IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

Nos M158 and M159 of 2010

WYNTON STONE AUSTRALIA PTY LTD (IN LIQUIDATION) (ACN 065 625 498) Applicant

and

MWH AUSTRALIA PTY LTD (FORMERLY MONTGOMERY WATSON AUSTRALIA PTY LTD) (ACN 007 820 322) Respondent

APPLICANT'S SUBMISSIONS

Part I: Certification of suitability for publication on the Internet

1 These submissions are in a form suitable for publication on the Internet.

Part II: Statement of issues

2 ***Abandoned claim:*** Can a court decide a case against a defendant on a claim not mentioned in the plaintiff's final submissions in circumstances where the court tells parties at the start of a trial, without objection, that it will treat as abandoned any pleaded claim not pressed in final submissions?

3 ***Inferred reliance:*** When is it open for a court to infer reliance on a representation for the purpose of finding that loss or damage was caused by contravention of s 52 of the *Trade Practices Act* 1974 (Cth) (**TPA**), when there is no evidence of inducement; there is a finding of fact that the relevant representation had not been relied on; the person who signed the relevant contract for the plaintiff is not called to give evidence and no explanation for that failure is provided; and no surrounding fact, circumstance or course of conduct is or could be invoked?

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4 ***Principles of contractual construction:*** When may what a court says is the "more likely" meaning of a commercial contract from "a business commonsense point of view" allow it to depart from the natural and unambiguous meaning of words used in a contract?

5 ***Procedural fairness:*** Did the Court of Appeal fail to accord the applicant procedural fairness by: (a) failing to consider its serious and substantial submissions; (b) failing to provide adequate reasons in relation to the rejection of its submissions; and (c) adopting a construction of the relevant deed which had not been contended for or raised in argument?

Part III: Certification as to compliance with section 78B of the Judiciary Act 1903

6 The applicant (**WSA**) has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth), and considers that no such notice should be given.

Part IV: Citation of judgments below

7 The relevant judgments below are not reported, and have the following citations *Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority (No 2)* [2006] VSC 117 (Byrne J); and *MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd (in liq)* [2010] VSCA 245.

Part V: Background facts

8 In early 1997, WSA was engaged by the respondent (**MWH**) to undertake work in relation to the design of two sewerage treatment plants in Victoria. At trial, WSA was found to have performed the work negligently.

9 On 6 May 1997, upon WSA selling its business to Taylor Thompson Whitting Pty Ltd (**TTW**) during the continuance of the project, MWH entered into a deed of novation (**the deed**) by which TTW was substituted for WSA.

10 Clause 2 of the deed provided: "[MWH] releases and discharges WS[A] from all claims and demands whatsoever in respect of the contract and accepts the liability of TTW under the contract in lieu of the liability of WS[A] and agrees to be bound by

the terms of the contract in every way as if TTW was named in the contract as a party thereto to [sic, in] place of WS[A]."

11 The deed also contained a provision for outstanding fees to be paid to WSA and an acknowledgment by WSA that the services performed under the contract by WSA prior to the date of the deed had been performed in accordance with the terms of the contract (cl 4).

12 MWH pleaded claims against WSA in negligence; for breach of the retainer; for breach of warranty (the acknowledgment) contained in cl 4; and under s 52 of the TPA, it being contended that it was misled by clause 4 into entering into the deed. MWH did not call evidence about whether, and if so how, it had relied on cl 4. Mr Angus, an engineer employed by MWH, testified that he "probably" read the deed and passed it to Mr Robinson, the state manager, who sent it to be signed by a director (Mr Waterhouse), who did not give evidence.[1] MWH instead alleged that its reliance on the acknowledgment was to be inferred from the terms of the deed.[2]

13 Because of the complexity of the trial, Byrne J said at the outset, without objection, that he would not go beyond the pleadings, and would treat pleaded issues as not pursued if they were not run or mentioned in final submissions.[3] As Byrne J accurately recorded: "[In the early days of the trial]... I told [the parties] that I would determine this case only upon the issues which emerged from the pleadings and, even then, only on those issue which were pressed in final address."[4]

