

Week 6 – Chapter 13 Remedies

- Private remedies available to the general public – Ch 5 Pt 5-2
- Ch 5 Pt 5-2 of ACL provides injunctive powers
 - Injunction generally – s. 232
 - Consent injunctions – s. 233
 - Interim injunctions – s.234
- ACL confers wide powers on court to grant injunction in whatever terms it considers appropriate and provides for variation and discharge of injunctions – s. 235
- Injunctive powers in s. 80 TPA similar to s. 80 of CCA which are identical ss. 232-235 of the ACL, the jurisprudence in s. 80 will also apply to s. 232-235 of ACL

Cardile v LED Builders Pty Ltd

- Term injunction used to identify a particular species of order, making of which the law in question provides as part of a new regulatory or other regime, which may be supported by penal provisions
- Empowers courts to give remedy in many cases where none available in a court of equity in its jurisdiction
- To protect legal or equitable rights of plaintiff
- Administration of a trust for charitable purposes; or
- Observance of public law at the suit of the Attorney-General with or without a relator or at the suit of a person with a sufficient interest
- In these situations ‘injunction’ takes its content from the provisions of the particular statute in question...

Private parties v regulators

- Private party or an ACL regulator may seek injunction relief pursuant to s. 232 , consent injunctions s. 233, interim injunctions s. 234
- S. 235 – private parties or regulator can also seek to vary or discharge an injunction granted under s. 232, 233, 234
- Fundamental differences between private party seeking injunctive relief under ACL and an regulator making an application
 - Private party must comply with equitable maxims and equitable defenses when seeking injunction
 - Regulator is to enforce ACL in public interest therefore these requirements don’t strictly apply for regulator
 - Private party unlikely to be granted injunctive relief when damages are in adequate remedy
 - For regulator, since they operate in the public interest, this does not apply
 - Private party must provide undertaking to the court as to damages; that the plaintiff will compensate the defendant if the injunction is dissolved at later stage
 - This is not required for regulator – public interest
 - Private party is subject to court’s discretion on matters such as: hardship, mutuality, futility, utility and constant supervision of the court
 - While these discretionary considerations are relevant and important to regulator and applicable, in certain circumstances, this may come after the public interest
- Forms of injunction under equity
 - ✓ **Negative (prohibitory) injunctions** – restrains or forbids the defendant from engaging in certain conduct
 - ✓ **Positive (or mandatory) injunction** – directs or requires the defendant to engage in certain conduct
 - ✓ **Final injunctions** – granted only after all full determination of the rights of the parties (usually at judgment)

- ✓ **Interim injunctions** – are temporary and preserve the status quo under the final hearing; and
 - ✓ **Quia timet injunctions** – granted when there is a threat or fear of contravention and the court finds that a wrong may occur
- **Final injunctive** only granted if court satisfied that
 - Cause of action exists – cause of action to enforce an existing right and not to create a new right
 - Damages would be an inadequate remedy – inadequacy of damages can be proven in law if plaintiff proves to court that conduct of defendant will cause irreparable harm unless restrained; and
 - That the court in its discretion should grant the injunction – court can consider many matters in its discretion, including equitable maxims, equitable defenses, and other discretionary considerations such as, hardship, utility, futility, constant supervision and public interest
 - **Interim or interlocutory injunctive** relief will only be granted by court if
 - There is a prima facie case – prima facie case does not require the plaintiff to show that it is more probable than not that at trial the plaintiff will succeed, but it requires that the plaintiff show a sufficient likelihood of success to justify the injunction
 - Balance of convenience favors granting the injunction – Whether the inconvenience or injury would be caused to plaintiff if injunction were refused and whether that refusal would outweigh the injury caused to defendant if the injunction is granted
 - Factors taken into consideration
 - Strength of plaintiffs case
 - Irreparable harm
 - Hardship
 - Any 3rd parties be affected by injunction
 - Sufficiency of plaintiff's undertaking as to damages
 - **Quia timet injunctions**
 - Granted by court even in circumstances where cause of action has not 'crystallized'
 - Court will have regard to the degree of probability of apprehended injury and the degree of seriousness of injury

Section 232 ACL

- Schedule 7 of Trade Practices Amendment Act provides guidance on transitional use of injunctive powers
 - The extent that any such proceedings are proceedings for an injunction under s.80 TPA as so in force, the proceedings are taken, after that commencement, to be proceedings for an injunction under s. 232 of the ACL
- Section 232(1)
 - Court may grant injunction in terms it considers appropriate if satisfied that a person has engaged or proposed to engage in conduct that constitutes or would constitute
 - Contravention of a provision of Ch 2(general protections), Ch 3 (specific protections) or Ch 4 (offences)
 - An attempt to contravene such a provision; or
 - 'involvement' in a contravention (as defined in s. 2)
- courts duty to be satisfied of orders requires the court to determine that they are appropriate in law and fact based on the evidence before the court
- courts power under s.232(1) to grant public interest injunction is deliberately broad and expressly unconstrained (s.232(4)) by the requirements which may attend private law injunctions
- Section 232(2) private party or a regulator seek application for injunctive relief under s. 232(1) and court has power to grant it

- Section 2332(3) – injunctive relief is available for applying or relying on a declared unfair contract term under s. 250
- Section 232(4) – courts power to grant prohibitory injunctions – court may consider when granting an injunction under s. 232(1)
 - whether or not the person will engage in the conduct again
 - whether or not the person has previously engaged in such conduct
 - whether or not there is imminent danger of substantial damage to another person if the person engaged in conduct of that kind
- Section 232(4) ACL indicates a ‘legislative intention to broaden the circumstances in which public law injunctions under the ACL may be granted’

ICI Australian Operations Pty Ltd v Trade Practices Commission (TPC) , Lockhart J:

- Empower court to grant injunctive relief
- Designed to ensure that once the condition precedent to the exercise of injunctive relief satisfied, court should be given widest injunctive powers, devoid of traditional constraints, though the power must be exercised judicially and sensibly
- Injunction to be permitted – whether or not there is a likelihood of future contravention by defendant is regarded in judgments of the court as a relevant factor
- Injunctions are traditionally employed to restrain repetition of conduct
- Prevent conduct that has never been done before and is not likely to happen again is a statutory enlargement of traditional equitable principles
- Traditional doctrine of injunctions was developed primarily to protect private proprietary rights
- Public interest injunctions are different
- Parts IV and V relate to practices and conduct that are contrary to public interest... these are legislative enactments of matters vital to the presence of free competition and enterprise and a just society
- This does not mean traditional equitable doctrines are irrelevant
- It must be relevant to consider questions of repetition of conduct, whether it has occurred before or whether imminent substantial damage is likely: but the absence of any one or more these elements is not fatal to the grant of an injunction under s. 80

- Section 232(5) court grant injunction under Section 232(1) to restrain a person from carrying on a business, or supplying goods or services for a specified period or on specified terms
- Section 232(5) – does not limit the scope of s. 232(1), can restrain person from supplying goods or services whether or not as part of, or incidental to, the carrying on of another business
- Section 232(6) – court grant positive injunction requiring person to refuse money, transfer property, honour a promise and/or destroy or dispose of goods
- Section 232(6) – does not limit the scope of s. 232(1) added to assist lower courts and tribunals in their functions under ACL
- Section 232(7) – factors that court considers when granting injunction under s.232(1)
 - Whether or not person intends to refuse or fail again to do the act or thing
 - Whether or not the person has previously refused or failed to do the act or thing
 - Whether or not there is imminent danger of substantial damage to another person if the person refuses or fails to do the act or thing
- Section 232(7) – comments made by Lockhart are applicable to this

BMW Australia Ltd v ACCC

- S. 80(4) TPA - Removes normal rule that an injunction is only to be granted to restrain threatened or impending conduct
- S. 80(5) TPA - Removes the same rule in the case of mandatory injunction
- It is clear that the terms of any injunction based only on past conduct should be limited to restraining repetition of precisely that conduct

- Injunction based on an intention to commit further conduct is different
- Terms can be cast more widely, in order to catch conduct of any kind threatened or tended

ACCC v Dataline.Net.Au Pt Ltd

- Full Federal Court rejected the distinction between injunctions based only on past conduct and injunctions based on intention to commit future conduct
- We don't fully understand the distinction between 'based only on past conduct' as opposed to that of an injunction 'based on an intention to commit further conduct'
- The purpose of injunction will be to prevent, or to reduce the likelihood of, future infringement
- Past misconduct will be relevant to future misconduct because it demonstrates a propensity or inclination to infringe
- Past conduct will give an indication of future intention
- Absence of past misconduct, court may infer an intention to offend in the future based on other evidence
- Future misconduct will be the underlying rationale for injunctive relief
- Not to overlook the power to grant injunctive relief in the absence of an threatened future misconduct
- Prevention of future misconduct may be the most common reason for granting injunctive relief

Statutory Principles

- S. 80 TPA – current s. 80 CCA and s. 232 of ACL

Why are statutory injunctions required?

