

Statutory Remedies for or relating to Breach of Contract [21 3 17]

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That distinguished 19th century admiralty Judge Dr Lushington said of the remedy of damages: *'Perfect justice is nothing less than full compensation.'* Unfortunately, 20th century judges in Australia have not always agreed. The differences in levels of compensation may appear minor and the choice of remedies may often appear unimportant, but the consequences of choosing the right remedy may be crucial for any good lawyer wanting to assist a client to achieve the best possible just outcome, and for a defence lawyer wanting to understand the risks of opposition.

INTRODUCTION:

The topic raises some of the more interesting questions of analysis for the common lawyer, in the context of contemporary commercial law, particularly with respect to responsible lending conduct by banks and other financial institutions, and the web of available statutory remedies and commerce generally.

I propose to discuss the question before the Chair under three topics.

First, irresponsible business conduct.

Second Irresponsible lending conduct.

Third the remedies the law gives for proved misconduct.

THE LAW OF CONTRACT AND STATUTORY REMEDIES

A contract of course is an agreement giving rise to obligations promissory in character that are enforced or recognized by law. The remedies which the law provides for breach of contract are founded upon the agreement itself: First to rescind or terminate the agreement; second to award damages for its breach; thirdly in some limited cases to afford specific execution of the contract in which equity has intervened eg for the specific delivery of land or ships. As Lord Wrenbury famously said of self help remedies, for example performing by some other mode than that agreed – in that case salvaging the agreed cargo from the Barend Sea during wartime and delivering it in part by another vessel to a port in England - there is no fourth way apart from agreement acceptable to the law.

However, for present purposes, the activities of legislatures over the past century have given to the courts a large number of additional remedies parallel to and supplementing those remedies for wrongful conduct in breach of agreements in a business context. It is this mix of contractual and statutory remedies with which this paper is concerned.

At the outset this issue raises a general and traditional moral question with broader economic implications. The machinery of the common law of contract is founded upon the simple moral principal that a person should fulfil his or her promises and abide by agreements made. As Professor Atiyah has observed this moral virtue is founded upon the English model of Christian values in which tradition Australia is firmly rooted¹. I will not stray into religious discussion here because it may be that sticking by your agreements is a value of other religions and the irreligious. However the many statutory interventions to the simple contract model now means that many contractual causes of action are statutory in nature, and the basal moral reason for enforcing contracts has all but disappeared, replaced by the precept you must do what Parliament says you must do. That morality is more questionable and some such as Ms McManus the President of the ACTU have publicly done so.

The business or economic implication is reflected in Roscoe Pound's observation that 'Wealth in a commercial age, is made up largely of promises.'² Economic development which is at the heart of most contemporary political strategies accordingly depends upon the growth of credit. The emergence of the complex credit economy and the legislative responses in Australia and elsewhere is the context of this paper although the statutory remedies to which

¹ *Introduction to the Law of Contract* 2nd ed P.S Atiyah, Clarendon Oxford, 1971, page 1.

² *Introduction to the Philosophy of Law* R Pound, page 236.

I refer are applicable in other commercial and personal contexts. At bottom the topic remains one of enforceable promises. Although section 2 of the Competition and Consumer Act 2010 [Cth] which is the source of most relevant statutory remedies for breach of contract states '*The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection*' when it comes to promises the new remedies open up more the possibility of a third approach, of freestanding palm tree justice having nothing to do with promises at all, with an absence of a principled foundation. Contract with an overlay. We are back legally speaking in medieval times when justice was measured by the length of the Chancellor's foot.

The common law did not provide a remedy restoring a party to the position he or she was in prior to the breach of an agreement except so far as money could do it. Now statutory remedies do, eg under section 76 of the National Credit Code or section 12GM of the *Australian Securities and Investment Commission Act 2001* ['ASIC Act']. Although equity allowed a limited remedy of restitution it arose only if the robust hurdles of restitution in integrum could be overcome, and did not award compensation having the same result. Nor did the common law acknowledge a remedy for misrepresentation apart from fraud³ and later negligence⁴. Significantly many of the statutory remedies have turned an inquiry under the common law into whether or not a contract exists and has been breached into an inquiry whether there has been a representation by the defendant and whether that led the claimant into error, or whether the conduct was in some unconscionable, meaning has the defendant taken advantage to

³ *Derry v Peek* [1889] 14 App Cas 337

⁴ *Hedley Byrne v Heller* [1964] AC 465

the claimants disadvantageous position. These notions of misrepresentation and unconscionability lie at the heart of the statutory remedies for what would otherwise have once been argued in the arena of breach of contract.