14 Before final submissions, the trial judge circulated a draft summary of pleadings which referred to all MWH's pleaded claims, including the warranty claim.[5]

15 MWH filed detailed written closing submissions. Senior counsel's closing address occupied over 300 pages of transcript. His reply occupied 50 pages. He addressed

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[1] Angus witness statement (re-amended), [81]–[82]; Angus XXN, T1611ff (9 November 2005); Robinson witness statement (amended), [31]–[33].
[2] The pleading is set out at [2010] VSCA, [94] (per Buchanan and Nettle JJA).
[3] T217 (19 October 2005).
[4] [2006] VSC 117 (per Byrne J), [15]. Byrne J's admonition is found at T217 (19 October 2005).
[5] The relevant part of the summary is at [2006] VSC 117 (per Byrne J), [48].

every cause of action pleaded by the respondent, except the claim for breach of warranty.[6]

16 The trial judge rejected all MWH's claims, except for breach of warranty, which he upheld.[7] He construed the release in cl 2 to operate in accordance with its terms, to accrued and future liabilities.[8] He further found that MWH had not proven that it had relied on the warranty in entering into the deed.[9]

17 WSA raised the issue of MWH's abandonment of the warranty claim with Byrne J after he published his reasons but before orders were made. His Honour declined to re-consider the matter and said in reply to counsel for WSA: "So you can tell that to the Court of Appeal...I mean, you may be right or I may be wrong, but it's really for them to look into this..."[10]

18 MWH appealed on multiple grounds. One ground of appeal was against Byrne J's finding that MWH's claim under s52 of the TPA failed because MWH had not established reliance or loss in entering into the deed containing the warranty alleged in clause 4.[11] Another ground of appeal was that (contrary to Byrne J's finding) cl 2 of the deed operated to release WSA only in respect of breaches of the contract committed on or after the date of the deed. WSA cross appealed on the ground (among others) that the warranty claim had been abandoned because the parties had been on notice from the outset that the judge would only decide issues both pleaded and pressed in final submissions; no one objected; and the claim for breach of warranty was not mentioned in final submissions (or anywhere other than in its pleading).

19 The Court upheld MWH's appeal with respect to the grounds described above. The Court held that clause 2 of the deed operated to release WSA only in respect of breaches of the contract committed on or after the date of the deed.[12] The majority (Buchanan and Nettle JJA, Warren CJ dissenting) also agreed with MWH's contention

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[6] See "Comparison of MWH pleaded claims and final submissions" (given to Court of Appeal WSA during hearing on 10 November 2009: T68).
[7] [2006] VSC 117 (per Byrne J), [213], [233].
[8] [2006] VSC 117 (per Byrne J), [213].
[9] [2006] VSC 117 (per Byrne J), [217].
[10] T19, 29 March 2007.
[11] [2006] VSC 117, [217].
[12] [2010] VSCA 245, [21]-[24] (per Warren CJ), [70]-[85] (per Buchanan and Nettle JJA).

that inferred reliance sufficed. The majority held that nothing in *Campbell v Backoffice Investments Pty Ltd*[13] "runs counter" to the decisions in *Ricochet Pty Ltd v Equity Trustees Executors and Agency Company Ltd*[14] and *Hanave Pty Ltd v LFOT Pty Ltd*[15] and "that those cases remain as authoritative statements that Wilson J's approach in *Gould v Vaggelas*[16] provides a practical guide to the way in which inferences can and should be drawn..."[17] The majority applied the dicta of Wilson J in *Gould v Vaggelas*[18] and related cases,[19] and held that a "fair inference" arose that the warranty operated as an inducement to MWH to enter into the deed because of "relevant surrounding facts and circumstances and the course of conduct leading up to the execution of the deed" and the "absence of evidence of the kind...determinative in *Campbell*..."[20] They further held that, if necessary, they would make orders preventing WSA from relying on the release.[21]

