

**MARINA INDUSTRIES ASSOCIATION
OF
AUSTRALIA**

2008 MARINA CONFERENCE PAPER

1) **CONTRACTS**

- a) When is a legally binding contract or agreement made?
- b) Often such negotiations culminate in either:
 - i) An invitation to treat; or
 - ii) An offer by one party to accept a good or service.
- c) An invitation to treat is not an offer but an overture to another to make an offer, either conditional or unconditional, which is capable of acceptance;
- d) An offer, either conditional or unconditional, is capable of acceptance;
- e) Acceptance on its own does not constitute a binding contract or agreement;
- f) An offer, either conditional or unconditional, must not only be accepted but supported by consideration moving both from the party making the offer to the acceptor and from the acceptor to the offeror.
- g) Consideration must be valuable consideration;
- h) Section 6 of the SALE OF GOODS ACT 1923 is in the following terms:

6 Sale and agreement to sell

(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price. There may be a contract of sale between one part owner and another.

- (2) A contract of sale may be absolute or conditional.
- (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.
- (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled, subject to which the property in the goods is to be transferred.
- i) An example of such a condition in a contract is a clause known as a “Romalpa clause” which clause defers the transfer of title in a good until after the total consideration has been paid by the purchaser to a vendor . An example of such a clause **Attachment “A”**.
- j) Consideration that predates the offer and acceptance, and is not given in relation to the offer, is referred to in legal parlance as “past” consideration and therefore is not consideration which can support an offer and acceptance.
- k) Where there is an offer and acceptance and valuable consideration then, generally speaking, a binding legal agreement is established.
- l) We say “generally speaking” since, if all of the necessary attributes for a binding agreement are established, but the agreement is in breach of statute or the general law, such as being void as against public policy, then the whole or part of the agreement may be void or voidable.
- m) Void or voidable can be explained in the following manner:

i) Void means that a term of an agreement or the agreement itself has no legal force or effect at all.

ii) For example:

(1) a contract to price fix in contravention of the *Trade Practices Act* would be a contract with such illegal effect and therefore unenforceable.

(2) Similarly if a term of a contract of employment or supply agreement, or the effect of the whole agreement itself, unreasonably restrains trade then such a term or agreement would be void and unenforceable.

iii) Voidable means that a term or an agreement may be enforceable save for the exercise by another party of a right to seek that such a term or agreement be challenged.

(1) Examples would be a term or agreement whereby a debt is repaid by agreement and subsequently the debtor goes into administration, receivership, liquidation or bankruptcy and thereafter a liquidator, receiver or trustee in bankruptcy asserts a superior right to the recipient of funds and seeks to set aside the transaction. These are known as preferential payments. Of course if the point is not taken then the term or agreement continues to bind the parties to contract.

2) **TRADE PRACTICES ACT 1974 (Commonwealth) (“TPA”):**

Misleading and deceptive conduct prior to a contract being entered into:

a) Part V of the Trade Practices Act deals with unfair practices. A duty of care being owed to someone or a contractual obligation can be unnecessary in determining whether a party to a contract has engaged in misleading and deceptive conduct.

- b) Silence can constitute misrepresentation where such silence is intentional. Otherwise silence by one party is a fact which a court may consider in determining whether or not the overall conduct of a party to a contract constitutes misleading and deceptive conduct.
- c) Privity of contract is not essential.
- d) Exclusion clauses in a contract which clauses exclude liability for statements and representations made before the entering into of the contract have been given effect at common law.
- e) However such clauses will be ineffective to defeat claims under s52 of TPA, particularly where the conduct is a continuing inducement. In other words the party entering into the contract relies upon a statement or representation of the other party in entering into the contract. Since the conduct cannot break the nexus between conduct and the making of the agreement and the exclusion clause is ineffective. Lockhart J, in *Henjo Investments v Collins Marrickville Pty Limited*, 79 ALR 83 at 98, said:

“Irrespective of the construction of these two special conditions it does not matter ultimately whether the impugned conduct with which this case is concerned falls literally within them or not. Section 52 is a section in the consumer protection provisions of an Act concerned to protect the public from misleading or deceptive conduct and unfair trade practices which may result in contravention of the Act. It has been held that exclusion clauses, of which special conditions 6 and 7 are examples, cannot operate to defeat claims under s.52...