Thus for example an oral promise by A to B to deliver a piebald horse the next day to B's yard for a consideration of 200 dollars is an agreement; but it may also give rise to a representation of existing fact as to the capacity of A to make good his promise ie that A not only owns and is entitled to possession and can make delivery of such a dappled horse. In not delivering A may have an excuse in contract such as frustration, so that B may want to bring a separate action founded upon the misrepresentation. It may possibly be unconscionable because the horse's true worth was \$1,000,000, and A might wish to resist the bargain because of economic duress. A's conduct may also amount to a representation of A's intention, eg it may be a representation by A to B that he intends to take the steps to perform his promise. Assuming that A has made his representation in trade or commerce both of these representations are enforceable separately from the contractual right under the modern Australian Consumer Law ['ACL']. Accordingly every lawyer advising his or her client about remedies for wrongful business conduct should begin with the contract, but then look further afield for thwarted legitimate expectations founded upon misrepresentation and other misconduct.

The long established response of the common law to irresponsible conduct in business has been remedies for breach of contract, principally damages for loss of bargain. Statutory remedies apart from contract arise because the promisor may have erroneously inferred a statement of preparedness to take steps to bring about the promise, bringing into play section 18 of the *Australian*

Consumer Law ['ACL'] the old section 52 of the *Trade Practices Act 1974*, repealed in 2010 and replaced by the *The Competition and Consumer Act* [Cth].

The first significant statutory step in this direction was the *Trade Practices Act 1974* [Cth] ['TPA'] which introduced section 52. Section 18 of the ACL, in similar terms, restates section 52. The former law about section 52 accordingly applies to section 18 of the ACL.

Section 52 provided simply: '*A corporation shall not in trade or commerce engage in conduct that is misleading or deceptive or likely to mislead or deceive*'.

This provision states a general principle of conduct. Elsewhere in the TPA remedies were provided for compensation [section 80], injunctive relief [section 82] and specific relief [section 87]. Liability for misrepresentations was limited by the following:

1. Corporation: section 52 was concerned only with conduct of a corporation, and that in the Australian constitutional context meant a section 51(xx) corporation ie a foreign corporation or a trading or financial corporation;
2. Trade or Commerce: section 52 only applied to representations made in the course of trade or commerce, which for example has been held to exclude a home sale transaction, and conduct by governments;
3. Misrepresentations made by a person who acts as a communication mode for others such as real estate agents so long as the agent does not adopt the representation as its own;

4. Predictions: where there is a real belief in the prediction there is no basis for holding that the forecaste was misleading even if it turns out to be wrong.

As already noted in 2010 the TPA was replaced by *Consumer and Competition Act 2010* and the familiar provisions in section 52 and following became section 18 of the *Australian Consumer Law* ['ACL'] being schedule 2 to the Act, with the remedies more difficult to find in Part 5.2 of the ACL. Some other changes occurred in the statutory remedies.

The limitation on the perpetrator being a corporation was removed, due to the transfer of legislative powers over individuals under the State Fair Trading Acts to the Commonwealth by the States, under Constitution section 51(xxxvii). Also liability in respect of representations made by financial corporations was removed from the 2010 Act and made subject to the *Australian Securities and Investment Commission Act 2001* [Cth]. This has led to difficulties of accessing the statutory remedies for breach of contract because some are found in the ACL and others in the ASIC Act, and others yet again in the *Corporations Act 2001*. However the ASIC Act provisions and the Corporations Act provisions tend to be similar in effect. As the High Court recently observed in *Paciocco v ANZ* [2016] HCA 28 the different ways in which the statutory tests of unconscionability are expressed , eg section 76 of the *National Credit Code* and section 12CB and 12CC of the ASIC Act and section 21 of the ACL all have slightly different lists of factors making up what is aid to be unconscionable in the eyes of the law-makers, but all having the same result in their application.

The provisions relating to representations generally made in business and commerce generally are found in the ACL. I will set out the text of the principal

provisions to which I have been referring in Annexure A to this discussion paper. Let me illustrate the way the statutory remedies work in the context of irresponsible commercial conduct.

At [292] of the Reasons of Keane J identified what the courts see as the contemporary understanding of unconscionable conduct, by adopting the views of Allsop CJ in the Full Court in of the Federal Court of Australia in that matter, as follows:

Allsop CJ rejected the "gravamen" of the appellants' attack on ANZ's conduct, which depended upon what was said to be the "huge disparity between the level of the fees and the costs [ANZ] sustained by the exception fee events." His Honour concluded that:

"In all the circumstances, in particular, the lack of any proven predation on the weak or poor, the lack of real vulnerability requiring protection, the lack of financial or personal compulsion or pressure to enter or maintain accounts, the clarity of disclosure, the lack of secrecy, trickery or dishonesty, and the ability of people to avoid the fees or terminate the accounts, I do not consider the conduct of ANZ to have been unconscionable. To do so would require the court to be a price regulator in banking business in connection with otherwise honestly carried on business in which high fees were extracted from customers."