The Court of Appeal rejected WSA's appeal.[22] The first version of the reasons of Buchanan and Nettle JJA[23] (with whom Warren CJ agreed on this point) said that WSA "did not address oral submissions to any" of its grounds of appeal and the Court thus "[took] them to have been abandoned."[24] They went on to deal with WSA's grounds of appeal "in case [they] were wrong" in holding that WSA had abandoned its appeal. With respect to WSA's ground of appeal that MWH had abandoned its warranty claim, the Court said only this: "That contention is unfounded. The claim was pleaded, opened, pursued in evidence at trial and dealt with in written submissions and final addresses."[25]

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[13] (2009) 238 CLR 304.
[14] (1993) 41 FCR 229.
[15] [1999] FCA 357.
[16] (1985) 157 CLR 215, 238.
[17] [2010] VSCA 245, [105] (per Buchanan and Nettle JJA).
[18] (1985) 157 CLR 215, 238: "Where a plaintiff shows that a defendant has made false statements to him intending thereby to induce him to enter into a contract and those statements are of such a nature as would be likely to provide such inducement and the plaintiff did in fact enter into that contract and thereby suffered damage and nothing more appears, commonsense would demand the conclusion that the false representations played at least some part in inducing the plaintiff to enter into the contract."
[19] *Ricochet Pty Ltd v Equity Trustees Executor & Agency Co Ltd* (1993) 41 FCR 229; and *Hanave Pty Ltd v LFOT Pty Ltd* [1999] FCA 357, [45]-[49].
[20] [2010] VSCA 245, [106] (per Buchanan and Nettle JJA).
[21] [2010] VSCA 245, [106], [108] (per Buchanan and Nettle JJA).
[22] [2010] VSCA 245, [112] (per Buchanan and Nettle JJA); [58] (Warren CJ, agreeing).
[23] [2010] VSCA 245, [111] (per Buchanan and Nettle JJA).
[24] [2010] VSCA 245 (unrevised reasons dated 21 September 2010), [111] (per Buchanan and Nettle JJA); [58] (Warren CJ, agreeing).
[25] [2010] VSCA 245, [112] (per Buchanan and Nettle JJA); [58] (Warren CJ, agreeing).

21 The Court had, however, overlooked the fact that WSA had made oral submissions in relation to all of its grounds of appeal,[26] including extensive submissions in relation to the abandonment of the warranty claim ground; and that WSA had filed two further documents, including a chronology of events relating to abandonment, provided at the Court's request.[27] This was pointed out (among other things) in a memorandum from the parties sent to the Court on 1 October 2010. The Court issued revised reasons on 28 October 2010. Those reasons removed the assertion that WSA "did not address oral submissions to any of them [its grounds of appeal] and the finding that "we take [the grounds of appeal] to have been abandoned." Otherwise, the reasons were relevantly unchanged.

Part VI: Argument

22 ***Trade Practices Act Ground:*** **General Principles:** The principle that in deceit cases inducement might be inferred from the circumstances is of long standing.[28] It is an inference of fact, not a presumption or inference of law.[29] The burden of proving inducement at all times remains on the party seeking relief.[30]

23 The fact of inducement or reliance should not be inferred merely from a finding of materiality. There is no legal presumption, "merely the possibility of a factual inference".[31] The character of the representation, without more, will suffice only in exceptional cases.[32] In *St Paul Fire and Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd*, a case for rescission of an insurance policy for non-disclosure, Evans LJ held that the following statement in Halsbury's Laws of

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[26] T62-83 (10 November 2009); in reply T99-100 (10 November 2009).
[27] See "Comparison of MWH pleaded claims and final submissions": T68 (10 November 2009); and "Chronology of events relating to abandonment of claim for damages for breach of warranty", provided to the Court at its request following the hearing: *eg* T104 (10 November 2009).
[28] *Pasley v Freeman* (1789) 3 T R 51; *Redgrave v Hurd* (1881) 20 Ch D 1; *Smith v Chadwick* (1884) 9 App Cas 187 at 196-7; *Arnison v Smith* (1889) 41 Ch D 348; *Derry v Peek* (1889) 14 AC 337; *Holmes v Jones* (1907) 4 CLR 1692; *Sibley v Grosvenor* (1916) 21 CLR 469; *Gould v Vaggelas* (1985) 157 CLR 215. See also *Australian Woollen Mills Ltd v FS Walton & Co Ltd* (1937) 58 CLR 641 at 657: "When a dishonest trader fashions an implement or weapon for the purpose of misleading potential customers he…provides a reliable and expert opinion on the question whether what he has done is in fact likely to deceive" (per Dixon and McTiernan JJ).
[29] See Spencer Bower, Turner and Handley, *Actionable Misrepresentation* (4th ed) at [127].
[30] See by way of example only *Gould v Vaggelas* (1985) 157 CLR 215, 239.
[31] Howard N Bennett, "Utmost Good Faith, Materiality and Inducement" (1996) 112 *Law Quarterly Review* 405 at 409-410.
[32] See e.g. *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] 1 All ER (Comm) 140, citing *St Paul Fire and Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1996] 1 All ER 96, 112.