There are wider objections to allowing effect to such clauses. Otherwise the operation of the Act, a public policy statute, could be ousted by private agreement. Parliament passed the

Act to stamp out unfair or improper conduct in trade or in commerce; it would be contrary to public policy for special conditions such as those with which this contract was concerned to deny or prohibit a statutory remedy for offending conduct under the Act.”

In *Clark Equipment Australia Limited v Kovcat Pty Limited* (1987) 71 ALR 367, Sheppard J at 371 said:

“Parties may agree that statements and representations made antecedently to their entering into a contract are not to form the basis of any remedy in the event of there being a subsequent disagreement. Except in the case of fraud, the common law will give effect to their contract. But the remedy conferred by s.52 of the *Trade Practices Act* will not be lost, whatever the parties may provide in their agreement. If a vendor of goods has engaged in misleading and deceptive conduct, the law makes him accountable for loss and damage suffered as a result of his unlawful conduct. That conduct will usually have been committed, as in this case, prior to the signing of any contract. If, as a result of the conduct, a person is induced to enter into a contract and suffers loss, an action to recover it lies. The terms of the contract are irrelevant. As Wilcox J said in *Petera Pty Limited v EAJ Pty Limited* (1985) 7 SCR 375 at 378:

‘Whatever may be the effect of cl.19 [the exemption clause in that case] in relation to an action brought in contract, in which reliance is placed upon an alleged warranty or condition not included in the contract of sale, that clause should not be allowed to defeat a claim based on s.52. To permit such a clause to defeat such a claim would be to accept the possibility that a vendor might exacerbate his deception, as by actively misleading a purchaser as to the existence or nature of such an exclusion, and thereby ensure that he would escape liability.’

- f) Such clauses have been found to be contrary to public policy when relied upon to deny or prohibit the application of statute.

- g) A disclaimer is different from an exclusion clause. A disclaimer is designed not to exclude the operation of s52 but to prevent liability from arising by preventing the relevant conduct from being construed as misleading and deceptive. A disclaimer achieves this by communicating the information to the recipient such that they are not misled, or providing information in such a way that they could not be said to have relied upon it.
- h) In a dispute relating to the sale of a boat the following issues may arise:
- i) Did the broker mislead or deceive the purchaser into buying his boat thereby breaching section 52 of the Trade Practices Act 1974?
 - ii) Did the broker make any representations that were false?
 - iii) If so, did the purchaser rely on any false representations when buying his boat?
- i) The answer to these questions must be supported by evidence of statements and representations which pre date the date on which the parties enter into the contract. Subsequent conduct will not normally be given any weight in determining whether conduct as a whole is deceptive or misleading, unless it is relevant to inducing the waiver of a condition to a contract which has already commenced.
- j) Firstly, in relation to the construction of section 52, the section should be construed flexibly to give the fullest relief which the fair meaning of language of the section will allow. The courts give effect to the natural and ordinary meaning of the section even if to do so “*may result in the imposition of liability and the administration of remedies which differ from those supplied by the general law. This is because the relevant conduct falls to be judged*

*under section 52 not, as at common law, by the state of mind or intention of the maker of the statement” (See the High Court decision of *Butcher v Lachlan Elder Realty Pty Limited* (2004) 218 CLR).*

- k) Secondly, the words “engage in conduct” in section 52 are not confined to conduct which involves the making of representations. Section 52 requires the Court to examine the impugned conduct as a whole.
- l) Thirdly, conduct will be misleading or deceptive if it induces or is capable of inducing error. A corporation does not avoid liability for breach of section 52 because a person who has been the subject of misleading or deceptive conduct could have discovered the misleading or deceptive conduct by proper inquiry. Conduct that objectively leads one into error is misleading. Conduct is likely to mislead or deceive if there is a real and not remote chance or possibility that a person is likely to be misled or deceived.
- m) McHugh J in *Butcher v Lachlan Elder Realty Pty Limited* (2004) 218 CLR at 625 at paragraph 109 stated:

“The question whether conduct is misleading or deceptive or is likely to mislead or deceive is a question of fact. In determining whether a contravention of s.52 has occurred, the task of the Court is to examine the relevant course of conduct as a whole. It is determined by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances. It is an objective question that the Court must determine for itself”.

