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Update Summary

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UPDATE 45 **MARCH 2025**

COMMERCIAL CONTRACT CLAUSES

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Update Summary

Leigh Warnick SC has provided updated commentary. Highlights include the following.

Joint, several and proportionate liability

The broad/narrow scope issue – current status

Legislation in some States applies proportionate liability to actions for damages arising from a failure to take reasonable care. This requirement is open to broad and narrow interpretations. The broad view is that a claim is apportionable if it arises from a failure to take reasonable care. The narrow view is that a claim is only apportionable if the absence of reasonable care is an element of the cause of action on which the claim is based. Recent case law suggests that a claim is apportionable if the plaintiff must prove a failure to take reasonable care, in order to succeed in the claim; it would seem to follow as a matter of logic that if the plaintiff must prove a failure to take reasonable care in order to succeed, they must also plead a failure to take reasonable care. However, it has also been recently held that a claim, whatever the pleaded cause of action, which has been upheld on the basis that there was a failure to take reasonable care will constitute an apportionable claim: *Gerrard Toltz Pty Ltd v City Garden Australia Pty Ltd (in liq) (No 2)* [2024] NSWCA 232. See [26030].

Exclusions from proportionate liability – specific exclusions

Each jurisdiction has specific exclusions from proportionate liability. Many relate to particular Acts or regulations of the relevant jurisdiction. The duties imposed on a builder and project manager under New South Wales building laws may be non-delegable duties attracting the *Civil Liability Act 2002* (NSW). As a result, a builder and project manager may be treated as vicariously liable for the work done on a project by other parties, and cannot exclude or limit their liability by apportioning any part of that liability to those other parties. However, it is still open to the builder and project manager to cross-claim against other parties who had breached a duty of care owed to them: *Pafburn Pty Ltd v The Owners–Strata Plan No 84674* (2024) 99 ALJR 148; [2024] HCA 49. See [26430].

Option and pre-emption clauses

Pre-emptive rights in closely-held group enterprises

Recognition of the legitimate economic interests protected by a pre-emption clause influences courts toward a reasonably liberal construction of such clauses: *Macquarie Retail Pty Ltd v Dexus Capital Funds Management Ltd* [2024] NSWSC 1413. See [41190].

Good faith clauses

Express obligations of good faith operate only within framework of contract

A pre-emption clause may be ineffective if it imposes obligations on a selling joint venturer's holding company rather than a subsidiary which is party to the agreement. A subsidiary has no power to compel its holding company to do anything. An obligation of good faith in a contract does not oblige the obligor to act contrary to its own interests, and in the interests of the other contracting party: *Re IG Power Callide Ltd (Administrators Appointed) (No 4)* [2024] FCA 1316. See [60283].

Good faith as an element of statutory unconscionable conduct

Failure to act with good faith may be a factor in the finding of unconscionable conduct. Breach of an express or implied duty of good faith may be pleaded as an element of a claim of statutory unconscionability under the Australian Consumer Law: *Lindfield NSW Pty Ltd v Netdeen Pty Ltd (t/as GJ Gardner Homes) (No 3)* [2024] NSWSC 1305. See [60930].

Penalty and forfeiture clauses

Default interest cases after *Cavendish Square* and *Paciocco*

A default interest rate of 0.05% per day (18.25% per annum) may be held to be penal and unenforceable, on the basis that it is out of proportion to, or unconscionable in comparison with, the maximum amount of damage that might be anticipated to flow from the breach: *Liu v Lam* [2024] NSWSC 1306. See [105341].

Application of the penalty doctrine after *Paciocco*

Where it is difficult to quantify the potential effect of the triggering event on the legitimate interests of the party protected at the time of making the contract, it is appropriate to uphold the parties' negotiated and agreed compensation regime: *New South Wales v Schofields Nominee No 5 Pty Ltd* [2024] NSWSC 1590. See [105361].

Onus of proof and evidence in penalty cases

Without evidence of likely loss calculated at the time of making a contract, there is no baseline for the calculation of "disproportionality", and no reason for the court to disturb the parties' agreed pre-estimate of otherwise unquantifiable potential loss: *New South Wales v Schofields Nominee No 5 Pty Ltd* [2024] NSWSC 1590. See [105395].

Relief against forfeiture of the tenant's interest in a lease – Court intervention

An application for relief against forfeiture may be opposed on grounds that a lessee is "hopelessly insolvent". However, even if that is established, that is not a decisive factor but a discretionary one: *Okami SA Newton Pty Ltd v Newton SC Pty Ltd* [2024] SASC 151. See [105680].

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COMMERCIAL CONTRACT CLAUSES

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TAKE OR PAY CLAUSES AND THE DOCTRINE OF PENALTIES

[15650] Can the "pay" obligation be avoided as a penalty?

In *M & J Polymers Ltd v Imerys Minerals Ltd* [2008] 1 All ER (Comm) 893; [2008] EWHC 344 (Comm), the Commercial Court of the Queen's Bench Division considered a contract for the supply of chemical dispersants from M & J to Imerys. The contract contained a take or pay clause. Imerys repudiated the contract by termination, at a time when payments were outstanding under the take or pay clause due to shortfalls in the amounts purchased by Imerys. Imerys argued that the amount claimed under the take or pay clause amounted to a penalty.

Burton J noted that neither counsel nor the court had been able to locate any authority on whether a take or pay clause could amount to a penalty: at [40].

Burton J began his analysis with the dictum of Lord Roskill in *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 1 WLR 399; [1983] 2 All ER 205:

> The clause was not a penalty clause because it provided for payment of money upon the happening of a specified event other than a breach of contractual duty owed by the contemplated payor to the contemplated payee.

It might have been expected that this would lead immediately to the conclusion that the obligation to make shortfall payments was not a penalty, because failure to take delivery of the full contractual quantity in a monthly period was an event contemplated by the contract and sanctioned by a substitute obligation – the obligation to pay money. However, Burton J did not see things this way. He considered that the "pay" obligation could, by definition, only arise if there had been a breach of the contractual obligation to "take". He thought that in the event of a breach of both the obligation to take and the obligation to pay, the supplier might have an option either to claim damages for breach of the obligation to deliver, or to make a liquidated claim for the amount due under the take or pay clause: at [41].

This analysis led Burton J to the view that the clause under consideration could be a penalty on Lord Roskill's test, because it provided for payment of money on the happening of a breach of contractual duty. However, he went on to consider other authorities on the subject of penalties, and concluded that the clause did not have any of the recognised hallmarks of a penalty:

> On the facts of this case, I am entirely satisfied that the take or pay clause was *commercially justifiable*, did not amount to *oppression*, was negotiated and freely entered into between *parties of comparable bargaining power*, and did not have the *predominant purpose of deterring a breach of contract* nor amount to a provision *"in terrorem"*.

Following the decisions of the High Court in *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; [2012] HCA 30 and *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525; 90 ALJR 835; 333 ALR 569; [2016] HCA 28, it is clear that the doctrine of penalties under Australian law can apply in a situation where no breach of contract has occurred. This opens the way for Australian courts to apply the analysis from *M & J Polymers*, in an appropriate case. However, having regard to the cumulative effect of *Andrews*, *Paciocco* and the High Court's earlier decision in *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656; 80 ALJR 219; [2005] HCA 71, it would seem that an attack on the "pay" obligations as a penalty could succeed only where the amount payable on failure to take delivery was out of all proportion to the commercial interests protected by those obligations, as viewed at the time of making the contract.

For a discussion of relevant Australian and UK cases on penalties, see the chapter on penalty and forfeiture clauses starting at [105010] and in particular, [105355].

In the United States, a challenge to the "pay" obligation under a take or pay contract as a penalty came before the US Court of Appeals, Sixth Circuit in *Hemlock Semiconductor Corp v Kyocera Corp* No 17-2276 (6th Cir 2018). The dispute concerned a series of long-term contracts for the supply of polysilicon by Hemlock to Kyocera, for use in the manufacture of solar panels. Some years after the contracts were entered into, the market price of polysilicon fell significantly below the contract price, due to the entry of subsidised Chinese suppliers into the solar panel market. Kyocera sought to renegotiate the price. When negotiations stalled, Hemlock insisted on enforcing the take or pay obligations under the contracts, at the original price. Hemlock sought a declaration that Kyocera had repudiated the contracts and Kyocera counterclaimed seeking a declaration that the "pay" provisions of the contracts were unenforceable penalties. Kyocera's counterclaim was dismissed on the pleadings by the District Court for the Eastern District of Michigan, and Kyocera appealed.

The appeal on the penalty issue was upheld by majority. The majority asked first whether the take or pay provisions offered Kyocera two viable performance options, or one option coupled with liquidated damages. The answer to this question was that the "pay" provisions did not offer a viable performance option – they simply required Kyocera to pay something for nothing. These provisions were distinguishable from the corresponding provisions in take or pay contracts in the natural gas supply industry: first because there were no "make-up rights" providing for payments under the "pay" provisions to be credited against the cost of future purchases, and secondly because the "pay" provisions could not be justified by reference to any front-end construction costs incurred by Hemlock (contrast the gas industry situation where the supplier incurs the cost of developing the field, against the security of a long-term offtake contract containing take or pay provisions).

Having decided that the take or pay contracts offered one performance option coupled with liquidated damages, the majority went on to ask whether the pay option was a lawful measure of liquidated damages. By reference to the pleadings only, it could not be said that requiring Kyocera to pay full price for nothing was a reasonable measure of damages. It followed that Kyocera's counterclaim on the penalty issue had prospects of success and should not have been dismissed on the pleadings.

In both *M & J Polymers* and *Hemlock Semiconductor*, reference was made to whether the "pay" provisions were commercially justifiable. This approach aligns with the test now endorsed by the High Court of Australia, for determining whether a provision is a penalty: is the "negative incentive" effect of the stipulation out of all proportion to the commercial interests it protects? See [105355]. The analysis in *Hemlock Semiconductor* includes a salutary reminder that take or pay cases from the natural gas industry are not necessarily reliable precedents in cases arising in the context of other industries, because the commercial interests protected by the "pay" provisions are different.

QNI Resources Pty Ltd v North Queensland Pipeline No 1 Pty Ltd (2022) 11 QR 648; 406 ALR 125; [2022] QCA 169 (see [105395]) was essentially a take or pay case, with the commodity to be taken or paid for being usage of a gas pipeline. Charges for imbalances in usage of the pipeline were challenged by QNI, as penalties. Both at first instance and before the Queensland Court of Appeal, the challenge was unsuccessful. At [96] - [115], the Court of Appeal accepted that the imbalance charges were collateral stipulations engaging the penalty doctrine; but since the evidence indicated that the loss likely to be caused by a usage imbalance could not be quantified as at the time of entering into the gas transportation contract, it could not be said that the agreed imbalance charges were out of all proportion to the likely financial impact of a usage imbalance on the pipeline operator. In those circumstances, the agreed imbalance charges represented the parties' own pre-estimate of the otherwise unquantifiable potential loss. The result was that QNI had failed to establish that the provision imposing imbalance charges was a penalty.

[15670] Are "pay" provisions specifically enforceable?

In his dissenting judgment in *Hemlock Semiconductor Corp v Kyocera Corp* No 17-2276 (6th Cir 2018) (see [15650]), Circuit Judge Clay made the point that under normal circumstances, the remedy for breach of contract will be damages, not specific performance. Specific performance of the "pay" obligation had been accepted in the natural gas supply industry, because of the special circumstances of that industry. However, in a normal contract for supply of goods there was no reason why the "pay" provisions should be specifically enforced, unless they were a true measure of liquidated damages.

Gispac Pty Ltd v Michael Hill Jeweller (Australia) Pty Ltd [2024] NSWSC 18 involved a contract for supply of paper carry bags. Gispac claimed liquidated damages for breach of a clause requiring Michael Hill to take a minimum quantity in each quarter, or pay for that quantity if not taken. Michael Hill claimed that the clause was a penalty. Gleeson J held (at [235]) that the clause was a promise by Michael Hill to provide Gispac with a revenue stream calculated by reference to a fixed number of bags each quarter. Viewed in that light, it was not a secondary obligation triggered by breach, but a primary obligation given in exchange for obligations undertaken by Gispac. This finding made it unnecessary to consider proportionality; but Gleeson J went on (at [238]-[241]) to find that the take or pay provision was commercially justifiable and did not have the predominant purpose of deterring breach.

An appeal in the Gispac case was upheld, on the ground that the relevant clauses had not been effectively incorporated into the contract: *Michael Hill Jeweller (Australia) Pty Ltd v Gispac Pty Ltd* [2024] NSWCA 211. The penalty reasoning was not considered on appeal.

The analysis in the *Gispac* case suggests that under the penalty doctrine as now applied in Australia, there are two possible responses to a penalty defence. One is that the "pay" obligation is not a collateral stipulation enlivened by breach of the obligation to take, but a primary obligation reflecting an agreed allocation of risk between the parties. The other is that the obligation to pay upon failure to take is commercially justifiable – that is, it is not out of all proportion to the commercial interests it is designed to protect.

[The next text page is 25001]

Joint, several and proportionate liability

by

Leigh Warnick SC

[The next text page is 34101]

JOINT AND SEVERAL CONTRACTUAL CLAUSES

[25010] Introduction

In the simplest contractual arrangements there are only two parties. Each of them has rights against, and owes obligations to, the other. In the bilateral contract situation, liability issues are relatively straightforward.

The position becomes more complicated when multiple parties are involved. Contractual clauses may involve single promises given *by* two or more parties (co-promisors) or *to* two or more parties (co-promisees). These clauses may confer rights or impose obligations on multiple parties collectively or separately – or both collectively and separately.

The law classifies multiple obligations and rights in three ways: purely joint, purely several, or joint and several. The classification can have significant consequences.[1]

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1 For a detailed analysis of this subject, and particularly of the common law rules, see Williams GL, *Joint Obligations* (Butterworth & Co, 1949).

[25030] Joint and several obligations

Contractual clauses may impose obligations upon any number of co-promisors.

Where co-promisors collectively undertake to do something, a purely joint contractual obligation is created. Where co-promisors both collectively and individually agree to do something, the obligation is both joint and several.

A purely joint contractual obligation arises where A and B together undertake to pay C $4000. Their responsibility is collective only, not individual. But if A and B undertake both separately and together to pay C $4000, not only do they undertake collective responsibility – in addition, each of them undertakes individual responsibility. This is a joint and several obligation.

In *Re Broons* [1989] 2 Qd R 315 at 316, Moynihan J explained the difference between obligations that are purely joint, and those that are joint and several:

> A joint promise by two or more persons creates a single obligation incumbent upon both or all. A joint and several promise creates both a joint obligation on all and a number of several obligations respectively incumbent on each of the parties. The several obligations are not cumulative so that performance by one is performance by all.

The defining feature of a joint obligation is the “singleness” of the responsibility to perform. Purely joint obligations create a single liability which binds all the co-promisors together. Joint and several obligations create both a singular obligation which is binding on the co-promisors collectively, and a separate, concurrent obligation binding upon each co-promisor individually; but the several obligations are not cumulative.

Purely several obligations impose responsibility for performance on one party only. Several obligations are individual, cumulative and separate; so liability is also individual, cumulative and separate. For example, suppose A promises to pay B $4000 and C promises to pay B $4000. Because the responsibilities are cumulative, B is owed a total of $8000. If both A and C fail to pay, however, their respective liability is only individual. B cannot sue A for $8000, because A never promised that B should have $8000. This is the position even if the obligations of both A and C are contained in the same document. The law considers them, in substance, two independent contracts with B: *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 319 per Gaudron J.

[25050] Joint and several rights

Since the converse of an obligation is a right, contractual clauses may also confer rights on multiple parties (co-promisees) jointly, severally, or jointly and severally.

As with a joint obligation, it is the "singleness" of the benefit which characterises a purely joint contractual right. A purely joint contractual right is a single benefit conferred on two or more parties; eg A promises B and C to pay D $4000.

A clause creating a joint and several right gives co-promisees a single benefit as well as a separate, individual benefit that is non-cumulative; eg A promises B and C to pay D $4000 and A also separately promises B to pay D $4000 and separately promises C to pay D $4000. However, there is a common law rule that a single promise cannot be both joint and several, and in jurisdictions where this rule has not been modified by statute a promise purporting to create joint and several rights must (unless it can be construed as two separate promises) be classified as either joint or several: see [25070] and the references in that paragraph to *Smith v Rynne* [2005] NSWCA 77 at [19] and *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* (2010) 383 ALR 577; [2010] NSWCA 268 at [200].

Finally, a purely several clause gives co-promisees separate, cumulative, individual benefits; eg A promises B to pay B $4000 and A also promises C to pay C $4000.

[25070] Principles of construction

Whether a contractual provision is purely joint, purely several or joint and several is a matter of construction and no particular words are needed: *White v Tyndall* (1888) 13 App Cas 263 at 269 per Lord Halsbury LC.

Construction of the clause is dependent on the wording of the clause and the parties' objective intention. The usual rules of contractual construction apply – eg as Hayne J said in *Kendle v Melsom* (1998) 193 CLR 46; [1998] HCA 13 at 68:

> [T]he construction to be preferred is that which will give effect to the commercial bargain that has been struck between the parties and is recorded in that instrument.

If one interpretation of the clause would lead to a result viewed as absurd, the court may prefer a different construction.

In *Kendle v Melsom* (1998) 193 CLR 46; [1998] HCA 13, a company charge authorised the bank to appoint "any person" as receiver, and also contained an interpretation clause saying that words importing the singular included the plural. The instrument of appointment said the appointment was joint and several. All five justices of the High Court agreed that this allowed the appointment of two receivers who would hold office jointly, so the appointment was valid. It was also the unanimous view of the court that the receivers were jointly and severally liable for their acts. However, the court was divided as to whether the appointment could validly permit the receivers to exercise their powers jointly and severally. This was a question of construction of the instrument of appointment, read with the relevant clause of the charge; but all justices approached it by looking at the nature of the powers to be exercised. Brennan CJ and McHugh J took the view that although the appointment was expressed to be joint and several, it should be read as authorising only the joint exercise of power (at 52):

> These are powers which, by their nature, must be exercised in an orderly manner for the purposes of the receivership. It is absurd to think that the receivership could proceed without the receivers agreeing on the course to be pursued.

However, Gummow and Kirby JJ (in a joint judgment) and Hayne J construed the instrument of appointment as validly authorising the exercise of powers by the receivers either jointly or severally – they did not consider that the possibility of overlapping and potentially conflicting action by the individual receivers, acting severally, was of serious practical concern.

The majority view in *Kendle v Melsom* was applied by the Supreme Court of NSW in *Parker v Higgins* (2012) 17 BPR 32817; [2012] NSWSC 1516. In that case two sisters, co-holders of an enduring power of attorney from their parents, were empowered to act jointly and severally. Slattery J held that one of the sisters, who had been individually exercising power as an attorney, was entitled to do so and was under no obligation to act jointly.

Courts may look to the nature of the parties' interests in the subject matter of the contract to resolve ambiguity. So where the language of the clause is ambiguous and the obligors' interests are joint, this suggests that the rights and obligations were intended to be joint and relevant clauses will be construed accordingly: *White v Tyndall* (1888) 13 App Cas 263; *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 317 per Gaudron J.

In *Federation Insurance* the Wasson family entered into a lease-rent agreement on a motor vehicle, with the leasing company CAGA. Both parties insured their interests in the vehicle under a policy with Federation Insurance. The policy could be terminated by request of the "insured" at any time. One of the Wasson family, with the permission of the others (but without the permission of CAGA), purported to cancel the policy by phone in April 1979. Two months later the vehicle was damaged beyond repair in an accident and the Wasson family sought to claim under the policy. The issue was whether one of two co-insured parties could terminate the policy in respect of their interest, leaving the policy in force covering the interest of the other co-insured. The High Court held that the policy did not authorise the Wassons to act unilaterally to terminate in respect of their own insured interest. Effective termination required the participation of all the co-insured parties. Thus, notwithstanding the Wassons' purported termination the policy remained in effect, covering all insured interests, and the Wassons were still entitled to claim under it.

Although the nature of Federation Insurance's obligation to indemnify "the insured" was not precisely at issue, Gaudron J made some observations about the construction of that obligation (at 317–318):

> The application of the rule of construction to the obligation to provide indemnity contained in the subject policy results in obligations owed severally to the members of the Wasson family and to CAGA as to their separate interests as lessees and lessor in the insured property, although as between the members of the Wasson family, the separate obligation was owed to them jointly.

Gaudron J pointed out (at 318) that a clause expressed to create a joint obligation might have to be construed as creating several obligations, where the nature of the parties' interests made a joint obligation inappropriate:

> One set of words, albeit that they are used once only, expressing an obligation to indemnify different persons against loss of property in which they have separate interests, necessarily gives rise to several different obligations, for the content of the obligation is different for each of the insured, the difference being referable to their different interests.

The construction-based approach outlined above provides the starting point where there is ambiguity in construing a clause. There is, however, a common law presumption (overridden by statute in some jurisdictions) that contractual obligations are purely joint where they are undertaken *by* two or more persons (co-promisors) and there is no indication that the parties are to be bound separately as well as together: see Williams GL, *Joint Obligations* (Butterworth & Co, 1949), Ch 1; *Adler (t/as Argo Rederei) v Soutos (Hellas) Maritime Corp (The Argo Hellas)* [1984] 1 Lloyd's Rep 296 at 300.

At common law a promise *to* two or more persons (co-promisees) was treated as joint, in the absence of a contrary intention: Francis EA and Thomas KJ, *Mortgages and Securities* (3rd ed, Butterworths, 1986), pp 69-70.

Another common law rule (which applies in the absence of any applicable statutory provision) is that a single covenant cannot be made with multiple covenantees (co-promisees) both jointly and severally, so as to leave it to the election of the co-promisees whether to sue together or to sue separately. Where this rule applies, it means that a promise in favour of two promisees cannot be both joint and several. Unless the promise can be construed as two separate promises, one joint and one several, it must be either joint or several. Where breach to one is necessarily a breach to all, that indicates that the promise is properly classified as joint: *Doyle v Doyle* [1992] 3 NZLR 170; *Smith v Rynne* [2005] NSWCA 77 at [19]; *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* (2010) 383 ALR 577; [2010] NSWCA 268 at [200].

See also *Zphere Pty Ltd v Pakis* [2022] VSC 496 at [186]-[209], where a promise in a partnership deed, expressed to be in favour of the partnership and the partners, was construed as a joint promise – despite an interpretation provision in the deed saying that an undertaking in favour of two or more persons was for the benefit of them jointly and severally. The commercial purpose of a partnership deed and the context of historical partnership principles were influential in the construction process.

It also appears that where parties have no beneficial interest in the performance or subject matter of a contractual right, they are presumed at common law to be joint co-promisees: *Anderson v Martindale* [1775-1802] All ER Rep 352. In *Mizzi v Reliance Financial Services Pty Ltd* [2007] NSWSC 37 Brereton J referred to this presumption, but said (at [84]) that it must yield to the contractual intent.

Legislation in the Northern Territory, Queensland, Victoria and Western Australia provides that in the absence of a contrary intention, a covenant made by two or more persons (co-promisors) is presumed to impose joint and several obligations: *Law of Property Act 2000* (NT) s 55(1); *Property Law Act 1974* (Qld) s 54(1)(a); *Property Law Act 1958* (Vic) s 81(1); *Property Law Act 1969* (WA) s 50.

Victoria and Western Australia have provisions derived from s 81(1) of the *Law of Property Act 1925* (UK), deeming a contract or covenant "made with two or more [co-promisees] jointly" to be made with each of them, in the absence of a contrary intention: *Property Law Act 1958* (Vic) s 81(1); *Property Law Act 1969* (WA) s 51(1). This has the effect of overriding the common law rule referred to in the cases cited above (*Doyle v Doyle*, *Smith v Rynne* and *Macquarie International Health Clinic v Sydney South West Area Health Service*), and allows each of the co-promisees to sue separately on the promise: *Oakleigh Acquisitions Pty Ltd (in liq) v Johnstone-Hall* [2006] WASC 306, per Simmonds J at [19].

In other jurisdictions the common law presumptions still operate.

Courts can look to surrounding circumstances to interpret contracts: *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337; 56 ALJR 459 per Mason J at 352 (CLR). For further analysis of this issue, see [1310]. The statutory and common law presumptions will have a role to play only where the ordinary construction process does not resolve the issue. Where the parties' intention can be determined by construction, it will be decisive.

Bosveld v Cardup Industrial Land Holdings Pty Ltd (2011) 41 WAR 504; [2010] WASC 411 provides an example of the determination of the parties' intention by a process of construction. A promise to purchase land from five parties who held as tenants in common was construed as a joint promise, not a joint and several promise. This construction followed from the "singleness" of the promise; the agreement was to purchase the whole of the land from all of the vendors.

The practical effect of these principles is illustrated by *BHP Coal Pty Ltd v O and K Orenstein and Koppel AG* [2008] QSC 141. This case concerned the failure of a bucket-wheel excavator at the Goonyella open cut coal mine in Queensland. The reclaimer was owned by a joint venture consisting of BHP Coal, Mitsubishi Development and a number of other parties. The joint venturers brought a series of claims for the cost of replacing or rebuilding the excavator:

- O&K, the designer and manufacturer of the excavator, had given advice on repairing it after an earlier breakdown. O&K was sued for negligence, and also for misleading advice under former s 52 of the *Trade Practices Act 1974* (Cth) (see now s 18 of the Australian Consumer Law).
- Krupp had a maintenance contract with the joint venture, under which it inspected the excavator regularly. Krupp was sued for negligence and also for breach of contract.

These causes of action arose before the commencement of the *Civil Liability Act 2003* (Qld), so apportionment of liability was not available to the defendants.

The joint venturers succeeded in their actions for negligence and misleading advice against O&K. McMurdo J held (at [222]–[224]) that each plaintiff had sustained a several loss, because its interest in property of the joint venture was held in common. As a result, each plaintiff had a several right of action, both in negligence and under former s 52 (now s 18 of the Australian Consumer Law). As a result, each plaintiff was entitled to recover a percentage of the total loss equal to its interest in the joint venture. It transpired that one of the plaintiffs, holder of an 8.5% interest, had only acquired that interest after the date when the excavator collapsed, so it had no standing to sue. As a result, O&K was only liable for 91.5% of the total loss.

But in the contract claim against Krupp, the position was different. McMurdo J held (at [229]) that the joint venturers were joint promisees – they had the same interest in the performance of the contract, although they had separate interests in the property that was affected. Joint promisees do not have several rights of action. Ordinarily all parties entitled to the benefit of the joint promise should be plaintiffs in the action, and that was not the case here because of the transfer of the 8.5% interest. However, it was conceded that absence of one promisee as a plaintiff should not preclude recovery by the others (see [25170]). Because there was only one cause of action and one award of damages, the award was not reduced because the plaintiffs only represented 91.5% of the interests in the damaged property. Krupp was held liable for breach of contract, and damages were assessed at 100% of the loss.

Krupp was also liable in negligence, but these liabilities were owed to the plaintiffs severally. Because the principal claim against Krupp was the joint claim and the amount of the joint claim exceeded the total of the several claims, judgment against Krupp was given on the joint claim only.

[25090] Consensual releases and covenants not to sue

Where an obligation is purely joint or joint and several, the common law rule is that a consensual release of that obligation as against any of the co-promisors will discharge that obligation against all: *Walker v Bowry* (1924) 35 CLR 48; *Deanplan Ltd v Mahmoud* [1993] Ch 151 at 170; *Cassaniti v Ball* [2022] NSWCA 161 at [55]. For an obligation owed jointly, this results from the fact that there is only one obligation: *Duck v Mayeu* [1892] 2 QB 511 at 513, per AL Smith LJ.

In the case of an obligation owed jointly and severally, the rule was justified in *Walker v Bowry* by reference to the fact that there is only one cause of action: per Isaacs ACJ at 54–55.

Different explanations for the application of the rule to joint and several obligations were suggested in *Deanplan Ltd v Mahmoud* [1993] Ch 151 at 170, one being that if co-promisors could still be sued by the party with the benefit of the obligation, they could claim contribution from the co-promisor who had already settled. This would defeat the purpose of the original settlement.

In *Dorgal Holdings Pty Ltd v Buckley* (1996) 22 ACSR 164 at 167, McLelland CJ in Eq observed that this rule, as it applies to joint and several (as opposed to purely joint) obligations, "seems impossible to justify". However, the Court was bound by the authority of *Walker v Bowry* to apply the rule (in that case, to a joint and several statutory obligation).

Authorities on the common law "release rule" were reviewed by Ward CJ in Eq (as her Honour then was) in *Re Earth Civil Australia Pty Ltd (in liq)* [2021] NSWSC 966 at [2360] ff.

In *Cassaniti v Ball* [2022] NSWCA 161 (at [42]–[87]) it was held that the release rule (as it applies to all joint or joint and several obligations, other than those arising in tort[1]) had been impliedly abrogated in NSW by s 97 of the *Supreme Court Act 1970* (NSW), subsequently re-enacted as s 95 of the *Civil Procedure Act 2005* (NSW).

The rule has also been abrogated in Victoria, with respect to all forms of joint liability, by s 24AA of the *Wrongs Act 1958* (Vic): *Harplex Pty Ltd v Konstandellos* (2018) 54 VR 174; [2018] VSCA 67 at [43]–[64].

Cassaniti and *Harplex* were applied by the New South Wales Court of Appeal in *Anderson v Cannacord Genuity Financial Ltd (No 2)* [2024] NSWCA 161 at [170]-[178].

The release of a purely several co-promisor will not release all co-promisors because the obligations are entirely individual: *Walker v Bowry* (1924) 35 CLR 48 at 56 per Isaacs ACJ (Rich J agreeing).

Turning from co-promisors to co-promisees, the position becomes more complex because of the interplay of law and equity. At common law, a release by a single co-promisee in respect of a joint right constitutes a release by all co-promisees. But where the right is one attracting equitable principles, there is a rebuttable presumption that the promisees hold the right as tenants in common, so that all must agree to the release. In *Murray-Oates v Jjadd Pty Ltd* (1999) 76 SASR 38; [1999] SASC 537, Wicks J (Doyle CJ and Mullighan J agreeing) stated the principle as follows:

> At common law where a promise is given to two promisees, they are treated as having a joint interest in the debt or obligation and a satisfaction to one of the promisees of a joint demand due to both puts an end to the joint demand. In equity, however, the general rule in respect of such a debt or obligation is that the promisees are treated as tenants in common and not joint tenants so that to discharge the entire debt or obligation, the signatures of both are required: *Steeds v Steeds* (1889) LR 22 QBD 537 at 541. If the instrument under which the debt or obligation arose declared the promisees to be entitled to the money as joint tenants both at law and in equity, then equity would follow the law and treat the promisees as joint tenants in equity: *Bell v Rowe* (1901) 26 VLR 511 at 526.

The presumption of tenancy in common will apply, for example, to rights under equitable charges or securities: *Powell v Brodhurst* [1901] 2 Ch 160.

In *Bosveld v Cardup Industrial Land Holdings Pty Ltd* (2011) 41 WAR 504; [2010] WASC 411, the defendant CILH had entered into a contract to purchase land from five parties who owned the land as tenants in common. CILH failed to complete the purchase. All five vendors sued CILH. Subsequently, three of the five vendors entered into a deed of settlement with CILH. The other two vendors continued to pursue the action, joining as defendants the three vendors who had settled.

CILH successfully applied for summary judgment. Kenneth Martin J applied a line of authority commencing with *Wallace v Kelsall* (1840) 7 M & W 264; 151 ER 765; see also *Page v McKensey* [2008] NSWSC 147 (at [28]). These authorities establish that an accord and satisfaction, given to one of two joint creditors, operates to discharge the joint debt. The principle has been applied to discharge of the debt arising when land is sold by co-owners, where one co-owner has entered into a settlement with the purchaser: *Coleman v Bone* (1996) 9 BPR 97706 at 16,238.

The plaintiffs in *Bosveld* sought to rely on *Steeds v Steeds* (1889) 22 QBD 537, where Wills J referred to the intervention of equity, in appropriate circumstances, to ameliorate the common law position arising from the application of *Wallace v Kelsall*. Kenneth Martin J dealt with this argument (at [80]–[82]) by pointing out that in *Steeds v Steeds*, the defendant was relying on equity for a defence, and was obliged to accept the equitable principles applicable to the circumstances in their entirety. In *Bosveld*, the equitable jurisdiction of the court was not invoked; and even if it had been, the circumstances indicated that the vendors were the joint recipients of a single promise, and should not be treated as the holders of several rights in equal proportions as against the purchaser CILH. As in *Murray-Oates v Jjadd Pty Ltd*, the equitable presumption of tenancy in common was rebutted.

In relation to joint and several rights, there is no clear authority. Joint and several rights have both collective and individual dimensions, and the individual dimension would appear to require that the rights of one co-promisee would survive the release by another. To hold otherwise would ignore the several aspect of the right.

A release by a several co-promisee could not bind co-promisees, because the right being released is entirely individual.

It is necessary to distinguish a consensual release from a covenant not to sue particular co-promisors. A release will discharge the obligation against all co-promisors, whereas a covenant not to sue an individual co-promisor will preserve the obligation as against the other co-promisors: *New South Wales v McCloy Hutcherson Pty Ltd* (1993) 43 FCR 489 at 495 per Beazley J. The reason for the distinction was explained by Smith LJ in *Duck v Mayeu* [1892] 2 QB 511 at 513:

> a release granted to … one joint debtor, operates as a discharge of the … other joint debtor, the reason being that the cause of action, which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released. … It has also been held that a covenant not to sue one of two joint debtors does not operate as a release to the other joint debtor … the reason being that the joint action is still alive.

While this reasoning has been criticised, the rule is now entrenched by long usage: *New South Wales v McCloy Hutcherson Pty Ltd* (1993) 43 FCR 489. In the same case an attempt to confine the rule to "the traditional categories of debt and tort" was rejected.

The distinction is between the release of the obligation itself and the promise not to enforce the obligation against individual co-promisors. If a person agrees not to enforce a singular obligation, all parties subject to it are inevitably released from responsibility (subject to statutory abrogation of the release rule, referred to above). A covenant simply not to hold particular parties liable, on the other hand, does not affect the liability of the remaining parties: see for example *Avis v Mark Bain Constructions Pty Ltd* (2011) 82 ACSR 655; [2011] QSC 80 at [203].

In view of this distinction, courts will not construe an agreement with one party as a release of a joint or joint and several obligation unless that was clearly the parties' intention: *Harplex Pty Ltd v Konstandellos* (2018) 54 VR 174; [2018] VSCA 67 at [93]. It is not strictly necessary to expressly reserve a party's rights against remaining co-promisors in order to show that an agreement is a covenant not to sue rather than a release: *Harplex* at [92]. However, an explicit reservation of rights is a clear marker of a covenant not to sue, so where that construction is intended it is prudent to include an express reservation: *Duck v Mayeu* [1892] 2 QB 511; *Murray-Oates v Jjadd Pty Ltd* (1999) 76 SASR 38; [1999] SASC 537 at 53–54.

Where joint or joint and several obligors who were not parties to the release agreement claim that the agreement releases them, they bear the onus of proof: *Harplex* at [97].

These principles were applied by the New South Wales Court of Appeal in *Carr v Thomas* [2009] NSWCA 208. A company called Resource Equities Limited brought an action for breach of duty against three of its directors. Subsequently it entered into a deed of settlement with one of the directors (Thomas), but persisted with the claims against the other two (Carr and Purves). Carr and Purves then cross-claimed against Thomas, seeking equitable contribution on the basis that Thomas owed the same duties and if the duties had been breached, all three directors had breached them in the same way.

In a joint judgment, the Court (Beazley, Ipp and McColl JJA) first considered the effect of the settlement deed, and construed it as a covenant not to sue rather than a release of the underlying obligation. A decisive factor (see [23]) was the reservation of rights to continue proceedings against the other directors; this brought the case within the qualification referred to by McClelland CJ in Eq in *Dorgal Holdings Pty Ltd v Buckley* (1996) 22 ACSR 164 at 167, requiring the document to be construed as a covenant not to sue and not as a release.

Once the settlement deed was classified as a covenant not to sue, it followed on the basis of well-established authority that it did not affect rights of contribution as between the persons subject to the obligation. As a result, Carr and Purves were entitled to claim contribution from Thomas, notwithstanding the settlement deed entered into between Thomas and the company: see [34]–[38].

Padstow Corp Pty Ltd v Fleming [2011] NSWSC 1337 provides another example of a covenant not to sue, as opposed to a release. A number of factors influenced Gzell J in arriving at this classification of the terms of settlement before him: the document was not expressed as a release, the liability concerned was joint and several, there was an express covenant not to sue, the terms contained an express reservation of rights and the terms referred to a right of contribution between the defendants. Finally, the fact that the proceedings remained on foot indicated that the parties intended the terms to take effect as a covenant not to sue, not a release: see [17] and following.

Interaction between these principles and the principles relating to suretyship was considered by the NSW Court of Appeal in *Pritchard v DJZ Constructions Pty Ltd* (2012) 16 BPR 31141; [2012] NSWCA 196. The facts in that case were complex, but for present purposes it is sufficient to note that seven guarantors gave joint and several guarantees to three lenders. Two of the guarantors (severally) gave charges over units in a unit trust, to secure moneys contingently owing under the guarantee. Subsequently two of the three lenders agreed to accept constraints on their rights to recover from several of the guarantors – including constraints on their rights to enforce one of the charges. The majority (Bathurst CJ and Barrett JA) held that all guarantors were discharged from liability under the joint and several guarantee. The joint and several nature of liability under the guarantee (with the associated rights of contribution) gave rise to an implied condition that the security for the guarantee would be maintained (per Bathurst CJ at [60]; Barrett JA at [592]). The rights under the charge could only be exercised by all three lenders acting together; so when two of them agreed to limit their rights to recover under the charge, the limits applied to the rights of all three. This amounted to a material variation of the suretyship contract, and had the effect of discharging all guarantors (applying *Williams v Frayne* (1937) 58 CLR 710 and *Ankar Pty Ltd v National Westminster Finance (Aust) Ltd* (1987) 162 CLR 549; 61 ALJR 245). It appears that a material limitation on the right to recover under the charge would have operated to discharge the guarantors, whether it was construed as a release or a covenant not to sue.

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1 The corresponding rule relating to tortious obligations (known as the rule in *Brinsmead v Harrison* (1872) LR 7 CP 547) having been abrogated by earlier legislation dealing with contribution between tortfeasors, as interpreted by the High Court in *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574; see *Re Earth Civil Australia Pty Ltd (in liq)* [2021] NSWSC 966 at [2392] ff; *Cassaniti v Ball* [2022] NSWCA 161 at [58]–[62].

[25110] Defence for one, defence for all?

Both purely joint clauses and joint and several clauses involve multiple parties. Where such a clause is breached, any or all of the parties may have a defence. The ability of one co-promisor to rely on defences available to other co-promisors depends on the classification of the clause.

Where an obligation is joint, a defence which goes to the heart of the common responsibility is effective in absolving all co-promisors from liability: *Pirie v Richardson* [1927] 1 KB 448. In *Pirie*, one joint co-promisor successfully defended a claim for breach of contract on the basis that the plaintiff himself had not complied with the contract. The other co-promisors had not pleaded that defence; but they were all released from responsibility, because it was a defence which went to the heart of the joint obligation. Scrutton LJ said (at 456):

> When the court has before it a fact common to the whole contract, which is an answer to any claim on the joint contract, it is bound to take notice of that fact as applicable to every joint contractor, whether he has pleaded it or not.

Various defences are capable of having this effect. Fraud and forgery are examples: *Pirie* at 455 per Scrutton LJ.

Where a defence is specifically applicable to an individual co-promisor, such as the defence of minority, this will discharge the obligation against the affected co-promisor, but usually not against the others. An exception may arise where the obligation requires specific and non-severable components of the joint obligation to be performed by the co-promisor establishing the defence – ie where the obligation could only be carried out by the co-promisors together: *Harrick v Rose* (1931) 37 ALR 356; *McFarland v Brumby* [1966] NZLR 230 at 234 per Woodhouse J. In both of these cases one co-promisor successfully relied on infancy, but this did not discharge the obligations of the adult co-promisor who could still carry out the contract.

For joint and several obligations, the outcome is logical. The joint aspect of the joint and several obligation is subject to the same rules as purely joint obligations; therefore a successful defence by one, provided the defence goes to the heart of the single obligation, will be effective in releasing all. The several aspects of the obligation, however, are individual to the co-promisors themselves, and each must be separately defended: *Hagedorn v Bazett* (1813) 2 M & S 100 at 105–106 per Lord Ellenborough CJ. That separate defence may, of course, be made out by proving the same facts which vitiated the joint obligation, if relevant to the individual co-promisors.

The position with respect to defences against joint co-promisees also follows logically: a defence available against one joint co-promisee will be effective against all if it is not purely idiosyncratic to the individual co-promisee. A defence against a joint and several co-promisee will be effective against all co-promisees in relation to the joint aspect of the right; but will need to be separately established in relation to the several aspect. Finally, a defence in relation to a several co-promisee is not necessarily effective against other several co-promisees unless they can all be shown to be individually affected by it.

[25130] Survivorship

The existence of joint, several or joint and several rights or obligations has consequences where one of the parties dies. The consequences established at common law sometimes operated harshly, so they have been extensively modified by statute in Australian jurisdictions.

Common law position

Dealing first with *joint obligations*, the basic common law position is that the death of a joint co-promisor transfers the responsibility to the remaining co-promisors; the estate of the deceased co-promisor is not responsible: *Godson v Good* (1816) 6 Taunt 587 at 594; *Read v Price* [1909] 1 KB 577 at 586 per Channell J. The exception is where the joint co-promisor who dies is the last remaining co-promisor bound by the obligation. In that situation, the liability is transferred to the estate: *Calder v Rutherford* (1822) 3 Brod & Bing 302.

In relation to *joint contractual rights*, at common law the death of a joint co-promisee extinguishes the co-promisee's interest and the benefit of the promise passes to the remaining co-promisees: *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460; 40 ALJR 471 at 479 (CLR) per Barwick CJ. But an action to enforce the contractual right must usually still include the deceased co-promisee's personal representative as a party, even though judgment on the promise would benefit surviving co-promisees alone. Barwick CJ explained this in *Coulls* (at 479 (CLR)):

> C could not, in any event, in my opinion, be the sole plaintiff against A because A's promise was not made with C alone. Consequently, B's personal representative would need to be either a co-plaintiff or joined as a defendant, though in this case the judgment would be for C alone, the promise with B and C being to pay the survivor of them.

Turning to *joint and several obligations*, the common law position is that if a co-promisor dies, the estate of the deceased co-promisor remains liable on the several aspect of the promise: *Read v Price* [1909] 1 KB 577 at 585–586 per Channell J.

For *joint and several contractual rights*, the common law position is that if a co-promisee in respect of a joint and several contractual right dies, the several aspect of the promise passes to the co-promisee's personal representative. Similarly, where the contractual right is purely several, the benefit of the promise passes to the promisee's personal representative: *Read v Price* [1909] 1 KB 577.

Statutory modification

There is uniform statutory modification of the rule regarding purely joint obligations in the case of partnerships. Legislation in all jurisdictions provides that the estate of a deceased partner is severally liable for the debts and obligations of the partnership incurred when he or she was a partner: *Partnership Act 1963* (ACT) s 13; *Partnership Act 1997* (NT) s 13(2); *Partnership Act 1892* (NSW) s 9; *Partnership Act 1891* (Qld) s 12; *Partnership Act 1891* (SA) s 9; *Partnership Act 1891* (Tas) s 14; *Partnership Act 1958* (Vic) s 13; *Partnership Act 1895* (WA) s 16.

In Queensland and the Northern Territory, extinguishment or discharge of a joint liability (obligation), or a cause of action on a joint liability (right), is effectively placed on the same footing as if the underlying liability was joint and several: *Property Law Act 1974* (Qld) s 54(1)(b); *Law of Property Act 2000* (NT) s 55(1)(b). These provisions will override the common law position, both where a co-promisor dies and where a co-promisee dies. Liability on a joint promise will not be discharged by the death of a co-promisor; liability will pass to the co-promisor's estate. Similarly, a cause of action on a joint promise will not be discharged by the death of the joint promisee; the right will pass to the estate of the deceased co-promisee.

In New South Wales, Tasmania, Victoria and Western Australia, legislation provides that in the absence of a contrary intention, any covenant for the *benefit* of two or more co-promisees jointly is deemed to enure for the benefit of the survivors of them, and any person to whom the right to sue on the promise devolves: *Conveyancing Act 1919* (NSW) s 71; *Conveyancing and Law of Property Act 1884* (Tas) s 72; *Property Law Act 1958* (Vic) s 81; *Property Law Act 1969* (WA) s 51. A similar provision exists in the Australian Capital Territory, but only applies to real property transactions: *Land Titles Act 1925* (ACT) s 109(2). In these jurisdictions the right of a deceased co-promisee to the benefit of the joint promise does not pass to the surviving co-promisees, but passes to the deceased co-promisee's personal representative.

[25150] Performance and discharge of rights and obligations

The singular character of purely joint obligations means that performance by one co-promisor is sufficient to discharge the obligation against all.

For joint and several obligations also, performance by one is performance by all, because the several obligations are not cumulative: *Re Broons* [1989] 2 Qd R 315 at 316 per Moynihan J.

In relation to joint rights, the position is more complex. Usually, when one co-promisee receives the benefit of a joint contractual right, the right is discharged as against other co-promisees: *Powell v Brodhurst* [1901] 2 Ch 160 at 164 per Farwell J; *Williams v Nicoski* [2003] WASC 131 at [386] per Barker J. But where equitable principles are involved (eg where the co-promisees are trustees), equity will require that the benefit be provided to all of the joint co-promisees because they are considered to be tenants in common of the right (unless the instrument creating the right declares that the co-promisees are joint tenants both at law and in equity): *Murray-Oates v Jjadd Pty Ltd* (1999) 76 SASR 38; [1999] SASC 537 at 53 (SASR) per Wicks J (Doyle CJ and Mullighan J agreeing).

In *Bosveld v Cardup Industrial Land Holdings Pty Ltd* (2011) 41 WAR 504; [2010] WASC 411 (see [25090]), vendors of land were held to have joint rights under a contract of sale. When three of the five vendors settled their claim against the purchaser for failure to complete, the rights of the other two vendors were discharged. The vendors were recipients of a joint promise, and any equitable presumption of tenancy in common was clearly rebutted (at [83]).

These principles are relevant when one of a number of joint debtors seeks to serve a statutory demand under s 459E of the *Corporations Act 2001* (Cth). In *Manzo v 555/255 Pitt Street Pty Ltd* (1990) 21 NSWLR 1; 2 ACSR 809 Hodgson J (at 7 (NSWLR); 814 (ACSR)) expressed a tentative view that since payment to one of a number of joint creditors discharged a joint debt, "it could be argued that it must be open to one joint creditor to demand payment of a joint debt". However, in keeping with the principles above, the position was different where equitable rules applied: the creditors became tenants in common of the debt, and a statutory demand had to be signed by all of them, because

> Otherwise, the debtor would face the possibility, if he complied with a notice, of a subsequent claim by a creditor who did not sign the notice.

The suggestion by Hodgson J that a single joint creditor had a right to demand payment of a purely joint debt was questioned by Debelle J (obiter) in *Bentham Management Pty Ltd v Union Finance Pty Ltd* (2007) 247 LSJS 103; [2007] SASC 42, in a Full Court judgment with which Doyle CJ and Perry J agreed. Although Debelle J preferred the view that all joint creditors should join in making a demand for a joint debt, his Honour noted that where one or more joint creditors failed to sign a statutory demand under s 459E, whether the statutory demand would be set aside would depend on whether substantial injustice would be caused:

Corporations Act 2001 s 459J, and see Assaf F, *Assaf's Winding Up in Insolvency* (3rd ed, LexisNexis, 2021) at [3.27]; *Randall Pty Ltd v Chepan Pty Ltd* (2009) 73 ACSR 267; [2009] NSWSC 783.

Where contractual rights are both joint and several, it would seem that the receipt by one co-promisee of the benefit of the right would disentitle other promisees from insisting on its performance. This is because the right is non-cumulative and the several dimension of the right indicates that performance is capable of being received by the parties either individually or collectively.

A related issue is whether co-promisees who have not personally provided consideration can sue to enforce joint or joint and several contractual rights. In relation to joint contractual rights, because of their "collective" nature, consideration provided by one co-promisee is deemed to be consideration provided by all: *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460; 40 ALJR 471 at 479 (CLR) per Barwick CJ, at 486 per Taylor and Owen JJ, at 504 per Windeyer J. For joint and several contractual rights, the position would appear to be the same: *McEvoy v Belfast Banking Co Ltd* [1935] AC 24 at 43 per Lord Atkin, at 52 per Lord Thankerton.

In relation to purely several contractual rights, as with any normal bilateral contractual arrangement, co-promisees must individually provide consideration. This is because the rights are inherently personal in character.

[25170] Actions involving co-promisors and co-promisees

At common law, joint co-promisees wishing to enforce an obligation were all required to be parties to the enforcement action: *Australian Securities Ltd v WA Insurance Co Ltd* (1929) 29 SR (NSW) 571 at 572 per Ferguson ACJ. Due to the fact that parties could not be forced to become plaintiffs in an action, co-promisees who were unwilling to be plaintiffs had to be added as defendants: *Lion White Lead Ltd v Rogers* (1918) 25 CLR 533 at 544–545 per Barton J, at 551–552 per Isaacs and Rich JJ.

Similarly, the common law rule was that proceedings in respect of a purely joint obligation must be brought against all surviving co-promisors. This is because a joint obligation is, and is only, a singular obligation owed by all co-promisors collectively; there is no individual aspect permitting individual co-promisors to be sued alone. A plea in abatement, now no longer available, formerly permitted individual co-promisors to reduce their responsibility to a plaintiff by pleading the fact that other co-promisors liable for the obligation had not been joined as defendants.

Modern rules of civil procedure restate but modify the common law position. Courts are empowered to continue proceedings in the absence of relevant co-promisees or co-promisors in limited circumstances, such as where joinder of parties would embarrass, delay or otherwise be inconvenient: see *Uniform Civil Procedure Rules 2005* (NSW) rr 6.20 – 6.23; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rr 9.03 – 9.05; *Uniform Civil Procedure Rules 1999* (Qld) rr 63, 64, 67; *Rules of the Supreme Court 1971* (WA) O 18 rr 4(2), 4(3), 5(1), 6; *Supreme Court Civil Rules 2006* (SA) rr 73, 74, 77; *Supreme Court Rules 2000* (Tas) rr 176, 179, 181; *Court Procedures Rules 2006* (ACT) rr 213, 214, 217, 218; *Supreme Court Rules 1987* (NT) rr 9.03, 9.05.

In *BHP Coal Pty Ltd v O and K Orenstein and Koppel AG* [2008] QSC 141 (see [25070]), the assignment of a joint venture interest resulted in one joint promisee not joining in the action as a plaintiff. McMurdo J nevertheless gave judgment in favour of the other joint promisees for the full amount of the joint obligation, saying at [229]:

> Ordinarily all persons who are jointly entitled to the relief sought must be parties to the proceeding [footnote: A long standing requirement now within Uniform Civil Procedure

> Rules (Qld) r 63], however an action will not fail for want of parties and it is apparently conceded that the absence of one of the then joint venturers should not preclude recovery by the others for breach of contract [footnote: *Equus Financial Services Ltd v Glengallon Investments Pty Ltd* [1994] QCA 157 per McPherson JA citing *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 462 and Uniform Civil Procedure Rules (Qld) r 67.]

There is also some statutory modification of the common law requirement for joinder, in that bankrupt co-promisors or co-promisees need not be joined as plaintiffs or defendants: *Bankruptcy Act 1966* (Cth) s 62.

In relation to joint and several rights and obligations, the position has always been different. Co-promisors can be sued separately or together; and co-promisees may sue separately or together. This reflects the individual aspect of joint and several rights and liabilities: *Re Jeffery; Ex parte Honey* (1871) LR 7 Ch App 178 at 183 per Mellish LJ. However, courts do have discretion to require particular parties to be joined as plaintiffs or defendants before permitting an action to proceed, in order to avoid multiplicity of proceedings: see the procedural rules cited above.

[25180] Set-off in actions against co-promisors

When one joint and several obligor is sued alone, he or she cannot raise a set-off to which his or her co-obligor is entitled. Thus when a creditor issued a statutory demand against T Pty Ltd for a judgment debt owed jointly and severally by T Pty Ltd and Mrs Fletcher, T Pty Ltd was entitled to set off an amount owed severally by the claimant to it, but not another amount owed severally by the claimant to Mrs Fletcher. The reason for this is that rights of contribution between the co-obligors cannot be resolved by the court, because one of them is not a party to the proceedings: see *Tatlers.com.au Pty Ltd v Davis* (2007) 213 FLR 109; 25 ACLC 1150; [2007] NSWSC 835, per White J at [39]–[46]; see also *Remly v Annis-Brown* [2010] NSWSC 397.

Note that different principles apply in cases (including applications to set aside statutory demands) where a guarantor seeks to raise a set-off available to the principal debtor: see *Saratoga Integration Pty Ltd v Canjs Pty Ltd* (2010) 78 ACSR 600; [2010] NSWSC 654.

[25190] Contribution and accounting between co-promisors and co-promisees

Where obligations are imposed on multiple parties, it is not uncommon for individual co-promisors to end up bearing more than their fair share of the resulting liabilities. For example, suppose A and B jointly and severally promise to pay C $4000 and this obligation is not fulfilled. C sues A and recovers the full $4000 from him; A is jointly and severally liable for the debt, because joint and several obligations impose joint and several liability on the co-promisors.

In this situation, A would be able to recover contribution from the co-promisor B. This is because parties, who are bound jointly or jointly and severally by obligations, are able to claim contribution from each other where they incur a disproportionate liability in discharging the obligations: *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 350–352 per Kitto J. This rule, which was established both at common law and in equity, has its foundation in principles of fairness and equality.

It is open to the parties, of course, to provide in a contract that the co-promisors with respect to a joint or joint and several obligation will not bear liability equally, but will be liable in some different proportions: *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75.

A similar situation would appear to exist where joint or joint and several co-promisees obtain a disproportionate amount of the benefit conferred by a contractual clause. The co-promisee receiving the benefit would need to account to the other co-promisees for this benefit (usually money). The rationale requiring a division of the benefit between the co-promisees is the same as that requiring contribution between joint co-promisors, which is based on concepts of equality and fairness. It may also be possible to argue that accounting is required on the basis of unjust enrichment: see Edelman J and Bant E, *Unjust Enrichment* (2nd ed, Hart Publishing, 2016) pp 297-8.

[The next text page is 34301]

JOINT AND SEVERAL LIABILITY

[25310] Introduction

When multiple parties are potentially liable to a plaintiff for a legal wrong, such as a breach of contract, the concept of joint and several liability becomes relevant. This should be distinguished from the narrower concept of joint and several contractual rights and obligations.

When speaking of contractual rights and obligations as being joint, several or joint and several, the focus is on the primary rights and obligations in the contract. When speaking more generally of joint, several or joint and several liability, the emphasis is on the secondary liability (for instance, a requirement to pay damages to the innocent party) which results from a breach of a primary obligation (which may be contractual, or may arise in some other way). The issue in this context is whether and to what extent multiple parties are responsible collectively or individually for this secondary liability.

[25330] Joint, several and joint and several wrongdoers

Where two or more parties are collectively responsible for one wrongful act (such as a breach of contract or a tort), they are known as "joint tortfeasors" or (using more modern language) joint wrongdoers. Where they are together responsible for the same damage, but not the same act, they are termed "several concurrent tortfeasors" or several concurrent wrongdoers: see *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635; [2001] HCA 66 at 646 per Gleeson CJ and Callinan J, adopting language used by Professor Glanville Williams in his book *Joint Torts and Contributory Negligence* (1951). The terms "concurrent tortfeasors" or concurrent wrongdoers encompass both joint wrongdoers and several concurrent wrongdoers.

This is a general legal concept which arises at common law and in equity, somewhat akin to the notion of joint and several contractual rights and obligations. Joint wrongdoers at common law have a singular liability to the plaintiff in respect of the damage and must be sued together. Several wrongdoers have a liability which is purely individual, so they can be sued separately. Where wrongdoers are both collectively and individually liable for the whole of the damage suffered by an innocent party, their liability is joint and several. They can be sued separately or together, but satisfaction of that liability by one wrongdoer will prevent the innocent party from claiming against any of the others. This is not because of the character of joint and several liability, but because of the rule against double recovery: *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635; [2001] HCA 66 at 656, [46] per Gleeson CJ and Callinan J.

The liabilities of parties who are knowingly involved in a breach of trust or fiduciary duty were considered by the Full Federal Court in *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; [2012] FCAFC 6 at [553] and following. The general principle is that the fiduciary and the third party will only be severally liable for the profits each of them makes through the breach of fiduciary duty or trust. However, there are exceptions to this where the third party is the "alter ego" (usually corporate) of the fiduciary, or the third party and the fiduciary have been acting in concert to secure a mutual advantage. In those situations, the third party and the fiduciary will be jointly and severally liable to restore the trust or account for the profits made. See also *Re Earth Civil Australia Pty Ltd (in liq)* [2021] NSWSC 966 at [2443] and *Cassaniti* *v Ball* [2022] NSWCA 161, where the Court expressed the view (*obiter*, at [120]) that even where the obligations of fiduciaries and accessories are joint and several, the release of one obligor will not release the others.

[25340] Rights of contribution

In some situations, concurrent wrongdoers may be able to bring an action for contribution against each other – either under legislation such as the *Wrongs Act 1958* (Vic) Pt IV, or by virtue of an equitable right of contribution: see *Burke v LFOT Pty Ltd* (2002) 209 CLR 282; [2002] HCA 17, particularly the descriptions of the principle of equitable contribution by Gaudron ACJ and Hayne J at [14]ff, by McHugh J at [38]ff and by Kirby J at [87]ff; see also the listing of conditions for application of the doctrine of contribution by Callinan J at [142].

The factual background in *Burke v LFOT Pty Ltd* involved the purchase of retail premises, in reliance on a misrepresentation about the sitting tenants. The purchaser recovered damages from the vendor for contravention of s 52 of the *Trade Practices Act 1974* (Cth) (see now s 18 of the Australian Consumer Law). However, the vendor failed to recover contribution from its solicitor who had given negligent advice on the transaction, because the liabilities of the vendor and the solicitor were not of the same nature and extent.

In *Friend v Brooker* (2009) 239 CLR 129; [2009] HCA 21, an attempt was made to expand the scope of the equitable doctrine of contribution to an obligation undertaken in support of a "common design". The argument succeeded before the New South Wales Court of Appeal, but was rejected by the High Court which reaffirmed the principle as stated in *Burke v LFOT Pty Ltd*: the right of contribution arises as between parties sharing co-ordinate liabilities or a common obligation to make good the one loss, where the liabilities are of the same nature and extent:

> As explained in United States authority, contribution is an attempt by equity to distribute equally, among those having a common obligation, the burden of performing it, so that without that common obligation there can be no claim for contribution.

See *Friend v Brooker* at [39]–[40].

The High Court considered equitable contribution again in *HIH Claims Support Ltd v Insurance Australia Ltd* (2011) 244 CLR 72; 85 ALJR 877; [2011] HCA 31. A sub-contractor S was erecting scaffolding for the Australian Grand Prix in Melbourne, when the scaffolding collapsed damaging a large and valuable video screen. The owner of the screen successfully sued S for damages. S was covered by his own liability insurance policy with HIH. At the same time, he was also covered by a policy with another insurer SGIC, taken out by the event organiser. S claimed on his HIH policy, but shortly afterwards (and before the greater part of the claim could be paid) the HIH Group collapsed. The Commonwealth Government responded to the collapse by setting up the HIH Claims Support Scheme to assist people left without insurance cover. The appellant HIH CSL became the trustee of the Scheme. HIH CSL subsequently paid S 90% of the damages awarded against him, and 90% of his liability for legal costs.

HIH CSL then sued the respondent (successor to the obligations of SGIC), seeking by way of equitable contribution half of the amount the appellant had paid to S. The Supreme Court of Victoria, the Victorian Court of Appeal and the High Court all rejected the equitable contribution claim, on the basis that the liabilities of HIH CSL and SGIC were not co-ordinate liabilities.

As between HIH and SGIC as two insurers of the same risk, the liabilities to pay the insured when the insured event happened would have been co-ordinate liabilities. "Double insurance" creates a co-ordinate liability when the insurers are each liable to insure the same insured against the same loss: see *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342; *Accident Compensation Commission v Baltica General Insurance Co Ltd* [1993] 1 VR 467 at 481; *QBE Insurance (Aust) Ltd v Insurance Australia Ltd* (2011) 247 FLR 333; [2011] ACTSC 40.

However, HIH CSL did not step into the shoes of HIH as co-insurer of S. Rather, it stepped into the shoes of S as the insured; and on paying S 90% of what he would have received as insurance proceeds, HIH CSL obtained an assignment of the right of S to prove in the liquidation of HIH. Thus the obligation of HIH CSL under the HIH Claims Support Scheme was not "of the same nature and to the same extent" as the obligation of SGIC as co-insurer (per Gummow ACJ and Hayne, Crennan and Kiefel JJ at [51]).

In *Zurich Australian Insurance Ltd v GIO General Ltd* (2011) 16 ANZ Insurance Cases 61-880; [2011] NSWCA 47, the NSW Court of Appeal held that the principle of contribution on the basis of double insurance extended to a situation where there were two different insurers and two different insureds, each covered in respect of the same loss. The court in that case also held that while the first insurer has to establish the liability for which it is obliged to provide indemnity, it is sufficient if the liability of the first insurer's insured has been judicially determined or has been the subject of a reasonable compromise: [57].

An associated principle is that where the equitable right of contribution, in relation to co-ordinate liabilities, is altered or lost by an act of the person to whom the obligations are owed, the liability of the co-ordinate obligors may also be discharged: *Hancock v Williams* (1942) 42 SR (NSW) 252 at 255, per Jordan CJ and Halse Rogers J.

The nature of a "co-ordinate liability", and the above principle concerning discharge of co-ordinate obligations, were considered in *Teparyl Pty Ltd v Willis* [2009] V ConvR 54-766; [2009] VSC 259. There, a lessor leased property to a lessee, and the lessee's liabilities were guaranteed. The lease was assigned to an assignee, and the assignee's liabilities were also guaranteed. In the assignment, the lessee and the lessee's guarantor remained liable for liabilities (ie the liabilities of the assignee) under the lease. Later, the lessor granted a discharge to the lessee and the lessee's guarantor. When the assignee defaulted and the lessor claimed on the assignee's guarantors, the assignee's guarantors claimed that the discharge of the lessee and lessee's guarantor also discharged the assignee's guarantors.

Byrne J rejected this argument, on the basis that the liabilities of the assignee's guarantors and the liabilities of the lessor and lessor's guarantor were not co-ordinate liabilities giving rise to a right of equitable contribution. The ultimate liability lay with the assignee, which had defaulted. If the lessee had not been discharged and had paid the amount owed by the assignee, it could have claimed indemnity from the assignee. However, if the assignee had paid what it owed, it could not have claimed indemnity from the lessee. It followed that if the lessor released the assignee, this would release the lessee; but if the lessor released the lessee, that would not affect the liability of the assignee to the lessor: see [39].