England[33] was justified by the authorities (including *Smith v Chadwick*):[34]
"Inducement cannot be inferred in law from proved materiality, although there may be cases where the materiality is so obvious as to justify an inference of fact that the representee was actually induced, but, even in such exceptional cases, the inference is only a prima facie one, and may be rebutted by counter-evidence."[35]

24 The dicta of Wilson J in *Gould* is, in terms, limited to cases in which "a plaintiff shows that a defendant has made false statements to him intending thereby to induce him to enter into a contract..."[36] *Gould* "lays down no rule in claims for damages under s82 of the [TPA] Act for contravention of s52, where the gist of the conduct complained of is the making of representations."[37]

25 The inference only arises when "nothing more appears".[38] It should never be permitted to be employed as an evidentiary "gap filler", where evidence of reliance is lacking or is insufficient, let alone where it is inconsistent with proven facts or inferences.

26 The inference should never arise where the plaintiff for no good reason declines or fails to testify. In *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*[39] the House of Lords said that before an underwriter can avoid a contract for non-disclosure of a material circumstance he or she must show that he or she had been actually induced by the non-disclosure to enter into the policy on the relevant terms. In that respect, "the test of 'inducement' is the same in cases as that established by many authorities in the general law of contract."[40] See also *Laker Vent Engineering Ltd v Templeton Insurance Ltd*, where the Court of Appeal upheld the trial judge's finding refusing to "speculate" about the issue of inducement, holding that "where no evidence was called, the judge's conclusion that [the insurer] had failed to prove

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[33] 4th edition, vol 31, para 1067.
[34] (1884) 9 App Cas 187.
[35] An example of a representation "so plainly material, and calculated to induce, that it is simply set out [in a pleading] without any allegation that it was made in order to induce or did induce" is "where something which the defendant knew to be a piece of glass is sold as a diamond." The example is given by Cussen ACJ in *Nicholas v Thompson* [1924] VLR 554 at 565, citing *Benas and Essenhigh on Chancery Pleadings.*
[36] (1985) 157 CLR 215, 238.
[37] *Ricochet Pty Ltd v Equity Trustees Executors and Agency Company Ltd* (1993) 41 FCR 229 at 234. See also *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [143].
[38] *Gould v Vaggelas* (1985) 157 CLR 215, 238 (per Wilson J).
[39] [1995] 1 AC 501.
[40] *St Paul Fire and Marine Ins Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1996] 1 All ER 96 at 108.

inducement...cannot be faulted" and that "[t]here was no basis on which he could have reached any other view."[41]

27 In *Marc Rich & Co AG v Portman*,[42] Longmore J observed: "In most cases in which the actual underwriter is called to give evidence and is cross-examined, the Court will be able to make up its own mind on the question of inducement. The inference will only come into play in those cases in which the underwriter cannot (for good reason) be called to give evidence and there is no reason to suppose that the actual underwriter acted other than prudently in writing the risk."[43]

28 Because it is an inference of fact and not of law, "it really amounts to no more than this. It simply operates where the evidence before the court is enough to lead to the inference that the insurer or reinsurer was, as a matter of fact, induced to enter into the contract."[44] See also *Gould v Vaggelas*, per Brennan J to similar effect.[45] As the Full Court said in *Ricochet Pty Ltd v Equity Trustees Executors and Agency Company Ltd*,[46] "a combination of factors may, if unanswered, lead to the conclusion that a person was induced by the representation of another to make the relevant decision." But it will not suffice if the conclusion from those factors is that the misrepresentation *might* have induced the plaintiff, because there "would not be the level of certainty necessary to enable an inference to be drawn."[47]