- Why it is necessary to grant an injunction to restrain conduct that is already prohibited by the legislation

BMW Australia Ltd v ACCC

- The purpose of granting an injunction to restrain conduct already prohibited by legislation can only be to add to whatever consequences the legislation attaches to that conduct the additional consequences of a possible finding of contempt of court by failure to comply with an injunction

- Why necessary to grant injunctive relief to restrain conduct that is already prohibited by the legislation to be in the public interest

ACCC v Star Promotions Club Pty Ltd

- Ordinary reasonable members of the community know that injunctions are for prohibiting a person from acting a certain way
- Person's conduct has been such as to warrant the invocation of this substantial power, limiting an individual's or corporation's freedom of action
- The injunction is sending a simple message that the person enjoined had engaged or proposes to engage in an activity that the law prohibits
- There is a manifest public interest in identifying the misrepresentations and contraventions that I have found and making orders against the contravener that prevent conduct being repeated

- Why injunctive relief might be appropriate where there is no evidence that the defendant will continue to engage in the offending conduct?

TPC v Mobil Oil Australia Ltd, Toohey J

- Even though there is no evidence to indicate the offender's intention to continue the offending conduct, it might be appropriate to mark the court's disapproval by an injunction as well as a monetary penalty

Framing an injunction

- Drafting an injunction is ultimately a practical question

- Each case must be examined on its own facts to determine the appropriateness of the particular form of injunction
- Must be clear and precisely stated to be capable of being complied with
- Must contain sufficient content so defendant knows what is required
- Avoid multiplicity of overlapping injunctions – can cause confusion about scope of obligations imposed
- Inappropriate to make an injunction simple to restrain a person from contravening the legislation without adding any substance to the injunction
- Injunction not appropriate if it operates on a range of conduct some of which does but some which does not fulfill the requirements under s. 232 of ACL
- Should not be framed to prohibit conduct falling outside the boundaries drawn by s. 232. Same limitation applies to mandatory injunctions
- If possible to specify course of conduct that will prima facie be in contravention of ACL, better to proscribe that conduct
- Injunctions will only be granted if framed in a way that can and will be enforced by the court
- Inappropriate to grant injunction in terms which leave unresolved the central issues in the case

Granting an injunction

- Injunctions under s.232 are statutory in nature and not granted to the court's equitable jurisdiction
- Court has a wider jurisdiction to grant an injunction under ACL than at general law, the traditional equity principles are relevant
- Injunction for public interest can be made under s. 232
- Section 232 permits rather than requires, the court to grant an injunction once the prohibited conduct has been proven

Limits on granting an injunction

- Injunction if granted must have utility. Prevent a repetition of the contravening conduct. Must be a sufficient nexus (link) or relationship between breach and injunction
- Sufficient nexus or relationship between the breach and injunction is an evaluative judgment
- Injunction must relate to the case or controversy

Time periods of injunctions

- S. 232 is wide enough to support a permanent injunction or an injunction for a specified period of time
- Deterrence effect on restraining repetition of contravening conduct is a consideration to determine whether an injunction should be permanent or time limited, and if time limited, the length of time the injunction should exist
- Injunction can be varied or discharged – consideration to determine whether an injunction should be permanent or limited in time
- Where an injunctive order is sought in respect of a class of conduct, similar to proven conduct that has come to an end, the injunction should operate for a limited period of time
- Time limited injunction can be order for any time period – short, medium or long term
- Time limited injunction
 - Provides a limit to the remedy of contempt of court for breach of the injunction
 - Sets a period during which the party restrained will have a very powerful incentive to ensure there is no further contravening conduct
- By the end of the injunction, it is hoped that the procedures and the culture of the organization will be such that further contravention is unlikely

Breach of injunction

- Breach of injunction is contempt of the court
- General rule – duty of those subject to an order to strictly observe the terms of the order
- Its not necessary for the court to prescribe a manner in which the order is to be achieved, sufficient if the court clearly specifies that a defendant is to carry out a particular course of conduct
- Injunction must specify with certainty the result to be achieved but the applicant and the court don't need to prescribe a particular method of compliance

- Contempt proceedings are not appropriate for the determination of questions of construction of the injunction or the appropriateness of the language in which they are framed
- Not necessary to prove any subjective intent to deliberately disobey the injunction – deliberate commission or omission breaching the injunction will constitute disobedience unless it be causal, accidental or unintentional
- Deliberately disobeying injunction is important to determine appropriate defense
- Honest belief that a failure to act does not constitute breach is not a defense
- Contempt proceedings whether civil or criminal contempt, must be seen as criminal in nature for the purposes of fixing the standard of proof
- Charges of civil contempt must be proved beyond a reasonable doubt
- Range of remedies available for contempt of court – imprisonment, fines and sequestration orders
- Imprisonment – for most serious cases – applied only where court satisfied that it is necessary in the interests of the ordered and fearless administration of justice and where the attacks are unwarrantable
- Prison sentence may be suspended on conditions

Section 233 of the ACL

- Application for injunction made under s. 232, 233 permits court to grant it when all parties consent without requirements in s. 232(1)
- Courts have the power to grant injunction regardless of whether the contravening conduct is admitted or established by evidence
- S.233 allows matters under an investigation by ACL regulator and court proceedings to be settled by an agreement in a timely manner if the possibility arises
- S.233 similar to s.80(1AA) CCA
- An agreement of facts and joint submission ‘often helpful in assisting court to determine whether consent orders are appropriate and within power’

Section 234 ACL interim injunctions

- S. 234(1) application for injunction under s. 232, s.234 permits court to grant interim injunction if considered appropriate
- S. 234(2) – specific exemption for regulator or responsible Minister to provide an undertaking regarding damages where injunction sought under s. 232(1)
 - Does not exempt private party, which is a condition of seeking the interim injunction
- Requisite elements for grant of interim injunction under s.234(1) and common law
 - There is a prima facie case; and
 - The balance of convenience favours granting the injunction

ACCC v Clarion Marketing Australia Pty Ltd , Jacobson J:

What is required to show prima facie?

- Enough for plaintiff to show sufficient likelihood of success to justify preservation of the status quo pending trial
- How strong the probability need be depends on the practical consequences likely flow from the relief

- Strength or weakness of applicants case relevant factor but only in relation to the balance of convenience or the exercise of the discretion
- Assessing the balance of convenience in an interlocutory injunction application, public interest and 3rd persons are relevant and have more or less weight according to other material circumstances
- Whether those interests favour the grant or refusal depends on the circumstances of the case
- Hardship on 3rd persons or the public due to the grant of an interlocutory injunction will rarely be decisive

Section 235 ACL

- S. 235- s.80(3) CCA
- Court have the power to vary or dissolve final or interim injunction under Ch 5 Pt 5-2 Div 2

- Court has jurisdiction to dissolve permanent injunction where legislation has removed the foundation for the grant of the injunction

Damages

- Section 236 ACL – primary basis for a person to claim damages for any loss or damages suffered by conduct of another person who contravened Ch 2 or Ch 3
- S. 236 - Provides a person with a right to claim damages caused by the conduct of another person
- Section 236 –similar to s. 82 CCA
- Common law principles only used to there determination of and assessment of damage under s. 236 in so far as analogies can be drawn
- Courts are careful to avoid drawing close analogies with particular common law and then applying those rigidly to all cases of similar nature
- Courts have cautioned against such an approach – made it clear that court should not give s.236 a restrictive interpretation due to fear to move

Wardley Australia Ltd v State of Western Australia, Mason CJ:

- Determining a plaintiff's economic loss or damages regarding misleading conduct, it is necessary to apply measures of damages
- Measures of damages recoverable coincide with measure of damages applicable in an action for deceit or in an for negligent misrepresentation
- Common law measures of damages will in many cases be an appropriate GUIDE but it will always be necessary to look at the provision with a view to ascertaining the existence of any relevant legislative instrument