What that means for remedies requires turning to Part 5.2 the principal provisions of which I have set out in Annexure A. Critically it includes injunctive relief, but without the general law limitations such as an inflexible requirement to give an undertaking as to damages, and compensation without the common law limitations as to remoteness of damage, and other remedies such as restitution

without the limitation in equity of refusing the remedy if complete restoration of a party to the pre-contract or pre-conduct position is impossible.

Let me now turn to other statutory remedies for breach of contract. A current topic of some significance is irresponsible lending conduct. The growth of credit, referred to by Roscoe Pound, has led to huge economic and financial power being concentrated in a few companies. Parliament has intervened, but so far to little effect. Parliament has even taken a backward step in 2010 by removing the whole of the ACL from the field of lending and credit contracts. Some judges have complained about the resulting confusion but to no avail.

The armoury at the disposal of the lawyer in this field is substantial but the problem is convincing the courts to reach past principles of contract to which I have referred.

In Annexure B I have set out the principal areas of intervention and statutory remedies for irresponsible lending conduct in relation to credit contracts and security contracts including guarantees.

Most legislative activity in the area of statutory remedies for breach of contract has been in the federal context. Former State laws such as the *Fair Trading Act 1987* [NSW] has now been subsumed under the ACL, where it applies. However some State laws remain relevant, principally *Contracts Review Act 1980*. That statute does not in terms apply to commercial non-farming contracts. Section 6 (2) provides: '*A person may not be granted relief under this Act in relation to a contract so far as the contract was entered into in the course of or for the purpose of a trade, business or profession carried on by the person or proposed to be carried on by the person, other than a farming undertaking (including, but not*

limited to, an agricultural, pastoral, horticultural, orcharding or viticultural undertaking) carried on by the person or proposed to be carried on by the person wholly or principally in New South Wales.’ The protection of farming related contracts is supplemented by the *Farm Debt Mediation Act 1994* which confers extensive support in relation to farm debt contracts and obligates mediation to occur in certain circumstances.

Section 7 of the Contracts Review Act 1980 now confers extensive statutory remedies for breach of contract by excusing such breaches or enforcing them in different ways unknown to the common law. It provides:

‘7(1) Where the Court finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result, do any one or more of the following:

(a) it may decide to refuse to enforce any or all of the provisions of the contract,

(b) it may make an order declaring the contract void, in whole or in part,

(c) it may make an order varying, in whole or in part, any provision of the contract,

(d) it may, in relation to a land instrument, make an order for or with respect to requiring the execution of an instrument that:

(i) varies, or has the effect of varying, the provisions of the land instrument, or

(ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the land instrument.

(2) Where the Court makes an order under subsection (1) (b) or (c), the declaration or variation shall have effect as from the time when the contract was made or (as to the whole or any part or parts of the contract) from some other

time or times as specified in the order.

(3) The operation of this section is subject to the provisions of section 19.

Section 19 limits the remedies in relation to contracts concerning land as follows:

*‘(1) An order made under section 7 (1) (b) or (c) has no effect in relation to a contract so far as the contract is constituted by a **land instrument** that is registered under the **Real Property Act 1900** .*

*(2) Where an order is made under section 7 (1) (b) or (c) in relation to a contract constituted (in whole or in part) by a **land instrument**, not being a **land instrument** registered under the **Real Property Act 1900** , the regulations made under this Act may make provision for or with respect to prescribing the things that must be done before the order, so far as it relates to the **land instrument**, takes effect.*

(3) The Registrar-General and any other person are hereby authorised to do any things respectively required of them pursuant to subsection (2).’

Nonetheless as can be seen both with respect to land dealings and all other contracts apart from commercial contracts the statutory remedies are broad and powerful. The Act remains the most effective statutory remedy with respect to unjust contract dealings.

Before concluding it is appropriate to conduct a detailed review of the general and financial statutory remedies set out in the Annexures, to demonstrate the extensive nature of the new processes. However one caution is appropriate- the traditional common law reluctance to be involved in supervision of the Court’s orders will limit in practice the grant of many of the new remedies provided for.

Conclusion.

The law of contract in NSW at least has had, since 1980 an extensive overlay of statutory remedies. The calls for further reforms especially in relation to banking products are becoming more strident and are likely to occur. Contract lawyers wishing to keep up to date must be vigilant and watch events in the area with interest.

Annexure A

Australian Consumer Law: Chapter 2 -- General protections

Part 2-1 -- Misleading or deceptive conduct

18 Misleading or deceptive conduct

(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

(2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection (1).

Part 2-2 -- Unconscionable conduct

20 Unconscionable conduct within the meaning of the unwritten law

(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.

