Contracts

Seminar 12 - Vitiating Factors:
Misrepresentation, Misleading &
Deceptive Conduct and
Unconscionability

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Slight rearrangement for weeks 12 - 14:

Today we’ll cover misrepresentation, misleading & deceptive conduct and unconscionability.

Next week – Illegality, remedies and exam preparation tips

Class participation – it’s still not too late to get your marks up!

Any questions?
Vitiating factors
A quick reminder about vitiating factors.

These are extraneous influences that impact upon the formation and/or the terms of the contract and include:

- Undue influence
- Duress
- Mistake
- Misrepresentation (misleading & deceptive conduct)
- Unconscionability
- Illegality
- Legislation

Today we deal with misrepresentation, misleading & deceptive conduct & unconscionability
There are common law and equitable causes of action for misrepresentation. What are they?

In addition, s.18 of the Australian Consumer Law (ACL) (Sch 2 of the Competition and Consumer Act 2010) also provides statutory protection against a broader category of behaviour called misleading and deceptive conduct which includes misrepresentation. (cf s 54 Trade Practices Act 1974)

The ACL only covers misleading and deceptive ‘conduct’ by ‘persons’ (can include a body corporate) in ‘trade and commerce’ for consumer contracts of less than $40K so the common law and equity are still relevant to those circumstances not covered by the legislation.

Surf board? Toaster? Golf buggy?

We will look at the common law first....
Misrepresentation

A **REPRESENTATION** is a statement (orally or in writing or which is implied from words or conduct (see *Given v Pryor* (1978) 39 FLR 437)

- Made by the representor
- That *induces* the other party to enter into the contract
- That is *not* a term of the contract

**MISREPRESENTATION** is a false representation of past or present fact

For example, LawnsRus tells you they have just been appointed as the preferred lawn mowing contractor by the council when you are negotiating your big mowing contract. It turns out not to be true, they just said that to try an get you to sign up.

Whether a misrepresentation is actionable is determined by many factors which we will now consider....
Misrepresentation as a term of the contract....

But firstly it is important to distinguish misrepresentations from terms of the contract.

How can you tell if a misrepresentation made before the contract is formed is a term?

- Is contract is entirely written?
- Was proper notice given?
- Can the term be implied?

What is the appropriate cause of action if the misrepresentation is a term of the contract?

If the misrepresentation merely induces the contract and does not become a term, the remedies differ according to the nature of the misrepresentation. Note: we have considered in previous seminars remedy for breach of contractual term. Someone please remind us please?

We therefore need to look at the different categories of misrepresentation in turn.
Categories of misrepresentation (3 types)

**Innocent misrepresentation (low end of moral scale)**
- Honest and mistaken belief
- Common law = no remedy (no damages)
- Equity = rescission, representor cannot get specific performance
- Statutory rights of compensation

**Fraudulent misrepresentation**
- Knowing it to be false
- Recklessly and without caring if it is true or false
- Remedy = rescission **plus**
- Common law = damages (tort = deceit)

**Negligent misrepresentation**
- Holding out as having particular expertise Duty; Breach; Cause
- Realised reliance and trust
- Advice incorrect due to negligence
- Remedy = rescission **plus**
- Common law = damages (tort = negligence)
Elements of actionable fraudulent misrepresentation

- False statement of fact at or before the time of contract formation
  - Some sort of positive statement or conduct, generally NOT silence
  - About a past or present fact - this requirement serves to exclude mere puffs, statements of opinion or future intent and representations of law – see eg. Fitzpatrick v Michel (1928)
  - Honest belief is a complete answer to a charge of false representation (cf ACL).

- Addressed to the party that has been misled
  - Otherwise affected parties (Third Parties) cannot recover. If you overhear a misrepresentation then you cannot sue!

- Reliance and inducement
  - Intends to and actually induces the contract (subjective test).

- Harm – damages have to reflect harm which resulted from the misrepresentation.

These apply across all the categories of misrepresentation.
When can silence become a misrepresentation?

- In *Davies v London & Provincial Marine Insurance Co* (1878) 8 CH D, the court said:
  
  ‘if a statement has been made which is true at the time, but which during the course of the negotiations becomes untrue, then the person who knows that it has become untrue is under an obligation to disclose to the other the change of circumstances...’

- Contracts of Insurance are classified *uberrimae fidei* (of utmost good faith) and there is a general obligation to disclose the material facts as per section 21(1) of the Insurance Contracts Act 1984 (CTH).