- S.236 is not limited by the principles and monetary caps under the state and territory Civil Liabilities Act in terms of damages regarding negligence claims

Common law Principles

- Requisite elements of damages under the tort deceit and some key principles regarding assessment of damages
- To receive compensatory damages under common law, court must be satisfied, on a balance of probabilities that these elements are established
 1. Plaintiff has a cause of action – onus of proof on plaintiff
 2. Defendant has caused the plaintiff's loss – onus of proof on plaintiff
 3. Plaintiff's loss is not remote; and – onus of proof on plaintiff
 4. Plaintiff has mitigated, where appropriate, any loss – onus of proof on defendant

1. Cause of Action

- Plaintiff must establish he has a cause of action against the defendant
- Prove the following requisite elements of liability
 - ✓ D made false representation
 - ✓ D made the representation with knowledge that it was false or D was reckless or careless as to whether the representation was false or not
 - ✓ D made representation with intention that it be relied upon by P
 - ✓ P acted in reliance on the false representation
 - ✓ P suffered damage caused by reliance on false representation

2. Causation

- If cause of action established, plaintiff must prove his loss was in fact caused by defendant's wrong
 - i) causation of fact
 - ii) causation of law
- Causation of fact: applying common sense and experience to the facts - 'common sense' approach
- Causation of fact has an alternative test – 'but for' test – but for the defendant's wrong, would the plaintiff have suffered loss?

- ‘but for’ test heavily criticized and labeled as ‘inadequate and troublesome’
 - ✓ multiple sufficient causes
 - ✓ supervening casing in the form of *novus actus interveniens*; and
 - ✓ contributory negligence
- Despite the drawbacks of the ‘but for’ test – it is still used
- *Novus actus interveniens* - new cause or intervening event is one that is ‘ultraneous, unwarrantable, extraneous or extrinsic’
- *Novus actus interveniens* - new event was caused by a causally independent event that is by ordinary standards so extremely unusual as to be termed a coincidence
- Plaintiff’s loss can be caused by more than one defendant, such as, joint tortfeasors or by several tortfeasors
- Plaintiff can contribute to his own loss – contributory negligence
- Common sense approach to causation is that it is not reducible to a ‘test’ that can be applied across the spectrum of factual situations that arise from case to case
- Breach by defendant needs to be a cause but doesn’t need to be a sole cause of the loss or damage
- Breach by defendant must be a material contribution to the loss/ damage
- As long as the breach a materially contributed to the damage, a causal connection will ordinarily exist even though the breach without more would not brought about the damage
- Exceptional cases, where abnormal event intervenes between breach and damage – common sense approach – it might be that the breach was not the cause of the damage in these situations
- Reliance on the deceit is necessary to prove but doesn’t have to be the only reason why the plaintiff made a decision
- Causation of law is determined by considerations of policy factors and value judgments

3. Remoteness of damage

- If causation established, plaintiff must prove loss was not remote
- Remoteness of damage test
- Test requires that damages must be of a type that is reasonably foreseeable as a consequence of the wrong
- Direct causation test” was replaced by the ‘remoteness of damage test” because direct causation test allowed P to recover all damages caused by D’s wrongs
- Remoteness of damage test is considered as a controlling mechanism of claims damages arising from tort liability
- Courts have adopted an expansive view of what is reasonably foreseeable as a consequence of the wrong

4. Mitigation

- P had a duty to mitigate any losses from D’s wrongs
 - Failure to mitigate loss will result in a reduction in damages for P
- Duty to mitigate loss is based on an objective test
 - What a reasonable person would have done in the P’s circumstances
- Reasonable mitigation
 - does not require P to do what he cannot afford to do
 - does not require P to do what he will do if it is costly, complex or extravagant as where expenditure in mitigation would exceed the loss
- D’s cannot rely on P’s failure to mitigate the consequences of the D’s wrongful act when the wrongful act itself made it impossible P to take necessary steps to mitigation
- Cost of reasonable mitigation by P can b recovered, even in circumstances where the P’s intervention increased the loss

Assessment of damages

- Assessment of damages – place P back in the position he would have been in had the wrong not been committed
- Date of assessment is usually the date when the cause of action arises
 - Date of assessment rule is not universal

- Assessment must give solution to an injured P an amount in damages that is mostly fairly compensate him for the wrong suffered
- Award of damages, usually a lump sum only once – ‘once-and-for –all’ rule
 - Lump sum? Because the D should not have to answer more than once the consequence of the same act
- Exceptions to the once-and-for-all rule include where the tort of deceit is a continuing one
- Amount of damages is measured by the actual loss suffered by the P as a result of the deceit – includes compensatory damages for consequential loss
- Damages will also include losses in carrying on businesses flowing directly from the deceit and any expenses incurred as a result of the deceit
- Aggravated and exemplary damages may also be available

Section 236 – Actions for Damages

(1) If:

- (a) a person (the *claimant*) suffers loss or damage because of the conduct of another person; and
- (b) the conduct contravened a provision of Chapter 2 or 3;

the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.

(2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

- Section 236 similar to s. 82 CCA
- S.236(1) ACL – two elements to be satisfied
 1. a contravention of a provision in Ch 2 or Ch 3, and
 2. a person suffers loss or damage because of the conduct of another

Element One:

- Damages not available under s. 236(1) regarding unfair contract term provisions
- This is because a declared unfair contract term is not a contravention, whereas, s.236(1) requires contravention of a provision
- Damages not available for death or personal injury not resulting from smoking

Element two:

- A person suffers loss because of the conduct of another, courts have been guided by but not bound to common law principles

Statutory Principles

- Statutory principles in relation to damages under s. 82 CCA and s. 236 ACL
- Five discrete elements
 1. It identifies the legal norms for contravention of which the action under the section is given
 2. It identifies those by and against whom that action lies
 3. The section specifies the injury for which the action lies as the suffering of loss or damage
 4. It stipulates a causal requirement that the P’s injury must be sustained ‘by’ the contravention
 5. The measure of compensation is ‘the amount of’ the loss or damage sustained
- S. 236 creates both a right and remedy – allows claimant to commence proceedings against D and recover damages
- Under s.236 pleading must allege the damage suffered and that it was caused by contravention
- Claimant bears onus of proof of establishing contravention of Ch 2 -3 and that he suffered loss from contravening conduct of another
- Cause of action created by s. 236(1) cannot be voluntarily assigned and must be enforced by action by the person who suffers the loss or damage

Causation

- Causation in s.236 ACL is determined by the common sense approach – claimant can only recover compensation for actual loss or damage incurred NOT potential or likely damage
- To recover damages P must demonstrate reliance on misleading conduct if alleging breach of s. 18
- Proportionate liability is contained in Pt VIA of CCA and limited to a claim for damages under s. 236 for economic loss or damage to property which was caused by D for misleading or deceptive conduct in contravention of s. 18
- There is a single apportionable claim even if that loss is based on more than one cause of action
- No apportionment of liability under Pt VIA CCA if concurrent wrongdoer intentionally or fraudulently caused the economic loss or damage to property
- Proceedings of apportionable claim- D's liability as a wrongdoer is limited to an amount reflecting that proportion of loss which the court considers just, having regard to the extent of the D's responsibility for the loss or damage
- If D have reasonable grounds to believe that he is not the wrongdoer, D must give P written notice of certain information regarding the other person
- D cannot be required to contribute to any damages or contribution recovered from other wrongdoer in respect of the apportionable claim and cannot be required to indemnify any such wrongdoer
- Where the wrongdoer is not a party to the proceedings, P is not prevented from further claims for damages but is prevented from recovering damages greater than the actual loss or damage sustained
- Court will give leave to one person or joined D's involving an apportioned claim BUT court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim

Pt VIA CCA

- Prevents a person being vicariously liable for a proportion of an apportionable claim for which another person is liable
- Prevents a partner from being held severally liable with another partner for a proportion of a claim
- Affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim

Remoteness

- Courts apply both 'direct causation test' and 'reasonable foreseeability test'

Wardley Australia Ltd v State of Western Australia

Applied 'direct causation test'

- P entitled to recover damages for representation of prejudice or disadvantage which altered his position under inducement of misleading conduct or 'the actual damage directly flowing from' that conduct'
- Whether condition of foreseeability is applicable to claims of consequential damages in cases of negligent misrepresentation inducing the purchase of property, would apply for consequential damages under s.82(1) is a question that may be put to one side for present purpose
→ did not consider the reasonable foreseeability test