As for the guarantors, the lessee's guarantor (if not released) would have been severally liable with the assignee's guarantors (who as between themselves were jointly liable). If the assignee's guarantors paid the rental default amounts as sureties for the ultimately liable party (the assignee), they could not seek contribution from the lessee or the lessee's guarantor – so releasing the lessee and the lessee's guarantor did not increase the burden on the assignee's guarantors. Byrne J adopted the analysis of Giles JA of the New South Wales Court of Appeal in *Karacominakis v Big Country Developments Pty Ltd* (2000) 10 BPR 18235; [2000] NSWCA 313, where his Honour said at [183]:

> The lessee and the assignee or successive assignees are not in any sense under coordinate liabilities, let alone co-suretyship obligations, but parties to a chain of indemnities.

The equitable right of contribution may be modified or excluded by a contrary common intention (express or implied) on the part of the co-obligors: *Chidiac v Maatouk* [2010] NSWSC 386, per Ward J at [204].

In *Ventia Utility Services Pty Ltd v Electricity Networks Corporation (t/as Western Power) (No 3)* [2024] WASC 179, Archer J considered equitable contribution between defendants who were the subject of a joint and several costs order (and were therefore under a coordinate liability in respect of costs). Although a previous judgment had apportioned liability for damages between the defendants in different percentages, Archer J concluded that she was unable to apportion costs in the same proportions as damages, because equitable contribution between parties who were under coordinate liabilities and were liable in the same amount could only be in equal shares (subject to a common intention to the contrary).

In *Ossen Pty Ltd v K&S Developments Pty Ltd (recs and mgrs apptd)* [2024] NSWSC 165, a borrower claimed that she was in substance a surety rather than a principal obligor, was therefore under a coordinate liability with a guarantor of the loan, and was entitled to claim equitable contribution from the guarantor. Richmond J noted (at [58]) that extrinsic evidence is admissible to determine, as between obligors, whether they are principal debtors or merely sureties. However, in the case before the Court there was no evidence to indicate that the borrower was in substance a mere surety, so there was no coordinate liability and no right of contribution.

Joint, several and joint and several liability in contract

[25430] Overview

Issues of joint, several or joint and several liability do not often arise in the law of contract. However, the notion may become important in some situations, eg:

(a) where joint, several or joint and several contractual obligations are breached;

(b) where the contract specifically imposes a particular type of liability upon two or more parties in the event of a breach (usually joint and several liability); and

(c) where the breach of a contractual obligation causes the same damage as another wrongful act committed by a separate person.

[25450] Breach of joint, several or joint and several contractual obligations

Where a contractual obligation imposed on multiple parties is breached, the secondary liability for breach is determined by construction of the primary obligation. In other words, liability depends on whether the obligation is itself joint, several or joint and several.

Where a contractual clause imposes a purely joint obligation on two or more promisors, they are jointly (but not severally) liable for breach of that obligation: *Kendall v Hamilton* (1879) 4 App Cas 504 at 522 per Lord Hatherley. This follows from the "singleness" of the joint obligation. Joint co-promisors are, therefore, liable together for the damage flowing from a breach of the obligation. It follows that they can only be held liable separately if they can be sued separately. This is only permissible in exceptional cases, under the procedural rules cited in [25170].

If a joint co-promisor was successfully sued individually for breach of the joint obligation, that joint co-promisor would be entitled to recover contribution from other joint promisors: *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 350–352 per Kitto J.

If the plaintiff fails to obtain full satisfaction in a claim against one or more joint co-promisors, the plaintiff cannot afterwards proceed against any other co-promisors because the joint obligation does not survive beyond judgment: *Kendall v Hamilton* (1879) 4 App Cas 504. This rule is modified by legislation in the Northern Territory and Queensland, which provides that joint liability is to be treated the same way as joint and several liability in this context: *Law of Property Act 2000* (NT) s 55(1)(b); *Property Law Act 1974* (Qld) s 54(1)(b).

Where a purely several contractual obligation is breached, liability is also purely several. Given that the promise is itself individual to the promisor, only that promisor can be held liable for it. In *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1985) 6 FCR 524 at 551, Lockhart J said:

> Where a several obligation is entered into by two, three or more parties in one instrument, it is as if each had executed a separate instrument; each obligation may give rise to a several cause of action and to a different remedy.

Lastly, a contractual obligation which is both joint and several renders all co-promisors both separately and collectively liable for a breach of it: *Re Jeffery; Ex parte Honey* (1871) LR 7 Ch App 178 at 183 per Mellish LJ. It follows that one co-promisor may be held liable for the whole of the loss in an action for breach of the obligation and it is then up to that co-promisor to seek contribution from the other co-promisors. In the event that full satisfaction is not obtained from the co-promisor who is sued first, the plaintiff can sue the other co-promisors for the balance of the claim, subject to the rule against double recovery: *Dorgal Holdings Pty Ltd v Buckley* (1996) 22 ACSR 164 at 167 per McLelland CJ.

[25470] Where a clause specifically imposes a particular type of liability

While liability in relation to co-promisors follows logically from the characterisation of the obligation as either joint, several or joint and several, the contract may of course expressly set out the nature of liability flowing from a breach. If the contract does this, it will usually make liability joint and several, since joint and several liability gives the innocent party greater flexibility in the event of a breach.

A common situation where this happens is in contracts with joint ventures comprising two or more contractors. For example, a proprietor may engage a joint venture to carry out a construction project and provide in the contract that the contractors are jointly and severally liable for all of the obligations of the joint venture. This clause enables the proprietor to hold either joint venturer solely liable in the event of a breach – ie to sue either of them for the whole damage. It would then be up to the joint venturer who had the misfortune to be sued first to recover contribution from the other joint venturer.

[25490] Where a breach of a clause constitutes a concurrent wrongful act

As the discussion in [25430]–[25470] shows, liability of multiple parties in the event of a breach of contract will usually be determined by the contract itself. It is possible, however, for joint and several liability to become relevant in other situations.

Perhaps the best example is where a breach of an obligation under a contract leads to the same damage as a concurrent wrongful act committed by a different party. For example, suppose A causes B damage by breaching a contractual term requiring the exercise of reasonable care and C concurrently causes B the same damage by negligence. In that situation, wrongdoing by A and C is not joint, but A and C are jointly and severally liable to B, in the sense that they can be held liable separately or together for the whole of the damage.

As a result of recent statutory intervention in all Australian States and Territories, the joint and several liability which would have arisen in the situation described above is now likely to be displaced by proportionate liability – see [25630] ff.

Where joint and several liability does still apply, a further issue is whether there is a right of contribution between the concurrent wrongdoers. In most jurisdictions the statutory right of contribution is confined to tortfeasors, and does not extend to parties in breach of their contractual obligations. This is the position in New South Wales, the Northern Territory, Queensland and Western Australia: see *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) s 5; *Law Reform (Miscellaneous Provisions) Act 1956* (NT) s 12; *Law Reform Act 1995* (Qld) s 6; *Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947* (WA) s 7. In the Australian Capital Territory, South Australia and Tasmania, contribution legislation covers breach of a contractual duty of care, but not any other contractual breach: *Civil Law (Wrongs) Act 2002* (ACT) Pt 2.5; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) ss 4 and 6; *Wrongs Act 1954* (Tas) ss 2, 3. In Victoria, any contractual breach would appear to give the party committing the breach a right to claim contribution from concurrent wrongdoers: *Wrongs Act 1958* (Vic) ss 23A and 23B.

Clearly, the Victorian legislation is the most favourable to a party seeking contribution in respect of a breach of contract. In *Fluor Australia Pty Ltd v ASC Engineering Pty Ltd* [2007] VSC 262, an attempt was made to invoke the Victorian legislation to recover contribution in respect of a breach of contract involving manufacture of equipment in South Australia, and delivery of that equipment in Western Australia. The Supreme Court of Victoria (Bongiorno J) rejected the claim, noting that the case had no factual connection to Victoria and applying common law choice of law rules (at [55]).

In the absence of a statutory right of contribution, an equitable right of contribution may arise where the remedial obligations between multiple wrongdoers can be considered “common” obligations (ie obligations of the same nature and extent). This depends very much on the particular facts: see *Burke v LFOT Pty Ltd* (2002) 209 CLR 282; [2002] HCA 17 at 303 per McHugh J; *Friend v Brooker* (2009) 239 CLR 129; [2009] HCA 21 at [38] and following; see also [25330].

[The next text page is 34401]

PROPORTIONATE LIABILITY

[25610] Introduction

The contractual liability of multiple parties – or the concurrent contractual and tortious or statutory liability of multiple parties – may, in certain circumstances, be affected by the proportionate liability regimes which now apply in all Australian jurisdictions. Where proportionate liability applies, it supersedes joint and several liability. Proportionate liability has a potentially significant impact on contractual claims where an element of carelessness is involved.

The proportionate liability regimes of Australian jurisdictions are relatively complex, and the national picture is confusing because of differences between the individual legislation of the various States and Territories. Although proportionate liability is a statutory creation of relatively recent origin, it has received extensive judicial attention. The High Court has considered the subject in *Hunt and Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; 87 ALJR 505; [2013] HCA 10, and the judgments in that case provide a valuable reference point for practitioners confronted with proportionate liability issues.[1]

For a review of the operation of proportionate liability principles in commercial cases, see Clarke G S "Proportionate Liability in Commercial Cases: Principles and Practice" (2019) 93 ALJ 188.

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1 See Warnick L, "Proportionate Liability in the High Court" (2013) 87 ALJ 864; see also the subsequent decision of the High Court in *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661; 89 ALJR 572; 320 ALR 47; 105 ACSR 552; [2015] HCA 18.

[25630] How proportionate liability operates

In *Yates v Mobile Marine Repairs Pty Ltd* [2007] NSWSC 1463 at [93]–[94], Palmer J described the operation of the proportionate liability regime in Pt 4 of the *Civil Liability Act 2002* (NSW):

> The object … is remedial and it dramatically changes the previous law. Formerly, a plaintiff could choose to sue only one of several wrongdoers who caused the same loss and the court could enter judgment for the whole of that loss against that defendant. Even if the defendant cross claimed in the proceedings for indemnity or contribution against the other wrongdoers, the plaintiff could enforce a judgment against the defendant alone for the whole of the loss, leaving the defendant to recover from the cross defendants, if it could. …
>
> Part IV is designed to alleviate this perceived injustice. It is intended to visit on each concurrent wrongdoer only that amount of liability which the court considers "*just*", having regard to the comparative responsibilities of all wrongdoers for the plaintiff's loss… the policy of Part IV is that a wrongdoer who is, in a real and pragmatic sense, more to blame for the loss than another wrongdoer should bear more of the liability.

There are variations between the legislation in different Australian jurisdictions but except for South Australia, the core provisions are in similar terms. Section 35(1) of the *Civil Liability*

Act 2002 (NSW) shows how the court is directed to apportion liability:

> In any proceedings involving an apportionable claim:
>
> (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss, and
>
> (b) the court may give judgment against the defendant for not more than that amount.

The threshold definition in all States except South Australia is "apportionable claim". Again there are variations, but s 34(1) of the *Civil Liability Act 2002* (NSW) illustrates the concept:

> This Part applies to the following claims ("apportionable claims"):
>
> (a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injury,
>
> (b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* for a contravention of former s 42 of that Act (as in force before its repeal by the *Fair Trading Amendment (Australian Consumer Law) Act 2010)* or under the *Australian Consumer Law* (NSW) for a contravention of section 18 of that Law.

For present purposes the key feature of this definition is that it extends to certain kinds of contractual claims: specifically, those arising from a breach involving carelessness.

In a nutshell, proportionate liability requires a court to apportion liability between the parties who caused the same damage, in proportion to their respective fault in causing the damage. This means a plaintiff can only recover from each party at fault ("wrongdoer") an amount reflecting that wrongdoer's contribution to the damage. Contrast joint and several liability, which treats each wrongdoer as separately responsible for the whole of the loss suffered by a plaintiff, and separately liable to compensate the plaintiff for the whole loss.

The difference between the two approaches may be illustrated by an example. Suppose A contracts with B for B to design and oversee the erection of an office block. B appoints a subcontractor C, to carry out the actual construction work. The foundations are inadequately constructed, reflecting lack of care in construction (70%) as well as lack of care in supervision (30%). As a result, A suffers loss.

- Under joint and several liability, either or both of B and C could be held responsible for the whole loss. A could sue B for damages representing compensation for the full amount of the loss, leaving B to seek contribution from C (assuming C could be found and had money). In the contribution proceedings, the court would allocate liability between B and C, allowing B to recover 70% of the amount paid to A – subject to the ability of C to pay.

- Under a proportionate liability system, if A makes a claim against B, B will plead the concurrent responsibility of C. The court must then determine how culpable B and C were in causing A's loss and allocate liability between B and C in proportion to their responsibility for the loss. Assuming a 30:70 allocation between B and C, A could only recover 30% of the total loss from B. A would have to recover the remaining 70% directly from C, or not at all.

The plaintiff's notional right to recover 100% of its loss exists in both cases. The difference is initially procedural: the plaintiff must institute proceedings against all defendants who may have contributed to the loss, in order to recover fully. But there is a significant substantive difference if recovery against all defendants is not possible – eg where one defendant is insolvent or cannot be located. In that situation, the plaintiff is unable to recover the full amount of the loss.

This is the key difference between proportionate liability and joint and several liability, from the perspective of a plaintiff. Joint and several liability places the unrecoverable loss risk on the first defendant(s) sued, who may be unable to recover a contribution from insolvent or absent co-wrongdoers. Proportionate liability transfers the unrecoverable loss risk to the plaintiff.

In *Gunston v Lawley* (2008) 20 VR 33; [2008] VSC 97, Byrne J (at [65]) described the effect of the proportionate liability provisions in the *Wrongs Act 1958* (Vic) Pt IVAA:

> Under the proportional liability scheme a plaintiff is, in effect, suing each concurrent wrongdoer separately and recovers a separate judgment against it. This is such a fundamental change from the position which previously existed that courts must struggle to rid themselves of concepts which depend on the outmoded joint and several solidary liability. The plaintiff under the new regime takes, in each case, the risk that any of the judgments will not be satisfied.

It follows that it will usually be in the interests of a plaintiff to keep its claim outside the scope of the proportionate liability regime, but in the interests of a defendant (and the defendant's insurer) to attract proportionate liability as a means of limitation, as an alternative to a complete denial of liability.

From the perspective of a defendant, the proportionate liability regime is nothing more nor less than a liability limitation mechanism, and it is in the defendant's interests to plead the limitation in any case that falls within the scope of the legislation. It is a mistake to view the legislative commitment to proportionate liability as having any broader effect than that.

In *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd* (2009) 69 ACSR 418; [2009] VSC 7, it was argued that "in Victoria at least, proportionate liability is now a fundamental legal norm". Cavanough J, while conceding that Pt IVAA of the *Wrongs Act 1958* had made fundamental changes to the law of Victoria, rejected this submission and confined Pt IVAA to operating within its strict statutory framework: see [25] and following.

Nor does the proportionate liability regime create a set of mandatory provisions which will automatically be applied by a court. If a defendant wishes to rely on proportionate liability as a limitation, the issue must be pleaded in the defence: *Permanent Custodians Ltd v King* [2010] NSWSC 509, per Schmidt J at [15] and following, and see [27210].

A helpful analysis of how the proportionate liability defence works was provided by Dixon J (obiter) in *Gunnersen v Henwood* [2011] VSC 440 at [409]. In an apportionable claim where there is at least one concurrent wrongdoer, the proportionate liability claim is advanced by the defendant against the plaintiff, as if made directly by the plaintiff against the concurrent wrongdoer. The relief claimed by the defendant is a reduction in its liability, recognising the comparative responsibility of the concurrent wrongdoer. In a trial where the putative concurrent wrongdoer remains a party in its own right, the issues between the plaintiff and the concurrent wrongdoer will be fully argued in a normal way. But where the putative concurrent wrongdoer is not participating in the trial (because it has not been sued by the plaintiff, or has settled with the plaintiff) a paradoxical situation can emerge: the defendant is arguing that the plaintiff has a legal claim against the concurrent wrongdoer, while the plaintiff is arguing that it has no such claim – and therefore, that the only relevant responsibility is that of the defendant, who should not be entitled to any reduction in liability to pay damages for the plaintiff's loss.

[25650] Policy basis of the proportionate liability regime

The background to the introduction of proportionate liability was briefly set out by Finkelstein J in *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2)* [2008] FCA 1656 at [4]:

> Proportionate liability was introduced into State and Federal legislation following an inquiry into the law of joint and several liability established by the Commonwealth and the New South Wales Attorneys-General in 1994. The impetus for the inquiry was the growing number of actions against professionals, particularly auditors, who were being singled out as targets for negligence actions not because of their culpability (which might be small) but because they were insured and had the capacity to pay large damages awards. The inquiry was conducted by Professor Davis of the Australian National University. He published stage one of his report in July 1994 and stage two in January 1995. In his report Professor Davis recommended that joint and several liability for negligence which causes property damage or economic loss be replaced by liability which is proportionate to each defendant's degree of fault.

The background to the legislation is more fully described by Mr Horan in his paper prepared in support of proposals to achieve greater national uniformity[1] (referred to later in this paragraph).

The policy objective of the reforms was to contain and reduce the cost of professional indemnity and public liability insurance: *Woods v De Gabriele* (2007) 2 BFRA 168; [2007] VSC 177 at [50] per Hollingworth J. See also the statements on the policy basis for proportionate liability legislation by the High Court in *Hunt and Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; 87 ALJR 505; [2013] HCA 10 (majority judgment at [10] ff; minority judgment at [78] ff).

This purpose supports a broad interpretation of the relevant proportionate liability provisions, and courts have been attracted to this approach: see *Ucak v Avante Developments Pty Ltd* [2007] NSWSC 367; *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* (2007) 164 FCR 450; [2007] FCA 1216; *Reinhold v New South Wales Lotteries Corp (No 2)* [2008] NSWSC 187. The judgment of the High Court majority in *Hunt and Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; 87 ALJR 505; [2013] HCA 10 also reflects a broad interpretation, as opposed to the narrower view preferred by the minority. However, the capacity of defendants to plead a defence of proportionate liability, outside the core categories of negligence, breach of a contractual duty of care and statutory claims for misleading or deceptive conduct, has been significantly restricted by the appellate decisions discussed in [26030]. The consensus of appellate authority now appears to be that the words "arising from a failure to take reasonable care" (as used in the legislation of all States and Territories except Queensland and South Australia) restrict the concept of an apportionable claim to those cases where where failure to take reasonable care is an element of the plaintiff's cause of action, in the sense that the plaintiff is required to plead and prove a failure to take reasonable care in order to succeed.

Proportionate liability has been adopted, in one form or another, in every State and Territory and at the Federal level in legislation providing a remedy for misleading or deceptive conduct. The legislation, while broadly similar across the board, is not uniform and there are significant differences between jurisdictions in the way the proportionate liability regime operates.

As will appear from the discussion below, these differences are confusing – especially for companies and firms with national operations, who are exposed to the operation of the regime in multiple jurisdictions. In February 2009 it was announced that the Standing Committee of Attorneys-General was examining ways to achieve greater national consistency in proportionate liability legislation, and in particular was considering the issue of contracting out. The announcement referred to two reports on the operation of, and inconsistencies in, the proportionate liability legislation of Australian jurisdictions. The first, by Mr Tony Horan, is a very thorough and useful comparative analysis of the legislation in all jurisdictions, with recommendations for amendment. The second is a shorter analysis by Professor Jim Davis, incorporating comments on Mr Horan's paper and additional recommendations.[2]

Also linked to the announcement was a set of drafting instructions identifying inconsistencies and containing proposals for achieving uniformity, arising from the Horan and Davis papers.

Significantly, the report of Professor Davis recommended amendments based on a relatively narrow view of the underlying policy objective:

> The *guiding principle* which should inform all proposals for amendment to the proportionate liability legislation is that the purpose of the legislation is to be a replacement for joint and several liability, which provides for an equitable distribution of liability between concurrent wrongdoers according to their proportionate share of fault in damages claims involving property damage or purely economic loss.
>
> A *principal consequence* of that purpose behind the legislation is that it is applicable only when two or more persons cause a single loss or damage to another through their breach of a tortious duty of care or of a contractual obligation which is concurrent and co-extensive with that tortious duty, or by a breach of the statutory prohibition on misleading conduct.[3]

This view confines proportionate liability in the contractual sphere to breach of a contractual duty which is co-extensive with the tortious duty of care. That would give the legislation a narrower ambit than had been envisaged in some of the cases in New South Wales and Victoria, but it is consistent with the current state of appellate authority: see [26030].

In September 2011, a consultation draft of model uniform legislation was released for comment by the Standing Committee of Attorneys-General. In the same month, the Standing Committee of Attorneys-General transitioned to the Standing Council on Law and Justice (SCLJ).[4] Submissions on the model provisions closed on 7 October 2011. At its meeting in April 2012, the SCLJ agreed that the model provisions should be revised in light of the submissions received. A revised draft of the model provisions and a comprehensive regulatory impact statement were presented to the SCLJ meeting in October 2013.[5] Commonwealth and State Ministers at the meeting agreed to release the draft provisions and impact statement, and to consider introducing the provisions in their respective jurisdictions. However, the SCLJ was superseded by the Law, Crime and Community Safety Council in December 2013, and this body has in turn been superseded by the Council of Attorneys-General. Amidst these name changes, uniformity of proportionate liability legislation appears to have lost priority as a law reform project.

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1 Horan T, *Proportionate Liability: Towards National Consistency* at [33]–[68], see http://webarchive.nla.gov.au/gov/20141215114931/http://www.lccsc.gov.au/sclj/archive/former_sclj/projects/proportionate_liability.html, viewed 11 February 2025.

2 Horan T, *Proportionate Liability: Towards National Consistency*, and Davis JLR, "Proportionate Liability: Proposals to Achieve National Uniformity"; see http://www.justice.tas.gov.au/__data/assets/pdf_file/0016/113623/Davis_Report.pdf, viewed 11 February 2025.

3 Davis, *Proportionate Liability: Proposals to Achieve National Uniformity*, Section 1.

4 http://webarchive.nla.gov.au/gov/20141215114931/http://www.lccsc.gov.au/sclj/archive/former_sclj/projects/proportionate_liability.html, viewed 11 February 2025.

5 http://webarchive.nla.gov.au/gov/20141215114931/http://www.lccsc.gov.au/sclj/archive/former_sclj/projects/proportionate_liability.html, viewed 11 February 2025.

[25670] Legislative framework

The provisions which impose proportionate liability were mostly inserted into existing Acts and are set out in the table below.

Jurisdiction	Legislation	Date of Commencement
Commonwealth	*Corporations Act 2001* (Cth) Pt 7.10, Div 2A *Competition and Consumer Act 2010* (Cth) Pt VIA (formerly *Trade Practices Act 1974* (Cth) Pt VIA *Australian Securities and Investments Commission Act 2001* (Cth) Pt 2, Div 2, Subdiv GA	26 July 2004 (all)
Australian Capital Territory	*Civil Law (Wrongs) Act 2002* (ACT) Ch 7A	8 March 2005
New South Wales	*Civil Liability Act 2002* (NSW) Pt 4	1 December 2004, in respect of claims arising after 26 July 2004, except for building and subdivision actions: see *Civil Liability Regulation 2019*, reg 5.
Northern Territory	*Proportionate Liability Act 2005* (NT)	1 June 2005
Queensland	*Civil Liability Act 2003* (Qld) Ch 2 Pt 2	11 March 2005
South Australia	*Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) Pt 3	1 October 2005
Tasmania	*Civil Liability Act 2002* (Tas) Pt 9A	1 June 2005
Victoria	*Wrongs Act 1958* (Vic) Pt IVAA	1 January 2004
Western Australia	*Civil Liability Act 2002* (WA) Pt 1F	1 December 2004

Whether a loss was suffered (and therefore whether a claim arose) before or after the operative date of the proportionate liability legislation was considered in *Permanent Custodians Ltd v King* [2010] NSWSC 509. In that case a father was duped by his son into granting two mortgages over his home, and a solicitor failed to give proper advice protecting the father from his son's conduct. Schmidt J held that the father had suffered damage when the mortgages were granted – which was before the operative date of Pt 4 of the *Civil Liability Act 2002* (NSW). Her Honour (at [42]) distinguished *Wardley v Western Australia* (1992) 175 CLR 514 where a contingent risk of loss arose, but no actual damage was suffered until the contingency occurred and the loss became actual.

[25680] Which legislation applies?

Because there are differences between the apportionment legislation of the various jurisdictions, importance may attach to the question of which legislation applies to a particular case. In contract cases, the issue will often be determined by a choice of law clause; but as to the limits on choice of law in this context, see [26910]-[26970]. In the absence of a choice of law clause, standard conflict of law principles will apply.

In a non-contractual case involving breach of a duty of care, the applicable law is the law of the *lex loci delicti* (place of the wrong), since the provisions of the apportionment legislation are substantive rather than procedural: *Australian Executor Trustees (SA) Ltd v Kerr* (2021) 151 ACSR 204; [2021] NSWCA 5 at [229] (NSWCA).

[25690] How proportionate liability applies to contracts – "apportionable claims"

Proportionate liability is generally associated with negligence claims, or claims for misleading or deceptive conduct. However, it does apply to claims under contracts if the legislative criteria are satisfied and the parties to the particular contract have not attempted (or have not been able) to contract out of the applicable proportionate liability legislation.

Proportionate liability, like joint and several liability, is relevant to the secondary obligation arising from a breach of contract. In all jurisdictions except South Australia (which approaches the matter differently), proportionate liability only applies to contractual actions which fall within the definition of "apportionable claim".

In all jurisdictions except Queensland (and of course South Australia, where the term is not used) "apportionable claims" are defined to mean:

- claims for economic loss or damage to property in an action for damages arising out of a failure to take reasonable care (whether in contract, tort or otherwise); and
- claims for misleading or deceptive conduct under the fair trading legislation of the relevant State or Territory.

See *Civil Liability Act 2002* (NSW) s 34; *Wrongs Act 1958* (Vic) s 24AF; *Civil Liability Act 2002* (WA) s 5AI; *Civil Liability Act 2002* (Tas) s 43A; *Civil Law (Wrongs) Act 2002* (ACT) s 107B; *Proportionate Liability Act 2005* (NT) s 4.

Queensland has a similar approach, but defines an apportionable claim as a claim for economic loss or property damage "arising from a *breach of a duty of care*": *Civil Liability Act 2003* (Qld) s 28(1)(a). The application of proportionate liability to claims under the fair trading legislation, based on misleading or deceptive conduct, is restricted in Queensland by s 28(3) and s 32F.

In South Australia, there is no concept of apportionable claims. The concept used instead is "apportionable liability", meaning liability in damages that arises: (a) under the law of torts; (b) for breach of a contractual duty of care; or (c) under statute: *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 4(1).

The most controversial aspect of these definitions has been the requirement in the first limb for a connection with some failure to take care: see [25870] and following, below.

Commonwealth legislation also has a concept of "apportionable claims" relating to misleading or deceptive conduct: see the provisions listed at the beginning of the table in [25670]. The *Corporations Act 2001* (Cth) and *Australian Securities and Investments Commission Act 2001* (Cth) deal with misleading or deceptive conduct in relation to financial products and services, whereas the relevant provisions of the *Competition and Consumer Act 2010*, specifically s 18 of the Australian Consumer Law (formerly s 52 of the *Trade Practices Act 1974*), concern misleading or deceptive conduct more generally. It is important to acknowledge the application of proportionate liability to misleading and deceptive conduct, since it frequently overlaps with the law of contract. However, a detailed consideration of the subject is beyond the scope of this book. For an analysis of the provisions in the *Corporations Act 2001* (Cth) and *Australian Securities and Investments Commission Act 2001* (Cth), see *Selig v Wealthsure Pty Ltd* (2013) 94 ACSR 308; [2013] FCA 348 at [1054] and following (first instance); *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661; 89 ALJR 572; 320 ALR 47; 105 ACSR 552; [2015] HCA 18 at [8] ff.

A claim for breach of a director's duty of care and diligence under section 180 of the *Corporations Act 2001* (Cth) is not an apportionable claim under State proportionate liability legislation: see the discussion of *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* (2007) 164 FCR 450; [2007] FCA 1216 at [26010].

Where a statute implies a warranty in a contract, and the benefit of the warranty is extended by the statute to successors in title of the original contracting party, a claim on the warranty by a successor in title is "an action for damages in contract" and can be an apportionable claim: see *Owners Corp SP 72357 v Dasco Constructions Pty Ltd* (2010) 77 NSWLR 607; [2010] NSWSC 819, an interlocutory decision of Einstein J involving a claim under Pt 2C (s 18B) of the *Home Building Act 1989* (NSW). However, it should be noted that Dasco concerned a claim against the builder who had actually done the work. In a case where the same statute (s 18C) deemed the developer who had caused work to be done to have the same liability as the builder who had done the work, the Court of Appeal expressed the view (obiter) that a claim against the developer was not an action for damages arising from a failure to take reasonable care, so it was not an apportionable claim and proportionate liability did not apply. One reason given for this view was that applying proportionate liability in a case where a builder had become insolvent would defeat the purpose of s 18C, by allowing the developer to pass some or all of the liability back to the insolvent builder: *Owners Corp Strata Plan 64757 v MJA Group Pty Ltd* (2011) 81 NSWLR 426; [2011] NSWCA 236 per Young JA at [49] ff; see also *Owners of Strata Plan No 68372 v Allianz Australia Insurance Ltd* [2014] NSWSC 1807 at [26] ff.

The correct approach is to determine whether a claim is apportionable, before determining whether there are any concurrent wrongdoers in relation to that claim: *Tanah Merah Vic Pty Ltd v Owners Corp No 1 of PS613436T* [2021] VSCA 72 at [134].

[25695] Parallel claims where some are apportionable and some are not

Where a plaintiff brings an action based on multiple claims, of which some are apportionable and some are not, the court must determine liability for the apportionable claim under the proportionate liability regime, and determine liability for the other claim or claims under the normal rules of joint and several liability: *Civil Liability Act 2002* (NSW) s 35(2); *Wrongs Act 1958* (Vic) s 24AI(2); *Civil Liability Act 2003* (Qld) s 31(2); *Civil Liability Act 2002* (WA) s 5AK(2); *Civil Liability Act 2002* (Tas) s 43B(2); *Civil Law (Wrongs) Act 2002* (ACT) s 107F(3); *Proportionate Liability Act 2005* (NT) s 9. The provision in South Australia is expressed differently, but it has the same effect: *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 8(4)(b).

An example of how apportionable claims can operate in parallel with non-apportionable claims may be seen in *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2)* [2008] FCA 1656. In that case, the plaintiff brought apportionable claims for negligent misstatement and misleading or deceptive conduct in breach of s 52 of the *Trade Practices Act 1974* (Cth) (see now s 18 of the Australian Consumer Law), but also claims for breach of warranty of authority and for relief under s 87 of the *Trade Practices Act 1974*, as it then was (now the *Competition and Consumer Act 2010* (Cth)). Finkelstein J held that the latter claims were not apportionable. In such a case, if the plaintiff succeeds on a non-apportionable claim the defendant(s) will lose the liability-limiting benefit of proportionate liability, and will have to rely on rights to claim contribution (if applicable).

In *Perpetual Trustee Co Ltd v Ishak* [2012] NSWSC 697, the conduct of Mr Ishak contravened two different sections of the *Fair Trading Act 1987* (NSW): former s 42 (misleading or deceptive conduct) and former s 45 (false or misleading representations concerning the nature of an interest in land). A contravention of former s 42 could be an apportionable claim under s 34(1)(b) of the *Civil Liability Act 2002* (NSW) (as in force at the relevant time), but a contravention of s 45 could not be an apportionable claim. Brereton J concluded that because the conduct contravened both sections, the proportionate liability regime did not apply: [189].

In mid-2014, differently-constituted benches of the Full Federal Court delivered conflicting decisions on whether the proportionate liability provisions in Pt 7.10, Div 2A of the *Corporations Act 2001* (Cth) could extend beyond claims for damages under s 1041I, resulting from a contravention of s 1041H, to permit apportionment in parallel claims arising under other sections of the *Corporations Act 2001* (Cth). Fortunately, the conflict has now been resolved by the High Court. The cases are summarised below.

At first instance in *Selig v Wealthsure Pty Ltd* (2013) 94 ACSR 308; [2013] FCA 348, it had been held that defendants lost the benefit of proportionate liability under Pt 7.10, Div 2A because the plaintiffs succeeded not only in the claims under s 1041H, but also in parallel claims under other sections. On appeal, however, a Full Court majority (Mansfield and Besanko JJ) held that the proportionate liability provisions extended to parallel claims in respect of the same loss or damage: *Wealthsure Pty Ltd v Selig* (2014) 221 FCR 1; [2014] FCAFC 64. They reached this conclusion as a matter of statutory construction, relying primarily on the words of s 1041L(2): per Mansfield J at [10]; per Besanko J at [77]. White J dissented on this issue, expressing the view that s 1041L(2) could not make claims part of a "single apportionable claim" unless they were apportionable claims in the first place under s 1041L(1). This view was reinforced by s 1041L(4), which made it clear that apportionable claims were limited to those specified in s 1041L(1).

In *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1; 309 ALR 445; 99 ACSR 336; [2014] FCAFC 65, a different Full Court bench (Jacobson, Gilmour and Gordon JJ), in a joint judgment, agreed with the dissenting view of White J in *Wealthsure Pty Ltd v Selig*, pointing to "evident policy considerations why the proportionate liability scheme is limited to claims for damages made under s 1041I for loss or damage caused by conduct in contravention of s 1041H": [1565].

An appeal to the High Court by Mr and Mrs Selig was successful: *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661; 89 ALJR 572; 320 ALR 47; 105 ACSR 552; [2015] HCA 18. French CJ, Kiefel, Bell and Keane JJ delivered a joint judgment; Gageler J concurred in a brief separate judgment. Both judgments made the same point, in the clearest terms: the proportionate liability regime in Pt 7.10, Div 2A of the *Corporations Act 2001* (Cth) applies only to claims under s 1041I based on contravention of the "misleading or deceptive conduct" provision in s 1041H. It does not extend to claims based on conduct of a different kind. Thus where a plaintiff succeeds in a parallel claim under s 1041I based on contravention of ss 1041E, 1041F or 1041G – or for that matter in a parallel claim based on any other conduct which does not qualify it as an "apportionable claim" under some specific legislative provision imposing proportionate liability – the defendant or defendants will not be able to rely on apportionment.

On the specific issue of statutory interpretation, the High Court agreed with the dissenting view of White J in the Full Court: "claim" must have the same meaning in both ss 1041L(1) and 1041L(2). Therefore s 1041L(2) could only be speaking of a claim that was within s 1041L(1) – that is, a claim under s 1041I arising from a contravention of s 1041H.

Similar reasoning was applied (obiter) to claims under the Australian Consumer Law (ACL) by Emmett JA of the NSW Court of Appeal in *Williams v Pisano* (2015) 90 NSWLR 342; [2015] NSWCA 177, at [55]ff. His Honour concluded (at [64]) that the proportionate liability provisions in Pt VIA of the *Competition and Consumer Act 2010* (Cth) apply to a claim for damages caused by conduct done in contravention only of s 18 of the ACL.

The combined effect of the cases cited above – *BHPB Freight v Cosco Oceania Chartering*, *Selig v Wealthsure* (High Court) and *Williams v Pisano* – appears to render untenable an apportionment defence against a claim under any section of the ACL, other than s 18. However, an apportionment defence was upheld by Digby J of the Victorian Supreme Court in *Prolearn Corporation Pty Ltd v Kytec Pty Ltd* [2022] VSC 5, where Prolearn had pleaded that representations by Kytec and the second defendant, Telstra, contravened both ACL s 18 and ACL s 29(1)(g). His Honour held (at [726]) that Prolearn's loss had been caused by several representations by both defendants, which contravened both s 18 and s 29(1)(g), and apportioned liability between the two defendants on a 50-50 basis.

An outcome more consistent with the authorities cited above would have been to hold the two defendants jointly and severally liable for the claim under s 29(1)(g).

In any event, where a plaintiff is suing multiple defendants under ACL s 18 but also has a potential claim against the defendants under another section, and wishes to argue that the liability of the defendants should be joint and several, the claim under the other section should be pleaded in the alternative.

Where the ACL is applied as State law under State *Fair Trading Acts*, the position will depend on whether the definition of "apportionable claim" refers specifically to s 18 of the State ACL (as in NSW and Victoria) or contains a general reference to an "action for damages under the [State Act applying the ACL] based on misleading or deceptive conduct" (as in WA). In the latter case, an argument that claims under other sections referring to misleading representations or conduct (such as those in Pt 3.1 of the State ACL) would appear to have greater prospects of success.

In *Hadgelias Holdings Pty Ltd v Seirlis* [2015] 1 Qd R 337; [2014] QCA 177 at [25] the Queensland Court of Appeal rejected a rather ambitious appeal argument by a concurrent wrongdoer that an apportionable claim ceases to be apportionable where a parallel, non-apportionable claim is available but is not relied upon.

[25700] Proportionate liability in arbitration proceedings

For a number of years leading up to August 2024, the consensus view was that proportionate liability legislation had no application in arbitration proceedings. But in August 2024, the High Court decided by a majority of five to two that as a general proposition, this view is wrong: *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2024) 98 ALJR 880; [2024] HCA 24. The majority held that in a commercial arbitration where the laws governing the substance of the dispute were the laws of South Australia, those laws included the proportionate liability provisions in Pt 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) and Pt VIA of the *Competition and Consumer Act 2010* (Cth).

However, as pointed out by Edelman J in a postscript to his dissenting judgment (at [225]), the decision does not mean that proportionate liability provisions will apply in every arbitration governed by the substantive law of an Australian jurisdiction.

The pre-2024 cases are reviewed in [25701]. The High Court's decision in *Tesseract* is analysed at [25702], and the current position – including the anomalous position in Victoria – is summarised at [25703].

[25701] Pre-2024 cases

The issue first arose in *Aquagenics Pty Ltd v Break O'Day Council* (2010) 20 Tas R 239; [2010] TASFC 3, where the Tasmanian Full Court favoured the view that the proportionate liability provisions in the *Civil Liability Act 2002* (Tas) did not apply in arbitration proceedings.

The *Aquagenics* case involved a construction contract for a waste water treatment plant. The contract contained an arbitration clause. The principal terminated the contract after giving a show cause notice; the contractor claimed repudiation and sought damages. The principal referred the dispute to arbitration. The contractor (Aquagenics) argued that:

- proportionate liability would apply, if the claim was heard in a court;
- arbitration proceedings on the claim should be stayed, because the proportionate liability provisions could not be applied by an arbitrator — so referring the claim to arbitration would deprive the contractor of the right to limit its liability.

The Full Court held that proportionate liability would not apply even if the claim was heard by a court, because the parties had contracted out. However, both Evans J (at [33]) and Tennent J (at [95]) expressed the view (without finally deciding) that the proportionate liability regime can only be applied by a court or a statutory tribunal, such as the Victorian Civil and Administrative Tribunal. Wood J agreed with Evans J. This view was based primarily on the references in the legislation to "court", "plaintiff" and "defendant", and on the relatively narrow definition of "court" – which includes "tribunal" but does not refer to arbitration.

In *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449, Curtin University (as principal) had made a claim against Woods Bagot (as contractor) on a construction contract. The claim was referred to arbitration. Woods Bagot sought to limit its liability under the proportionate liability provisions in Pt 1F of the *Civil Liability Act 2002* (WA). Curtin objected, saying the proportionate liability provisions did not apply in arbitration proceedings. The arbitrator referred to the Supreme Court the question of whether, as a matter of statutory construction, the proportionate liability regime applied to commercial arbitration proceedings. Beech J answered the question in the negative, relying on a number of considerations drawn from the language of the *Civil Liability Act 2002* (summarised at [96]) — and noting that his view was consistent with the dicta of the Tasmanian Full Court in *Aquagenics Pty Ltd v Break O'Day Council* (above). Beech J did point out, however, that the proportionate liability regime could be applied to an arbitration by an express or implied term of the arbitration agreement, a matter which was outside the scope of the question referred to him.

The origin of the *Tesseract* case was a dispute in which Pascale (builder of a Bunnings Warehouse building in Windsor Gardens, South Australia) claimed against Tesseract (an engineering consultancy) for breach of contract, negligence and misleading or deceptive conduct. Under a clause in the contract between Pascale and Tesseract, the dispute was referred to arbitration. It was accepted that the applicable substantive law was the law of South Australia. In the arbitration, Tesseract sought to rely on proportionate liability in its defence. Pascale objected, and the arbitrator referred a preliminary question of law (whether the relevant proportionate liability provisions applied to the arbitration) to the South Australian Supreme Court, where the matter was heard by the Court of Appeal.

In *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2022) 140 SASR 395; 406 ALR 293; [2022] SASCA 107, the Court of Appeal decided that the proportionate liability provisions in Pt 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) and Pt VIA of the *Competition and Consumer Act 2010* (Cth) were not applicable. This decision was consistent with the earlier Tasmanian and Western Australian decisions in *Aquagenics* and *Curtin University*.

The decision of the Court of Appeal in *Tesseract* reinforced a view which had been generally accepted, at least since the *Curtin University* decision: where parties had not contracted out of proportionate liability (see [26730]) but had included an arbitration clause in their contract, reference of a dispute to arbitration would deprive the respondent of the right to limit liability under proportionate liability legislation. In other words, providing for arbitration of all disputes under the contract was considered to be a way of contracting out of proportionate liability.

[25702] Tesseract International Pty Ltd v Pascale Construction Pty Ltd

Tesseract appealed to the High Court against the decision of the South Australian Court of Appeal. By a majority of five to two, the High Court upheld the appeal: *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2024) 98 ALJR 880; [2024] HCA 24. The reasons of the majority are contained in three judgments: an individual judgment of Gageler CJ, a joint judgment of Gordon and Gleeson JJ, and a joint judgment of Jagot and Beech-Jones JJ. Separate dissenting judgments were delivered by Edelman J and Steward J – a total of five judgments in all.

All judges accepted that in an arbitration, participation will almost always be restricted to the parties to the arbitration agreement. Third parties cannot be joined unless they agree, and the original participants agree to the joinder. Therefore, an arbitration could not necessarily resolve the whole of a dispute involving apportionable claims, because the arbitral tribunal would not have the capacity to enforce the apportionment of liability to concurrent wrongdoers who were not parties to the arbitration. This meant that if proportionate liability applied in an arbitration and the claimant succeeded in its claim, but the respondent succeeded in a defence of apportionment, the claimant could only recover the whole of its loss by suing concurrent wrongdoers in subsequent court proceedings.

The Court was faced with what Steward J described as an “invidious choice”: either to disadvantage the claimant in the arbitration, by forcing it to bring separate proceedings to recover all of its loss; or to disadvantage the respondent to the arbitration, by forcing it to bear the claimant’s full loss and seek contribution from other wrongdoers (reverting to the former “solidary liability” position, which proportionate liability legislation was intended to ameliorate).

The five judgments canvassed a range of detailed issues relating to both arbitration and proportionate liability, but the principal point of difference between the majority and the dissenting judges may be reduced to one question: when the parties to the arbitration chose (or were deemed to choose) the law of South Australia as the law applicable to the substance of their dispute, did that law include the liability-limiting provisions of proportionate liability legislation?

potential legal liability to the plaintiff as a condition for classifying a party as a concurrent wrongdoer, and the NSW Court of Appeal has taken a firm position on the issue. The sequence of cases is set out below.

In *Equal 54 Pty Ltd v Galimberti* [2016] VSC 588 at [305], Kennedy J adopted the view of the High Court minority, noting that it reflected the position taken by intermediate appellate courts as exemplified by *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666; [2009] VSCA 245.

The same approach is implicit in the decision of Stevenson J in *The Trust Co Ltd v VISA Global Logistics Pty Ltd* [2017] NSWSC 197. In that case, the plaintiff was initially refused leave to amend its defence to cross-claim to plead apportionment, because the facts as pleaded could not support a duty of care owed by the putative concurrent wrongdoer to the defendant; therefore the putative concurrent wrongdoer could not be liable to the defendant for negligence. After reformulation of the proposed amended defence, amendment was permitted on the basis that the facts as pleaded could arguably support a duty of care: *The Trust Co Ltd v VISA Global Logistics Pty Ltd (No 2)* [2017] NSWSC 326.

See also *Owners Corp Plan No PS 409234V v Barouche* [2017] VSC 143, where an application for joinder of solicitors as additional parties to a VCAT civil claim (on the basis that they were concurrent wrongdoers) was refused on the basis that the solicitors did not owe a duty of care to the plaintiff.

In *Trajkovski v Simpson* [2019] NSWCA 52, Brereton JA (with whom Basten JA and Sackville AJA agreed on this issue) said (at [195]):

> It is inherent in the notion of "concurrent wrongdoer" that the plaintiff has, or had, a good – albeit not necessarily recoverable – cause of action sounding in damages against the alleged concurrent wrongdoer.

The authorities cited in support of this proposition were *Shrimp v Landmark Operations* (above) and *Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd* [2013] 1 Qd R 319; [2012] QCA 315 at [60]–[62].

This passage from *Trajkovski* was cited by Macfarlan JA in *Liprini v Hale* (2020) 103 NSWLR 275; [2020] NSWCA 130 at [105], in holding that a barrister who was entitled to advocate's immunity could not be a concurrent wrongdoer because the appellant had no cause of action against him.

In *Woodhouse v Fitzgerald* (2021) 104 NSWLR 475; [2021] NSWCA 54, Basten JA (with the agreement of Meagher and Payne JJA) squarely addressed the question of whether the passage in the majority reasons in *Hunt & Hunt Lawyers*, quoted above, should be interpreted as opening up the possibility that a person could be a concurrent wrongdoer without having legal liability to the plaintiff – and firmly rejected that interpretation (at [90]–[96]). *Woodhouse* was a bushfire case, and the party nominated as concurrent wrongdoer was the Rural Fire Service – which is immune from suit in respect of actions taken in good faith in the performance of its functions under the *Rural Fires Act 1997* (NSW). Basten JA held that the primary judge had erred in determining that the High Court majority in *Hunt & Hunt Lawyers* had ruled inconsistently with the line of authority in intermediate appellate courts, applied both before and after *Hunt & Hunt Lawyers*, that confined the concept of "concurrent wrongdoer" to persons who were legally liable to the plaintiff.

The High Court minority view has been cited and relied upon in three Federal Court cases: *Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd* [2014] FCA 880 at [16]; *FYD*

Investments Pty Ltd v Promptair Pty Ltd (No 2) [2019] FCA 419 at [404] and *Babscay Pty Ltd v Pitcher Partners* [2019] FCA 480 at [46]–[47].

One result of this line of authority is that a party which is immune from suit cannot be a concurrent wrongdoer, and if the only putative concurrent wrongdoer is such a party, the defence of apportionment will not be available.

A related issue identified by Horan is whether, if a concurrent wrongdoer must be legally liable *to the claimant*, a party can cease to be a concurrent wrongdoer if the claimant releases or settles with that party, or the claimant's rights become statute-barred. This issue has additional force in Victoria, where the liability of a concurrent wrongdoer can only be taken into account if that person is a party to the proceedings: *Wrongs Act 1958* (Vic) s 24AI(3); see [27190].

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1 See http://webarchive.nla.gov.au/gov/20141215114931/http://www.lccsc.gov.au/sclj/archive/former_sclj/projects/proportionate_liability.html, viewed 11 February 2025.

[25777] Concurrent wrongdoer – causation issues

In *Artistic Builders Pty Ltd v Nash* [2010] NSWSC 1442, a property vendor sued its legal advisers (solicitors and a barrister) for failing to advise on its right of action against the original firm of solicitors who had acted on the sale, before that right became time-barred. The plaintiff settled its claim against the barrister, but pursued the claim against the solicitors to trial. The solicitors sought to limit their liability by apportionment under s 35(1) of the *Civil Liability Act 2002* (NSW). The plaintiff argued that if the barrister had been negligent, it was the solicitor's negligence and not that of the barrister which had been the proximate cause of the plaintiff's loss: [797]. Hall J rejected this argument, and apportioned responsibility 60% to the solicitors, and 40% to the barrister – resulting in a 40% reduction in the damages recovered by the plaintiff from the solicitors.

In cases like *Artistic Builders*, the line is thinly drawn between two arguments available to the plaintiff to resist reduction of the defendant's liability through apportionment. The first argument is that the defendant is not a concurrent wrongdoer because the "other person" nominated by them (in the *Artistic Builders* case, the barrister) did not cause the damage or loss that is the subject of the plaintiff's claim. The second, alternative argument is that although the other person did play a part in causing the loss (so that the defendant does qualify as a concurrent wrongdoer), the "causative potency" of the other person's conduct is relatively minor and does not justify a significant apportionment of liability to them (and away from the defendant). It is difficult to achieve complete or substantial elimination of the apportionment discount through the second argument, as the *Artistic Builders* case shows. However, given the relatively liberal view of causation supported by the High Court majority in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; 87 ALJR 505; [2013] HCA 10 (above), it may become more common for plaintiffs and courts to fall back on the apportionment argument and point to weak causal potency as a factor justifying a minimal or zero reduction in the defendant's liability through apportionment.

In *Gunnersen v Henwood* [2011] VSC 440 the plaintiffs, owners of a coastal property on the Mornington Peninsula, claimed that actions of the defendants (adjoining landowners) had caused a landslip on their property. They also made a claim against Mornington Shire Council, but that claim was settled before the trial. At trial, the defendants denied liability but said that if they were liable, the Mornington Shire Council was a concurrent wrongdoer. Dixon J dismissed the plaintiffs' claim, but went on (obiter) to hold that the defendants' proportionate liability defence would have failed for two reasons. Firstly, the defendants had not established that the Council owed a duty of care to the plaintiffs. Apart from anything else, the defendants had not dealt with Pt XII of the *Wrongs Act 1958* (Vic), which prescribes the matters a court must consider when deciding whether a public authority has breached a duty of care. Secondly, the defendants had not established a causal connection between any breach of duty by the Council, and the plaintiffs' loss.

Issues of causation were considered in detail by the Federal Court (Rares J) in *Wingecarribee Shire Council v Lehman Bros Australia Ltd (in liq)* (2012) 7 BFRA 1; 301 ALR 1; [2012] FCA 1028. The defendant sought to limit its liability under various proportionate liability provisions – primarily those in Pt 2, Div 2, Subdiv GA of the *Australian Securities and Investments Commission Act 2001* (Cth) – on the basis that several rating agencies and another Lehman Bros group company were concurrent wrongdoers. Rares J concluded that neither the rating agencies nor the other Lehman Bros company had caused the losses suffered by the applicant councils, so they were not concurrent wrongdoers for the purposes of the proportionate liability provisions.

An unusual causation issue, involving liability transmitted by law, was considered in *Utility Services Corp Ltd v SPI Electricity Pty Ltd* (2012) 35 VR 628; [2012] VSCA 158. This case arose out of the 2009 Kilmore bushfire. USC, a contractor which carried out inspection services for the electricity distribution network in the Kilmore area, was sued for loss said to have been caused by various failures, including failures in the inspection system. USC sought to amend its defence to include a claim for limitation of liability under the proportionate liability provisions in Pt IVAA of the *Wrongs Act 1958* (Vic). SPI was nominated as the concurrent wrongdoer – not on the basis of anything done by SPI itself, but on the basis of acts or omissions by the State Electricity Commission of Victoria and Electricity Services Victoria Limited prior to the corporatisation and disaggregation of SECV by the *Electricity Industry Act 1993* (Vic), for which liability was transmitted to SPI under the statutory disaggregation framework. The judge managing the action refused leave to amend, on the basis that the proportionate liability claim could not succeed. He reached this conclusion on the basis that a person could not be a concurrent wrongdoer unless their acts or omissions directly caused the loss or damage claimed and made them legally liable to the plaintiff for that loss or damage.

The Victorian Court of Appeal allowed an appeal against this decision and permitted the amendment. In the leading judgment, Dixon AJA accepted that a concurrent wrongdoer must not only have caused the loss or damage but must also be liable to the plaintiff for that loss (citing *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666; [2009] VSCA 245 as the authority establishing that proposition in Victoria). However, this did not rule out the possibility that responsibility for the loss, together with potential liability to the plaintiff, might be transmitted by law to a person other than the original actor. The concept of "concurrent wrongdoer" in s 24AH of the *Wrongs Act 1958* (Vic) is capable of accommodating a person presently responsible for the consequences in law of an act or omission causing damage to the plaintiff, even if that person did not originally commit that act or omission.

In *Rennie Golledge Pty Ltd v Ballard* (2012) 82 NSWLR 231; [2012] NSWCA 376, a defendant made an unsuccessful attempt to extend the concept of "concurrent wrongdoer" to the plaintiff. The case concerned the negligent survey of a building site, resulting in houses being built below flood risk level. The surveyor consented to judgment on liability but attempted, just before the hearing on assessment of damages, to amend its defence to claim limitation of liability under Pt 4 of the *Civil Liability Act 2002* (NSW). One of the parties belatedly nominated as a concurrent wrongdoer was the builder. The other was the owner of the property, who was the plaintiff in the action. The application to amend was dismissed in the District Court, and the applicant appealed. The Court of Appeal dismissed the appeal. Two points of principle emerge from the case. First, the plaintiff cannot be a concurrent wrongdoer for the purposes of the proportionate liability provisions: [15], [128]. If a defendant says the plaintiff has contributed to its own loss, it should plead contributory negligence in its defence.

Second, when a defendant consents to judgment for the whole of the plaintiff's loss, issues of liability are closed. This puts an end to the defendant's right to raise issues of apportionment: [16], [154].

[25778] Causation – vicarious liability and the "distinct acts" debate

In *Hadgelias Holdings Pty Ltd v Seirlis* [2015] 1 Qd R 337; [2014] QCA 177 the Queensland Court of Appeal considered the definition of concurrent wrongdoer in s 87CB(3) of the *Trade Practices Act 1974* (Cth) (now s 87CB(3) of the *Competition and Consumer Act 2010*): "one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss …". In the leading judgment (with which Gotterson and Morrison JJA agreed), Holmes JA (at [21]) construed the definition as:

> concerned with distinct acts (or omissions) or sets of acts (or omissions) by different actors, combining or working independently to cause loss or damage, and consequently inapplicable where there is but a single act or set of acts causing loss attributable to more than one person. [Emphasis added]

In other words, two actors doing different acts causing the same loss are concurrent wrongdoers; two actors jointly doing the same act (and therefore necessarily causing the same loss) are not concurrent wrongdoers. This distinction is an interesting one, and it is not beyond question. In the first place, it seems to overlook one of the linguistic combinations emerging from the words of the statutory provision. Section 87CB(3) and corresponding sections in other jurisdictions specifically cover the situation where two or more persons by their act (singular, by force of the words in brackets) cause (jointly) the damage or loss. Secondly, as a matter of policy this construction may exclude from the proportionate liability regime a situation where it really should apply. As Holmes JA went on to observe at [24], one of the two actors jointly engaged in the same act may be more responsible for the act than the other. In such a case, apportionment would produce a just result.

These issues were considered by Emmett JA of the NSW Court of Appeal in *Williams v Pisano* (2015) 90 NSWLR 342; [2015] NSWCA 177. That case concerned misleading representations made by two vendors (husband and wife) in connection with the sale of their residential property. The principal question on appeal was whether the representations constituted conduct in trade or commerce; all three judges (Bathurst CJ, McColl JA and Emmett JA) held that they did not. This was sufficient to dispose of the appeal, but Emmett JA went on to consider in some detail whether, had relevant provisions of the *Competition and Consumer Act 2010* (Cth) and the *Australian Consumer Law* been applicable, the vendors would have been concurrent wrongdoers and if so, how liability should have been apportioned between them. The other two judges specifically reserved their opinions on the proportionate liability issues.

Emmett JA stated the central issue at [67]: where a single act that causes damage is committed by two or more persons jointly, are they concurrent wrongdoers within s 87CB(3) of the *Competition and Consumer Act 2010* (Cth)? For both vendors, the acts causing the purchaser's loss were the same – being the representations made by the agent, for which both vendors were vicariously liable (the agent was in liquidation and was not sued). Emmett JA concluded (at [85]) that the definition of concurrent wrongdoer in s 87CB(3) "should be construed as applying to a situation in which two or more persons contribute to the commission of a single act that causes the damage that is the subject of the claim". Thus, both vendors, husband and wife, were concurrent wrongdoers. His Honour went on to say that they were equally responsible for the agent's misrepresentation, so that the apportionment between them would have been 50:50.

In the course of his analysis in *Williams v Pisano* (at [84]), Emmett JA identified examples of groups of "wrongdoers acting 'jointly', to whom the purpose of Pt VIA [of the *Competition and Consumer Act 2010*] should not extend". One was partnership, where the act of one partner is the act of all partners. Another was vicarious liability. Both of these situations were recognised in s 87CI of the *Competition and Consumer Act 2010*. With respect to vicarious liability:

> to apply proportionate liability in a case where one defendant's liability arose simply from its vicarious liability for another defendant would completely undermine the principles of vicarious liability and the policy behind them. Accordingly, the introduction of proportionate liability does not apply to instances of vicarious liability.

Emmett JA distinguished two earlier decisions where courts had declined to apportion liability for misleading or deceptive conduct, on the basis that they involved vicarious liability: *Tomasetti v Brailey* (2012) 91 ATR 531; [2012] NSWCA 399; see [25780] and *Hadgelias Holdings Pty Ltd v Seirlis* [2015] 1 Qd R 337; [2014] QCA 177.

One difficulty with the reasoning of Emmett JA is that s 87CI of the *Competition and Consumer Act 2010* does not exclude apportionment where vicarious liability applies. The effect of s 87CI(a) simply is that if Person A is held liable for a proportion of an apportionable claim, Person A's liability can be passed on to Person B under principles of vicarious liability. However, the NSW Court of Appeal overcame this difficulty in *DSHE Holdings Ltd (Receivers and Managers) (in liq) v Potts* (2022) 371 FLR 349; 405 ALR 70; 163 ACSR 23; [2022] NSWCA 165 at [440], by a process of construction of ss 87CI(1)(a) and 87CF. The Court concluded that the legislation does not allow a vicariously liable principal to be a concurrent wrongdoer.

The provision dealing with vicarious liability in s 87CI of the *Competition and Consumer Act 2010* also appears in s 1041S of the *Corporations Act 2001*. Provisions to the same effect are contained in the proportionate liability legislation of all States and Territories (in South Australia, through the definition of "derivative liability"). There is also a specific provision preserving potential joint and several liability as between principal and agent, in the proportionate liability legislation of Victoria (*Wrongs Act 1958* s 24AP(b)), Queensland (*Civil Liability Act 2003* s 32I(b)) and the Australian Capital Territory (*Civil Law (Wrongs) Act 2002* s 107K(b)). The model uniform legislation circulated in October 2013 (see [25650]) follows the current legislation of Victoria, Queensland and ACT by excluding apportionment as between principal and agent: proposed s 13(1)(b), and see [26430].

In South Australia, the position with regard to vicarious liability is clear because of the definition of "group" and related definitions in s 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001*. Wrongdoers who are linked through vicarious liability and other types of "derivative liability" form part of the same group. For the purposes of apportionment, wrongdoers who are members of the same group are treated as a single wrongdoer: s 8(3). Rights of contribution between members of the group are preserved after the group has participated as a single wrongdoer in an apportionment: s 9(a).

The aftermath of *Hadgelias* and *Williams v Pisano* is an unresolved difference of view on this question: where two or more persons contribute to the commission of a single act, can they be concurrent wrongdoers for the purposes of the *Competition and Consumer Act 2010* (Cth) Pt VIA? The Queensland Court of Appeal in *Hadgelias* said no; Emmett JA in *Williams v Pisano* said yes, unless the parties are in a relationship of partnership, or a relationship that creates vicarious liability. The decision of Emmett JA has now received authoritative support from the dicta of the NSW Court of Appeal in *DSHE Holdings Ltd (Receivers and Managers) (in liq) v Potts* (2022) 371 FLR 349; 405 ALR 70; 163 ACSR 23; [2022] NSWCA 165 at [440].

Another case involving representations by vendors and agents came before the Queensland Court of Appeal in *Makings Custodian Pty Ltd v Orchid Avenue Realty Pty Ltd* [2018] QCA 33. It was not necessary to consider whether persons contributing to a single act could be concurrent wrongdoers, since the vendors and the agents had engaged in separate and distinct acts amounting to misleading or deceptive conduct. Therefore, they could readily be classified as concurrent wrongdoers. However, in the leading judgment Gotterson JA took the opportunity to refer to the judgment of Emmett JA in *Williams v Pisano*, and in particular to the analysis in that judgment of *Hadgelias*.

Gotterson JA noted that Emmett JA, while apparently regarding the agents and the principals in *Hadgelias* as concurrent wrongdoers, agreed with the decision not to apportion liability as between the principals and the agents in *Hadgelias* because the principals were vicariously liable for the acts of the agents under s 84 of the *Competition and Consumer Act 2010*. Gotterson JA said it was unnecessary to express a view on the correctness of the conclusion reached by Emmett JA that where two or more persons contributed to a single act, they could be concurrent wrongdoers. However, Gotterson JA did say that the decision in *Hadgelias* should not be taken as requiring every act of a real estate agent and its principal in a real estate transaction to be characterised as a single set of acts. This might well be the case where the agent was merely repeating a misstatement made to the agent by the vendor; but where the principal had made separate representations which had no direct counterparts in conduct of the agent, it was inappropriate to characterise the conduct of the principal and the conduct of the agent as "all within a single set of acts".

[25780] Corporation and its officers or employees as concurrent wrongdoers?

In *Ventouris Enterprises Pty Ltd v Dib Group Pty Ltd* [2010] NSWSC 963, the plaintiff (a small, "mother and daughter" family company) was considering making a loan to a third party. The plaintiff company was negotiating through the daughter KV, who was the working director. The defendant company, through its chief executive, made representations to KV to the effect that the loan would be a safe investment, that it would be repaid with interest, and that the defendant would ensure that the loan was repaid. The loan was made, the third party borrower defaulted, and the plaintiff company suffered loss.

Slattery J found that the representations made by the chief executive of the defendant company were misleading, and induced the plaintiff company to make the loan.

Towards the end of the hearing the defendant amended its defence to plead the proportionate liability provisions of the *Civil Liability Act 2002* (NSW) and the *Trade Practices Act 1974* (Cth) (see now Pt VIA of the *Competition and Consumer Act 2010*). This proportionate liability defence was based on the argument that KV had failed to act with proper care in causing the plaintiff company to make the loan.

Slattery J accepted the argument that KV had failed to act with reasonable care and that her failure caused the plaintiff company's loss. He therefore found that she was a concurrent wrongdoer, and apportioned responsibility 80% to the defendant, and 20% to KV. This resulted in a 20% reduction of the defendant's liability.

