INCORPORATION

• BY SIGNATURE

  L’Estrange v Graucob – a party will be bound by the terms contained in a contractual document which has been signed by the party, whether or not the party has read the document.
  o Reasonable notice is not required Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd
  o Unless
    • Vitiating factors (fraud, misrepresentation, mistake whether negligent or innocent, duress)
    • Non est factum – “it’s not my deed” - when the party doesn’t understand what they are signing (limited exception). For e.g. they are blind, signing a document in a different language, limited intellectual capacity. There is no suggestion that the party has mislead (though they often have!)
    • The document is not contractual Curtis v Chemical Cleaning and Dyeing Co

• BY NOTICE – must meet both requirements

  1. Timing - notice of the terms must be given before the contract is formed Oceanic Sun Line Special Shipping Company Inc v Fay
  2. Knowledge - must know of the terms. Reasonable steps must be taken to bring unusual or onerous terms to the notice of the party to be bound Baltic Shipping Co v Dillon (unusual terms) Thornton v Shoe Lane Parking Ltd (onerous terms)

• BY COURSE OF DEALINGS – must meet both requirements

  1. Sufficient regularity of dealings in the past - regular and uniform, contractual terms introduced in earlier contracts may be incorporated into subsequent contracts Balmain New Ferry v Robertson
  2. The requirements of a contract must be satisfied at least once (there must be assent) Rinaldi & Patroni v Precision Holdings (1986)

• ORAL STATEMENTS

  1. The admissibility of the evidence in court must be considered. This rule is known as the parole evidence rule, and limits the ability for extrinsic evidence to add or vary the terms of a contract.

    • Parole Evidence Rule
      Only works when
      a. Agreement is in writing
      b. Written agreement is the entire agreement

Incorporation
It prevents extrinsic evidence being given to add to, vary or contradict the terms of the contract as they appear in the document
  o For the purposes of determining whether the agreement is wholly in writing, the court is permitted to examine extrinsic evidence (McHugh in State Rail Authority of New South Wales v Heath Outdoor Pty Ltd)

Exemptions
  o Collateral contracts
    i. Must be promissory and used to induce entry into the main contract (consideration for the collateral contract is entering into the main contract) JJ Savage & Sons Pty Ltd v Blakney
ii. Must be consistent with the main contract and made before or at the time of formation Hoyt's Pty Ltd v Spencer

  o Estoppel - promissory
    Entire agreement clauses and no-reliance clauses do not prevent claims of estoppel Saleh v Romanous, contrast with Australian Co-operative Foods v Norco Co-operative (which doesn’t represent the law in Australia)

  o Misrepresentation
    i. Negligent misrepresentation (tort – Hedleyburn and Heller)
    ii. Fraudulent misrepresentation (tort – deceit)

  o Statutory Relief

2. Courts must consider the intention of the parties, and whether they intended the statement to form part of the contract Masterton Homes Pty Ltd v Palm Assets Pty Ltd

  • Significance of a written contract Equuscrop v Glengallan Investments and Saleh v Romanous regarding EAC
  • Language used JJ Savage & Sons v Blakney
  • Relevant expertise of the parties Oscar Chess v Williams and Dick Bentley Productions v Harold Smith (Motors)
  • Importance of the statement
  • Timing of the statement
  • Form of the written contract

3. Accordingly, the courts may find that the statement was

   1. Promissory
   2. Mere Representation
   3. Misrepresentation
      i. Negligent
      ii. Fraudulent
      iii. Innocent

CONSTRUCTION

• In determining the meaning of a contract, courts apply the meaning that a reasonable person would give to the contract Royal Botanic Gardens and Domain Trust v South Sydney City Council and Pacific Carriers v BNP Paribas

• Parole evidence Rule
  Only works when
  i. Agreement is in writing
  ii. Written agreement is the entire agreement

  Construction
  Limits the evidence that might be given to explain the meaning of those terms, except in the instance of ambiguity