Henville v Walker

Reasonable foreseeability test

- Concept of remoteness in assessing damages in contract or tort and its relationship with causation, proper to read the term 'by' in s. 82 as including the concept of remoteness
- Here, remoteness, that is loss or damage, was not reasonably foreseeable even in a general way by the contravener

HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd

Remoteness of damage test can be based on different tests and will depend on particular facts of the case

- Analysis of the tests for remoteness of damage in contract, in tort and under s. 82 may make a difference on the particular facts of some cases

Mitigation

- Damage claim under s. 236 ACL for economic loss or damage to property maybe reduced if P fails to take reasonable care and D did not intend to cause the loss and did not fraudulently cause the loss
- Onus of proof on D to prove P failed to take reasonable care

Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 2)

- Obligation of party affirming contract to take reasonable steps to mitigate the loss resulting from the deceit
- Actual or imputed affirmation will probably be the point where it becomes unreasonable for consequential damages to continue if no steps to mitigate the loss are take or if affirmation of contract was not the reasonable course to have followed

Assessment

- Court should not restrict the exercise of its discretion by imposing upon itself technicalities which might defeat the policy of s. 236
- ACL is a fundament piece of remedial and protective legislation which gives effect to ‘matters of high public policy;
- S. 236 should be construed to give the fullest relief which the fair meaning of its language will allow
- The only task under s.236 is to identify the loss or damage suffered by P
- Representation can give rise to claim under s.236
 - For lost of benefit or loss of expectation only where there is an obligation to perform the representation– **Exceptional loss**
 - For loss of actual costs or wasted expenditure in certain circumstances where expectation loss is not available – **Reliance loss**
 - For loss of opportunity – **Loss of chance damages**
- S. 13 of ACL – similar to s.4K of CCA – loss or damage performs two functions in s. 236
 1. It refers to the injury which constitutes the wrong; and
 2. As a component of the phrase ‘the amount of any loss or damage’, it identifies the measure of compensation
- Any loss or damage includes reference to injury
- Context of the area of commercial conduct – loss or damage in s.236 includes economic or financial loss
- Under s. 236 in relation to occupational liability in breach of s. 18, will be limited to professional standards law of the state or territory
- Compensation for death or personal injury contained in Pt VIB of CCA, except for death or personal injury resulting from smoking

Part VI of CCA – s. 87F-87ZC

<ul style="list-style-type: none"> i. Rules of limitation periods ii. Limits on personal injury damages for non-economic loss iii. Limits on person injury damages for loss or earning capacity iv. Limits on personal injury damages for gratuitous attendant care services 	<ul style="list-style-type: none"> v. Assessment of damages for future economic loss vi. Damages for loss of superannuation entitlements vii. Interest on damages viii. Exemplary and aggravated damages and Structured settlements under s. 87
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Marks v GIO Australia Holdings Pty Ltd 1998

- Marks entered contract with GIO
- GIO said contract is for specific interest rate plus fixed margin of 1.25
- Specific interest rate was fine but the fixed margin was variable within the terms of contract
- Margin was increased from 1.25 to 2.25
- GIO informed Marks of change but Marks did not refinance and instead sued GIO for misleading conduct under s.52 TPA and sought damages under s.82 for increase of margin
- **First instance:** damages were awarded to marks
- GIO appealed and Marks cross-appealed
- **Full Federal Court held:** damages could be awarded under s.82 and s. 87 but only for ‘consequential’

loss not 'expectation' loss. Difference between fixed margin of 1.25 and variable margin was 'expectation' loss

- **High Court:** even though GIO breached s. 52, no damages awarded because Marks could not show he was placed in a 'worse position' caused by the loan
- Increased rate was substantially lower than any other rate offered in the market at the time
- Marks was not prejudiced or disadvantaged by increased rate
- Case does not demonstrate that party that was misled and had suffered loss or damage
- Mislead party does not suffer disadvantage unless it is shown that party could have acted in some other way which would have been of greater benefit or less detriment to it than the course in fact adopted
- Consequential loss could be suffered but it was not alleged
- Necessary to determine whether the value of what was acquired is less than what was paid
- **How is value assessed?** The value of what in fact was acquired is to be identified according to what price freely contracting and fully informed parties would have offered and accepted for it.
- Only if some alternative were available, that it can be said that the contract made was less valuable to the party that was misled than had been represented - then that a comparison of value can be made
- The contravening conduct has left the party that was misled no worse off than it was before the contravention occurred

Limited period

- Section 236(2) – cause of action under s.236(1) may be commenced at any time within six years after the day on which the cause of action that relates to the conduct accrued
- S. 236(1) requires two elements
 1. a contravention of a provision in Ch 2 or 3; and
 2. a claimant suffers loss or damage because of the conduct of another
- Question of when the claimant suffers a loss is a question of fact to be determined by the type of damage alleged and all of the circumstances of the case
- S.236(2) identical wording to s.28(2) CCA

Basic Principles

- S. 236(2) more procedural than substantive provision
- S.236(2) condition of the remedy instead of an element in the right and prerequisite to jurisdiction which cannot be waived
- It is not for P to assert compliance but for D to assert non-compliance as element for cause of action
- D must file and serve a limitation defense. P must prove cause of action accrued within the limitation period and onus is on D to establish the damage accrued happened at an earlier time or that the defense was made out for some other reason
- Cause of action is constituted by every fact that the P has to prove in order to support its right to recover the amount of loss
- Fraudulent concealment is not applied to limitation periods under s.236(2)
- P's unawareness of existence of his cause of action does not prevent it accruing; time runs during his ignorance
- Not appropriate to dismiss an application on the basis of being statute barred without resolving a factual dispute

Loss or Damage

- S. 236(1) loss or damages can be given 'no narrow meaning'
 - S. 13 ACL provides amount of any loss includes injury
 - Includes economic or financial loss
- P can only recover compensation for actual loss NOT for 'risk' of loss or 'prospective loss' or 'likelihood of loss'
- If loss is contingent, cause of action accrues when the loss crystallizes and becomes actual loss

- Not inconsistent with s. 236 that where conduct causes several discrete losses which occur at different times that the right to recover the amount for each loss only when the particular loss occurs
- S. 236(2) –may prevent P from suing for some losses that are statute barred but possible to recover others even though all losses arose from a single piece of breaching conduct

Murphy v Overton Investments Pty ltd 2004

- Murphy, a pensioner couple wanting to lease retirement home
- O lease offer obliged the M's to contribute to outgoings
- O made a periodical estimate of what outgoings would be and O would charge or credit tenant of any variances between estimate and actual cost
- After 2 yrs, O increased outgoings by 18.37%
- Lower courts: M did not prove they suffered loss – no damages
- High court: if person enters into a contract and it exposes them to contingent loss, there is no loss sustained until the contingency is fulfilled and loss becomes actual loss
- M's did not suffer loss at time of formation of contract but when O required M to pay full amount of the outgoings
- P claimed loss suffered at time of contract which was not the case because it was two years after when the outgoing was increased
- The increase was also under market value and P knew D was to determine the outgoing costs as stipulated in the contract
- Where a contingency is controlled by the D, accrual of loss will only arise where the D exercises its discretion to fulfill the contingency and actual loss or damage is suffered
- M did not suffer until the D charged for the outgoings, which were hidden b the D's initial misrepresentations
- His honours categorized this a 'contingency in the sense that the adverse risk might never have eventuated'
- M failed to show evidence of loss suffered and that if a full disclosure were to be made by the D's they would have negotiated more favorable lease
- NO damages awarded

HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd

- A sought advice from Mr. Deacon about current rental levels for retail shops
- A asked Mr. D whether HTW could advise
- HTW provided advice that rental levels were maintainable despite the fact that a new mall was being built
- A tried to sell the retail property later but no luck because devalued
- A sued HTW for advice relied upon
- Held: collapse in rentals was mainly due to new mall and HTW was negligent in failing to qualify its opinion by cautioning the effects of a new mall to A
- A awarded 355,000 and HTW appealed
- High Court: A suffered loss form point of entering contract
- This case is not similar to *Wardley* where the contract was a contingent loss or liability – there were no actual damages – here there was actual loss
- Not similar to *Murphy case* because there P's were induced to inter into a lease and an obligation to pay outgoings and whether the outgoings would increase was contingent – the contingency was hidden by D's conduct But here the risk of the catastrophic effect on rent levels which HTW did not alert A had already an impact on the property
- There was no contingency and it did not rest on any discretion therefore, damages awarded

