolton, Jacobs & Young
    - Obligations (mutual & independent, conditional & dependent, concurrent – Progressive)
2. **Discharge by abandonment or consent** – McDermott, DTR
3. **Discharge for non-fulfilment of contingent condition** – Perri, Grieve
4. **Breach**
    - Non-performance – Koompahtoo
    - Late performance – Louinder, Laurinda
    - Defective performance – Bolton
    - Anticipatory – Foran
5. **Right to terminate**
    - Repudiation of contract as a whole – Koompahtoo
        - Repudiation by wrongful termination – Oxborough, Starlight
        - Repudiation in instalment contracts – SOGA s33, Maple Flock, Coca-Cola
        - Good faith (bona fide) misinterpretation – Starlight, DTR
    - Breach of condition – Associated
    - Breach of intermediate term (amount to repudiation of term) – Koompahtoo
        - Terminate for delay (refer to 7)
6. **Contractual obligations**
    - Essential -> conditions – Luna, Bunge, Associated
        - Express / implied essentiality => right to terminate after breach
    - Non-essential
        - Intermediate – Hong Kong, Koom
            - Substantial breach => right to terminate after breach
            - Insubstantial => no right to terminate
        - Warranty (implied by statute)
            - Insubstantial breach => no right to terminate
7. **Time Stipulation and Delay**
    - Time for performance stipulated
        - Time is of the essence
            - Express – Foran, Tropical Traders
            - Implied – Bunge
        - Time is not of the essence – Property Law Act s62
            - Repudiation required
    - Time for performance open – Louinder, Laurinda
        - Repudiation required
            - Double delay requirement w/ notice
8. **Affirmation** – cf Coastal Estates
    - Actual or Imputed
    - Co-operation & legitimate interest – White & Carter
9. **Termination** – Vitol SA, Mc