  • Codelfa Construction Pty Ltd v State Rail Authority of New South Wales – Mason J – stated that evidence of surrounding circumstances is admissible to assist in the interpretation if the language is ambiguous.
  • Maggbury Pty Ltd v Hafele Australia Pty Ltd and International Air Transport Association v Ansett Australia Holdings Ltd both suggest no need for ambiguity.
  • Western Export Services v Jireh International confirms the High Court’s position that Codelfa is correct and ambiguity is required.
• **Exclusion Clauses**
  - Can be relied on if
    1. Properly *incorporated* into the contract *Darlington Futures v Delco Aust* term was not incorporated, *Davis v Pearce Parking Station* term was incorporated
    2. *Applicable* to the issue at hand *Thomas National Transport (Melbourne) v May & Baker (Australia)*
      - Interpretation relies on the language of the clause and should be construed in its natural and ordinary meaning and construed contra proferentum in the case of ambiguity (against the party seeking reliance on the clause)

**IMPLIED TERMS**

• **BY FACT**
  Terms intended by the parties but not expressly stated. For a term to be implied by fact it must meet all 5 criteria established in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*. 2 and 3 are the most important.
  1. Reasonable and equitable
  2. Necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it *Byrne v Australian Airlines; Frew v Australian Airlines*
     1. So obvious that “it goes without saying” *Codelfa Construction v State Rail Authority of NSW*
     2. Capable of clear expression
     3. Not contradict any express term of the contract.

• **BY LAW**
  Terms that the law automatically implies in certain types of contract regardless of the intention of the parties *Byrne v Australian Airlines; Frew v Australian Airlines*
  - Applicable to a defined category of contracts
  - Suitable and necessary to be implied into all contracts in that category *University of Western Australia v Gray*
    - Examples include
      - Reasonable fitness and quality on a contract for the sale of goods; payment and delivery of the goods are concurrent; implied warranty of seaworthiness; implied condition on the letting of a furnished house that it is reasonably fit for habitation; implied promise by a servant not to disclose secret processes; not to hand over rival written work completed for a master; not, while still in masters employment, solicit customers to transfer their custom to herself; implied promise by a worker (in some cases) to furnish work; implied duty of care in the carriage of passengers and in looking after bailed goods; implied promise by a banker not to disclose the state of a customers accounts

• **BY CUSTOM**
  Terms will be implied into contracts for a particular industry when: *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Aust) Ltd*
  1. There must be such a custom (question of fact).
  2. There must be evidence that the custom relied on is so well known and acquiesced in that everyone making a contract in that situation can reasonably be presumed to have imported that term into the contract (not necessarily universally accepted).
  3. The implied term cannot contradict an existing express term.
  4. It is also established person may be bound by a custom notwithstanding the fact that he had no knowledge of it.

• **BY STATUTE**
  Terms can be implied because statute requires it. These terms will be implied even if the parties attempt to expressly exclude them.
THE RIGHT TO TERMINATE

• BY MUTUAL AGREEMENT
  • Express term
    • Expiration of length clause
    • An express termination clause. This clause will give the right to terminate
      a. "at will"
      b. after a specified period of time
      c. triggered by a certain event (contingent condition)
    • An express term must explicitly state whether there is a right to damages. A contractual right to terminate does not automatically come with a right to damages
  • Implied term
    • There can also be an implied right to terminate a contract of otherwise indefinite duration. Reasonable notice must be given according to the circumstances Crawford Fitting Co v Sydney Valve & Fitting Pty Ltd

• Subsequent agreement
  • Express in subsequent agreement- consideration is forfeiting each other’s rights. If one party has no rights left, deed or fresh consideration can be provided
  • Inferred from subsequent agreement
    a. if inconsistent with the original agreement, the new terms replace those in the original agreement
    b. If it is unlikely the parties intended to abandon their rights under the original contract, or the subsequent contract cannot stand alone, then it simply modifies.

• Abandonment
  • Both parties do not see the contract as operating and don’t think it should be performed further DTR Nominees Pty Ltd v Mona Homes Pty Ltd

• FAILURE OF CONTINGENT CONDITION
  o Implied or express duty to co-operate - parties must do everything reasonable within their power to ensure the condition is fulfilled. Failure of duty to co-operate means party can't rely on non-fulfillment of CC as a reason for termination Suttor v Gundowda
  o Non-fulfillment happens when
    • Event occurs which is opposite to the condition
    • time period elapses (express, implied, reasonable)
  o Consequences are a matter of construction
    • CC relates to a particular obligation not fulfilled, parties excused, contract still on foot (voidable in part).
    • CC for whole contract not fulfilled, entire contract is voidable. Both parties reserve the right to terminate (provided they complied with duty to co-operate)
    • If the contract is terminated, no party liable for damages, as no party has promised that the condition will be fulfilled (unless breach of implied duty to corporate).
    • If the contract can be terminated, this right must be clearly exercised Suttor v Gundowda
  o CC can be waived
    • Must be agreement between the parties
    • Party who waives is bound by the decision,
• Must be done before termination
  • One party can waive the condition if it is completely to their benefit *Perri v Coolangatta*