- Contracts of guarantee are not contracts *uberrimae fidei*, but there is a limited duty to disclose (on creditors).

- Fiduciary relationships give rise to a full duty to disclose - *McKenzie v McDonald*. 
Statement of opinion as a misrepresentation

A statement of opinion is generally not considered to be capable of supporting an action for misrepresentation.

However there is sometimes a blurry line between what is an opinion and what is a statement of fact, particularly where facts are particularly within the knowledge of the person expressing the opinion in the sense that an opinion may imply a statement of fact.

*Smith v Land and House Property Corporation* (1884) LR 28 Ch D 7 is an English contract law case, concerning misrepresentation in which it was held that a statement of opinion can represent that certain facts exist, and therefore can be classified as actionable misrepresentation.
Smith v Land and House Property Corporation
(1884) LR 28 Ch D 7

FACTS

- Land and House Property Corp (LHP) (as buyer) contracted with Mr Smith (as seller) to buy the freehold title of the Marine Hotel at Walton-on-the-Naze.
- Mr Smith had advertised that it was let to Mr Fleck, who was “a most desirable tenant” (ie the statement of opinion).
- Land and House agreed to buy the Hotel however Mr. Fleck, who had been overdue with rent, went bankrupt just before transfer of title.
- Land and House Property Corp. refused to complete the transaction.
- Smith sued for specific performance and the suit was defended on the basis that the description of Fleck's "virtues" was grounds for misrepresentation.
Held

Bowen LJ held there was a misrepresentation and that statements of opinion can often involve statements of facts, because, "if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion."

In his lordship’s opinion the landlord "avers that the facts peculiarly within his knowledge are such as to render that opinion reasonable." And it "amounts at least to an assertion that nothing has occurred in the relations between the landlords and the tenant which can be considered to make the tenant an unsatisfactory one... In my opinion a tenant who has paid his last quarter’s rent by driblets under pressure must be regarded as an undesirable tenant."

Given that the misrepresentation did induce the LHP to enter the contract initially, Mr Smith was not entitled to specific performance of the contract.
In *Smith v Land and Housing Property Corporation*, the statement of opinion was about the current status of a tenant and implied a representation that this opinion was based on current and/or past facts (ie that the tenant was in fact in arrears of rent). The vendors statement implied that he had grounds that justified his opinion.

Compare this against a person who has no belief about the age of a house - ie I believe the house if 10 years old – there is a misrepresentation about the persons belief not an implied representation about the age of the house.
Opinion about future events

Where the opinion is about a future state of affairs the situation will be different as long as the opinion is honestly held as the court found in *Fitzpatrick v Michel* (1928)....
Fitzpatrick v Michel (1928)

FACTS
Fitzpatrick leased a block of flats under a five-year contract from Michel. The agreed rent was £40/week for the first six months and £45/week for the remainder of the five-year lease. Fitzpatrick brought an action against Michel for fraudulent misrepresentation regarding two separate matters:

1. One of the flats had already been leased to a Mr Rich for three years at 6 guineas/week
2. Five of the flats that had water views would bring 6 guineas/week, and the others 5 guineas/week.
HELD

The court was asked to take the view that the representations with regard to the rentals were matters of opinion only. But an expression of opinion, as the authorities show, always involves some statement of fact - ie that the opinion is actually held by the person expressing it. However, statements regarding the future cannot be factual in the same way as present facts.

To prove a breach of warranty that the flat could be let for 6 guineas, it would be enough to show that there was no one willing to pay that rent.

Honesty of belief in the truth of a warranty is no defence, whereas it is a complete defence to a charge of false representation. If a statement is an honest expression of opinion, honestly entertained, it cannot be said that it involves a fraudulent misrepresentation of fact.
“A jeweller may state that a ring is gold either as an expression of opinion or as a statement of fact. The fact that it is or is not gold is an existing fact, and if he knows that it is not, he is guilty of misrepresentation. But I doubt whether any statement that something will happen in the future can in the same sense be a statement of fact.”

“If a statement is an honest expression of opinion, honestly entertained, it cannot be said that it involves a fraudulent misrepresentation of fact.”
Opportunity to verify the representation

What happens when a misrepresentation is made but the representee has the opportunity to check whether the representation is true or not?