29 **The majority's reasoning on the TPA ground is unsustainable:** MWH pleaded that "[i]nduced by the warranty and relying on the representation [it] entered into the deed."[48] Its sole basis for that allegation is an inference of reliance. As Lord Jessel MR said of the unsuccessful plaintiff in *Smith v Chadwick* (a deceit case): "we are [thus] dealing with a Plaintiff who says he has been deceived, but will not condescend to particulars, and will not tell us in what respect he was deceived."[49]

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[41] [2009] Lloyd's Rep IR 704 at [70]. See also *Colinvaux's Law of Insurance* (9th edition, 2010), at [6-028].
[42] [1996] 1 Lloyd's Law Reports 430.
[43] [1996] 1 Lloyd's Law Reports 430, 442.
[44] *Assicurazioni Generali SpA v Arab Insurance Group BSC* [2002] EWCA Civ 1642, [2003] 1 All ER (Comm) 140, [61] (Clarke J).
[45] (1985) 157 CLR 215, 250-251.
[46] (1993) 41 FCR 229, 234.
[47] *Hanave Pty Ltd v LFOT Pty Ltd* (1999) 43 IPR 545, [46] (per Kiefel J); *Ricochet Pty Ltd v Equity Trustees Executors and Agency Company Ltd* (1993) 41 FCR 229 at 235.
[48] [2010] VSCA 245, [94] (per Buchanan and Nettle JJA).
[49] (1882) 20 Ch D 27 at 49.

30 The majority in the Court of Appeal said that "relevant surrounding facts and circumstances and the course of conduct leading up to the execution of the deed" were the basis of the "fair inference" that they drew.[50] But the majority did not identify any such facts or circumstances nor did they refer to any fact or circumstance that constituted a course of conduct leading up to the execution of the deed. For reasons that Hayne J explained in *Waterways Authority v Fitzgibbon*,[51] it must thus be taken that none was considered in arriving at the result.

31 In the course of their reasons, the majority said that the decision in *Campbell*[52] "adopted what may be seen as a more demanding approach to the proof of causation in cases of misleading and deceptive conduct."[53] The passages from *Campbell* cited by the majority in support of that statement, however, are, with respect, inapposite. Instead, the critical passage in *Campbell* making three points about *Gould* is the passage at [143], which was quoted by the Chief Justice,[54] but which the majority seem to have overlooked. That passage, in particular, required the majority (as counsel for WSA submitted) "to attend closely" to the facts, including the crucial facts that (a) Mr Angus testified only that he "probably" read the deed and passed it to Mr Robinson, the state manager, who testified only that he sent it to be signed by a director; and (b) MWH did not call the director who signed the deed (or any relevant moving mind of the company), and offered no explanation for doing so.

32 The evidence called by MWH (fact (a)) points against any reliance of causative nexus.[55] From the failure to call the signatory (fact (b)), it must be inferred that the evidence would not have been favourable to MWH.[56] Close attention to those facts, and the inferences that must be drawn from them, mean that MWH wholly failed to discharge the onus on it to prove on the balance of probabilities that it was induced to enter into the deed by the terms of the second sentence of clause 4 of the deed. There was not the evidentiary foundation required to enable an inference of reliance to be

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[50] [2010] VSCA 245, [106] (per Warren CJ).
[51] [2005] 221 ALR 402, 428, [130]: "[B]ecause the primary judge was bound to state the reasons for arriving at the decision reached, the reasons actually stated are to be understood as recording the steps that were in fact taken in arriving at that result."
[52] (2009) 238 CLR 304.
[53] [2010] VSCA 245, [103] (per Buchanan and Nettle JJA). Presumably, their Honours intended the reference to "more demanding" to mean "more demanding than *Hanave* and *Ricochet*."
[54] [2010] VSCA 245, [30] (per Warren CJ).
[55] See eg *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2010] NSWSC 29, [451]-[456].
[56] *Jones v Dunkel* (1959) 101 CLR 298, 320-321; *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 225 FLR 1, [999]-[1022] and [3493]-[3494].