**SERIOUS BREACH**

  o **Any breach of a condition**
    • All breaches of conditions, no matter how small *Associated Newspapers v Bancks*
      • A term in a condition if it is so important that a party would not have entered the contract without it being assured of strict performance/“goes to the root of the contract” *Tramways Advertising v Luna Park*
        o A term may not be a condition when
          ▪ Presence of other clauses that deal with non-compliance
          ▪ Proportion of benefits the clause deals with
          ▪ Drafting history of the agreement
  
  o **Serious breach of an intermediate term**
    • Dependent on
      • *nature of the breach* – must be serious, deprive the aggrieved party of “substantially” the whole benefit to be obtained from the contract
        *Hongkong Fir Shipping Co v Kawasaki Kisen Kaisha* and recent case *Koompahtoo Local Aboriginal Land Council v Sanpine*
      • *Foreseeable consequences* of the breach *Ankar v National Westminster Finance (Aust)*
        o In the instance that there is a breach of a non-essential intermediate term or a warranty, the aggrieved party can only recover damages *Tramways Advertising v Luna Park*

**REPUDIATION**

  o Evinces unwillingness or inability to perform to the extent that the aggrieved party may terminate.

  o Unwillingness or inability may be evidenced through
    ▪ Words (express statements) or conduct *Carr v JA Berriman*
    ▪ Combination of small breaches *Progressive Mailing House v Tabali*
    ▪ Erroneous interpretation *DTR Nominees v Mona Homes*

  o Defined by Brennan in Laurinda –
    “Repudiation is not ascertained by an inquiry into the subjective state of mind of the party in default, it is to be found in the conduct, whether verbal or other, of the party in default which conveys to the other party the defaulting party’s inability to perform the contract or promise or his intention not to perform it or to fulfill it only in a manner substantially inconsistent with his obligations and not in any other way”

  o Anticipatory breach occurs when one party repudiates prior to the time set for performance, aggrieved party can choose to terminate the contract or wait until actual breach occurs. Refer below to restrictions on the right to terminate *Foran v Wight*

  o In the context of an **installment contract** *Maple Flock v Universal Furniture Products (Wembley)*
    ▪ ratio qualitatively which breach bears to the contract as a whole
degree of probability or improbability that such a breach would be repeated

**DELAY (A SPECIAL KIND OF SERIOUS BREACH)**

- **Time is essential** when
  - expressly stated
  - implied

- Otherwise, the law implies an obligation to perform within a **reasonable time**.

- If **time is not essential** of the essence, can only terminate for delay if
  - such a long delay it amounts to **repudiation**
  - such a long delay it amounts to **breach**
  - makes use of **notice procedure** *Louinder v Leis*.
    - The notice must (as specified in *Laurinda v Capalaba Park Shopping Centre*):
      1. **Specify a time**
      2. Time must be **reasonable**
      3. **Notify** that time is of the essence, or state that the party giving notice will be **entitled to terminate** if the notice is not complied with

**ELECTION**

- When the aggrieved party has a right to terminate, they are put to their election. They have two options:

  - **Affirmation**
    - Keeps the contract **alive** for both parties
    - For the non-performing party, they may rely on subsequent events including breaches by the aggrieved party *Bowes v Chaleyer*

  - **Termination**
    - Brings an **end** to both parties’ future obligations to perform
    - Rights that have already been acquired are not discharged (eg the right to recover payment for parts of the contract already performed, right to claim damages for any breaches up until termination) *Bowes v Chaleyer*

- **To affirm or terminate you need**
  - **knowledge** *Immer (No 145) v Uniting Church in Australia Property Trust (NSW)*
  - **unequivocal conduct** *Tropical Traders v Goonan* and *Immer (No 145) v Uniting Church in Australia Property Trust (NSW)*

- Not required to elect immediately - it can delay election as long as it does nothing to "Affirm the contract and so long as the respondents’ position was not prejudiced in consequence of the delay" (that is, no detrimental reliance) *Tropical Traders v Goonan*

- When you affirm, you lose your right to terminate. You do not lose your right to damages.