- n) At page 634, paragraph 139, McHugh J also stated:

“Section 52 looks at the conduct of a corporation and is only concerned with whether that conduct misled or was likely to mislead a consumer. It is not concerned with the mental

state of the corporation. As Hill J observed in *Equity Access Pty Limited v Westpac Banking Corporation* [1990] ATPR 40-994 at 50, 951 (135):

‘Section 52 is not confined to conduct which is intended to mislead or deceive... and a corporation which acts honestly and reasonably may nonetheless engage in conduct that is likely to mislead or deceive.’”

- o) That section 52 is not concerned with the mental state of the corporation is supported by further authority in *Johnson Tiles Pty Limited v Esso Australia Pty Limited* (2000) 104 FCR 564 where at paragraph 66, French J, Beaumont and Finkelstein JJ said:

“In the case of an alleged non-disclosure it is not necessary to show that the contravenor knew of the facts not disclosed. In *Fraser v NRMA Holdings Limited* (1985) 55 FCR 452 at 467, the Full Court said:

‘... For the purposes of s.52, if by reason of what was said and what was left unsaid the conduct of the corporation is misleading and deceptive or likely to mislead or deceive, a contravention would occur even if the corporation through its directors and officers did not have knowledge of the undisclosed facts which rendered the conduct in breach of s.52. A contravention of s.52 may occur without knowledge or fault on the part of the corporation, and notwithstanding the exercise of reasonable care: *Parkdale Custom Built Furniture Pty Limited v Puxu Pty Limited* [1982] 149 CLR 191 at [197]’.

“That is not to say that knowledge may not be a relevant circumstance. For in a case where disclosure

would reasonably be expected of a fact if that fact were known to the corporation, failure to make disclosure may convey the implication that that fact is not known.”

- p) The requirement to examine the overall conduct (including silence) objectively and in context is also supported in *Demagogue Pty Limited v Ramensky* (1992) 39 FCR, where Black CJ observed at 32:

“Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive. To speak of ‘mere silence’ or a duty of disclosure can divert attention from that primary question. Although ‘mere silence’ is a convenient way of describing some fact situations, there is in truth no such thing as ‘mere silence’ because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed.”

- q) Gummow J also observed in that case (Cooper J agreeing) at 40:

“... In any case where a failure to speak is relied upon the question must be whether in the particular circumstances the silence constitutes or is part of misleading and deceptive conduct.”

- r) Overall, the relevant test is whether, in the light of all of the relevant circumstances constituted by acts, omissions, statements and silence, a party to the contract has engaged in misleading and

deceptive conduct (see *Demagogue Pty Limited v Ramensky* (1992) 39 FCR 31 at 32, 40-1; 110 ALR 68.

Brokers Passing on Erroneous Information, and Disclaimers

s) In *Butcher v Lachlan Elder Realty Pty Limited* [2004] 218 CLR 592 McHugh J at 626-629, paragraphs 113-124, referred to a number of decisions where there were findings that a corporation had contravened s.52 when it had passed on information as agent for a vendor, despite the contravention being unwitting and despite the existence of disclaimer clauses. His Honour then went on at page 629, paragraph 123, to state:

“However, the courts have held that in three situations a corporation does *not* contravene s.52 when it passes on erroneous information. They are:

(1) where the circumstances make it apparent that the corporation is not the source of the information and that it expressly or impliedly disclaims any belief in its truth or falsity and is merely passing on the information for what it is worth (115);