Damages v Compensation orders

- Substantial difference between s.236 and s.237-238 for P

Section 236	Section 237-28
Allows compensation order	Allows compensation orders and remedial orders in

	s.243 such as recession, varying contracts and specific performance
applicable to breach of Ch 2-3	applicable to Ch 2-4
does not provide compensation for unfair contract	Remedies available where a declared unfair term is purported to apply or be relied on by a person
Right to full compensation of loss	Relief for injured person and MAY be awarded in whole or in part for loss
Creates right and remedy – “double function provision’	Does not create right Remedies are subject to court’s discretion
No discretion for awarding damages	Discretionary in nature <i>Finucane v NSW Egg Corp.</i> → powers under s.82 are be contrasted with the discretion authorized by s.87 of Act (237-238)
Orders made by court cannot prevent or reduce loss	Allows such orders
Only a person can claim compensatory claim	Person and ACL regulator on behalf of person
Requires P to have suffered loss	Does not require person or regulator to prove loss
Provides claimant with cause of action- claim the right to commence proceedings against D	s. 237- Provides no cause of action but provides right to make an application for claim
	s. 238 – no cause of action - person and regulator does not have a right to make an application for claim

237 Compensation orders etc. on application by an injured person or the regulator

(1) A court may:

(a) on application of a person (the *injured person*) who has suffered, or is likely to suffer, loss or damage because of the conduct of another person that:

(i) was engaged in a contravention of a provision of Chapter 2, 3 or 4; or

(ii) constitutes applying or relying on, or purporting to apply or rely on, a term of a contract that has been declared under section 250 to be an unfair term; or

(b) on the application of the regulator made on behalf of one or more such injured persons;

make such order or orders as the court thinks appropriate against the person who engaged in the conduct, or a person involved in that conduct.

Note 1: For applications for an order or orders under this subsection, see section 242.

Note 2: The orders that the court may make include all or any of the orders set out in section 243.

(2) The order must be an order that the court considers will:

(a) compensate the injured person, or any such injured persons, in whole or in part for the loss or damage;

or

(b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the injured person or any such injured persons.

(3) An application under subsection (1) may be made at any time within 6 years after the day on which:

(a) if subsection (1)(a)(i) applies--the cause of action that relates to the conduct referred to in that subsection accrued; or

(b) if subsection (1)(a)(ii) applies--the declaration referred to in that subsection is made.

➤ S.237(1) person suffered loss because of:

✓ The conduct of another person that has breached a provision CH 2-4

✓ Their conduct that constitutes applying or relying on, or purporting to apply or rely on, a term of a consumer contract that has been declared under s. 250 to be an unfair term,

➤ Can make an application to court for an order – order will be as the court thinks appropriate against person who engaged or was involved in the conduct

➤ S. 237(2) application under s.237(1) can be made anytime within 6 years after cause of action and when declaration on a consumer contract is made

➤ Entitlements to damages under s.236 is not a prerequisite to compensation under s. 237

- The fact that damages are not available under s.236 is no bar to relief under s.237

238 Compensation orders etc. arising out of other proceedings

(1) If a court finds, in a proceeding instituted under a provision of Chapter 4 or this Chapter (other than this section), that a person (the *injured person*) who is a party to the proceeding has suffered, or is likely to suffer, loss or damage because of the conduct of another person that:

- (a) was engaged in a contravention of a provision of Chapter 2, 3 or 4; or
- (b) constitutes applying or relying on, or purporting to apply or rely on, a term of a contract that has been declared under section 250 to be an unfair term; the court may make such order or orders as it thinks appropriate against the person who engaged in the conduct, or a person involved in that conduct.

Note: The orders that the court may make include all or any of the orders set out in section 243.

- (2) The order must be an order that the court considers will:
- (a) compensate the injured person in whole or in part for the loss or damage; or
 - (b) prevent or reduce the loss or damage.

- S. 238- Court allows as a result of a finding in favour of P during criminal or civil proceedings to make compensation or other remedial order as thinks appropriate
- Where person suffered loss because of:
 - ✓ The conduct of another person that has breached a provision CH 2-4
 - ✓ Their conduct that constitutes applying or relying on, or purporting to apply or rely on, a term of a consumer contract that has been declared under s. 250 to be an unfair term
- Court can make such orders or orders it thinks appropriate against person who engaged or was involved in the conduct
- Order under s.238 must be one that court considers will compensate injured person in whole or in part for the loss, prevent or reduce the loss
- Entitlements to damages under s.236 is not a prerequisite for s.238 – The fact that damages are not available under s.236 is no bar to relief under s.238

239 Orders to redress etc. loss or damage suffered by non-party consumers

(1) If:

- (a) a person:
 - (i) engaged in conduct (the *contravening conduct*) in contravention of a provision of Chapter 2, Part 3-1, Division 2, 3 or 4 of Part 3-2 or Chapter 4; or
 - (ii) is a party to a contract who is advantaged by a term (the *declared term*) of the contract in relation to which a court has made a declaration under section 250; and
- (b) the contravening conduct or declared term caused, or is likely to cause, a class of persons to suffer loss or damage; and
- (c) the class includes persons who are non-party consumers in relation to the contravening conduct or declared term; a court may, on the application of the regulator, make such order or orders (other than an award of damages) as the court thinks appropriate against a person referred to in [subsection \(2\)](#) of this section.

Note 1: For applications for an order or orders under this [subsection](#), see section 242.

Note 2: The orders that the court may make include all or any of the orders set out in section 243.

- (2) An order under [subsection \(1\)](#) may be made against:
- (a) if [subsection \(1\)\(a\)\(i\)](#) applies--the person who engaged in the contravening conduct, or a person involved in that conduct; or
 - (b) if [subsection \(1\)\(a\)\(ii\)](#) applies--a party to the contract who is advantaged by the declared term.
- (3) The order must be an order that the court considers will:
- (a) redress, in whole or in part, the loss or damage suffered by the non-party consumers in relation to the contravening conduct or declared term; or
 - (b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the non-party consumers in relation to the contravening conduct or declared term.
- (4) An application under [subsection \(1\)](#) may be made at any time within 6 years after the day on which:

- (a) if subsection (1)(a)(i) applies--the cause of action that relates to the contravening conduct accrued; or
- (b) if subsection (1)(a)(ii) applies--the declaration is made.

- S. 239(1) where person has breached a provision of
 - Ch 2 – misleading or deceptive conduct and unconscionable conduct
 - Pt 3-1 – false or misleading representations, unsolicited suppliers, pyramid schemes, pricing or other unfair practices
 - Pt 3-2 Div 2 – unsolicited consumer agreements, Div 3 – Lay-by agreements
 - Ch4 – offences, or
 - Where a person is a party to a consumer contract and is advantaged by a term in relation to which the court made a declaration under s.250 and
 - Contravening conduct or declared term caused or likely to cause loss or damage to a class of persons (includes non-party consumers), court may make orders to redress loss or damage suffered to non-party consumers as sees appropriate
- S. 239(1) application for order must be made by ACL regulator in accordance with s.242 and may include all or any orders in s.243
- Non-party redress under s.239 and application under s. 242, ‘enforcement proceedings’ and ‘non-party consumer’ are defined in s.2
- S. 239(2) provides that an order under s. 239(1) may be made against person who engaged or was involved in breach or an advantaged party to a declared unfair term
- S. 239(3) - order must redress in whole or part loss to non-party consumers or prevent or reduce loss or likely to be suffered
- S. 239(4) – application under s. 239(1) can be made within 6 yrs after cause of action or when declaration in a consumer contract is made

240 Determining whether to make a redress order etc. for non-party consumers

(1) In determining whether to make an order under section 239(1) against a person referred to in section 239(2)(a), the court may have regard to the conduct of the person, and of the non-party consumers in relation to the contravening conduct, since the contravention occurred.

(2) In determining whether to make an order under section 239(1) against a person referred to in section 239(2)(b), the court may have regard to the conduct of the person, and of the non-party consumers in relation to the declared term, since the declaration was made.