drawn.[57] The majority was wrong to conclude otherwise. As the Chief Justice said in dissent, such a conclusion is "speculative".[58] Further, it is unfair to WSA.[59] Thirdly, courts "should not draw inferences favourable to [a plaintiff]...when no attempt was made to prove them by direct evidence and in particular when no relevant questions were asked" of its own witnesses. If a party fails "to examine a witness in chief on some topic" that "indicates as the most natural inference that the party fears to do so. This fear is then some evidence that such an examination in chief would have exposed facts unfavourable to the party."[60]

33 The majority's crucial finding that they "[did] not consider that the acknowledgement [could] be regarded as uninfluential on the mind of MWH"[61] in effect *presumes* inducement, without asking the next necessary question: namely, whether "when all the evidence has concluded...the misrepresentation in question contributed to the decision to enter the contract."[62] As *Campbell* makes clear, "all the evidence" must include the crucial facts referred to above. But the majority did not mention those facts, let alone consider them[63] (or WSA's submissions about them).

34 The failure to call any witness (including the director who signed the deed or the relevant moving mind of the company), and to offer any good explanation for not doing so, should mean that the inference of inducement cannot arise.[64] In the circumstances of this case, the Court of Appeal should have declined to consider the inference, ruled it inapplicable *in limine* and found that MWH's TPA appeal ground failed.

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[57] See also *Tu v Primary Contracting Services Pty Ltd* [2009] NSWCA 7, [34] (per Macfarlan JA) ("The appellant pointed to the fact that reliance upon an inducement by misleading and deceptive conduct may be inferred where the representee does not give direct evidence to that effect. He relied first upon *Gould v Vaggelas* (1985) 157 CLR 215 which supports the general proposition that inducement may be inferred. That does not however appear to have been a case where the representees did not give evidence of inducement.")

[58] [2010] VSCA 245, [31] (per Warren CJ).

[59] [2010] VSCA 245, [39]-[49] (per Warren CJ). See too *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 398 A-D.

[60] *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418 E-G, (internal quotations omitted). See too *ibid* at 418 G- 419 G; and *Pratt v Hawkins* (1993) 32 NSWLR 319 at 322.

[61] [2010] VSCA 245, [106] (per Buchanan and Nettle JJA).

[62] *Ricochet Pty Ltd v Equity Trustees Executors and Agency Company Ltd* (1993) 41 FCR 229 at 234.

[63] It is unclear, with respect, what significance is to be placed on the majority's observation that "[a]bsent evidence of the kind which was held to be determinative in *Campbell*, common sense dictates the conclusion [reached]." [2010] VSCA 245, [106] (per Buchanan and Nettle JJA). The evidence in this case is, not surprisingly, different to that held to be determinative in *Campbell*, but it is determinative nonetheless.

[64] *Marc Rich & Co AG v Portman* [1996] 1 Lloyd's Law Reports 430 at 442 (appeal dismissed at [1997] 1 Lloyd's Law Reports 225). Compare the slightly less dogmatic view of Lord Blackburn in *Smith v Chadwick* (1884) 9 App Cas 187 at 196: "[If a plaintiff] is not so called, or being so called does not swear that he was induced, it adds much weight to the doubts whether the inference was a true one. I do not say it is conclusive."

35 ***Contract Ground*:** The Court (Buchanan and Nettle JJA, Warren CJ agreeing) was wrong as a matter of principle in construing the release in cl 2 of the deed by departing from the unambiguous words only because it was "more likely from a commonsense business point of view".[65] Without identifying any relevant surrounding facts, circumstances or course of conduct and without considering (or receiving submissions about) the weight or "likelihood" of the unambiguous construction, the Court was not, with respect, permitted to construe the deed in the way it did. The Court's approach to the construction of the deed would work a radical departure from established principle and it should be rejected. The approach, if right, would mean that courts could assume to themselves the ability to impose their own idiosyncratic notions of business common sense unassisted by evidence (including relevant surrounding facts, circumstances and course of conduct evidence) or submissions.