This question was considered on the old English case of *Redgrave v Hurd*...
Redgrave v Hurd (1881)

COURT OF APPEAL - Rescission for misrepresentation

FACTS
During negotiations for the sale to Hurd of his house and legal practice, Redgrave misrepresented the gross earnings of the practice as being £300 to £400 per year. Hurd later inspected summaries of receipts accounting for only £200.

He was referred to other papers as showing the remainder, but he did not examine them.

When he discovered the truth he refused to complete the purchase.
HELD
Hurd was entitled to an order rescinding the contract and returning the deposit.

RATIO
The mere fact that a party had the opportunity of investigating whether a representation was true or false, was not sufficient to deprive him of his right to rely on it.
To avoid rescission, the onus of proof was on the maker of the misrepresentation to show that the other party knew it was untrue or did not rely on it. This had not been shown in the present case.
Reliance and inducement

Should the misrepresentation to be actionable be “material” in the sense that it would induce a reasonable person to enter into the contract.

In Nicholas v Thompson [1924] the Supreme Court of Victoria ruled that a statement doesn’t need to be material.

If the representor intended for the representee to act on the representation and representee was in fact induced into acting on it then that’s it – “sufficient”.

Note for negligent misstatement the misrepresentation has to be material (ie it’s a reasonable person test)
Nicholas v Thompson [1924]

FACTS
Nicholas purchased an interest in a speculative venture – a new film process - from Thompson. He claimed that he had been induced to do so by a fraudulent misrepresentation that Thompson had been offered, and had refused, a very large sum of money for his interest.

HELD
Nicholas was entitled to rescission of the agreement and return of the price.
It was doubtful whether it was an essential part of the cause of action that the representation was a material statement (likely to induce an ordinary reasonable man as distinguished from the particular plaintiff in this case), but in any event materiality was proved where it was proved that the statement was made for the purpose of inducing the agreement, and did in fact induce.
Section 18 of the Australian Consumer Law (ACL), which is found in schedule 2 of the Competition and Consumer Act 2010[1] (formerly the Trade Practices Act 1974) prohibits conduct by ‘persons’ in trade or commerce which is misleading or deceptive or is likely to mislead or deceive.

Individuals may be ancillary liable for breaches of s18 if they are "knowingly concerned" in the breach (s75B of the CCA).

A person who suffers loss of misleading or deceptive conduct is entitled to damages (i.e., monetary compensation) if they have suffered loss or damage as a result of the conduct. The measure of loss or damage here is generally the same as it is in contract law or tort law. See section 236 Other remedies s 237 and 243.
What is misleading or deceptive conduct under the ACL?

‘Conduct’ includes actions and statements, such as:

- advertisements
- promotions
- quotations
- statements
- any representation made by a person.

Likely to break the law if it creates a misleading overall impression among the intended audience about the price, value or quality of consumer goods or services.

Intention to mislead or deceive is irrelevant; what matters is how statements and actions could affect the thoughts and beliefs of a consumer.
What is conduct that is “misleading or deceptive”? 

• What do the words mean?
  • The words **misleading** and **deceptive** do not mean the same thing. They must be given their ordinary meaning: *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546

• How misleading or deceptive must the conduct be?
  • Conduct will only be misleading or deceptive if **it induces, or is capable of inducing error**: *Parkdale Custom Built Furniture v Puxu Pty Ltd* (1982) 149 CLR 191
  • It is **not sufficient** for the conduct to cause **confusion** or **wonderment**: *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45

• Is the test objective or subjective?
  • The intent of the defendant is not relevant. All that is relevant is **whether, tested objectively, the conduct was misleading or deceptive**: *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216
Who is the audience to whom the conduct is directed?

Conduct may be directed towards the public at large, or to private negotiations between two parties (*Butcher v Lachlan Elder Realty Pty Ltd*).

- **Public at large**
  - Determine the class of people to whom the conduct was directed and isolate a “representative member of that class”. The test is an **objective** one: *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45

- **Individuals**
  - The analysis of the relevant conduct is undertaken by considering whether a **reasonable person** in the position of the party (**taking into account that they knew**) would have been misled or deceived by the conduct: *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592
Some examples...