(3) In determining whether to make an order under section 239(1), the court need not make a finding about either of the following matters:

- (a) which persons are non-party consumers in relation to the contravening conduct or declared term;
- (b) the nature of the loss or damage suffered, or likely to be suffered, by such persons

- S. 240(1) determine whether to make an order under s. 239(1) – court may consider conduct of party breaching the ACL and of non-party consumers
- S. 240(2) – determining whether to make an order under s. 239(1) – consider conduct of party advantaged by a declared term and of non-party consumers
- S. 240(3) determining whether to make an order under s. 239(1) – court does not need to make a finding about
 - ✓ Which specific persons are non-party consumers to the contravening conduct or declared term; or
 - ✓ Exact loss or damage suffer or likely to be suffered by such persons

241 When a non-party consumer is bound by a redress order etc.

(1) A non-party consumer is bound by an order made under section 239(1) against a person if:

(a) the loss or damage suffered, or likely to be suffered, by the non-party consumer in relation to the contravening conduct, or the declared term, to which the order relates has been redressed, prevented or reduced in accordance with the order; and

(b) the non-party consumer has accepted the redress, prevention or reduction.

- (2) Any other order made under section 239(1) that relates to that loss or damage has no effect in relation to the non-party consumer.
- (3) Despite any other provision of:
- (a) this Schedule; or
 - (b) any other law of the Commonwealth, or a State or a Territory;

- S. 241(1) – non-party consumer is bound by an order under s. 239(1) if he accepts the redress, prevention or reduction of loss
- S. 241(2) – any other order made under s. 239(1) that relates to that loss has no effect in relation to the non-party consumer
- S. 241(3) – non-party consumer can only accept one order for redress and cannot make any other claim or demand against the person regarding the loss

242 Applications for orders

- (1) An application may be made under section 237(1) or 239(1) even if an enforcement proceeding in relation to the conduct, or the term of a contract, referred to in that subsection has not been instituted.
- (2) The regulator must not make an application under section 237(1)(b) on behalf of one or more persons unless those persons have consented in writing to the making of the application.

- S. 242(1) application by injured person or regulator seeking compensation order can be made even if enforcement proceedings have not been instituted – allows regulator to take action for redress for non-party consumer without previously taking other action regarding the breach of declared term
- S. 242(2) regulator cannot make an application under s. 237(1)(b) on behalf of person or person's unless the persons consent in writing to make an application

243 Kinds of orders that may be made

Without limiting section 237(1), 238(1) or 239(1), the orders that a court may make under any of those sections against a person (the *respondent*) include all or any of the following:

- (a) an order declaring the whole or any part of a contract made between the respondent and a person (the *injured person*) who suffered, or is likely to suffer, the loss or damage referred to in that section, or of a collateral arrangement relating to such a contract:
 - (i) to be void; and
 - (ii) if the court thinks fit--to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- (b) an order:
 - (i) varying such a contract or arrangement in such manner as is specified in the order; and
 - (ii) if the court thinks fit--declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- (c) an order refusing to enforce any or all of the provisions of such a contract or arrangement;
- (d) an order directing the respondent to refund money or return property to the injured person;
- (e) except if the order is to be made under section 239(1)--an order directing the respondent to pay the injured person the amount of the loss or damage;
- (f) an order directing the respondent, at his or her own expense, to repair, or provide parts for, goods that had been supplied by the respondent to the injured person;
- (g) an order directing the respondent, at his or her own expense, to supply specified services to the injured person;
- (h) an order, in relation to an instrument creating or transferring an interest in land, directing the respondent to execute an instrument that:
 - (i) varies, or has the effect of varying, the first mentioned instrument; or
 - (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first mentioned instrument.

- S. 242 – provides non-exhaustive list of redress but does not limit orders that can be made under s. 237(1), s.238(1) or s. 239(1)

- S. 242 referred to as 'remedial smorgasbord'

Akron securities Ltd v Iliffe, Mason J

- S. 242 – wide discretion
- 'court must consider all circumstances before it in the exercise of its discretion
 - ✓ Reg Russell & Sons Pty Ltd v Buxton Meats Pty Ltd, Ipp JL → court has wide discretion...in exercising discretion court will take into account whether there is a causal link between the loss by P, whether and to what extent the P is the author of his own misfortune, and whether another remedy is or was available to recover the loss in question
- No point in having a remedial smorgasbord if the table is not scanned at least briefly to see what is best on offer
- This is not to demand trial judge to provide evidence of their picks
- The onus for establishing judicial error on exercising discretion is on the disappointed P

Awad v twin Creeks Propoerties Pty Ltd, Allsop P:

- Should not be bound by common law principles in contract, tort or equity
- Should be viewed not by reference to general law analogues by reference to the rule of responsibility in the statute that is directed against misleading and deceptive conduct
- Responsibility is the public policy of protection of people in trade and commerce from being misled
- Whether or not to grant rescission or limit P to damages is a question in the nature of a discretion to be approached by the reference to the facts of the case, policy, underpinning of the statute and the evaluative assessment of what is the appropriate relief to compensate for, or to prevent the likely suffering of los or damage by the conduct
- Approach that is limited mechanically around a but for causation enquiry will be likely not to involve a full evaluative assessment of the appropriate relief

- Court can make any or all orders under s.243 and also make these orders in addition to injunctions, damages, non-punitive orders, adverse publicity orders and disqualification orders

I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd

- Appropriateness of seeking a remedy
- In Akron illustrates that there are cases where a monetary remedy is not available or appropriate – the remedial smorgasbord will assist the court in obtaining a just result
- In some cases it may be necessary to have orders under s. 87 (s.243) and s. 82 (S.236) to compensate P
- **Kinbeau Pty Ltd v WG & B Pty Ltd** → supplemented award using both s.87 and s.82

- Restitution, accounts of profits, exemplary damages and other deterrent and punitive remedies cannot be sought under s.243 because they are not compensatory in nature
- What can be sought under s. 243 → see legislation box for s.243 list

Section 243(a) ACL

- Court make order declaring the whole or part of contract made between D and P
 - ✓ Void; and
 - ✓ If court thinks fit, have been void *ab initio* or void at all times on and after such date as is specified in the order
- Loss suffered under s. 243(a) is from breach of conduct or involvement of the D or by collateral arrangement

TPC v Milreis Pty Ltd

- S. 87(2)(a) does not require the declaratory power to be understood as other than a familiar judicial power to make a declaration consonant (in agreement with) with the legal status of the contract
- It will operate to confer a power to make a declaration in accordance with the legal validity of the contract determined in accordance with the ordinary rule
- CONTRACT CAN ONLY BE VOID IN LIMITED CIRCUMSTANCES
- DEANE J added: court's power to make an order is independent in its operation to the other substantive provisions of the TPA
- Power to grant ancillary declaratory relief is neither textually connected with s. 45(2) nor limited to declarations of invalidity resulting from the provisions of that sub-section
- Once the decision is made that this power is declaratory in the ordinary sense and does not add to or detract from the operation of the substantive provisions of the Act, it becomes apparent that the provisions and operation of s. 45(2) are independent of the existence or validity of it

Webb Distributors (Aust) Pty Ltd v State of Victoria

- Made it clear that s. 87(2)(a) is not to be understood as conferring a power to declare void a contract which was valid at its inception, other than through the operation of some other provision of the TPA or by reason of some alteration in circumstances

- Within s.243- words 'loss or damage' are given ordinary meaning and are interpreted to mean no more than the disadvantage which person suffered
 - ✓ It does not involve any concept of quantum or assessment of damages

Demagogue Pty Ltd v Ramensky

- Black J: quantum or assessment of the loss suffered in monetary terms which must be demonstrated.. rules to assessment of damages in an action for deceit are relevant under s. 82 (s.236 ACL) but those rules are not relevant to the meaning of the phrase in s.87(2)

- S.243(a) does not explicitly refer to remedy of rescission but to declare the entire contract void has the same effect as rescinding a contract

Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)

- Lockhart J: court is not restricted by the limitation under the general law of a party's right to rescind for breach of contract or misrepresentation
- At general law the question is to determine whether to allow restitution are 'whether restitution in integrum is substantially possible and whether rescission is timely and just and fair'
- Court must consider all circumstances before exercising discretion
- Court will be more open to granting rescission when innocent party has been induced by fraud – the rescission will deny the D the benefit of the fraud at the expense of the innocent party

- Common law principles of rescission area guide for the court
- **Akron Securities Ltd v Iiffe** → court is not restricted by the limitations under the general law upon a party's right to rescind for misrepresentation. The power conferred by s.87 to make such order or orders as the court thinks appropriate...remedy of rescission for innocent misrepresentation are clearly available to give guidance in the exercise of the statutory discretion

Section 243(b) ACL

- Similar to s. 87(2) CCA- courts can make an order varying a contract or arrangement in such manner specified in the order
- If court considers appropriate, it can declare contract or arrangement to have had effect as so varied on the date as specified in the order