(2) where the corporation while believing the information, expressly or impliedly disclaims personal responsibility from what it conveys, for example, by disclaiming personal knowledge (116); and

(3) where the corporation, while believing the information, ensures that its name is not used in association with the information (117).”

t) The important ingredients are therefore:

- i) any information provided to a broker by either a manufacturer or vendor of a boat should be only handed on to a prospective

purchaser with an express statement/disclaimer that the broker did not author the information and therefore the broker disclaims the accuracy or truth or correctness of the information and states that the purchaser should rely upon his own enquiries;

ii) any disclaimer should go further and state that the broker has no personal knowledge of the facts contained in such materials; and

iii) DO NOT use the broker's name in providing another party's information to a purchaser.

u) In amplification of the above, Kirby J stated in *Butcher v Lachlan Elder Realty Pty Limited* [2004] 218 CLR 592 at 647, paragraph 183:

“This was not a case where the agent was merely passing on information supplied by another within the words used by this Court in *Yorke v Lucas* (189). Nor was it a case where the agent was simply passing on the information ‘for what it is worth’. Nor was it an instance where information was incorporated by a course of past dealings between the parties (190). Here, in a unique dealing, the agent was performing the corporation's precise function, namely promoting the sale of the subject land to purchasers and describing that land. The agent did not have to include in its pamphlet the diagram showing the boundary line designated by the mean high-watermark. Having done so, it was obliged to accept the legal consequences. Clearly, its conduct occurred in the performance of its professional activity as a corporate real estate agent. Moreover, it acted as it did for its own economic advantage. It stood to gain the agent's fee for the sale of the property. The more attractive it could make the property seem, the more likely it was to succeed in effecting a sale.”

- v) In *Gardem v George Wills & Co Ltd* (1988) 82 415 at 427; ATPR 40-884, French J said, in a case relating to s53:

“The innocent carriage of a false representation from one person to another in circumstances where the carrier is and is seen to be a mere conduit, does not involve him in making that representation”.

- w) However, his Honour went on to say:

“When, however, a representation is conveyed in circumstances in which the carrier would be regarded by the relevant section of the public as adopting it, then he makes that representation”.

- x) The reliance of a party to a contract upon a statement or representation is also a relevant factor in determining whether there is a liability for loss and damage. In *Ingot Capital Investments & Ors v Macquarie Equity Capital Markets & Ors* [No 6] [2007] NSWSC 125 [429] (“*Ingot*”) McDougall J said:

“Whether reliance has been established is something that needs to be considered on the whole of the available material (including, as I have said, the nature of the representations found to have been made and what happened after they were made); and that, in some circumstances, an inference adverse to reliance may be drawn from a failure to check or verify a representation.

For example if that which is represented were unlikely or improbable evidence of reliance without any attempt at verification might be treated with some suspicion. On the other hand, if that which is represented, whenever inherently plausible, and if the representor was someone who should be thought to have knowledge of the subject matter of the

representation, a failure to check or verify might not negative reliance.”

- y) In *Elders Trustee & Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193 Gummow J said at p.241:

“Sec 52 is not designed for the benefit of persons who fail in the circumstances of the case to take reasonable care of their own interests ... it would be wrong to select particular words or acts which although misleading in isolation do not have that character when received in context.”

3) AIDING, ABETTING, COUNSELLING AND PROCURING:

- a) Section 75 of the Trade Practices Act and section 61 of the Fair Trading Act provide for liability to be pursued against a person who:
- i) has aided, abetted, counselled or procured the contravention;
 - ii) has induced, whether by threats or promises or otherwise, the contravention;
 - iii) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or has conspired with others to effect the contravention.
- b) If the evidence establishes conduct of the kind that contravenes a section of Part V then any loss or damage becomes a claim under section 82 of the Act.
- c) For a person to be liable, there must be an element of intention: *Yorke v Lucas (1883) 49 ALR 672*. The state of mind required to establish accessorial liability under section 75 does not necessarily involve actual subjective knowledge of a contravention. A person

could be liable acting in good faith: *Dimension Data Australia Pty Ltd v Kepper* [2000] FCA 218.