This was a case where each party had acted through a single officer. Slattery J noted (at [127]) that complexity can arise in the apportionment process when the responsibility of a company is being assessed for apportionment purposes, as well as the individual responsibility of its directors or executives. He referred to situations where the board of directors of a company was comprised of a number of individuals with differing involvement in the underlying transactions and different personal culpability, citing as examples *Daniels v Anderson* (1995)

37 NSWLR 438 and *Duke Group Ltd v Pilmer (No 2)* (2000) 78 SASR 216; [2000] SASC 418. He concluded that in the case before him, no particular complexity arose: "There is no occasion for the corporate actors to have a different responsibility as wrongdoers from the responsibility of the natural persons who were their representatives in the transaction".

Despite the observation quoted, it seems that in the *Ventouris* case the corporate actor (the plaintiff company) did have a different responsibility from the responsibility of KV who was its representative. KV was held to be a concurrent wrongdoer – that is, a person (separate from the plaintiff company) whose acts or omissions caused the damage or loss claimed by the plaintiff company. If her acts were truly identified with the acts of the plaintiff company, the proper limiting defence would have been the contributory negligence of the company, not the proportionate liability of KV as a concurrent wrongdoer. However, the result would still have been the same.

The *Ventouris* case was the subject of an appeal, but the Court of Appeal was not called upon to consider the issue of proportionate liability: *Dib Group Pty Ltd v Ventouris Enterprises Pty Ltd* (2011) 284 ALR 601; [2011] NSWCA 300.

In *Latol Pty Ltd v Gersbeck* (2015) 303 FLR 298; 110 ACSR 158; [2015] NSWSC 1631 at [53], the NSW Supreme Court (Hamill J) accepted a submission that where contributory negligence provisions in s 12GF of the *Australian Securities and Investments Commission Act 2001* (Cth) were invoked by a defendant in reliance on conduct of a corporate plaintiff, the defendant could not also invoke the proportionate liability provision in s 12GR on the basis that the managing director of the plaintiff was a concurrent wrongdoer. The conduct of the managing director was the conduct of the plaintiff, and the same conduct could not be relied on twice to relieve the defendant of liability. That would "involve an inequitable double discount": see also *Cam & Bear Pty Ltd v McGoldrick* [2018] NSWCA 110 at [100]–[101]; *About Life Pty Ltd v Maddocks Lawyers* [2021] NSWSC 1370 at [678]–[679].

Slattery J considered the responsibility of corporations and their officers/employees again in *Lovick & Son Developments Pty Ltd v Doppstadt Australia Pty Ltd* [2012] NSWSC 529; but in this case his decision on the "concurrent wrongdoer" issue was overturned on appeal.

In the *Lovick* case, a company (Lovick Developments) had bought equipment and leased it to a related company, Lovick Engineering. Both companies were under the control and direction of the same person, Mr Lovick. The machine did not meet expectations and the companies sued the supplier under the misleading/deceptive conduct provisions in the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010*) and the *Fair Trading Act 1987* (NSW). The supplier as defendant sought to limit its liability under the proportionate liability provisions of the *Trade Practices Act 1974* (Cth) and the *Civil Liability Act 2002* (NSW), naming (in respect of each company's claim) the other company and Mr Lovick as other persons who had caused the damage or loss claimed by the plaintiff.

At first instance Slattery J adopted essentially the same approach (and used substantially the same language) as in *Ventouris*. He concluded (at [261]) that in relation to each plaintiff company's claim, the other plaintiff company and Mr Lovick were concurrent wrongdoers with the defendant (although how their acts or omissions caused the first plaintiff company's loss was not explained). Up to this point, the reasoning was consistent with *Ventouris*. However, at the next step a point of difference emerged. Instead of apportioning responsibility to Mr Lovick as a concurrent wrongdoer (as he had done with KV in *Ventouris*), Slattery J held that no liability for either plaintiff company's loss should be apportioned either to Mr Lovick or to the other plaintiff company. Although the judgment provides no detailed explanation for this apportionment, Slattery J evidently considered that it was "just" (as that term is used in s 35(1) of the *Civil Liability Act 2002* (NSW)) because Mr Lovick and the two plaintiff companies "were all in reality creatures of the one decision maker, Mr Lovick": [259].

On appeal (*Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd* [2014] NSWCA 158), Doppstadt claimed that Slattery J erred in not apportioning liability to Lovick Developments for the loss suffered by Lovick Engineering. This ground of appeal depended on the first instance finding that Lovick Developments was a concurrent wrongdoer with Doppstadt. However, that finding did not survive on appeal. Gleeson JA (with the agreement of Ward and Emmett JJA) doubted whether Lovick Developments owed a duty of care in the terms pleaded by Doppstadt and held that even if it did, the duty had not been breached. It followed that Lovick Developments was not a concurrent wrongdoer and the question of apportionment did not arise.

In both *Ventouris* and *Lovick & Son Developments*, the court was considering apportionment as between the defendant and a director (or a director-related entity) of the plaintiff. Apportionment as between a defendant and a director of the defendant is a somewhat different issue. Whether a defendant company and its employees can be concurrent wrongdoers under Pt 2 of the *Civil Liability Act 2003* (Qld) was considered in *GEJ & MA Geldard Pty Ltd v Mobbs (No 2)* [2011] QSC 33. As noted in [25777], the Queensland Act differs from the proportionate liability legislation of other States in that the definition of "concurrent wrongdoer" only includes persons who have acted independently of each other. It does not include persons who have acted jointly.

GEJ & MA Geldard Pty Ltd v Mobbs (No 2) [2011] QSC 33 concerned negligent aerial spraying. The spraying contractor, a company, sought to rely on a defence of apportionment, nominating various putative concurrent wrongdoers including two of its employees who flew the spraying aircraft. Lyons J rejected the attempt to classify the pilots as concurrent wrongdoers, pointing out that the liability of a vicariously liable employer and a negligent employee is joint, not independent. This took the relationship outside the scope of the definition of "concurrent wrongdoer" under the Queensland Act. This reasoning was confirmed on appeal: *Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd* [2013] 1 Qd R 319; [2012] QCA 315 at [65].

The reasoning based on the express statutory requirement for concurrent wrongdoers to be acting independently of each other will not apply in States other than Queensland. Nevertheless, the NSW Court of Appeal came to a consistent conclusion in *Tomasetti v Brailey* (2012) 91 ATR 531; [2012] NSWCA 399. That case involved claims for negligence and misleading or deceptive conduct against an accountant/financial adviser (Mr Brailey), who was also a shareholder in and representative for a financial planning company (TJC). Some of the claims were successful, and Mr Brailey sought to limit his liability under Pt 4 of the *Civil Liability Act 2002* (NSW) by arguing that he and the financial planning company TJC were concurrent wrongdoers. The Court of Appeal rejected his attempt to rely on the proportionate liability provisions. Macfarlan JA, who delivered the leading judgment, said that the acts and omissions of Mr Brailey in giving the relevant financial advice were the corporate acts of TJC: "Accordingly, they were both liable for the losses, their acts and mind being the same". As both were fully responsible for the losses, there was no basis for apportionment by reference to their relative shares of responsibility: [154].

Tomasetti was distinguished by the Queensland Court of Appeal in *Hadgelias Holdings Pty Ltd v Seirlis* [2015] 1 Qd R 337; [2014] QCA 177. In that case the purchaser of an apartment sued the vendors and the vendors' agents for misleading conduct, based on statements about the car parking entitlement associated with the apartment. The conduct of the agent was imputed to a corporate vendor under s 84(2) of the *Trade Practices Act 1974* (Cth) (now s 84(2) of the

Competition and Consumer Act 2010). At first instance it had been held that although the relationship between the vendor and the agent was not as close as in *Tomasetti*, nevertheless Tomasetti provided a direct analogy; the conduct of the corporate vendor and the conduct of the agent was the same conduct, so there was no basis for apportionment between those defendants under former s 87CD of the Trade Practices Act. An appeal was unsuccessful, as the Court of Appeal held that apportionment should not occur because the vendor and the agent were not concurrent wrongdoers (see [25777]). However, in the leading appeal judgment Holmes JA (with the agreement of Gotterson and Morrison JJA) went on (at [24]) to consider the apportionment issue and expressed a different view from the trial judge: although the acts of the agent and the vendor were the same acts, those acts emanated from different minds. This was different from the situation of a director who was the directing mind and will of a company – there, the mind was the same. Moreover there was scope for different degrees of responsibility, as between the different minds; where the vendors knew that the representation was false but still caused it to be made, there was a strong argument that their responsibility for the loss was greater.

Tomasetti was distinguished on a different ground in *Ambergate Ltd v CMA Corp Ltd* (2016) 110 ACSR 642; [2016] FCA 94. Ambergate claimed a loss in the value of shares purchased (and retained) in reliance on statements which were alleged to be misleading. Buchanan J found that the pre-purchase statements were not misleading; the post-purchase statements were misleading, but Ambergate had not proved that the post-purchase statements had caused it to suffer loss. Nevertheless, his Honour went on to consider how Ambergate’s loss, if proved, would have been apportioned. The plea of apportionment had been raised by the third respondent Mr Rowe, who was the managing director and chief executive officer of CMA. Buchanan J accepted that in relation to the claim against Mr Rowe, Mr Rowe and CMA were concurrent wrongdoers. CMA’s responsibility extended beyond what could be attributed to it for the conduct of Mr Rowe; the company also carried responsibility for the inaction of its Board, and the actions of its Chairman: [274]. The Board also had a responsibility to control and direct Mr Rowe. In the circumstances, the proportion of responsibility and loss which could justly have been apportioned to Mr Rowe was 30%: [284].

In *Dunn v Hanson Australasia Pty Ltd* (2017) 12 ACTLR 138; [2017] ACTSC 169, the ACT Supreme Court (Mossop J) considered facts which (for present purposes) were closely analogous to those of *Tomasetti*, and came to the same result – albeit by a slightly different route. The case involved a misleading representation made by a company through its sole director. The relevant issue was whether the company and the director could be concurrent wrongdoers as defined in s 87CB(3) of the *Trade Practices Act 1974* (Cth) (now s 87CB(3) of the *Competition and Consumer Act 2010* (Cth)).

The section referred (and still refers) to “a person who is one of 2 or more persons whose acts or omissions (or act or omission) cause, independently of each other or jointly, the damage or loss …”. Mossop J held (at [61]) that because there was only the act of a single person (done by the company through the director), it could not be said that the act caused the plaintiff’s loss, “independently of each other or jointly”. It followed that the company and the director could not be concurrent wrongdoers in relation to the claim. *Williams v Pisano* was distinguishable, because the two vendors in that case had jointly participated in a single act.

In *Robinson v 470 St Kilda Road Pty Ltd* [2018] FCAFC 84, a ground of appeal was the refusal of apportionment. The appellant Mr Robinson was the chief operating officer of a building company; in that capacity he had provided the respondent, proprietor of the relevant building project, with a statutory declaration which was found at first instance to be misleading. The primary judge rejected Mr Robinson’s claim that the company (which had gone into liquidation) was a concurrent wrongdoer and part of the proprietor’s loss should be apportioned to it. On appeal, Mr Robinson relied on the dicta of Emmett JA in *Williams v Pisano* as authority for the proposition that where two persons were jointly and directly liable for a single representation, the claim was an apportionable claim and the two persons were concurrent wrongdoers.

The apportionment issue was dealt with in a joint judgment of McKerracher and Markovic JJ (Rangiah J agreeing on the issue of apportionment).

The starting-point of the apportionment analysis in the joint judgment was to identify the nature of a company's liability for the act of a senior officer – referred to as "*Tesco* liability", because it stems from the decision in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, and in particular from a passage in the judgment of Lord Reid at page 170. His Lordship pointed out that a corporation could only act through living persons, so that the person who acted was not acting *for* the company but *as* the company: "his mind which directs his acts is the mind of the company". The direct liability of the company under *Tesco* was to be distinguished from vicarious liability for the act of a director, servant or agent: *Robinson*, [36].

The joint judgment in *Robinson* went on to distinguish *Williams v Pisano*, where the two vendors had engaged jointly in a single act. In the case of Mr Robinson and his company, there was no action at all on the part of the company that could be regarded as concurrent wrongdoing. The company was simply directly liable by reference to the conduct of Mr Robinson, through *Tesco* liability: [47]. This put the case on the same footing as *Dunn* (above) and *Tomasetti*, and the joint judgment expressed agreement with the views of Mossop J in *Dunn* and Macfarlan J in *Tomasetti*.

It was "unnecessary to comment on the correctness or otherwise of the helpful obiter analysis in *Williams* as the facts and basis of liability in this instance are quite different": [56]. However, it is clear from the decision in *Robinson* that the relationship between a company and a director through whom the company acts is to be analysed in terms of *Tesco* liability, not vicarious liability.

The above cases support the proposition that, where a company acts only through a director, the company and that director are not concurrent wrongdoers: *Tomasetti*, *Latol*, *Dunn*, *Robinson*. However, the NSW Court of Appeal in *DSHE Holdings Ltd (Receiver and Manager) In liq) v Potts* (2022) 371 FLR 349; 405 ALR 70; 163 ACSR 23; [2022] NSWCA 165, in obiter comments at [439]-[441], doubted the authority of *Tomasetti* and *Robinson*, insofar as those cases held that a director who was the alter ego of the company could not be a concurrent wrongdoer with the company. The Court in *DSHE Holdings v Potts* pointed out that in the alter ego situation the director and the company would be jointly liable for a single act, bringing them within the definition of "concurrent wrongdoer" in s 87CB(3) of the *Competition and Consumer Act 2010* (Cth). The alter ego situation was to be distinguished from a situation where the company's only liability for the acts of the director was vicarious; the language of the apportionment legislation made it clear that a vicariously liable principal could not be a concurrent wrongdoer.

Whichever view is taken of the situation where the director is the alter ego of the company, the position is likely to be different when the company has committed separate and distinct acts or omissions contributing to the plaintiff's loss, through other persons or organs: *Ambergate*. Where the company has a functioning board of directors, the *Ambergate* precedent is likely to be invoked by defendants, on the basis that the company committed a distinct omission by failing to control the director who engaged in the conduct which was the direct cause of loss.

[The next text page is 34451]

Requirement of carelessness

[25870] Apportionable claims: broad or narrow scope?

Within the scope set by the definition of "apportionable claims" (or in South Australia, "apportionable liability"), proportionate liability only applies in a contractual context where carelessness of some kind forms a part of the breach of contract claim. Different jurisdictions express this requirement in different ways, which means the range of contractual actions falling within the proportionate liability regime may vary as between jurisdictions.

The difference in jurisdictional approaches reflects fundamental confusion about the purpose of the proportionate liability reforms. In his paper prepared for the Standing Committee of Attorneys-General as part of the initiative to achieve national uniformity in proportionate liability legislation,[1] Professor Davis recommended as a starting point for uniformity the guiding principle that the purpose of proportionate liability legislation is to provide a replacement for joint and several liability. It follows from this that proportionate liability should apply, and should only apply, in circumstances where there would previously have been joint and several liability and an accompanying right to claim contribution. This means that an apportionable claim should arise only where there is:

- a breach of a tortious duty of care;
- a breach of a contractual obligation *which was concurrent and co-extensive with the tortious duty*; or
- a breach of the statutory prohibition on misleading or deceptive conduct.

This interpretation would restrict the proportionate liability regime to a more limited scope, in the realm of contract, than some courts have been prepared to give it: see [26010]. However, it is consistent with the wording of the legislation in Queensland and South Australia, and the interpretation of the NSW legislation which has been endorsed at appellate level: see [26030].

Professor Davis explained his recommendation by reference to two assumptions (at [2.4.4] of his report):

> Prior to the introduction of PL, joint and several liability and the right to claim contribution from others did not apply if one of the defendants owed obligations to the plaintiff in contract which were not concurrent and co-extensive with a tortious duty of care. Given that, it can be assumed that the introduction of PL was not intended to affect the rights or obligations of parties who had not been regarded as jointly and severally liable prior to that introduction. Additionally, it can be assumed that PL does not apply where a defendant owes to a plaintiff a contractual obligation which is more extensive than one which is concurrent and co-extensive with a tortious duty of care. (Footnote omitted.)

The model uniform legislation circulated in October 2013 (see [25650]) included a proposed definition of "apportionable claim" in section 2(2) which would have excluded (through footnoted examples) claims for breach of strict or absolute contractual duty.

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1 Davis JLR, *Proportionate Liability: Proposals to Achieve National Uniformity*, Section 1, see http://www.justice.tas.gov.au/__data/assets/pdf_file/0016/113623/Davis_Report.pdf, viewed 11 February 2025.

[25970] New South Wales, Victoria, Western Australia, Tasmania, Australian Capital Territory and Northern Territory

The legislation in New South Wales, Victoria, Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory provides that proportionate liability applies to actions for damages "arising (in contract, tort or otherwise) from a failure to take reasonable care": see *Civil Liability Act 2002* (NSW) s 34(1); *Wrongs Act 1958* (Vic) s 24AF(1); *Civil Liability Act 2002* (WA) s 5AI(1); *Civil Liability Act 2002* (Tas) s 43A(1); *Civil Law (Wrongs) Act 2002* (ACT) s 107B(2); *Proportionate Liability Act 2005* (NT) s 4(2).

This requirement is open to different interpretations, broad and narrow. The broad view is that a claim is apportionable if it arises, as a matter of fact, from a failure to take reasonable care. The narrow view is that a claim is only apportionable if the absence of reasonable care is an element of the cause of action on which the claim is based. For a long time, the issue had not been definitively addressed by an appellate court, but decisions of intermediate appellate courts now establish that absence of reasonable care must be an element of the cause of action as pleaded: see *Rahme v Benjamin & Khoury Pty Ltd* (2019) 100 NSWLR 550; [2019] NSWCA 211 and *Tanah Merah Vic Pty Ltd v Owners Corp No 1 of PS613436T* [2021] VSCA 72. Both of these cases are discussed at [26030].

[25990] Narrow view: claims for breach of duty of care only

On one interpretation, the legislation only applies to contractual claims where there is a breach of an express or implied contractual term requiring the defendant to exercise reasonable care. In other words, proportionate liability can only arise in a contractual claim where a duty of care is imposed by the contract. This was essentially the approach recommended by Professor Davis.[1]

On this approach, apportionment would not be available in a claim for breach of a strict contractual duty to take or refrain from taking a particular action, even if the breach was caused by failure to take reasonable care.

Despite the view of Professor Davis that a narrow view reflects the policy intention of the legislation, a body of authority built up in favour of a wider, "factual basis" view – see [26010]. Problems arising from the narrow interpretation are outlined in Hayford O, "Proportionate liability – its impact on contractual risk allocation" (2010) 26 BCL 11 at 17–18.

Commentary referring to the narrow view includes McDonald B, Carter J, "The Lottery of Contractual Risk Allocation and Proportionate Liability" (2009) 26 JCL 1; McDonald B, "Indemnities and the Civil Liability Legislation" (2011) 27 JCL 56; Sappideen C, "Fleming's The Law of Torts" (10th ed, Thomson Reuters 2011) at [11.100] p 316.

As to the position in Queensland see Jones A, "All blown out of proportion? Contracting and proportionate liability in Queensland" (2011) 31 Qld Lawyer 114.

Further support for the narrow view may be drawn from the decision of the Victorian Court of Appeal in *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666; [2009] VSCA 245. In that case Nettle JA (with whom Mandie JA and Beach AJA agreed) pointed out (at [59]) that the object of the proportionate liability legislation was to put a defendant in exactly the same position as it would have been in if all other concurrent wrongdoers liable to make contribution under the contributory negligence legislation were in front of the court and had enough money to pay their share of a judgment. His Honour supported this proposition by reference to a second reading speech, said to be for the Commonwealth Bill but which in fact related to the Northern Territory Proportionate Liability Bill: see *Shrimp v Landmark Operations Ltd* (2007) 163 FCR 510; [2007] FCA 1468 at [66]. Nevertheless, the logic still holds good. But does the corollary apply: do the limits on the right of contribution between concurrent wrongdoers (see [25490]) become limits on the application of proportionate liability? This would seem to be consistent with the view of Professor Davis (see [25650]), but it would introduce additional confusion because these limits differ significantly as between the Australian jurisdictions. The comments of Nettle JA in *St George Bank Ltd v Quinerts* were made in the context of the broad statutory right of contribution that exists in Victoria.

In *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; 87 ALJR 505; [2013] HCA 10, the High Court majority drew a distinction between the language of contribution legislation, and the language of proportionate liability legislation: [47]. Although the scope of the expression "arising from a failure to take reasonable care" was not an issue in the *Hunt & Hunt Lawyers* case, the observations by the majority ([57]–[58]) about the policy underlying proportionate liability legislation did not appear to favour a narrow view. However, an attempt to rely on *Hunt & Hunt Lawyers* as support for the broad view was rejected by the Victorian Court of Appeal in *Tanah Merah Vic Pty Ltd v Owners Corp No 1 of PS613436T* [2021] VSCA 72 at [131].

In *Demetrios v Lehmann* [2019] VSC 301 it was argued (in support of an application for summary dismissal of the proportionate liability defence, in a trespass case) that the decision of the High Court in *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661; 89 ALJR 572; 320 ALR 47; 105 ACSR 552; [2015] HCA 18 compelled adoption of the narrow view. However, Matthews JR pointed out (at [52]) that *Selig* was concerned with the proportionate liability regime in the *Corporations Act 2001* (Cth), and was decided by the High Court by a process of construction of the statute and not by reference to the cases propounding either a broad or a narrow view.

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1 See [25650] and [25870].

[26010] Broad view: claims factually arising from a failure to take reasonable care

An alternative construction is that proportionate liability applies to any breach of contract, provided the conduct giving rise to the breach originates in a failure to take reasonable care. In other words, it is neither the "form" of the plaintiff's claim, nor the type of contractual term on which the claim is based, which determines whether the proportionate liability regime applies. The determining factor is whether, as a matter of fact, the cause of action has its origin in some carelessness on the part of the defendant.

In *Woods v De Gabriele* (2007) 2 BFRA 168; [2007] VSC 177, the plaintiff invested in debt notes issued by a company in the Westpoint group and lost money as a result of the collapse of Westpoint. De Gabriele was the plaintiff's financial adviser, who had advised him first to take up the investment and later to maintain it. The plaintiff claimed damages from De Gabriele and from two other companies (the second and third defendants, Pyxus and Chimaera). At the time when he gave the later advice to maintain the investment, De Gabriele was an employee of Pyxus and an authorised representative of Chimaera.

The plaintiff relied on a number of causes of action, including breach of a contractual term requiring "reasonable care, skill or diligence" and misleading or deceptive conduct.

Pyxus and Chimaera sought to do two things. First, they sought to join as a defendant a company called SPM, which was the employer of De Gabriele at the time when he gave the original advice. As it happened, SPM was in liquidation. Second, they sought leave to amend their defence to contend that the plaintiff's claim against them was "apportionable" under the *Corporations Act 2001* (Cth), the *Australian Securities and Investments Commission Act 2001* (Cth) and also the *Wrongs Act 1958* (Vic). Clearly, the objective of Pyxus and Chimaera was to achieve a four-way apportionment of liability, with the effect of limiting the liability apportioned to them.

The plaintiff stood to lose if these applications were granted; they raised the prospect that part of his loss might be unrecoverable if it was apportioned to an insolvent defendant. It was therefore not surprising that the plaintiff resisted the applications and sought to amend his statement of claim. In particular, he attempted to alter his pleading of the contractual cause of action from breach of a contractual term requiring "reasonable care, skill or diligence" to breach of a term requiring "due skill and diligence". This was clearly an attempt to deny the defendants access to the limiting provisions of the proportionate liability legislation, by removing any reference to a failure to take reasonable care.

Hollingworth J considered that the plaintiff's proposed alteration would make no difference, preferring to interpret the statute broadly (at [58]):

> it is at least arguable that a claim should be regarded as apportionable … if the facts on which the claim is based include allegations of a failure to take reasonable care, whether or not the plaintiff chooses to give it that name. In other words, it is arguable that an apportionable claim is a claim for economic loss or damage to property that arises, *on the facts*, from a failure to take reasonable care. (Emphasis added.)

Insofar as it ensures claims that are substantially about carelessness cannot be avoided through manipulative pleading, the approach of Hollingworth J conforms to the policy of the legislation. However, this approach does have the potential to widen the scope of proportionate liability in contractual claims, if it subsumes all contractual actions where the breach involves any element of lack of care.

Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd (2007) 164 FCR 450; [2007] FCA 1216 was another financial advice case arising from the collapse of the Westpoint group, involving similar facts to *Woods*. Middleton J of the Federal Court provided further guidance on the issue at [29]–[30]:

> the legislature deliberately chose to define "apportionable claim" by reference to an action for damages arising from a failure to take reasonable care. The provisions do not require that the claim itself be a claim in negligence or for breach of duty – it only requires that the claim arise from a failure to take reasonable care. The expressions "arising from" or "arising out of" are of wide import …
>
> … Where a claim brought by an applicant does not have as one of its necessary elements any allegation of failing to take reasonable care, an additional enquiry into the failure to take reasonable care may become relevant in the course of a trial to determine the application of Part IVAA. Even though the claims in this proceeding themselves do not rely upon any plea of negligence or a "failure to take reasonable care" in a strict sense, a failure to take reasonable care may form part of the allegations or the evidence that is tendered in the proceedings.

Despite the support given by Middleton J to a broad construction of the expression "arising from a failure to take reasonable care", the proportionate liability regime in the Victorian *Wrongs Act 1958* was held not to apply in *Dartberg*. This was because the plaintiff was relying on claims under Commonwealth legislation, the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001*. The particular sections relied upon (not the misleading/deceptive conduct sections) did not provide for proportionate liability. It was held that the Commonwealth *Judiciary Act 1903* did not apply the *Wrongs Act 1958* to the claims, because the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001* contained their own specific and comprehensive schemes for the determination of compensation liability – which, in the case of the sections relied upon, did not provide for application of the proportionate liability regime. The decision on this issue in *Dartberg* was followed in *Yeo v Freeman* [2018] VSC 448.

The effect of the *Dartberg* line of authority is that a claim for breach of a director's duty of care and diligence under s 180 of the *Corporations Act 2001* (Cth) is not an apportionable claim under State proportionate liability legislation.

In *Reinhold v New South Wales Lotteries Corp (No 2)* [2008] NSWSC 187, Barrett J of the Supreme Court of NSW followed *Dartberg* in adopting a broad construction of the expression "arising from a failure to take reasonable care". In the *Reinhold* case, a contractual term of a lottery ticket provided that the ticket was not to be cancelled unless the holder requested cancellation, and the ticket was returned to the place of purchase on the day of purchase. This term said nothing about taking care; but on the facts, Barrett J found that breaches by the ticket issuer and the newsagent were attributable to carelessness, so that the liability of each defendant was limited to a proportion of the loss reflecting the apportionment of responsibility between them. The nature of the claim was to be judged in light of the findings made, and was not determined by the words in which the claim was framed: at [30].

These cases suggested that the threshold test was whether the factual basis of the claim, as found by the court, is failure to take reasonable care. On that basis, it would not benefit the plaintiff to plead its claim in terms which avoid any reference to carelessness.

The broad interpretation adopted in *Dartberg* and *Reinhold* was followed by Pagone J of the Victorian Supreme Court in *Solak v Bank of Western Australia Ltd* [2009] V ConvR 54-762; [2009] VSC 82; see [25710]. However, in the light of subsequent appellate authority it is now clear that whether a claim is apportionable cannot be determined solely by reference to the factual basis of the claim: see [26030].

[26030] The broad/narrow scope issue – current status

The relative importance of the factual basis of the court's decision on the one hand, and the claim as pleaded by the plaintiff on the other, was the subject of a difference in views between members of the NSW Court of Appeal in *Perpetual Trustee Co Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58. Macfarlan JA, who delivered the leading judgment, expressed the view that for a successful action for damages to have arisen from a failure to take reasonable care, the absence of reasonable care must have been an element of the, or a, cause of action on which the plaintiff succeeded: at [22]. He considered that in the case before the court, Perpetual had been entitled to judgment on at least one cause of action that did not require it to prove that that CTC failed to exercise reasonable care.

The other two members of the court, while agreeing with Macfarlan JA on the other issues in the case and the orders, did not express the same view on the "apportionable claim" point. In particular, Barrett JA referred to his view, as expressed in *Reinhold* (above), that factual findings are important in determining the nature and quality of a claim. Noting that *Reinhold* had been cited with approval by Ashley JA of the Victorian Court of Appeal in *Godfrey Spowers (Victoria) Pty Ltd v Lincolne Scott Australia Pty Ltd* (2008) 21 VR 84; [2008] VSCA 208 at [109], Barrett JA concluded with a slightly modified version of the view expressed in *Reinhold*: neither the court's decision nor the manner in which the claim was pleaded was the sole decisive factor. Rather, a combination of these two factors had to be assessed in order to determine whether the relevant claim was a claim in an action for damages arising from a failure to take reasonable care: [42].

This "combination of factors" approach does represent a degree of convergence between the broad (factual only) and narrow (pleading only) views; but it rules out any version of the broad view that relies on factual findings only to determine whether a claim is apportionable.

The emphasis placed on the nature of the plaintiff's cause of action in the *Perpetual Trustee* case encouraged plaintiffs to seek summary dismissal of the proportionate liability defence in cases where breach of a duty of care was not an element of the plaintiff's claim as pleaded: see *Demetrios v Lehmann* [2019] VSC 301 (action for trespass) and *Colagrossi v Transport for NSW* [2019] NSWSC 493 (action for nuisance). Not surprisingly, in each of these cases the court refused the application for summary dismissal on the basis that the proportionate liability defence based on the broad view raised a "complex, difficult and substantial question of law" (*Colagrossi*, [46]), which could not be resolved in the context of an interlocutory application for summary dismissal.

The "combination of factors" view was endorsed by the NSW Court of Appeal in *Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd* (2019) 99 NSWLR 780; [2019] NSWCA 161, where Bell P said (citing *Reinhold*) that whether or not a claim was apportionable did not fall to be determined simply on the pleadings, but would generally involve a characterisation of the claim based on the evidence before the court: [42]. The other members of the bench in *Landpower* agreed with the judgment of Bell P; notably, one of them was Macfarlan JA.

The subsequent unanimous decision of the NSW Court of Appeal in *Rahme v Benjamin & Khoury Pty Ltd* (2019) 100 NSWLR 550; [2019] NSWCA 211 reaffirmed the primary importance of the cause of action as pleaded. Macfarlan JA (at [135]) repeated relevant passages from his judgment in *Perpetual Trustee*, and confirmed his view that the reference in s 34(1)(a) of the *Civil Liability Act 2002* (NSW) to a claim "arising from a failure to take reasonable care" required that the absence of reasonable care must be an element of the plaintiff's cause of action. Since the action before the Court involved a breach of fiduciary duty, the defence of proportionate liability was not available. Bathurst CJ and McCallum JA agreed with the judgment of Macfarlan JA.

A similar view was expressed by the Victorian Court of Appeal in *Tanah Merah Vic Pty Ltd v Owners Corp No 1 of PS613436T* [2021] VSCA 72, where the Court said at [120]: "the terms in which a claim is framed against a concurrent wrongdoer are an essential determinant of whether the claim can be said to arise from a failure to take reasonable care". The Court referred to the differing views expressed in *Perpetual Trustee*, but noted that even on the view of Barrett JA as expressed in that case, a claim will not be apportionable unless it is framed (or pleaded) by reference to a failure to take reasonable care.

In *Herridge Parties v Electricity Networks Corporation (t/as Western Power)* (2021) 59 WAR 69; [2021] WASCA 111 the Western Australian Court of Appeal considered the issue in the context of an action for nuisance. At first instance in *Herridge v Electricity Networks Corporation (t/as Western Power) (No 4)* [2019] WASC 94, Le Miere J of the Western Australia Supreme Court had held that in a nuisance case where a landowner does not cause a nuisance but allows it to arise, liability is dependent on breach of duty, so that breach of a duty of care is an element of the cause of action. The authority relied upon was the judgment of the High Court plurality (Taylor and Owen JJ) in *Hargrave v Goldman* (1963) 110 CLR 40, 52–56 and the decision of the Privy Council in the same case: *Goldman v Hargrave* [1967] 1 AC 645, 656–657. This aspect of the decision was upheld on appeal. For present purposes, the significance of the decision lies in what the Court of Appeal said about the definition of "apportionable claim". The Court (at [321]) rejected the plaintiffs' submission that the reference to a "claim" in the definition "is to the elements of a form of action, such as negligence". The Court went on to say (at [323]):

> A civil proceeding for the recovery of damages will arise 'from a failure to take reasonable care' within the definition of 'apportionable claim', where, as here, establishing liability in the action for damages requires the plaintiff to prove that the defendant failed to take reasonable care in some respect.

The Court cited *Rahme* with apparent approval, saying that the New South Wales Court of Appeal in that case had held that whether a claim was apportionable "turned not on the facts which happened to be found, but on the essential character of the plaintiff's successful cause of action". The "essential character" of a cause of action "looks to the facts which give rise to a right to sue, rather than the description of the form of action (such as negligence)".

On the *Rahme* test as interpreted in *Tanah Merah* and *Herridge*, a claim is apportionable if the plaintiff has to prove a failure to take reasonable care, in order to succeed in the claim; and it would seem to follow as a matter of logic that if the plaintiff must prove a failure to take reasonable care in order to succeed, they must also plead a failure to take reasonable care.

Having regard to the High Court's direction to intermediate appellate courts and trial judges in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22 at [135], it now appears to be settled law, in States where the legislation defines an apportionable claim as a claim "arising from a failure to take reasonable care", that a claim cannot be apportionable unless failure to take reasonable care is an element of the cause of action – that is, an element which has to be pleaded and proved in order for the cause of action to succeed.

However, as *Herridge* makes clear, breach of a duty of care does not need to be an element of the *form* of action.

Despite the apparent clarity of this outcome, it seems that the controversy over the definition of an apportionable claim is not over. In *obiter* comments in *Gerrard Toltz Pty Ltd v City Garden Australia Pty Ltd (in liq) (No 2)* [2024] NSWCA 232, two judges of the New South Wales Court of Appeal criticised the decision in *Rahme*. Stern JA (at [173]-[182]) supported an approach "that looks to both how a claim is framed, and to the findings of the court, but is not limited in its focus to the narrow question whether a lack of reasonable care is an element of the cause of action". Basten AJA went to greater lengths in criticising *Rahme*, devoting the whole of his judgment ([187]-[243]) to an analysis which arrived at the conclusion that "a claim, whatever the pleaded cause of action, which has been upheld on the basis that there was a failure to take reasonable care will constitute an apportionable claim".

Notwithstanding the criticism in *Gerrard Toltz*, the combined authority of *Rahme*, *Tanah Merah* and *Herridge* establishes that a claim will only be apportionable if failure to take care is pleaded, and has to be proved, by the plaintiff. This is likely to reduce the number of cases where proportionate liability can be pleaded as a defence. Strike-out or summary dismissal applications, such as those in *Demetrios* and *Colagrossi* (above), are now more likely to succeed.

While claims based on causes of action such as breach of fiduciary duty will clearly not be apportionable, the position may be less obvious with respect to claims based on breach of a contractual duty. However, the judgment of Macfarlan JA in *Perpetual Trustee* (at 22]–[23]), quoted at length in his Honour's subsequent judgment in *Rahme* at [135], makes it clear that proportionate liability in a contractual context will be restricted to claims for breach of a specific contractual duty of care (express or implied).

If the recommendations for national uniformity ever found their way onto the legislative agenda, the narrow view would receive statutory confirmation. The draft of model uniform legislation circulated in October 2013 (see [25650]) defined "apportionable claim" as an action for damages where a failure to take reasonable care is an element of the claimant's action, then added (underneath the definition) a series of examples. Examples of apportionable claims included actions for breach of duty of care, breach of express or implied contractual term to take reasonable care, and breach of a director's civil obligation to act with due care and diligence (although this would usually apply only where the claim is made by the company, since directors' duties are in general owed only to the company). Examples of actions that would not be apportionable claims included breach of strict contractual duty, and breach of absolute contractual duty.

[26130] Queensland and South Australia

In Queensland and South Australia, the statutes do not use the words "arising from a failure to take reasonable care" to define the scope of proportionate liability. In South Australia, the regime applies to a liability in damages "for breach of a contractual duty of care", or arising under the law of torts or by statute: *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 4(1). Queensland only applies proportionate liability where there is a claim for economic loss or property damage "arising from a breach of a duty of care": *Civil Liability Act 2003* (Qld) s 28(1)(a).

These provisions support a narrow view of proportionate liability in a contractual context. It is difficult to read the words "for breach of a duty of care" broadly. If the plaintiff's action is founded in contract and relates to a breach of a duty of care contained in that contract, whether express or implied, proportionate liability would seem to apply. But in situations where the claim has a different contractual basis (eg breach of a strict obligation such as a time clause), proportionate liability will have no role to play – even where careless conduct is an ingredient of the breach.

This narrower scope of proportionate liability in the contractual context conforms closely to the intended model as described by Professor Davis – see [25650] and [25870].

However, the position may be different for non-contractual claims. In delivering judgment on a nuisance claim in the Queensland District Court, Rosengren DCJ expressed the view that the difference between "arising from a breach of a duty of care" and "arising from a failure to take reasonable care" was "not critical". As in *Herridge*, the proportionate liability regime was held to apply to the nuisance claim, because the plaintiff had been required to prove that the defendants had failed to take reasonable care – that is, failure to take reasonable care was an element of the plaintiff's cause of action: *Fangyuan v Stockwell* [2024] QDC 200, [111] and [184].

[26135] Application of the narrow view in contract cases

On the narrow view of proportionate liability, the question in relation to a contractual claim is not whether the claim arose as a matter of fact from a failure to take care, but whether the claim really arose from breach of a contractual duty of care. This question cannot be circumvented by manipulative pleading; the answer depends on the true nature of the contractual duty alleged to have been breached. For example if *Woods v De Gabriele* (2007) 2 BFRA 168; [2007] VSC 177 (see [26010]) came before a court in South Australia, and the plaintiff attempted to amend the statement of claim to rely on failure to exercise due *skill and diligence* rather than failure to exercise reasonable *care*, it would still be open to the court to classify the claim as one for breach of a contractual duty of care. The key issue is whether the substance of the contractual duty relied upon is an obligation to take care. Duties to do something by a certain time, or to provide goods in a certain condition, do not have at their core duties to take care; so it may be expected that claims for breach of these duties will not attract the statutory apportionment principles in South Australia or Queensland – even if breach of the duty resulted from carelessness.

It follows that if a defendant owes to a plaintiff a contractual obligation which is concurrent and co-extensive with a tortious duty of care, but also another contractual obligation which is more extensive, the plaintiff can avoid the proportionate liability regime by pleading a breach of the more extensive term.

[26140] Defendants' propensity to mischaracterise claims against them, to gain benefit of apportionment

The attraction of the apportionment regime in limiting a defendant's liability has led to the pleading of defences which assert that the plaintiff's claims arise from a failure to take care, when on any view there is no apparent basis for that assertion. Examples may be seen in *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Doepel* [2016] NSWSC 1566 at [49] (claim for fraudulent breach of fiduciary duty), *Henley Arch Pty Ltd v Lucky Homes Pty Ltd* [2016] FCA 1217 at [266] (claim for breach of copyright), *Rove Estate Pty Ltd v Chomp Excavations & Demolition Pty Ltd (No 3)* [2023] NSWSC 274 (claim for trespass) and *City Garden Australia Pty Ltd (in admin) v Dai* [2023] NSWSC 1498, [509] (claim for breach of fiduciary duty by solicitor.

In *Cassegrain v Cassegrain* [2016] NSWCA 71, the NSW Court of Appeal rejected an attempt to classify liability under the first ("knowing receipt") limb of *Barnes v Addy* (1874) LR 9 Ch App 244 as arising from a failure to take reasonable care. See also *Elston Private Wealth Pty Ltd v Wilson Advisory and Stockbroking Ltd* [2022] ACTSC 237 at [534] (second "knowing assistance" limb of *Barnes v Addy*) and *George v Webb* [2011] NSWSC 1608 at [312] ff (breach of trust).

In *Permanent Custodians Ltd v Geagea (No 4)* [2016] NSWSC 934, an attempt to represent liability for breach of warranty of authority as arising from a failure to take care was equally unsuccessful. Rothman J pointed out at [41] that liability for breach of warranty of authority was strict, in the sense that it required no actual intention, fraud, negligence or fault on the part of the agent. It required only the giving of a warranty of authority by the agent, and reliance on that warranty causing damage. In any event, there had been no finding by the Court that the defendant seeking to plead apportionment had failed to take reasonable care; so that even if a finding of failure to take care could turn a strict liability case into an apportionable claim, that would not assist the defendant.

Similarly, in *Tarangau Game Fishing Charters Pty Ltd v Eagle Yachts Pty Ltd* [2017] QSC 306, the defendant failed in an attempt to invoke the apportionment provisions of the *Civil Liability Act 2002* (NSW) or alternatively the *Civil Liability Act 2003* (Qld), in a case involving breach of implied terms of fitness for purpose and merchantable quality. The subject-matter of the case was the sale of a yacht, and the defendant seeking to rely on apportionment was the seller (not the manufacturer). Atkinson J pointed out (at [397]) that there could only be an apportionable claim if the court found that the claim arose from the defendant's failure to take reasonable care. There was no evidence before the court to support a finding of lack of care on the part of the seller; on the contrary, the evidence available to the seller at the time the yacht was sold indicated that the vessel was in a sound condition.

Rahme v Benjamin & Khoury Pty Ltd (2019) 100 NSWLR 550; [2019] NSWCA 211 was another claim for breach of fiduciary duty. The NSW Court of Appeal held that the defence of proportionate liability was not available. As noted in [26030], the statements of principle in *Rahme* have not met with universal acceptance, but the consensus of appellate authority is that a claim cannot validly be characterised as an apportionable claim unless the nature of the claim as pleaded requires the plaintiff to prove a failure to take reasonable care, in order to establish their cause of action.

[26150] Failure to take reasonable care must be on the part of the defendant

A defendant cannot plead that a claim is apportionable, if it is not an action for damages arising from a failure to take care – even if the plaintiff's loss was contributed to by the failure of someone else (other than the defendant) to take reasonable care. Thus it was a misconception of the proportionate liability legislation for a defendant guarantor to plead a right of apportionment in his defence to the lender's claim against him on the guarantee, on the basis that his accountant had failed to use reasonable care when advising him to enter into the guarantee: *Commonwealth Bank of Australia v Witherow* [2006] VSCA 45.

Owners – Strata Plan 69312 v Allianz Australia Insurance Ltd [2012] NSWSC 1477, concerned a claim for defective building work. However, the claim was not against the builder (which had gone into liquidation), but against the insurer who had given an indemnity to the owners under a contract of insurance covering loss or damage arising from breach of statutory warranties under Pt 2C of the *Home Building Act 1989* (NSW) (warranties that the work would be proper and workmanlike, would conform to the plans and would result in a dwelling fit for occupation). The owners claimed on the indemnity, the insurer refused to pay, and the owners brought an action to enforce the indemnity obligation. After filing a response to the claim, the insurer sought to amend the response to plead reliance on the proportionate liability provisions in Pt 4 of the *Civil Liability Act 2002* (NSW). The insurer argued that if found liable on the indemnity, it was a concurrent wrongdoer because it was one of three persons whose acts or omissions caused the owners' loss – the others being the builder and the local council. Bergin CJ in Eq refused the application for leave to amend, on the basis that the claim did not fall within the definition of "apportionable claim"; the claim against the insurer did not arise from any failure by the insurer to take reasonable care, but from a decision by the insurer to withhold indemnity.

[26230] The requirement that the claim be an action for damages

All jurisdictions provide that proportionate liability applies only in relation to actions "for damages": *Civil Liability Act 2002* (NSW) s 34(1); *Wrongs Act 1958* (Vic) s 24AF(1); *Civil Liability Act 2003* (Qld) s 28(1); *Civil Liability Act 2002* (WA) s 5AI(1); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 4(1); *Civil Liability Act 2002* (Tas) s 43A(1); *Civil Law (Wrongs) Act 2002* (ACT) s 107B(2); *Proportionate Liability Act 2005* (NT) s 4(2). In a standard breach of contract claim, the action will be for damages and this element will not be controversial. However, issues may arise in certain contractual claims where the claim is for recovery of a liquidated amount.

[26250] The meaning of "damages"

At common law, the expression "damages" tends to denote a sum of money directed at undoing or reversing loss or damage suffered; ie it has a compensatory dimension. Other types of damages do exist, such as exemplary or punitive damages, but these are exceptions to the general rule. Lord Blackburn gave the classic exposition in *Livingstone v Rawyards Coal Co* (1880) LR 5 App Cas 25 at 39:

> where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured … in the same position as he would have been in if he had not sustained the wrong.

The notion that common law damages further a compensatory purpose has been reiterated countless times: see eg *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185 at 191 per Taylor and Owen JJ; *Haines v Bendall* (1991) 172 CLR 60 at 63 per Mason CJ, Dawson, Toohey and Gaudron JJ. Because of this fundamentally "loss-based" focus, not all monetary remedies are considered to be "damages". It depends on the function of the award.

In all jurisdictions except the Australian Capital Territory, South Australia and Western Australia, the term "damages" is defined, in the proportionate liability context, to include "any form of monetary compensation": *Civil Liability Act 2002* (NSW) s 3; *Wrongs Act 1958* (Vic) s 24AE; *Civil Liability Act 2003* (Qld) s 8 (Schedule 2); *Civil Liability Act 2002* (Tas) s 3; *Proportionate Liability Act 2005* (NT) s 3. The South Australian legislation is very similar, defining damages to mean "compensation or damages for harm": *Law Reform (Contributory*

Negligence and Apportionment of Liability) Act 2001 (SA) s 3(1). The legislation in the Australian Capital Territory and Western Australia does not define the term "damages".

Some commentators have suggested that this statutory definition, where present, increases the number of monetary remedies which will be caught by proportionate liability - for instance, by including actions for recovery of debt: Stephenson A, "Proportionate Liability in Australia – The Death of Certainty in Risk Allocation in Contract" [2005] ICLR 64 at 71; Hayford O, "Proportionate Liability – Its Impact on Risk Allocation in Construction Contracts" (2006) BCL 22(5) 322 at 340.

Middleton J in *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* (2007) 164 FCR 450; [2007] FCA 1216 at [17] also commented briefly that he thought the expression "damages" in Pt IVAA of the *Wrongs Act 1958* (Vic) would include "a claim for a sum certain" (ie a debt or a claim under a guarantee).

The "monetary compensation" definition and the common law concept of damages clearly have one thing in common: the requirement for a compensatory element. However, the statutory definition may be broader than the common law in one way: arguably, it does not require a breach of contract. Compensation may be payable under a contractual provision, on the happening of a particular event which is not in itself a breach of contract. A claim for such an amount is a claim for monetary compensation, but would not normally be viewed as a claim for damages. The distinction becomes relevant in considering obligations to pay liquidated amounts, and claims on guarantees and indemnities: see [26270] – [26310].

In *George v Webb* [2011] NSWSC 1608 at [312] and following, Ward J of the NSW Supreme Court expressed the view that "damages" would include equitable compensation for loss suffered through the unauthorised disbursement by solicitors of funds held on trust for a client. However, her Honour went on to hold that such a claim was not an "apportionable claim" because it arose primarily from breach of trust, not failure to take reasonable care: at [325], and see [26010].

If it was established that the statutory definition had the effect of widening the meaning of "damages", the narrower common law definition would still apply in the Australian Capital Territory and Western Australia, since the term is not defined in the legislation of those jurisdictions.

[26270] Clauses requiring payment of a liquidated sum

Contractual clauses often oblige one party to pay a fixed or liquidated amount to another. Liability to pay a liquidated amount may arise in a number of different ways. First, a clause may require the payment of a liquidated amount as a deposit or as the "contract price", whether unconditionally or conditionally and whether in a lump sum or instalments. Second, a clause may provide for a liquidated amount to become payable on the happening of a certain event, which is not in itself a breach: eg where a landlord enters leased premises to make repairs, and is entitled to recover the cost of the repairs from the tenant. Third, an amount may become payable on breach of a contract, as agreed or liquidated damages: *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79.

In the first and second situations, a failure to pay the whole or part of the liquidated sum is a breach of contract; but an action to recover the fixed sum is viewed differently from a classic action for damages. The failure to pay the liquidated sum, although based on the breach of contract, leads to an action for recovery of debt: *Young v Queensland Trustees Ltd* (1956) 99 CLR 560; [1956] ALR 939 at 567 (CLR) per Dixon CJ, McTiernan and Taylor JJ; *Jervis v Harris* [1996] Ch 195 at 202-203 per Millett LJ. An action in debt is viewed, at common law, as a claim to recover a specific sum of money which has been "detained" by the defendant: *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; 61 ALJR 151 at 265 (CLR) per

Dawson J. It is more in the nature of specific performance of the obligation to repay. On this analysis a claim for debt seems unlikely to fit within the definition of "damages" in the legislation. The Court of Appeal of Victoria applied this view in *Commonwealth Bank of Australia v Witherow* [2006] VSCA 45 at [10] (per Maxwell P, Buchanan JA and Redlich AJA agreeing).

In relation to agreed or liquidated damages, there are fewer difficulties. The validity of clauses providing for liquidated damages has been the subject of much consideration by appellate courts in Australia: see the discussion of penalty clauses in this book at [105110] and following. Procedurally, liquidated damages (when validly claimed) have been treated in much the same way as debts, but courts have emphasised that an action based on an agreed damages clause is still, at its core, an action for damages (albeit damages in an amount determined in advance) and not an action in debt: *President of India v Lips Maritime Corp (The Lips)* [1988] AC 395 at 422 per Lord Brandon. This is not surprising: enforceable agreed damages clauses have the purpose of pre-estimating loss, so they are necessarily compensatory in character.

It follows that an amount claimed under an agreed damages clause is within the common law definition of "damages" and comes within the scope of the proportionate liability regime if other requirements are satisfied: see also Hawke F, "Proportionate Liability and Contract Certainty" (2007) 22(6) ILB 82 at 86-87.

[26290] Indemnity claims

A related issue is whether a claim under a contractual clause requiring one party to indemnify another is properly styled an action "for damages": see Hawke F, "Proportionate Liability and Contract Certainty" (2007) 22(6) ILB 82 at 87.

The case of *Firma C-Trade SA v Newcastle P and I Assn (The Fanti)* [1991] 2 AC 1 suggests that a claim under at least one type of contractual indemnity clause is a claim for damages. In that case, Lord Goff said (at 34):

> at common law, a contract of indemnity gives rise to an action for unliquidated damages, arising from the failure of the indemnifier to prevent the indemnified person from suffering damage, for example, by having to pay a third party … the cause of action does not (unless the contract provides otherwise) arise until the indemnified person can show actual loss.

On this analysis, a failure to indemnify is an ordinary breach of contract and an action based on it would be an action for damages, capable of being caught by the proportionate liability regime if other requirements are met.

However, not all indemnities will necessarily fit into this analytical framework. An indemnity obligation may be drafted, or categorised by a court, as an obligation to pay a certain sum to make good (ie compensate for) a loss, rather than as damages for failure to prevent the loss from occurring. In each case, it is a question of the wording and construction of the particular indemnity clause: D'Angelo N, "The Indemnity: It's All in the Drafting" (2007) 35 ABLR 93 at 107.

Whichever categorisation is adopted, there is a strong argument that an indemnity claim (with the requisite causal connection with a failure to take care, or a breach of a duty of care) would be an action for damages, within the statutory definitions in the legislation of Queensland, New South Wales, Victoria, Tasmania, South Australia and the Northern Territory. This is because these definitions extend to compensatory payments. This argument was accepted by the NSW Court of Appeal in *Perpetual Trustee Co Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58 at [18]. That case concerned the application of the NSW legislation, but Macfarlan J also referred to the corresponding Victorian provision.

In Western Australia and the ACT, the position may be different. In these jurisdictions, “damages” has its common law meaning. This would catch an indemnity payment of the type described in the *Fanti case*, but it is not so clear that it would catch a liquidated “make-good” payment.

The District Court of WA held that an indemnity claim was not apportionable in *Owners of Strata Plan 13529 v Fowler* [2013] WADC 5. That case involved a fire in an apartment block, commencing in the apartment leased by the defendant and caused by another occupant of the apartment carelessly leaving a heater on. The owner’s claim was based on indemnities in the lease, by which the tenant agreed to indemnify the owner against damage caused by the tenant or his visitors. Deane DCJ held that the claim was not an apportionable claim, because it was not an action for damages arising from a failure to take reasonable care. Her Honour did not give detailed consideration to the meaning of “damages”, but accepted an analogy between the indemnities before the court and the guarantee considered by the Victorian Court of Appeal in *Commonwealth Bank of Australia v Witherow* [2006] VSCA 45 (see [26310]).

But even if an indemnity claim is a claim in an action for damages, the indemnifier may encounter other problems in limiting liability under the proportionate liability provisions. Except in South Australia, the core limitation provisions (*Civil Liability Act 2002* (NSW) s 35(1)(a); *Wrongs Act 1958* (Vic) s 24AI(1)(a); *Civil Liability Act 2003* (Qld) s 31(1)(a); *Civil Liability Act 2002* (WA) s 5AK(1); *Civil Liability Act 2002* (Tas) s 43B(1)(a); *Civil Law (Wrongs) Act 2002* (ACT) s 107F; *Proportionate Liability Act 2005* (NT) s 13(1)(a)) only limit the liability of a “concurrent wrongdoer”. A concurrent wrongdoer is one of two or more persons whose acts or omissions caused the plaintiff’s loss: Victoria – s 24AH(1); NSW – s 34(2); Queensland – s 30(1); Western Australia – s 5AI; Tasmania – s 43A(2); ACT – s 107D; Northern Territory – s 6(1). It is not easy to see how an indemnifier could be a concurrent wrongdoer within this definition. If indemnifiers are not concurrent wrongdoers, then claims on indemnities cannot be brought directly within the proportionate liability regime.

If a party (eg a head contractor) is a concurrent wrongdoer, but has also given an indemnity against loss caused by the default of other concurrent wrongdoers (eg sub-contractors), it would seem that the plaintiff has two parallel claims:

- First, a claim against the head contractor as a concurrent wrongdoer. This would be an apportionable claim.
- Second, a claim against the head contractor as indemnifier. This would not attract the proportionate liability provisions in States other than South Australia, because the defendant is not “a concurrent wrongdoer in relation to that claim” – although it might be a concurrent wrongdoer in relation to the first claim.

The same result seems to follow where a claim is made on an indemnity and the indemnifier is not itself a concurrent wrongdoer – eg where a construction contractor defaults in performance of obligations and the project owner claims on an indemnity from the contractor’s parent company. Although the defaulting contractor could have relied on the proportionate liability regime to limit its liability, it would seem that (in States other than South Australia) the indemnifier cannot gain the benefit of proportionate liability. It would have to pay out on the indemnity and seek contribution from concurrent wrongdoers by subrogation to the rights of the defaulting contractor. It may be possible through the wording of the indemnity to confine the indemnifier’s liability to the liability which would have been imposed on the contractor if a direct claim had been made against the contractor, and determined under the proportionate liability provisions. However, such an indemnity would require careful drafting, and is likely to be resisted by counterparties because the extent of the indemnifier’s liability cannot be ascertained without an apportionment by the court.

The position is different in South Australia. There, the core limitation provision is in s 8 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), which applies where liability is apportionable. Apportionable liability is defined in s 3(2), and rests on the expression "wrongdoer". This is defined in s 3(1) to include a person who has a derivative liability for harm resulting from the act or omission of someone else. "Derivative liability" is also defined in s 3(1), to include:

> (c) if an insurer or indemnifier is directly liable to a person who has suffered harm for the act or omission of a person who is insured or indemnified against the risk of causing the harm – the liability of the insurer or indemnifier.

A condition in paragraph (b) of the definition of "apportionable liability" is that two or more wrongdoers have *committed* wrongdoing. However, references to the wrongdoing of a wrongdoer are taken to include references to wrongdoing for which the relevant wrongdoer has a derivative liability: see the definition of "wrongdoing" in s 3(1).

Thus a holding company or head contractor who has given a contractual indemnity directly to a project owner will, under South Australian law, take the benefit of the proportionate liability regime to the same extent as the contractor for whose obligations the indemnity was provided.

[26310] Guarantee claims

A guarantor made an unsuccessful attempt to limit liability on the guarantee using proportionate liability principles, in *Commonwealth Bank of Australia v Witherow* [2006] VSCA 45. Mr Witherow was a director of a company and had given a guarantee to the bank for the company's debts. The company defaulted on its overdraft facility and the bank claimed on the guarantee. The bank sought summary judgment. Mr Witherow resisted the summary judgment application, raising two defences which he said should go to trial. One concerned the wording of the guarantee. The other issue, and the one that is relevant for present purposes, was whether Mr Witherow could limit his liability under the proportionate liability provisions in Pt IVAA of the *Wrongs Act 1958* (Vic). The basis for this argument was Mr Witherow's claim that his accountant had been negligent in advising him on the company's financial position when he entered into the guarantee.

The bank's application for summary judgment was dismissed at first instance, on the basis that the proportionate liability argument was novel and should be argued at trial. However, on appeal the Victorian Court of Appeal granted summary judgment. It was held that the proportionate liability provisions in Pt IVAA were not applicable because the bank's claim on the guarantee was not a claim in an action for damages. It was an action for a sum certain. In addition, the claim on the guarantee involved no failure to take care – even though Mr Witherow might have had a related but separate right of action against his accountant for negligent advice. It is the claim against the defendant who seeks to plead proportionate liability that must comply with the definition of "apportionable claim" (ie an action for damages arising from a failure to take reasonable care, or from misleading or deceptive conduct), not any cross-claim that the defendant may have against anyone else – even if that other person's conduct may have contributed to the loss that is the subject of the original claim. This principle was applied in *Suncorp-Metway Ltd v Panagiotidis* [2009] VSC 126, at [21].

The first aspect of the decision in *Witherow* was questioned by Middleton J of the Federal Court in *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* (2007) 164 FCR 450; [2007] FCA 1216 at [17]. His Honour expressed the view that Pt IVAA would apply to a claim for a sum certain, noting that in *Witherow* the extended definition of "damages" did not appear to have been discussed.

The *Witherow* case involved a guarantee of a debt. The position may be different where the guarantee is for performance of a general obligation, rather than an obligation to pay a liquidated amount. The distinction was explained by Mason CJ in *Sunbird Plaza Pty Ltd v*

Maloney (1988) 166 CLR 245; 62 ALJR 195 at 255 (CLR):

> a creditor's rights against a guarantor depend on the terms of the guarantee and the nature of the obligation, performance of which is guaranteed. If the subject of the guarantee is payment of a debt or a sum of money which has accrued due, the creditor may, on default by the principal debtor, sue the guarantor instead of the principal debtor for the debt or sum of money, his claim being for a liquidated amount. If, on the other hand, the subject of the guarantee is the performance of some other obligation, then the person having the benefit of the guarantee may, upon default, sue the guarantor for damages for breach of contract.

In effect, where the guarantee is for the payment of a sum of money, an action to enforce the guarantee is basically an action for debt; but when the guarantor guarantees another contractual obligation, an action on the guarantee is an ordinary claim for damages for breach of contract. On the analysis in *Witherow*, proportionate liability is unlikely to apply to the first type of guarantee claim, but it may apply to the second (if other conditions are satisfied).

As in the case of indemnities, even if guarantors can establish that claims against them are claims for damages, they will still face the problem (in States other than South Australia) that they are not "concurrent wrongdoers in relation to the [guarantee] claim": see [26290]. Even in South Australia, the definition of "wrongdoer" extends only to direct derivative liability under an indemnity or an insurance policy; it does not refer to a guarantee. However, it may be that South Australian courts will construe the word "indemnity" in this context as extending to a guarantee of performance – it would appear that such a construction would be consistent with the purpose of the legislation.

[26330] Non-monetary remedies and equitable damages

Since proportionate liability only applies to actions "for damages", contractual actions seeking non-monetary remedies will not be subject to the regime. Coercive remedies such as injunctions or specific performance are, by their very nature, impossible to apportion and therefore escape the ambit of proportionate liability.

What is the position when "equitable damages" are claimed in addition to or in lieu of an injunction or specific performance? It seems that this would be an "action for damages": see *Supreme Court Act 1970* (NSW) s 68; *Supreme Court Act 1986* (Vic) s 38; *Supreme Court Act 1935* (WA) s 25(10); *Supreme Court Act 1935* (SA) s 30; *Supreme Court Civil Procedure Act 1932* (Tas) s 11(13).[1] In *Johnson v Agnew* [1980] AC 367; [1979] 2 WLR 487; [1979] 1 All ER 883 at 400 (AC), Lord Wilberforce noted that equitable damages rest on the same basis as damages at common law; ie they provide compensation for loss suffered. As a result, a claim for equitable damages would appear to fall within the reach of proportionate liability, if made in an action based on the requisite ingredient of carelessness.

In *Pearsons Barristers and Solicitors v Avison* (2009) 1 ASTLR 417; [2009] VSCA 54, Buchanan JA (at [30]) made a brief observation doubting (without deciding) whether a claim for breach of trust, albeit one seeking equitable compensation, could be described as "arising from a failure to take reasonable care". This observation was applied by the County Court of Victoria in *Glibanovic v Iacovino* [2012] VCC 1754, in refusing leave to amend a defence to plead limitation of liability by apportionment under Pt IVAA of the *Wrongs Act 1958* (Vic). Exclusion of breach of trust cases from the category of apportionable claims is consistent with the approach of Ward J (as her Honour then was) in *George v Webb* [2011] NSWSC 1608; see [25710].

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1 The power to award equitable damages in Queensland, ACT and Northern Territory arises less directly, by preservation of the powers exercised by the English Court of Chancery under Lord Cairns' Act 21 & 22 Vict c

27: see Seddon NC and Bigwood RA, *Cheshire and Fifoot's Law of Contract* (11th Australian ed, LexisNexis Butterworths, 2017) at [24.25].

[The next text page is 34501]

Exclusions from proportionate liability

[26430] Specific exclusions

Each jurisdiction has a number of specific exclusions from proportionate liability. Many relate to particular Acts or regulations of the relevant jurisdiction. The exclusions are too numerous and disparate for detailed review here, but it is prudent to review the exclusion provisions in the legislation and regulations of the relevant jurisdiction before seeking to rely on limitation of liability under the proportionate liability regime. A list of exclusions is provided by Mr Horan in his paper prepared to support proposals for national uniformity.[1] Mr Horan's comment under the heading "Discussion" (at [321]) will be echoed by anyone who has to work their way through the exclusions:

> The above summary of exclusions under the various PL Acts demonstrates the labyrinthine nature of this legislation. The complexity and inconsistencies between jurisdictions will no doubt present major challenges for contracting parties, disputing parties, their lawyers and the courts, especially in proceedings which involve more than one jurisdiction.