(2) This section does not apply to conduct that is prohibited by section 21.

21 Unconscionable conduct in connection with goods or services

(1) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a person (other than a listed public company); or

(b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

(2) This section does not apply to conduct that is engaged in only because the person engaging in the conduct:

(a) institutes legal proceedings in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition; or

(b) refers to arbitration a dispute or claim in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition.

(3) For the purpose of determining whether a person has contravened subsection (1):

(a) the court must not have regard to any circumstances that were not

reasonably foreseeable at the time of the alleged contravention; and

(b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(4) It is the intention of the Parliament that:

(a) this section is not limited by the unwritten law relating to unconscionable conduct; and

(b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and

(c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:

(i) the terms of the contract; and

(ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.

22 Matters the court may have regard to for the purposes of section 21

(1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the **supplier**) has contravened section 21 in connection with the supply or possible supply of goods or services to a person (the **customer**), the court may have regard to:

(a) the relative strengths of the bargaining positions of the supplier and the customer; and

(b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

(c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and

(f) the extent to which the supplier's conduct towards the customer was consistent with the supplier's conduct in similar transactions between the supplier and other like customers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the customer:

(i) any intended conduct of the supplier that might affect the interests of the customer; and

(ii) any risks to the customer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer);

and

(j) if there is a contract between the supplier and the customer for the supply of the goods or services:

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and

(iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; and

(l) the extent to which the supplier and the customer acted in good faith.

(2) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the **acquirer**) has contravened section 21 in connection with the acquisition or possible acquisition of goods or services from a person (the **supplier**), the court may have regard to:

(a) the relative strengths of the bargaining positions of the acquirer and the supplier; and

(b) whether, as a result of conduct engaged in by the acquirer, the supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer; and

(c) whether the supplier was able to understand any documents relating to the acquisition or possible acquisition of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the supplier or a person acting on behalf of the supplier by the acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the goods or services; and

(e) the amount for which, and the circumstances in which, the supplier could have supplied identical or equivalent goods or services to a person other than the acquirer; and

(f) the extent to which the acquirer's conduct towards the supplier was consistent with the acquirer's conduct in similar transactions between the acquirer and other like suppliers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the supplier acted on the reasonable belief that the acquirer would comply with that code; and

(i) the extent to which the acquirer unreasonably failed to disclose to the supplier:

(i) any intended conduct of the acquirer that might affect the interests of the supplier; and

(ii) any risks to the supplier arising from the acquirer's intended conduct (being risks that the acquirer should have foreseen would not be apparent to the supplier); and

(j) if there is a contract between the acquirer and the supplier for the acquisition of the goods or services:

- (i) the extent to which the acquirer was willing to negotiate the terms and conditions of the contract with the supplier; and
- (ii) the terms and conditions of the contract; and
- (iii) the conduct of the acquirer and the supplier in complying with the terms and conditions of the contract; and
- (iv) any conduct that the acquirer or the supplier engaged in, in connection with their commercial relationship, after they entered into the contract; and
- (k) without limiting paragraph (j), whether the acquirer has a contractual right to vary unilaterally a term or condition of a contract between the acquirer and the supplier for the acquisition of the goods or services; and
- (l) the extent to which the acquirer and the supplier acted in good faith.

Part 5-2 – Remedies

Division 2 -- Injunctions

232 Injunctions

(1) A court may grant an injunction, in such terms as the court considers appropriate, if the court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:

- (a) a contravention of a provision of Chapter 2, 3 or 4; or
- (b) attempting to contravene such a provision; or
- (c) aiding, abetting, counselling or procuring a person to contravene such a provision; or
- (d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision; or
- (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
- (f) conspiring with others to contravene such a provision.

Division 3 -- Damages

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.

Division 4 -- Compensation orders etc. for injured persons and orders for non-party consumers

Subdivision A--Compensation orders etc. for injured persons

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 consumer 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.

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 consumer 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.

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.

Annexure B

The Australian Securities and Investment Commission Act 2001

SECT 12DA

Misleading or deceptive conduct

(1) A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

(1A) Conduct:

(a) that contravenes:

(i) [section 670A](#) of the [Corporations Act](#) (misleading or deceptive takeover document); or

(ii) [section 728](#) of the [Corporations Act](#) (misleading or deceptive fundraising document); or

(b) in relation to a disclosure document or statement within the meaning of [section 953A](#) of the [Corporations Act](#); or

(c) in relation to a disclosure document or statement within the meaning of [section 1022A](#) of the [Corporations Act](#);

does not contravene subsection (1). For this purpose, conduct contravenes the provision even if the conduct does not constitute an offence, or does not lead to any liability, because of the availability of a defence.