- Word “such” relates to contracts or arrangements which are declared void under s. 243(a)
- Power to vary contracts in s. 243(b) enables courts to prevent failure of contracts declared void under s. 243(a)
- This allows courts to interfere with the terms of the contract as it sees appropriate to compensate P
- Under common law – court cannot vary terms of contract whereas its permitted under s. 243(b)
- S. 243(b) – not bound by principles of common law or equity, although the variation order can only be made if it compensates the P
- **Pont Data Australia Pty Ltd v ASX Operations Pty Ltd** – extreme wide power in s. 87(2) – discretion is unlimited but the courts would not justify varying a contract beyond the extent necessary to provide a result that conforms with the Act and is reasonable between parties

Section 243(c) ACL

- Similar to s. 87(2)(ba) of TPA – court can make order to refuse to enforce any or all of the provisions of a contract or arrangement
- **Demagogue Pty Ltd v Ramensky**, Black J: contract causes loss to P, such an order has consequential effect of releasing the innocent from the obligations imposed by the contract. To provide compensation, it is the obligations imposed by the contract which the order seeks to redress
- If the court enforces the whole contract to be void, the injured person will return to the position prior to the contract being made

Section 243(d) ACL

- Court can make order that directs the D to refund money or return property to P
- Separate remedy but is complementary to s. 243(c) in the sense that an unenforceable contract usually requires the D to refund money or property
- **Karmot Auto Spares Pty Ltd v Dominelli Ford (Hurstville) Pty Ltd**, Heerey J: express power to order a refund or return property is not conditioned on a finding that the contract under which the money was paid has been rescinded, nor is it in terms necessarily excluded where there has been conduct which might amount at common law to an affirmation of that contract.
 - Provision should not be read down to conform to common law
- Discretion of court is to make an order against the person who received the money, it is only that person who may be ordered to refund it.

Section 243(e) ACL

- Similar to s. 87(2)(d) TPA – court can make an order directing the D to pay compensation to the injured for amount of loss or damage
- Phrase ‘loss or damage’ in s. 243(e) same meaning as in s. 243(a) and the principles in relation to assessment of damages in s. 236 largely overlap with s. 243(e) but there are a number of differences between awards under s.236 and s.243(e)

Section 243(f) ACL

- Similar to s. 87(2)(e) TPA – court can make an order that directs the D at his own expense to repair or provide parts for goods supplied to the P
- Does not explicitly refer to the remedy of specific performance, an order to direct the D to repair or provide parts has the same effect as specific performance

Section 243(g) ACL

- Similar to s. 87(2)(f) – court makes order that directs D at own expense to supply specified services to P
- Does not explicitly refer to the remedy of specific performance, an order to direct D to supply specified services has the same effect as specific performance
- **Angelatos v National Australia Bank**, Branson J: rule that ordinarily specific performance will not be granted when the contract is one to lend money does not necessarily restrict the powers of a court under s. 87 to frame such order as the section envisages, however, court will no doubt take into account those principles which lie behind ordinary rule

Section 243(h) ACL

- Similar to s. 87(2)(g) – court can make an order in relation to an instrument creating or transferring an interest in land, directing the D to execute:
 - ✓ An instrument (second instrument) that varies, or has the effect of varying the forest mentioned instrument; or
 - ✓ An instrument (second instrument) that terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation of effect of the first mentioned instrument
- **Juice Station Franchising Pty Ltd (In liq) v Konidaris**, Gzell J: declined to make an order retrospectively varying a franchisee agreement in such a way as to allow the applicants to retain possession of the franchise, his honour thought that damages were more appropriate under the given circumstances

244 Power of a court to make orders

A court may make an order under Subdivision A or B of this Division whether or not the court:

- (a) grants an injunction under Division 2 of this Part; or
- (b) makes an order under section 236, 246, 247 or 248.

- Court can make a compensation order under s. 237 and s.238 or an order for non-party redress under s. 239 whether or not the court has:
 - ✓ Granted an injunction under s.232 (injunctions), 233 (consent injunctions) or 234 (interim injunctions); or
 - ✓ Made an order under s.236 (actions for damages), 246 (non punitive orders), 247 (adverse publicity orders or 248 (disqualification orders)

245 Interaction with other provisions

Subdivisions A and B of this Division do not limit the generality of Division 2 of this Part.

- Powers relating to compensatory orders in s.237-241 – do not limit the generality of the injunctive powers under the ACL

Declarations

- Declaration is a court order that proclaims (declares) the respective rights and obligation of a party or parties in legal proceedings. It is made for the purpose of resolving legal issues
- Declaration is granted as final relief
- Intended to state the rights of the parties with respect to a particular matter with precision, and in a binding way
- Declarations have expended and can be made independent of any other remedy
- Provisions that grant court power to make declaration
 - ✓ Section 163 CCA
 - ✓ S. 243(a) ACL
 - ✓ S. 250 ACL- unfair contract terms
 - ✓ S. 21 Federal Court Act 1976

Section 163A CCA

Declarations and orders

(1) Subject to this section, a person may, in relation to a matter arising under this Act, institute a proceeding in a court having jurisdiction to hear and determine proceedings under this section seeking the making of:

(a) a declaration in relation to the operation or effect of any provision of this Act other than the following provisions:

- (i) Part V;
- (ii) Part XIB;
- (iii) Part XIC; or

(aaa) a declaration in relation to the operation or effect of any provision of the Australian Consumer Law other than Division 1 of Part 3-2 or Part 5-4; or

(aa) a declaration in relation to the validity of any act or thing done, proposed to be done or purporting to have been done under this Act; or

(b) an order by way of, or in the nature of, prohibition, certiorari or mandamus; or both such a declaration and such an order.

(1A) [Subsection](#) (1) does not apply in relation to a matter arising under Part IIIAA.

When Minister may institute, or intervene in, proceedings

(2) Subject to [subsection](#) (2A), the Minister may institute a proceeding under this section and may intervene in any proceeding instituted under this section or in a proceeding instituted otherwise than under this section in which a party is seeking the making of a declaration of a kind mentioned in [paragraph](#) (1)(a) or (aa) or an order of a kind mentioned in [paragraph](#) (1)(b).

(2A) [Subsections](#) (1) and (2) do not permit the Minister:

(a) to institute a proceeding seeking a declaration, or an order described in [paragraph](#) (1)(b), that relates to Part IV; or

(b) to intervene in a proceeding so far as it relates to a matter that arises under Part IV.

When Commission may institute proceedings

(3) The Commission may institute a proceeding in the Court seeking, in relation to a matter arising under this Act, the making of a declaration of the kind that may be made under [paragraph](#) (1)(a).

- ‘any person’ can apply for a declaration but the court cannot make a declaration ‘divorced from any attempt to administer the law’ – cant divert from the law
- **Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd**, Gummow J: it is a power to be enjoyed by each member of an innominate and universal class to hold the D liable. It is not only for members who suffer an injury but injury to the public interest in observance of the requirements of the Act
- While it says ‘any person’ the court will refrain from making a declaration if the person doesn’t have a “real interest’ in the matter

Jurisdiction of the court to make a declaration

- **Bray v F Hoffman-La Roche Ltd**, Branson J: courts jurisdiction includes jurisdiction to hear and determine not only the applicant’s claim but also her claim for declaratory relief. S. 163A TPA is an alternative conferral of jurisdiction on the court in respect of the subject matter. It is not necessary to reach a concluded view as to the effect of s.163A so far as the court’s jurisdiction generally in this proceeding.
- **Tooth & Co Ltd, Re**, Bowen CJ and Franki J: because of the terms of Chapter III of the Constitution, court can only validly be given jurisdiction where is a ‘**matter**’. This requirement is reflected in s. 163A, which confers jurisdiction ‘**in relation to a matter arising under the Act**’
 - ✓ Where jurisdiction is found to exist... it is...a matter within the discretion of the court
 - ✓ Court have general power to make declarations of right in relation to matters in the original jurisdiction but this power is exercisable only when the court already has jurisdiction in the matter and does not confer original jurisdiction as does s. 163(a)
- Power to make a declaration is discretionary power and the same principles that apply to making a declaration under s. 21 of the Federal Court of Australia apply to s. 163A
- The scope is limited by the words ‘in relation to a matter arising under this Act’
- **Polgardy v Australian Guarantee Corp Ltd**, Toohey J: declined to make a declaration in relation to the rescission of a hire purchase agreement
 - ✓ **Section 163A** empowers the court to express a view of the validity of any act or thing done under the Act. At all times the court’s jurisdiction is controlled by the words ‘in relation to a matter arising under the Act’
- Section 163A(1)(a) person in relation to issue arising under CCA may apply for declaration in relation to the operation and effect of the provision of the CCA and the ACL (S. 163A(1)(aaa)), exempt to ACL provisions in Pt 302 Div 2 and Pt 5-4
- S. 163A(1)(b) permits person under CCA to apply for an order by way of, or in the nature of, prohibition, certiorari or mandamus