All jurisdictions exclude access to the limiting effect of proportionate liability where the defendant was fraudulent in causing the plaintiff's loss, and all except Victoria exclude it where the defendant intended to cause the loss: *Civil Liability Act 2002* (NSW) s 34A(1); *Wrongs Act 1958* (Vic) s 24AM; *Civil Liability Act 2003* (Qld) ss 32D, 32E; *Civil Liability Act 2002* (WA) s 5AJA(1)(b); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 3(2)(c); *Civil Liability Act 2002* (Tas) s 43A(5)(b); *Civil Law (Wrongs) Act 2002* (ACT) s 107E(1); *Proportionate Liability Act 2005* (NT) s 7(1); *Competition and Consumer Act 2010* (Cth) s 87CC; *Australian Securities and Investments Commission Act* (Cth) s 12GQ; *Corporations Act 2001* (Cth) s 1041M.

Queensland also excludes access to the limiting effect of proportionate liability for a wrongdoer who has engaged in misleading or deceptive conduct contravening s 18 of the Australian Consumer Law (Qld): see *Civil Liability Act 2003* (Qld) s 32F. Claims by consumers are also excluded from the Queensland proportionate liability regime: *Civil Liability Act 2003* (Qld) s 28(3), applied in *Selig v Wealthsure Pty Ltd* (2013) 94 ACSR 308; [2013] FCA 348 at [1138].

All States and Territories exclude claims arising out of personal injury: NSW s 34(1)(a); Vic s 24AG(1); Qld s 28(3)(a); SA s 3(2); WA s 5AI, definition of "apportionable claim"; Tas s 43A(1)(a); ACT s 107B(3)(a); NT s 4(3)(a). A claim under Compensation to Relatives legislation is a claim arising out of personal injury for this purpose, so a defendant to such a claim cannot rely on apportionment: *Shinwari v Anjoul* [2017] NSWCA 74.

Finally, in all jurisdictions a number of particular legal scenarios remain outside the scope of proportionate liability. All States and Territories make specific provision for vicarious liability and partnership situations.

Vicarious liability is preserved, ensuring that apportioned liability can still be transmitted under vicarious liability principles: see for example NSW s 39(a); Victoria s 24AP(a); Queensland s 32I(a); WA s 5AO(a); *Competition and Consumer Act 2010* (Cth) s 87CI(a); *Corporations Act 2001* (Cth) s 1041S(a). One effect of these sections is that where loss is caused both by Person A and by distinct acts or omissions of Person B, in circumstances where Person B is vicariously liable for the acts of Person A, Person B will be liable for the whole of the loss and cannot rely on apportionment: *Woodhouse v Fitzgerald* (2021) 104 NSWLR 475; [2021] NSWCA 54 at [98] ff. In the *Woodhouse* case (but for negative findings about negligence) a landowner would have been vicariously liable for the acts of an independent contractor, because the duty of care owed by the landowner was a non-delegable duty (see *Civil Liability*

Act 2002 (NSW) s 5Q and the discussion of non-delegable duties in *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22: [2007] HCA 6).

In *Owners of Strata Plan No 84674 v Pafburn Pty Ltd* (2023) 113 NSWLR 105; [2023] NSWCA 301, the New South Wales Court of Appeal held that the defence of proportionate liability under Pt 4 of the *Civil Liability Act 2002* (NSW) was not available to a defendant which was sued for breach of a non-delegable statutory duty. Adamson JA pointed out (at [13]) that the purpose of the proportionate liability provisions was to reduce a defendant's liability to reflect the degree of its responsibility for the damage suffered by the plaintiff. It was neither unjust nor contrary to public policy for a wrongdoer which breached a non-delegable duty to remain liable for the whole of the loss, since that was the purpose and effect of a non-delegable duty. At the time of writing, the High Court had granted special leave to appeal against this decision.

Submissions asserting the existence of non-delegable duties were rejected in *Herridge Parties v Electricity Networks Corp t/as Western Power* [2021] WASCA 111 at [235] and *Tanah Merah Vic Pty Ltd v Owners Corp No 1 of PS613436T* [2021] VSCA 72 at [80] ff.

In *Pafburn Pty Ltd v The Owners—Strata Plan No 84674* (2024) 99 ALJR 148; [2024] HCA 49, the High Court held (by a majority of four to three) that the duties imposed on a builder and project manager under ss 37 and 39 of the *Design and Building Practitioners Act 2020* (NSW) were non-delegable duties attracting s 5Q of the *Civil Liability Act 2002* (NSW). As a result, the builder and project manager were to be treated as vicariously liable for the work done on the construction project by other parties, and could not exclude or limit their liability by apportioning any part of that liability to those other parties (majority judgment, [57]) — so the apportionment provisions of the Civil Liability Act were not applicable. However, it remained open to the builder and project manager to cross-claim against other parties who had breached any applicable duty of care owed to them: [65].

Where there is no "distinct act" creating a separate basis for liability of Person B – in other words, where the liability of Person B is vicarious only – apportionment will not apply as between A and B for a different reason: see [25778] and [25780].

Similarly, in a partnership situation, where a partner is held to be liable for a proportion of an apportionable claim, his or her partners will be jointly and severally liable for the same amount: eg NSW s 39(b), Victoria s 24AP(c); Queensland s 32I(c); WA s 5AO(b); *Corporations Act 2001* (Cth) s 1041S(b); *Competition and Consumer Act 2010* (Cth) s 87CI(b).

In addition to the general provision about vicarious liability, proportionate liability is specifically excluded as between principal and agent in Victoria (s 24AP(b)), Queensland (s 32I(b)) and the Australian Capital Territory (s 107K(b)). The exclusion as between principal and agent is adopted in the 2013 model uniform provisions (see [25650]) at s 13(1)(b).

In South Australia, partnership and vicarious liability are dealt with through the definition of "derivative liability" and "group" in s 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001*. Wrongdoers who are linked through vicarious liability and other types of "derivative liability" form part of the same group. For the purposes of apportionment, wrongdoers who are members of the same group are treated as a single wrongdoer: s 8(3). Rights of contribution between members of the group are preserved after the group has participated as a single wrongdoer in an apportionment: s 9(a).

In *Reinhold v New South Wales Lotteries Corp (No 2)* [2008] NSWSC 187 at [21]–[22], Barrett J seemed to suggest that fraud or intention to cause loss need not be specifically alleged, but may be apparent from the surrounding facts as found by the court:

> the nature of a "claim", for the purposes of Part 4 [of the NSW Act], will be determined by what the court has decided in the case, not by what might be prayed or pleaded in an initiating process or points of claim. In short, "claim" refers to a claim as proved and established, not a claim as made or advanced.

This suggests that it is open to a court to decide that a claim should be excluded from the proportionate liability regime on grounds of the defendant's fraud or intentional conduct, whether or not those matters are pleaded by the plaintiff (either in the originating process, or in response to a plea of apportionment in the defence). However, at least in relation to fraud, if there is admissible evidence of fraud on the part of the defendant, known to the plaintiff, it should be specifically pleaded: see [26435].

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1 Horan T, *Proportionate Liability: Towards National Consistency* at [310]–[323], see http://webarchive.nla.gov.au/gov/20141215114931/http://www.lccsc.gov.au/sclj/archive/former_sclj/projects/proportionate_liability.html, viewed 11 February 2025; see also commentary in Davis JLR, *Proportionate Liability: Proposals to Achieve National Uniformity*, Section 10.

[26435] Fraud exclusion – specific issues

If a defendant pleads proportionate liability and the plaintiff seeks to meet that defence with a reply alleging that apportionment is not available because the fraud exclusion applies, the reply must plead the alleged fraudulent conduct with particularity. This is an application of the principle that whenever a case of fraud is to be mounted, it must be pleaded specifically and with particularity: *Ambergate Ltd v CMA Corp Ltd* (2016) 110 ACSR 642; [2016] FCA 94 at [276] ff, citing *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486; [2012] HCA 39 at [22].

As the Full Federal Court observed in *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1; 309 ALR 445; 99 ACSR 336; [2014] FCAFC 65 at [1568], the aim of the fraud exclusion is to exclude conduct involving particular moral culpability. Therefore, the fraud exclusion is not attracted simply because a statutory provision (such as s 13 of the *Sale of Land Act 1962* (Vic)) deems a defendant to have knowledge that a representation is false: *McNee v P-Value Pty Ltd* [2016] VSCA 223 at [168].

Perhaps the most common situation where plaintiffs seek to rely on the fraud exclusion is in claims for misleading or deceptive conduct under s 18 of the Australian Consumer Law, or the analogous provisions in other legislation. It is of course one of the advantages of a claim for misleading or deceptive conduct that there is no need to prove fraud. As a result, many cases that would formerly have been pleaded in deceit are now pleaded as claims for misleading or deceptive conduct. However, if the defence in such a case invokes the proportionate liability provisions of the relevant legislation, it will be necessary for the plaintiff to plead fraud in reply in order to negate the apportionment defence. Alternatively, if the circumstances support a claim for deceit, that claim (which is not an apportionable claim) can be pleaded in the statement of claim, as an alternative to the claim for misleading or deceptive conduct.

A person who causes loss by deceit does so fraudulently within s 34A(1)(b) of the *Civil Liability Act 2002* (NSW) and analogous provisions: *Johnson v Mackinnon* [2021] NSWCA 152 at [286] per Brereton JA, Macfarlan JA and Simpson AJA agreeing; *Jiangsu Lianguan Zhaoxing Petrochemical Science and Technology Co Ltd v Wu* [2021] VSC 228 at [180] ff; *Galati v Deans* [2021] NSWSC 1094 at [923].

In the *Jiangsu* case at [188], McDonald J cited the well-known definition of fraud in the context of deceit, from the judgment of Lord Herschell in *Derry v Peek* (1889) 14 App Cas 337 at 374 (false representation made knowingly, without belief in its truth, or recklessly as to whether it was true or false). His Honour also referred to *Krakowski v Eurolynx Properties Ltd*

(1995) 183 CLR 563, where (at 575) the High Court majority endorsed 19th century English decisions holding that fraud could also consist of suppressing what was known to be the truth.

[The next text page is 34551]

Can liability be reapportioned through contractual indemnities?

[26530] Allocation of risk between contracting parties

As the discussion at [25610]–[26430] shows, proportionate liability can have a significant impact on contractual disputes. A primary function of the law of contract is the allocation of risk between contracting parties; parties can plan for contingencies and specify what will happen in the event that they occur. Proportionate liability legislation represents a partial mandatory allocation of risk. Parties who may find this regime less attractive than the allocation that could be achieved by private treaty will naturally seek to avoid the mandatory allocation if they can. Parties who are likely to be plaintiffs will seek to contract out altogether; parties who are likely to be defendants will seek either to exclude liability as against the potential plaintiff, or (if exclusion of liability is not possible) to reallocate their liability to other defendants through contractual indemnities.

Prior to the introduction of proportionate liability legislation, it was clearly possible for parties to allocate responsibility through contractual indemnities. This is particularly important in situations where multiple parties are involved. For instance, suppose A engages B as an architect to design and oversee construction of an office block. B engages C to carry out the construction work. If B fails to detect negligent construction by C, B may be in breach of the contract with A. If A suffers loss or damage, then:

- Leaving aside proportionate liability, A would be able to sue B for the full amount of the loss. B would have to claim contribution from C (if a right of contribution was available[1]).
- Under a proportionate liability regime, if C owed a duty of care to A, B could plead that C was a concurrent wrongdoer and limit its liability according to its percentage responsibility for loss.

In either case, a prudent measure of self-protection for B in this situation is to obtain a contractual undertaking from C, to indemnify B for the full amount of any liability B incurs to A as a result of the performance of work by C. Clearly this is particularly important if proportionate liability does not apply and there is no applicable statutory right of contribution.

With regard to the application of proportionate liability, two questions arise from the example.

First, if proportionate liability applies, could a contractual right of indemnity be enforced? This depends on the interpretation of the proportionate liability legislation. The legislation may restrict or exclude the use of contractual indemnities to alter the outcomes achieved by apportionment. As with so many other aspects of the proportionate liability regime, there are differences between jurisdictions in the way this issue is dealt with, and these are considered in [26550]–[26630]. The draft uniform legislation circulated in October 2013 (see [25650]) would have brought all jurisdictions into line with the current position in Western Australia, Tasmania and the Northern Territory, by confirming the validity of indemnity agreements between concurrent wrongdoers: see proposed section 12(4).

But there is a second question, which may make the first question academic: would proportionate liability ever apply in a situation like this? According to Professor Davis, it is difficult to contemplate any circumstances when it would apply, because in a situation like the one outlined above, the court would not find that C owed a duty of care to A:

> There is … a series of decisions at first instance in Australia in which a building owner has been denied the right to sue a sub-contractor of the prime contractor in negligence for the purely economic loss resulting to the owner from the carelessness of the sub-contractor, on the basis that the sub-contractor does not owe a duty of care to the owner. The reason for

> the denial of a duty of care is that, the parties having structured their relationship in such a way as to preclude any contractual liability between owner and sub-contractor, because of the operation of the doctrine of privity of contract, it would be inconsistent with their presumed intentions to impose a duty of care in negligence on the sub-contractor.[2]

If the sub-contractor had no liability to the owner, a claim by the owner against the principal contractor would not be an apportionable claim: see [25775].

In *Macquarie Bank Ltd v Meinhardt (NSW) Pty Ltd* [2010] NSWSC 1320, a contractor failed in an attempt to reduce or eliminate its liability by claiming apportionment under s 35 of the *Civil Liability Act 2002* (NSW) or former s 87CD of the *Trade Practices Act 1974* (Cth) (see now s 87CD of the *Competition and Consumer Act 2010* (Cth)). The contractor nominated a sub-contractor as a concurrent wrongdoer on the basis that it owed (and had breached) a duty of care to the plaintiff. Einstein J held that the sub-contractor's duty of care had not been proved. He referred to cases on the existence (or non-existence) of a duty of care between non-contracting parties, and to the analysis in Walmsley S, Abadee A, Zipser B, *Professional Liability in Australia* (2nd ed, Thomson Lawbook Co, 2007). Einstein J noted that a duty of care could be found to exist where there was actual reliance by a property owner on a sub-contractor, where the sub-contractor had assumed responsibility, or where other special circumstances existed; but he held that none of those factors were present in the case before the Court.

For commentary on the relationship between contractual indemnities and contracting out see McDonald B, "Indemnities and the Civil Liability Legislation" (2011) 27 JCL 56 at 63.

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1 The current contribution legislation in New South Wales, Queensland, Western Australia and the Northern Territory only applies between tortfeasors, although contribution in cases involving breach of contract may be available in Victoria, South Australia, Tasmania and the ACT: see [25490], and see also New South Wales Law Reform Commission, *Contribution Between Persons Liable for the Same Damage*, Report No 89 (1999) at para 1.16.

2 Davis JLR, *Proportionate Liability: Proposals to Achieve National Uniformity* at [8.6], citing Balkin RP and Davis JLR, *Law of Torts* (3rd ed, LexisNexis Butterworths, 2004) at [13.70]; see http://www.justice.tas.gov.au/__data/assets/pdf_file/0016/113623/Davis_Report.pdf, viewed 11 February 2025.

[26550] Victoria and the Australian Capital Territory

The legislation in Victoria and the Australian Capital Territory provides as follows:

> A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim:
>
> (a) cannot be required to contribute to any damages or contribution required from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant); and
>
> (b) cannot be required to indemnify any such wrongdoer.

See *Wrongs Act 1958* (Vic) s 24AJ; *Civil Law (Wrongs) Act 2002* (ACT) s 107H. A natural reading of this section suggests that it may override pre-existing contractual indemnities between persons who are found to be concurrent wrongdoers. The phrase "cannot be required to indemnify any such wrongdoer" seems clear enough.

Note, however, that the limit on indemnities is intended to protect a defendant against whom judgment is given as a concurrent wrongdoer, and it only applies in that situation. There is no restriction on the enforcement of indemnities against other parties – either by a defendant against whom judgment has been given, or by any anyone else who may have the benefit of an indemnity.

Commentators have suggested that there are strong policy reasons why the "no-indemnity" provision should be read down. The purpose of introducing proportionate liability was to prevent concentration of risk on insured defendants. Contractual liabilities play a part in the distribution of insurable risk. This may militate against an interpretation of the above provision which would override pre-existing contractual indemnities: see Uren AG and Aghion D, *Proportionate Liability: An Analysis of the Victorian and Commonwealth Legislative Schemes* (Commercial Bar Association Paper for CLE Seminar, 2005) p 20. However, a countervailing argument is that the final apportionment of liability in line with responsibility is reasonable, because it aligns insurance risk with business risk.

Commentators have suggested several ways of reading down the provision:

- It may be possible to limit the words "cannot be required to indemnify any such wrongdoer" as applying only to requirements arising under common law or statutory rights of indemnity, as opposed to contractual ones: Hayford O, "Proportionate liability – its impact on contractual risk allocation" (2010) 26 BCL 11 at 22. It is a little difficult to find any basis for this construction in the words of the section.
- Alternatively, "cannot be required to indemnify" may be read down to mean "cannot be required by a court to indemnify". This would leave contractual indemnities intact: McDonald B, "Proportionate Liability in Australia: The Devil in the Detail" (2005) 26 ABR 29 at 44. Again, this limitation is difficult to justify on the words of the section.
- A third suggestion is that because the provision applies to "a defendant against whom judgment is given", it will apply only to an indemnity sought after judgment, in separate proceedings. It will not apply to an indemnity where the indemnity claim is made in the course of apportionment proceedings. Before giving judgment, the court can consider the indemnity as a "factor" in determining how to apportion liability in the first place, since the court must do so according to what is "just" between the parties: Watson J, "From Contribution to Apportioned Contribution to Proportionate Liability" (2004) 78 ALJ 126 at 144; and see Uren and Aghion, above. This approach, however, still leaves room for the court to depart from the contractual allocation of responsibility if it sees fit and therefore does not guarantee that the pre-existing contractual arrangements will be allowed to operate.

On the broader question of whether the provision should be read down at all, Uren and Aghion make the point that it was open to the legislatures in Victoria and the Australian Capital Territory to specify that contractual indemnities were not to be affected by the legislation (as was done in the legislation of Western Australia, Tasmania and the Northern Territory: see [26610]), but they chose not to do so.

The position has not been judicially considered and remains unsettled. Courts may be prepared to read down the provision on a purposive approach, if favourably impressed by the need to preserve indemnities as a matter of policy. However, the "pro-indemnity" policy arguments do not seem to be overwhelmingly convincing. As a matter of statutory construction the better view appears to be that where the apportionment provisions apply in the Australian Capital Territory or Victoria, loss lies where it falls as a result of apportionment and cannot be reapportioned under a contractual indemnity.

[26570] Queensland

Queensland has the same provision as the Australian Capital Territory and Victoria: *Civil Liability Act 2003* (Qld) s 32A. However, the argument that this provision overrides contractual indemnities is stronger in Queensland because of s 7(3) of the Act. This subsection says:

> This Act, other than chapter 2, part 2 and chapter 3, does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract (the "express provision") in relation to any matter to which this Act applies.

The proportionate liability provisions are contained in Ch 2, Pt 2. The inference from the express exclusion of Ch 2, Pt 2 is that the Act *does* prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract, where the proportionate liability regime applies.

This would prevent the parties from contracting out of the proportionate liability provisions. Reading s 7(3) with s 32A, it appears that the prevention would extend to provisions which redistribute apportioned loss. The extension is supported by statements of the High Court indicating that where a statute expressly forbids contracting out, this not only includes express terms directed to that end, but also any indirect provisions which have the effect of circumventing the prohibition: *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516 at 522-523 per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ. The better view appears to be that any contractual indemnity between defendants in Queensland will be invalid insofar as it attempts to reapportion liability apportioned under the proportionate liability regime.

See Jones A, "All blown out of proportion? Contracting and proportionate liability in Queensland" (2011) 31 Qld Lawyer 114.

[26590] New South Wales

The proportionate liability legislation in New South Wales also has the same "anti-reapportionment" provision as Queensland, Victoria and the Australian Capital Territory: *Civil Liability Act 2002* (NSW) s 36. However, the New South Wales equivalent of s 7(3) of the *Civil Liability Act 2003* (Qld) does not refer to the proportionate liability provisions as an exception, so it has the opposite effect. Section 3A(2) of the *Civil Liability Act 2002* (NSW) says:

> This Act (except Part 2) does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract with respect to any matter to which this Act applies and does not limit or otherwise affect the operation of any such express provision.

Pt 2 deals with personal injury damages, not proportionate liability.

In light of s 3A(2), it seems that a conflict between a contractual indemnity and the "anti-indemnity" provision in s 36 must be resolved in favour of the contractual indemnity.

[26610] Western Australia, Tasmania and Northern Territory

The Acts in Western Australia, Tasmania and the Northern Territory also contain the same provision about indemnities between concurrent wrongdoers as the legislation in Victoria, the Australian Capital Territory, Queensland and New South Wales: *Civil Liability Act 2002* (WA) s 5AL(1); *Civil Liability Act 2002* (Tas) s 43C(1); *Proportionate Liability Act 2005* (NT) s 15(1). Tasmania also has an identical provision to s 3A(2) of the New South Wales Act: *Civil Liability Act 2002* (Tas) s 3A(3). The legislation in the Northern Territory, Tasmania and Western Australia, however, goes further and makes the position regarding contractual indemnities clear, by including a specific, permissive subsection in the "anti-indemnity" section:

> Subsection (1) does not affect an agreement by a defendant to contribute to the damages recoverable from or to indemnify another concurrent wrongdoer in relation to an apportionable claim.

See *Civil Liability Act 2002* (WA) s 5AL(2); *Civil Liability Act 2002* (Tas) s 43C(2); *Proportionate Liability Act 2005* (NT) s 15(2).

Thus the legislation in these jurisdictions expressly provides that contractual indemnities are effective as between concurrent wrongdoers.

[26630] South Australia

The South Australian legislation approaches the matter of indemnities differently from other jurisdictions. It does not contain any provision indicating that the proportionate liability provisions in Pt 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) are intended to operate to the exclusion of contractual indemnities.

As well as proportionate liability, the South Australian legislation deals with contribution between wrongdoers. A person who is liable for damages can bring an action for contribution against another wrongdoer who is also liable in damages for the same harm: *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 6(1), (3). If the action is successful the court will award contribution assessed on principles of fairness and culpability as between the wrongdoers: s 6(5). The legislation also provides that an existing contractual indemnity overrides this statutory right to contribution: s 6(9)(a).

The interaction between Pt 2 (contribution) and Pt 3 (proportionate liability) is dealt with in s 9. The contribution principles still apply where the liability of a wrongdoer has been limited under Pt 3, but subject to several qualifications – one of which is that no order may be made for contribution between wrongdoers whose liability is limited under Pt 3. This is the closest equivalent of the “no-indemnity” provisions in other jurisdictions, but the context makes clear that it only operates to prevent recovery by way of contribution under Pt 2.

The result would seem to be that a contractual indemnity can be enforced against a concurrent wrongdoer in South Australia, even where proportionate liability is applicable.

[The next text page is 34601]

Contracting out

[26730] Contracting out of provisions in the proportionate liability legislation

The next question is whether it is possible, by direct contractual stipulation, to contract out of the limiting provisions in the proportionate liability legislation - in other words, to exclude the operation of the legislation so that the joint and several liability of concurrent wrongdoers is preserved for the benefit of the plaintiff. Again, the answer depends on the jurisdiction.

See Hayford O, "Proportionate liability – its impact on contractual risk allocation" (2010) 26 BCL 11 at 24.

In jurisdictions where contracting out is permitted, large "service-taker" organisations routinely contract out through provisions in their standard documentation. This raises issues for service providers, especially smaller ones with limited relative bargaining power. Not only do they lose the potential limitation of liability through apportionment; they may also lose the benefit of their insurance coverage, because it is common for insurance policies (especially professional indemnity policies) to exclude liabilities assumed under contract.

Allowing contracting out has significantly reduced the capacity of the proportionate liability regime to achieve its intended effect in relation to contractual liability. Recognition of this was reflected in the 2013 draft of uniform legislation (see [25650]), which proposed to bar contracting out, while preserving contractual indemnities: s 12.

Prior to the decision of the High Court in *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2024) 98 ALJR 880; [2024] HCA 24, the accepted view was that proportionate liability did not apply in arbitration, so that requiring contractual disputes to be resolved by arbitration was an effective method of contracting out. The decision in *Tesseract* established that under the law of jurisdictions other than Victoria, proportionate liability does apply in arbitration. It follows that parties wishing to contract out must do so expressly – if the governing law of the contract permits contracting out. Whether contracting out is permitted under the laws of the various jurisdictions is discussed below.

[26750] Western Australia

The *Civil Liability Act 2002* (WA) is the only Act which makes a clear statement about contracting out. Section 4A(1) of the Act says:

> A written agreement signed by the parties to it may contain an express provision by which a provision of … Part 1F is excluded, modified or restricted and this Act does not limit or otherwise affect the operation of that express provision.

The proportionate liability provisions are in Pt 1F.

Section 4A(2) confirms that s 4A(1) applies "even if the provision [of Part 1F] applies to liability in contract".

It is clear from s 4A that parties can exclude any or all of the provisions of Pt 1F from their contracts.

Section 4A was applied by Deane DCJ of the *Owners of Strata Plan 13529 v Fowler* [2013] WADC 5. That case involved a claim on indemnities in a lease. Deane DCJ held that the indemnities were express provisions by which the provisions of Pt 1F were excluded, notwithstanding that they did not expressly refer to Pt 1F. Deane DCJ referred with approval to the comments on contracting out in *Aquagenics Pty Ltd v Break O'Day Council* (2010) 20 Tas

R 239; [2010] TASFC 3: see [26770]. The decision is consistent with the approach of the NSW Court of Appeal in *Perpetual Trustee Co Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58, also referred to in [26770].

[26770] New South Wales and Tasmania

The position regarding contracting out in New South Wales and Tasmania is similar to Western Australia, but not as clear-cut. Section 3A(2) of the *Civil Liability Act 2002* (NSW) and s 3A(3) of the *Civil Liability Act 2002* (Tas) provide:

> This Act (except [the part dealing with personal injury damages]) does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract with respect to any matter to which this Act applies and does not limit or otherwise affect the operation of any such express provision.

The legislation adds that this subsection applies "even if the provision applies to liability in contract": NSW – s 3A(3); Tasmania – s 3A(4).

The consensus among commentators is that this wording does allow parties to contract out of proportionate liability: Hayford O, "Proportionate liability – its impact on contractual risk allocation" (2010) 26 BCL 11 at 25; McDonald B, "Proportionate Liability in Australia: The Devil in the Detail" (2005) 26 ABR 29 at 34; Johnson R, Harding M, Lee R and Porter E, "Insurance Update: Proportionate Liability and Advancement of Defence", *Ebsworth and Ebsworth Lawyers Seminar Series* (2005) 8. This view has been confirmed by appellate courts.

First, the Supreme Court of Tasmania (Full Court) held in *Aquagenics Pty Ltd v Break O'Day Council* (2010) 20 Tas R 239; [2010] TASFC 3 (at [19]) that the parties had contracted out of proportionate liability by inconsistent liability allocation provisions in the contract, even though these provisions did not refer specifically to proportionate liability or to the relevant provisions in Pt 9A of the *Civil Liability Act 2002* (Tas). The relevant clause simply said that the contractor was liable to the principal for the acts and omissions of subcontractors, and their employees and agents.

The NSW Court of Appeal came to a similar conclusion in *Perpetual Trustee Co Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58. There, a mortgage origination deed included a provision requiring the originator (CTC) to indemnify the trustee (Perpetual) against any breach by the originator of its warranties or obligations under the deed. In its original decision on the appeal, the Court of Appeal found that CTC had breached its obligations of care under the deed, and was liable to indemnify Perpetual. Limitation of CTC's liability under s 35 of the *Civil Liability Act 2002* (NSW) was not dealt with in this first decision, as the court was of the view that concessions made by CTC precluded reliance on the proportionate liability provisions: *Perpetual Trustee Co Ltd v CTC Group Pty Ltd* [2012] NSWCA 252. CTC filed a notice of motion contesting the court's view on the relevant concessions, and requesting consideration of its claim to limit liability under the proportionate liability provisions. In its second decision, the Court of Appeal accepted the request to consider the limitation claim based on proportionate liability, but held that limitation was not available to CTC for a number of reasons. The primary reason, endorsed by all members of the court (Macfarlan JA, Meagher JA and Barrett JA) was that the indemnity provision in the deed was an express provision made by the parties for the rights and liabilities under their contract, so it ousted the proportionate liability provisions in Pt 4 of the *Civil Liability Act 2002* by force of s 3A(2): *Perpetual Trustee Co Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58 at [11].

Whether the parties *intended* to oust the proportionate liability provisions was irrelevant, as was the fact that the deed was entered into before the proportionate liability legislation came into force; the decisive factor was that the deed contained an express provision for the allocation of liability.

Macfarlan JA noted that the court's conclusion on this issue was consistent with the decision of the Tasmanian Full Court in *Aquagenics Pty Ltd v Break O'Day Council* (2010) 20 Tas R 239; [2010] TASFC 3, and also with the analysis by Professor McDonald in her article "Indemnities and the Civil Liability Legislation" (2011) 27 JCL 56 at 62–63.

The Court in *Aquagenics* also expressed the view that the proportionate liability regime does not apply to arbitration proceedings. This view has since been indorsed by the Supreme Court of Western Australian and the South Australian Court of Appeal: see [25700]. It follows that including an arbitration clause is a de facto method of contracting out.

[26790] Victoria, South Australia, the Australian Capital Territory and the Northern Territory

The legislation in Victoria, South Australia, the Australian Capital Territory and the Northern Territory does not contain any provision either permitting or preventing contracting out. The issue is a matter of statutory interpretation, on which no judicial guidance is yet available.

Where a statute does not expressly permit or prohibit contracting out, contracting out may be possible, depending on whether that would be contrary to the public policy underpinning the statute: *Re Morris* (1943) 43 SR (NSW) 352 at 356 per Jordan CJ. As Latham CJ said in *Lieberman v Morris* (1944) 69 CLR 69 at 78, an important question is:

> whether the benefits of the Act were provided solely in the interests of the persons who might make applications under the Act, or whether they were intended to enure also for the public benefit.

If the legislation is purely private or personally directed, it seems possible to give up the benefits conferred by the statute in a valid contract. The question, then, is whether the proportionate liability legislation has this character, or whether it furthers a broader public interest as well.

The policy purpose of the proportionate liability legislation was to deal with the rising cost and diminishing availability of liability insurance. It does this by limiting the liability of wrongdoers to the extent of their proportionate responsibility for the plaintiff's loss or damage, so that insured wrongdoers do not bear a disproportionate share of loss. These policy concerns are clear from second reading speeches – eg in South Australia and Victoria.[1]

Direct contracting out would enable parties to escape the ambit of the legislation altogether, which would seem to undermine the public policy underpinning the reforms. If (in accordance with the authorities cited above) courts view the public policy significance of the legislation as determinative, contracting out may not be permissible in these jurisdictions.

The recognition given to the policy basis of proportionate liability legislation by the High Court majority in *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2024) 98 ALJR 880; [2024] HCA 24 might suggest that courts will view proportionate liability legislation as "enuring for the public benefit". However, there are specific references in the majority judgments to the ability of parties to contract out of proportionate liability laws in an arbitration clause: see [131] per Gordon and Gleeson JJ, and [291] per Jagot and Beech-Jones JJ. The possibility of contracting out does not appear to have been the subject of argument in *Tesseract*, and the decision does not provide conclusive guidance on the issue.

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1 South Australia, House of Assembly, The Hon M J Atkinson, *Law Reform (Contributory Negligence and Apportionment of Liability) (Proportionate Liability) Amendment Bill* (2 March 2005) 1832; Victoria, Legislative Assembly, The Hon Steve Bracks, *Wrongs and Limitation of Actions Acts (Insurance Reform) Bill* (21 May 2003) 1781. See also *Woods v De Gabriele* (2007) 2 BFRA 168; [2007] VSC 177 per Hollingworth J at 50; Horan T, *Proportionate Liability: Towards National Consistency* at [33]ff, see http://webarchive.nla.gov.au/gov/

20141215114931/http://www.lccsc.gov.au/sclj/archive/former_sclj/projects/proportionate_liability.html, viewed 11 February 2025.

[26810] Queensland

Section 7(3) of the *Civil Liability Act 2003* (Qld) states:

> This Act, other than chapter 2, part 2, and chapter 3, does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract (the "express provision") in relation to any matter to which this Act applies and does not limit or otherwise affect the operation of the express provision.

Proportionate liability in Queensland is imposed by Ch 2, Pt 2.

The inference from the express exclusion of Ch 2, Pt 2 is that the Act *does* prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract, where the proportionate liability regime applies. This would prevent the parties from contracting out of the proportionate liability provisions.

If this view of the legislation is correct, it might be seen as conflicting with the proposition that including an arbitration clause provides an indirect method of contracting out: see [26770]. However, the policy justification for excluding arbitration proceedings from the ambit of proportionate liability legislation is strong (see [25700]) and is likely to prevail.

[The next text page is 34651]

Indirect contracting out through choice of law

[26910] Choice of appropriate law

An indirect method of contracting out is through choice of law: parties may include in their contract a clause purporting to subject the contract to the law of a particular jurisdiction.

Choice of law clauses are commonly used where the subject matter of the contract, or the domicile of its parties, leaves some uncertainty as to what law would otherwise apply to the contract. However, choice of law clauses can have other applications. For example, contracting parties domiciled in one State, who prefer to be subject to the (more lenient) laws of another State, may insert a clause into their contract providing that the contract and all rights and obligations arising under it are to be "governed exclusively" by the law of the other State.

The leading case on choice of law in contract is the decision of the High Court in *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418; 71 ALJR 156. In that case, the High Court considered whether a contract could escape the ambit of the *Insurance Contracts Act 1984* (Cth) by providing that the governing law of the contract was to be the law of England. Toohey, Gaudron and Gummow JJ (Dawson and McHugh JJ dissenting) held that the clause was ineffective because an express provision of the Act prohibited this type of contracting out.

In relation to choice of law as a mechanism for ameliorating unwanted effects of proportionate liability, the issue would be whether parties in one jurisdiction could choose to subject their contract to the law of a different jurisdiction with little or no connection to the subject matter of the contract. This issue was not resolved in *Akai*. The dissenting judges (Dawson and McHugh JJ) appeared to accept that a clause having this effect would be valid (at 429 (CLR)), but the majority did not make their views on this issue clear.

A number of cases have suggested that generally, parties can validly subject their contract to the law of a jurisdiction which has a slight or even non-existent connection with the contract: see *Vita Food Products Inc v Unus Shipping Co Ltd (in liq)* [1939] AC 277; [1939] 1 All ER 513 at 290 (AC) per Lord Wright (delivering the advice of the Privy Council); *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725 at 747–748 per Murray J; *Re Bulong Nickel Pty Ltd* (2002) 42 ACSR 52; [2002] WASC 126 at 66 per Heenan J. This would appear to be a consequence of the judicial desire to hold parties to their bargain: *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197; 62 ALJR 389 at 224 (CLR) per Brennan J, at 259 per Gaudron J.

The majority in *Akai*, however, did make the following point (at 447):

> the courts may disregard or refuse effect to contractual obligations which, whilst not directly contrary to express or implied statutory prohibition, nevertheless contravene "the policy of the law" as discerned from a consideration of the scope and purpose of the particular statute.

It is open to a court, then, to refuse to enforce a choice of law clause which attempts to subject the contract to the law of a different jurisdiction, if this choice runs counter to a statutory policy. This would seem to be an exception to the parties' freedom to choose the governing law of their contract, which would apply whether or not the relevant Act expressly prevents contracting out.

To determine whether a choice of law will be valid if it is made for the purpose of avoiding proportionate liability, it is necessary to consider the law that would apply but for the purported choice. Again, the position varies from one jurisdiction to another.

[26930] New South Wales, Tasmania and Western Australia

Where contracting out is permitted by the legislation in the jurisdiction, which is the position in New South Wales, Tasmania and Western Australia, there should be no objection to indirect contracting out through a choice of law clause. Of course, parties in these jurisdictions are unlikely to want to contract out, since it would be simpler to exclude proportionate liability altogether.

[26950] Queensland

As discussed in [26810], the inference from s 7(3) of the *Civil Liability Act 2003* (Qld) is that the Act does prevent parties from making express provision for their "rights, obligations and liabilities" in a contract where such provision is contrary to the proportionate liability regime of the Act. Given that the purpose behind the legislation supports a broad interpretation of these words, a choice of law clause is likely to be caught by this provision. It is a provision which affects the parties' rights, obligations and liabilities.

Consequently, in Queensland a choice of law clause attempting to apply the law of a different jurisdiction to prevent limitation of liability under the proportionate liability provisions of the *Civil Liability Act 2003* is likely to be held ineffective because it is inconsistent with the statutory policy advanced by s 7(3).

[26970] Victoria, South Australia, the Australian Capital Territory and the Northern Territory

The issue is particularly difficult where the legislation is silent on the question of contracting out, as in Victoria, South Australia, the Australian Capital Territory and the Northern Territory. As noted in [26790], proportionate liability serves a broad public interest in maintaining the availability of liability insurance. If a choice of law clause would frustrate that public interest, the clause may be invalid. However, not every choice of law clause necessarily has that effect.

If a choice of law clause would result in proportionate liability being avoided entirely, it is likely the clause would be repugnant to public policy and therefore invalid. This would, for example, be the case where a contract in the Australian Capital Territory nominated Western Australian law as the governing law and contained a provision attempting to exclude proportionate liability, as permitted by the Western Australian legislation.

Proportionate liability, however, is far from uniform across the States and Territories, even when it does apply. A good example is the issue of carelessness, discussed at [25870]. For example, in Victoria proportionate liability applies to contractual claims "arising from a failure to take reasonable care", whereas in South Australia it only applies (in a contractual context) to claims "for a breach of a contractual duty of care". It may suit parties to a contract in Victoria to subject their agreement to the law of South Australia, in order to limit the application of proportionate liability and enable greater certainty of risk allocation. It would be harder to argue that such a clause would frustrate the policy behind proportionate liability.

A court may have to balance the extent to which such a clause runs counter to public policy in the relevant jurisdiction against the court's deference to parties' freedom of choice. It may ultimately be a question of determining which concern is stronger in the circumstances and giving effect to it.

In the absence of judicial guidance, it would be hazardous to express a definitive view on the choice of law issue. The best that can be said is that while "shopping" between jurisdictions which do apply proportionate liability may be tolerated by courts in Victoria, South Australia, the Australian Capital Territory or the Northern Territory, clauses which enable parties to escape the regime entirely are less likely to find favour.

[The next text page is 34701]

Contracting out by defendants: interaction between exclusion clauses and proportionate liability

[27070] Liability can be excluded

What is the position where the contract between the parties expressly excludes all liability of the defendant for careless conduct, whether in negligence or contract? Here, we are not dealing with a situation where the *plaintiff* has deprived the *defendant* of the liability-limiting effect of proportionate liability; instead, through the exclusion clause the *defendant* has deprived the *plaintiff* of its right to recover for a breach within the ambit of the clause.

Apart from the proportionate liability legislation, contractual exclusion clauses can exclude liability for both breach of contract and negligence, if properly drafted: see [115410]; see also Seddon NC and Bigwood RA, *Cheshire and Fifoot's Law of Contract* (11th Australian ed, LexisNexis Butterworths, 2017) at [10.77].

It seems clear that in the jurisdictions which permit contracting out (Western Australia, New South Wales and Tasmania), these clauses will not be affected by the proportionate liability legislation.

In South Australia, the court is expressly directed in making its apportionment of liability to take into account any special limitation of liability to which any defendant may be entitled: *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* s 8(4)(d). "Special limitation of liability" is defined to include both a limitation under an Act, and a limitation under a contract: s 3.

At the other end of the spectrum in Queensland, where the proportionate liability provisions are excluded from the section allowing parties to make express provision for their rights, obligations and liabilities under a contract in relation to any matter to which the legislation applies, the question is whether total exclusion of liability is a matter to which the proportionate liability provisions apply. Arguably, it is not. The core provision in Queensland, s 31(1)(a), says "the liability of a defendant who is a concurrent wrongdoer … is limited …". Thus the Act does not deal with the imposition of liability, but with the limitation of liability. On this basis it may be argued that there is no reason why liability should not be limited at a lower level or excluded altogether.

This approach does not conflict with the policy of the legislation. As identified by Professor Davis in his paper "Proportionate Liability: Proposals to Achieve National Uniformity",[1] that policy is to protect defendants.

If this argument is valid under the Queensland legislation, it must also be valid under the legislation of Victoria, the Australian Capital Territory and the Northern Territory, where nothing is said about contracting out.

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1 See http://www.justice.tas.gov.au/__data/assets/pdf_file/0016/113623/Davis_Report.pdf, viewed 11 February 2025.

[The next text page is 34751]

Procedural issues

[27170] Joinder and pleading issues

The proportionate liability legislation has raised a number of issues of practice and procedure. Many of these are associated with the requirement, peculiar to the legislation of Victoria, that in apportioning liability a court can only have regard to concurrent wrongdoers if they are parties to the action. However, some issues have also arisen under the legislation of other jurisdictions.

[27190] Compulsory joinder of concurrent wrongdoers in Victoria

Section 24AI(3) of the *Wrongs Act 1958* (Vic) provides that in apportioning liability between defendants in proceedings on an apportionable claim, the court must not have regard to the comparative responsibility of any person who is not a party to the proceedings. Exceptions are made for individuals who are dead, or companies that have been wound up. There is no exception for a company that is still being wound up. Where a claim for relief is made against a company in liquidation, the claim can only proceed with the leave of the court: *Corporations Act 2001* (Cth) s 471B. However, where a company in liquidation was joined as a defendant to meet the requirements of s 24AI(3) without any claim for relief being made against it (to allow the original defendants to limit their liability through broader apportionment), it was held that leave was not required – or alternatively that if leave was required, it should be granted: *Woods v De Gabriele* (2007) 2 BFRA 168; [2007] VSC 177, at [66]–[69] per Hollingworth J.

In interlocutory proceedings in *Suncorp-Metway Ltd v Panagiotidis* [2009] VSC 126, Evans AsJ considered the operation of s 24AI(3) in the context of a web of counterclaims: see [25750]. He took the view that as long as a person is a defendant to one counterclaim in the overall proceeding, the comparative responsibility of that person can be taken into account in apportioning responsibility in another counterclaim. However, this presumably could not result in a judgment against the relevant person in the second counterclaim for an amount corresponding to the responsibility apportioned to them, because they were not named as a defendant; it could only reduce the amount of responsibility apportioned to the other parties who were named as defendants to the second counterclaim.

The effects of s 24AI(3) were described by Ashley JA of the Victorian Court of Appeal in *Godfrey Spowers (Vic) Pty Ltd v Lincolne Scott Australia Pty Ltd* (2008) 21 VR 84; [2008] VSCA 208 at [55]–[56]:

> if a defendant wishes to have the distinct advantage of the proportionate liability regime, and if the plaintiff has not named as defendants all of those persons which it considers might be held to be concurrent wrongdoers, then it is the defendant which must bring them into the proceeding – that is, unless the person sought to be implicated is dead or, being a corporation, has been wound up.
>
> The further consequence … is this: if a defendant brings in putative concurrent wrongdoers, and if the plaintiff does not make them defendants to its proceeding, and if they are found to be concurrent wrongdoers, then the plaintiff will only recover … such proportion of its damages as are attributable to the proportionate liability of the defendant (or defendants).

The Victorian requirement is intended to protect plaintiffs from "liability leakage" by forcing defendants to bring in concurrent wrongdoers as parties to the action, if they wish to lay off liability to them. Other States and Territories achieve the same objective by different means – requiring defendants to notify the plaintiff of the identity of concurrent wrongdoers, without actually having to join them in the action: see [25750]. In their respective papers on national uniformity proposals, both Mr Horan[1] and Professor Davis[2] express the opinion that the "notification" approach of other jurisdictions is preferable to the "forced joinder" approach of Victoria, although the reasons supporting their opinions are different.

The 2013 draft of model uniform legislation (see [25650]) adopted an "enhanced notification" approach, in proposed s 7. On this approach it would not be necessary to join putative concurrent wrongdoers as parties to the action, but the defendant seeking to limit liability would have more extensive obligations to give information to the plaintiff about the person identified as a concurrent wrongdoer – with copies of that information to the person so identified, and to the court. Failure to do this could result in loss of the right to proportionate limitation, if that was viewed by the court as just and equitable.

Some difficulties have arisen in determining how a defendant should join other concurrent wrongdoers, in order to meet the requirements of s 24AI(3): see *P & V Industries Pty Ltd v Secombs (a firm)* [2008] VSC 209; *Godfrey Spowers (Vic) Pty Ltd v Lincolne Scott Australia Pty Ltd* (2008) 21 VR 84; [2008] VSCA 208, per Ashley JA at [18] and n 9. It seems that where a defendant wishes to claim substantive or declaratory relief against the additional party, they should be joined as a defendant to counterclaim. Where no relief is sought against the additional party, they may be joined as an additional defendant under r 9.06(b) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic): see *Cowan v Greatorex* [2008] VSC 401, per Hollingworth J at [33]–[34].

Section 24AI(3) has also caused difficulties in determining how to deal with defendants who settle with the plaintiff. In *Vollenbroich v Krongold Constructions Pty Ltd* [2006] VCAT 1710, a case before the Victorian Civil and Administrative Tribunal, the owners of a new house brought an action against the builder, architect and drainage design engineer. The engineer joined the landscape designer, and the builder joined various subcontractors. The architect and the engineer settled with the owner before the hearing, and each applied for judgment in favour of the owners. Some of the continuing parties resisted the application, on the ground that if the architect and engineer ceased to be parties to the action, the Tribunal could no longer take their liability into account when apportioning liability. Senior Member Walker accepted this argument and dealt with it by keeping the architect and engineer as nominal parties to the action (without requiring them to take any further part in it) and postponing the entry of judgment against them until the overall conclusion of the proceedings: see [7]–[10] of the judgment.

The effect of settlement involving discontinuance rather than judgment was considered in *Mercedes Holdings Pty Ltd v Waters (No 6)* [2012] FCA 1412 – an interlocutory decision in Federal Court proceedings, where the applicants proposed to discontinue against a number of respondents. Some of the continuing respondents, members of a firm of auditors, intended to rely on the proportionate liability regime to limit their potential liability. They opposed the discontinuance, citing concern that if the applicable proportionate liability regime was held to be Pt IVAA of the *Wrongs Act 1958* (Vic), discontinuance against the settling respondents might make them "parties to a previously concluded proceeding" for the purposes of s 24AL(2) of the *Wrongs Act 1958* (Vic). If this were the case, s 24AL(2) would bar the plaintiff from re-joining them as parties; and since they were not parties, their comparative responsibility could not be taken into account in apportionment because of s 24AI(3).

Jacobson J held that this concern did not justify withholding approval for discontinuance. With regard to s 24AL(2), he agreed with the opinion expressed by Ashley JA in *Godfrey Spowers* (above, at [58]) that "previously concluded proceeding" meant a proceeding which culminated in judgment.

In *Wheelahan v City of Casey (No 12)* [2013] VSC 316, a defendant pleaded proportionate liability, naming as concurrent wrongdoers various parties including some who had settled the claims against them and had been released as parties. Dixon J held that the defendant was obliged to seek leave under s 24AL of the *Wrongs Act 1958* (Vic) for joinder of these alleged concurrent wrongdoers as defendants to its counterclaim. Otherwise, the Court would be barred by s 24AI from having regard to their comparative responsibility: [133].

In *Braham v ACN 101 482 580 Pty Ltd* [2014] VSC 171 at [49], it was held that a proceeding in which only an interlocutory judgment has been entered and damages have not yet been assessed is not a "concluded proceeding" within s 24AL(2). Lansdowne AsJ cited policy reasons for this conclusion: it would undermine the proportionate liability regime if a plaintiff could "pick off" impecunious or insolvent concurrent wrongdoers by entering default judgments against them, and so remove them as potential parties (and candidates for apportionment) in an action against another concurrent wrongdoer who does have the capacity to pay.

Other consequences of settlement under the Victorian legislation were considered by Byrne J in *Gunston v Lawley* (2008) 20 VR 33; [2008] VSC 97 at [60]–[66].

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1 Horan T, *Proportionate Liability: Towards National Consistency* at [296], see http://webarchive.nla.gov.au/gov/20141215114931/http://www.lccsc.gov.au/sclj/archive/former_sclj/projects/proportionate_liability.html, viewed 11 February 2025.

2 Davis JLR, *Proportionate Liability: Proposals to Achieve National Uniformity* at [5.3], see http://www.justice.tas.gov.au/__data/assets/pdf_file/0016/113623/Davis_Report.pdf, viewed 11 February 2025.

[27200] Other jurisdictions – can and should concurrent wrongdoers be joined?

In *Fudlovski v JGC Accounting & Financial Services Pty Ltd (No 3)* [2013] WASC 476 Kenneth Martin J considered an application by the defendants for leave to add the putative concurrent wrongdoer (Mr Hart) as an additional defendant to a proposed counterclaim against the plaintiffs. The application was strongly opposed by the plaintiffs, who argued that the joinder would amount to condoning an abuse of process since it was not necessary for Mr Hart to be joined; the only relief which could be sought against Mr Hart by the defendants was a declaration, and any such declaration would be purely hypothetical. Kenneth Martin J rejected these arguments and gave the defendants leave to add Mr Hart as a defendant to their proposed counterclaim.

However, an appeal against this decision was upheld: *Hart v JGC Accounting and Financial Services Pty Ltd* (2015) 47 WAR 582; [2015] WASCA 22. In the leading Court of Appeal judgment, Murphy JA accepted (at [56]) the submission that a declaration of Mr Hart's liability to the plaintiffs would be abstract and hypothetical – it would not determine any legal controversy and adopting the words of Finkelstein J in *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2)* [2008] FCA 1656 at [12] (see [27230]), would be a "dispute without any legal significance". Accordingly, JGC had no proper claim for declaratory relief against Mr Hart or the plaintiffs.

Murphy JA pointed out that the observations of Finkelstein J in *BHPB Freight* have been applied in *Rivercity Motorway Finance Pty Ltd v AECOM Australia Pty Ltd (No 2)* [2014] FCA 713 at [76]ff. His Honour also referred to the observations of Gray J in *Miletich v Murchie* (2012) 297 ALR 566; [2012] FCA 1013 at 114, although the passage cited from that case appears to relate to pleading requirements for a proportionate liability defence rather than declaratory relief against a concurrent wrongdoer who is not otherwise a party to the action.

In an earlier interlocutory chapter of the same litigation, *Fudlovski v JGC Accounting & Financial Services Pty Ltd (No 2)* [2013] WASC 301, Kenneth Martin J had commented (obiter) on the forensic difficulties – and potential unfairness – which might arise when a defendant attempts to attribute a share of responsibility for the plaintiff's loss to a putative concurrent wrongdoer, who is not joined as a party to the action. In the appeal judgment in *Hart v JGC Accounting & Financial Services Pty Ltd* (2015) 47 WAR 582; [2015] WASCA 22 (at [62]ff) Murphy J took the opportunity to answer these comments, expressing the view that the refusal to allow the defendants to join Mr Hart would not result in unfairness to Mr Hart or the plaintiffs or prevent the just determination of the issues between the plaintiffs and the defendants. There was some risk of inconsistent judgments, if the plaintiffs were subsequently to sue Mr Hart, but this could be dealt with by dismissing JGC's application to join Mr Hart, on condition that the plaintiffs formally undertook to the Court not to bring subsequent proceedings against Mr Hart. The same condition had been imposed by Nicholas J in *Rivercity Motorway Finance Pty Ltd v AECOM Australia Pty Ltd (No 2)* [2014] FCA 713 to deal with the risk of inconsistent judgments in subsequent proceedings: at [96].

In *Lion-Dairy & Drinks Pty Ltd v Sinclair Knight Merz Pty Ltd* [2014] FCA 386, the Federal Court (Griffiths J) considered an application by the respondent to file a cross-claim against two putative concurrent wrongdoers. One of the proposed cross-claims involved a direct claim for negligence by the respondent, as well as a declaration as to apportionment; the other sought only a declaration as to apportionment. The "declaration only" application was opposed by the applicant, on the ground that the proposed cross-claim would serve no purpose and was not a valid claim. Following *Fudlovski (No 3)*, Griffiths J gave the respondent leave to file both cross-claims.

Courts have a broad discretion to decide whether to grant declaratory relief in a particular case. Nevertheless, having regard to the WA Court of Appeal decision in *Hart v JGC Accounting and Financial Services Pty Ltd* (2015) 47 WAR 582; [2015] WASCA 22 and the Federal Court decision in *Rivercity Motorway Finance Pty Ltd v AECOM Australia Pty Ltd (No 2)* [2014] FCA 713, future "declaration only" cross-claims against putative concurrent wrongdoers appear to have a low probability of success in jurisdictions other than Victoria.

As to whether it is necessary for the defendant to serve a pleading on the new party at the time of joinder, Victorian authority suggests that this may not be necessary: *P & V Industries Pty Ltd v Secombs (a firm)* [2008] VSC 209 at [11]; and see [27210].

[27210] What has to be pleaded

What a defendant must plead in order to claim limitation of liability under the proportionate liability provisions has been considered in a number of cases. In *Ucak v Avante Developments Pty Ltd* [2007] NSWSC 367, Hammerschlag J (at [35]) identified three elements which had to be pleaded, reflecting the key elements in s 35 of the *Civil Liability Act 2002* (NSW). These were:

- the existence of a particular person;
- the occurrence of an act or omission by that particular person; and
- a causal connection between that occurrence and the loss that is the subject of the claim.

In *HSD Co Pty Ltd v Masu Financial Management Pty Ltd* [2008] NSWSC 1279, Rothman J prescribed a more extensive set of pleading requirements, saying (at [15]–[18]):

> The obvious precondition to limiting liability, on the basis that others are also responsible for the damage, is to prove that those others have caused the damage and are legally responsible for it.

Summary dismissal

[27420] Summary dismissal in proportionate liability cases

The complexity of litigation, in which proportionate liability is pleaded as a defence, has prompted frequent resort to interlocutory applications seeking strike-out or summary dismissal. Ironically, the very complexity of the issues raised by a defence of apportionment has made courts reluctant to determine those issues summarily.

These applications have, for example, arisen where a defendant asserted that a claim was apportionable (in order to gain the benefit of apportionment), even though the claim did not fall within the "core" categories (negligence, breach of contractual duty of care and statutory claims of misleading or deceptive conduct), and the plaintiff sought to strike out the apportionment defence. In this situation defendants have often argued that their liability (if any) resulted as a matter of fact from failure to take reasonable care, even though failure to take care was not an element of the plaintiff's cause of action. The applications then became a contest between the broad and narrow views of proportionate liability: see [25870] ff. It was not surprising, given the ongoing controversy over this issue, that courts refused to strike out or summarily dismiss the proportionate liability defence on the basis that the narrow view was unarguably correct: see *Demetrios v Lehmann* [2019] VSC 301; *Colagrossi v Transport for NSW* [2019] NSWSC 493.

However, the prospects for strike-out or summary dismissal of the proportionate liability defence in cases where failure to take care is not an element of the plaintiff's cause of action have improved markedly in the wake of recent appellate decisions (see [26030]) which support the view that a claim is not apportionable unless the plaintiff is required to prove a failure to take reasonable care in order to succeed in the claim.

There have always been good prospects for strike-out or summary dismissal where the pleadings do not refer to any failure to take care on the part of the defendant, but only to the failure of the alleged concurrent wrongdoers to take care. Then the situation is analogous to *Commonwealth Bank of Australia v Witherow* [2006] VSCA 45: see [26150] and [26310].

In *Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd* (2019) 99 NSWLR 780; [2019] NSWCA 161, the NSW Court of Appeal upheld an appeal against the decision of a District Court judge to strike out a defendant's cross-claims for contribution against parties who were also named as concurrent wrongdoers in a proportionate liability defence. On the principle in *Dymocks Book Arcade Pty Ltd v Capral Ltd* [2010] NSWSC 195 (see [27330]), such claims could not survive if the proportionate liability defence succeeded. However, it was not appropriate to dismiss the contribution claims summarily, because it could not be determined until trial whether the proportionate liability defence would succeed; and if it failed (for example, because the parties named as concurrent wrongdoers were not legally liable to the plaintiff, or parties had contracted out), the contribution claims could proceed.

[The next text page is 34851]

Contributory negligence

[27430] Proportionate liability and contributory negligence

In *Astley v Austrust Ltd* (1999) 197 CLR 1; [1999] HCA 6 the High Court held that in contract claims defendants could not rely on legislation providing for the proportionate reduction of damages on the ground of contributory negligence by the plaintiff. Relevant legislation in Australian jurisdictions has since been amended, and now extends to certain claims for breach of contract – essentially, where the contractual claim is for breach of a contractual duty of care.[1]

How does the liability apportionment process under contributory negligence legislation interact with the liability apportionment process under proportionate liability legislation?

In all jurisdictions except Victoria and South Australia, the court is directed to exclude that proportion of damage or loss that is attributable to contributory negligence of the plaintiff, when apportioning liability between defendants in an apportionable claim: *Civil Liability Act 2002* (NSW) s 35(3)(a); *Civil Liability Act 2003* (Qld) s 32G; *Civil Liability Act 2002* (WA) s 5AK(3)(a); *Civil Liability Act 2002* (Tas) s 43B(3)(a); *Civil Law (Wrongs) Act 2002* (ACT) s 107F(2)(a); *Proportionate Liability Act 2005* (NT) s 13(2)(a). Under these provisions, in any proceedings on an apportionable claim a positive duty is imposed on the court to determine how much of the damage or loss claimed is caused by contributory negligence of the plaintiff, and to exclude that part of the loss or damage before apportioning the balance between the concurrent wrongdoers.

It would appear that these provisions should be interpreted as follows: if the plaintiff's contributory negligence bears 20% of the responsibility for the loss, the court must exclude 20% of the damage or loss; then the 80% damages figure is split up among the concurrent wrongdoers. So if there are two concurrent wrongdoers who are equally responsible, each will end up bearing 50% of 80% (ie 40%) of the total loss, and the plaintiff will be left to bear the 20% attributable to contributory negligence.

The operation of s 35(3)(a) of the *Civil Liability Act 2002* (NSW) was briefly referred to by Young CJ in Eq in the first instance judgment in *Vella v Permanent Mortgages Pty Ltd* (2008) 3 BFRA 269; [2008] NSWSC 505; but how the section was applied in that case is not entirely clear. His Honour said (at [587]):

> In making the apportionment, I exclude any negligence or carelessness on the part of Mitchell Morgan (*Civil Liability Act* s 35(3)(a)).

This is a little different from what the section actually says. Section 35(3)(a) of the *Civil Liability Act 2002* requires the court to "exclude that proportion of the loss or damage in relation to which the plaintiff is contributorily negligent under any relevant law". In other words, the statutory direction is to exclude the proportion of damage attributable to contributory negligence, not to exclude any contributory negligence.

The *Vella/Mitchell Morgan/Hunt & Hunt Lawyers* case (*Mitchell Morgan Nominees Pty Ltd v Vella* (2011) 16 BPR 30189; [2011] NSWCA 390; *Hunt and Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; 87 ALJR 505) involved losses suffered by lenders: first through fraud and secondly through conduct by solicitors which was classified by Young CJ in Eq as negligent in that it failed to protect the lenders against the consequences of the fraud. It is difficult to determine from the judgment in *Vella* whether there was any contributory negligence on the part of Mitchell Morgan as a lender, although there are indications that the lenders involved in the case did not take reasonable care to protect themselves against the risk of fraud (see eg [124] of the first instance judgment). The question of contributory negligence was not considered on appeal: *Mitchell Morgan Nominees Pty Ltd v Vella* (2011) 16 BPR 30189; [2011] NSWCA 390; *Hunt and Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; 87 ALJR 505; [2013] HCA 10.

In Victoria the same effect is achieved by preserving the operation of statutory provisions providing for apportionment of liability in contributory negligence situations: see *Wrongs Act 1958* (Vic), s 24AN. Section 26 of the *Wrongs Act 1958* will apply to reduce the amount of the damages recoverable, before s 24AI(1) applies to apportion the damage among concurrent wrongdoers. An example of the application of these sections may be found in the judgment of the Victorian Court of Appeal in *Metzke v Sali* [2010] VSCA 267 at [63] and [96].

In South Australia the approach is to direct the court to *include* the contributory negligence and attribute a percentage to it in the apportionment process: *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* s 8(3)(b) and (c). Using the example above, the mathematical outcome will be the same: loss will be distributed 20% to the plaintiff and 40% to each of the concurrent wrongdoers.

Although these three drafting approaches achieve the same effect, the one used in South Australia is preferable because it leaves no doubt about what the court is required to do.

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1 *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) ss 8, 9(1); *Law Reform Act 1995* (Qld) ss 5, 10; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) ss 3, 7(2); *Wrongs Act 1954* (Tas) ss 2, 4(1); *Wrongs Act 1958* (Vic) ss 25, 26(1); *Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947* (WA) ss 3A, 4(1); *Civil Law (Wrongs) Act 2002* (ACT) ss 101, 102; *Law Reform (Miscellaneous Provisions) Act 1956* (NT) ss 15, 16(1).

[27435] Defences based on same conduct – no double discount

Where a defendant raises the defence of contributory negligence against a corporate plaintiff, the defendant cannot raise a separate defence of apportionment, on the basis that the directors of the corporate plaintiff are concurrent wrongdoers because they have legal liability for the plaintiff's loss, arising out of the same conduct that is the basis for the defence of contributory negligence. The conduct of the directors is the conduct of the company, and the same conduct cannot be relied on twice to relieve the defendant of liability; that would involve an "inequitable double discount": see *Latol Pty Ltd v Gersbeck* (2015) 303 FLR 298; 110 ACSR 158; [2015] NSWSC 1631 at [53]; *Cam & Bear Pty Ltd v McGoldrick* [2018] NSWCA 110 at [100]–[101]; *About Life Pty Ltd v Maddocks Lawyers* [2021] NSWSC 1370 at [678]–[679].

[The next text page is 34901]

CONCLUSION

[27530] Uniform legislation – without uniformity

The table below lists a number of key aspects of the proportionate liability legislation as it applies to contractual claims, showing differences between the various States and Territories.

Paragraph	Subject	NSW	VIC	QLD	WA	SA	TAS	ACT	NT
[25750]	Concurrent wrongdoers must be joined as parties to action	×	✓	×	×	×	×	×	×
[25770]	Catches concurrent wrongdoers acting jointly, as well as independently	✓	✓	×	✓	×	✓	✓	✓
[25870]	Contractual application restricted to breach of duty of care	×	×	✓	×	✓	×	×	×
[26290]	Indemnifier entitled to benefit of proportionate liability	×	×	×	×	✓	×	×	×
[26430]	Intentional wrongdoing excluded	✓	×	✓	✓	✓	✓	✓	✓
[26430]	Proportionate liability excluded as between principal and agent	×	✓	✓	×	×	×	✓	×
[26530]	Reapportionment through contractual indemnities permitted	✓	×?	×	✓	✓	✓	×?	✓
[26730]	Contracting out permitted	✓	?	×	✓	?	✓	?	?