(2) Nothing in [sections 12DB](#) to [12DN](#) limits by implication the generality of subsection (1).

SECT 12CB

Unconscionable conduct in connection with financial services

(1) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of financial services to a person (other than a listed public company); or

(b) the acquisition or possible acquisition of financial services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

(2) This section does not apply to conduct that is engaged in only because the

person engaging in the conduct:

(a) institutes legal proceedings in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition; or

(b) refers to arbitration a dispute or claim in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition.

(3) For the purpose of determining whether a person has contravened subsection (1):

(a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(4) It is the intention of the Parliament that:

(a) this section is not limited by the unwritten law of the States and Territories relating to unconscionable conduct; and

(b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and

(c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:

(i) the terms of the contract; and

(ii) the manner in which and the extent to which the contract is carried

out;

and is not limited to consideration of the circumstances relating to formation of the contract.

(5) In this section:

"listed public company " has the same meaning as it has in the [Income Tax Assessment Act 1997](#) .

SECT 12GF

Actions for damages

(1) A person who suffers loss or damage by conduct of another person that contravenes a provision of Subdivision C ([sections 12CA to 12CC](#)) or Subdivision D ([sections 12DA to 12DN](#)) may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

(1A) Subsection (1) has effect subject to [section 12GNA](#).

Note: [Section 12GNA](#) may limit the amount that the person may recover for a contravention of [section 12DA](#) (Misleading or deceptive conduct) from the other person or from another person involved in the contravention.

(1B) Despite subsection (1), if:

(a) a person (the **claimant**) makes a claim under subsection (1) in relation to:

(i) economic loss; or

(ii) damage to property;

caused by conduct of another person (the **defendant**) that was done in contravention of [section 12DA](#); and

(b) the claimant suffered the loss or damage:

- (i) as a result partly of the claimant's failure to take reasonable care; and
- (ii) as a result partly of the conduct referred to in paragraph (a); and
- (c) the defendant:
 - (i) did not intend to cause the loss or damage; and
 - (ii) did not fraudulently cause the loss or damage;

the damages that the claimant may recover in relation to the loss or damage are **to be** reduced to the extent to which the court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage.

Note: Subdivision GA also applies proportionate liability to a claim for damages under this section for a contravention of **section 12DA**.

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

SECT 12GM

Other orders

(1) Without limiting the generality of **section 12GD**, if, in a proceeding instituted under, or for an offence against, this Division, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of a provision of this Division, the Court may, whether or not it grants an injunction under **section 12GD** or makes an order under **section 12GF**, **12GLA** or **12GLB**, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (7) of this section) if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.

(2) Without limiting the generality of **section 12GD** or **12GNB**, the Court may, on the application of:

(a) a person who has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of a provision of this Division; or

(b) ASIC in accordance with subsection (3) on behalf of such a person or persons;

make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (7)) if the Court considers that the order or orders concerned will:

(c) compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage; or

(d) prevent or reduce the loss or damage suffered, or likely **to be** suffered, by such a person or persons.

(3) ASIC may only make an application under paragraph (2)(b) on behalf of one or more persons identified in the application who:

(a) have suffered, or are likely to suffer, loss or damage by the conduct of another person that was engaged in in contravention of a provision of this Division; and

(b) have consented in writing to the application being made before it is made.

(4) An application may be made under subsection (2) in relation to a contravention of this Division notwithstanding that a proceeding has not been instituted under another provision of this Part in relation to that contravention.

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

(6) For the purpose of determining whether to make an order under this section in relation to a contravention of Subdivision C ([sections 12CA to 12CC](#)), the Court may have regard to the conduct of parties to the proceeding since the contravention occurred.

(7) Without limiting the generality of subsections (1) and (2), the orders referred to in those subsections include the following:

(a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, [to be void](#) and, if the Court thinks fit, to have been void ab initio or at all times on and after a date before the date on which the order is made;

(b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after a date 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;

(d) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage;

(e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage;

(f) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his or her own expense, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage;

(g) an order, in relation to an instrument creating or transferring an interest in land, directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct 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.

(7A) Subsections (1) and (2) have effect subject to [section 12GNA](#).

Note: [Section 12GNA](#) may limit the liability, under an order under subsection (1) or (2) of this section, of a person for his or her contravention of [section 12DA](#) (Misleading or deceptive conduct) or involvement in such a contravention.

(8) The powers conferred on the Court under this section in relation to a contract or covenant do not affect any powers that any other court may have in relation to the contract or covenant in proceedings instituted in that other court in respect of the contract or covenant.

(9) In subsection (7):

"interest ", in relation to land, has the same meaning as in [subsection 12DC\(3\)](#).