The Federal Court held that the phrase “world’s longest lasting battery in high powered devices” was misleading: *Gillette Australia Pty Ltd v Energizer Australia Pty Ltd* [2005] FCA 1647
ACCC v Telstra

- Federal Court held that the “everywhere” advertisement did not convey the impression that Telstra Next G services were available “everywhere”: Australian Competition and Consumer Commission v Telstra Corporation Limited (ACN 051 775 556) [2007] FCA 1904
The words “misleading” and “deceptive” must be given their ordinary meaning

- Misleading or deceptive conduct generally consists of representations (whether express or by silence), but conduct is not confined to circumstances that constitute a representation
- Silence can be misleading in circumstances that give rise to an obligation to disclose the true position (will depend on the facts of each case)
- Generally speaking, exclusion clauses cannot operate to defeat claims under section 52 (s.18 ACL).
To inquire whether there is a “duty to disclose” is only one aspect of when silence can be misleading.

The question is whether, in the light of all the relevant circumstances constituted by acts, omissions, statements, or silence there has been conduct which is or is likely to be misleading or deceptive.

Note this is an extension of the common law.
Unconscionable Conduct
Unconscionable Conduct

Equitable concept

Conduct which is against good conscience. Occurs where one party, the stronger party, takes unconscionable advantage of a party burdened with a particular disability (the weaker party), to gain a contractual advantage – *Commercial Bank of Australia v Amadio*

Relief is given because the stronger party has exploited or taken unconscientious advantage of the disadvantage of another. The stronger party who obtained the benefit of the bargain in such circumstances has the burden of showing that the bargain was fair. The leading case that sets out the principles is *Commercial Bank of Australia v Amadio* as per Deane J.
FACTS
Vincenzo Amadio owned a building company that had once been very profitable but had got into financial trouble. Vincenzo lived an opulent lifestyle and, even though he was in financial difficulties, his parents still believed his company was doing very well. Vincenzo's bank knew otherwise.

In fact Vincenzo's company built up a $195,000 overdraft (an overdraft is a loan). The Bank started to dishonour cheques and it became apparent that the company was insolvent. In order to keep trading, Vincenzo offered the Bank the security (mortgage) of an office building his parents owned in return for a loan.

The Bank agreed to the security in exchange for an overdraft of $270,000 for a week, after which it would be reduced to $220,000, then two weeks later it would be reduced to $180,000, and shortly thereafter it would be reduced to nil from a loan by another of Vincenzo's companies. Nothing was said about what amount of money the mortgage over the parents' property would secure.
FACTS (cont.)
Vincenzo finally asked his parents to be guarantors of the account and provide the security. In evidence it was disclosed that Mr and Mrs Amadio thought they were guaranteeing $50,000 for a period of six months.
The Bank Manager called at the home of Mr and Mrs Amadio to obtain their signatures on the mortgage. The document secured all the money owed plus interest and used their office building as security. The Amadio's did not read the documents.
About nine months later, Vincenzo's company went into liquidation and the Bank demanded its money and threatened a power of sale over the secured office building.
Mr and Mrs Amadio challenged this on the basis that the contract of guarantee was voidable due to the unconscionable conduct of the bank.
Held
The court found in favour of Mr and Mrs Amadio on the basis that they were under a special disability when they executed the deed containing the guarantee.

Ratio
The special disability was their age, their poor English and their reliance on the son's representation as to the solvency of his company. The special disability was sufficiently evident to the Bank to make it unfair or unconscionable for it to be able to rely on the deed of guarantee. Mason J stated the two-pronged test to establish unconscionability: First, the Bank had to be aware of the possibility that there was a special disability. Second, the Bank took unfair advantage of that special disability.
RATIO (cont.)
Deane J found that the Bank knew of the son's financial problems, they knew about the parents' special disability because of their age and language skills and because of this they knew the parents needed advice, but the Bank ignored that need. Once the disability was established the onus of proof shifted to the Bank to show the transaction was fair—the Bank failed to do this.

Gibbs J also found in favour of Mr and Mrs Amadio, but not on the basis of unconscionability. His Honour found for the parents on the basis of non-disclosure by the Bank.
The elements of unconscionable conduct

As a result of the *Amadio* case the elements of non-statutory unconscionability are:

1. Weaker party suffers from a **special disability** (a legal disability not a physical one).
2. Stronger party **knows** (or ought to know) about that special disability.
3. Stronger party takes unfair and unconscionable advantage of that disability to secure an unfair bargain and a benefit.