A significant proportion of Australian commerce is now conducted on a national basis, or by organisations operating nationally. It follows that creating a nominally "uniform" legislative regime that contains significant but confusing differences between States and Territories is economically inefficient. This is a lesson that Australian State and Territory legislators should have learned many years ago.

The introduction of proportionate liability legislation was designed to achieve a more efficient economic outcome, but even on a State level the legislation is complex and confusing. Viewed on a national level, the matrix of proportionate liability legislation resembles some form of fiendish obstacle course designed to trap, or sap the resources of, business people and their lawyers. There seem to be two reasons for this.

- First, there has not been a clear consensus on the policy objective of the legislation. This is evident from the papers prepared in support of the initiative to achieve national uniformity. Mr Horan says the policy objective was to protect professionals by ensuring that they could obtain available and affordable professional indemnity insurance.[1] It was not to protect insurers, or a wider class of insured persons – although the protection offered by the legislation as passed is not limited to professional service providers. Professor Davis approaches the matter quite differently: he says that the purpose of the legislation is to provide an equitable distribution of liability between concurrent wrongdoers, as a replacement for joint and several liability.[2] Economic effect and legal theory will need to be reconciled before uniformity can be achieved.
- Second, the people responsible for preparing the legislation of each jurisdiction have felt at liberty to depart from the original uniform model by injecting their own "bright ideas". This is partly referable to the novelty of the subject, and the immature state of debate, at the time the legislation was being drafted. Hopefully, now that the overall subject has received the attention of courts and commentators, the issues (including the inefficiency of disparate approaches) stand out more clearly and will be easier to resolve.

The circulation of a consultation draft of model uniform legislation by the Standing Committee of Attorneys-General in September 2011 (see [25650]) appeared to be a positive step. The uniform legislation project was to be taken forward by the Standing Council on Law and Justice (SCLJ), which replaced the Standing Committee of Attorneys-General. The SCLJ meeting in October 2013 approved the issue of a revised draft and regulatory impact statement, and Ministers at the meeting agreed to consider the introduction of the uniform provisions in their respective jurisdictions.[3]

However, the SCLJ was replaced in 2013 by the Law, Crime and Community Safety Council, and that body in turn was replaced by (or renamed as) the Council of Attorneys-General. Along the way, promotion of true uniformity in proportionate liability legislation appears to have lost priority as a law reform project.

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1 Horan T, *Proportionate Liability: Towards National Consistency* at [80], see http://webarchive.nla.gov.au/gov/20141215114931/http://www.lccsc.gov.au/sclj/archive/former_sclj/projects/proportionate_liability.html, viewed 11 February 2025.

2 Davis JLR, *Proportionate Liability: Proposals to Achieve National Uniformity*, Section 1, see http://www.justice.tas.gov.au/__data/assets/pdf_file/0016/113623/Davis_Report.pdf, viewed 11 February 2025.

3 http://webarchive.nla.gov.au/gov/20141215114931/http://www.lccsc.gov.au/sclj/archive/former_sclj/projects/proportionate_liability.html, viewed 11 February 2025.

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Option and pre-emption clauses

by

Leigh Warnick SC

[The next text page is 49101]

NATURE OF OPTIONS AND PRE-EMPTIVE RIGHTS

[40010] Options

In ordinary language, an option is simply a choice. In the law of contract, "option" has a more specific meaning, although the element of choice is still central. An option is an enforceable discretionary right (or choice) of one party to bring into effect a contract with another party, by a unilateral act (known as the **exercise** of the option). A definition to this effect was accepted by the Full Federal Court (Beaumont, Carr and Lindgren JJ) in *Commissioner of Taxation v Guy* (1996) 67 FCR 68; 137 ALR 193 at 76 (FCR).

Commercially, the option is a useful and versatile concept. Common applications are:

- options to subscribe for securities to be issued by companies: see Austin RP and Ramsay IM, *Ford, Austin & Ramsay's Principles of Corporations Law* (LexisNexis, looseleaf), [17.290] and [22.090];
- options to buy or sell issued securities of companies: *Ford, Austin & Ramsay's Principles of Corporations Law*, [17.230]–[17.320] and [22.090];
- options in leases, to renew the lease or to buy the freehold from the lessor – these are the most prolific source of legal authority on option clauses; and
- options to buy (or, less commonly, sell) land or other property, outside the security and lease context.

The parties to an option arrangement may be referred to in various ways, but the terminology used in this chapter is **option-holder** for the holder of the option right, and **option-grantor** for the person against whom it may be enforced.

Options to buy property (especially issued securities) may be referred to as **call options**. Options to sell property may be referred to as **put options**. If consideration is paid specifically for the option right, it may be referred to as an option **premium**.[1]

1 For an analysis of the definition of an option in the context of corporate securities and a glossary of related terms, see Hains MG, "Options Revisited" (1989) 5 Aust Bar Rev 168. See also Austin RP and Ramsay IM, *Ford, Austin & Ramsay's Principles of Corporations Law* (LexisNexis, looseleaf) at [22.090] for definitions relating to options over issued securities.

[40020] Pre-emptive rights

A right of pre-emption or pre-emptive right, as the Latin derivation indicates, is a right to buy property before someone else does. Pre-emptive rights differ from options in that exercise is not initiated by the holder of the right. Pre-emptive rights are responsive, triggered by notice from the owner of the property of a desire to sell it, and giving the holder a right in some form to buy the property before it is sold to another.

Pre-emptive rights are useful devices to protect the interests of a party who has an economic interest in property, but does not own it (or all of it). These rights are commonly found in resource and property joint ventures, and in the constitutions of closely-held companies.

[The next text page is 49201]

OPTIONS

[40110] Legal analysis of an option

If an option is an enforceable right to bring a contract into force, why is it enforceable? Courts have struggled to come up with a satisfactory answer to this question, within the conventional framework of contract law. In 1961, Dixon CJ in *Braham v Walker* (1961) 104 CLR 366; 34 ALJR 459 at 376 (CLR) described the nature of an option as a "standing controversy". Despite extensive judicial consideration since then, the standing controversy refuses to lie down.[1]

One view is that an option is a conditional contract. The condition is the exercise of the option. The grant of the option creates an incipient contract, defines its terms, and binds the option grantor to perform the contract if the option is exercised; but the contract does not become binding on the option-holder until the option is exercised. This is the dominant view, supported by a sequence of authorities in both Australia and England.[2]

The competing view is that an option is an irrevocable offer by the grantor to the option-holder, capable of being accepted by the exercise of the option. This view also has authoritative support in both Australia and England.[3] Indeed, it appeared to be the preferred view of the NSW Court of Appeal in *Lifoon Pty Ltd v Gillard* [2006] NSW ConvR 56-160; [2006] NSWCA 182 at [43] (although the court did not compare the two views in detail and referred to the conditional contract view as an alternative analysis).

A perceptive analysis of the two competing views was undertaken by Hoffmann J in the English case, *Spiro v Glencrown Properties Ltd* [1991] Ch 537; [1991] 2 WLR 931; [1991] 1 All ER 600. There is much to be said for his conclusion (at 605–606 (All ER)) that:

> An option is not strictly speaking either an offer or a conditional contract. It does not have *all* the incidents of the standard form of either of these concepts. To that extent it is a relationship sui generis. But there are ways in which it resembles each of them. Each analogy is in the proper context a valid way of characterising the situation created by an option.

In most cases, it will make no difference whether an option is characterised as a conditional contract or an irrevocable offer. Farrands in his book *The Law of Options and Other Pre-Emptive Rights*[4] identifies a number of situations where a difference may arise; but in most of these the difference is either ignored by the courts, or resolved by adoption of the conditional contract approach.

The New South Wales Court of Appeal discussed the "standing controversy" in *Willis Australia Ltd v AMP Capital Investors Ltd* [2023] NSWCA 158 at [61]-[67]. At [65], the Court identified two areas where the classification might be significant: where there is a question of the proprietary status of an option (where the option is viewed as an interest in land), and in relation to the assignment of an option.

The position in Australia now appears to be as stated by Bryson J in the first instance judgment in *Tonitto v Bassal* (1990) 5 BPR 11258; [1991] ANZ ConvR 354 at 360–361 (ANZ ConvR):[5]

> The true nature of an option is not treated as established by general considerations but is decided only after close consideration of the form of the option.

In some cases the option will be drafted as an irrevocable offer. However, where the wording is neutral (referring only to an option) and anything turns on the distinction, it is likely that Australian courts will classify an option as a conditional contract.

The Queensland Court of Appeal reviewed authorities on the characterisation of an option in *Tripple A Pty Ltd v WIN Television Qld Pty Ltd* [2018] QCA 246 at [36] ff.

Options were classified as conditional contracts in *Norton Property Group Pty Ltd v Ozzy States Pty Ltd (in liq)* [2020] NSWCA 23 at [71] and [121].

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1 See Farrands DJ, *The Law of Options and Other Pre-Emptive Rights* (Lawbook Co, 3rd ed, 2023) p 19ff; Hains MG, "Options Revisited" (1989) 5 Aust Bar Rev 168, 171–173; Rossiter CJ, "Options to Acquire Interests in Land" (1982) 56 ALJ 576; *Takeovers and Reconstructions in Australia* (LexisNexis, looseleaf) [406].

2 *Goldsbrough, Mort & Co Ltd v Quinn* (1910) 10 CLR 674 per Griffith CJ (at 678) and O'Connor J; *Carter v Hyde* (1923) 33 CLR 115; 29 ALR 430 at 125 (CLR); *Ballas v Theophilos (No 2)* [1958] VR 576 (the conditional contract/irrevocable offer issue was not considered on appeal to the High Court *Ballas v Theophilos (No 2)* (1957) 98 CLR 193; 31 ALJR 917); *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57; 48 ALJR 492; *Chew v Hamilton* (1985) 13 ACLR 440 at 446; *Griffith v Pelton* [1958] Ch 205; [1957] 3 WLR 522; [1957] 3 All ER 75 at 225 (Ch); *Wilbow Corp Pty Ltd v Mailli* [2002] 1 Qd R 574; [2001] QSC 213 at 575 (Qd R)).

3 *Goldsbrough, Mort & Co Ltd v Quinn* (1910) 10 CLR 674 per Isaacs J (diss) at 677; *Commissioner of Taxes (Qld) v Camphin* (1937) 57 CLR 127, per Latham J at 132; *Cavallari v Premier Refrigeration Co Pty Ltd* (1952) 85 CLR 20 at 25; *Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd* (1957) 59 SR (NSW) 122 at 123; *Beesly v Hallwood Estates Ltd* [1960] 1 WLR 549; [1960] 2 All ER 314; *Hughes v St Barbara Ltd* (2011) 5 ARLR 471; [2011] WASCA 234 at [85]; *Piazza Trevi Pty Ltd v Cromwell BT Pty Ltd* [2017] NSWSC 794 at [66].

4 See Farrands DJ, *The Law of Options and Other Pre-Emptive Rights* (Lawbook Co, 3rd ed, 2023), p 34 ff; see also Rossiter CJ, *Principles of Land Contracts and Options in Australia* (LexisNexis Butterworths, 2003) para 3.3 ff.

5 This decision was reversed by the Court of Appeal on other grounds: see *Tonitto v Bassal* (1992) 28 NSWLR 564; [1993] ANZ ConvR 264.

[40120] Significance of classification as an "option"

Generally, it will not matter whether or not a contractual right is properly called an option. The important question will be what the relevant clause requires the parties to do, and what rights or obligations it gives them. However, the classification does matter when the term "option" is used in a statutory context.[1]

Whether a clause fits within the definition of "option" in a particular statute or regulation will ultimately be a matter of statutory construction. The statutory context may indicate that the term is to be broadly or narrowly construed. In a number of cases, courts have adopted the common law concept of an option when defining the term in a statutory context. In *Commissioner of Taxation v Guy* (1996) 67 FCR 68; 137 ALR 193, the Full Federal Court took this approach in construing Pt IIIA of the *Income Tax Assessment Act 1936* (Cth). The court said (at 76 (FCR)) that an option was:

> ... a right in one party unilaterally to require another party to enter a new set of jural relations or to extend and continue an existing jural relationship.

Applying this definition, a standard contract of sale between a vendor and purchaser did not create an "option" within the meaning of the Act.

The extent of the interest created by the grant of an option is determined by the relief available in equity, if the option-holder seeks to enforce the option right. This issue was considered by the NSW Court of Appeal in *Australia Capital Financial Management Pty Ltd v Linfield Developments Pty Ltd* [2017] NSWCA 99 at [95] ff. Citing DJ Farrands, *The Law of Options* *and other Pre-emptive Rights* (Thomson Reuters, 2nd ed 2012) at 40 ff, Ward JA (with whom McColl JA and Gleeson JA agreed) noted that two concurrent equitable interests arise on the grant of an option:

- an immediate equitable interest, measured by the equitable relief a court will grant to the option-holder to prevent the option-grantor from disposing of the property inconsistently with the option; and
- a contingent equitable interest, measured by the relief a court will grant if the option is exercised.

In the case of an option to purchase land, an equitable interest in the land arises because the option-grantor can be deprived of the land without any action on his or her part, and so cannot be regarded in conscience as holding the entire interest in the land: *Carter v Hyde* (1923) 33 CLR 115 at 125; *Sharp v The Union Trustee Co of Australia Ltd* (1944) 69 CLR 539 at 558; *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57 at [75]–[76]; *Sahade v BP Australia Pty Ltd* [2004] NSWSC 512 at [37].

However, in the case of an option to renew a lease, it has been held that the option is a contractual right only, conferring no proprietary interest in the subject property: *Piazza Trevi Pty Ltd v Cromwell BT Pty Ltd* [2017] NSWSC 794 at [75] ff and [360] per Sackar J, citing *Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd* (1957) 59 SR (NSW) 122.

An additional complication arose in the *Australia Capital Financial Management* case, in that the option held by the option-holder (Linfield Developments) was not to acquire land from the registered proprietor, but to acquire either the purchaser's interest under a contract for sale of the land, or the land itself once completion had occurred under the sale contract. In these circumstances, Linfield Developments could not obtain any relief in equity against the registered proprietor prior to the time when the sale was completed – so it had no immediate equitable interest in the land prior to that time.

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1 As in *Income Tax Assessment Act 1997* (Cth) s 104-40; *Sale of Land Act 1970* (WA) s 19A(1); *Retail Leases Act 1994* (NSW) s 16(1); *Planning and Development Act 2005* (WA) s 136.

[40125] Is relief against forfeiture available, where an option is not exercised properly?

The classification of an option may have an effect on the ability of the option-holder to obtain relief against forfeiture where the right conferred by the option is lost through failure to exercise properly (for example, by the specified time).

Where the option confers a proprietary interest in the subject-matter and that interest is lost, relief against forfeiture may be available if the option-holder can establish reliance on one of the "special heads" of fraud, accident, mistake or surprise: see [105500] and [105505].

However, where the interest is lost is not a proprietary right, the position is not so clear. This question has arisen in cases where a tenant has claimed relief against forfeiture following the loss of its right to renew a lease.

In *Leads Plus Pty Ltd v Kowho Intercontinental Pty Ltd* (2000) 10 BPR 18085; [2000] NSWSC 459, Young J expressed the tentative view (at [21]) that relief against forfeiture would be available where what was forfeited was "the equitable interest in property that exists under an option to renew a lease prior to exercise of the option" – albeit only where there was a finding of unconscionable conduct (by the option grantor).

A contrary view was expressed by Sackar J of the NSW Supreme Court in *Piazza Trevi Pty Ltd v Cromwell BT Pty Ltd* [2017] NSWSC 794 at [75] ff and [360]. This view was based on two propositions. The first was that the equitable doctrine of forfeiture is restricted to situations where an interest, estate or other proprietary right is determined. The second was that the option to renew a lease is a contractual right only, conferring no proprietary interest: see *Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd* (1957) 59 SR (NSW) 122 at 123. It followed that where the right under an option was lost because of a failure to exercise within the stipulated time or in the stipulated manner, relief against forfeiture was not available; "there is no loss of a proprietary right to relieve against".

However, in *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825 at [980] ff, Edelman J (then sitting in the Federal Court) considered this issue and referred to a number of difficulties attending the argument that relief against forfeiture was limited to proprietary rights. He would have been prepared to proceed on the basis that the claim for forfeiture was not precluded merely because the claim did not relate to proprietary rights, but rejected the claim for other reasons. On appeal, the Full Court said: "for the reasons set out by the primary judge …, relief against forfeiture may be taken to be available in principle": *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2017] FCAFC 55 at [421].

Despite the decision in *Piazza Trevi*, the preponderance of authority now appears to support the availability of relief against forfeiture in an appropriate case, where the rights which have been lost are not proprietary in nature but are purely contractual (such as the right under an option to renew a lease). However, appropriate cases are likely to be relatively rare: see [40250].

In *Replay Australia Pty Ltd v Nightowl Properties Pty Ltd* [2023] QCA 76, the appellant lessee (Nightowl) had exercised an option within time but between that time and the expiry of the lease (during the period of the COVID pandemic) had unilaterally reduced its rent payments. Under the terms of the option clause in the lease, the right to a further term only arose if there had been no breach of the lease during the term, and there was no unremedied breach at the time of the exercise notice or expiry of the initial term. The landlord (Replay) contended that the lease had expired, the conditions for grant of a further term pursuant to the option had not been validly met, and the lessee was not entitled to a further term. At first instance the lessee was successful in obtaining an order for relief against forfeiture. However, an appeal was successful. The Queensland Court of Appeal held (at [32]-[56]) that because the conditions for grant of a further term had not been met, the lease had simply expired by effluxion of time; Nightowl had no remaining interest, and there was no action of Replay against which to relieve.

As to relief against forfeiture generally, see [105500] ff.

[40130] An option must be capable of being unilaterally invoked

In *Rosebridge Nominees Pty Ltd v Commonwealth Bank of Australia* (2008) 36 WAR 561; [2008] WASCA 107, the Court of Appeal of WA considered whether a clause created an "option to renew". In that case, the owner of a building leased part of the building to the appellant (Rosebridge) for a term of 12 years. The lessor subsequently granted Rosebridge a new lease, with some additional terms. One of these terms was clause 14, requiring the lessor to give Rosebridge the right to renew the lease if the lessor redeveloped the building. Any decision on whether to redevelop was at the lessor's sole discretion. The issue before the Court of Appeal was whether this created an option to extend or renew the lease. If it did, the second lease would have been void, because s 20 of the *Town Planning and Development Act 1928* (WA) required the consent of the WA Planning Commission for any lease exceeding 21 years duration (including any option to renew), and this consent had not been obtained.

Steytler P (with whom Buss JA agreed) held that the lease did not create an option to renew (at

[19]):

> ... the ordinary and natural meaning of the word "option", consistently with the legal use to which that word has traditionally been put, does not comprehend a case in which the grantee's right to choose to do something depends upon the grantor's unfettered discretion to choose to do something else. In such a case, the grantor would not be bound to do anything unless and until he or she chose to do whatever is required to trigger the grant of the option.

Steytler P referred to the dictum of Gibbs J in *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57; 48 ALJR 492, quoting his Honour's statement (at 76 (CLR)) that an option to purchase:

> ... is not an agreement which gives one of the parties [the grantor] the right to perform it or not as he chooses; it gives the grantee the right, if he performs the stipulated conditions, to become the purchaser.

These authorities confirm that an option must be a unilateral right in the option-holder to either create a new legal relationship with another, or extend or continue an existing legal relationship. The right is not an option unless it has that unilateral character. If the right is subject to a discretion on the part of the grantor it is not an option, though it may be a right of pre-emption.

This does not mean that conditions cannot be imposed upon the exercise of the unilateral right, provided the grantor is irrevocably bound as soon as the conditions are satisfied: *Whitemore Pty Ltd v OF Gamble Pty Ltd* (1991) 6 WAR 110 at 116–117 per Malcolm CJ. It is common, for example, for options to be exercisable only on the conditions that the option-holder has given prior notice and that there are no outstanding breaches of the contract containing the option. Clauses which enable a party to create or alter legal rights in the event that a contract is terminated,[1] or that a company changes its name,[2] have also been accepted as options.

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1 *JLF Bakeries Pty Ltd (in liq) v Baker's Delight Holdings Ltd* (2007) 64 ACSR 633.

2 *Re McDowall, Department of Social Security* (1994) 37 ALD 117.

[40140] Where transfer is subject to third party consent

Where a statute or contract prohibits the transfer or disposal of property unless the consent of a specified third party is obtained, the *grant* of an option without the third party's consent does not breach the prohibition, because the grant of an option does not of itself involve any transfer or disposal of an interest from the grantor to the grantee. At its highest, the holder of the option has a contingent equitable interest in the property, to call for its transfer: *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* (2012) 45 WAR 29; [2012] WASCA 216, per McLure P at [134]; see also *GPT RE Ltd v Lend Lease Real Estate Investments Ltd* (2005) 12 BPR 23217; [2005] NSWSC 964.

In the same situation, the position on *exercise* of the option is that the option-grantor has an obligation to take all necessary steps (or, in the language of some of the cases, all reasonable steps) within the option-grantor's power and control to obtain the required consent. In this phase, the option-holder has an equitable right to enforce the obligation, but no immediate equitable interest in the subject property. Once the consent is obtained, the option-grantor's obligation becomes a conventional obligation to transfer and the option-holder obtains an immediate equitable interest in the subject property: see *Fowler v Federal Commissioner of Taxation* (2012) 90 ATR 360; [2012] FCA 1040 at [58], and the authorities there cited, especially *Brown v Heffer* (1967) 116 CLR 344; 41 ALJR 195; *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* (2012) 45 WAR 29; [2012] WASCA 216, per McLure P at [186].

The decision in *Fowler* was upheld on appeal: *Fowler v Federal Commissioner of Taxation* [2013] FCAFC 69.

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REQUIREMENTS FOR VALID CREATION AND EXERCISE

[40150] Commercial significance

The deferment of contractual commitment by the option-holder carries with it a risk that the grantor may have second thoughts during the option period, about the commercial attraction of completing the transaction. This risk is heightened if circumstances change – eg in the case of an option to buy listed shares, if the market price of the shares rises markedly above the exercise price of the option. The risk that the validity of an option may be challenged by a reluctant grantor at the time of exercise emphasises the need to ensure that the option is both validly created, and validly exercised.

In drafting an option clause, it is essential that requirements for initial validity are observed, and that the provisions governing time for and method of service are clear and workable. In advising on the exercise of an option, exercise requirements should be strictly observed to avoid any possible argument that the option right has been lost through invalid exercise. As the cases show, a casual approach to the exercise of options – particularly in the renewal of leases – is common, and frequently results in the loss of option rights.

A solicitor who does not follow a prudent course in exercising an option on a client's behalf commits a breach of professional duty: *Tonitto v Bassal* (1992) 28 NSWLR 564; [1993] ANZ ConvR 264 at 269 (ANZ ConvR).

[40155] Principles of construction

It follows from the previous paragraph (at [40150]) that construction of option clauses is frequently the subject of dispute. In construing option clauses, courts apply the well-established general principles relating to the construction of commercial agreements, as set out by the High Court in *Electricity Generation Corp (t/as Verve Energy) v Woodside Energy Ltd* (2014) 251 CLR 640; 88 ALJR 447; [2014] HCA 7 at [35]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; 89 ALJR 990; [2015] HCA 37 at [46]–[52]; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544; 91 ALJR 486; [2017] HCA 12 at [16]. In particular, the meaning of an option clause is to be determined by what reasonable business people would have understood the clause to mean, taking into account not only the words used but also the surrounding circumstances known to the parties and the commercial purpose of the option: *Payne v Timilty* [2021] NSWSC 986 at [32]; *2620 Ipswich Road Pty Ltd v DN Holdings Qld Pty Ltd* [2022] QCA 49 at [18]; *Willis Australia Ltd v AMP Capital Investors Ltd* [2023] NSWCA 158 at [48]-[49].

Requirements for valid creation

[40170] Consideration

The first requirement for validity is that the option-holder must give consideration for the grant of the option, unless it is granted by deed. Consideration is required on normal contractual principles, whichever conceptual approach to the analysis of an option is adopted: either to support the conditional contract, or to support the collateral contract not to revoke the offer. Consideration for an option will usually take the form of a payment (an option fee or option premium), or a contractual promise (eg a promise to incur expenditure on the property which is the subject of the option: *Vakele Pty Ltd v Assender* [1989] ANZ ConvR 462 at 463–464).

A liberal approach to the requirement for consideration was taken by Gibbs J in *Barba v Gas and Fuel Corp of Victoria* (1976) 136 CLR 120; 51 ALJR 219. An option was expressed to be granted in consideration of a payment of $10. Although the grantors had acknowledged receipt of the $10, it had not in fact been paid. The grantors sought to avoid the option on the ground of absence of consideration. Gibbs J held that the grantors were not estopped by the acknowledgment from denying that payment had been made. However, the evidence established that there was an oral agreement to pay the $10, and the option-holder's promise to pay was accepted as sufficient consideration to support the validity of the option.

In *Townsville Pharmacy No 4 Pty Ltd v V Quattro Pty Ltd* [2023] QSC 105, consideration for an option agreement was expressed to be a premium of $10, payable within two business days after the date of the agreement. The $10 was not paid within that time; it was only paid at the time when the option was exercised, some 21 months later. Henry J granted a declaration that the option had been validly exercised, holding that the requirement for payment within two business days was not a condition precedent to the creation of an enforceable contract, nor a "time of the essence" stipulation. The decision was upheld on appeal (*V Quattro Pty Ltd v Townsville Pharmacy No 4 Pty Ltd* [2024] QCA 34), with the leading judgment of Bond JA focusing (at [27]) on the promise to pay the $10 premium, rather than the payment itself, as the real consideration.

When an option is granted by a term of another contract (eg an option to renew a lease), the consideration supporting the original contract (eg rent) also supports the option.

An agreement to vary an option by extending the exercise period is a separate contract requiring separate consideration, unless contained in a deed: *Vakele v Assender*.

Unless there are reasons to avoid the use of a deed, prudence suggests that documents creating options should be expressed as deeds to avoid arguments about consideration.

[40190] Certainty

The second requirement for validity is that the essential terms of the option must be certain. Key terms where certainty is required include the property subject to the option, price and payment terms, exercise period and method of exercise. Normal contractual principles of construction apply and if a court is able to determine the meaning of a provision from the contract read as a whole, the provision will not be void for uncertainty: *Spectra Pty Ltd v Pindari Pty Ltd* [1974] 2 NSWLR 617. In the context of a lease this extends to giving a meaning, by reference to the lease construed as a whole, to a clause which is on its face meaningless: *Watson v Phipps* (1985) 60 ALJR 1; 63 ALR 321. Even in cases where the meaning of a provision cannot be ascertained from the contract read as a whole and admissible extrinsic evidence, the court may be prepared to rectify the contract to give effect to the intention of the parties if there is evidence which establishes that intention clearly.[1]

A number of cases have considered uncertainty in price terms: see Farrands DJ, *The Law of Options and Other Pre-Emptive Rights* (Lawbook Co, 3rd ed, 2023), pp 81-85. It is clear that where reference is made to a price "to be agreed", the option is void for uncertainty. Courts will not imply a term that the exercise price should be reasonable. Where a method of working out price is stipulated but the method is uncertain, Australian authorities take the same approach: the option is void for uncertainty and it is not appropriate to imply a term that the price will be reasonable – see *Hall v Busst* (1960) 104 CLR 206; 34 ALJR 332 and *Stocks & Holdings (Constructors) Pty Ltd v Arrowsmith* (1964) 112 CLR 646; 38 ALJR 288. However, the position is different when the option terms include clear provisions for the calculation of price, but the calculation process is frustrated by the failure of a party (usually the grantor) to take a necessary step in the calculation process (eg the appointment of a valuer or arbitrator). In *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600; 43 ALR 68, the High Court considered an option for renewal of a lease at a rent to be agreed, or failing agreement to be determined by arbitration (with a minimum rent specified). The court implied a term that if the parties did not agree on rent, they would do everything necessary to appoint an arbitrator. The result was an order for specific performance, both of the implied term for appointment of an arbitrator and (subject to the rent being fixed by the arbitrator) of the obligation to renew the lease.

When it comes to the exercise period, courts take a more lenient view. An option which does not specify an exercise period will usually be construed as remaining open for a reasonable period. Reasonableness is determined by reference to the terms of the option read as a whole. These principles of construction have been developed to a fairly high level of sophistication in the context of lease renewals – see [40250]. However, it is prudent drafting practice to stipulate the exercise period for any option with precision.

In *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57; 48 ALJR 492, the High Court was divided on the issue of uncertainty in the method of exercise of an option. The stipulated method of exercise was delivery of a notice to the grantor, and payment of a deposit to the grantor's agent under the attached form of sale contract. No agent was named in the sale contract. Menzies and Mason JJ construed the option and the sale contract, read together, as requiring payment of the deposit to the grantor (actually the grantor's successor, since the grantor had died). This had not been done, so the option had not been validly exercised. Gibbs J took a different approach, holding that failure to name an agent made the method of exercise uncertain. Payment of the deposit to the agent was an integral part of the method of exercise and could not be severed. As a result, the option was unenforceable on the ground of uncertainty.

Extrinsic evidence is not admissible to determine whether an uncertain provision in an option is severable: *David Jones Ltd v Lunn* (1969) 91 WN (NSW) 468.

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1 *Issa v Berisha* [1981] 1 NSWLR 261; [1981] ANZ ConvR 236; *Thermoplastic Foam Industries Pty Ltd v Imthouse Pty Ltd* (1990) 5 BPR 11181; [1990] ANZ ConvR 532; [1990] NSW ConvR 55-538.

[40210] Other requirements for valid creation

A further requirement for validity applies to contracts required by statute to be evidenced in writing.[1] The most common application of this requirement is to options where the subject-matter is an interest in land: Farrands, *The Law of Options and Other Pre-Emptive Rights* (3rd ed, 2023), pp 89-91.

Validity of an option may also be challenged on the grounds that the option was entered into as a result of fraud, misrepresentation, or conduct which is misleading or deceptive: Farrands, *The Law of Options and Other Pre-Emptive Rights* (3rd ed, 2023), p 96.

As a general rule a trustee cannot validly grant an option to buy trust property, since that is taken to fetter the proper exercise of the trustee's power to sell on the best available terms in the circumstances prevailing at the time of sale. However, the rule does not apply universally and the grant of an option may be permitted in an appropriate case: see Farrands, *The Law of*

Options and Other Pre-Emptive Rights (3rd ed, 2023), pp 97-99. In addition, there are statutory provisions in some States, allowing trustees as lessors to grant options to purchase the reversion[2] or renew the lease.[3]

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1 *Conveyancing Act 1919* (NSW) s 54A; *Instruments Act 1958* (Vic) s 126; *Property Law Act 1974* (Qld) s 59; *Law of Property Act 1936* (SA) s 26(1); *Conveyancing and Law of Property Act 1884* (Tas) s 36; *Civil Law (Property) Act 2006* (ACT) s 204; in WA, the *Statute of Frauds 1677* (Imp) s 4 as amended by the *Law Reform (Statute of Frauds) Act 1962* (WA).

2 *Trusts Act 1973* (Qld) s 32(3)(b); *Trustees Act 1962* (WA) s 27(3)(b), 28A.

3 *Trusts Act 1973* (Qld) s 32(3)(a); *Trustees Act 1962* (WA) s 27(3)(a); *Trustee Act 1925* (NSW) s 36(3)(b); *Trustee Act 1936* (SA) s 25C(3)(b).

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OPTIONS TO RENEW LEASES

[40480] Formal requirements

As an option to renew a lease of real property constitutes a contract for the disposition of an interest in land, it is subject to formal statutory requirements. The relevant State legislation requires that no action or proceedings may be brought on any contract for the sale or other disposition of land or any interest in land, unless the agreement is in writing and signed by the party to be charged.[1]

If the formal requirements have not been met, a party seeking to enforce an option must establish sufficient acts of part performance. This requires sufficient certainty as to the essential terms. Essential terms include parties, premises, rent, duration of new term and option exercise period.

These requirements will be interpreted strictly. In both *King's Motors (Oxford) Ltd v Lax* [1970] 1 WLR 426; [1969] 3 All ER 665 and *Randazzo v Goulding* [1968] Qd R 433 an option was held to be unenforceable because there was insufficient certainty in relation to the rate of rent. However, the requirement for certainty will be met if the option terms provide a mechanism to determine the rent, such as by valuation or by arbitration: *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600; 43 ALR 68.

Courts have shown some tendency to accept commercial realities.[2] In *Spectra Pty Ltd v Pindari Pty Ltd* [1974] 2 NSWLR 617 the lease contained a blank space in the clause stipulating the period for exercise of the renewal option, so that the option was to be exercised [blank] months prior to expiry of the term. Wootten J in the New South Wales Supreme Court took a "common sense" approach, holding that the parties clearly intended to create an option to renew. As no period for exercise had been specified, notice of renewal could be sent at any time prior to expiry of the term.

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1 *Conveyancing Act 1919* (NSW) s 54A; *Instruments Act 1958* (Vic) s 126; *Property Law Act 1974* (Qld) s 59; *Law of Property Act 1936* (SA) s 26(1); *Conveyancing and Law of Property Act 1884* (Tas) s 36; *Civil Law (Property) Act 2006* (ACT) s 204; in WA, *Statute of Frauds 1677* (Imp) s 4 as amended by the *Law Reform (Statute of Frauds) Act 1962* (WA).

2 See Farrands DJ, *The Law of Options and Other Pre-Emptive Rights* (Lawbook Co, 3rd ed, 2023), p 120.

[40490] Exercise of option creates new lease unless parties agree otherwise

A lease obtained by the exercise of an option is a new lease: see *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; 260 ALR 1; 83 ALJR 1152; [2009] HCA 41 at [8], and authorities there cited. As a result, references in such a lease to the "commencement date" are to the commencement date of the new lease (not the original lease), in the absence of provision to the contrary. However, "it is open to parties to proceed on a different basis and to provide that a lease obtained by the exercise of an option is a continuation of the original lease". Whether the parties have done so is a question of construction: see *Agtan Pty Ltd v Caltex Australia Petroleum Pty Ltd* [2018] VSCA 169 at [125] ff.

In *Jong v Advanced Dental Services Pty Ltd* [2019] NSWCA 318 at [36]–[37], Basten JA observed that If an option to renew a lease is exercised, but the parties do not take the necessary steps to create a registrable lease, the lessor may have difficulty obtaining an order for specific performance of the agreement arising from exercise.

[40500] Compliance with lease covenants

A lessee wishing to exercise an option to renew a lease must comply with covenants contained in the lease. Covenants in the lease, such as an obligation to pay rent duly and promptly, can be construed as conditions precedent to the entitlement of the lessee to exercise the option to renew: *Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd* (1957) 59 SR (NSW) 122; *BS Stillwell & Co Pty Ltd v Budget Rent-a-Car System Pty Ltd* [1990] VR 589. Compliance is strictly enforced by the courts unless the precise terminology of the covenant allows for reasonable compliance: *Robinson v Thames Mead Park Estate Ltd* [1947] Ch 334; [1947] 1 All ER 366; *Spectra Pty Ltd v Pindari Pty Ltd* [1974] 2 NSWLR 617.

In some jurisdictions the disentitling effect of a breach of the lease is mitigated by statutory provisions which oblige the lessor to specify the breach in a notice, and permit the lessee (after receiving the notice) to apply to the court for relief against forfeiture: see [40540].

A degree of distinction is drawn in the case law between subsisting breaches and breaches which have been remedied at the time the option is exercised. Generally it will turn on the words of the covenant. In *Bass Holdings Ltd v Morton Music Ltd* [1987] 3 WLR 543; [1987] 2 All ER 1001 the English Court of Appeal held that the conditions for exercise of an option in a lease merely required that there should be no subsisting breaches at the date when the option was exercised; there was no requirement that the lessee should never have committed any breach whatsoever of any covenant prior to exercising the option. However, in *Rethmeier v Pioneer House Pty Ltd* (1990) 6 BPR 13245 Bryson J interpreted a condition expressed in the following terms:

> if the lessee shall in the meantime duly and punctually pay the rent reserved

as being satisfied only if there had never been a rent default. His Honour did not accept that *Bass Holdings* established any general principle concerning the irrelevance of spent breaches.[1]

A distinction has also been drawn between actual breaches/defaults, and events which are described in the lease as "events of default". In *JB (Northbridge) Pty Ltd v St George Bank Ltd* (2010) 15 BPR 28933; [2010] NSWCA 249, the lessee of a hotel had gone into voluntary administration. Receivers were then appointed by the Bank. Administration and receivership were "Insolvency Events" under the lease, as a result of which the lessee was "deemed to have made default" and the lessor was entitled to re-enter and terminate the lease. However, when the lessor attempted to exercise its right to terminate, it was restrained by injunction based on a term in the deed by which the lessor had consented to the Bank's charge. The receivers (on behalf of the lessee) then purported to exercise the option to renew the lease. The option clause said that the lessee was not entitled to exercise the option unless it had observed and performed the covenants in the lease. Giles JA (with whom Handley AJA and Sackville AJA agreed) held that the deemed default resulting from an Insolvency Event did not amount to a failure to observe the covenants in the lease: [19].

The lessor in *JB (Northbridge) Pty Ltd v St George Bank Ltd* (2010) 15 BPR 28933; [2010] NSWCA 249 also sought to rely on an assignment of the lease by the receivers as a breach which precluded the exercise of the option to renew. The lease did contain a covenant not to assign or transfer the lessee's interest in the lease. However, Giles JA held (at [27]) that only a registrable assignment of the legal interest would breach this covenant. The purported assignment by the receivers could only have been effective in equity, and therefore did not amount to a breach.

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1 See Rossiter CJ, *Principles of Land Contracts and Options in Australia* (LexisNexis Butterworths, 2003) at p 85 for further discussion of the distinction between spent and subsisting breaches.

[40520] Torrens system land

Separate registration of a renewal option in a lease is not possible or necessary under Torrens system legislation: *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 at 106; *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976) 136 CLR 326; 9 ALR 39 at 343 (CLR), 50 (ALR). However, if a lease is registered, any option for renewal or purchase contained in the lease gains the same protection of indefeasibility as other covenants in the lease: *Consolidated Development Pty Ltd v Holt* (1986) 6 NSWLR 607; *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976) 136 CLR 326; 9 ALR 39.

The registration of an otherwise illegal lease incapable of specific performance does not have the effect of preserving the option to renew. If the lease is void, then all covenants contained in the agreement will be defeasible notwithstanding adequate registration: *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 at 30 per Menzies J, at 34–35 per Gibbs J.

In *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976) 136 CLR 326; 9 ALR 39 it was held that an option to renew (as distinct from an option to purchase the freehold) is an incident of the lease which touches and concerns the land. Therefore, the option is protected by registration of the parent lease. The right to exercise a specifically enforceable option of renewal will take priority over all subsequently registered interests. This decision was followed by McPherson J in *Medical Benefits Fund of Australia Ltd v Fisher* [1984] 1 Qd R 606.

In *Consolidated Development Pty Ltd v Holt* (1986) 6 NSWLR 607 it was held that the registration of a lease containing an option to purchase cured any problems arising from the rule against perpetuities. Young J said (at 617):

> If this were not so, then a person could not safely deal on the faith of the register with respect to the option and would have to consider in each case whether it might possibly offend the rule against perpetuities.

This was confirmed by McPherson JA in *Denham Bros Ltd v W Freestone Leasing Pty Ltd* [2004] 1 Qd R 500; [2003] QCA 376 at 511–512 (Qd R).

[40540] Statutory relief against forfeiture of option

In some Australian jurisdictions there is a statutory right for the court to grant relief against forfeiture of an option to renew, or an option to purchase a reversionary interest, where the option has been lost by reason of a breach of covenant.[1]

If a lessor intends to reject a lessee's attempt to exercise an option by reason of breach, the lessor is generally required by the relevant legislation to serve a prescribed notice on the lessee within 14 days of the purported exercise of the option by the lessee. The notice must state the breaches upon which the lessor relies in denying the exercise of the option.[2] If the lessor fails to serve a compliant notice within the requisite time period after the exercise of the option, the statutory provisions prevent the lessor from relying on the lessee's failure to comply with the lease to preclude the effective exercise of the option. The NSW provisions were applied in *Dad & Dave Pty Ltd v W & J Nicholls Pty Ltd* (2005) 12 BPR 98221; [2005] NSWSC 415.

The lessor's notice must specify the breaches clearly, because the lessee has a right to apply for relief against denial of the option (below), and the lessee should be told in clear terms what it must address in applying for relief: *JB (Northbridge) Pty Ltd v St George Bank Ltd* (2010) 15 BPR 28933; [2010] NSWCA 249, per Giles JA at [35].

The validity of s 133E notices has been considered by the NSW Supreme Court in a series of recent cases: see *Dee-Tech Pty Ltd v Neddam Holdings Pty Ltd* (2012) 16 BPR 31089; [2012] NSWSC 251; *Allsvelte Pty Ltd v Cassegrain Wines Pty Ltd* (2015) 18 BPR 35637; [2015] NSWSC 1370; *The Highlands on a Plate Pty Ltd v Roloz Pty Ltd* (2021) 20 BPR 41593; [2021] NSWSC 1072; *Coastal Services Centres Pty Ltd v United Petroleum Pty Ltd* [2023] NSWSC 1010. A number of these cases indicate that failure to specify unpaid rental and/or outgoings accurately will invalidate the notice, defeating the lessor's right to contest exercise of the option to renew. However, in *Coastal Services* Peden J held (at [127]) that in the circumstances of that case, understatement of the rent owing did not invalidate the notice given under s 133E of the *Conveyancing Act 1919*. The decision of Peden J was upheld on appeal, although the validity of the s 133E notice was not an issue in the appeal: *United Petroleum Pty Ltd v Coastal Service Centres Pty Ltd* [2024] NSWCA 97.

One factor which may vitiate a notice is claiming outgoings which are not properly chargeable to the lessee under legislation relating to retail shops, including special provisions relating to the COVID-19 pandemic.

If the lessor does serve a valid notice, the lessee may still seek relief from a court against the effect of the breach. The lessee must apply to a court within one month of receiving the notice from the lessor. The court can make such orders as it thinks fit for the purpose of granting the relief sought. The criteria for relief are specified in the legislation and include:

- the nature of the breach complained of;
- the extent to which, at the date of the institution of the proceedings, the lessor was prejudiced by the breach;
- the conduct of the lessor and the lessee, including conduct after the giving of the prescribed notice; and
- the rights of persons other than the lessor and the lessee.

The burden of proving the breaches rests with the lessor, while the burden of proving that relief should be granted, despite the breaches, rests on the lessee (Wootten J in *Evanel Pty Ltd v Stellar Mining NL* [1982] 1 NSWLR 380).[3]

In *Nameless, Shameless and Legless Pty Ltd v 2 Roslyn Street Pty Ltd* [2004] NSWSC 519 the Supreme Court of NSW granted relief to a tenant who had continuously breached covenants of the lease relating to rent payments during the lease period. The NSW legislation provided that the court could take into account any relevant considerations. Considerable significance was attached to the fact that the tenant had spent $400,000 on refurbishment. Relief was granted even though there was little prospect of the tenant discharging its lease obligations in the future. The case has been criticised on the basis that the court should refrain from using its equitable discretion to grant relief against forfeiture where a tenant is likely to continue to default.

Coastal Services Centres Pty Ltd v United Petroleum Pty Ltd [2023] NSWSC 1010 is another example of the grant of relief under the NSW provision (*Conveyancing Act 1919* (NSW) s 133F), following the issue of a valid notice under *Conveyancing Act 1919*s 133E.

Where breaches by the lessee occur between the time the option has been purportedly exercised and the end of the lease period, it is not clear (except in NSW) how the legislation is to be applied. Some cases have held that an agreement to grant a new lease arises when the option is exercised, and the lessee is protected against forfeiture of the interest under this agreement by the separate provisions protecting against forfeiture of leasehold interests, such as s 124 of the *Property Law Act 1974* (Qld). Other cases have held that neither the provisions protecting options to renew nor the provisions protecting leasehold interests apply in respect of breaches occurring after the exercise of an option to renew; so there is no right to relief in respect of these breaches. See the analysis of the Queensland provision in *Bentley v Chang Holdings Pty Ltd* [2012] QSC 366 at [26], and the cases there cited; and see also Farrands DJ, *The Law of Options and Other Pre-Emptive Rights* (Lawbook Co, 3rd ed, 2023) p 133 at note 135.

Relief under the Queensland provision was refused in *NightOwl Properties Pty Ltd v Replay Australia Pty Ltd* [2022] QSC 204, where breaches had occurred both before and after the exercise of the option. Bradley J held that the lessor was not proceeding by action to enforce a right of entry or forfeiture; the lease had simply expired by effluxion of time, because the conditions for exercise of the option had not been met: [91]-[92]. Bradley J went on to grant equitable relief against loss of the option, but this aspect of the decision was overturned on appeal: *Replay Australia Pty Ltd v Nightowl Properties Pty Ltd* [2023] QCA 76.

In NSW the ambiguity in operation of the relief provisions has been dealt with by an amendment to the *Conveyancing Act 1919* (NSW). The court now has jurisdiction to grant relief whether the lessee's breaches occur before, after, or before and after, the purported exercise of the option. A notice under s 133E of the *Conveyancing Act 1919*, specifying a breach which occurred before exercise of the option, must be given within 14 days after exercise of the option. A notice specifying a breach which occurred after exercise of the option must be given within 14 days of the breach. But only breaches occurring up to the date of expiry of the lease can be relied upon: *Dee-Tech Pty Ltd v Neddam Holdings Pty Ltd* (2012) 16 BPR 31089; [2012] NSWSC 251 at [119]. The continued existence of unrectified breaches after the expiry of the lease does not provide a further ground of disentitlement, so an ongoing breach cannot be relied on as a "clock-starter" for the 14-day period: *Todarello Property Investments Pty Ltd v GJA Kalra Pty Ltd* [2021] NSWSC 1678 at [47].

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1 *Conveyancing Act 1919* (NSW) ss 133C–133G; *Property Law Act 1974* (Qld) s 128; *Property Law Act 1969* (WA) s 83A–83E; *Law of Property Act 2000* (NT) s 143; see Duncan WD and Christensen S, *Commercial Leases in Australia* (8th ed, Thomson Reuters, 2017) at [120.7300] ff.

2 *Conveyancing Act 1919* (NSW) s 133E(1) and (2); *Property Law Act 1974* (Qld) s 128(4); *Property Law Act 1969* (WA) s 83C; *Law of Property Act 2000* (NT) s 143(2).

3 For matters which will be relevant in considering an application, see Farrands DJ, *The Law of Options and Other Pre-Emptive Rights* (Lawbook Co, 3rd ed, 2023), p 131.

[40545] Relief against forfeiture arising from failure to exercise properly

Loss of the right conferred by an option to renew as a result of a breach of covenant must be distinguished from the situation where the lessee's right is lost through failure to renew within the specified time, or in the specified manner, rather than as a result of any breach. It was held in *Piazza Trevi Pty Ltd v Cromwell BT Pty Ltd* [2017] NSWSC 794 that relief against forfeiture is not available in the "no breach" situation, for a number of reasons: see [40125].

[The next text page is 49301]

RATIONALE FOR PRE-EMPTIVE RIGHTS

[41190] In closely-held group enterprises

Pre-emptive rights are common in closely-held group enterprises, such as proprietary companies and joint ventures, because:

- they give the continuing participants an opportunity to prevent unwanted parties (eg those with competing commercial interests) from joining in the enterprise; and
- they allow a participant who wants or needs to exit to do so, while giving the remaining participants the right to take advantage of the value opportunity inherent in the sale, in preference to outside parties.

The economic rationale for inclusion of pre-emption clauses in resource joint ventures was succinctly stated by Hargrave J in *Beaconsfield Gold NL v Allstate Prospecting Pty Ltd* [2006] VSC 320, [33]. Recognition of the legitimate economic interests protected by a pre-emption clause influences courts toward a reasonably liberal construction of such clauses: see *Beaconsfield* at [33]-[34]; *Santos Offshore Pty Ltd v Apache Oil Australia Pty Ltd* [2015] WASC 242, [35]; *Macquarie Retail Pty Ltd v Dexus Capital Funds Management Ltd* [2024] NSWSC 1413, [75].

An example of a pre-emption clause in a proprietary company constitution may be seen in *Vermillion Resources Pty Ltd v Gibbins Investments Pty Ltd* (2011) 86 ACSR 246; [2011] FCAFC 149. In that case, an attempt was made to avoid the application of the pre-emptive clause on the basis that the holder of the right had said (in an email) words to the effect of “I’m happy for you to sell your shares to whoever you like, and I’ll sell my shares to whoever I like. You have no authority to act on my behalf”. It was held that this statement did not result in loss of the pre-emptive right – either through the formation of an inconsistent agreement or by promissory estoppel. The email did not evince an intention to create contractual relations; and it could not amount to a representation that the pre-emptive right would not be enforced, because the evidence showed that the holder of the pre-emptive right had not been made aware of the right in the constitution at the time when the statement was made. Despite his requests for a copy of the constitution, it had not been provided to him.

The operation of a pre-emption clause in a partnership agreement was considered by the Western Australian Court of Appeal in *Atwell v Roberts* (2013) 43 WAR 507; [2013] WASCA 37; see [41320].

[41210] Other commercial applications

Pre-emptive rights may have other relevant commercial applications.

Pre-emptive rights over land may be granted to a party with a special interest in the land, such as a lessee or the owner of adjoining land: *John Nitschke Nominees Pty Ltd v Hahndorf Golf Club Inc* (2004) 88 SASR 334; [2004] SASC 128.

In a completely different context, pre-emptive rights in a sale and purchase agreement may provide the vendor with some ongoing degree of control over the purchaser's subsequent dealings in the subject property. For example, in *Metcash Trading Ltd v Hourigan's IGA Umina Pty Ltd* [2003] NSWSC 326, Metcash obtained an injunction restraining Hourigan's from completing the sale of a supermarket business to a major retail supermarket competitor of Metcash. The proposed sale by Hourigan's was in violation of a pre-emptive right in favour of Metcash, contained in the sale and purchase agreement under which Metcash had previously sold the supermarket business to Hourigan's, and giving Metcash an option to repurchase the business before Hourigan's could sell it on to any third party.

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of the agreement, the court determined that the clause should be given a recurring operation. Again, the case reinforces the need for clear drafting to eliminate scope for dispute.

[41580] Beaconsfield Gold v Allstate Prospecting

The Supreme Court of Victoria took a similar commercial approach in *Beaconsfield Gold NL v Allstate Prospecting Pty Ltd* [2006] VSC 320. The case turned on the correct construction of a pre-emption clause in a joint venture agreement, under which pre-emption was triggered where any joint venturer ceased to be "a subsidiary of another corporation". The issue was whether the pre-emptive right was only triggered if a joint venturer ceased to be a subsidiary of its immediate or direct holding company, or whether the right extended to changes further up the corporate chain. Hargrave J proceeded on the basis that the pre-emption clause was an anti-avoidance measure designed firstly to prevent the transfer of a joint venturer's interest to a related corporation with a view to further transfer to a new owner; and secondly to capture upstream changes in corporate ownership or control as a means of effectively disposing of a joint venture interest to a new owner. Against that twofold purpose, Hargrave J had no difficulty in finding that the word "subsidiary" in the pre-emption clause should be given an extended meaning so as to cover all intermediate entities up to the ultimate holding company.

[41585] Goldus v Australian Mining

The liberal, commercial approach to construction of change of control clauses can only be taken so far. In *Goldus Pty Ltd v Australian Mining Pty Ltd* [2015] SASC 32, Parker J accepted the correctness of the purposive approach taken by Hargrave J in *Beaconsfield Gold*, observing that it was consistent with general principles governing the interpretation of commercial contracts: at [33] and [89]. However, in the *Goldus* case it was simply not possible to give a workable interpretation to the pre-emption clause as it operated in the context of a change of control. The interpretations contended for by the plaintiff would, his Honour said, extend beyond a purposive interpretation of the words used and would amount to an impermissible rewriting of the joint venture agreement by the court: at [89]. It followed that the change of control provision was void for uncertainty and was to be severed from the agreement.

[41590] Burbank Trading v Allmere – appointment of voluntary administrators

In *Burbank Trading Pty Ltd v Allmere Pty Ltd* (2009) 22 VR 633; [2009] VSCA 82, the parties were the only shareholders in Carpet Call Holdings Pty Ltd. Their relationship was governed by a shareholders' agreement, including a pre-emption clause which gave each shareholder a pre-emptive right if the other shareholder wished to sell its shares, or underwent a change in ultimate control.

Voluntary administrators were appointed to Allmere. A proposal was formulated to sell Allmere's Carpet Call shares to a third party for $10 million. Burbank was notified of the third party's offer. Burbank argued that by the time it received this notice, it already had a pre-emptive right triggered by the appointment of voluntary administrators to Allmere, which constituted a change in ultimate control; and once the pre-emptive right had arisen, no further notice of intended sale could validly be given until the pre-emption procedure had run its course.

Burbank's argument failed at first instance, but was upheld by the Victorian Court of Appeal. Dodds-Streeton JA (with whom Weinberg JA and Williams AJA agreed) held that both the language and the context of the shareholders' agreement established that the appointment of voluntary administrators amounted to a change in ultimate control, triggering the pre-emptive right: at [63]. This conclusion was based on her Honour's view that the appointment of administrators could not be viewed as a typically short-term displacement of existing controllers and a brief suspension of the corporate status quo. On the contrary, it was a radical change of status: at [57].

[41595] IG Power (Callide) Ltd

Re IG Power Callide Ltd (Administrators Appointed) (No 4) [2024] FCA 1316 concerned a joint venture between IG Power (Callide) Ltd (IGPC) and Callide Energy Pty Ltd (CEPL), a company ultimately owned by the Queensland Government. IGPC and a number of related companies were under administration. The administrators proposed to sell the shares in IGPC and its holding company. They applied to the Federal Court under s 90-15 of the Insolvency Practice Schedule (Corporations) (Schedule 2 to the *Corporations Act 2001* (Cth)) for directions confirming their ability to sell the shares without complying with the pre-emption provisions in the joint venture agreement between IGPC and CEPL.

The joint venture agreement, as originally executed in 1998, did not contain a change of control clause. However, change of control clauses (9A and 9B) were introduced by an amending deed.

Clause 9B defined the concept of a change of control by reference to the relationship between an entity in the corporate chain above IGPC, and its "Ultimate Holding Company". But the clause had ceased to have any effect, because the original Ultimate Holding Company had exited (with the agreement of CEPL), but CEPL had not required IGPC to nominate a replacement Ultimate Holding Company.

Clause 9A required a sale notice to be given to CEPL in the event of a change of control of IGPC. Critically, however, the obligation to give the sale notice was imposed on the upstream entity engaged in the control change transaction, which was not a party to the joint venture agreement — not on the joint venture party IGPC. As Derrington J observed at [68], "the agreement appears to be one which attempts to overreach to impose obligations on non-parties". His Honour went on to consider whether IGPC, in entering into the joint venture agreement and amending deeds, had contracted as agent for the upstream entities, but concluded (at [95]) that there was insufficient evidence of agency.

As a result, both of the clauses failed: clause 9B through inadequate contract administration, and clause 9A through a drafting deficiency: the party purportedly bound to give the sale notice was not a party to the joint venture agreement. After considering the scope of the Court's power under s 90-15, Derrington J gave the direction sought by the administrators.

[The next text page is 49521]

PERMITTED CHANGE OF CONTROL

[41610] Permitted change of control: transfer to related party

Change of control clauses frequently contain exceptions for transfers to related corporations. They often go on to stipulate that if the related corporation ceases to be related, pre-emption will be triggered unless the interest is transferred back to the original transferor or another entity still related to it. Care must be taken with these clauses, as they are complex and can introduce considerable scope for uncertainty.

A clause of this type was considered by the Queensland Court of Appeal in *Aquila Steel Pty Ltd v AMCI (IO) Pty Ltd* [2007] QCA 456. Westiron Pty Ltd (Westiron) and Aquila Steel Pty Ltd (Aquila) had entered into a joint venture in 2005. By cl 14.2, either joint venturer could transfer its interest to a related body corporate "as a matter of right". Separately, cl 14.5 contained a conventional change of control clause: if there was a change in control of one joint venturer, the other would have an option to purchase the interest affected by the change in control. A "change in control" was deemed to occur if a person who did not have control of a joint venturer as at the commencement date of the joint venture gained control after that date.

The AMCI group of companies underwent a corporate restructure and two new related companies of Westiron were created: AMCI (IO) Pty Ltd and AMCI (WA) Pty Ltd. Westiron executed a transfer of its shares in AMCI (IO) to AMCI (WA). Straight afterwards, Westiron transferred its interest in the joint venture to AMCI (IO). The upshot was that AMCI (WA) (a new sibling entity of Westiron) became the parent company of AMCI (IO) and AMCI (IO) became the joint venture participant.

An unfortunate result of the drafting in cl 14 was that in one situation, a transfer to a related body corporate (permitted by cl 14.2) could be viewed as a change of control under cl 14.5 (triggering the pre-emptive right). This occurred where the joint venture interest was transferred to a related company controlled by another company which, although related by the time of the transfer, had not been related at the date of commencement of the joint venture. Aquila argued that just such a situation had occurred in the AMCI reconstruction. It further argued that in the resulting conflict between cl 14.2 and cl 14.5, cl 14.5 should prevail.

AMCI responded that cl 14.2 provided a free-standing facility for transfers to related companies, which operated independently of cl 14.5 and should not be construed subject to it. Both sides commenced proceedings in different courts, but it was agreed that the matter should be resolved through the hearing (in the Supreme Court of Queensland) of AMCI's application for a declaration.

The trial judge (Muir J) rejected Aquila's arguments and granted the declarations sought by AMCI: *AMCI (IO) Pty Ltd v Aquila Steel Pty Ltd* (2007) 64 ACSR 427; [2007] QSC 238. Aquila's appeal was unsuccessful.

Both at first instance and on appeal, it was evident that the judges were not attracted to Aquila's attempt to exploit the lack of alignment between cll 14.2 and 14.5. They said that both textual and commercial considerations favoured AMCI's argument that cl 14.2 operated independently of cl 14.5. In the Court of Appeal, Keane JA (with whom McMurdo P and

Jerrard JA agreed) said (at [38]):

> ... it is relevant, though not decisive, that there is no discernible commercial reason which justifies reading cl 14.2 so as to allow cl 14.5 to defeat a transfer to a related entity merely because that transferee is under the control of a related corporate entity which did not exist when the joint venture commenced.

Keane JA went on (at [39]–[43]) to identify "powerful textual indications that cl 14.2 was intended by the parties to operate independently of cl 14.5".

Both at first instance and on appeal the judges turned the technique of technical interpretation back on Aquila: even if cl 14.5 applied, there had been no "change of control of a participant" triggering the pre-emptive right. If the relevant change of control was the change in control of AMCI (IO), then at the time when control of AMCI (IO) changed, it was not yet a participant. As it happened, there had been a delay in registering the transfer of shares in AMCI (IO) until after the transfer of the joint venture interest; but Muir J dealt with this by holding that on the proper construction of the change of control clause, control changed when beneficial ownership changed – that is, before transfer of the joint venture interest.

The approach of the courts in this case illustrates the difficulty which will be encountered by any party seeking to rely on a pre-emptive right arising through the narrow or technical interpretation of a change of control provision. It was summed up by Muir J in the first instance judgment (at [68]):

> The joint venture agreement is a commercial document intended to establish the legal relationship between co-venturers in a large-scale mineral exploration and development project. In determining rights and obligations under such a document, in the absence of a clear indication to the contrary, the parties should be regarded as being concerned with substance over form and technicality, [citing *Sirius International Insurance Co v FAI General Insurance Ltd* [2004] 1 WLR 3251 at 3257 and 3258] and "no narrow or pedantic approach is warranted" [citing *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* (1967) 118 CLR 429; 41 ALJR 348, per Barwick J (sic) at 437].

[41620] Permitted change of control: agreed transfer

Change of control clauses (and other clauses triggering pre-emptive rights) may contain an exception for transfers which have been agreed to by the non-transferring party or parties. In such a case, a non-transferring party wishing to claim that the pre-emption clause has been triggered by a transfer must be careful to avoid conduct which may be construed as constituting agreement to the transfer: see *Yara Australia Pty Ltd v Oswal (No 2)* [2013] WASCA 187, per Pullin JA at [283] and per Murphy JA at [454].

[41630] Allstate Prospecting v Posgold Mines

A different aspect of an effective change in control is where one party to a joint venture agreement seeks to transfer its interest to another joint venturer without triggering pre-emptive rights in favour of the remaining joint venturers. In *Allstate Prospecting Pty Ltd v Posgold Mines Ltd* (unreported, Supreme Court of Tasmania, Wright, Crawford and Slicer JJ, 8 June 1995, A37,1995), the issue was whether the joint venture agreement allowed one joint venturer, Posgold, to transfer any part of its percentage interest in the joint venture to another joint venturer, Beaconsfield Gold NL, without going through the pre-emption procedure under the joint venture agreement. The pre-emption clause was triggered where a joint venturer intended to transfer part or all of its percentage interest to "any third party". Posgold and Beaconsfield argued unsuccessfully that Beaconsfield was not a "third party" within the meaning of the pre-emption clause.

[The next text page is 49541]

IMPLIED RESTRICTIONS ON CIRCUMVENTING PRE-EMPTIVE RIGHTS

[41650] Duty not to render the pre-emptive right worthless

A pre-emptive right is, in substance, an undertaking to give the grantee the first opportunity of entering into a separate contractual arrangement with the grantor. Rights of pre-emption are often triggered by the grantor deciding to "sell" a particular item of property. The question has arisen whether the grantor is entitled to dispose of the property in a way that does not constitute a "sale", such as by gift, and thereby defeat the right of pre-emption. As Chesterman J noted in *THL Robina Pty Ltd v Glades Golf Club Pty Ltd* [2005] 2 Qd R 186; [2004] QSC 461 at 194, a "sale" is usually viewed as the transfer, by mutual assent, of the ownership of a thing from one person to another for a money price.

In *Gardner v Coutts & Co Ltd* [1968] 1 WLR 173; [1967] 3 All ER 1064, a proprietor of land granted a right of first refusal to a grantee, who subsequently assigned the benefit of that agreement to the plaintiff (Gardner). The proprietor conveyed the property to his sister as a gift. The plaintiff brought an action against the proprietor's executor, the defendant, arguing that there was an implied term in the contract that the proprietor was not entitled to dispose of the property without first offering it to the plaintiff. Cross J agreed with the plaintiff and expressed the principle as follows (at 179):

> I think that it is implicit in a grant of first refusal that the person who has to offer the property to the other party should not be entitled to give it away without offering it and so to defeat the first refusal.

Cross J based his conclusion, in part, on the fact that the contract also provided "if such offer is declined … [the proprietor] may thereafter sell or dispose of the property as he shall think fit". Furthermore, the right of pre-emption was to become an option to purchase on the death of the proprietor. In the view of Cross J, these factors prompted a construction of the contract which was inconsistent with the idea that the proprietor could give away the property.