(10) A reference in this section to a contravention of a provision of this Division

includes a reference to applying or relying on, or purporting to apply or rely on, a term of a consumer contract that the Court has declared under [section 12GND to be](#) an unfair term.

National Consumer Credit Protection Act [Cth]

SECT 128

Obligation to assess unsuitability

A [licensee](#) must not

enter a [credit contract](#) with a [consumer](#) who will be the [debtor](#) under the contract; or

(aa) make an unconditional representation to a [consumer](#) that the [licensee](#) considers that the [consumer](#) is eligible to enter a [credit contract](#) with the [licensee](#); or

(b) increase the [credit limit](#) of a [credit contract](#) with a [consumer](#) who is the [debtor](#) under the contract; or

ba) make an unconditional representation to a [consumer](#) that the [licensee](#) considers that the [credit limit](#) of [credit contract](#) between the [consumer](#) and the [licensee](#) will be able to be increased;

on a day (the [credit day](#)) unless the [licensee](#) has, within 90 days (or other period prescribed by the regulations) before the [credit day](#)

(c) made an assessment that

(i) is in accordance with [section 129](#); and

(ii) covers the period in which the [credit day](#) occurs; and

(d) made the inquiries and verification in accordance with [section 130](#).

1. [Civil penalty](#): 2,000 [penalty units](#).

2. When credit contract must be assessed as unsuitable

3. Requirement to assess the contract as unsuitable

4. (1) The [licensee](#) must assess that the [credit contract](#) will be unsuitable for the [consumer](#) if the contract will be unsuitable for the [consumer](#) under subsection (2).

5. [Civil penalty](#): 2,000 [penalty units](#).

6. Note: Even if the contract will not be unsuitable for the [consumer](#) under subsection (2), the [licensee](#) may still assess that the contract will be unsuitable for other reasons.

7. Particular circumstances when the contract will be unsuitable

8. (2) The contract will be unsuitable for the [consumer](#) if, at the time of the assessment, it is likely that:

9. (a) the [consumer](#) will be unable to comply with the [consumer's](#) financial obligations under the contract, or could only comply with substantial hardship, if the contract is entered or the [credit limit](#) is increased in the period covered by the assessment; or

10. (b) the contract will not meet the [consumer's](#) requirements or objectives if the contract is entered or the [credit limit](#) is increased in the period covered by the assessment; or

11. (c) if the regulations prescribe circumstances in which a [credit contract](#) is unsuitable--those circumstances will apply to the contract if the contract is entered or the [credit limit](#) is increased in the period covered by the assessment.

12. (3) For the purposes of paragraph (2)(a), it is presumed that, if the [consumer](#) could only comply with the [consumer's](#) financial obligations under the contract by selling the

consumer's principal place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved.

13. (3A) If the contract is a **small amount credit contract** (the **relevant contract**) and either of the following apply:
 14. (a) at the time of the assessment:
 15. (i) the consumer is a **debtor** under another **small amount credit contract**;
and
 16. (ii) the consumer is in default in payment of an amount under that other contract;
 17. (b) in the 90-day period before the time of the assessment, the consumer has been a **debtor** under 2 or more other **small amount credit contracts**;
18. then, for the purposes of paragraph (2)(a), it is presumed that the consumer could only comply with the consumer's financial obligations under the relevant contract with substantial hardship, unless the contrary is proved.
19. Information to be used to determine if contract will be unsuitable
20. (4) For the purposes of determining under subsection (2) whether the contract will be unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:
 21. (a) the information is about the consumer's financial situation, requirements or objectives, or any other **matter** prescribed by the regulations under paragraph 130(1)(d) or (e);
 22. (b) at the time of the assessment:
 23. (i) the **licensee** had reason to believe that the information was true; or
 24. (ii) the **licensee** would have had reason to believe that the information was true if the **licensee** had made the inquiries or verification under **section 130**.

National Credit Code

72 Changes on grounds of hardship

Hardship notice

(1) If a **debtor** considers that he or she is or will be unable to meet his or her obligations under a **credit contract**, the **debtor** may **give** the **credit provider** notice (a **hardship notice**), orally or in writing, of the **debtor's** inability to meet the obligations.

Note: If the **debtor gives** the **credit provider** a hardship notice, there may be requirements (beyond those in **section 88**) that the **credit provider** must comply with before beginning enforcement **proceedings**--see section 89A.

Further information

(2) Within 21 days after the day of receiving the **debtor's** hardship notice, the **credit provider** may **give** the **debtor** notice, orally or in writing, requiring the **debtor** to **give** the **credit provider** specified information within 21 days of the date of the notice **stated** in the notice.

The information specified must be relevant to deciding:

- (a) whether the **debtor** is or will be unable to meet the **debtor's** obligations under the contract; or
- (b) how to change the contract if the **debtor** is or will be unable to meet those obligations.