- d) Liability does not depend upon an affirmative answer to the question of whether the alleged accessory knew the representations were false and misleading. All that is necessary is for the accessory to know the matters that enabled the representations to be characterised in that way: *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 205 ALR 402.
- e) A deliberate failure to gain the necessary knowledge by failing to make reasonable enquiries may render a person liable: *Fried v Dixie Holdings Pty Ltd* [2000] FCA 1048.
- f) Present knowledge as distinct from past knowledge is necessary: *Lawson Hill Estate Pty Ltd v Tovegold Pty Ltd* [2004] FCA 1593.
- g) Although it can be argued that a person may be acting in the course of his employment and therefore performing an act of his employer corporation. There is now authority for the proposition that a person can act in a dual capacity and therefore aid and abet but at the same time bind his employer: *Hamilton v Whitehead* (1988) 166 CLR 121 and *ACCC v Kaye* [2004] FCA 1363.
- h) Liability may attach to an accessory irrespective of his principal's state of mind of his principal.

4) **MERCHANTABLE QUALITY AND FITNESS FOR ITS PURPOSE:**

Questions that may result from the sale of a boat, and have given rise to litigation, are:

- a) Was the boat of merchantable quality and fit for its purpose?

- b) Was the actual value of the boat less than the purchase price by reason of any defects present at the time of delivery?
- c) Did the purchaser suffer or incur any other losses or expenses as a result of any defects in the boat at the point of sale?
- d) The following legislation deals with such issues:
 - i) Trade Practices Act (Part V Division 2);
 - ii) Sale of Goods Act 1923; and
 - iii) Fair Trading Act 1987.
- e) Section 19 of the **Sale of Goods Act** is in the following terms:

19 Implied condition as to quality or fitness

Subject to the provisions of this Act, and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(1) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether the seller be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose:
Provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

(2) Where goods are bought by description from a seller who deals in goods of that description (whether the seller be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality:

Provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed.

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

- f) Sections 40Q, 40U and 40W of the **Fair Trading Act (NSW)**, (and note the corresponding sections in the **Trade Practices Act (Cmwth)** referred to thereunder which are in the same terms):

40Q Implied undertakings as to quality or fitness

(TPA s 71)

(1) If a person supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business, there is an implied condition that the goods supplied under the contract for the supply of the goods are of merchantable quality, except that there is no such condition by reason only of this section:

(a) as regards defects specifically drawn to the consumer's attention before the contract is made, or
(b) if the consumer examines the goods before the contract is made-as regards any defect that the examination ought to have revealed.

(2) If a person ("the supplier") supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business and the consumer, expressly or by implication, makes known:

(a) to the supplier, or
(b) to the person by whom any negotiations are conducted,

any particular purpose for which the goods are being acquired, there is an implied condition that the goods supplied under the contract for the supply of the goods are reasonably fit for that purpose, whether or not that purpose is one for which such goods are commonly supplied, except where the circumstances show that the consumer does not rely, or that it is unreasonable for the consumer to rely, on the skill or judgment of the supplier or the person conducting the negotiations.

(3) Subsections (1) and (2) apply to a contract for the supply of goods made by a person who in the course of a business is acting as agent for the supplier in the same way as they apply to a contract for the supply of goods made by a person in the course of a business, except where that person is not supplying in the course of a business and either the consumer knows that fact or reasonable steps are taken to bring it to the notice of the consumer before the contract is made.

40U Actions in respect of unsuitable goods

(TPA s 74B)

(1) If:

- (a) a person ("the supplier"), in trade or commerce, supplies goods manufactured by the supplier to another person who acquires the goods for re-supply, and
- (b) a person (whether or not the person who acquired the goods from the supplier) supplies the goods (otherwise than by way of sale by auction) to a consumer, and
- (c) the goods are acquired by the consumer for a particular purpose that was, expressly or by implication, made known to the supplier, either directly, or through the person from whom the consumer acquired the goods or a person by whom any negotiations in connection with the acquisition of the goods were conducted, and
- (d) the goods are not reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, and
- (e) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods are not reasonably fit for that purpose,

the supplier is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the supplier in a court of competent jurisdiction.