The decision in *Gardner* was applied in Australia by Marks J in *Esso Australia Ltd v Air Ride Transportation Pty Ltd* (unreported, Supreme Court of Victoria, 28 September 1988). In *Esso*, the first defendant was the proprietor of a service station and contracted with the plaintiff that if it ever decided to enter into a contract of sale with respect to the property, the plaintiff would have a right of first refusal. The first defendant granted a third party an irrevocable option to purchase the property, without offering to sell to the plaintiff. The option was then exercised and the plaintiff claimed damages for breach of the first refusal clause. Marks J held that although the grant of an option to purchase is not itself a contract of sale, the clear common intention of the parties was that the plaintiff should have an opportunity to buy the property in the event that the first defendant decided to sell it. Applying a long line of authority beginning with *Stirling v Maitland* (1864) 5 B & S 840; 122 ER 1043, Marks J held that the first respondent owed the plaintiff a duty not to do anything to render performance of the agreement impossible and that this duty was breached by the grant of the option to the third party.[1]

In *THL Robina Pty Ltd v Glades Golf Club Pty Ltd* [2005] 2 Qd R 186; [2004] QSC 461, Chesterman J of the Supreme Court of Queensland applied *Gardner* and *Esso*. In that case, the relevant pre-emptive right provided, in effect, that if the first respondent intended to sell a particular parcel of land during a certain period, the first respondent must first offer to sell the land to the applicant. Chesterman J suggested that the substance of a right of first refusal is an implied negative promise not to part with ownership of the property without first offering it to the other party. If the right of pre-emption was to confer a right of real value, this was the construction which had to be accepted. According to Chesterman J, there was an implied obligation not to render performance of the parties' bargain impossible or nugatory (at 197-198). On this basis, a disposition other than by sale was not effective to defeat the right of first refusal.

The authorities cited above establish that there is an obligation on the grantor of a pre-emptive right not to do anything to render the right worthless. However, whether this obligation is breached depends on the terms of the particular contract and the surrounding circumstances. In *Nicholson v Markham* (1998) 75 P & CR 428, where a clause imposed a right of first refusal in the event of a decision to "sell" property, a disposal of the property by gift was held not to breach any such obligation. The circumstances surrounding the grant of the right of pre-emption were distinguishable from *Gardner*. In *Nicholson*, the pre-emptive right was created to resolve a contentious dispute between the parties; it therefore seemed reasonable to believe that the parties had not intended to create a wider right of pre-emption than the word "sale" suggested. Furthermore, unlike the contract in *Gardner*, the parties' agreement contained no additional clauses suggesting that the parties intended to prohibit a disposition other than by sale.

The true issue, as recognised by McMurdo J (with whom Jerrard JA agreed) in *Jackson Nominees Pty Ltd v Hanson Building Products Pty Ltd* [2006] QCA 126, is what the parties bargained for under the contract. The court is not seeking to rewrite the parties' contract, or to enhance the commercial value of the contract. As McMurdo J said (at [51]):

> The duty to do what is necessary to enable the other party to have the benefit of the contract is limited to acts which are necessary to the performance of obligations under the contract. To assess the scope of the duty in a particular case, it is first necessary to define the relevant obligation, and in particular, to define the circumstances in which the parties have agreed that a certain obligation is to be performed. It is not a duty upon one party to act so as to enhance the commercial value to the other party of the contract.

In effect, the court needs to ascertain the substance of the obligation which one party owes another, in light of their contract. The duty requires that the parties do what is necessary to preserve the substance of that obligation. In *Gardner*, *Esso* and *THL Robina*, the substance of the obligation was to give the grantee the absolute right to have the first opportunity of obtaining title to the property. Once that was recognised, it was evident that any disposal of the property would undermine the substance of that obligation, even though, as a matter of semantics, the strict wording of the pre-emptive right was not breached. On the other hand, in *Nicholson* and *Peppercorn Holdings No 1 Pty Ltd v DDH Graham Ltd* [2006] QSC 156 (discussed at [41660]),[2] the substance of the obligation, as determined by construing the parties' contract, was not the absolute right to have the first opportunity of obtaining title, but something less than that.

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1 For further discussion on the implied duty of co-operation, see [35430] and [60640]; and see *Secured Income Real Estate (Aust) Ltd v St Martins Investment Pty Ltd* (1979) 144 CLR 596; 53 ALJR 745.

2 The same analysis can also be applied to *Mount Isa Mines Ltd v Seltrust Mining Corp Pty Ltd* (unreported, Supreme Court of WA, Rowland J, 5 July 1985) – see [41360] and *Fedsure International Ltd v NSP Financial*

Services Group Pty Ltd [2001] NSWSC 910 – see [41520].

[41660] Disposal of a lesser interest

If a party has a pre-emptive right which is triggered when the owner decides to sell the subject property, can the owner grant a lesser interest in the property without breaching the obligation not to render the pre-emptive right worthless? The answer depends on whether creation of the interest is consistent with the substance of the parties' contract and their presumed intentions.

In *Peppercorn Holdings No 1 Pty Ltd v DDH Graham Ltd* [2006] QSC 156, a tenant had been granted leases over a number of different properties in Queensland and New South Wales. Each of the leases contained a right of first refusal for the tenant to purchase the properties. These leases were due to expire around June or July 2006. The landlord subsequently granted new leases over the properties to a competitor in early June 2006. These contained options which, if renewed, would extend the new leases to 25 years. Another party offered to purchase the properties and the landlord then offered to sell the properties to the tenant, subject to the new leases, for the same price as the earlier offer. The tenant argued that it should not be bound by the new leases if it decided to purchase the properties and also submitted that the landlord should not be able to grant new leases before offering to sell the properties to the tenant. The argument was that the right of first refusal would be rendered worthless if the properties could be burdened with new leases, before any offer to purchase the properties was made to the tenant. The tenant relied upon *THL Robina Pty Ltd v Glades Golf Club Pty Ltd* [2005] 2 Qd R 186; [2004] QSC 461 and *Gardner v Coutts & Co Ltd* [1968] 1 WLR 173; [1967] 3 All ER 1064 for that contention.

Chesterman J held that the landlord was entitled to dispose of the possessory interest in the properties by granting new leases, without breaching any obligation owed to the tenant. Although Chesterman J was attracted to the tenant's submissions, he felt that an implied duty not to frustrate the effectiveness of a pre-emptive right had to give way to any contrary intention which could be gleaned from the contract itself. The contract before him did manifest a contrary intention.

While there were multiple factors relied upon by Chesterman J in support of this view, there were two which were particularly significant. First, it was provided in the contract that if a certain event occurred, the custodian was to give the applicant notice of the terms on which it was prepared to sell the premises, including specifying "the extent of the interest in the premises proposed to be sold". According to Chesterman J, this suggested that the interest which might be offered for sale could be less than the unencumbered fee simple. Second, the lease contemplated that when the right of pre-emption was triggered, the landlord might only have a reversionary interest to offer the tenant. This was because the tenant was able to assign the lease or sublet the premises, which meant it was possible that the landlord would have to offer the premises to the tenant when they were encumbered by a sublease or assigned lease.

The result in *Peppercorn Holdings* confirms that while there is an obligation on grantors not to do anything to render a right of pre-emption worthless, this must be moulded to fit the parties' bargain as recorded in their contract. In an appropriate case, burdening the property with an interest such as a lease could constitute a breach of this implied obligation. However, in *Peppercorn Holdings* the facts did not support that outcome.

[41665] Disposal of subject property as part of larger parcel

In *Rasch Nominees Pty Ltd v Bartholomaeus* (2012) 114 SASR 448; [2012] SASC 70 it was held that a right of first refusal over two lots was triggered when the two lots were offered for sale along with another adjoining lot: at [27].

[The next text page is 49561]

CERTAINTY OF PRE-EMPTION CLAUSE

[41680] Drafting a pre-emption clause

In drafting a pre-emption clause in a joint venture agreement it is essential to determine whether transfers between existing joint venturers are to be unrestricted, or whether they are required to follow the pre-emption process in the same way as transfers to outsiders. The former approach is more common but the parties' intentions may vary from case to case.

The ordinary requirement of certainty applies to a pre-emption clause. However, even where a clause is vague or difficult to construe, courts will resist a construction that defeats the evident commercial intentions of the parties.

[41700] Noranda Australia

Noranda Australia Ltd v Lachlan Resources NL (1988) 14 NSWLR 1 involved a dispute over an intended assignment of an interest in a mining joint venture. The joint venture agreement contained an unusually vague pre-emption clause, requiring that the other joint venturers should first be afforded "the like opportunity to purchase the interest proposed to be sold". Bryson J held that this language created an effective pre-emptive right, but only after lamenting the shortcomings of the drafting (at p 12):

> It is I suppose useless to protest against the difficulty of understanding this document but it is a commercial document, and constructions in which it is meaningless or has a meaning of no practical use in conferring rights of significance on anybody are very unlikely to represent the intentions of the parties.

It was a corollary of this finding that the intending seller had to tell the other participants what the intended terms of sale were.

[The next text page is 49581]

CERTAINTY OF OFFER

[41730] Terms of offer

Pre-emption clauses invariably require that an offer be made to the continuing participants. The terms of this offer must be certain, or the attempt to sell to a third party after purported compliance with the pre-emption process may not be valid.

The terms of the pre-emption notice containing the offer must also comply with the requirements of the pre-emption clause. In *Santos Offshore Pty Ltd v Apache Oil Australia Pty Ltd* [2015] WASC 242, a case involving an upstream change of control, the notices given under the pre-emption clause contained conditions which failed to comply with the contractual requirements. Pritchard J declined to sever the invalid conditions and declared each notice invalid.

Case law on certainty of offer

[41760] Jones v BWE International

Jones v BWE International Ltd [2003] EWCA Civ 298 concerned the construction of a pre-emption clause in the constitution of a company, BWE Ltd. BWE International wished to sell part of its interest in BWE Ltd to a third party. As required by the pre-emption clause, BWE International served a transfer notice, specifying the number of shares to be sold and the price. However, the price was not expressed in "bright line" terms; the price calculation involved an earn-out component which would not be ascertained for some time. The notice referred to a base price, subject to various adjustments (by reference to the net asset value and gross sales of BWE) over a four-year period. As a result, it was impossible for the continuing shareholders to know what price they were being asked to match, at the time when they had to decide on whether to exercise the pre-emptive right.

The case came to the English Court of Appeal in an unusual way. Mr Jones challenged the proposed sale in court, but the judge at first instance held the transfer notice valid. Costs were awarded against Mr Jones, and he appealed in order to avoid this liability.

The Court of Appeal held that the relevant article in BWE's constitution required the notice to specify a price that was fixed and certain at the date of the notice. The transfer notice given by BWE International did not do this, so it was invalid. The court referred to the competing policy considerations involved: on the one hand the freedom of shareholders to deal in their shares, and on the other hand the need to give effect to commercial arrangements agreed between parties to a joint enterprise. These competing considerations complicated the task of adopting a purposive construction. In the end, the court determined the case by construing the relevant article as a whole: on its proper construction the article contemplated that a transfer notice would specify a fixed and certain price, so that a transfer could be completed immediately.

The court noted that "it is well known among practitioners that very great care must be taken over the drafting of pre-emption articles such as these". The observation applies to pre-emption clauses generally. These clauses limit the right to sell, so the scope they allow for sale should be clear. The clause should say clearly how a third party's price must be expressed, in order to:

- tell the continuing participants exactly what they have to match; and
- tell the exiting participant exactly what it has to do in order to qualify for the protection of the clause, in selling to a third party.

[41780] Sanrus v Monto Coal

A similar issue arose in *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd* [2005] QSC 284, in the context of a mining joint venture agreement. An intending transferor's offer was held to be non-compliant as the offer to the continuing participant (contained in a transfer notice) was not for "specific cash consideration" as required by the pre-emptive clause. Monto Coal had offered to transfer part of its interest in a mining joint venture to its co-joint venturer, Sanrus, "for a cash purchase price of A$29.423 million … and otherwise on the terms and conditions contained in the attached Sale Agreement (which forms part of this offer)". The sale agreement related to a proposed transaction between Monto Coal and a third party, based overseas, in respect of the same part-interest in the joint venture, and was subject to a number of conditions in respect of matters that were yet to be agreed. The Supreme Court of Queensland held that Monto Coal's offer to Sanrus was not sufficiently certain in its terms to allow creation of a binding contract on acceptance.

Muir J observed, at [36], that there are good reasons for including a cash consideration requirement in a pre-emption clause:

> Existing joint venturers can avoid being put in a position of disadvantage as a result of the intending transferor's ability to agree with a third party terms and conditions which suit their interests of that entity, but which are of no or lesser value to the existing joint venturers. Also, in the case of offers like the subject one, it may be extremely difficult to determine whether a subsequent offer to a non-participant is for a consideration and on terms and conditions "not more favourable" than those offered to participants.

The decision highlights the need for caution when negotiating the sale of a joint venture interest to a third party, if there is a pre-emption clause in the joint venture agreement. The exiting participant must ensure that the proposed terms of sale comply with the requirements of the pre-emption clause – otherwise the transaction will not qualify as a permitted sale.

[The next text page is 49601]

ACCEPTANCE OF OFFER

[41800] Acceptance must be effective, or right may be lost

A pre-emption clause gives the holder of the pre-emptive right a finite period to accept the offer. The holder of the right, if wishing to exercise it, must take care to ensure that the acceptance is effective. If an effective acceptance is not delivered within the stipulated period, the pre-emptive right may be lost. Normal common law principles relating to the acceptance of an offer are applicable. A purported acceptance will be construed objectively, by reference to what a reasonable recipient would have understood the document to mean. The subjective intentions of the party purporting to accept are irrelevant. Both the context and the content of the acceptance document will be relevant in determining whether it is effective: *APT SEA Gas Holdings Pty Ltd v ANP SEA Gas Holdings Pty Ltd* [2010] NSWSC 1221, per Brereton J at [21] and following.

[The next text page is 49621]

BREACH OF PRE-EMPTION CLAUSE

[41830] Effect of breach of pre-emption clause

A party alleging a breach of its pre-emptive rights will normally seek injunctive relief to prevent a transfer of the interest, or seek damages if the possibility of injunctive relief has already been overtaken by events. In *Metcash Trading Ltd v Hourigan's IGA Umina Pty Ltd* [2003] NSWSC 326 it was held that a third party with actual knowledge of a pre-emptive right cannot set up its transactional costs as a basis for resisting an injunction by another party alleging violation of its pre-emptive rights. But what is the position when a transfer in breach of the pre-emptive right has occurred?

As a preliminary matter, there is no reason why a transfer in breach of a pre-emptive right would necessarily be invalid. A transfer may be ineffective if it conveys no legal or equitable interest in property, or if it conveys an interest which is then defeated by another interest; but it cannot be void between vendor and purchaser because of a contractual restriction contained in an existing contract to which the purchaser is not a party. As Dixon CJ remarked in *Hall v Busst* (1960) 104 CLR 206; 34 ALJR 332 at 217 (CLR):

> ... with contractual restrictions there is no fetter upon alienation which does more than sound in damages, that is, unless a doctrine of equity intervenes …

The decision of the House of Lords in *Hunter v Hunter* [1936] AC 222 has been regarded as establishing that transfers in violation of pre-emptive rights are totally void, but the tendency has been to confine this case to its own complicated facts, where no equitable interest was passed to the purchaser by the transfer: *Rathner v Lindholm* (2005) 194 FLR 291; [2005] VSC 399 at 306–307 (FLR) per Whelan J. In light of the comments by Dixon CJ in *Hall v Busst*, this is possibly the only acceptable construction of *Hunter*.

It seems that transfers of property in breach of contractual restrictions are only invalid if and to the extent that the contractual restrictions have the effect of creating an interest in property. If the holder of a pre-emptive right has something less than the entire ownership over the property (which must invariably be the case), then the grantor can effectively convey the remaining interest in that property to a third party. The position of the third party purchaser will then depend on what interest the vendor had in the property when the transfer was attempted.

Normally the grantor of the pre-emptive right would retain the legal interest in the property. Depending on the formality requirements applicable to that property, the grantor should be able to convey the legal estate, or failing that an equitable interest, to a prospective purchaser. The vendor would, of course, be in breach of the pre-emptive right, but this should not affect the purchaser's ability to obtain the vendor's subsisting interest in the property. In *Hawks v McArthur* [1951] 1 All ER 22, Vaisey J considered the position where shares were sold in contravention of pre-emption provisions in a company's articles of association. Since the share transfer was never registered, the purchasers could not obtain a legal interest. Vaisey J nevertheless recognised that the purchasers obtained an equitable interest in the shares by virtue of the specifically enforceable contract of sale.

What interest will the holder of a pre-emptive right have? Depending on the particular clause, a pre-emptive right will not usually give the grantee an immediate interest in the property in relation to which the right is granted: *Mackay v Wilson* (1947) 47 SR (NSW) 315 at 325 per Street J. The grantee obtains no immediate equitable interest, but an equitable interest may arise when the triggering event occurs if, at that time, the pre-emptive right can be enforced by an order of specific performance: *Robertson v Lagreg Investments Pty Ltd* [2004] VSC 86 at [23] per Byrne J; and see [41300].

Ultimately, the effectiveness of a transfer in contravention of a pre-emptive right depends on a competition between the interest which the purchaser obtains by the transfer and the interest which the beneficiary of the pre-emptive right holds: *Rathner v Lindholm* (2005) 194 FLR 291; [2005] VSC 399 at 311 (FLR) per Whelan J. This will be resolved according to the priority rules relating to competing interests in property: see *Pilcher v Rawlins* (1872) LR 7 Ch App 259; *Rice v Rice* (1853) 2 Drew 73; *Northern Counties of England Fire Insurance Co v Whipp* (1884) 26 Ch D 482.

In relation to share transfers, the holder of a pre-emptive right will usually prevail over a subsequent purchaser, since the holder's interest will usually arise first in time and the purchaser will not obtain a legal interest unless the transfer is registered: *Rathner* at 311 (FCR) per Whelan J. If the purchaser did manage to obtain a legal interest in the shares, the purchaser would be free of the pre-emptive right if they were a bona fide purchaser for value without notice. But where shares are transferred in breach of a pre-emptive right in the company's constitution, the purchaser will almost always lose out, since shareholders are entitled to have the share register rectified if a transfer in contravention of their pre-emptive rights is registered: *Grant v John Grant & Sons Pty Ltd* (1950) 82 CLR 1 at 29 per Williams J.

A share transfer in breach of a pre-emptive rights clause in a company constitution was considered by the Victorian Supreme Court in *Slea Pty Ltd v Connective Services Pty Ltd (No 9)* [2022] VSC 136. Robson J, after reviewing the authorities, held (at [1308]–[1314]) that there is no general rule about the effect of such clauses; in each case it is a question of the proper construction of the clause. The particular clause before the Court in *Slea* did not confer any right on the remaining shareholders to receive an offer from the shareholder wanting to exit, so it could not be relied upon by a remaining shareholder as the source of an equitable interest in the shares being transferred in breach of the clause. The only effect of the clause was to prohibit a transfer to a third party, unless the shares had first been offered to existing shareholders. An existing shareholder's remedy where a transfer had been registered in breach of the clause was to take action to have the register rectified: *Grant v John Grant & Sons Pty Ltd* (1950) 82 CLR 1.

In the case of real property, registration in accordance with the Torrens System is required to obtain a legal interest. If this were done, assuming that no relevant exceptions to the doctrine of indefeasibility of title could be made out, the purchaser would take free of any prior pre-emptive right.

As regards property other than shares or land, a transfer in breach of a pre-emptive right may be effective to convey a legal interest to the purchaser without any additional requirements. The question would simply be whether the purchaser acted bona fide and without notice of the pre-emptive right.

[The next text page is 49651]

PRE-EMPTION CLAUSES IN LEASES

[41900] Superannuation Board v Safeway

In *Australian Safeway Pty Ltd v State Authorities Superanuation Board* [1988] ANZ ConvR 412, a lease gave the lessee a right of first refusal over the leased property. The lessor gave notice of its desire to sell, but later purported to withdraw the notice (before the lessee had responded). The lessee, refusing to accept the withdrawal, went ahead with the exercise of its pre-emptive right and claimed specific performance. Needham J made an order for specific performance, holding that on the proper construction of the lease the notice could not be withdrawn until the period stipulated for a response had expired. His decision was upheld on appeal: *State Authorities Superannuation Board v Australian Safeway Stores Pty Ltd* [1989] ANZ ConvR 490. The Court of Appeal emphasised that its approach was based on the proper construction of the lease involved in the case, so caution is required in deducing any general principle from the case.

For other examples of pre-emption clauses in leases see *Choice Services Pty Ltd v Gicubo Pty Ltd* [2003] ANZ ConvR 612; [2003] NSWSC 314; *Dorsman v Castagna* [1992] NSW ConvR 55-616.

[The next text page is 49701]

RIGHTS OF FIRST REFUSAL

[41950] Nature of right

As noted above, a right of first refusal is a right to receive an offer, before a corresponding offer can be made to anyone else: *Emmett v Kiely* (1946) SASR 17; *Gold Valley Iron Pty Ltd (in liq) v OPS Screening & Crushing Equipment Pty Ltd* [2022] WASCA 134 at [123]. Strictly speaking, a right to match and defeat an offer made by someone else is a right of last refusal (although this semantic distinction is not always observed by parties in describing their own arrangements). In both cases, the right represents a fetter on the right to sell to third parties. The holder of the right must be given the opportunity to exercise it, before a sale to a third party can go ahead.

The nature of a right of first refusal was described in the following terms in the joint judgment of Fullagar and Kitto JJ in *Woodroffe v Box* (1954) 92 CLR 245 at 257:

> The term "first refusal" is not a technical term. It is a colloquial term, and indeed a somewhat inept term, because what the potential offeree wants is an opportunity of accepting an offer rather than an opportunity of refusing an offer. … If I promise to give you the first refusal of my property, I am making prima facie only a negative promise: I am saying "I will not sell my property unless and until I have offered it to you and you have refused it".

The term does not have a fixed and certain meaning; the content of a right described as a right of first refusal may vary from case to case. Consequently, any provision conferring such a right must be analysed carefully in the light of its own words and context: *Woodroffe v Box* at 258; *Pata Nominees Pty Ltd v Durnsford Pty Ltd* [1988] WAR 365 at 372; *White Property Developments Ltd v Richmond Growth Pty Ltd* [1998] FCA 26; *Beneficial Finance Corp Ltd v Multiplex Constructions Pty Ltd* (1995) 36 NSWLR 510 at 522; *Penrith RSL Club Ltd v Cameron* (2001) 10 BPR 18621; [2001] NSWSC 413; *Goldmaster Homes Pty Ltd v Johnson* [2006] NSW ConvR 56-142; [2004] NSWCA 144 at [39] and [40]; *Nationwide Produce (Holdings) Pty Ltd (in liq) v Linknarf Ltd (in liq)* [2005] FCAFC 129 at [61].

This approach may result in what the parties have described as a right of first refusal being classified by the court as an option, on the proper construction of the words used in their contractual context. However, such reclassification will occur only where the indicia of an option are present: *Legune Land Pty Ltd v Northern Territory and Corp* [2012] NTSC 83 at [47].

In *Gold Valley Iron Pty Ltd (in liq) v OPS Screening & Crushing Equipment Pty Ltd* [2022] WASCA 134, an agreement for the hire of equipment referred to the hirer having an option to purchase; but the "Special Terms & Conditions of Hire" referred to the hirer having a "first right of refusal to purchase". After reviewing authorities on the difference between a right of first refusal and an option (at [120]-[125]), Buss P and Murphy JA concluded that the hirer had an option which was liable to defeasance if the owner decided to sell the equipment during the hire period, and offered to sell the equipment to the hirer as required by the right of first refusal: [141] and [154]; Vaughan JA agreeing at [247].

[41951] Content of first refusal clauses varies widely

As Dalton J observed in *Butchart v Sinnamon* [2021] QSC 317 at [30], the drafting and content of clauses conferring a right of first refusal varies widely. Dalton J reviewed a series of cases involving first refusal clauses, from the very detailed (*THL Robina Pty Ltd v The Glades Golf Club Pty Ltd* [2005] 2 Qd R 186; [2004] QSC 461 at 190–191; and see [41650]), through those with some level of detail (*Jonns v Tan* (1999) 9 BPR 17113; [1999] NSWSC 648; *Octra Nominees Pty Ltd v Chipper* [2007] ANZ ConvR 455; [2007] FCAFC 92; see [41970]), to those with little or no detail at all (*Smith v Morgan* [1971] 2 All ER 1500; *Goldmaster Homes Pty Ltd v Johnson* [2006] NSW ConvR 56-142; [2004] NSWCA 144; see [41950]). Where the language of the clause is brief and imprecise, a court may draw the conclusion that no binding obligation is intended: see *Goldmaster* at [14]–[15]. But in both *Butchart v Sinnamon* and *Smith v Morgan*, very simple clauses were held to confer an enforceable right of first refusal.

[41952] What constitutes "refusal"

A right of first refusal is actually a right to be given an opportunity to accept an offer, before the subject property is sold to a third party. In this context, acceptance has its normal contractual meaning; it must be a clear acceptance, and not a counter-offer. If the opportunity is offered, anything short of a clear acceptance will result in the right of first refusal being discharged. *Butchart v Sinnamon* [2021] QSC 317 is an example of this; and the case also shows that where a right of first refusal clause is expressed in very simple terms, an offer made with a minimum of formality will be sufficient to comply with the clause.

[41953] Obligation to match the triggering proposed sale?

In *Woolworths Ltd v About Life Pty Ltd* [2017] NSWSC 1117 at [102], Emmett AJA described a right of first refusal in the following terms:

> A right of first refusal or first right of refusal, without more, signifies that the grantor promises that it will not dispose of the property in question to a third party except on terms no less favourable than the terms on which the grantor has offered to dispose of the property to the grantee and the grantee has rejected that offer.

Some first refusal clauses do expressly require the opportunity to purchase to be offered on terms matching those of the proposed sale to a third party: see for example *THL Robina Pty Ltd v The Glades Golf Club Pty Ltd* [2005] 2 Qd R 186; [2004] QSC 461 and *Rasch Nominees Pty Ltd v Bartholomaeus* (2012) 114 SASR 448; [2012] SASC 70. However, in the case of a "bare" right of first refusal, the authorities differ on whether there is an obligation to express the opportunity to purchase in terms which match those of another proposed sale.

In *White Property Developments Ltd v Richmond Growth Pty Ltd* [1998] FCA 26 Madgwick J held that a clause creating a bare right of first refusal could only be complied with if the holder of the right was offered the opportunity to accept an offer on terms which were the same as, or more favourable than, the terms of a proposed third-party sale.

In *Butchart v Sinnamon* [2021] QSC 317, Dalton J rejected the plaintiffs' argument that their bare right of first refusal could only be discharged if they had declined to accept an offer expressed in terms matching those of an offer which the defendant proposed to make to a third party. Her Honour held (at [67]) that that the "matching" requirement was contrary to dicta in *Woodroffe v Box* (1954) 92 CLR 245, *Smith v Morgan* [1971] 2 All ER 1500 and *Goldmaster Homes Pty Ltd v Johnson* [2006] NSW ConvR 56-142; [2004] NSWCA 144; the defendant had sufficiently discharged his first refusal obligation by asking the plaintiffs if they wanted to buy the land at a specified price, without reference to any proposed third-party sale.

[41954] Interpretation by reference to commercial context

In *United Co Rusal Plc v Crispian Investments Ltd* [2018] EWHC 2415 (Comm), the English High Court (Queen's Bench Division Commercial Court) considered the purported exercise of a right of first refusal in a shareholders' agreement. The relevant clause provided that if any of the parties wished to sell shares, it had to offer the others a right of first refusal at "the price proposed by a bona-fide third party". Phillips J applied standard principles of contractual interpretation, based on text and commercial context (with particular reference to commercial context), to conclude that an offer from a party associated with one of the shareholders could not validly trigger the sale process.

[41955] Disposal as part of a wider transaction

A right of first refusal is enlivened by a proposal to dispose of the subject property to a third party. Difficulties may arise where the disposal of the subject property is part of a wider proposed transaction between the grantor and the third party. In particular, it may be difficult to isolate the terms that have to be matched, from the terms of the wider transaction.

Woolworths Ltd v About Life Pty Ltd [2017] NSWSC 1117 concerned a "right of first refusal to lease", granted to Woolworths by a lessee, About Life. The Court interpreted this as a right of first refusal to take an assignment of the lease. About Life had agreed with a third party, Harris Farms, to sell the retail shop business being conducted on the subject premises, including an assignment of the lease. Harris Farms contended that Woolworths' right of first refusal did not extend to the whole of the business sale transaction, of which the assignment of lease formed part.

Emmett AJA held (at [97]) that since About Life had formed the wish to assign the lease to Harris Farms on the terms of the business sale contract, the obligation of About Life was to offer to enter into an agreement with Woolworths on terms equivalent to the terms of the business sale contract: in effect, to offer to sell the retail shop business to Woolworths on the same terms as those contained in the sale contract with Harris Farms.

[41960] Requirement for information on offer to be matched

In *Southern Region Ltd v Wallington Hardware & Timber Pty Ltd* [2010] VSC 95, the plaintiff was a Mitre 10 group company and the defendant was a Mitre 10 licensee. Mitre 10 licensees were required to enter into a package of agreements including a Right of First Refusal (RFR) Agreement, which required any licensee proposing to sell their business to offer it first to a Mitre 10 nominee. The RFR Agreement required the licensee to submit to Mitre 10 "a true and complete copy of any bona fide offer … made or received".

The defendant proposed to sell its business to Bunnings Group Limited, owner of a competing hardware chain. It entered into a conditional business acquisition agreement with Bunnings, and sent an email to Mitre 10 giving broad details of the proposed transaction including the proposed purchase price. One of the questions for the court was whether the defendant's email giving broad details of the proposed business sale was a valid notice of intention to sell, which set time running for exercise of the right of first refusal.

Croft J held (at [41]) that in construing the RFR Agreement, regard should be had to its commercial purpose, which should be determined having regard to the nature of the property which was the subject of the right of first refusal and the words of the agreement. An underlying influence on the construction process was recognition of the general purpose of an agreement of this nature: namely to put the holder of the right of first (or last) refusal in a position to be able to assess the third party offer or agreement which has triggered the operation of the right of first refusal. A simple arrangement involving simple property might well be the subject of a simple notice setting out the essential terms – price and time and method of payment. On the other hand, where relatively complex property was being sold, "then it is likely that the grantee of the right will not be able to assess its position without being provided with a complete copy of the documentation for the proposed sale to a third party": [42].

In the *Southern Region* case, the provisions of the RFR Agreement and the nature of the property being sold (the retail hardware business) led to the conclusion that the terms of the proposed sale to a third party had to be presented to Mitre 10 in a "high state of definition": [44], see Farrands DJ, *The Law of Options and Other Pre-Emptive Rights* (Lawbook Co, 3rd ed, 2023) pp 181-183. Thus the initial email giving broad details of the proposed transaction was insufficient; it was only when a complete copy of the proposed agreement with Bunnings was provided to Mitre 10 that time began to run for exercise of the right of first refusal.

[41970] Exhaustion and revival of right

If the holder of a right of first refusal is offered the right to buy on certain terms and declines to exercise it, the right will generally be exhausted in the sense that the owner is free to sell to a third party on the same terms or (usually) on terms less favourable to the third party, within any period that may be specified. However, if no third party is prepared to buy on those terms and the owner is forced to make a revised offer on terms which are more favourable to a buyer, the right of first refusal will (subject to any special peculiarities of the particular clause concerned) revive, with the result that the new terms must be offered first to the holder of the right: *White Property Developments Ltd v Richmond Growth Pty Ltd* [1998] FCA 26.

If a contract is entered into with a third party after the holder of the right of first refusal declines to exercise it, a subsequent variation of that contract – even one which makes the terms more favourable to the third party – will not revive the right of first refusal (in the absence of bad faith, prior arrangement, fraud, mistake or misrepresentation): *Octra Nominees Pty Ltd v Chipper* [2007] ANZ ConvR 455; [2007] FCAFC 92. However, if the contract with the third party is terminated rather than simply varied and the owner then seeks to enter into a new contract with the same or another third party on terms more favourable than those previously offered under the right of first refusal, the right of first refusal will revive and the revised terms must be offered first to the holder of the right.

[41980] Right of first refusal subject to additional conditions

It is always a condition on the exercise of a first right of refusal (indeed, of any true pre-emptive right – as opposed to a right that is really an option) that the owner of the subject property has decided to sell it. The right may also be subject to other conditions. For example, a right of first refusal contained in a lease may be subject to a condition that there should be no existing breach of the lease. This situation arose in *Rasch Nominees Pty Ltd v Bartholomaeus* (2013) 115 SASR 473; [2013] SASCFC 23. Mr and Mrs Bartholomaeus had leased premises to a lessee, MBP. The lease contained a right of first refusal over the premises, subject to two conditions: that the lessor was desirous of selling, and that there was no existing breach of the lease. Mr and Mrs Bartholomaeus entered into a contract of sale with a third party, Rasch Nominees, in disregard of the pre-emptive right. MBP challenged their right to sell and Mr Bartholomaeus took legal advice, which led him to offer the property to MBP. MBP accepted, the sale was completed and MBP became the registered proprietor. Effectively, the property had been sold twice.

Rasch Nominees sought to have the conveyance to MBP set aside so that it could obtain an order for specific performance of its own purchase contract. At trial and on appeal, one issue was whether MBP's right of first refusal had validly arisen.

At first instance (*Rasch Nominees Pty Ltd v Bartholomaeus* (2012) 114 SASR 448; [2012] SASC 70) Kourakis J (as he then was) held that if the "no breach of lease" condition had been fulfilled, the right of first refusal would have arisen and would have prevailed over the equitable interest of Rasch Nominees under its contract of sale – either as a prior equity, or because it had been elevated into a statutory legal interest by s 117, *Real Property Act 1886* (SA). However, the condition was not fulfilled because at the relevant time MBP was in breach of its maintenance and repair obligations under the lease. Therefore the right of first refusal did not validly arise. Nevertheless, MBP still succeeded at first instance because it had obtained an indefeasible title by registration.

Rasch Nominees' appeal to the Full Court was dismissed, but the Full Court disagreed with Kourakis J on the right of first refusal. In the view of the Full Court, the right of first refusal had not been lost. The right would be lost only by reason of an actionable breach of the lease, and neither of the two breaches identified were actionable. They could only have become actionable if notices to remedy had been issued, and this had not been done: [80]. In any event, giving of notice of intention to dispose without any form of qualification or reservation of rights as to breach amounted to a waiver of the breaches as factors vitiating the right of first refusal.

[41985] Certainty

In *Woolworths Ltd v About Life Pty Ltd* [2017] NSWSC 1117, About Life took a lease of retail shop premises from Woollahra Municipal Council but gave Woolworths a "first right of refusal to lease" the subject premises if certain events occurred. The most obvious of these was "if [About Life] wishes to assign its lease … to a third party". For some of the other triggering events, it was considerably more difficult to see how a right of first refusal could operate. About Life argued that having regard to the difficulties of determining how the right would operate in those circumstances, the whole clause conferring the first right of refusal was void for uncertainty.

Emmett AJA rejected that argument, holding that since a certain meaning could be given to the operation of the clause in the circumstances before the Court (a proposed assignment of the lease), the fact that uncertainty might arise in other circumstances did not render the clause void for uncertainty.

[The next text page is 54001]

favour. Macquarie was substantially successful in the appeal, but on other grounds. However, Allsop P made it clear that if the case had been conducted differently and the evidence had established that Area Health had promoted a proposal competing with the plans of Macquarie, that might well have been a serious breach of the duty of good faith, going to the root of the contractual arrangements: [22].

In *Australian Style Pty Ltd v .au Domain Administration Ltd* [2009] VSC 422, the plaintiff company had been acting as a domain name registrar, but had its registrar status terminated by the regulatory body responsible for administering the domain name registration system in Australia. The plaintiff challenged the termination on various grounds, including alleged breach of an obligation in the contract of appointment obliging the domain name regulator to exercise its responsibilities in good faith. The content of the duty of good faith was argued only briefly, and it was accepted by both sides that the good faith requirement would be met if the defendant acted honestly, reasonably and for legitimate regulatory purposes when it terminated the registrar agreement. Hargrave J found that on the evidence before the Court, the defendant had so acted.

In *Brighton Automotive Holdings Pty Ltd v Honda Australia Pty Ltd* [2024] VSC 262, a case involving termination of a motor vehicle dealership agreement, alleged breach of an express obligation of good faith was relied on as an element of a statutory unconscionability claim under s 21 of the Australian Consumer Law. Matthews J held (at [360]-[365]) that in terminating the dealership agreement for its own business reasons, the defendant had not breached the obligation of good faith. A further factor militating against a finding of breach of the obligation of good faith was that Honda Australia had agreed to compensate the dealer for any loss that it incurred as a result of termination of the contract.

[60282] Other cases involving exercise of contractual power

Cases since 2010 have tested the application of express good faith obligations to aspects of contractual performance, going beyond the areas of negotiation and termination.

In *Orchard Capital Investments Ltd v Ross Neilson Properties Pty Ltd* [2010] Q ConvR 54-741; [2010] QSC 340, Orchard (responsible entity of a property trust) acquired land and entered into a development agreement with Neilson (a developer) providing for a shopping centre development on the land. The agreement provided that if development approval was not obtained for the original development proposal, Neilson would submit an alternative development or realisation strategy to Orchard. By clause 14.1 of the development agreement, Neilson was required to act in good faith in preparing the alternative strategy, and Orchard was required to act in good faith in deciding whether to accept or reject it.

Development approval was refused and Neilson submitted an alternative strategy involving a residential townhouse and unit development. Orchard rejected this proposal on the ground that the trust did not invest in or develop residential real estate. The agreement provided that if the owner rejected the developer's alternative strategy, the land was to be sold as soon as practicable – in which event Neilson as developer would be liable to contribute to any loss on sale.

Neilson sought to avoid liability for contribution to the loss on sale, arguing (among other things) that Orchard had breached its express obligation of good faith by rejecting the alternative strategy. The Supreme Court of Queensland (Peter Lyons J) refused to accept Neilson's argument. Lyons J determined the content of the express good faith obligation by reference to the other express provisions of the contract: [99]. He noted that the discretion given to Orchard to accept or reject was broad – broad enough to allow Orchard to take into account considerations such as limits on the investment powers or objectives of the trust. The good faith obligation required Orchard to give genuine consideration to any recommendation that Neilson made; but in doing so, it was entitled to take its own interests into account: [111].

The substance of Neilson's claim was that Orchard breached its good faith obligation, because it failed to give genuine consideration to – "failed to weigh up the commercial pluses and minuses" of – the alternative strategy. However, this claim could only be sustained by evidence about the decision-making process – and according to the judgment ([114]), the decision-making process was not explored in evidence. As a result, Neilson failed to discharge its onus of proof on this issue. This reinforces the lesson that there is no point in bringing a claim for breach of an obligation of good faith, unless the claim is supported by evidence of conduct amounting to bad faith.

Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd [2011] QSC 264; (2011) 5 ARLR 419 involved a coal-mining joint venture. The joint venture agreement obliged each party to "act in good faith and in the best interests of the joint venture". Aquila claimed that BCC breached this obligation when it submitted a mine development proposal to successive meetings of the joint venture management committee, because the proposal was not submitted for the purpose of developing the mine – it was submitted to force Aquila into a position where its interest in the joint venture could be compulsorily acquired by BCC, at less than fair value. Aquila sought an interlocutory injunction from the Supreme Court of Queensland. The claim succeeded at first instance (before Applegarth J), on the basis that there was "a strong case of a breach of" the express obligation of good faith ([129]) and the balance of convenience favoured the grant of an injunction.

An appeal was successful, on the balance of convenience issue. The Queensland Court of Appeal held that Aquila was not exposed to any adverse consequences justifying the grant of an injunction, because BCC would be unable to proceed with the forced acquisition of Aquila's interest until the validity of its right to do so was determined at trial: *Bowen Central Coal Pty Ltd v Aquila Coal Pty Ltd* [2011] QCA 334 at [35]–[57]. The alleged breach of the express obligation of good faith was discussed, without any conclusion being reached – although it was evident that the Court of Appeal placed some significance on whether the interest would be acquired at an undervalue, and was not satisfied that this would in fact be the case on the proper construction of the joint venture agreement.

In *Tabcorp Holdings Ltd v Victoria* [2014] VSC 301, Tabcorp claimed to be entitled to a "termination payment". The claim was founded primarily on construction of the relevant legislation, but Tabcorp raised alternative contractual claims including one based on breach of an express obligation to deal with Tabcorp in good faith. The express good faith term was contained in a letter from the Treasurer. Earlier in the letter, a number of principles were set out; the letter said that the statement of these principles was not binding on the Government or future Governments, and of course could not bind Parliament. Hargrave J held that the good faith term was binding, even though other parts of the letter were expressly not binding. However, the context in which the good faith term appeared – a letter which stated non-binding principles – impacted on the scope and content of the term in such a way as to deprive it of any meaningful content: [258]. As the principles in the letter were stated to be non-binding, Tabcorp could not obtain a result by a term of good faith which was inconsistent with an express statement in the same instrument (the letter) which created the good faith obligation: [263].

The related case *Tatts Group Ltd v Victoria* [2014] VSC 302 was also heard by Hargrave J. In this case the plaintiff was successful on a contractual claim, but not on the good faith argument which was raised in the same way as in *Tabcorp* – and with the same lack of success. One point of difference was that in the *Tatts Group* case, the plaintiff also sought to argue that the express obligation of good faith (and the obligation, implied by law, to cooperate in allowing the other party to obtain the benefit of the contract) should influence the interpretation of the parties' contract. Hargrave J found for the plaintiff on the contractual interpretation point without needing to rely on any inference from the good faith and cooperation terms: [184].

The findings of Hargrave J on the express term of good faith in both cases were upheld on appeal: *Tabcorp Holdings Ltd v Victoria* [2014] VSCA 312; *Victoria v Tatts Group Ltd* [2014] VSCA 311. On further appeals to the High Court, the State succeeded on the contractual interpretation issue in both cases, but the good faith point was not argued.

In *Trampoline Enterprises Pty Ltd v Fresh Retailing Pty Ltd* [2019] VSCA 74, the Victorian Court of Appeal dismissed an appeal against the trial judge's finding that an express term of good faith had been breached. The case concerned the purchase of a business; the vendor was entitled to additional purchase consideration (an "earn-out" payment) if a particular store opened for business within 180 days. A clause in the contract required the purchaser to act in good faith. The store opened after 182 days. The trial judge concluded that that purchaser had intentionally delayed the opening to avoid having to make the earn-out payment, and held that this was a breach of the express obligation to act in good faith. The Court of Appeal noted (at [64]) that in view of the seriousness of an allegation that a party to a contract had failed to act in good faith, the judge's finding could be sustained only if so satisfied on the balance of probabilities, by cogent proofs; that is, to the standard required in *Briginshaw v Briginshaw* (1938) 60 CLR 336. In the Court's view, the evidence did provide a sound foundation for the judge's conclusion that the obligation to act in good faith had been breached. The Court (at [62]–[63]) determined the content of the obligation of good faith by reference to passages from *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum* [2005] VSCA 228 and *Virk Pty Ltd (in liq) v YUM! Restaurants Australia Pty Ltd* [2017] FCAFC 190.

Macquarie International Health Clinic Pty Ltd v Sydney Local Health District (2020) 383 ALR 688; [2020] NSWCA 161 was a further round of the litigation over construction of a new hospital on a site adjoining Royal Prince Alfred Hospital, Sydney. Under a clause of the Construction Deed, SLHD had an "absolute and unfettered discretion" to extend the timetable for completion of project works. Because of the long delays resulting from the prior litigation (see [60280]), SLHD set a new timetable – and ultimately terminated the Construction Deed and associated lease for defaults including failure to meet the new timetable. The NSW Court of Appeal held that the power to extend the timetable did extend to setting a new timetable for steps that had previously been completed, but had to be completed again because of the long delay; but as a matter of construction, the exercise of the "absolute and unfettered" power to set a new timetable was constrained by the express obligation of good faith in another clause of the Construction Deed: [268]. Bathurst CJ (with whom Bell P and McCallum JA agreed) cited *Burger King Corp v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558; [2001] NSWCA 187 (see [60720]) where the Court had been prepared to imply, and apply, a term of good faith and reasonableness as a constraint on a clause conferring a right of approval in the approving party's sole discretion. Bathurst CJ was not deterred from adopting this construction in the *Macquarie* case by the inclusion, at the beginning of the express good faith clause, of the words "Without limiting the generality of any other provision of this deed"; these words prevented the clause from overriding other express rights or obligations, but did not prevent it from operating as a constraint on contractual powers conferred by other provisions: [272].

Although satisfied that the power to set a new timetable had to be exercised in good faith, the Court accepted the view of the primary judge that SLHD had in fact acted reasonably in setting the new timetable. The case involved a number of other issues, but in the result SLHD's termination of the contract was upheld.

In *Euromark Ltd v Smash Enterprises Pty Ltd* [2021] VSC 97, the Victorian Supreme Court (Lyons J) held that conduct by an Australian manufacturer, in "bypassing" its UK distributor by direct solicitation of the distributor's customers, was a breach of a specific clause in the distribution agreement; but her Honour went on to hold that if she was wrong in construing the relevant clause as governing the conduct, an equivalent obligation would arise under the express good faith obligation in the agreement. The express good faith obligation meant that the manufacturer was required to act honestly and with fidelity to the bargain, and not to undermine the bargain: [795]. It was an essential term of the distribution agreement, and breach amounted to repudiatory conduct which justified termination: [954]. Ultimately, the manufacturer was saved from contractual liability by the Court's finding that the distributor was not ready, willing and able to perform its own obligations under the distribution agreement at the time when it purported to terminate. However, the distributor succeeded in recovering damages against two of the manufacturer's senior executives, under the statutory unconscionable conduct provisions in ss 21 and 22 of the Australian Consumer Law (applied in conjunction with s 236). The manufacturer's failure to act with good faith and its use of unfair tactics were factors taken into account in the finding of unconscionable conduct. The decision was upheld on appeal: *Smash Enterprises Pty Ltd v Euromark Ltd* [2022] VSCA 267.

In *Binningup Nominees Pty Ltd v Mirvac (WA) Pty Ltd* [2021] WASCA 130; see [60912], the Western Australia Court of Appeal considered a contract for the large-scale development of land between an owner and a developer, under which the developer was obliged to prepare budgets and the parties had power to approve or disapprove the proposed budgets. The contract contained an express good faith obligation. The Court observed (at [418]) that the developer would not act in good faith if it designed a budget not for the purpose of implementing the project, but for the purpose of delaying the project until the owner became liable to repay project funding provided by the developer. Similarly, the power to approve or disapprove budgets could only be used to protect the legitimate interests of the parties, which the clause was intended to protect. The extent of those legitimate interests had to be ascertained by construction of the contract: [440].

[60283] Express obligations of good faith operate only within framework of contract

In *Sentinel Robina Office Pty Ltd v Clarence Property Corporation Ltd* [2018] QCA 314, the appellant and respondent were joint owners of an office building, and had entered into a deed governing the rights and obligations arising from that relationship. The deed contained a term obliging the parties to act in the utmost good faith. The jointly-owned building was managed by a related company of Sentinel, and the executive functions of the manager were performed by a Mr Kennedy. Clarence "poached" Mr Kennedy, by offering him a role as property manager of one of its other buildings. Sentinel complained that this was a breach of the express obligation of good faith.

The Queensland Court of Appeal held that the express contractual obligation of good faith related only "to the bargain between the parties and their mutual contractual objectives" (at [16]). It did not extend to conduct outside the scope of the bargain. Clarence's recruitment of Mr Kennedy had nothing to do with the relationship of Sentinel and Clarence under the deed; he was recruited simply because he was judged to be an able property manager. The deed expressly excluded any relationship of partnership between the parties, and the good faith clause should not be construed as imposing a relationship of good faith of the kind that partners owe to each other. The Court referred to the review of good faith authorities by Allsop P in *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* (2010) 15 BPR 28563; [2010] NSWCA 268 at [12]–[16], which emphasised fidelity to the bargain and the furtherance of contractual objectives as defining characteristics of the obligation of good faith.

Another attempt to give a far-reaching effect to an express obligation of good faith came before the Victorian Court of Appeal in *Knights Quest Pty Ltd v Daiwa Can Company* (2018) 366 ALR 557; 133 ACSR 374; [2018] VSCA 349. The argument failed. The Court held that the primary judge had correctly determined the commercial purpose and context of the contract from admissible evidence of pre-contractual negotiations. Having regard to the commercial purpose and context of the contract as so ascertained, and applying the principles of contractual interpretation summarised by the High Court in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2015] HCA 37 at [46]–[52], it was impossible for the good faith clause to have the far-reaching effect contended for by the appellants.

Principles of construction were applied by the Western Australia Court of Appeal to limit the scope of an express obligation of good faith in *Binningup Nominees Pty Ltd v Mirvac (WA) Pty Ltd* [2021] WASCA 130; see [60282] and [60912].

In *Re IG Power Callide Ltd (Administrators Appointed) (No 4)* [2024] FCA 1316 (see [41595]), a party to a joint venture agreement sought — without success — to fall back on the good faith clause in the joint venture agreement to overcome deficiencies in the drafting of the pre-emption clause. The pre-emption clause was ineffective because it imposed obligations on the selling joint venturer's holding company, and not on the selling joint venturer itself; the continuing joint venturer argued that the express obligation of good faith obliged the selling joint venturer to procure compliance with the pre-emption obligation, by its holding company. Derrington'J (at [100]-[102]) rejected this argument, pointing out that a subsidiary has no power to compel its holding company to do anything. Furthermore, an obligation of good faith in a contract does not oblige the obligor to act contrary to its own interests, and in the interests of the other contracting party; this was precisely how the continuing joint venturer was seeking to use the good faith clause in the case before the Court.

[60285] Good faith and reasonableness in performing a contract – a "collapsed" distinction?

The general uncertainty over the content of an obligation of good faith has been reflected in the variety of approaches taken by courts to a central question: does acting in good faith mean the same thing as acting reasonably? Courts have expressed different views, but the preponderance of authority now favours interpreting the obligation of good faith and reasonableness "in a composite and interrelated sense": *Virk Pty Ltd (in liq) v YUM! Restaurants Australia Pty Ltd* [2017] FCAFC 190 at [164]. The course of debate on this issue is outlined below.

In *Nauru Phosphate Royalties Trust v Business Australia Capital Mortgage Pty Ltd (in liq)* [2008] NSWSC 916, a contract contained various obligations to use reasonable endeavours, or act reasonably. In an action for breach of the contract, it was claimed that these obligations had been breached. In the alternative, claims were made for breach of implied obligations of good faith and fair dealing. Einstein J advanced the proposition that the distinction between contractual obligations of good faith and obligations of reasonableness had been "collapsed". For this he relied on the judgments of the NSW Court of Appeal in *Burger King Corp v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558; [2001] NSWCA 187 (see [60720]) and *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 (see [60760]), as well as the judgment of Barrett J in *Overlook Management BV v Foxtel Management Pty Ltd* (2002) Aust Contract R 90-143; [2002] NSWSC 17 (see [60740]). In either case, the obligation was effectively an obligation to "eschew bad faith" (citing *Overlook*, [68]). Collapsing this distinction meant that it was unnecessary for him to give further consideration to the claims for breach of implied obligations of good faith, since they added nothing to the claims for breach of express obligations of reasonableness.

Equivalence between obligations of good faith and obligations of reasonableness was expressly rejected by the New Zealand Court of Appeal in *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486, at [17]. However, the approach of Einstein J is similar to that taken by Pagone J of the Victorian Supreme Court in *Network Ltd v Speck* [2009] VSC 235. In that case it was held that an obligation to act in good faith arose – by construction of the language used, rather than by implication – where a contract referred to acting reasonably. A purchaser was entitled to terminate an acquisition agreement and recover its deposit if the purchaser became aware of a material adverse effect as a result of its due diligence investigation. "Material adverse effect" was defined as something which, if known, would cause the purchaser (acting reasonably) to seek to reduce the purchase price. It was held that this language in the definition of the termination trigger had the effect of requiring the right of termination to be exercised in good faith. On the evidence, the right had not been exercised in good faith but for the collateral purpose of securing more time to arrange funding or renegotiate the sale terms.

Although *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* (2010) 15 BPR 28563; [2010] NSWCA 268 (see [60280]) was primarily a termination case at first instance, the emphasis on appeal was on a claim for damages for breach of an express obligation of good faith in relation to the performance of a contract. The judgments of Allsop P and Hodgson JA demonstrate that an express good faith obligation does have meaningful content and needs to be recognised as a significant influence on contractual performance. Allsop P referred to the "controversy" over the tendency of courts to equate reasonableness with fair dealing and good faith, at [15].

In *Sydney Attractions Group Pty Ltd v Schulman* [2013] NSWSC 858, the NSW Supreme Court (Sackar J) considered a clause which obliged the purchaser of a business "acting in good faith [to] use its commercial judgment to maximise economic returns from" the business, until certain payments due from the purchaser had been made. Sackar J commented that the clause was not entirely clear, but expressed the view (at [277]) that the requirement to act in good faith did include an obligation to comply with standards of conduct that were reasonable having regard to the interests of the parties. He cited *Macquarie International Health* as authority for this view; in particular, the reference at paragraph [146] of that case to the paper by Sir Anthony Mason (see [60280]). However, on analysis of the evidence (including expert evidence) in the case before him, Sackar J was not persuaded that the purchaser's exercise of commercial judgment was unreasonable.

In *North East Solution Pty Ltd v Masters Home Improvement Australia Pty Ltd* [2016] V ConvR 54-873; [2016] VSC 1, Croft J considered an express obligation on the parties to act "reasonably and in good faith" in resolving differences in relation to certain issues. The defendants argued that courts had tended to equate reasonableness with or into fair dealing and good faith; in other words, to collapse the distinction. After reviewing the authorities, Croft J rejected the argument, expressing the view (at [72]) that while there was considerable overlap between the obligation to act reasonably and the obligation to act in good faith, "the concepts are not co-extensive and are not to be conflated".

The decision of Croft J was overturned on appeal (*Masters Home Improvement Pty Ltd v North East Solution Pty Ltd* (2017) 372 ALR 440; [2017] VSCA 88), on the ground that the evidence did not support the inferences drawn at first instance, in arriving at the conclusion that the defendants had failed to act reasonably and in good faith. The "bifurcation" of the duty into separate components of reasonableness and good faith was raised in submissions on the appeal. The Court of Appeal did not deal specifically with this issue, but said (at [99]) it was sufficient to note that the contractual duty to act reasonably and in good faith encompassed three basic obligations: (a) to act honestly and with fidelity to the bargain; (b) not to undermine the bargain or the substance of the contractual benefit bargained for; and (c) to act reasonably and with fair dealing having regard to the interests of the parties (which will at times be in conflict), and to the provisions and objectives of the contract objectively ascertained. These are the same three elements as were identified by Allsop P (as he then was) in *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268 at [12], and again (as Allsop CJ) in the Federal Court decision in *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199; [2015] FCAFC 50 at [288]. It would appear that, on this analysis, breach of any of the three "basic obligations" will result in a breach of an express obligation to act reasonably and in good faith.

Edelman J (then a judge of the Federal Court) considered the content of an implied obligation of good faith in *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825 at [1003]ff; see [60905]. His Honour referred with approval to Victorian Court of Appeal authorities denying that an obligation of good faith should be implied as a matter of law into all commercial contracts, and cited two reasons for this. First, implication required close focus on the terms of the individual contract; and second, the content of "good faith" could differ from one contractual content to another. Focusing on the content of an implied obligation of good faith in the context of a contractual clause empowering one party to act to the detriment of another, his Honour said:

> the content of the norm of good faith has often been described as requiring "reasonableness" in the exercise of the power, or, in more detail, "to act reasonably and with fair dealing having regard to the interests of the parties …".

This is the third of the three "basic obligations" referred to in *Macquarie International Health*, *Paciocco* and *Masters Home Improvements*. The analysis by Edelman J suggests that, while all three basic obligations making up the obligation of good faith should be recognised, where the context involves an implied limit on the exercise of a contractual power, the third obligation – acting reasonably and with fair dealing having regard to the interests of the parties, recognising the potential for those interests to conflict – will usually be most relevant.

Virk Pty Ltd (in liq) v YUM! Restaurants Australia Pty Ltd [2017] FCAFC 190 (the *Pizza Hut* case – analysed more fully at [60910]) concerned the exercise of a franchisor's contractual power to fix maximum prices for pizzas. The franchisees complained that the power had been exercised in a way that reduced or eliminated the profitability of their businesses. Both sides conceded the existence of an implied obligation to act reasonably and in good faith. At first instance, it was held that while the franchisor might have exercised its power on the basis of a poor business judgment, it had not acted dishonestly, in bad faith or with reckless disregard for the franchisees. On appeal to the Full Federal Court, the franchisees argued that the duty to act reasonably required the franchisor to use due care to ensure that the exercise of its contractual power produced a reasonable outcome. Rejecting this argument, the Full Court held that an implied obligation of good faith and reasonableness was not to be separated into distinct components of good faith and reasonableness. It was to be construed "in a composite and interrelated sense" so that reasonableness was to be determined by reference to the norms underlying the concept of good faith, not by reference to an objectively ascertained duty to exercise powers in a way that would produce a reasonable outcome.

In *ACCC v Geowash Pty Ltd (No 3)* [2019] FCA 72 at [746], Colvin J reviewed "the current state of the unwritten law as to the meaning of good faith", and set out a seven-point summary: see [60935]. The summary included the following proposition:

> where the scrutinised conduct, viewed in the particular context, is objectively unreasonable then the unreasonableness may form part of the basis for a conclusion that there has been a lack of good faith, but objective unreasonableness is insufficient of itself to amount to a lack of good faith...

The "imposition of an objective standard of mere reasonableness" was rejected by the New South Wales Court of Appeal in *United Petroleum Pty Ltd v Coastal Service Centres Pty Ltd* [2024] NSWCA 97 at [102]-[106]. In the leading judgment in that case, Basten AJA analysed the seminal authorities on the implied duty of good faith and reasonableness, and wrote (at [103]):

> Nor is it clear that the concept of unreasonableness engaged in those cases is anything less than a standard of gross or serious unreasonableness, described in public law as legal unreasonableness.

[The next text page is 81301]

STATUTORY OBLIGATIONS OF GOOD FAITH

A catalyst for articulation of the unwritten law

[60930] Good faith as an element of statutory unconscionable conduct

One of the indicators of "statutory unconscionability" (as opposed to unconscionability under the unwritten law) is the extent to which the parties have acted in good faith; see Australian Consumer Law ss 21, 22(1)(l), 22(2)(l); *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CB, 12CC(1)(l), 12CC(2)(l).

Paciocco v Australia & New Zealand Banking Group Ltd (2015) 236 FCR 199; [2015] FCAFC 50 was a case concerned with the doctrine of penalties, in its application to bank fees, and in that context is considered at [105355]. However, the plaintiff had raised an alternative plea of statutory unconscionable conduct. In dealing with the unconscionable conduct claim on appeal to the Full Federal Court, Allsop CJ took the opportunity to comment on the expression "good faith" as used in the sections cited above. His Honour said (at [288]–[289]):

> The usual content of the obligation of good faith that can be extracted from [the leading appellate decisions – citations omitted] is an obligation to act honestly and with a fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.
>
> None of these obligations requires the interests of a contracting party to be subordinated to those of the other. It is good faith or fair dealing between the parties by reference to the bargain and its terms that is called for, be they both commercial parties or business dealing with consumers.

The content of the expression "good faith" did not attract comment in the High Court's judgments on appeal: *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 333 ALR 569; 90 ALJR 835; [2016] HCA 28.

As pointed out by Edelman J in *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825 at [1003]ff, the good faith concept outlined by Allsop CJ overlaps with established implied obligations of cooperation and honesty, so the only "new" content for the implied obligation of good faith is a duty to act reasonably and with fair dealing.

Failure to act with good faith was a factor in the finding of unconscionable conduct in *Euromark Ltd v Smash Enterprise Pty Ltd* [2021] VSC 97 (see [60282]) and also in *Lindfield NSW Pty Ltd v Netdeen Pty Ltd (t/as GJ Gardner Homes) (No 3)* [2024] NSWSC 1305, [194]-[217].

Breach of an express or implied duty of good faith may be pleaded as one element of a claim of statutory unconscionability under s 21 of the Australian Consumer Law: see for example the

Lindfield NSW case (above) and *Brighton Automotive Holdings Pty Ltd v Honda Australia Pty Ltd* [2024] VSC 262 at [358]-[365] (where the statutory unconscionability claim failed — see [60280]). Reliance on statutory unconscionability, rather than simply on breach of an express or implied term of good faith, may be viewed as an attractive option for plaintiffs where the contract involves the supply or acquisition of goods or services, and particularly where other aspects of unconscionability (such as disparity in bargaining power, discriminatory treatment or misleading or deceptive conduct) are alleged to form part of the impugned conduct.

[60935] The Franchising Code of Conduct – "good faith within the meaning of the unwritten law"

The current version of the *Franchising Code of Conduct* is contained in Sch 1 to the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014*, made under s 51AE of the *Competition and Consumer Act 2010* (Cth). It applies to conduct occurring on or after 1 January 2015.

Cl 6(1) of the Code provides:

> Each party to a franchise agreement must act towards another party with good faith, within the meaning of the unwritten law from time to time, in respect of any matter arising under or in relation to:
>
> (a) the agreement; and
>
> (b) this code.
>
> This is the *obligation to act in good faith*.
>
> Civil penalty: 600 penalty units.

In addition to the civil penalty consequences, failure to comply with the Code is a contravention of s 51ACB of the *Competition and Consumer Act 2010*, and can be the basis of a civil action for injunctive relief under s 80 of that Act, or damages under s 82: see *Digital Central (Assets) Pty Ltd v Stefanovski* [2017] FCA 738 at [126]. For an analysis of cl 6 of the *Franchising Code of Conduct* and its background, see *ACCC v Geowash Pty Ltd (No 3)* [2019] FCA 72 at [684]ff.

Setting the statutory standard of conduct by reference to the unwritten law requires courts, which are called upon to apply the standard, to determine what "good faith within the meaning of the unwritten law" means.

In *ACCC v Ultra Tune Australia Pty Ltd* [2019] FCA 12 at [351], Bromwich J accepted a submission by the ACCC that the reference in cl 6(1) to "the unwritten law from time to time" was intended to apply common law concepts to give content to the statutory obligation of good faith imposed by the Code. After a brief review of authorities on the content of the obligation of good faith at common law, Bromwich J went on (at [359]–[360]) to accept a further submission by the ACCC that while the obligation of good faith required the franchisor to consider the position and interests of the franchisee, it did not prevent the franchisor from preferring its own commercial interests where the interests were in competition: "What is prohibited is conduct that harms the franchisee where such conduct is not necessary for the protection of the franchisor's interests". On the facts before the Court, Bromwich J found that the conduct of Ultra Tune in relation to a particular potential franchisee was a serious contravention of the obligation to act in good faith: [362]. Although Ultra Tune appealed on other issues, it did not challenge the finding of the trial judge that the obligation of good faith had been breached: *Ultra Tune Australia Pty Ltd v ACCC* [2019] FCAFC 164.