(3) The **debtor** must comply with the requirement.

Note: The **credit provider** need not agree to change the **credit contract**, especially if the **credit provider**:

- (a) does not believe there is a reasonable cause (such as illness or unemployment) for the **debtor's** inability to meet his or her obligations; or
- (b) reasonably believes the **debtor** would not be able to meet his or her obligations under the contract even if it were changed.

Notice of decision on changing **credit contract**

(4) The **credit provider** must, before the end of the period identified under subsection (5), **give** the **debtor** a notice:

(a) that is in the form (if any) prescribed by the regulations and **records** the fact that the **credit provider** and the **debtor** have agreed to change the **credit contract**; or

(b) that is in the form (if any) prescribed by the regulations and **states**:

(i) the **credit provider** and the **debtor** have not agreed to change the **credit contract**; and

(ii) the reasons why they have not agreed; and

(iii) the name and contact details of the **approved external dispute resolution scheme** of which the **credit provider** is a member; and

(iv) the **debtor's** rights under that scheme.

Civil penalty: 2,000 **penalty units**.

(5) The **credit provider** must **give** the notice before the end of the period identified using the table.

Period for giving notice

	If:	The period is:
1	The credit provider does not require information under subsection (2)	21 days after the day of receiving the hardship notice
2	The credit provider requires information under subsection (2) but does not receive any information in compliance with the requirement	28 days after the stated date of the notice under subsection (2)
3	The credit provider requires information under subsection (2) and receives information in compliance with the requirement	21 days after the day of receiving the information

Regulations may prescribe shorter periods for **credit contracts**

(6) The regulations may provide for subsections (2), (3), (4) and (5) to have effect in relation to **credit contracts** prescribed by the regulations as if a particular reference in subsection (2) or (5) to a number of days were a reference to a lesser number of days prescribed by the regulations.

73 Notice of change

(1) A **credit provider** that enters into an agreement with the **debtor** to change the **credit contract** as a result of a hardship notice by the **debtor** must, not later than 30 days after the date of the agreement, **give** to the **debtor**, and any guarantor under a **guarantee** related to the contract, a written notice setting out:

(a) particulars of the change in the terms of the **credit contract**; and

(b) any information required by the regulations.

Criminal penalty: 50 **penalty units**.

(2) The **credit provider** may, under subsection (1), **give** a **person** particulars only of a **matter** as changed instead of particulars of the change, but only if the **credit provider**:

- (a) makes it clear to the **person** that the **matter** has changed; or
- (b) issues to the **person** a new set of terms and conditions relating to the **credit contract**.

(3) Subsection (1) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code* .

74 Changes by court

(1) If the **credit provider** does not change the **credit contract** as a result of a hardship notice by the **debtor**, the **debtor** may apply to the court to change the terms of the **credit contract**.

(2) The court may, after allowing the applicant, the **credit provider** and any guarantor a reasonable opportunity to be heard:

(a) by order change the **credit contract** (but not so as to reduce the amount ultimately payable by the **debtor** to the **credit provider** under the contract), and make such other orders as it thinks fit; or

(b) refuse to change the **credit contract**.

(3) The court may, if it thinks it appropriate in the circumstances, stay any enforcement **proceedings** under the **credit contract**, and make such other orders as it thinks fit, until the application has been determined.

75 **Credit provider** may apply for variation of change

(1) A **credit provider** under a **credit contract** that has been changed by an order under **subsection 74(2)** may apply to the court for an order varying or revoking the order.

(2) A **credit provider** subject to a stay of enforcement **proceedings** or other order under **subsection 74(3)** may apply to the court for an order varying or revoking the stay or order.

(3) On an application under this section, the court may vary or revoke the order or stay to which the application relates as it thinks fit, or may refuse the application.

76 Court may reopen unjust transactions

Power to reopen unjust transactions

(1) The court may, if satisfied on the application of a **debtor**, **mortgagor** or guarantor that, in the circumstances relating to the relevant **credit contract**, mortgage or **guarantee** at the time it was entered into or changed (whether or not by agreement), the contract, mortgage or **guarantee** or change was unjust, reopen the transaction that gave rise to the contract, mortgage or **guarantee** or change.