- S. 163A(3) – permits ACCC, in relation to a matter arising under the CCA, to apply for a declaration under s. 163A(1)(a) in relation to the operation or effect of certain provisions of the CCA
- BUT s. 163 DOES NOT explicitly permit the ACCC, in relation to a matter arising under the CCA, to apply for a declaration under s. 163A(1)(aaa)
- However, such a provision may be unnecessary, given the ACCC can, and does, seek declarations for ACL matters in the original jurisdiction in the Federal Court under s. 21 of the FCA

250 Declarations relating to consumer contracts

- (1) A court may, on the application of a party to a consumer contract or on the application of the regulator, declare that a term of such a contract is an unfair term
- (2) Subsection (1) does not apply unless the consumer contract is a standard form contract
- (3) Subsection (1) does not limit any other power of the court to make declarations

- S. 250(1) ACL – court may declare a term in a consumer contract to unfair
 - ✓ Declaration can be made by the court on application of a party to the consumer contract or by the ACL regulator
- Important: access to other remedies that a declared unfair term is not a contravention of the ACL, it is for this reason that damages under s. 236 ACL cannot be sought
- S. 236 – only when the conduct contravenes a provision of Ch2-3
 - ✓ However, certain other remedy provisions contain specific reference to unfair contract terms and allow for relief
- Remedies are available only after court declares a term unfair under s. 250 and where a person continues to apply or rely or purports to apply or rely on, that term:
 - ✓ An injunction s. 232
 - ✓ A compensation order s. 237; and
 - ✓ An order for non-party redress s. 239
- Only a court can declare a term to be unfair and when it does, the D should remove or vary the declared term immediately, otherwise it will expose itself to possible further litigation
- S. 250(2) – court cannot make a declaration under s.250(1) unless the consumer contract is a standard form contract – consistent with operative in s. 23
- S. 250(3) – declaratory power s. 250(1) does not limited in any way any other power of the court, including the power under s. 163A CCA, to make declarations
- State and territory fair trading laws have separate requirements for seeking a declaration under s. 250 ACL
- The power to make a declaration under s.250 is a discretionary power and the same principles under s. 21 FCA which likely apply to s.250

Section 21 FCA

Declarations of right

- (1) the Court may, in civil proceedings in relation to a matter in which it has original jurisdiction, make binding declarations of right, whether or not any consequential relief is or could be claimed
- (2) a suit is not open to objection on the ground that a declaratory order only is sought

- s. 21(1) Federal has original jurisdiction to make declaration for civil proceedings
- FC can make declarations under s.21(1) regardless of whether or not any other equitable remedy or consequential relief is claimed or could be claimed
- S. 21(2) – no objection can be made by any person to FC about court’s jurisdiction on the basis that the declaration is the only order sought
- FC has wide discretionary power and it is clear to make declarations regarding ACL

Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organizations Inc (No 2), Hill J

- Declaratory decree cannot be made unless there be a right to consequential relief capable of being had in the same court or in certain cases in some other court
- Jurisdiction limitations on the power to grant declaratory relief are nor more extensive than the

limitations applicable to the power to grant declaratory relief exercisable by a court under a judicature system

- Jurisdiction has been said to be a ‘very wide one’
- Power of the court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited

- Despite the wide power, it is unlikely that a declaration will be made by the court unless three requirements are satisfied
 1. Question must be real and not a hypothetical or theoretical one
 2. The applicant must have a real interest in raising the question and obtaining the relief sought
 3. There must be a proper contradictor

1. Question must be Real

- Declaratory relief must be directed to the determination of ‘legal controversies’ and not to answer ‘abstract’ or ‘hypothetical’ questions
- Declaratory relief unlikely granted if:
 - ✓ In relation to circumstances that have not occurred and might never happen;
 - ✓ If the court’s declaration will produce on foreseeable consequences for the parties
 - ✓ If the court’s declaration has no utility
 - ✓ In the absence of a context on the question; and
 - ✓ In the absence of a dispute in existence

2. Real Interest in relief

- Person seeking relief must have a ‘real interest’
- Real interest –requires the P to establish a sufficient interest in the subject matter of the dispute
- Usually satisfied if private right of P has been interfered with
- In rare circumstances, real interest will be satisfied if the contravening conduct interferes with public rights

Public interest in relief

- In ACCC proceedings, Federal court will consider public interest, including the role of the ACC in enforcing the CCA and ACL
- Declarations
 - ✓ Appropriate in cases that involve public interest and will justify the ACCC’s claim of that the D breached the ACL
 - ✓ Assist the ACCC in the future in carrying out its duties conferred on it by the CCA
 - ✓ Appropriate vehicle to record the court’s disapproval of contravening conduct
 - ✓ Deter other corporations from breaching the ACL
 - ✓ Often warranted for public interest and protecting Aussie consumers from contravening conduct of ACL
 - ✓ Declarations, if made, are declarations of right because the right declared is a public rights, that is, the right of the public not to be a victim of the contravening conduct
 - ✓ Used to inform consumers of the dangers posed by D’s contravening conduct
- **IMF (Australia) Ltd v Sons of Gwalia Ltd (admin apptd)**, French CJ:
 - ✓ A party whether a private person or body or a statutory regulator, expresses opposition to, and an intention to oppose, a proposed course of action by another party on the basis that it is in breach of some contractual or statutory prohibition
 - ✓ Party opposing the conduct may not contest declaratory proceedings about the lawfulness so the declaration may be made by consent or be uncontested

Other discretionary factors

- Remedy of declaration is not appropriate way of recording in a summary form, conclusions reached by the court in reasons for judgment
 - ✓ Even stronger when conclusion is not one from which an right or liability necessarily flows

- Mere declaration of contravention of a particular provision is a ‘bad precedent’
- Declaration should contain some indication of how and why the conduct complained of is a contravention
- Courts declined to make a declaration in circumstances where multiple declarations that overlap are sought
- **ACCC v Virgin Mobile Australia Pty Ltd (No 2)**, French J:
 - ✓ Not necessary to make multiple declarations for multiple contraventions
 - ✓ Multiple remedies run the risk of devaluing the importance of remedies
 - ✓ There should be an appropriate relief not necessarily multiple remedies for relief
- **ACCC v Danoz Direct Pty Ltd**, Dowsett J:
 - ✓ Declaration is a recent remedy
 - ✓ Courts are jealously protective of it, resisting attempts to resort to it where there is no real dispute to be resolved
 - ✓ Must ensure that this very useful device is not deprived of its efficacy by over-use or inappropriate use
 - ✓ Doesn’t mean that declaration is inappropriate
 - ✓ But it is important that any declaration be framed so as to convey a limited and accurate message to those who have an interest in its subject matter
 - ✓ More effective form of declaration will accurately reflect the impugned conduct in a concise way
 - ✓ Complete accuracy is essential

Consent declarations

- As a general principle, a court does not make declarations on matters relating to public rights by consent or on admissions, unless it is satisfied by evidence
- Statement of agreed facts is ‘evidence’, as ‘evidence’, not requires to prove existence of an agreed fact
- Where declaration is agreed by consent of parties, the general principles of consent orders become relevant
- **ACCC v McCaskey**, French J:
 - ✓ Approach of court to making consent orders is informed by a general principle of judicial restraint
 - ✓ Not the job of the court to obstruct settlements between parties who have lawyers and understand and evaluate the desirability of agreeing to the settlement
 - ✓ Nor will the court refuse to give effect to the terms of a settlement by refusing to make orders or accept undertakings where they are within jurisdiction and otherwise unobjectionable
 - ✓ Court will not substitute orders which it thinks appropriate if those proffered are within power and within range of appropriate dispositions of cases
 - ✓ But in making orders, court must ensure that the orders are within power and appropriate for its exercising a public function in doing so and must have regard to the public interest
- Consent declarations are unlikely to be made by courts in circumstances where they may effect the non-consenting parties