36 **Court's reasons:** The Court disagreed with Byrne J's construction of cl 2. It reasoned that "[p]erforce of clause 3…one must then overlay the stipulation" in it and add the "formulation" "as and from the date of this deed" from cl 4,[66] such that cl 2 should be read as having "the effect" set out at length in paragraph [75] of the reasons (which means that WSA ceased to be responsible only in respect of work done after the deed).[67]

37 The Court conceded that "syntactically, it would be open" to construe the words in clause 2 in the manner contended for by WSA and adopted by Byrne J.[68] Similarly, the Chief Justice said that cl 2 "is not ambiguous on its face" and was "expressed in the broadest language available."[69] But the Court thought that the construction contended for by WSA "would not appear to make a great deal of sense" and would "produce a remarkable lack of symmetry." It further said that: "Approaching the question as one of what reasonable business persons in the position of the parties would take clause 2 to mean, we think it more likely that the two stipulations [in cl 2] were intended to correspond and so to operate only as and from the date of the

[65] [2010] VSCA 245, [77]–[79] (per Buchanan and Nettle JJA).
[66] [2010] VSCA 245, [75], footnote 42 (per Buchanan and Nettle JJA).
[67] The construction of the deed set out in paragraph [75] of [2010] VSCA 245 was not contended for by MWH nor was it alluded to by the Court in argument.
[68] [2010] VSCA 245, [76] (per Buchanan and Nettle JJA).
[69] [2010] VSCA 245, [21] (per Warren CJ).

deed."[70] The Court then returned to its approach to the construction question founded upon what it believed was "more likely", repeating in the next paragraph that "from a commonsense business point of view, it seems more likely that the two stipulations were intended to correspond and so to operate only as and from the date of the deed."[71] The "more likely" formulation was no slip – the Court used it four times during the course of its reasons on this point.[72]

38 **Governing principles:** Construing a contract must begin with the words chosen by the parties.[73] The words are to be considered objectively by reference to what a reasonable person would understand by the language used by the parties,[74] together with admissible evidence of surrounding circumstances, and the purpose and object of the transaction.[75]

39 It is fundamental "that the parties intended to say that which they have said."[76] As Lord Hoffman explained, "The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents."[77]

40 As Lord Hoffman further observed, the court "may nevertheless conclude from the background that something must have gone wrong with the language".[78] The same point was said to be made in the dictum of Lord Diplock, that detailed semantic and syntactical analysis of words must yield to business commonsense.[79]

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[70] [2010] VSCA 245, [77] (per Buchanan and Nettle JJA).
[71] [2010] VSCA 245, [78] (per Buchanan and Nettle JJA).
[72] [2010] VSCA 245, [77], [78], [79] and [84] (per Buchanan and Nettle JJA).
[73] See by way of example only *Goldsbrough Mort & Co v Carter* (1914) 19 CLR 429, 447.
[74] *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, [22]; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151, [53].
[75] *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 352; *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95, [25]; *cf Chartbrook v Persimmon Homes* [2009] 1 AC 1101; *Prenn v Simmonds* [1971] 3 All ER 237.
[76] *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, 263 (Lord Simon). It is submitted that, like statutes, "[t]he language which has actually been employed" in contracts is "the surest guide" to the intention of the parties. Compare *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46-47. "While courts are no longer confined to the language, they are still confined by it. Violence must not be done to the words chosen." Felix Frankfurter, *Some Reflections on the Reading of Statutes* (1947) 47 Columbia Law Review 527, 543, cited in JJ Spigelman, *From text to context: Contemporary contractual interpretation* (2007) 81 Australian Law Journal 322, 325.
[77] *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896, 913.
[78] *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896, 913.
[79] *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201.