Another enforcement action by the ACCC, involving claims for contravention of a number of statutory provisions including cl 6(1) of the *Franchising Code of Conduct*, came before the Federal Court (Colvin J) in *ACCC v Geowash Pty Ltd (No 3)* [2019] FCA 72. At [706]ff, Colvin J reviewed Australian good faith jurisprudence in some detail, concluding (at [746]) with the following summary of "the current state of the unwritten law as to the meaning of good faith for the purposes of cl 6(1) of the Code":

> (1) the term "good faith" imports a normative standard to be observed by the parties in dealings as to matters to which the standard is applied;
>
> (2) the normative standard embraces an obligation to act honestly and with fidelity to the bargain concluded between the parties;
>
> (3) the normative standard also embraces an obligation to act co-operatively in matters related to performance;
>
> (4) the standard does not require a party to subordinate its legitimate interests to those of the counterparty, but … does require due regard to the legitimate interests that both parties have in the performance of the contract they have made;
>
> (5) conduct which is dishonest, capricious, arbitrary or motivated by a purpose which is antithetical to the evident object of any provision of the franchise agreement or the Code … or conduct that is otherwise motivated by bad faith will not meet the standard;
>
> (6) where the scrutinised conduct, viewed in the particular context, is objectively unreasonable then the unreasonableness may form part of the basis for a conclusion that there has been a lack of good faith, but objective unreasonableness is insufficient of itself to amount to a lack of good faith; and
>
> (7) the quality of the scrutinised conduct is to be evaluated having regard to the circumstances of the particular parties, particularly their sophistication, commercial power and the relative significance for each party of the subject matter of the conduct.

Applying these principles, Colvin J concluded that the conduct of the franchisor in relation to certain franchisees was dishonest, and therefore in breach of cl 6(1) of the *Franchising Code of Conduct*: [765].

[The next text page is 81601]

CONCLUSION

[60940] Good faith and reasonableness

The duty of good faith and reasonableness is not yet a fully settled concept under Australian law, whether it is in the form of an express obligation to act in good faith when negotiating or performing a contract, or a putative rule of construction or implied term fettering the exercise of contractual rights or powers. We still have no definitive statement on the subject from the High Court, although some guidance (tending towards a construction-based approach) may be derived from the judgments in *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169; 312 ALR 356; (2014) 88 ALJR 814; [2014] HCA 32. Intermediate appellate courts have demonstrated fluctuating levels of enthusiasm for the role of good faith in the law of contracts. However, a consensus now appears to have emerged that in appropriate cases, both express and implied obligations to act in good faith may be enforceable. Consensus is also emerging on the content of the duty, with courts frequently quoting the passage from the Federal Court decision in *Paciocco v Australia & New Zealand Banking Group Ltd* (2015) 236 FCR 199; [2015] FCAFC 50 at [288]-[292], in which Allsop CJ described "the usual content of the obligation of good faith": see [60930]. However, the success rate in claims for breach of the duty remains low, as courts frequently hold as a matter of fact that impugned conduct does not exhibit the requisite degree of unreasonableness or bad faith.

[60960] Express obligations

In the area of express good faith obligations, the decision of the NSW Court of Appeal in *United Group Rail Services Ltd v Rail Corp (NSW)* (2009) 74 NSWLR 618; [2009] NSWCA 177 has established a frame of reference based on the judgment of Kirby P in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1. The position following *United Group* is that an express contractual obligation to negotiate in good faith will be enforceable, if the content of the obligation can be established with certainty from the terms and context of the contract. It is likely to be easier to find certainty where the clause is part of an existing, enforceable contract – for example, an obligation to negotiate settlement of disputes in good faith, an obligation to negotiate in good faith on pricing for future contract periods, or an obligation to negotiate a more detailed contractual arrangement.

The subsequent decision of the NSW Court of Appeal in *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* (2010) 15 BPR 28563; [2010] NSWCA 268 extends the *United Group* reasoning to express obligations of good faith arising in the course of performance of an existing contract. In this area, the principal area of uncertainty is the scope of the duty, and in particular whether there is an "objective element of reasonableness in fair dealing" (per Allsop P in *Macquarie* at [15]). This concept is now gaining authoritative support; the contrary view expressed by Pullin JA in *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* (2010) 41 WAR 318; [2010] WASCA 222 at [61]), that an express obligation of good faith only required a party to act honestly, is "unlikely [to] be commonly encountered": per Edelman J in in *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825 at [1008].

But there are significant limits on the operation of express obligations to act in good faith: see [60283]. An express obligation of good faith will not extend to restrict conduct outside the scope of the contract in which the express obligation is contained: *Sentinel Robina Office Pty Ltd v Clarence Property Corporation Pty Ltd* [2018] QCA 314 at [16]. Express good faith obligations must also be interpreted having regard to the overall commercial purpose and context of the contract: *Knights Quest Pty Ltd v Daiwa Can Company* (2018) 366 ALR 557; 133 ACSR 374; [2018] VSCA 349.

[60980] Implied obligations and rules of construction

In cases on implied duties of good faith decided since the High Court's decision in *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169; 312 ALR 356; (2014) 88 ALJR 814; [2014] HCA 32 (see [60820]) the "necessity test", as reasserted in *Barker*, has been a decisive factor.

The state of the law in this area also remains unsettled, and the different approaches taken by different judges and courts create confusion for the practitioner. Perhaps the most useful way of concluding an analysis of the implied obligation of good faith is to list and summarise the relatively few cases where it has been held not only that an obligation of good faith should be implied, but also that the obligation has been breached. Following the High Court's decision in *Commonwealth Bank of Australia v Barker*, employment cases are not included. Cases in other areas are:

- *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; 9 BCL 40; [60600]. This case involved the termination of a standard-form construction contract by a Government Minister. The evidence demonstrated that the Minister's representatives had acted unreasonably. All three Justices of Appeal held the termination invalid, although only Priestley JA relied on an implied obligation of good faith and reasonableness (implied either as a matter of fact, or by law).
- *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187; [60720]. This case involved the termination of a franchise agreement. An obligation of good faith was implied; the implication was said to have been by law, although the supporting analysis was unclear. The evidence indicated that Burger King had used contractual powers for the purpose of preventing Hungry Jack's from performing its obligations, in order to set up grounds for termination. Burger King had also colluded in a breach of fiduciary obligations by a senior executive of Hungry Jack's.
- *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2005] Aust Contract Reports 90-213; [2005] FCA 288; [60770]. This case involved termination of a sub-licence for the use of trade marks. The implied obligation of good faith was a secondary cause of action, but Finkelstein J (having found for Underworks on the primary issue) went on to hold that an obligation should be implied (emphatically, as a matter of law – but this must now be doubted: see [60770]) and had been breached. He found that the conduct of Pacific Brands had been motivated by bad faith; it had decided to get rid of Underworks, made life difficult for Underworks to lead it into breach, then shown willingness to exploit any breach, however trivial.

  On appeal, the Full Federal Court focused on the primary issue, but expressed reservations about the findings on good faith. In particular, Emmett J questioned whether the conduct of Pacific Brands could properly be characterised as motivated by bad faith.
- *Council of the City of Sydney v Goldspar Australia Pty Ltd* [2006] FCA 472; [60800].

This case involved termination of a contract for supply of "smart poles" for street decoration. Gyles J held that the Council was, by implication as a matter of fact, subject to an obligation to administer the termination clause "in good faith in the sense of honestly". The Council had not done this, because it had deliberately set out to create a basis for termination by making unreasonable demands for performance, and had not acted properly in issuing a "show cause" notice and evaluating Goldspar's response. Gyles J said: "I regard the whole exercise as designed to effect the anterior purpose of preventing Goldspar from completing the contract": [187].

- *Maitland Main Collieries Pty Ltd v Xstrata Mt Owen Pty Ltd* [2006] NSWSC 1235. This decision of Bergin J in the NSW Supreme Court of NSW belongs to a different genre, because an obligation of good faith was implied as a qualifier on performance obligations, as opposed to a limit on the right to terminate. The basis for implication (as a matter of fact) was that it was necessary for the plaintiff to have the benefit of the contract. The distinction in this context between the implied duty of cooperation and the implied duty of good faith is not clear.
- *Insight Oceania Pty Ltd v Philips Electronics Australia Ltd* [2008] NSWSC 710; [60860]. Another decision of Bergin J, this case involved termination of a distributorship agreement. Bergin J found that Philips had set out to get rid of Insight as a distributor, had deliberately set an unreasonable sales goal, and had engaged in conduct that was "unconscionable". This was held to breach an obligation of good faith, implied as a matter of fact.
- *AMC Commercial Cleaning (NSW) Pty Ltd v Coade* [2010] NSWSC 832; [60870]. This case is the only one where it has been held that an obligation of good faith was implied by law, on a "class of contract" basis, and breached. Rein J repeated his view, expressed earlier in *J F Keir Pty Ltd v Priority Management Systems Pty Ltd* [2007] NSWSC 789 at [24-7], that franchise agreements are a class of contracts into which an obligation of good faith should always be implied. While this view on the basis for implication may not be free from controversy, his Honour's statement of the content of the duty of good faith in the *AMC case* at [7] provides a good summary of the authorities, and the case also provides a good example of dishonest and underhand business conduct which will be found to breach the duty. It should also be noted that cl 6(1) of the *Franchising Code of Conduct*, contained in Sch 1 to the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth), now imposes an obligation to act with good faith, "within the meaning of the unwritten law" into agreements that fall within the scope of that Code: see [60935].
- *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49; [60880]. On its face, this case (although a decision at first instance) represented a bold return to the broadest basis for implying a duty of good faith – the duty is to be implied in all commercial contracts: [596]. Bleby J appears to have been encouraged to return to a *Burger King* approach by the pro-good faith statements of the NSW Court of Appeal in *United Group Rail Services Ltd v Rail Corp (NSW)* (2009) 74 NSWLR 618; [2009] NSWCA 177. He did not consider himself bound by the narrower approach taken by appellate courts in *Vodafone* ([60760]), *Esso Australia Resources* ([60780]) and *Garrott and Blyton*. However, he did go on to hold that if he was wrong about universal implication, the contract before him (a complex construction contract) was one where an obligation of good faith should be implied. In that respect the case is similar to *Maitland Main Collieries*; it applies an implied obligation of good faith in the *performance* of a contract. However, when it comes to the content of the duty, it

does not seem to go beyond the duty of cooperation recognized in *Secured Income Real Estate (Aust) Ltd v St Martins Investment Pty Ltd* (1979) 144 CLR 596; 53 ALJR 745; [1979] HCA 51 at 607-8 (CLR).

- *Specialist Diagnostic Services Pty Ltd v Healthscope Ltd* [2012] VSCA 175; [60880]. This case is an extreme rarity: a decision of the Victorian Court of Appeal, upholding a claim for breach of an implied duty of good faith – indeed, a claim that had failed at first instance. The decisive factor for the court appears to have been the conduct of the hospital owner (landlord): having covenanted with the tenant not to grant a lease in the hospital precinct to a competing pathology provider, it set up a related pathology provider in adjoining premises and altered the physical structure of the hospital premises so that the competing provider could take delivery of pathology specimens directly of the hospital. The implied term was necessary to give effect to the express terms of the lease – without it, the landlord's conduct would have deprived the tenant of a key benefit of the lease.
- *Video Ezy International Pty Ltd v Sedema Pty Ltd* [2014] NSWSC 143, where a franchisor was held to have breached the franchise agreement by allowing related companies to compete with the franchisor in what was supposed to be an exclusive franchise territory.
- *Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd* [2015] FCAFC 127, another franchise case where the franchisor was held to have breached an implied obligation of good faith (coextensive with the implied duty of cooperation) by giving permission for a competitor to operate within the franchise territory.
- *Parkinson v Mackay Sugar Ltd* [2018] QSC 168 (see [60910]) involved a contract between a sugar mill and cane growers. The Queensland Supreme Court (Holmes CJ) was prepared to imply an obligation on both parties to act reasonably and in good faith, with the result that the mill was unable to impose a levy on growers without consulting their bargaining representatives. A strong influence on the court was the nature of the contract, which required close cooperation between the mill and the growers' agents (the bargaining representatives) "at all points". This reference to the obvious need for cooperation to make the contract work picks up a theme that is identifiable in the *Alstom* case (above and [60880]) and also in the decision of the Tasmanian Full Court in *Tote Tasmania Pty Ltd v Garrott* (2008) 17 Tas R 320; [2008] TASSC 86; [60860] (first type of contractual power, requiring cooperation).
- *Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd* [2019] NSWCA 87 resembled *Renard*, in that it involved the giving of a "show cause" notice, followed by termination. The approach of the terminating party was "redolent of bad faith", in that it proceeded to termination with a closed mind and gave no consideration to the substance of the counterparty's response to the show cause notice.

Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd [2019] QSC 163 involved the "cute" use of a poorly drafted clause in a contract, for a purpose other than the purpose for which the power was conferred. Decided at first instance by the implication of a term of good faith and fair dealing, the case was treated differently on appeal. In *Glencore Coal Queensland Pty Limited v Aurizon Network Pty Ltd* [2020] QCA 182, the Queensland Court of Appeal relied on construction, or alternatively the implication of a specific limiting term, as grounds for dismissing Glencore's appeal.

Recent cases demonstrate that courts will decide "unfair dealing" cases in favour of plaintiffs on the basis of breach of express obligations (either express obligations of good faith, or other express obligations) when possible, although breach of an implied obligation may be referred to as an alternative or "fallback" ground: see for example *Hewlett Packard Pty Ltd v Subasic* [2021] ACTCA 3 ([60912]) at [85] and *Euromark Ltd v Smash Enterprise Pty Ltd* [2021] VSC 97 ([60282]) at [797].

Only in the thirteen cases listed above has the ultimate result been determined by a finding that an implied obligation of good faith existed and had been breached. Six of the cases involved franchise, distributorship or licence agreements. As noted in [60935], in relation to conduct occurring after 1 January 2015 an obligation to act with good faith is implied into franchise agreements by cl 6(1) of the *Franchising Code of Conduct* contained in Sch 1 to the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth).

The NSW Court of Appeal said in the 2007 *CGU case* ([60850]) that a duty may be implied as a matter of law in specific classes of contract, or as a matter of fact to give business efficacy to a particular contract. Appellate decisions in Victoria *(Esso)* and Tasmania *(Tote Tasmania)* support the availability of implication as a matter of fact, but are less receptive toward implication by law. The difference of view on this issue has caused difficulty for judges at first instance: see *Tresedar Pty Ltd v Property Builders (Constructions) Pty Ltd (in liq)* [2014] NSWSC 382 at [160]. Edelman J, then a judge of the Federal Court, expressed a firm view against *universal* implication of a duty of good faith into commercial contracts in *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825 at [1007]. First instance judges in the Supreme Court of Victoria are now consistently treating implication as a matter of fact and applying the *BP Refinery* tests: see [60911] and [60913].

The judgment of the WA Court of Appeal in *Scanlan v 2-4 McCabe Pty Ltd* [2023] WASCA 135 contains (at [89]) a concise example of circumstances where an obligation of good faith, implied as a matter of fact, might be found to have been breached: where a power (in that case, a power of termination) is used for a purpose going beyond the protection of the user's legitimate interests, in a way which undermines the apparent objective intention of the parties (as determined by construction of the contract).

It is often difficult to distinguish the implied obligation of good faith from the implied obligation of cooperation recognised by the High Court in *Secured Income Real Estate (Aust) Ltd v St Martins Investment Pty Ltd* (1979) 144 CLR 596; 53 ALJR 745; [1979] HCA 51 at 607-8 (CLR). The similarity of these two obligations is particularly evident where the obligation relates to performance (as distinct from termination) of a contract. It seems that *Maitland Main Collieries* could have been decided by reference to the *Secured Income* duty, and in *Alstom* the two duties were pleaded and accepted as operating in parallel (along with a duty not to prevent or hinder the plaintiff's performance of the contract): *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49 at [1423]. In *Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd* (2015) 237 FCR 534; [2015] FCAFC 127, the Full Federal Court recognised an implied duty of good faith, but concluded that in the circumstances of the case it added nothing to the implied duty of cooperation; see also *IW & CA Price Constructions Pty Ltd v Australian Building Insurance Services Pty Ltd* [2017] QSC 39. In the first instance judgment in the *Aurizon* case (*Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd* [2019] QSC 163 at [223]), Jackson J referred to the "loose" analogy between the *Secured Income* duty and the implied term of good faith and fair dealing.

The *Secured Income* duty of cooperation has the advantage (from a plaintiff's point of view) that it is to be implied as a matter of law, avoiding the need for argument over whether implication passes the necessity test.[1] However, the reasoning of the Full Federal Court in *Marmax Investments* (at [130] ff) suggests that the concept of necessity will be relevant in determining the scope of the implied obligation to cooperate. The question here is: what is necessary to enable performance? This is very similar to the necessity test for implication: what is necessary to give efficacy to the contract?

In the broader context, the lesson from the cases is that practitioners wishing to plead or argue an implied obligation of good faith must build their case on something more than the plaintiff's instinctive feeling that he or she has been treated unreasonably. What will be required is a foundation of evidence showing that the defendant has gone beyond merely acting in its own commercial interests, and has used contractual powers arbitrarily, capriciously or for an extraneous purpose. The analysis in this chapter indicates that this area of law works on a "pull" rather than "push" basis: judges tend to be pulled to a conclusion by their view of the evidence, rather than pushed to a conclusion by the overwhelming force of principle.

The corollary proposition is that in an "extraneous purpose" case, failure to plead breach of an implied term of good faith may be fatal: see *Bytan Pty Ltd v BB Australia Pty Ltd* (2012) 41 VR 46; [2012] VSCA 233, discussed at [40320].

Those who are drafting contracts should, if they wish to be able to rely on an obligation of good faith, insert the obligation expressly. This will at least take the potentially difficult step of implication out of the enforcement process; but even where an express obligation of good faith is concerned, it is likely to be necessary to produce evidence of conduct which amounts to bad faith or subverts the contract, before a breach will be established.

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1 But note the view expressed by P McMurdo J in *Jackson Nominees Pty Ltd v Hanson Building Products Pty Ltd* [2006] QCA 126 at [50], that the duty is implied *as a matter of fact* where cooperation relates to acts that are not necessary to the performance of fundamental obligations; and see the comments by Jackson J in *Wellington v Huaxin Energy (Aust) Pty Ltd* [2019] QSC 18 at [54].

[The next text page is 86001]

claim that default interest amounts to a penalty must be adequately supported by evidence, with the onus being on the party alleging penalty – see [105395]. However, if the party alleging "not penalty" asserts positively that the challenged stipulation was a genuine pre-estimate of loss, it will bear the onus of proving that assertion: see *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* (2016) 93 NSWLR 231; [2016] NSWCA 328 at [111].

Default interest rates were classified as penal in *Demlakian Engineers Pty Ltd v Owners of Strata Plan 80453* [2014] NSWSC 401 (see [94] ff) and *Hawker v Ocean Style Pty Ltd* (2014) 85 SR (WA) 158; [2014] WADC 39 (see [44] ff).

1 An interesting aspect of the first instance decision in *Kellas-Sharpe v PSAL Ltd* [2013] 2 Qd R 233; [2012] QCA 371 was that although reversion from the "concessional rate" to the higher rate on default was not found to be a penalty, the judge did find that it was unconscionable in terms of s 12CC of the *Australian Securities and Investments Commission Act 2001* (Cth) and s 51AC of the *Trade Practices Act 1974* (Cth) to continue charging interest at the higher rate (capitalised monthly) for an extended period when the loan had ceased to be a short term one: see at [23]. This finding led to an order that loan documents should be read and construed as if the higher rate of 7.5% per month (capitalised monthly) was reduced to 5% and the provision for monthly capitalisation was deleted. This aspect of the first instance judgment was not the subject of appeal.

[105341] Default interest cases after Cavendish Square and Paciocco

The authorities on the application of the penalty doctrine to cases where interest rates increased prospectively from the time of default in payment were reviewed by the UK Supreme Court in *Makdessi v Cavendish Square Holdings BV* [2016] AC 1172; [2015] 3 WLR 1373; [2016] 2 All ER 519; [2015] UKSC 67 at [26] to [28] per Lords Neuberger and Sumption; [147] to [150] per Lord Mance; [222] to [225] per Lord Hodge.

The determination of proportionality in default interest cases must now be carried out having regard to the approach of the High Court in *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525; 90 ALJR 835; 333 ALR 569; [2016] HCA 28, where the majority accepted that the base for the proportionality calculation should include all of the interests of the bank that were affected by late payment, through operational costs, loss provisioning and regulatory capital costs. Contrast the dissenting opinion of Nettle J, who would have limited the base for the proportionality calculation to the amount recoverable as damages for breach of contract.

Wu v Ling [2016] NSWCA 322 was the first appellate decision to consider default interest rates in the post-*Paciocco* era. The NSW Court of Appeal applied the test articulated by Gageler J in *Paciocco* (2016) 90 ALJR 835; [2016] HCA 28 at [164]: was the "negative incentive" of the default interest rate so far out of proportion with the lender's positive interest in performance that it could only amount to deterrence by threat of punishment? The Court of Appeal dismissed the borrower's appeal in *Wu v Ling*, concluding that "there was no basis upon which the primary judge could have found that the only purpose of the default interest rate was to punish the appellant": per Bergin CJ in Eq at [122]. This is essentially the same test used in the pre-*Paciocco* cases such as *Bay Bon* (above).

In *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* (2016) 93 NSWLR 231; [2016] NSWCA 328, the proportionality test was again applied; the 2% increment applied to the interest rate when default occurred could not be regarded as extravagant or unconscionable in comparison with the loss that might foreseeably be suffered by the lender: [95]. The analysis in *Arab Bank* has been influential in later cases, particularly for its "distillation" of the disparate reasons in *Paciocco*. The case also illustrates the importance of expert evidence, and in particular the importance of presenting expert evidence which is conceptually sound.

By contrast, a default interest provision was held to be a penalty in *Broadway Plaza Investments Pty Ltd v Broadway Plaza Pty Ltd* [2020] NSWSC 1778. In that case, Ward CJ in Eq held (at [2829] to [2859]) that a default interest provision of 9% per month (108% per annum) was out of all proportion to the lender's interest in repayment of a loan made to provide vendor finance for the purchase of a commercial development site. A significant influence on the decision was the contrast between this default interest rate, and the much lower interest rate payable under the property purchase agreement in the event of a delay in settlement; her Honour considered that this lower rate "demonstrates the parties' agreement on true prejudice to which [the vendor/lender] would be exposed from a delay in receipt of the purchase [money]".

A default interest provision was again held to be unenforceable as a penalty in *Aquamore Credit Equity Pty Ltd v Hung* [2021] NSWSC 1681. That case concerned short term lending for property development. The initial "Lower Rate" of interest was 2.5% per month, but on the occurrence of any one of sixteen events of default, a "Higher Rate" of 5% per month became payable for as long as the event of default lasted. Meagher JA held (at [142]) that at the time of commencement of the loan, it would not have been possible to determine that the Higher Rate was a genuine pre-estimate of loss, or a rate which reflected increased credit risk:

- First, accurate estimation in advance was not possible because of the many different events which might trigger the clause.
- Second, the clause did not increase the interest rate for the balance of the loan period, as it might have been expected to do if it was calculated by reference to increased credit risk; the Higher Rate only applied during the continuance of an event of default.
- Third, an interest uplift from 30% per annum to 60% per annum was out of proportion to any likely increase in credit risk.

The evident purpose of the clause was to discourage any action or inaction by the borrower that might result in an event of default, and encourage the borrower to rectify any event of default that did occur.

In *Bellas v Powers* [2023] NSWSC 1198, the facts were similar to *Aquamore* and the Court (Robb J) came to the same conclusion: that the default interest rate was a penalty ([71] ff).

In *Jasper Nominees Ltd v Kairouz* [2023] VSC 718, very high default interest rates were held not to be penal. Citing *Arab Bank*, M Osborne J referred (at [363]-[364]) to the high-risk nature of the loan and the fact that the parties "were persons of considerable commercial sophistication and had no shortage of legal advice, or access to legal advice". Further, the defendant guarantors could not establish that, when the loan documents were construed as a whole, the purpose of the default interest clauses was to punish the borrower for default; the clauses simply ensured that interest would be paid in the event of a payment default.

In *Taycon Pty Ltd v Williams* [2023] QSC 297 Applegarth J, applying *Paciocco* and *Arab Bank*, held (at [225]) that a default interest rate of 20% per annum was "a reasonable reflection of the costs and other disadvantages to Taycon of being kept out of money owed to it". Its purpose was to compensate, not to punish. The parties were of equal bargaining power, and the default interest provision was the product of negotiation between them.

In *Liu v Lam* [2024] NSWSC 1306, a default interest rate of 0.05% per day (18.25% per annum) was held to be penal and unenforceable, on the basis that it was "out of all proportion to, or unconscionable in comparison with, the maximum amount of damage that might be anticipated to flow from the breach" ([804]). Walton J noted that although the plaintiff had given evidence that he might have had to borrow to cover the defendant's failure to make payment when due, the evidence did not establish the amount of interest that would have been payable on any such borrowing.

[105345] Default interest as price of extension of time for payment

In *Moran v Argonaut Equity Partners Pty Ltd* [2021] WASCA 45, a borrower informed the lender that he would be unable to repay his loan on the due date. He sought an extension of time for payment, so that he could seek refinance without being in default. The lender granted the extension request (and subsequently a further extension request), but the extension agreements required the borrower to pay interest at the "default rate" of 5% per month applicable under the original loan agreement. The borrower argued that the default interest obligation imposed by the extension agreements was penal in nature, because it really represented a partial implementation of the default interest provision in the original loan agreement – which was a prima facie penalty. The WA Court of Appeal rejected the borrower's argument, holding (at [81] ff) that the extension agreements were, in substance, new contractual arrangements under which the borrower received new contractual rights – namely extensions of the time for repayment of the loan. The obligation to pay interest at the default rate was the contractual price for those new rights; it did not arise from any breach of the original loan agreement, so the penalty doctrine was not engaged.

[105350] The "no breach, no penalty" debate: Interstar and Andrews

A recurring issue in penalty cases is whether the penalty doctrine applies to consequences which are imposed by contractual provisions, not as a result of breach of a contractual obligation, but as a result of some other stipulated event. These events are commonly referred to in contracts as events of default, and when they occur they give the non-"defaulting" party various rights, usually including a right of termination. Typically, the list of events of default in a contract includes some events that are breaches of other provisions, and some that are not.

In a series of cases between 2008 and 2011, intermediate appellate courts in NSW, Victoria and South Australia held that the penalty doctrine applied only where a breach of contract had occurred. However, this limitation on the penalty doctrine was rejected by the High Court in *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; [2012] HCA 30.

The issue came before Brereton J in the NSW Supreme Court in *Integral Home Loans Pty Ltd v Interstar Wholesale Finance Pty Ltd* (2007) 2 BFRA 23; [2007] NSWSC 406. His Honour delivered a detailed and carefully reasoned judgment, striking down the relevant clause as a penalty. The judgment gave a broad scope to the penalty doctrine, but it was comprehensively overturned on appeal: *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd* (2008) 257 ALR 29; [2008] NSWCA 310.

Integral Home Loans, a loan originator, entered into loan origination and management agreements with Interstar, a lender. For each loan originated under the agreements, Integral was entitled to an upfront fee, as well as ongoing "trailer commissions". Interstar was entitled to terminate the agreements in various events, including where Integral had engaged in deceptive or fraudulent activity in relation to a loan, or Interstar in its reasonable opinion thought this had happened. Clause 20(3)(c) in each agreement provided that if the agreement was terminated on this ground, Integral had no further right to receive trailer commission on any loan.

Interstar terminated the agreements after forming the opinion that Integral had engaged in deceptive conduct. Integral disputed the right of Interstar to terminate, but also claimed that cl 20(3)(c) was an unenforceable penalty.

On appeal Allsop P, with Giles and Ipp JJA agreeing, held that cl 20(3)(c) was not a penalty for a number of reasons. His analysis began by considering the proper construction of the contract. At first instance, Brereton J had held that the trailer commissions were earned and accrued when loans were made. Applying ordinary principles of construction, Allsop P came to a different view: the trailer commission was not earned until the consideration for it – both origination and management of the loan – was undertaken (at [79]). The commission had not been earned, because the management of the loan was not complete; and the right to receive it was lost on termination: [84]. Thus cl 20(3) could not be a penalty; it was part of the definition of the entitlement, not an instrument for taking away an accrued entitlement: [94].[1]

This conclusion was sufficient to dispose of the appeal. However, Allsop P went on to consider other issues dealt with in the judgment at first instance – primarily the extent of the law of penalties.

First, the clause attacked as a penalty in this case did not require the payment of money. If (contrary to the view of the Court of Appeal) the right to trailer commission had accrued, the clause took away this accrued right. Allsop P noted the authorities establishing that a stipulation requiring transfer of property could be a penalty, just as much as a clause requiring payment of money: [101]. It was "but a small step" from accepting that the penalty doctrine applied to a transfer of property, to applying it to "forfeiture of property in a clause designed to encourage performance". Allsop P pointed out that at this point, "[t]he relationship between penalties and relief against forfeiture becomes less than pellucid". However, he was prepared to assume that the penalty doctrine could apply to forfeiture of rights or property: [104].

Next, Allsop P considered a question which, at first instance, Brereton J had described as the "main issue in the case". This was the question of whether the penalty doctrine could apply to a clause which was triggered by the occurrence of an event of default, as opposed to a breach of contract. In a lengthy and detailed analysis of English and Australian hire-purchase and chattel lease cases, Brereton J had concluded that a provision imposing consequences following termination for an "event of default" may be a penalty, just as much as a provision imposing consequences following breach. The main authorities relied upon for this proposition were cases equating lease termination on an event of default with lease termination on breach of covenant (cited in the first instance judgment at [58]–[60]), and a passage from the judgment of Deane J in *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170; 68 ALR 185.[2]

This reasoning was comprehensively rejected by the Court of Appeal. Indeed, Allsop P expressed the view that it was not open to Brereton J to hold that the penalty doctrine applied where no breach of contract had occurred. This was because the overwhelming weight of authority ("intermediate appellate authorities in Australia, the persuasive view of a unanimous House of Lords, existing High Court authority and other views expressed in the High Court") compelled a conclusion that the doctrine of penalties was limited in its application to circumstances of breach of contract. If a wider doctrine of penalties was to be enunciated, it was for the High Court to enunciate it: [106]. Allsop P went on to analyse the relevant authorities, at [107]–[138].

Finally, Allsop P considered (at [142]) an issue that could arise only if all of his earlier reasoning was wrong: if the penalty doctrine was capable of application to these facts, did the relevant clause impose a penalty? Applying the line of authorities extending from *Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6 and *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79 through to *AMEV-UDC* and *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656; 80 ALJR 219; [2005] HCA 71 (see [105130] – [105290]), his answer was no. It could not be said, at least at the time of making the contract, that the loss of trailer commissions pursuant to cl 20(3)(c) would be "extravagantly and unconscionably disproportionate to the damage that could be caused to Interstar from the perpetration of deceptive or fraudulent activity".

The High Court granted special leave to appeal in the *Interstar* case, but the proceedings were settled before the appeal could be heard. The submissions in support of the special leave application focused on the narrow and semantic difference between termination for breach, and termination as a result of an "event of termination".[3]

On the "no breach, no penalty" issue, the decision of the NSW Court of Appeal in *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd* (2008) 257 ALR 29; [2008] NSWCA 310 was followed by the Victorian Court of Appeal in *Ange v First East Auction Holdings Pty Ltd* (2011) 284 ALR 638; [2011] VSCA 335. The no breach, no penalty principle was also applied by the Full Court of the South Australian Supreme Court in *Diakos v Mason* [2010] SASCFC 37.

Fortunately, another opportunity for the High Court to consider the issue arose quickly, in *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; [2012] HCA 30. In this case, a representative action in the Federal Court, a group of some 38,000 members challenged bank fees charged by the ANZ Bank on deposit accounts and credit card accounts. One ground of challenge was that the obligation to pay the fees was unenforceable as a penalty.

In interlocutory proceedings at first instance, Gordon J found that a number of the fees were payable without any breach of contract. On the authority of *Interstar*, she held that these fees could not be penalties. The applicants sought leave to appeal to the Full Federal Court against this aspect of the decision. The application for leave to appeal was removed to the High Court. In a unanimous judgment the High Court (French CJ and Gummow, Crennan, Kiefel and Bell JJ) granted leave to appeal and upheld the appeal: the fact that the fees were not charged as a result of a breach of contract did not prevent them from being classified as penalties.

The High Court reviewed the origin of the equitable jurisdiction to relieve against penalties, noting that the first field for the operation of the equitable doctrine concerned the enforcement of bonds (ie obligations to pay money if some condition was not performed). As pointed out by Brereton J at first instance in *Interstar*, equity would grant relief against a condition in a bond, whether or not there was a contractual promise to comply with the condition. Courts of equity subsequently extended their jurisdiction to penal provisions in simple contracts, but that extension did not bring about any change in the nature of the jurisdiction: [44]. In holding that the penalty doctrine could only apply where a breach of contract had occurred, the NSW Court of Appeal in *Interstar* had misunderstood the scope of the doctrine: [50].

One of the propositions relied upon by the Court of Appeal in *Interstar* was that the penalty doctrine had disappeared from equity by absorption into the common law action of assumpsit. The High Court examined and dismissed this proposition, concluding (at [63]): "In Interstar the Court of Appeal thus had no basis for the proposition that the penalty doctrine is a rule of law not of equity". As a corollary of this conclusion, the court expressed disapproval of the statement by Mason and Wilson JJ in *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170; 68 ALR 185 at 191 (CLR) that the equitable jurisdiction to relieve against penalties had "withered on the vine": [68].

Following the decision in *Andrews*, it is clear that the penalty doctrine in Australian law is not limited to situations where an actual breach of contract has occurred.

A question identified by the High Court in *Andrews*, but which remained open after the High Court's decision, was whether the relevant fees might be outside the scope of the penalty doctrine for a different reason. The Court referred (at [80]) to the "operative distinction" drawn in *Metro-Goldwyn-Mayer Pty Ltd v Greenham* (1966) 85 WN (Pt 1) (NSW) 468; [1966] 2 NSWR 717 at 723–724 and 727 (NSWR), and much earlier in *French v Macale* (1842) 2 Drury and Warren 269 at 275-6, between a stipulation attracting the penalty doctrine and one giving rise consensually to an additional obligation. The example given in *French v Macale* was a lease of grazing land for two guineas an acre, with the tenant having the right to plough the land and plant a crop on paying additional rent of a further two guineas an acre. Whether this distinction would take the relevant bank fees outside the penalty doctrine was left to be decided in the further course of the bank fees litigation – as to which, see the discussion of *Paciocco v Australia and New Zealand Banking Group Ltd* at [105355]. In the course of his judgment in the *Paciocco* appeal to the Full Federal Court, Allsop CJ observed that "the simplicity of the example given by Lord St Leonards [in *French v Macale*] belies the contestability of the conclusion that might be reached in any given case": *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199; [2015] FCAFC 50 at [201].

In *Helicopters Pty Ltd v Bankstown Airport Ltd* (2010) 15 BPR 28593; [2010] ANZ ConvR 10-041; [2010] NSWCA 178, the NSW Court of Appeal considered a sub-lease containing a rent review clause. The clause gave the sub-lessee the right to object to a rent review initiated by the sub-lessor, but only if the sub-lessee had paid all rent and outgoings then owing under the sub-lease. The sub-lessor initiated a rent review and the sub-lessee objected; but the sub-lessor refused to countenance the objection, because the sub-lessee had failed to reimburse the sub-lessor for an outgoing of about $7,700. At first instance, the sub-lessor's refusal to accept the objection to the rent review was upheld. On appeal, the sub-lessee raised an argument that the provision taking away its right to object was a penalty.

Handley AJA (McColl and Basten JJA agreeing) held that the relevant clause was not conditioned on a breach of contract; it was simply a condition precedent to a contractual right. Therefore, the clause could not fall within the penalty doctrine.

The *Interstar* case was not cited in *Helicopters Pty Ltd v Bankstown Airport*. It seems likely that the *Helicopters* case remains good authority after *Andrews*, as an application of the distinction between a penalty stipulation and one giving rise consensually to a contractual right.

Another example of the distinction between a penalty (a collateral liability imposed on the non-observance or failure of a primary contractual stipulation: *Andrews*) and a contractual stipulation giving rise consensually to a contractual right is *Love v Brien* [2012] WASC 457. In that case land was sold for a consideration that took two alternative forms: either $3.5 million plus retransfer of part of the land after rezoning and subdivision, or (if rezoning and subdivision could not be achieved by a certain date) $4 million. Rezoning and subdivision approvals were not obtained and the relevant part of the land could not be transferred back, so the seller claimed the price increment of $500,000. The buyer resisted on the ground that the price uplift was a penalty. Beech J held that the price uplift was not a penalty, but simply an alternative form of consideration provided for under the contract. This finding was not contested on appeal: *Love v Brien* [2013] WASCA 280.

In *Cedar Meats (Aust) Pty Ltd v Five Star Lamb Pty Ltd* (2014) 45 VR 79; [2014] VSCA 32, the Victorian Court of Appeal applied the reasoning in *Andrews* and the first instance decision in *Paciocco* (see [105355]) pointing out that little now turns upon the distinction between a breach of contract and failure of a primary stipulation (which does not amount to an actual breach of contract). *Cedar Meats* concerned fees payable in the event that the supplier failed to deliver agreed daily numbers of lambs to the abattoir. The Court of Appeal took the view that the fees were not compensation for breach of an implied obligation to deliver agreed quantities, but represented a collateral stipulation which arose in the event that the primary stipulation (delivery of the agreed quantities) was not performed. But that did not matter, because following the High Court's decision in *Andrews*, the collateral stipulation could be classified as penal if the amount of the fees was excessive and unconscionable. This meant the fees engaged the penalty doctrine. The primary judge had found that the fees were extravagant or exorbitant, and therefore penal. This finding was not challenged on appeal, but the observations of the Court indicate that it might well have been challenged successfully: see [105365].

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1 A similar approach was taken in *Harrison Ford Pty Ltd v Ford Motor Co of Australia Ltd* [2008] VSC 235, in relation to a dispute between a car manufacturer and a dealer over entitlement to retail incentives. Habersberger J held that on the proper construction of the offer made by the manufacturer, the dealer gained no accrued right to the incentives if fraud had occurred.

2 Cited in the first instance judgment at [62]–[63], 197–199 (CLR), 204–205 (ALR).

3 For an analysis which supported the first instance judgment of Brereton J in preference to the reasoning of the Court of Appeal, see Newland W, "Equitable relief against penalties" (2011) 85 ALJ 434.

[105351] Divergence and convergence between Australian and UK law: Cavendish Square

In *Makdessi v Cavendish Square Holdings BV* [2016] AC 1172; [2015] 3 WLR 1373; [2016] 2 All ER 519; [2015] UKSC 67, the UK Supreme Court considered competing submissions of a fundamental nature: on one hand that the penalty doctrine should be abolished (leaving the field to be covered by statutory regulation), and on the other hand that the doctrine should be extended to apply beyond the field of breach of contract. Both submissions were rejected; but in dealing with them, the Supreme Court undertook a comprehensive review of the penalty doctrine with a view to identifying its underlying principles.

The High Court's decision in *Andrews* was specifically considered in the joint judgment of Lord Neuberger PSC and Lord Sumption JSC (with whom Lord Carnwath JSC agreed). It was referred to as "a radical departure from the previous understanding of the law" (at [41]). Their Lordships concluded that "we cannot accept that English law should take the same path, quite apart from its inconsistency with established and unchallenged House of Lords authority" (at [42]), and went on to give four reasons why they thought the decision in *Andrews* was wrong. Limitation of the penalty doctrine to breach situations was also supported by the other members of the Court: see the judgments of Lord Mance at [130], Lord Hodge at [241], Lord Clarke at [291] and Lord Toulson at [292].

Notwithstanding the clear divergence between Australian and English law on the "no breach, no penalty" issue, the decision in *Cavendish Square* contains a great deal of insightful and valuable analysis; and comparison with the reasoning in the High Court's subsequent decision in *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525; 90 ALJR 835; 333 ALR 569; [2016] HCA 28 shows that on all issues other than the "no breach, no penalty" question, there is a high degree of convergence between the views of the High Court and those of the UK Supreme Court.

Cavendish Square was in fact two cases, heard and reported together on the basis that both required a comprehensive re-examination of the law relating to penalties. In the first case, *Cavendish Square Holding BV v Makdessi*, Mr Makdessi had sold a controlling interest in his advertising and marketing business in the Middle East to the Young & Rubicam International Group. Cavendish Square, a member of that group, was the buyer. The sale agreement was extensively negotiated over a period of six months with both sides represented by highly experienced and respected commercial law firms. The price included a substantial goodwill component, and was to be paid by instalments over a period. The agreement provided that Mr Makdessi was not to compete with his former company; if he did, he would not be entitled to any further instalment payments, and Cavendish Square would acquire an option to purchase his remaining shares for a lower price which excluded the goodwill component. Mr Makdessi did in fact breach the non-competition provision, and Cavendish Square sought a declaration that it was entitled to stop making instalment payments and exercise its option to buy Mr Makdessi's remaining shares. On behalf of Mr Makdessi, it was submitted that the clauses terminating instalment payments and giving Cavendish Square an option to buy the remaining shares at a lower price were penal. The Supreme Court held that the provisions were not penal, and granted the declarations sought.

The second case was *ParkingEye Ltd v Beavis*. Mr Beavis had been fined £85 for overstaying the two-hour limit in the carpark of a privately-owned shopping centre. The fine was imposed by ParkingEye Ltd, operator of the carpark under contract with the owner of the shopping centre. Mr Beavis refused to pay the fine, contending that it was unenforceable at common law as a penalty, and also unenforceable under unfair consumer contract legislation. The Supreme Court rejected both of these arguments and dismissed Mr Beavis's appeal against the fine.

The joint judgment of Lord Neuberger and Lord Sumption adopted a framework of analysis based on two questions:

- First, in what circumstances is the penalty rule engaged at all?
- Second, what makes a contractual provision penal?

As to the first question, the answer was that the penalty rule only applied to provisions operating on breach of contract. This would in some cases require the court to distinguish between a conditional primary obligation and secondary obligation providing a contractual alternative to damages at law, as "The penalty rule regulates only the remedies available for breach of a party's primary obligations, not the primary obligations themselves": [13]. Lords Neuberger and Sumption were inclined to the view that both the clause terminating instalment payments to Mr Makdessi, and the clause giving Cavendish Square an option to buy Mr Makdessi's remaining shares at a reduced price, were in reality conditional primary obligations: at [74], [77] and [83].

Limitation of the penalty doctrine to breach situations is in direct conflict with *Andrews*; although it was recognised in *Cavendish Square* that if the evidence shows that a secondary, "punishment" clause is disguised as a conditional primary obligation, the penalty doctrine may still apply: [77] and [258]. This may limit the scope of the apparent conflict; and the scope for conflict may be further limited, in that the distinction between conditional primary obligations and secondary obligations corresponds with the distinction drawn by the High Court in *Andrews*, based on the line of cases going back to *French v Macale*: see [105350].

The second question, asking what makes a contractual provision penal, led the Supreme Court into an extensive analysis of various themes underlying the penalty doctrine. Lords Neuberger and Sumption (at [28]) identified a critical "insight", consistent with the judgments of Lord Robertson in *Clydebank* and Lord Atkinson in *Dunlop*: a damages clause may properly be justified by some consideration other than the desire to recover compensation for a breach, where the innocent party has a legitimate interest in performance extending beyond the prospect of pecuniary compensation flowing directly from the breach. Therefore, just because a contractual clause was not a pre-estimate of loss did not necessarily mean that it was penal: at [31]. Their Lordships went on to state their "true test" in the following terms (at [32]):

> The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the

> innocent party in the enforcement of the primary obligation. The innocent party can have no interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance.

Lord Hodge (at [255]) stated the test in similar terms – without the distinction between primary and secondary obligations, but with a helpful differentiation between liquidated damages situations and situations where a broader commercial interest was being protected:

> the correct test for a penalty is whether the sum or remedy stipulated as a consequence of the breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in performance of the contract. Where the test is to be applied to a clause fixing the level of damages to be paid on breach, an extravagant disproportion between the stipulated sum and the highest level of damages that could possibly arise from the breach would amount to a penalty and thus be unenforceable. In other circumstances the contractual provision that applies on breach is measured against the interest of the innocent party which is protected by the contract and the court asks whether the remedy is exorbitant or unconscionable.

Applying these "proportionality to legitimate interests in performance" tests to the cases before the Court:

- Cavendish Square had a legitimate interest in observance of the non-competition provisions in the sale agreement, which extended beyond recovery of the loss flowing from a breach, since the goodwill of the business was critical to its value and the loyalty of Mr Makdessi was critical to maintenance of that goodwill; in other words, it had an interest in matching the price paid for the business to the value received. Cavendish Square also had a legitimate interest in severing its connection with a vendor and fellow shareholder who competed with the company, by acquiring his shares; and the lower price paid for those shares reflected the reduced value of the business, when the loyalty of Mr Makdessi could not be counted on. The fact that the contract had been negotiated between sophisticated parties with expert legal advice was also relevant.

  Lords Neuberger and Sumption were inclined to classify the relevant clauses in the Cavendish Square cases as price adjustment clauses, and therefore as conditional primary obligations which did not attract the penalty doctrine at all; but this view was not favoured by the other members of the Court, all of whom held that the challenged provisions were not penal because they were not disproportionate to the interest of Cavendish Square in the performance of the contract.

- In the *ParkingEye* case, the £85 fine engaged the penalty doctrine, and exceeded the loss that the carpark operator would suffer if a driver overstayed the two-hour limit; but the operator had a legitimate interest in the efficient operation of the carpark, which could only be served by deterring drivers from occupying parking spaces for long periods of time. The charge was no greater than was necessary to achieve that result, and was comparable with fines for overstaying in local authority parking facilities. Therefore it was not a penalty.

[105355] The bank fees litigation after Andrews: Paciocco v ANZ Bank

A further round of the litigation over bank fees culminated in the decision of the High Court in *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525; 90 ALJR 835; 333 ALR 569; [2016] HCA 28.

In a comprehensive judgment at first instance, Gordon J had held that only one of the five challenged fees (the late payment fee) was a penalty: (2014) 309 ALR 249; [2014] FCA 35. Both sides appealed. In the Full Court the leading judgment was delivered by Allsop CJ, supported by short concurring judgments of Besanko and Middleton JJ: *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199; [2015] FCAFC 50. The Full Court dismissed Mr Paciocco's appeal against the classification of the fees, other than the late payment fee, as non-penal. As to the late payment fee, the appeal by ANZ was upheld; in the view of the Full Court, Mr Paciocco had not established that the late payment fee was extravagant or exorbitant by reference to the Bank's legitimate interest in the performance of the contract, assessed at the time of making the contract by comparison with the greatest loss that could conceivably be proved to have followed from late payment.

By a 4-1 majority, the High Court dismissed the appeal. The five separate judgments analysed the penalty doctrine in detail – with the benefit of the analysis undertaken by the UK Supreme Court in *Cavendish Square*. The following propositions emerge from the judgments of the majority (French CJ and Kiefel, Gageler and Keane JJ):

- The rationale for the penalty doctrine in a breach of contract case is the public policy against using the law of contract to allow one party to punish another for non-performance: see the judgments of Kiefel J at [22] and [32], Gageler J at [118], [127] and [131] and Keane J at [253].
- An amount payable on breach of contract will not be classified as a penalty just because it provides a "negative incentive" – even a very strong negative incentive – to perform. The relevant indicator of punishment lies in the negative incentive being so far out of proportion to the other party's legitimate interest in performance, that the negative incentive amounts to deterrence by threat of punishment. This "out of all proportion" test is consistent with the decisions in *Clydebank*, *Dunlop*, *Ringrow* and *Andrews*: per Kiefel J at [69]; Gageler J at [164].
- To apply this test of proportionality, it is necessary to determine first what interests of the non-breaching party may legitimately be protected by the negative incentive to perform. In some cases (as in *Dunlop*, *Clydebank* and *Cavendish Square*), the interests being protected by the relevant provision may extend beyond the recovery of loss caused by the breach. In these cases, *all* commercial interests of the non-breaching party may be taken into account; the inquiry is not confined to assessing proportionality by reference to the damages which would be recoverable at law: per Kiefel J at [41]; Gageler J at [161]; Keane J at [270].

  This was the critical point of difference between the majority and the dissenting judge (Nettle J). The majority agreed with the Full Federal Court that the Bank's legitimate interest in the performance of the contract included the avoidance of provisioning costs and costs of maintaining additional regulatory capital – even though both categories of cost to the Bank were too remote to be recovered as damages for breach. Nettle J, on the other hand, agreed with the first instance view of Gordon J that proportionality was to be determined by reference to the greatest loss that could conceivably be recovered as damages for breach of contract: [371].
- The propositions set out by Lord Dunedin in *Dunlop* are aids to construction, not legal rules. They should not be applied with rigidity and should not obscure the fundamental test, which is whether the sum or remedy stipulated as resulting from a breach is not commensurate with the innocent party's interest in performance of the contract, but out of all proportion to that interest (broadly defined): per Kiefel J at [32]; Gageler J at [150] to [152]; Keane J at [268].

- In *Makdessi v Cavendish Square Holdings BV* [2016] AC 1172; [2015] 3 WLR 1373; [2016] 2 All ER 519; [2015] UKSC 67 the Supreme Court of the United Kingdom held that under UK law, the rule against penalties is confined to cases arising out of contractual breach. The decision exhibited emphatic disagreement with the High Court's approach in *Andrews*. The majority in *Paciocco* noted this divergence between Australian and UK law but accepted it as a legitimate difference in view on the proper application of the penalty doctrine. In other respects (notably the breadth of the legitimate interests of the innocent party, to be recognised in the calculation of what is extravagant, exorbitant or out of all proportion), the majority agreed with the reasoning in *Cavendish Square*.

The High Court's decision in *Paciocco* changed the task of pleading the response to a penalty claim (in all but the most straightforward liquidated damages cases). Unless it can be shown that the challenged provision is a primary rather than a collateral stipulation, the emphasis must be on identifying the widest possible range of legitimate commercial interests which are protected by the challenged provision, in order to improve the chance of a favourable outcome from the court's proportionality calculation.

Of course, the interests said to be protected must be proved as well as pleaded. As the *Paciocco* case also shows, much will depend on the court's view of the expert evidence: for an illustration of the influence of expert evidence on the outcome see *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* (2016) 93 NSWLR 231; [2016] NSWCA 328; and see [105361]. Needless to say, the value of expert evidence will depend to a great extent on the correspondence between the penalty test as articulated by the High Court, and the questions asked of the expert in the expert brief.

The first instance decision in *Paciocco* – analytical framework

Despite the subsequent appeals, the first instance judgment in *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249; [2014] FCA 35 remains useful to the practitioner because of the analytical framework set out by Gordon J, who was also the judge at first instance in *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; [2012] HCA 30. The validity of this analytical framework was not questioned in the appeals.

Her Honour summarised the matters decided by the High Court in *Andrews* (at [24] to [32]) and went on (at [33] to [38]) to focus on the additional "operative distinction" identified by the High Court, between fees imposed as security for performance of other obligations of the customer (which could be penalties) and fees specified in pre-existing arrangements with the customer as consideration for the provision of further accommodation – which were outside the scope of the penalty doctrine, on the line of authority going back to *French v Macale* (1842) 2 Drury and Warren 269 at 275–276 and including *Metro-Goldwyn-Mayer Pty Ltd v Greenham* (1966) 85 WN (Pt 1) (NSW) 468; [1966] 2 NSWR 717.

Gordon J set out (at [15]), and proceeded to apply, a six-step procedure for testing whether the relevant bank fees were penal in nature. With slight paraphrasing and omission of citations, the six steps are:

(1) Identify the terms and inherent circumstances of the contract, judged at the time of making the contract.

(2) Identify the event or transaction which gives rise to the imposition of the stipulation.

(3) Identify if the stipulation is payable on breach of a term of the contract (a necessary

element at law but not in equity). This necessarily involves consideration of the substance of the term, including whether the term is security for, and in terrorem of, the satisfaction of the term. [It may assist the practitioner to think of this as the "common law threshold".]

(4) Identify if the stipulation, as a matter of substance, is collateral (or accessory) to a primary stipulation in favour of one contracting party and the collateral stipulation, upon failure of the primary stipulation, imposes upon the other contracting party an additional detriment in the nature of a security for satisfaction of the primary stipulation. [This may be described as the "equity threshold".]

(5) If the answer to question 3 or 4 is yes, then further (interrelated) questions arise (at law and in equity). In the light of the High Court's decision on appeal, the decisive question is whether the sum stipulated is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved – taking into account all legitimate interests of the innocent party in performance of the contract, extending beyond those that are compensable by an award of damages.

(6) If the answer to question 5 is that the sum stipulated is not a genuine pre-estimate of damage and is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have been sustained by the breach, or the failure of the primary stipulation, then the party harmed by the breach (or the failure of the primary stipulation) can only enforce the collateral stipulation to the extent of that party's proved loss.

Applying this framework of analysis to the ANZ fees before the Court, Gordon J found that the honour, dishonour, non-payment and overlimit fees could not be penalties either at law or in equity, because they were not payable on breach of contract (step 3 of the analysis) or on failure of a stipulation (step 4 of the analysis). Instead, they were fees charged in accordance with pre-existing contractual arrangements, "according to whether ANZ chose to provide something more and further to the customer": [202]. This was an application of the "operative distinction" based on the *French v Macale* line of authority.

This analytical framework was accepted by the Full Court, and has since been referred to by the NSW Court of Appeal as a useful point of reference: *Australia Capital Financial Management Pty Ltd v Linfield Developments Pty Ltd* [2017] NSWCA 99, per Ward JA at [359].

Full Court decision in Paciocco – guidance on the use of extrinsic evidence

The Full Court in *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199; [2015] FCAFC 50 did not depart from the analytical approach adopted by Gordon J at first instance. The reason why the Bank succeeded in its appeal on the late payment fee was that the Full Court (and subsequently the High Court) came to a different answer on question 5: the fee was not extravagant or exorbitant compared to the possible loss as projected at the time of contracting, but was a genuine pre-estimate of that loss (broadly defined by reference to all of the Bank's legitimate interests in performance).

In dismissing Mr Paciocco's appeal on the other four fees, the Full Court upheld the reasoning of Gordon J. Applying the *French v Macale* line of authority, the fees did not engage the doctrine of penalties at all, because they were payable in return for some further contractual right or accommodation: *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199; [2015] FCAFC 50 at [199] ff. This part of the judgment of Allsop CJ provides guidance on the role of extrinsic evidence in a penalty case:

- Questions 3 and 4 of the framework proposed by Gordon J involve consideration of the substance of the contractual stipulation, to determine whether the stipulated amount is payable on breach of contract or failure of a primary stipulation, or whether (by contrast) it is payable in exchange for an additional right or benefit. This is a question of contractual interpretation, to be determined by applying normal rules of contractual construction.
- But once the answers to questions 3 and 4 determine that the penalty doctrine is engaged and the inquiry moves to question 5, the scope for extrinsic evidence becomes very broad: "all the circumstances and evidence tending to illuminate all the circumstances will be admissible to assist with the process of characterisation as to whether the clause is penal or is a genuine pre-estimate of damage in the relevant sense": *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199; [2015] FCAFC 50 at [212].

[105360] The evolving penalty doctrine, as applied in lower courts between *Ringrow* and *Paciocco*

In the 21st century, the penalty doctrine in Australian law has undergone a process of significant change, through the High Court decisions reviewed above: *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656; 80 ALJR 219; [2005] HCA 71, *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; [2012] HCA 30 and *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525; 90 ALJR 835; 333 ALR 569; [2016] HCA 28. The process of change has also been influenced by the decision of the UK Supreme Court in *Makdessi v Cavendish Square Holdings BV* [2016] AC 1172; [2015] 3 WLR 1373; [2016] 2 All ER 519; [2015] UKSC 67.

Ringrow focused attention on the relationship of proportionality between the innocent party's legitimate interest in performance, and the consequences as stipulated in the clause attacked as a penalty. This approach was confirmed in *Paciocco*, with the proviso that the legitimate interests of the innocent party are to be broadly defined (resulting in a narrower scope for the penalty doctrine). Meanwhile, *Andrews* broadened the scope of the doctrine in another direction, by confirming that it applied to "event of default" cases, as well as to cases of actual breach. These broad changes were accompanied by a number of subtle refinements in the doctrine, emerging from the detailed (and in some respects, different) analysis carried out by the judges of the High Court and the UK Supreme Court.

While this process of change has been going on at final appellate level, courts of first instance and intermediate appellate courts have been grappling with the subtleties of the evolving doctrine, and in particular with the continuing role of a concept formerly seen as central and determinative: "genuine pre-estimate of loss".

In the years immediately following the decision in *Ringrow*, cases in intermediate appellate courts reconfirmed that an obligation triggered by breach was likely to be a penalty unless it had a compensatory function. In other words, it had to be a pre-estimate of loss, producing a result which is not out of all proportion to the loss which might be suffered by any of the potential triggering breaches – as measured at the time of entering into the contract. Since the High Court's decision in *Paciocco*, these cases must be applied with some caution, since the interests recognised in calculating what is "out of all proportion" to the legitimate interests of the innocent party go beyond the range of interests that could be taken into account in an award of damages for breach of contract.

In *Fermiscan Pty Ltd v James* (2009) 261 ALR 408; [2009] NSWCA 355, the NSW Court of Appeal considered a clause in a settlement agreement, dealing with the consequences of breach. The court held by majority that no breach had occurred, but all three judges went on to consider and uphold the argument of the respondent, Dr James, that the relevant clause would have been unenforceable as a penalty. In the leading judgment Allsop P analysed the effect of the relevant clauses, 2.4 and 2.3(b). Clause 2.4 fastened upon a payment of $500,000 which was payable out of a future income stream (and was contingent on the income being earned); it converted that obligation into an immediate and unconditional obligation to pay the $500,000 as a lump sum. The clause had no apparent contractual purpose as a pre-estimate of damage; its only contractual purpose was to coerce performance, so it was void and unenforceable as a penalty: [143].

Clause 2.3(b) provided for an additional payment of $200,000 in the event of a breach. Again, nothing in the commercial background or context or the terms of the settlement agreement supported a conclusion that this payment was an agreed pre-estimate of damages for breach, so cl 2.3(b) was also held to be an unenforceable penalty.

In *Zachariadis v Allforks Australia Pty Ltd* (2009) 26 VR 47; [2009] VSCA 258, the Victorian Court of Appeal reaffirmed another fundamental aspect of the penalty test derived from *Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6 and *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79 (see [105130]): "the question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of *as at the time of the making of the contract, not as at the time of the breach*": *Dunlop*, at 86–87 (emphasis added).

The *Zachariadis* case concerned hiring agreements. The agreements contained clauses providing that in the event of termination, the hirer was required to pay all charges which would have been payable from the date of termination to the expiry date of the agreements. The hirer defaulted in the payment of hire and went into receivership. The owner terminated the agreements and claimed against Mr Zachariadis, a guarantor, for the amounts due under the hiring agreements, being arrears of hire at the date of termination and all hire charges that would have been payable for the balance of the term.

At first instance it was held that the provision requiring payment of hire charges for the balance of the term was not a penalty, because the evidence indicated that the payment would produce no windfall gain to the owner – ie the amount recovered under the clause would broadly correspond with the loss suffered by the owner at the date of breach (due to the owner's need to meet its own financing obligations). In the Court of Appeal Neave JA (Buchanan JA and Kyrou AJA agreeing) held that this was an erroneous application of the *Dunlop* test, because it took into account the situation at the time of termination. The proper approach was to determine, as at the time of making the contract, whether the amount payable under the relevant clause was a genuine pre-estimate of loss, or was out of all proportion to the loss the owner was likely to suffer.

Applying this approach, Neave JA classified the relevant clause as a penalty for three reasons. First, it had the same characteristics as the clause struck down as a penalty in *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359; 57 ALJR 172 (see [105150]). Second, it would not have been difficult to draft a clause in the hire agreements which provided a formula for the accurate pre-estimation of loss. Such a clause could be found in Rossiter CJ, *Penalties and Forfeiture* (Law Book Co., 1992) p 88. Third, the requirement to pay all future hire charges applied in the event of any breach justifying termination; and many of the events constituting grounds for termination would cause little or no loss. The lack of any relationship between the breach and the amount payable indicated that the clause was not a genuine pre-estimate of loss.

In affirming the *Dunlop* requirement for assessment as at the time of making the contract, Neave JA acknowledged that "in *Ringrow* the High Court did not compare the value of the option with the loss or damage likely to be suffered by BP, but instead compared the actual loss and the amount determined under the formula". His Honour offered two alternative explanations for this apparent anomaly (which may well have misled the judge at first instance in the *Zachariadis* case). One explanation could be found in the High Court's statement that a provision conferring an option to purchase property required a different approach: *Ringrow* at [21]. An alternative explanation was that the High Court might have regarded the valuation of goodwill at the date of termination as casting light on the circumstances existing at the time of the contract.

Assessing whether a liquidated damages provision is a genuine pre-estimate of loss as at the date of the contract necessarily involves an element of speculation about what may happen in the course of performing the contract. That views may differ on this issue is illustrated by the decision of the WA Court of Appeal in *Spiers Earthworks Pty Ltd v Landtec Projects Corp Pty Ltd (No 2)* (2012) 287 ALR 360; [2012] WASCA 53. In that case a developer claimed liquidated damages from a contractor, for failure to complete part of a road in a subdivision on time. The majority (McLure P and Newnes JA) took the view that this could not be a genuine pre-estimate of loss, because non-completion of the relevant part of the road could not have any adverse financial effect on the developer: other critical path items needed to be completed before lots could be sold, and the evidence supported an inference that as at the date of the contract the developer had no intention of completing these items within the relevant time-frame. Murphy JA, on the other hand, identified the possibility that delay in completing the first part of the road could have a "knock-on" effect in delaying other critical path items, and therefore could delay the sale of lots in the subdivision. On this view of the evidence, it was possible at the time of entering into the contract to identify potential loss to the developer from failure to complete the first part of the roadworks on time. A lesson from the case is the importance for both sides in a penalty case of adducing evidence on the relationship between the liquidated damages as stipulated, and the real risks of loss as assessed at the time of contracting.

In *Sun North Investments Pty Ltd v Dale* [2014] 1 Qd R 369; [2013] QSC 44, the defendant lent the plaintiff $500,000. As part of the security for the loan, the plaintiff gave the defendant an option to purchase certain shares (worth about $5 million) for $2 million. The loan was not paid when due, and the defendant purported to exercise the option. The plaintiff repaid the loan five days later. The Supreme Court of Queensland (Henry J) held that in addition to being a clog on the equity of redemption, the option agreement was an unenforceable penalty. The defendant's potential gain of $3 million represented over five times the greatest possible loss to the defendant – it was out of all proportion, extravagant and unconscionable: [134]. Henry J went on to say that he would also have granted relief against forfeiture of the shares, but this was unnecessary because of his primary finding that the option agreement was unenforceable as a clog on the equity of redemption and his alternative finding that it was unenforceable as a penalty. The case shows that those who seek to make extravagant windfall profits from loan arrangements with distressed borrowers can expect little sympathy from the courts.