Matters to be considered by court

(2) In determining whether a term of a particular **credit contract**, mortgage or **guarantee** is unjust in the circumstances relating to it at the time it was entered into or changed, the court is to have regard to the public interest and to all the circumstances of the case and may have regard to the following:

(a) the consequences of compliance, or noncompliance, with all or any of the provisions of the contract, mortgage or **guarantee**;

(b) the relative bargaining **power** of the parties;

(c) whether or not, at the time the contract, mortgage or **guarantee** was entered into or changed, its provisions were the subject of negotiation;

(d) whether or not it was reasonably practicable for the applicant to negotiate for the alteration of, or to reject, any of the provisions of the contract, mortgage or **guarantee** or the change;

(e) whether or not any of the provisions of the contract, mortgage or **guarantee**

impose conditions that are unreasonably difficult to comply with, or not reasonably necessary for the protection of the legitimate interests of a party to the contract, mortgage or [guarantee](#);

(f) whether or not the [debtor](#), [mortgagor](#) or guarantor, or a [person](#) who represented the [debtor](#), [mortgagor](#) or guarantor, was reasonably able to protect the interests of the [debtor](#), [mortgagor](#) or guarantor because of his or her age or physical or mental condition;

(g) the form of the contract, mortgage or [guarantee](#) and the intelligibility of the language in which it is expressed;

(h) whether or not, and if so when, [independent](#) legal or other expert advice was obtained by the [debtor](#), [mortgagor](#) or guarantor;

(i) the extent to which the provisions of the contract, mortgage or [guarantee](#) or change and their legal and practical effect were accurately explained to the [debtor](#), [mortgagor](#) or guarantor and whether or not the [debtor](#), [mortgagor](#) or guarantor understood those provisions and their effect;

(j) whether the [credit provider](#) or any other [person](#) exerted or used unfair pressure, undue influence or unfair tactics on the [debtor](#), [mortgagor](#) or guarantor and, if so, the nature and extent of that unfair pressure, undue influence or unfair tactics;

(k) whether the [credit provider](#) took measures to ensure that the [debtor](#), [mortgagor](#) or guarantor understood the nature and implications of the transaction and, if so, the adequacy of those measures;

(l) whether at the time the contract, mortgage or [guarantee](#) was entered into or changed, the [credit provider](#) knew, or could have ascertained by reasonable inquiry at the time, that the [debtor](#) could not pay in accordance with its terms or not without substantial hardship;

(m) whether the terms of the transaction or the conduct of the [credit provider](#) is justified in the light of the risks undertaken by the [credit provider](#);

(n) for a mortgage--any relevant purported provision of the mortgage that is void under [section 50](#);

(o) the terms of other comparable transactions involving other [credit providers](#) and, if the injustice is alleged to result from excessive interest charges, the [annual percentage rate](#) or rates payable in comparable cases;

(p) any other relevant factor.

Representing [debtor](#), [mortgagor](#) or guarantor

(3) For the purposes of paragraph (2)(f), a [person](#) is taken to have represented a [debtor](#), [mortgagor](#) or guarantor if the [person](#) represented the [debtor](#), [mortgagor](#) or guarantor, or assisted the [debtor](#), [mortgagor](#) or guarantor to a significant degree, in the negotiations process prior to, or at, the time the [credit contract](#), mortgage or [guarantee](#) was entered into or changed.

Unforeseen circumstances

(4) In determining whether a [credit contract](#), mortgage or [guarantee](#) is unjust, the court is not to have regard to any injustice arising from circumstances that were not reasonably foreseeable when the contract, mortgage or [guarantee](#) was entered into or changed.

Conduct

(5) In determining whether to grant relief in respect of a [credit contract](#), mortgage or [guarantee](#) that it finds to be unjust, the court may have regard to the conduct of the parties

to the [proceedings](#) in relation to the contract, mortgage or [guarantee](#) since it was entered into or changed.

Application

(6) This section does not apply:

(a) to a [matter](#) or thing in relation to which an application may be made under [subsection 78\(1\)](#); or

(b) to a change to a contract under this Division.

(7) This section does apply in relation to a mortgage, and a [mortgagor](#) may make an application under this section, even though all or part of the mortgage is void under [subsection 50\(3\)](#).

77 Orders on reopening of transactions

The court may, if it reopens a transaction under this Division, do any one or more of the following, despite any settlement of accounts or any agreement purporting to close previous dealings and create a new obligation:

(a) reopen an account already taken between the parties to the transaction;

(b) relieve the [debtor](#) and any guarantor from payment of any amount in excess of such amount as the court, having regard to the risk involved and all other circumstances, considers to be reasonably payable;

(c) set aside either wholly or in part or revise or alter an agreement made or mortgage [given](#) in connection with the transaction;

(d) order that the [mortgagee](#) takes such steps as are necessary to discharge the mortgage;

(e) [give judgment](#) for or make an order in favour of a party to the transaction of such amount as, having regard to the relief (if any) which the court thinks fit to grant, is justly due to that party under the contract, mortgage or [guarantee](#);

(f) [give judgment](#) or make an order against a [person](#) for delivery of goods to which the contract, mortgage or [guarantee](#) relates and which are in the possession of that [person](#);

(g) make ancillary or consequential orders.