Special disability = Inability to make rational decisions “affect his ability to conserve his own interests”
The elements of unconscionable conduct

In Amadio, Gibbs CJ at 459 stated:-

“In my opinion, it should not be held that this was the case of an unconscientious bargain of the kind which equity would set aside, even in the absence of fraud, misrepresentation or undue influence. Of course, the bank and the respondents did not meet on equal terms, but that circumstance alone does not call for the intervention of equity ... A transaction will be unconscientious within the meaning of the relevant equitable principles only if the party seeking to enforce the transaction has taken unfair advantage of his superior bargaining power, or of the position of special disadvantage in which the other party was placed. The principle of equity applies ‘whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.’: Blomley v Ryan [1956] HCA 81; (1956) 99 CLR 362 per Kitto J at 415 ...”
What constitutes a special disability?

Categories are not closed but include the following:

- Lack of assistance and education (see *Amadio*)
- Mental disorder (*Gibbons v Wright*) – but remember that legislation in most states deems that ‘necessaries’ must still be paid for.
- Drunkenness (*Blomley v Ryan*) – mere drunkenness is not enough, the person must be ‘seriously affected by drink’. Again the rule regarding paying for ‘necessaries’ still applies.
- Emotional dependence - In *Louth v Diprose* where the ‘pathetic devotion’ and ‘unrequited love’ had put the man in a position of dependence upon the women.

BUT- Inequality of bargaining power is not (see *AGC v CG Berbatis Holdings P/L*) - cf ACL
HIGH COURT OF AUSTRALIA - Unconscionable bargains - Equitable remedies

FACTS Ryan, a 78-year-old alcoholic, during a drinking bout was induced by Blomley's father and an agent to agree to sell his pastoral property for £25,000. This was £9000 less than its real value. Blomley's solicitor drew up a contract also providing for a £5 deposit and generous terms of payment, and Ryan signed it without receiving independent advice. Ryan later refused to complete the sale, and was sued for specific performance.

HELD, by majority: Specific performance should be refused and the contract should be set aside as an unconscionable transaction. The circumstances showed fraud according to the criteria of equity, in that advantage was taken of Ryan's weakness, ignorance and other disabilities, and the contract was derived from such behaviour and was an unfair bargain.
RATIO

Fullager J - ‘Mere’ drunkenness will not permit a person to get out of a contract. However, where one party was – to the knowledge of the other – ‘seriously affected by drink’, equity will refuse specific performance. In addition, if a court is satisfied a ‘contract disadvantageous to the party affected has been obtained by "drawing him in to drink", or that there has been real unfairness in taking advantage of his condition, the contract may be set aside.’

He went on to outline other factors that may induce equity to refuse relief as including:

‘poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other.’
FACTS

- Solicitor Louis Donald Diprose was infatuated with Carol Mary Louth, whom he had met in Launceston, Tasmania in 1981. He showered her with gifts and, at one time, proposed to her; she, however, refused. Subsequently, Louth informed Diprose that she was depressed and was going to be evicted and, if this happened, she would commit suicide (this was largely untrue). In response, the Diprose agreed to buy her a house and, at her insistence, put it in her name. Years later, when their relationship deteriorated, Diprose asked Louth to transfer the house into his name. She refused and he brought proceedings seeking to recover the house.

- Diprose won in the Supreme Court of South Australia on the basis that it would be unconscionable for the defendant to retain the house and land. Louth appealed to the Full Court of South Australia and again lost, she then filed special leave for an appeal to the High Court of Australia, which was granted.
Held

The appeal was dismissed. The High Court agreed with the lower courts that Diprose’s infatuation was a disability that could lead to unconscionable conduct.

Ratio

Mason CJ said:

‘...it is explicable only on the footing that he was so emotionally dependent upon, and influenced by, the appellant as to disregard entirely his own interests. By dishonestly manufacturing an atmosphere of crisis with respect to the house, the appellant played upon the respondent's susceptibility where she was concerned. Her conduct was unconscionable in that it was dishonest and was calculated to induce, and in fact induced, him to enter into a transaction which was improvident and conferred a great benefit upon her.' (para 10)
Relief from Unconscionable Transactions

The contract is rendered voidable at the election of the weaker party.

Given it is an equitable remedy, this right may be lost through ratification, acquiescence and intervention by a third party.
Statutory protection
Statutory protection

As for Misleading and Deceptive conduct there have been extensive efforts by governments to legislate in the area of unconscionable conduct and unfair contracts.