**RESTRICTIONS ON THE RIGHT TO TERMINATE**

- **PROMISEE IS READY, WILLING, ABLE TO PERFORM (TERMINATION FOR REPUDIATION)**
  - Complication of comparing actual breach with anticipatory breach *Foran v Wight*
  - In the case of repudiation, party is induced to believe there is no point in performing so will not have the onus of proving readiness and willingness *Foran v Wight*
• ELECTION
  - An aggrieved party can elect to affirm if
    1. Knowledge of the facts (and perhaps the right) \textit{Immer (No 145) v Uniting Church in Australia Property Trust (NSW)}
    2. Unequivocal conduct consistent with a decision to affirm \textit{Tropical Traders v Goonan} and \textit{Immer (No 145) v Uniting Church in Australia Property Trust (NSW)}
      - A decision to affirm/terminate cannot be retracted
      - A decision does not need to be made immediately

• ESTOPPEL AND WAIVER \textit{Agricultural and Rural Finance Pty Ltd v Gardiner}
  - The aggrieved party may be prevented from terminating if
    1. If the promisee leads the promisor to believe they will not terminate
    2. Promisor detrimentally relies on the promise

• RELIEF AGAINST FOREFEITURE
  1. Equity may order specific performance in favour of the party in breach to provide relief against forfeiture in the following instances:
     - Of the \textit{proprietary interest} \textit{Legione v Hateley}
     - Of the \textit{deposit} - when the purchaser is unable to complete due to no fault of their own, there are some instances where the purchaser can get the deposit back (no relief in \textit{Legione v Hateley} and \textit{Tanwar Enterprises Pty Ltd v Cauchi}; relief provided in installment case in \textit{Stern v McArthur})

FRUSTRATION

• When an event occurs, by fault of neither party and unprovided for in the contract, which \textit{completely changes the state of things}, making the \textit{performance} of the contract \textit{impossible} or \textit{impracticable} because the situation or performance are now \textit{radically or fundamentally different} to what was originally contemplated, a contract will be frustrated \textit{Codelfa Construction v State Rail Authority of New South Wales}

  - Traditional examples include
    - Destruction of the subject matter \textit{Taylor v Caldwell}
    - Foundation of the contract ceases to exist \textit{Krell v Henry} and \textit{Brisbane City Council v Group Project Pty Ltd}

  - Frustration will not be recognised when
    1. The event was \textit{provided for} in the contract \textit{Codelfa Construction v State Rail Authority of New South Wales}
    2. The event should have been \textit{reasonably foreseeable}
    3. The event occurred \textit{by fault of the party seeking frustration}

  - Consequence of frustration is that the contract is terminated. Stature now apportions losses

DAMAGES FOR BREACH OF CONTRACT (UNLIQUIDATED DAMAGES)

• Compensation principle - \textit{compensate to as if no breach occurred} (ie. the contract has occurred) \textit{Robinson v Harman}.

• This concept was broken down into: \textit{Commonwealth v Amann Aviation Pty Ltd}
  1. \textbf{Expectation damages} (\textit{Bellgrove v Eldridge} - compare difference in damage to cost of a cure) (see also \textit{Tabcorp Holdings v Bowen Investments, Ruxley Electronics and Construction Ltd v Forsyth}.
    - \textit{Loss of bargain damages} – direct loss, profits they would have made if the contract was performed. Consequential losses could be added to this (subject to limits on damages)
ii. **For a specific breach** – damages for factual loss caused by a specifically serious breach - if it’s a significantly serious breach and the aggrieved party affirms, or breach of a warranty

2. **Reliance damages** – if you cannot determine expectation damages, attempt to determine the reasonable wasted expenditure *McRae v Commonwealth Disposals Commission* (“reasonable wasted expenditure”) and *Commonwealth v Amann Aviation Pty Ltd*
   - Damages for Loss of a Chance – a separate type of damages, based on the value of a chance *Howe v Teefy*

**EXTRAORDINARY MEASURES OF DAMAGES**

- **GAINS BASED AND PUNITIVE DAMAGES**
  It is not possible to claim gains based/restitutionary or punitive damages in Australia. In the UK you can claim gains based damages. In the US and Canada you can claim both.