(2) Subsection (1) does not apply:

(a) if the goods are not reasonably fit for the purpose referred to in that subsection by reason of:

(i) an act or default of any person (not being the supplier or an employee or agent of the supplier), or

(ii) a cause independent of human control, occurring after the goods have left the control of the supplier, or

(b) if the circumstances show that the consumer did not rely, or that it was unreasonable for the consumer to rely, on the skill or judgment of the supplier.

40W Actions in respect of goods of unmerchantable quality

(TPA s 74D)

(1) If:

(a) a person ("the supplier"), in trade or commerce, supplies goods manufactured by the supplier to another person who acquires the goods for re-supply, and

(b) a person (whether or not the person who acquired the goods from the supplier) supplies the goods (otherwise than by way of sale by auction) to a consumer, and

(c) the goods are not of merchantable quality, and

(d) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods are not of merchantable quality,

the supplier is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the supplier in a court of competent jurisdiction.

(2) Subsection (1) does not apply:

(a) if the goods are not of merchantable quality by reason of:

(i) an act or default of any person (not being the supplier or an employee or agent of the supplier), or

(ii) a cause independent of human control, occurring after the goods have left the control of the supplier, or

(b) as regards defects specifically drawn to the consumer's attention before the making of the contract for the supply of the goods to the consumer, or

(c) if the consumer examines the goods before that contract is made, as regards defects that the examination ought to reveal.

(3) For the purposes of this section, goods of any kind are of "merchantable quality" if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to:

(a) any description applied to the goods by the supplier, and

(b) the price received by the supplier for the goods (if relevant), and

(c) all the other relevant circumstances.

- g) Section 40 ZA provides a right of recovery against the manufacturer if a seller would otherwise be liable to a consumer:

40ZA Right to recover against manufacturer or importer

(TPA s 74H)

If:

(a) a person ("the seller") is under a liability to another person ("the consumer") in respect of loss or damage suffered by the consumer as a result of a breach of a condition or warranty implied by a provision of Division 4 in a contract for the supply of goods by the seller to the consumer, and

(b) a third person ("the manufacturer") is liable to compensate the consumer in respect of the same loss or damage by reason of a provision of this Division,

the manufacturer is liable to indemnify the seller in respect of the liability of the seller to the consumer and the seller may, in respect of the manufacturer's liability to indemnify the seller, institute an action against the manufacturer in a court of competent jurisdiction for such legal or equitable relief as the seller could have obtained if the liability of the manufacturer to indemnify the seller had arisen under a contract of indemnity made between the manufacturer and the seller.

- h) Both the Trade Practices Act and the Fair Trading Act forbid contracting out:

40ZC Application of Division not to be excluded or modified

(TPA s 74K)

(1) Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that:

(a) purports to exclude, restrict or modify, or

(b) has the effect of excluding, restricting or modifying, any liability of a person to compensate or indemnify another person that may arise under this Division, is void.

(2) A term of a contract is not to be taken to exclude, restrict or modify the application of a provision of this Division unless the term does so expressly or is inconsistent with that provision.

- i) It is allowable in a contract for sale of goods to limit the seller's liability to the replacement of the goods or the repayment of purchase price for the return of the goods. In most cases it would be simply a matter of making good any defect, for instance a fuel tank that was of a size different to the specifications of a boat.