A liquidated damages clause in a restraint of trade agreement between an accounting firm and its former employee was challenged as a penalty in *Birdanco Nominees Pty Ltd v Money* (2012) 36 VR 341; [2012] VSCA 64. The Victorian Court of Appeal, having found that the restraint of trade was reasonable, went on to find that the defendant had not discharged the onus of proving that the amount fixed as liquidated damages was anything other than a genuine pre-estimate of loss (per Robson AJA at [91]). A similar view was expressed with respect to an "early termination fee" by the WA Court of Appeal in *Active Tree Services Pty Ltd v Electrical Resource Providers Pty Ltd* [2014] WASCA 6.

In *Cedar Meats (Aust) Pty Ltd v Five Star Lamb Pty Ltd* (2014) 45 VR 79; [2014] VSCA 32, the Victorian Court of Appeal took the opportunity to restate the need for caution in classifying obligations as extravagant, unconscionable or disproportionate: see [105365] below. In particular, the Court pointed out that disproportion may more readily be found in a contract of adhesion than in a bilateral contract negotiated between parties of approximately equal bargaining power.

[105361] Application of the penalty doctrine after *Paciocco*

In *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* (2016) 93 NSWLR 231; [2016] NSWCA 328, the NSW Court of Appeal considered what might be called a "classic" penalty case involving default interest. The respondent had borrowed $6.825 million from the appellant Bank under a commercial loan facility. The facility agreement provided for additional interest to be payable if monthly payments were not made on time; the default interest rate was 2% above the normal rate. The borrower made a number of late payments during the term of the loan. After the loan was repaid, the borrower sued the Bank to recover the default interest, claiming that it was a penalty.

At first instance (*Sayde Developments Pty Ltd v Arab Bank Australia Ltd* [2016] NSWDC 76), the borrower's claim was successful. The primary judge accepted evidence from an expert witness for the borrower, that a distinction should be drawn between major and minor breaches and that minor breaches were priced into the Bank's standard interest rate. The borrower's late payments were minor breaches, and a 2% interest uplift was extravagant and unconscionable in comparison with the greatest loss that the Bank could suffer from such minor breaches. Significantly, the first instance hearing occurred before the High Court delivered its decision in *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525; 90 ALJR 835; 333 ALR 569; [2016] HCA 28.

On appeal, the Bank was successful; the Court of Appeal held that the default interest provision was not penal. In a brief concurring judgment, Sackville AJA described the case as "a very good example of a contractual arrangement that should not attract the penalty doctrine". A corporate borrower had borrowed for commercial purposes and freely accepted the loan terms, and there was no suggestion of misleading conduct, impropriety or unfair tactics (at [7]).

McDougall J delivered the leading judgment in the Court of Appeal (Gleeson JA and Sackville AJA agreeing). McDougall J said (at [81]) that the primary judge had been led into error by the evidence of the borrower's expert, that there was a distinction between major and minor breaches. Nothing in the contract or the Bank's practice supported this distinction. At the time of entering into the contract, it could not be determined whether any particular breach was minor, or was (or would become) major. In looking at what had actually happened in the course of performance, the judge had been drawn into "the fallacy of retrospective analysis". Furthermore, nothing in the report of the borrower's expert witness supported the assertion that minor breaches were priced into the interest rate; this evidence from the expert was an "unreasoned ipse dixit opinion". All that could be said at the time the contract was made was that if the borrower defaulted, there might be a number of consequences. One possible consequence was that the Bank would need to make provision in its financial statements for possible loss. The Bank's expert witness identified the cost of provisions against impaired loans. Taking this evidence into account, it could not be said that the 2% default increment in the interest rate was extravagant or unconscionable.

McDougall J referred (at [106]) to the "harsh economic reality" that "the borrower in default is not the same credit risk as the prospective borrower with whom the loan agreement was first negotiated", and that "risky credit is more expensive credit", citing the observations to that effect by Colman J in *Lordsvale Finance plc v Bank of Zambia* [1996] QB 752 at 763, and by Keane J in *Paciocco* at [263]–[264].

Finally (at [109]), McDougall J touched on a sensitive issue: the statement by the primary judge that "there is no evidence that persuades me that the 2% default interest provision here was a genuine pre-estimate of the cost to the bank of a … failure to pay the monthly amount due on the due date". On one view, this demonstrates a return to the pre-*Ringrow* rule of thumb that a provision was a penalty unless it was a genuine pre-estimate of the loss caused by a breach, compounded by an *ex post* identification of the particular breach. However, McDougall J took a more generous view: he read the statement as saying no more than that there was no evidence of an attempt to strike a genuine pre-estimate of loss. His Honour went on to offer a helpful analysis of where the "genuine pre-estimate of loss" concept fits into the penalty doctrine, following *Andrews* and *Paciocco*:

- If a contractual stipulation is, regarded objectively, a genuine pre-estimate of loss, it cannot be a penalty.
- But the converse does not apply – that is, it does not follow that because the parties did not attempt to pre-estimate the loss that would be caused to one of them by the other's breach, that a stipulation dealing with the consequences of breach must be a penalty.

This analysis has a corollary in terms of the onus of proof. The onus of proving that a stipulation is penal is on the party who asserts that (ie the party seeking to avoid the stipulation). However, if the other party (ie the party seeking to enforce the stipulation) asserts that the provision cannot be a penalty because it is a genuine pre-estimate of loss, that is a separate issue and the onus of proving the "genuine pre-estimate" falls on the party asserting it.

In *Australia Capital Financial Management Pty Ltd v Linfield Developments Pty Ltd* [2017] NSWCA 99, the NSW Court of Appeal considered the penalty doctrine again, in a very different context. Again, the penalty argument failed.

The stipulation under challenge in the *Australia Capital* case was a call option agreement. A company (SXG) had entered into a contract to purchase land in the Sydney suburb of Auburn. Linfield Developments entered into a development agreement with SXG. Under the development agreement Linfield Developments agreed to provide some of the funding for the purchase, and also took a call option over SXG's rights under the purchase contract or (once the contract had been completed) the land itself. The call option became exercisable if certain events of default occurred, including "insolvency events". After completion of the purchase SXG went into administration and receivership, and Linfield Developments exercised the call option. Guarantors of the obligations of SXG under the development agreement claimed that the call option was unenforceable as an impermissible forfeiture, or alternatively that it was void as a penalty. The claim was dismissed at first instance and the guarantors appealed.

The appeal failed. The leading judgment in the Court of Appeal was delivered by Ward JA (McColl JA and Gleeson JA agreeing). On the penalty issue, the appellants (guarantors) had focused on the potential for the value of the land to exceed the option price, resulting in a windfall benefit to Linfield Developments and a detriment to SXG. Ward JA held (at [361]) that because the call option was triggered by "events of default", it was a collateral stipulation of the type identified in *Andrews*; so the penalty doctrine was engaged. However, the extent of the potential windfall to Linfield Developments was not out of all proportion to the legitimate interests of Linfield Developments intended to be protected by the call option: [358] and [371]. These interests were the opportunity to develop the land and share in the profits of the development (in which Linfield Developments had already invested considerable funds and effort): [370]. The loss of that opportunity through an insolvency event would not give rise to any right to recover damages from SXG.

Finally, Ward JA noted (at [376]) a conceptual flaw in the appellants' claim: if the call option had been classified as a penalty it would not have been void. If successfully challenged under the common law penalty doctrine, it would have been unenforceable if challenged, "except … to the extent that equity would permit 'scaling'". If successfully challenged in equity (more likely, given the analogy with *Andrews*), equitable relief might have been granted on terms preserving some aspects of the call option obligation.

The reference to the potential availability of flexible equitable relief – now that *Andrews* has established the continuing existence of an equitable jurisdiction over penalties – opens up an interesting prospect, which may be developed in future cases.

The *Australia Capital* case demonstrates the changes made to the penalty doctrine by *Ringrow* and *Andrews*, in particular. Like *Ringrow*, it was a non-standard application of the penalty doctrine, in that the stipulation under challenge called for the transfer of property, not the payment of money – with a potential forced sacrifice of value by the transferor representing the allegedly penal dimension. As in *Andrews*, the stipulated obligation was triggered by an event of default, not a breach.

The analogy with *Ringrow* brought up an issue that has troubled courts since that case was decided: did the High Court in *Ringrow* sanction an *ex post* assessment, by referring to the actual loss arising from operation of the challenged stipulation? This appears to be in conflict with the principle that the loss that could flow from a breach of the stipulation must be assessed *ex ante*, at the time of making the contract: see for example, *Zachariadis v Allforks Australia Pty Ltd* [2009] VSCA 258: [105360], where Neave JA recognised the apparent anomaly in *Ringrow* and attempted to explain it. In the *Australia Capital* case Ward JA also recognised the issue, noting (at [320]) the appellants' submission (based on an observation by Lord Woolf in *Philips Hong Kong Ltd v Attorney-General (HK)* [1993] 1 HKLR 269 at 280) that what happens after the contract is entered into can provide valuable evidence about what could reasonably be expected at the time the contract was made. Ultimately, however, Ward JA found it unnecessary to resolve the issue because on either an *ex ante* or an *ex post* assessment, the potential windfall gain to Linfield Developments was not out of all proportion to its legitimate interests which were intended to be protected by the call option: [328] to [331].

As to the relevance of *ex post* events to an *ex ante* assessment of loss, see *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* (2016) 93 NSWLR 231; [2016] NSWCA 328 at [94], where McDougall J quoted the observation of Gageler J in *Paciocco* at [169] that "evidence of the later occurrence of an event can be probative of the earlier probability of the event occurring". However, in relying on evidence of later events courts will need to proceed with care to avoid the "fallacy of retrospective analysis" referred to in *Arab Bank* at [101].

In *Zintix (Australia) Pty Ltd v Employsure Pty Ltd* [2018] NSWSC 924, the NSW Supreme Court considered a similar question to the one that arose in *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359; see [105150]. Where a contract provides for payment by instalments but the full contract amount becomes payable on default, is the contract truly one for immediate payment of a lump sum with payment by instalment being allowed as a concession; or is it truly a contract for payment by instalments with the obligation to pay the full contract amount being imposed as a collateral obligation arising upon breach? In the first situation, longstanding authority establishes that a clause requiring payment of the full amount on default in payment of instalments is not penal: see *O'Dea* at 366–7 per Gibbs CJ, citing *The Protector Endowment Loan & Annuity Co v Grice* (1880) 5 QBD 592 and *Wallingford v Mutual Society* (1880) 5 App Cas 685. But in the second situation, the penalty doctrine is engaged and the stipulation making the full contract amount payable will be assessed to determine whether it is a penalty (ie out of all proportion to the greatest loss that could be suffered by the non-defaulting party, assessed at the time of making the contract). In cases where the full contract sum becomes payable on default, it is likely that the "acceleration" clause will be classified as penal.

As in *O'Dea*, the Court in *Zintix* (Walton J) held, as a matter of construction, that the contract was truly one for payment by instalments: [92] ff. As a result, the penalty doctrine was engaged. Walton J held that the challenged clause was indeed a penalty. He did not refer to whether the amount payable on default was out of all proportion to the greatest loss that Employsure could have suffered, but simply said (at [138]) that "It was not (and could not be) suggested the sum payable under the contract by operation of cl (c) was a genuine pre-estimate of losses and damage. The purpose of the clause is plainly to coerce performance by the plaintiff". In this language we see the "genuine pre-estimate of loss" test re-asserting itself, although it appears that the amount payable on default was indeed out of all proportion to the greatest loss that could have been suffered by Employsure.

A number of cases since *Paciocco* have considered the application of penalty principles to default interest provisions. These cases are analysed at [105341]. While the current approach to these clauses shows a greater measure of tolerance, default interest provisions are still being held unenforceable in appropriate cases. The onus of proof can assume particular importance in this context: see [105395].

A penalty defence was rejected by the NSW Supreme Court (Henry J) in *Growthbuilt Pty Ltd v Modern Touch Marble & Granite Pty Ltd* [2021] NSWSC 290. Liquidated damages at the rate of $3,500 per day under a subcontract on a residential building project were "on the high side"; but the subcontractor had not discharged the onus of proving that liquidated damages at that rate were out of all proportion, extravagant or unconscionably disproportionate to the greatest loss that the head contractor could conceivably have suffered as a result of the subcontractor's delay: at [104], [111].

A penalty defence succeeded (as an alternative ground of decision) in *Laurus Group Pty Ltd v Mitsui & Co (Australia) Ltd* [2022] VSC 360. In that case, a buyer's terms of trade required the payment of liquidated damages at the rate of $2,000 per day on any late delivery of steel products. Osborne J held (at [155] ff) that the liquidated damages clause was penal and unenforceable, citing three factors. The first was the presumption, referred to by Lord Dunedin at paragraph 4(c) of his summary in *Dunlop* (see [105130]), that a clause is penal if it imposes a single compensation amount, however large or small the triggering breach. The second was that the principal executive of the buyer had proposed a different and lower compensation figure in negotiations. The third was that in the buyer's parallel claim for actual loss, expert evidence showed that no loss had in fact been suffered (using *ex post* calculation of actual loss as an indicator of what might have been a reasonable *ex ante* estimate of loss, referring to the cautious endorsement of that technique by Gageler J in *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525; 90 ALJR 835; 333 ALR 569; [2016] HCA 28 at [169] (see the reference to *Arab Bank*, earlier in this paragraph). The combination of these factors supported the view that the purpose of the "liquidated damages" clause was to punish a breach.

A penalty defence succeeded in unusual circumstances, in *Australian Karting Association Ltd v Karting (NSW) Inc* [2021] NSWSC 1075. The plaintiff (Karting Australia) was the peak body responsible for promoting the sport of karting in Australia; the defendant (Karting NSW) was the body responsible for promoting the sport and conducting races in NSW and the ACT, and until January 2019 was a member of the plaintiff. A dispute developed between Karting Australia and Karting NSW over moneys collected from State associations by Karting Australia, and held in trust for the State associations (including Karting NSW). Karting NSW called for distribution of moneys standing to its credit in the trust account. Karting Australia refused to make the distribution but agreed to advance money as a loan. The loan was initially interest-free but the loan agreement provided for the retrospective imposition of an interest obligation if certain events occurred. In January 2019 Karting Australia purported to expel Karting NSW as a member (for reasons relating to the financial dispute), and claimed repayment of the loan together with backdated interest. Adamson J held (at [135]–[137]) that the provision in the loan agreement providing for payment of backdated interest was unenforceable as a penalty. The claim was extravagant and wholly disproportionate to any loss that Karting Australia had suffered. The provision for backdated interest was being used to punish Karting NSW for conduct which Karting Australia regarded, rightly or wrongly, as warranting the expulsion of Karting NSW as a member of Karting Australia.

In *QNI Resources Pty Ltd v North Queensland Pipeline No 1 Pty Ltd* (2022) 11 QR 648; 406 ALR 125; [2022] QCA 169; (see [105395]) at [96]-[115], a penalty defence failed. While the Court accepted that the relevant payment obligation (to pay "imbalance charges" for pipeline throughput under a gas transportation agreement) was a collateral stipulation engaging the penalty doctrine, the evidence indicated that the financial impact of throughput imbalances could not be quantified at the time of making the agreement. Therefore it could not be said that the stipulated charge was out of all proportion to the greatest possible loss that might be suffered by the pipeline operator; rather, it represented the parties' own agreed pre-estimate of an otherwise unquantifiable loss. In those circumstances, QNI had failed to discharge the onus of proving that the provision requiring payment of imbalance charges was a penalty.

A cancellation fee payable under an agreement between a borrower and a finance broker was challenged as a penalty in *VA Holdings Pty Ltd (t/as Granton Homes) v Global Capital Corporation Pty Ltd* [2023] NSWSC 1522. The broker had procured an offer of finance which the borrower had accepted, but subsequent developments before drawdown caused the borrower to terminate the loan agreement. The broker claimed the cancellation fee and the borrower raised the penalty defence. Applying *Australia Capital* (above), McGrath J rejected the defence ([138] ff). The provision for a cancellation fee was not a collateral stipulation;– it was a form of remuneration for the work of procuring the loan, which replaced the Facilitation Fee which would have been payable on drawdown.

The New South Wales Government failed in an attempt to rely on a penalty defence, in *New South Wales v Schofields Nominee No 5 Pty Ltd* [2024] NSWSC 1590. The State had purchased land forming part of a master lot, for the purpose of building a school. This left the residual portion of the master lot "stranded", with no road access. Under the purchase contract, the State undertook to carry out road access works by a certain date – or, if the works were not carried out by that date and the developer issued a notice requiring payment of compensation, pay that compensation in an amount to be determined by a valuation process. Peden J held (at [28]-[30]) that the obligation to pay compensation was not a collateral stipulation arising upon breach of a primary obligation to provide road access by the specified date, but was an alternative limb of the primary obligation — so the penalty doctrine was not engaged. As an alternative ground, her Honour held (at [31]-[51]) that if the penalty doctrine was engaged, the agreed compensation regime could not be said to be out of all proportion to the impact on the developer's legitimate interests. In arriving at this conclusion, Peden J followed the approach taken by the Queensland Court of Appeal in the *QNI Resources case* (above): where it was difficult to quantify the potential effect of the triggering event on the legitimate interests of the party protected at the time of making the contract, it was appropriate to uphold the parties' negotiated and agreed compensation regime: [45], [51].

Courts continue to accept that clauses imposing a higher rate of interest, but granting the concession of a lower rate of interest in the absence of default, are outside the scope of the penalty doctrine, citing the established authorities such as *Kellas-Sharpe v PSAL Ltd* [2013] 2 Qd R 233; [2012] QCA 371; [105340] above: see *Commercial N Pty Ltd v Huang* [2024] NSWSC 23, [213]-[221]; *Chopsonion Pty Ltd (controllers apptd) v Watts Meat Machinery Pty Ltd (No 2)* [2025] FCA 4, [697].

[105362] Non-monetary collateral stipulations

As noted in [105361], the NSW Court of Appeal in *Australia Capital Financial Management Pty Ltd v Linfield Developments Pty Ltd* [2017] NSWCA 99 held that the penalty doctrine was engaged by a clause requiring the transfer of property (although in that case, the relevant clause was not a penalty). Previous authority to the same effect is referred to in [105232].

In *Kay v Playup Australia Pty Ltd* [2020] NSWCA 33, the NSW Court of Appeal again considered the application of the penalty doctrine to a non-monetary collateral stipulation. The relevant clause operated to deprive Playup of certain accrued contractual rights (the benefit of warranties and restraint clauses), in the event that a payment under the contract was not made within 7 days of the due date (time being of the essence). Brereton JA (with whom McFarlan JA and Simpson AJA agreed) held that a collateral stipulation bringing about deprivation of accrued contractual rights could amount to a penalty (at [93]). In the case before the Court the relevant provision did amount to a penalty, because it represented a severe undercutting of the subject matter of the contract (sale of shares in a company); the consequences of the clause were out of all proportion to the seller's legitimate interest in securing contractual payments when they fell due: [95]. Furthermore the clause operated without regard to the magnitude of the default – any delay in payment, however slight, would trigger the clause: [96].

[105363] Negotiated clauses can still be penal

In their joint judgment in *Makdessi v Cavendish Square Holdings BV* [2016] AC 1172; [2015] 3 WLR 1373; [2016] 2 All ER 519; [2015] UKSC 67 (see [105351]) at [35], Lord Neuberger PSC and Lord Sumption JSC expressed the view that in a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate – that is, what is necessary to protect a party's legitimate interests. In *Kay v Playup Australia Pty Ltd* [2020] NSWCA 33, Brereton JA noted (at [97]) that this observation, and its application to the contract before the court, had been influential in the first instance decision. The clause depriving Playup of accrued contractual rights had been inserted in the contract as a result of negotiation between the parties; indeed, Mr Kay had insisted on its inclusion, referring to the issue as a "deal breaker". Nevertheless, the Court of Appeal held that the provision was a penalty. Brereton JA observed that "a provision that is otherwise penal in character does not cease to be so by reason that it was negotiated".

[105364] Clawbacks on termination of leases

GWC Property Group Pty Ltd v Higginson [2014] QSC 264, decided before *Paciocco* and *Cavendish Square*, involved a lease of premises and an "Incentive Deed" which recited that it was "intended to supplement the Lease". The incentive provisions had apparently been included in a separate deed so that they would not appear on the public register as part of the lease, and could be kept confidential. The Incentive Deed provided for the landlord to make a contribution to the tenant's fit-out, grant a rent abatement and grant a signage fee abatement; but if the lease was terminated, the tenant had to repay the fit-out contribution and pay the abatement amounts. The tenant vacated the premises; the landlord terminated the lease and brought an action against the tenant's guarantors to recover the fit-out contribution and abatement amounts.

The Queensland Supreme Court (Dalton J) gave summary judgment for the defendants, on the ground that the repayment obligations engaged the penalty doctrine and "were wholly penal in their operation: providing for significant sums to be paid over and above damages which would be payable to the landlord at common law": [49].

Subsequent developments at appellate level (the *Paciocco* and *Cavendish Square* cases) support an expectation that a future case on similar facts might not be dealt with in the same way. First, there is an argument that the abatement provisions are price adjustment clauses and should be classified as conditional primary obligations rather than secondary obligations, so that the penalty doctrine is not engaged at all: see the judgment of Lords Neuberger and Sumption in *Cavendish Square*, referred to at [105351]. Second, even if obligations do engage the penalty doctrine, they will not be classified as penal merely because they exceed damages payable at common law. They must be out of all proportion to the innocent party's interest in performance of the contract (broadly defined): see [105355].

However, *GWC Property Group* was followed in *BMG SP Pty Ltd v YFG Strathton Pty Ltd* [2023] QSC 52. In that case, the lease and an accompanying incentive deed provided that in the event of termination due to a default by the tenant, the tenant had to repay to the landlord a pro rata portion of the landlord's fitout contribution. The tenant repudiated the lease and the landlord terminated. The landlord's claim for repayment of part of the fitout contribution was opposed by the tenant on the basis that the clawback provision was a penalty. The landlord argued that the fitout contribution was a "conditional indulgence"; that is, a benefit which had been given on the condition that the tenant remained in occupation for the term of the lease. This argument was rejected by Crowley J, by reference to the reasoning in *GWC Property Group*, on the basis that the fitout contribution was part of the consideration provided by the landlord for the tenant's entry into the lease. The judgment made no reference to *Cavendish Square*.

[105365] Take or pay cases

For a discussion of the application of penalty principles in "take or pay" cases, see [15650]. Following the decision of the High Court in *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; [2012] HCA 30 the position in Australia appeared to be that the "pay" component of a take or pay obligation is susceptible to attack as a penalty if the amount payable on failure to take delivery is out of all proportion to the damage likely to be suffered by the supplier through the lost sale, as assessed at the time of making the contract. The High Court's subsequent decision in *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 333 ALR 569; 90 ALJR 835; [2016] HCA 28 adds an additional qualification: the damage likely to be suffered by the supplier must be viewed broadly, taking into account all legitimate commercial interests of the supplier – extending beyond those which could be compensated by an award of damages.

Cedar Meats Pty Ltd v Five Star Lamb Pty Ltd [2013] VSC 164 involved a contract to deliver lambs to a meatworks for slaughter and processing. The evidence established that the meatworks had incurred little incremental cost in setting up to service the contract, and that most operating costs relating to the contract could be saved when lambs were not delivered. This could be distinguished from the traditional take or pay situation in a gas supply contract, when the gas supplier incurred significant costs in setting up infrastructure to service its sale contracts and needed to meet those costs whether or not gas was supplied. Sifris J concluded (at [108]):

> Insisting on payment of the full amount per head without making any allowance for the significant cost savings associated with not performing the relevant tasks constitutes in my opinion the stipulation for an extravagant amount that far exceeds the greatest loss suffered by Cedar Meats.

As this finding was not challenged on appeal (*Cedar Meats (Aust) Pty Ltd v Five Star Lamb Pty Ltd* [2014] VSCA 32), the Court of Appeal was not called upon to consider it. However, in upholding the appeal on other grounds the Court of Appeal did repeat the warning given by Mason and Wilson JJ in *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170; 68 ALR 185 at 193–194- (CLR), 201–202 (ALR): the courts should not be too ready to find disproportion, in case they impinge on the parties' freedom of contract: see [105210]. It may be inferred that had the finding of disproportionality been challenged on appeal, the challenge might have succeeded.

The Court of Appeal went on to say at [54]:

> In a case like this involving commercial organisations of apparently equal bargaining power, courts should be prepared to allow a substantially larger degree of latitude than would be appropriate in case of a contract of adhesion.

QNI Resources Pty Ltd v North Queensland Pipeline No 1 Pty Ltd (2022) 11 QR 648; 406 ALR 125; [2022] QCA 169 (see [105395]) was essentially a take or pay case, with the commodity to be taken or paid for being usage of a gas pipeline. Charges for imbalances in usage of the pipeline were challenged by QNI, as penalties. Both at first instance and before the Queensland Court of Appeal, the challenge was unsuccessful. At [96]-[115], the Court of Appeal accepted that the imbalance charges were collateral stipulations engaging the penalty doctrine; but since the evidence indicated that the loss likely to be caused by a usage imbalance could not be quantified as at the time of entering into the gas transportation contract, it could not be said that the agreed imbalance charges were out of all proportion to the likely financial impact of a usage imbalance on the pipeline operator. In those circumstances, the agreed imbalance charges represented the parties' own pre-estimate of the otherwise unquantifiable potential loss. The result was that QNI had failed to establish that the provision imposing imbalance charges was a penalty.

[105370] Break fees in corporate transactions

The Australian Takeovers Panel has issued a guidance note which assesses break fees and other lock-up devices in terms of the policy of ss 602 and 657A of the *Corporations Act 2001* (Cth): see *Guidance Note 7: Deal Protection*.[1] Paragraph 4 of *Guidance Note 7* defines break fees in the following terms:

> a fee payable payable by a target to a bidder if specified events occur which prevent a bid from proceeding or cause it to fail.

The Guidance Note focuses on the market effect of break fees and other lock-up devices, and does not deal with whether they are void or unenforceable under other principles of law.

One issue that has been raised in discussion of break fees is whether they may be unenforceable as penalties: see eg Mannolini J and Rich R, "Break Fee Agreements in Takeovers" (2001) 19 C&SLJ 222 at 224; Mayanja J, "No-shop, no-talk and break-up fee agreements in merger and takeover transactions: The case for a fresh regulatory approach" (2002) 14 *Australian Journal of Corporate Law* 1 at 21.

The dual criteria of disproportion/oppressiveness and unequal bargaining power/ unconscionability will determine whether the fee is classified as a penalty. In most break fee cases, the fee is likely to be negotiated between corporations with substantial resources and competent advisers, so unequal bargaining power is unlikely to be an issue and the emphasis will be on whether the fee is oppressive because it is out of all proportion to the legitimate interests of the bidder protected by the fee. The test for "oppressive disproportion" is likely to correspond closely to the test of what is "coercive" under *Guidance Note 7*.

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1 http://www.takeovers.gov.au/guidance_notes/gn7 viewed 4 February 2024. For a discussion of break fees see *Takeovers and Reconstructions in Australia* (LexisNexis, looseleaf) [1158], [1160], [1619] ff.

[105380] Penalty principles and contractual construction: *Gumland Property Holdings*

The High Court's decision in *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* 234 CLR 237; (2008) 82 ALJR 576; [2008] HCA 10 indicates that penalty principles cannot be relied on to influence the construction of a contract. In that case, a lessor of premises in a shopping centre granted a lease to Duffy Bros, the first respondent. The lessor subsequently assigned the benefit of the contract to the appellant, Gumland. Duffy Bros failed to pay the rent on time, largely due to the default of a sub-lessee. Gumland argued that it was entitled to terminate the lease and claim loss of bargain damages for the unexpired term.

One argument raised by Duffy Bros was that the doctrine of relief against forfeiture prevented Gumland from having both the possession of the leased premises, which were repossessed after termination, and loss of bargain damages which were based on the assumption that the premises were still leased. Duffy Bros claimed support for this argument from the judgment of Brennan J in *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359; 57 ALJR 172 – see [105150]. In *O'Dea*, a clause in a hire-purchase agreement allowing the lessor, in the event of default, to both retake possession and claim the balance of rent for the unexpired term of the lease, was not enforceable. In *O'Dea*, Brennan J held that the relevant clause was a penalty and that equity would relieve against forfeiture in those circumstances.

The High Court pointed out that Duffy Bros were not claiming that the lease created a penalty against which relief, in the nature of relief against forfeiture, should be given. The contention appeared to be that if loss of bargain damages were recoverable, that would operate as a penalty. This really amounted to a contention that the lease should not be construed as allowing Gumland to retake possession and also claim loss of bargain damages, because that construction would lead to a result that was punitive in character. The High Court rejected the notion that penalty or forfeiture principles could be used as an aid to construction, saying (at [60]):

> if the contractual words clearly have one meaning, the consequence that in that meaning they create a penalty cannot cause them to be given another meaning. To make a contract containing a penalty has remedial consequences, but it is not contrary to the law. And even if the lease, by reason of its stipulations for loss of bargain damages, operates as a penalty, relief against forfeiture on that ground would not be automatic. It would be a term of the relief that outstanding rent and outgoings be paid. The lessee has not offered to do that, and indeed, by its cross-appeal it actively resists that course … . Where a person in the position of the lessee can cure the phenomena which are said to render the arrangement a penalty by obtaining relief against forfeiture provided it complies with the condition of that relief, but it refuses to do so, it cannot rely on the allegedly penal character of the lease to compel a construction antithetical to its clear words.

[105390] Settlement agreement cases

In *Acron Pacific Ltd v Offshore Oil NL* (1985) 157 CLR 514; 59 ALJR 782, an unsuccessful attempt was made to classify a default provision in a moratorium deed as a penalty. The High Court said that the default provision "was no more than the loss of the qualified indulgence which the creditors had agreed to give" (per Mason ACJ and Wilson, Brennan and Dawson JJ at 519 (CLR)), or "the agreed machinery for termination of an agreed forbearance" (per Deane J at 520 (CLR)).

In more recent years, appellate courts in Australia have considered a series of cases in which "default" provisions in settlement agreements have been attacked as penal. In the usual scenario, proceedings are settled on the basis that the defendant agrees to pay the plaintiff a sum of money by instalments, in settlement of the plaintiff's claim; but if instalments are not paid on time, the plaintiff becomes entitled to payment of a larger sum.

After an initial divergence of views, a reasonably clear principle has emerged from the cases: a default provision in a settlement agreement requiring the payment of a higher sum will not be struck down as a penalty, provided the defendant clearly acknowledges liability for the higher sum, but receives the concession of being allowed to settle for a lower sum provided that sum is paid punctually by instalments.

The first case in the series was *Zenith Engineering Pty Ltd v Queensland Crane & Machinery Pty Ltd* [2001] 2 Qd R 114; [2000] QCA 221, a decision of the Queensland Court of Appeal delivered in June 2000. The original action was a claim under a contract for engineering work, in an amount of around $72,000. This claim was settled under a deed which required Queensland Crane to pay $55,000 by instalments, "in full settlement" of the claim and a counter-claim. Clause 4 of the settlement deed provided that if any of the instalments was not paid on the due date, Zenith would be entitled to enter judgment for the full $72,000.

Queensland Crane was late in paying several of the instalments. Zenith applied for judgment for the higher amount, relying on cl 4. At first instance the application was dismissed, on the basis that cl 4 was penal in nature.

Argument before the Queensland Court of Appeal focused on the application of principles discussed by the High Court in *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359; 57 ALJR 172; see [105150]. In particular, the question was whether cl 4 should be upheld in reliance on the line of authorities including *The Protector Endowment Loan & Annuity Co v Grice* (1880) 5 QBD 592 and *Wallingford v Mutual Society* (1880) 5 App Cas 685. These cases establish that there is no penalty where there is a present debt, and the creditor gives an indulgence allowing the debt to be paid later or in a lesser amount, provided certain conditions are met (such as punctual payment by instalments). Taking a lead from the High Court judgments in *O'Dea*, the Queensland Court of Appeal held that the *Protector Loan* principle should be confined to cases where there is an admitted debt payable by instalments, with a provision for acceleration: *Zenith* at [8]. In the case before the court, the higher sum "was neither in form nor in substance a present debt; it was merely an amount claimed": at [9]. Therefore the case was one where on breach, the defaulting party became liable to pay a much larger sum, bearing no rational relationship to the loss suffered by Zenith through late payment of an instalment; so cl 4 was an unenforceable penalty.

The second case in the series was *Cameron v UBS Attorney-General* (2000) 2 VR 108; [2000] VSCA 222. This decision of the Victorian Court of Appeal was heard in September 2000 and delivered in November 2000, and the then recent decision of the Queensland Court of Appeal in *Zenith* does not appear to have been cited in argument.

In *Cameron*, Swiss Bank Corporation had recovered judgment against Mr Cameron in Switzerland, for a sum of A$8.4 million. It commenced proceedings to enforce the judgment in

Australia. UBS AG, through a merger with Swiss Bank Corporation, became the successor to Swiss Bank's rights. UBS AG entered into a deed of settlement with Mr Cameron. The deed required Mr Cameron to pay UBS $1 million, by five instalments of $200,000 each. In consideration for Mr Cameron's agreement to make these payments, UBS agreed that the proceedings would be struck out with no order as to costs (but with a right of reinstatement). Clause 3 of the deed provided that in default of payment of any or all of the instalments, UBS would be at liberty to have the proceedings reinstated and to have judgment entered for the full amount of its claim; Mr Cameron agreed to consent to these orders.

Mr Cameron was late in paying the first instalment. UBS applied for judgment in accordance with cl 3 of the deed of settlement. Mr Cameron opposed the application on the ground that cl 3 was a penalty. Initially refused by a master, the application for judgment by UBS was granted by Beach J and this decision was upheld by the Court of Appeal. In the leading judgment, Phillips JA identified the "key to this appeal" (at [20]): the settlement deed was not simply an agreement to pay $1 million by instalments; it was a bargain about enforcement of the Swiss judgment. By the settlement deed Mr Cameron secured one last opportunity to pay a much lower amount in full and final satisfaction of the claim by UBS to enforce the Swiss judgment. In return, he bargained away any defence he had to enforcement of the judgment; he consented to the entry of judgment, if he defaulted in payment of the instalments. This brought the case within the line of authorities holding that no penalty arose when the sum payable on default was already due and owing, and the chance to pay a lesser sum was afforded as a privilege or indulgence (citing Gibbs CJ in *O'Dea* at 367 (CLR)).

In response to the argument that the deed of settlement contained no acknowledgement of Mr Cameron's liability, Phillips JA referred to the "considerable history" leading to the deed of settlement. From this history and the terms of the deed, "the consent to judgment can be seen as doing nothing more than formalising a liability acknowledged, by implication, when the terms of settlement were agreed and the deed was entered into". The implied acknowledgement of liability to pay the $8.4 million should there be default made it clear that the sum was effectively due and owing, albeit contingently owing.

In *Hunt v Kallinicos* (2009) 14 BPR 26517; [2009] NSWCA 5, the NSW Court of Appeal considered a slightly different default provision in a settlement agreement. The original claim was for taking of accounts of partnership or joint venture transactions. Mediation led to the signing of legally binding heads of agreement. These provided for the defendants to pay the plaintiff $900,000 by two instalments, one in February 2008 and the other in September 2009. Clause 14 provided that if an instalment was late, the plaintiffs could enter judgment for $900,000 or the outstanding balance. The defendants consented to the entry of judgment.

The first instalment was late and the plaintiffs applied for judgment. Judgment was entered; the first instalment was subsequently paid, and the appeal was limited to the second instalment of $450,000. The defendants argued that the provision for acceleration was a penalty.

Hunt differed from *Zenith* and *Cameron*, in that the amount agreed to be paid by instalments was not lower than the amount payable on default. The claimed "penalty" element was simply the acceleration of the time for payment. In the leading judgment in the Court of Appeal, Handley AJA held that the penalty claim was defeated by the line of authority based on *Wallingford v Mutual Society* (1880) 5 App Cas 685, as acknowledged by the High Court in *O'Dea*: a clause providing for the acceleration of payment of an existing debt on default in payment of an instalment is not a penalty. In the case before the court, the full amount was due on signing of the heads of agreement, albeit by instalments at future dates; it was a present obligation to pay a sum in the future.

Handley AJA referred briefly to *Cameron* and *Zenith*, which had been cited in argument. He recognised an analogy with *Cameron*, in that "the defendants' obligation to pay the settlement sum did not spring from the agreement but from past dealings between the parties": [27]. With respect to *Zenith*, his Honour simply said: "The decision … does not support a similar conclusion in this case".

The NSW Court of Appeal considered another settlement deed case later in 2009: *Fermiscan Pty Ltd v James* (2009) 261 ALR 408; [2009] NSWCA 355; see [105360]. In *Fermiscan*, the default provision in the settlement agreement did not relate to late payment of instalments of settlement money; it covered a range of other breaches. Further, and significantly, the default provision changed the character of the relevant payment obligation. Absent default, the only payment obligation of the defendant under the settlement deed was to make payment out of a fund of fees and royalties expected to be received in the future, from the successful commercialisation of an invention. However, any breach would result in an immediate obligation to pay this sum. This represented "transformation of a substantially conditional obligation deferred in performance into an absolute one being immediately performable". This could not be brought within the *Wallingford* line of authority recognised by the High Court in *O'Dea*, relating to a "present debt", because it effectively created a new obligation.

The potential conflict between *Zenith* and *Cameron* was squarely raised before the Victorian Court of Appeal in *Calcorp (Aust) Pty Ltd v 271 Collins Pty Ltd* (2010) 29 VR 462; [2010] VSCA 259. In that case, the original action was taken by a landlord against the tenant and the tenant's guarantors, seeking rent due under a lease after the tenant had defaulted and the landlord had retaken possession. The tenant counterclaimed. Both claim and counterclaim were compromised by terms of settlement, under which the defendants (tenant and guarantors) agreed to pay $200,000 by seven instalments. Clause 4 of the terms provided that if the defendants failed to pay any instalment when due, the plaintiff was entitled to enter judgment for the "agreed sum" of $262,000, plus interest and costs. The defendants were late with the last instalment, and the plaintiff moved for judgment.

The defendants opposed the application, claiming that to the extent that cl 4 of the terms of settlement gave the plaintiff an entitlement to claim more than $200,000, the clause was penal in nature and therefore unenforceable. In argument before the Court of Appeal, the parties accepted that the question came down to one of construction of the terms of settlement. If the terms comprised an acknowledgement by the defendants that they were obliged to pay $262,000, the obligation to pay that amount (or the outstanding balance) on default in payment of instalments could not be a penalty.

Nettle JA (with whom Redlich JA and Harper JA agreed) held that it was implicit in the terms of settlement that the tenant and its guarantors had acknowledged that the sum of $262,000 was due. Nettle JA cited (at [17]–[23]) a number of factors supporting this implication, including the analogy with *Cameron* and the use of the expression "agreed sum" in the terms of settlement. He distinguished *Zenith* on the basis of differences in the pleadings and the terms of settlement; the pleadings in *Zenith* did not contain an admission of any obligation to pay, and the terms of settlement did not refer to an "agreed sum".

The conflict between *Zenith* and *Cameron* was raised again before the Victorian Supreme Court in another settlement agreement case, *Talacko v Talacko* (2011) 31 VR 340; [2011] V ConvR 54-789; [2011] VSCA 71. The underlying dispute was between family members, concerning rights to property formerly owned by the family in the former Czechoslovakia and East Germany and subsequently available for restitution following the fall of the Communist governments in those countries. One family member (Jan) had taken the lead in obtaining restitution, and sought to retain a disproportionate share of the property recovered. A settlement agreement was entered into in 2001. Clause 6 provided that in the event of breach of the settlement terms by Jan, the other family members would be entitled to enter judgment requiring Jan to pay equitable compensation for breach of fiduciary duty in respect of each of the properties recovered and retained by him.

The other family members claimed that Jan had breached the settlement agreement, and sought to enter judgment for equitable compensation. Jan denied the breach, and also argued that cl 6 was an unenforceable penalty. At first instance, Kyrou J held that the other family members were entitled to enter judgment; he held that Jan's execution of the settlement agreement constituted an implicit acknowledgement of liability, creating a close analogy with *Cameron*. On appeal, counsel for Jan sought to distinguish *Cameron*, on the basis that the terms of settlement in *Talacko* contained no implicit acknowledgement of liability; on this argument, *Zenith* provided a closer analogy.

In a joint judgment, Neave JA and Harper JA (Tate JA agreeing) dismissed the appeal. On the penalty point they held that the settlement agreement did contain an implicit admission of Jan's liability: at [62].

Furthermore, as in *Cameron*, the provision challenged as a penalty was not included (as a consequence of breach) merely to induce or compel compliance. Instead, it was central to the purpose of the settlement agreement. Jan had promised to transfer certain properties or their value. He also promised that if he failed to do this, he would pay the monetary value of the other family members' entitlements, assessed on the basis that it was equitable compensation. The promise to pay equitable compensation was therefore integral to the main purpose of the settlement agreement. It was an alternative form of consideration provided by Jan: [74]–[76].

The combination of the "admitted liability" argument and the "central to the agreement" argument is slightly confusing. How the arguments fit together is perhaps best summed up in the joint judgment at [74]:

> A concession that a debt is owed or an obligation is due will, if the clause alleged to constitute a penalty provides for its discharge, point strongly if not conclusively to the conclusion that that clause is not a penalty. If other indicia point likewise to that clause being central to the main purpose of the bargain, because, for instance, it is central to the consideration offered by one party for the participation of the other in the contractual arrangements, then an argument that it does not amount to a penalty would be strengthened.

Neave JA and Harper JA distinguished *Zenith* on the basis that the facts in that case did not demonstrate a "considerable history" establishing that the provision attacked as a penalty was central to the main purpose of the bargain, and that the higher amount payable on default was independently owing. Their Honours went on to say, however, that if *Zenith* could not be distinguished they would in any event follow *Cameron*: [80].

In *Lachlan v HP Mercantile Pty Ltd* [2014] NSWSC 356 the NSW Supreme Court (Darke J) followed *Cameron* in implying into the settlement deed an acknowledgment of indebtedness in an amount equal to the amount for which judgment could be entered under the deed. The implication arose from an admission in the recitals to the deed that the full amounts claimed were due and owing. This took the case outside the scope of the penalty doctrine. The decision was upheld on appeal: *Lachlan v HP Mercantile Pty Ltd* (2015) 89 NSWLR 198; [2015] NSWCA 130.

On the other hand, in *Legal Practice Management (Vic) Pty Ltd (in liq) v Simms Corp Hotels & Leisure Pty Ltd* [2013] VSC 734 the Supreme Court of Victoria (Sloss J) could find no express or implied acknowledgment of present indebtedness in the settlement deed. As the sum stipulated to be payable was neither in form or substance a present debt, it could fall within the penalty doctrine. The remaining issue was whether the stipulated amount was extravagant and unconscionable in comparison with the greatest conceivable loss that could be proved to have followed from the triggering event (which in this case was insolvency of one of the Simms entities). At first instance the magistrate had held that the increase in the amount payable (from $80,000 to over $130,000) was extravagant and unconscionable. Sloss J agreed.

In *Auzcare Pty Ltd v Idameneo (No 123) Pty Ltd* [2015] NSWCA 412, various submissions were made in an attempt to distinguish the *Cameron* line of authority. All were rejected by the NSW Court of Appeal. The settlement deed before the Court contained an express and unambiguous acknowledgement of debt, and that was decisive; the provisions making that debt payable on further breach could not be penal.

Auzcare was applied in *Wong v Van Vlymen* [2020] NSWSC 841 at [161].

Cameron was applied by the Federal Circuit Court in *Dairy Farmers Pty Ltd v Issa* [2017] FCCA 1238.

Di Gregorio v Jersey Developments 27 Pty Ltd [2018] NSWSC 966 serves as a warning about complacency in relying on an implicit acknowledgment of indebtedness for the higher amount, as opposed to an explicit one. That case concerned a consent order compromising a claim, including a term that if the defendants did not meet agreed obligations to pay a lower sum by instalments, the plaintiffs would "be at liberty to … enter judgment in the amount which represents the difference between the Plaintiffs' claim of $769,762.61 … and … sums already received by the Plaintiffs". Darke J, distinguishing his earlier decision in *Lachlan v HP Mercantile Pty Ltd* and the decision of the Victorian Court of Appeal in *Calcorp*, found that there was no implicit acknowledgment of liability for the full amount claimed. His Honour took into account the language of the agreement itself (which only referred to the "Plaintiffs' claim") and the background of the proceedings, including the pleadings (which contained no admission of an obligation to pay). As a result, the case was "more akin to *Zenith*" than to the implied acknowledgment cases, and the term requiring payment of a higher amount on default was unenforceable as a penalty.

From this line of cases, lessons emerge for lawyers drafting settlement agreements. If a settlement agreement between party A and party B imposes additional obligations on B in the event that B commits a breach of the agreement, it should be made clear that B accepts the contingent additional obligation arising on breach, as part of the bargain allowing B to discharge A's claim for a lesser amount or on less onerous terms, subject to punctual compliance with those terms. This will satisfy both limbs of the argument in *Talacko*. Going back to the earlier cases based on *O'Dea* and *Wallingford*, the key factor is to create an admitted obligation, with a concessional right to discharge it on less onerous terms but with the original obligation being reinstated if those terms are not punctually complied with.

In cases where a defendant is not prepared to make an express concession of liability for the higher amount, the Victorian Court of Appeal cases (*Cameron*, *Calcorp* and *Talacko*) indicate that if the defendant agrees to the entry of judgment for an amount, that agreement is likely to be taken as an implicit admission of present liability to pay that amount. However, having regard to the decision in *Di Gregorio*, reference should at least be made to entry of judgment for the "agreed amount" (see *Calcorp* at [21]) as opposed to the "claimed amount" (as in *Di Gregorio*). Without some clear indicator that the obligation to pay the higher amount has been acknowledged, the obligation to pay the higher amount is likely to be unenforceable as a penalty.

Apart from the settlement agreement cases which involve an uplift in the amount payable if there is a default in performance of settlement terms, courts in the years following the decision of the High Court in *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; [2012] HCA 30 have been called upon to consider arguments that other onerous obligations arising under settlement agreements were penal in nature. These arguments have failed, on the basis that the onerous obligations complained of were accepted as primary stipulations in the settlement agreements; they were not imposed as collateral stipulations arising on breach of an antecedent agreement: see *Moran v Argonaut Equity Partners Pty Ltd* [2021] WASCA 45 at [86]–[89]; *Yue v CN-AU Capital Pty Ltd* [2021] QSC 248 at [67].

[105395] Onus of proof and evidence in penalty cases

The party resisting enforcement of a contractual provision on the ground that it is a penalty has the onus of proving on the balance of probabilities that the provision is a penalty: *Multiplex Constructions Pty Ltd v Abgarus Pty Ltd* (1992) 33 NSWLR 504 at 527; *Spiers Earthworks Pty Ltd v Landtec Projects Corp Pty Ltd (No 2)* (2012) 287 ALR 360; [2012] WASCA 53 at [23] (per McLure P) and [86] (per Murphy JA); *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525; 90 ALJR 835; 333 ALR 569; [2016] HCA 28 at [167].

In *Spiers Earthworks* McLure P expressed the view (at [26]) that determining whether a contractual provision was a penalty or not was not solely a matter of construction of the contract. As a result the limit on admissibility of extrinsic evidence for the purpose of construing a contract, as stated by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337; 56 ALJR 459 and reasserted by the High Court in *Western Export Services Inc v Jireh International Pty Ltd* (2011) 86 ALJR 1; 282 ALR 604; [2011] HCA 45, did not apply. On this view, extrinsic evidence is admissible to determine whether a particular provision is a genuine pre-estimate of loss and within acceptable bounds of proportionality, whether or not ambiguity is present.

In the Federal Court decision in *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199; [2015] FCAFC 50 at [199] ff, Allsop CJ provided guidance on the role of extrinsic evidence in a penalty case: see [105355].

In *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* (2016) 93 NSWLR 231; [2016] NSWCA 328 at [111], the NSW Court of Appeal considered the onus of proof issue as it applies where the party seeking to rely on a challenged stipulation asserts that it is a genuine pre-estimate of loss. The basic position, as noted above, is that the onus of proving that a stipulation is penal is on the party who asserts that (ie the party seeking to avoid the stipulation). However, if the party seeking to enforce the stipulation asserts that the provision cannot be a penalty because it is a genuine pre-estimate of loss, that is a separate issue and the onus of proving the "genuine pre-estimate" falls on the party asserting it.

This is a point of considerable practical importance, since (especially in lending cases) it would often be very difficult for the borrower who relies on a penalty defence to prove what a genuine pre-estimate of the lender's loss would have been. The subtlety of this shift in onus is not always appreciated; see the judgment of the NSW Supreme Court (Fagan J) in *NJ Capital Pty Ltd v AMKI Property Holdings Pty Ltd* [2021] NSWSC 1462 at [12]–[14]. In that case the borrower and guarantors who had pleaded the penalty defence did not appear at trial, so the issue was not fully argued. However, Fagan J (while citing *Arab Bank*) proceeded on the basis that the onus of proving all aspects of the penalty case – including the lender's cost of funds, the rate of return it could obtain in the market for its financial services and the level of return it could obtain by redeploying funds when a loan is repaid – fell on the defendants.

The rule that the onus of proof falls on the party asserting that a provision is a penalty (usually a borrower) has the potential to cause injustice when that party does not appear (or is not represented) at trial. The NSW Supreme Court (Robb J) dealt with this issue in *First Cash Flow Solutions Pty Ltd v Saad* [2023] NSWSC 686. A solution found by the Court in that case was to make use of the presumption referred to by Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79 at 87, point 4(c) (quoted at [105130]), that a provision is a penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage". Robb J held that the presumption applied and (even though the defendant did not appear to defend the claim) imposed a burden on the plaintiff to overcome the presumption. Alternatively, the plaintiff was obliged to tender the contract on which it sued, in order to make out its case; and the contract then became evidence that was capable of establishing a sufficient basis for the Court to find that a particular term had the characteristics of a penalty, casting an evidentiary burden on the plaintiff to call evidence to explain why it was not a penalty. Robb J proceeded to hold that in the case before the Court, a "payment default fee" and certain other default-related fees were unenforceable as penalties.

Robb J made similar observations on the evidentiary issues in penalty cases in a slightly later case, *Bellas v Powers* [2023] NSWSC 1198 at [62]-[67] and [86].

In *QNI Resources Pty Ltd v North Queensland Pipeline No 1 Pty Ltd* [(2022) 11 QR 648; 406 ALR 125; 2022] QCA 169 at [96] ff, the Queensland Court of Appeal (Kelly J, Morrison JA and Ryan J agreeing) made significant statements about what a party seeking to rely on a penalty defence must prove, in order to discharge their "evidentiary and persuasive onus". That case concerned charges for positive or negative imbalances in gas pipeline throughput. Kelly J said (at [99]) that what was called for was "a tailored inquiry into the commercial circumstances in which the parties entered into the [gas transportation agreement]". It was accepted that imbalances could cause loss to the pipeline operator, but the expert witnesses agreed that it would be difficult or impossible, as at the time of making the contract, to quantify the costs or monetary impacts that would be caused to the operator by an imbalance. In these circumstances, fixing of the imbalance charge by reference to 200% of the transportation tariff was not distinctly punitive in character; rather, it represented the parties "having settled for themselves the contractual allocation of burdens and benefits in respect of imbalances" ([114]).

The *QNI case* demonstrates that it will be difficult for a party alleging that a "pre-estimate of loss" provision is a penalty to discharge its onus of proof unless there is evidence enabling the likely loss, calculated as at the time of making the contract, to be quantified. Without such evidence, there is no baseline for the calculation of "disproportionality", and no reason for the court to disturb the parties' agreed pre-estimate of otherwise unquantifiable potential loss. This approach was applied by the NSW Supreme Court (Peden J) in *New South Wales v Schofields Nominee No 5 Pty Ltd* [2024] NSWSC 1590 at [31]-[51].

[The next text page is 156261]

the lease, not to bring about repair of the premises, but for a collateral purpose. In these circumstances, if the lease had been validly terminated, relief against forfeiture would have been justified.

In lease forfeiture cases, it often happens that the lessee has engaged in some form of unreasonable behaviour. In both *Home Ideas Centre* at [33] and *Hemer* at [78], relief against forfeiture was granted, notwithstanding "reprehensible" or "difficult and annoying" behaviour by the lessee. It was emphasised that such behaviour is not a decisive factor, when breaches of the lease have been remedied. However, in *Home Ideas Centre*, the behaviour of the lessee was punished by an award of indemnity costs, notwithstanding its success in obtaining relief against forfeiture.

By contrast, in a case where the conduct of the lessee was described as "wilful and obdurate", "deliberate and recalcitrant" and "wholly unreasonable", the NSW Supreme Court (Pembroke J) took the view that there was no hope for the continuation of a stable commercial relationship and that the grant of relief against forfeiture would only result in further disputation. Relief against forfeiture was therefore refused: *Casquash Pty Ltd v NSW Squash Ltd (No 2)* [2012] NSWSC 522 at [57] ff.

Casquash was distinguished in *Hookey v Whitelaw* [2020] QSC 63, where the lessor put forward a range of factors allegedly disentitling the lessee to relief against forfeiture – including the broken relationship between the principals of the lessor company and the lessee company. Flanagan J saw no reason to suspect that the lessee company would conduct itself otherwise than in accordance with the terms of the lease, just because of the personal animosity between the principals on either side.

The factors relevant to the exercise of this jurisdiction are in a state of some confusion, owing to the flow and ebb of the influence of unconscionability through the High Court decisions reviewed at [105590] to [105630]. However, the factors listed by Lord Wilberforce in *Shiloh Spinners* remain a firm starting point: *Greek Macedonian Club* at [77]. These factors are the conduct of the tenant (in particular whether the default was wilful), gravity of the breaches and disparity between the value of rights lost by the tenant on re-entry, compared with the damage caused by the breach (for a case where this "disparity" factor led to the grant of relief despite the insolvency of the tenant, see *Riviera Holdings Pty Ltd v Fingal Glen Pty Ltd* (2013) 120 SASR 450; [2013] SASC 77). Relief is granted in respect of wilful breaches only in exceptional cases, and is not granted where future compliance appears unlikely.

Introducing unconscionability into this mix is confusing, but the test is frequently expressed this way – see for example *Beamer Pty Ltd v Star Lodge Supported Residential Services Pty Ltd* [2005] VSC 236 at [442]:

> The test to be applied is one of unconscionability – that is, whether in the light of the tenant's remedying [the] breach of covenant, resort by the landlord to the strict legal right of re-entry would be unconscionable.

This test is taken from *Leads Plus Pty Ltd v Kowho Intercontinental Pty Ltd* (2000) 10 BPR 18085; [2000] NSWSC 459, a pre-*Tanwar* case (*Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315; 201 ALR 359), which may explain the use of the less preferred terminology. However, this does exemplify the third defect in the term "unconscionable", as identified by the joint judgment in *Tanwar* at [26]: instead of focusing on the unconscientious conduct of a particular party, it encourages a wider review taking in any element of hardship or unfairness in the transaction.

With respect, the potential for confusion is evident in the test as stated in *Tannous v Cipolla Bros Holdings Pty Ltd* (2001) 10 BPR 18563; [2001] NSWSC 236 at 18,568:

> whether, in the light of the tenant's remedying of the default in the payment of rent, resort by the landlord to his strict right of re-entry would be unconscionable; or, if I may put it another way, whether the tenant has been guilty of conduct over and above the remedied default in payment of rent which is of such gravity that, even accepting that the default for which the right of re-entry is security has been satisfied, it would not be unconscionable on the landlord's part to insist on his strict legal right.

In this formulation, the absence of unconscionability on the landlord's part arises from the gravity of the tenant's conduct. A more satisfactory approach might be to bypass the concept of unconscionability and return to the relatively simple formulation offered by Lord Wilberforce in *Shiloh Spinners*. Two propositions are fundamental:

- Where the default is made good, it will take some special disqualifying factor to make the court withhold relief. This may well equate with unconscientious conduct on the part of the tenant, but the other factors referred to by Lord Wilberforce are also relevant.
- The bias is towards the grant of relief in the absence of special factors. Contrast the *Tanwar* (sale of land) situation where the bias is towards upholding the vendor's right to terminate against the purchaser's claim for specific performance (formerly understood as refusal of the purchaser's claim for relief against forfeiture) in the absence of fraud, mistake, accident or surprise – the first and fourth requiring unconscientious conduct on the part of the vendor.

A helpful summary of relevant principles, drawing on recent decisions, is set out in *Sneakerboy Retail Pty Ltd (t/as Sneakerboy) v Georges Properties Pty Ltd* (2020) 19 BPR 40443; [2020] NSWSC 996 at [75]. In that case relief was granted on the condition that the bank guarantee securing rent payments was restored to its original level, despite "serial delinquency" by the lessee in performance of its obligation to pay rent. A complicating factor was that reinstatement of the lease subjected the parties to the regime of special provisions introduced in response to the COVID-19 pandemic, and Robb J required the parties to make submissions on how that regime would be applied to the lease.

Similarly, in *Heat Group Pty Ltd v Paragon Care Ltd* [2021] VSC 204 the Victorian Supreme Court (Forbes J) granted relief on condition that the bank guarantee securing future rent payments was restored. After a brief discussion of principles applicable to cost awards in applications for relief against forfeiture, the Court applied the usual principle that the applicant seeking relief should bear the costs of the action, notwithstanding that the application was successful.

In *Okami SA Newton Pty Ltd v Newton SC Pty Ltd* [2024] SASC 151, the South Australian Supreme Court considered an application for relief against forfeiture, which was opposed on grounds including an assertion that the lessee was "hopelessly insolvent". Stanley J (at [21]) accepted the lessee's submission that the test for "hopeless insolvency" in the context of an application for relief against forfeiture was whether, on the face of the documentary evidence, it was glaringly obvious that the lessee was unable to pay its debts as and when they fell due. His Honour concluded (at [35]) that in the circumstances, it had not been established that the lessee was hopelessly insolvent; but even if it was, that was not a decisive factor but only a discretionary one. If it transpired that the lessee was unable to pay rent in the future, a further application for relief was likely to be refused. A factor in the Court's decision to grant relief was the finding (at [57]) that the respondent had acted opportunistically to evict the applicant to permit redevelopment of the shopping centre where the premises were located.

In *Tasmanian Ports Corporation Pty Ltd v Resources Australia Pty Ltd* [2024] TASSC 60, an application for equitable, alternatively statutory relief against forfeiture of a lease was made in parallel with an application for relief on the ground of statutory unconscionability under s 21 of the Australian Consumer Law. Blow CJ was not prepared to grant relief on either basis, finding (at [62] and [76]) that the lessor had not acted unconscionably.

Delay by the displaced tenant in making the application for relief from forfeiture of a leasehold interest is likely to count against the grant of relief, especially where the rights of innocent third parties have arisen during the period of delay (for example, where the premises have been sold, or re-let to a new tenant): see *Gibbs v Lakeside Developments Ltd* [2019] 4 WLR 6; [2018] EWCA Civ 2874.

The principles governing relief against forfeiture of leases have been extended in England to protect the interest of the hirer under a finance lease: *On Demand Information plc v Michael Gerson (Finance) plc* [2001] 1 WLR 155; [2000] 4 All ER 734, affirmed on appeal *On Demand Information plc v Michael Gerson (Finance) plc* [2003] 1 AC 368; [2002] 2 WLR 919; [2002] 2 All ER 949; [2002] UKHL 13 – see [105520].

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1 Principles of intervention are outlined in *Meagher Gummow & Lehane's Equity Doctrines and Remedies* (LexisNexis, 5th ed, 2015) at [18-250] ff.

[105690] Relief against forfeiture of option to renew

In some jurisdictions the legislation regulating forfeiture of a tenant's interest in a lease, and giving courts statutory power to grant relief against forfeiture, goes on to grant similar power to relieve against loss of the tenant's right to exercise an option to renew, or to purchase the reversion: *Law of Property Act 2000* (NT) s 143; *Conveyancing Act 1919* (NSW) s 133F; *Property Law Act 1974* (Qld) s 128; *Property Law Act 1969* (WA) s 83D; and see [40540] and [40600].

The principles in *Shiloh Spinners Ltd v Harding* [1973] AC 691; [1973] 2 WLR 28; [1973] 1 All ER 90 which apply to forfeiture of a lease also apply to forfeiture of the option to renew: *Dee-Tech Pty Ltd v Neddam Holdings Pty Ltd* (2012) 16 BPR 31089; [2012] NSWSC 251 at [213]. This round of the *Dee-Tech* litigation provides another example of the grant of relief where the lessor's power under the lease was used for the collateral purpose of regaining possession, due to the deterioration of the lessor/lessee relationship.

Authorities relating to the forfeiture of an option to renew for both monetary and non-monetary default are listed in *Casquash Pty Ltd v NSW Squash Ltd (No 2)* [2012] NSWSC 522 at [57].

For a summary of principles and authorities relating to s 133F of the *Conveyancing Act 1919* (NSW), see the decisions of the NSW Supreme Court (Ball J) in *Allsvelte Pty Ltd v Cassegrain Wines Pty Ltd* [2015] NSWSC 1370 at [76]–[77] and *Nguyen v Valore* [2018] NSWSC 1364 at [59]–[61].

In *Piazza Trevi Pty Ltd v Cromwell BT Pty Ltd* [2017] NSWSC 794 at [75] ff, Sackar J held that the court's jurisdiction to relieve against forfeiture cannot be invoked where forfeiture arises from a mere failure to exercise an option to renew (either on time, in the required form or at all). The primary reason for this conclusion was that an option to renew is only a contractual right (an irrevocable offer by the lessor), which does not confer a proprietary interest in the leasehold land; and forfeiture only occurs where an interest, estate or other proprietary right of one person is determined in favour of another person (at [81]). As to this, see [105520] where the more expansive views expressed by Edelman J and the Full Federal Court in *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2017] FCAFC 55 are noted. A further and separate reason for the decision in *Piazza Trevi* was that the doctrine of relief against forfeiture has no application where forfeiture does not arise from an act or omission amounting to a breach: [82].

For the discretion to grant equitable relief against forfeiture to arise, there must be an "interest" which is being forfeited. A tenant seeking to exercise an option to renew only has an interest if the conditions for exercise of the option have been met. It follows that if a condition of exercise has not been met – for example, if the tenant has defaulted in payment of rent – the interest constituted by the option to renew does not arise. The lease expires simply by effluxion of time; there is no act by the landlord capable of amounting to forfeiture, so relief is not available: *Replay Australia Pty Ltd v NightOwl Properties Pty Ltd* [2023] QCA 76 at [43]-[56].

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