- **DATE OF ASSESSMENT** *Johnston v Perez*
  1. Start with the *date of breach*, can be altered if it does not produce the just result
  2. What will determine if damages are unjust is if in the hypothetical world an alternate date that damages would be awarded is more just

**LIMITS ON DAMAGES**

- **CAUSATION**
  - Causal link between breach and the damage – but for the breach, the loss would not have occurred
  - Determining the legally relevant event
  - The test is the “but for” test, plus common sense/policy *Alexander v Cambridge Credit Corp*

- **REMOTENESS**
  - How far do you go in attributing the breach to the contract
  - Damages will not be considered remote if the loss was: *Hadley v Baxendale*
    1. **Reasonably contemplated** loss arising in ordinary course of events
    2. Loss in reasonable contemplation because of special knowledge
      - If the defendant did not have knowledge, the unusual loss will be remote and unrecoverable *Stuart v Condor Commercial Insulation*

- **MITIGATION**
  1. **Avoidable Loss Rule** - plaintiff must take **all reasonable steps to mitigate loss**, cannot recover from avoidable loss. *Burns v MAN Automotive (Aust)*
  2. Reasonable Expenses Rule - if plaintiff takes reasonable steps, makes loss worse, can claim *Simonius Vischer v Holt and Thompson*
  3. Avoided loss rule – we will not be looking at this. Basic idea is that there is a breach, the plaintiff gets extra benefits, and they may be deducted from the damages award.

- **DISAPPOINTMENT AND DISTRESS** compensable if (McHugh in *Baltic Shipping Co v Dillon*)
  1. Distress and disappointment as a result of physical discomfort
  2. distress and disappointment when the object of the contract is enjoyment

- **CONTRIBUTORY NEGLIGENCE**
  - Legislation introduced to allow contributory negligence to be taken into consideration for damages
  - The court will apportion the loss
DAMAGES WHEN TERMINATING UNDER AN EXPRESS TERM

- If you have a common law right to terminate, then damages are available
- If you have a contractual right to terminate, then the condition would need to specify if damages are available
  - If a party a right to terminate, it has to be strict, ambiguity construed against the party relying on it *Shevill v Builders Licensing Board*

LIQUIDATED DAMAGES

- A liquidated damages clause is a clause that specifies the damages payable when an event happens and one party breaches the contract. It must be a genuine estimate of loss. It must not be it 'must be out of all proportion' disproportionate (or 'extravagant, exorbitant or unconscionable') to the loss the suffered. *Esanda Finance Corp v Pessnig*

- Liquidated damages clauses are are used when
  - The parties want *certainty*
  - The impact of a breach is *unclear*
  - There is *no need to prove loss* as required under common law breach

- A penalty is a stipulated payment of money meant to frighten or deter a party from breaching a term. Parties can agree to it in a contract, however a court can strike it down. Arguably the courts feel that one party is in a stronger position then another party or coerced into agreeing to it.

- General way to approach problems includes
  1. Whether the parties call it a "liquidated damages" clause, or a "penalty" clause is irrelevant.
  2. If the value is excessive, its more than likely a penalty and will not be enforceable. Damages in breach will be recovered instead *AMEV v Austin*
  3. The question of differentiating is one of *construction*. Particular circumstances are relevant, at the *time of formation* rather then the time of breach. In assessing whether the clause is a genuine liquidated damages clause or an invalid penalty,
  4. The following considerations from *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* are helpful
     a) If the sum is extravagant and unconscionable in amount in comparison to the greatest loss conceivable from the breach, it is a penalty (out of all proportion)
     b) If the breach is a failure to pay money, and the sum is greater than the sum that ought to have been paid, it is a penalty
     c) There is a presumption that it is a penalty when a single lump sum is payable by way of compensation on the occurrence of one or more events, some of which would only warrant trifling damages
     d) Just because the consequences of the breach are hard or impossible to estimate doesn't mean it is a penalty. There is a presumption that it is a liquidated sum.

ACTIONS FOR DEBT

1. Claim arises when sum is due (the essence of a claim in debt) – example is liquidated damages due under a valid liquidated damages clause. On the happening of an event, breach, or a date.