5) **CONTRACTS REVIEW ACT:**

- a) A person may not be granted relief under this Act in relation to a contract so far as the contract was entered into in the course of or for the purpose of a trade, business or profession carried on by the person or proposed to be carried on by the person or proposed to be carried on by the person wholly or principally in New South Wales.

b) **Principal relief :**

- i) Where the Court finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, if it considers it just to do

so, and for the purpose of avoiding as far as practicable an unjust consequence or result, do any one or more of the following:

- (1) it may decide to refuse to enforce any or all of the provisions of the contract,
- (2) it may make an order declaring the contract void, in whole or in part,
- (3) it may make an order varying, in whole or in part, any provision of the contract.

ii) Where the Court makes a declaration or variation, then such declaration or variation shall have effect as from the time when the contract was made or (as to the whole or any part or parts of the contract) from some other time or times as specified in the order.

iii) The Court may also make such orders as may be just in the circumstances for or with respect to any consequential or related matter, including orders for or with respect to:

- (1) the payment of money (whether or not by way of compensation) to a party to the contract,
- (2) the supply or repair of goods,
- (3) the supply of services, and
- (4) the rescission or variation of any order of the Court under this clause, and such orders in connection with the proceedings as may be just in the circumstances.

c) Matters to be considered by a Court

i) In determining whether a contract or a provision of a contract is unjust in the circumstances relating to the contract at the time

it was made, the Court shall have regard to the public interest and to all the circumstances of the case, including such consequences or results as those arising in the event of:

(1) compliance with any or all of the provisions of the contract, or

(2) non-compliance with, or contravention of, any or all of the provisions of the contract.

d) Additional matters to which the Court shall have regard shall, to the extent that they are relevant to the circumstances, include the following:

i) whether or not there was any material inequality in bargaining power between the parties to the contract,

ii) whether or not prior to or at the time the contract was made its provisions were the subject of negotiation,

iii) whether or not it was reasonably practicable for the party seeking relief under this Act to negotiate for the alteration of or to reject any of the provisions of the contract,

iv) whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party to the contract,

v) whether or not:

(1) any party to the contract (other than a corporation) was not reasonably able to protect his or her interests, or

(2) (any person who represented any of the parties to the contract was not reasonably able to protect the interests of any party whom he or she represented, because of his or her age or the state of his or her physical or mental capacity,

- (3) the relative economic circumstances, educational background and literacy of:
 - (4) the parties to the contract (other than a corporation), and
 - (5) any person who represented any of the parties to the contract,
 - (6) where the contract is wholly or partly in writing, the physical form of the contract, and the intelligibility of the language in which it is expressed,
 - (7) whether or not and when independent legal or other expert advice was obtained by the party seeking relief under this Act,
 - (8) the extent (if any) to which the provisions of the contract and their legal and practical effect were accurately explained by any person to the party seeking relief under this Act, and whether or not that party understood the provisions and their effect,
 - (9) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act:
- e) In determining whether a contract or a provision of a contract is unjust, the Court shall not have regard to any injustice arising from circumstances that were not reasonably foreseeable at the time the contract was made.
- f) In determining whether it is just to grant relief in respect of a contract or a provision of a contract that is found to be unjust, the Court may have regard to the conduct of the parties to the proceedings in relation to the performance of the contract since it was made.

6) CONSUMER CREDIT LAW:

- a) The Consumer Credit Code applies to the provision of credit if credit is provided to a natural person who is resident in the jurisdiction and is obtained wholly or predominantly for personal, domestic or household purposes.
- b) Goods leases are considered to be credit contracts being the sale of a good payable by way of instalments.
- c) It is important in any sale which is supported by such a contract that the Code is followed, namely:
 - i) the credit provider makes the required pre-contractual disclosure which shall include a pre-contractual statement and an information statement before the contract is entered into;
 - ii) The pre-contractual statement shall include:
 - (1) Name of the provider;
 - (2) Credit amount;
 - (3) Annual percentage rate or rates;
 - (4) Calculation of interest charges;
 - (5) Total amount of interest charges;
 - (6) Repayments including the number of repayments and the total;
 - (7) Credit fees and charges;
 - (8) Any changes affecting rates and charges;
 - (9) Any default rate of interest;
 - (10) Enforcement expenses;

(11) Mortgage and/or guarantee details; and

(12) Commissions.

iii) The form of any contract must follow the regulations.