In NSW two pieces of legislation are relevant:

Australian Consumer Law (ACL)
- Unconscionable conduct
- Unfair contracts
- Limited to corporations in trade & commerce supplying goods and services to consumers

Contracts Review Act 1980 (NSW)
- Unfair contracts
- Limited to consumer contracts
The Australian Consumer Law (ACL) introduced nationally consistent prohibitions on unconscionable conduct (Part 2-2 of the ACL).

The first of these prohibitions entrenches into statute the equitable doctrine of unconscionable conduct, thereby extending the range of remedies available to parties affected by unconscionable conduct.

The second prohibition extends the concept of unconscionability beyond that recognised in equity and can be relied upon by all persons, other than listed corporations, who acquire or supply goods or services in trade or commerce.
Preservation of the ‘unwritten law’
Section 20 of the ACL (which is in identical terms as its predecessor, s 51AA of the Trade Practices Act) prohibits unconscionability engaged in by a person 'within the meaning of the unwritten law' (meaning the equitable doctrine of unconscionable conduct). To prevent overlap, s 20 will not apply where s 21 applies.

Section 20(1)
A person must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.
Statutory Unconscionable Conduct

Statutory extension of the ‘unwritten law’
Section 21 prohibits unconscionable conduct in connection with the supply or acquisition of goods or services by or form a person (other than a listed public company). It is not intended to be ‘limited by the unwritten law relating to unconscionable conduct’ and relevant factors extend beyond 'consideration of the circumstances relating to formation of the contract' to the terms of the contract themselves (substantive unconscionable conduct).

Section 22 sets out a range of factors a court may consider when determining whether conduct is unconscionable.
ACL Remedies for Unconscionable Conduct

Remedies
ACL s 87 - Repayments
ACL ss 237 & 238 – Compensation Orders
Unconscionable Conduct: NSW Legislation
Unconscionable Conduct: NSW Legislation

Contracts Review Act 1980 (NSW)

Cause of Action

- ‘Unjust’: Defined as unconscionable, harsh/ oppressive (CRA s 4)
- Main provision (CRA s 7)
  - Step 1: Determine whether contract/ term was unjust (CRA s 9)
  - Step 2: Order must relate to the ground of injustice
- Only applies to consumers, not “trade, business or profession carried on by the person or proposed to be carried on by the person” (CRA s 6)

Relief

- CRA s 7, Court can:
  - Refuse to enforce the contract
  - Declare the contract void
  - Can vary the contract
Unfair Contract Terms - Legislation
Unfair Contract Terms - Legislation

Sections 23 – 28 of the ACL

- Video
- New consumer protections
- Effect: Unfair terms in std form consumer contracts are void

3 Elements to satisfy to be eligible for consumer protection under ACL

- Must be a ‘consumer contract’ – ACL s 23(3)
  - <$40k; not for resale; not for trade; personal, domestic & household
- Must be a ‘standard form contract’ – ACL s 27(2)
  - Pre-prepared; Q why are they used?
- Term in dispute must be found ‘unfair (see next)’ – ACL s 24

- On designed to protect consumer contracts which are standardformr
Unfair Contract Terms - Legislation

Unfair takes its normal and ordinary meaning.

3 Elements to satisfy for a term to be found ‘unfair’ (ACL s 24)
- Term causes a significant imbalance in the rights/obligations of the parties
- Terms is not reasonably necessary to protect the legitimate interests of the party benefited by the term (rebuttable)
  - (example: custom made vs off the rack)
- Term would cause detriment if it were applied/relied upon
Unfair Contract Terms Legislation

- Statute provides examples of UNFAIR TERMS as guidance (called the Grey List) – ACL s 25
  - Term that permits 1 party (only) to limit performance
  - Term that permits 1 party (only) to terminate the contract
  - Term that permits 1 party (only) to vary the terms of the contract
  - Term that gives 1 party (only) the right to renew/ not renew the contract

- Statutory Remedies: 2 Step Process
  - Declaration that the term is “unfair”, thus void (ACL s 250)
  - Once declared void… assess whether ‘severable’ from the rest of the Contract (ACL s 23(2))
Other references

There are two additional documents on vUWS that will be useful in developing your understanding of the statutory provisions relating to misleading & deceptive conduct and unconscionability (next week’s topic). These are:

1. An extract from a presentation by Kirsty Ruddock of the ACCC about recent consumer law cases

2. An article downloaded from The Law Handbook Website regarding national consumer protection legislation.