2. Often requires ‘counter performance’ (although often the case, not helpful to focus on)

3. Not limited by causation, remoteness or mitigation.

4. Can only be claimed if there is sufficient performance
Entire obligations – debt only recoverable if obligation done in full (narrow interpretation) or substantially performed (broad interpretation – see Steele v Tardiani, Hoenig v Isaacs for substantial performance, see Bolton v Mahdeva for unsubstantial performance)

Divisible obligations – debt recoverable according to the task performed (see

5. **Legislation** can impact to apportionment of a debt Nemeth v Bayswater Road

6. The debt is due when it says it is due, but **can be subject to conditions.** The retention of the debt may be subject to a condition that fails, and if it fails the debt may need to be paid back McDonald v Dennys Lascelles

7. A **deposit** is a special type of debt
   - As a method of construction, consideration for deposit is that the vendor is ready and willing to perform.
   - If the transaction is **not completed due to the vendor** being in breach, the purchaser will be entitled to recover the deposit.
   - If the transaction is not completed due to the default of the purchaser, the vendor will retain the deposit Bot v Ristevski
   - Vendor can claim the deposit even if the contract is terminated for reason of the purchaser’s breach Bot v Ristevski
   - **For installment contracts,** following payments have a total failure of consideration if the land is not transferred, and will have to be returned to the purchaser.

**MISREPRESENTATION**

- There are different types of misrepresentation – **fraudulent, negligent and innocent.**
- The **intention** of misrepresentation is to **deceive or induce** the aggrieved party
- The consequences for fraudulent and negligent misrepresentation are
  - At **common law, rescission and damages** (if a tort is established – deceit and negligence)
  - In **equity, consequential losses** attributable to the misrepresentation in lieu of rescission, or **part performance.** Remedy is more flexible McKenzie v McDonald
- For innocent misrepresentation, rescission is barred. May be able to get damages for breach of warranty/fraud.
- Less relevant now due to s 18 of the ACL (misleading or deceptive conduct in trade or commerce)

- **To prove a misrepresentation:**
  1. Must prove **reliance** by the representee
  2. Must prove a **misrepresentation of present fact / statement of fact**
     - Statements of opinion usually involve statements of fact Smith v Land & House Property Corp and Fitzpatrick v Michel
     - Statement of future intention with no present intention to perform in the stated manner also will be a misrepresentation of present fact Edgington v Fitzmaurice
     - Statements of law can also be used Public Trustee v Taylor (probably now treated as statements of fact after Walton Stores (Interstate) Ltd v Maher)
  3. Positive misrepresentation
     - **Silence** can constitute misrepresentation when
     - If the **circumstances change** after the representation is made Davies v London & Provincial Marine Insurance Co
If something is literally true but you have omitted an important fact Curwen v Yan Yean Land Co Ltd
  o Special relationships/Fiduciary relationships requiring full disclosure McKenzie v McDonald

RECISSION

* Rescission will occur in
  o Common law: if the parties can be returned to the exact same position they were in prior to the contract existing
  o Equity: if the parties cannot be returned to the exact same position. The judge often determines what is just and what is unconscionable. Return parties to substantially the same position (substantial restitution).

* Rescission is a form of relief available to victims of the following vitiating factors
  o Mistake
  o Misrepresentation Alati v Kruger
  o Duress
  o Undue influence
  o Unconscionable dealing
  o Breach of fiduciary duty
  o Rule of Yerkey v Jones

* If the contract is rescinded, there can be no claim for compensatory damages Brown v Smitt

* Improvements to property can be catered for when property is rescinded in the form of compensation Brown v Smitt

* In Equity, court can order partial recission or recission on terms Vadasz v Pioneer Concrete (SA)

* Rescission is barred if
  1. Innocent misrepresentation (instead could get damages for breach of warranty/fraud)
  2. Executed contracts
  3. Affirmation (perhaps need knowledge of the right Coastal Estates v Melevene)
  4. Lapse of time
  5. Misrepresentation becomes a term of the contract
  6. Third Parties
  7. Exclusion/Entire Agreement clauses
  8. Notification

MISLEADING OR DECEPTIVE CONDUCT

* s 18 - A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
  * Includes misrepresentations of fact, law, and specific sales puffs, and silence when there is a reasonable expectation that relevant facts will be disclosed (endorsed by the High Court in Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited)

* Trade or commerce limitation - must be in the course of business. Concrete Constructions (NSW) Pty Ltd v Nelson (reaffirmed in Houghton v Arms) If not, use misrepresentation.
  * private sales of property between individuals not covered (O’Brien v Smolongov), unless for a business activity: Havyn Pty Ltd v Webster