41 Cases which refer to "business commonsense" draw on the background circumstances to substantiate the reasoning. For example, in *Chartbrook Ltd v Persimmon Homes Ltd*,[80] the House of Lords closely examined the context, facilitating an analysis of the competing constructions as making commercial sense or nonsense.[81]

42 Further, what "in respect of a particular contract comprises 'business commonsense', as an apparently objectively ascertained matter, may itself be a topic upon which minds may differ and in respect of which an imputed consensus is impossible."[82] It is thus referable to evidence and is a matter about which there may be dispute.[83] It follows that "[i]t may be…that there is a real contest about the appropriate commercial perspective to take from the surrounding circumstances. This may be a function of contested evidence and produce the need for findings of fact to be made in those contested areas. It may also be a reflection of the fact that the parties brought evidently different commercial aims and purposes to the bargain." [84] And of course, courts are not permitted to re-write contracts.[85]

43 **The Court's reasoning:** The Court in this case purported to apply "business commonsense", and "[r]eason and commercial efficacy",[86] in substitution for unambiguous words, without identifying surrounding circumstances or any relevant purpose or object of the deed or pointing to any evidence which informed the point of view said to be commonsense, and without suggesting that something must have gone wrong with the words. Absent any of those things, it was not open to the Court to ignore the plain and unambiguous words of the deed and the Court was, with respect, clearly wrong to do so.[87] It was also wrong for the Court to do so when the notions of "business commonsense" and "[r]eason and commercial efficacy" upon which they relied were not contended for by MWH or raised by the Court in oral argument (or at any other time).

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[80] [2009] 1 AC 1101.
[81] [2009] 1 AC 1101 at [87]–[95] per Lord Walker of Gestingthorpe. See also Ch 4 and 5 of Scottish Law Commission "Review of Contract Law–Discussion Paper on Interpretation of Contract" (No 147).
[82] *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181, 198 [43].
[83] *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 264 ALR 15, [20].
[84] *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 264 ALR 15, [20].
[85] See *Kooee Communications Pty Ltd v Primus Telecommunications Pty Ltd* [2008] NSWCA 5, [27]; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 264 ALR 15, [23]; *Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd* [2006] EWCA Civ 1732, [21] (per Neuberger LJ); *Royal and Sun Alliance Ins plc v Dornoch Ltd* [2005] EWCA Civ 238, [15]-[16].
[86] [2010] VSCA 245, [79] (per Buchanan and Nettle JJA).
[87] *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, [22]; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151, [53].

44 In order to construe the deed as "having the effect" set out in paragraph [75] of the reasons[88], the Court's first step was to read the words "as if TTW was named in the contract in place of WS[A]" as governing each of the three preceding stipulations. That reading of cl 2, it is submitted with respect, is an artificial and incorrect syntactical reading.[89] The Court "acknowledge[d] that, syntactically, it would be open to construe the concluding words of clause 2 as applying only to the third of the three preceding stipulations"[90], but that is, with respect, the only way that the words may be read as a matter of ordinary English. Adding to the first stipulation (that "MWH releases and discharges WS[A] from all claims and demands whatsoever...") the words "as if TTW was named in the contract in place of WS[A]" is, with respect, a *non-sequitur*.

45 The second step was to "overlay the stipulation" of the words in cl 3 of the deed ("the effective date for the substitution of TTW for WS[A] and the acceptance of such substitution and transfer by [MWH] is the date of this deed"[91]). However, the terms of cl 3 (and the words which the Court employed by its next step (see below)) do not inform the scope of liability released, as they are more naturally construed to describe the time when the deed (and thus the release) takes legal effect.[92] The "overlaying", and the meaning attributed to the words of the deed in the process of doing so, are accordingly inconsistent with the plain meaning of the words of the deed.

46 The third step is apparent from paragraph [75], but not expressly articulated, viz that the words in cl 4 "as and from such date" are read instead to say "as and from the date of this deed" and then that re-written part of clause 4 is merged with clause 3, such that the words "as and from the date of this deed" are read into each of the three stipulations in clause 2.[93] That reading cannot, with respect, be correct, because, among other things, the words which the Court emphasizes ("as and from the date of this deed") do not appear in the deed.[94] The reading is also artificial in straining the

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[88] [2010] VSCA 245, [75] (per Buchanan and Nettle JJA).
[89] [2010] VSCA 245, [74] (per Buchanan and Nettle JJA).
[90] [2010] VSCA 245, [76] (per Buchanan and Nettle JJA).
[91] [2010] VSCA 245, [75] (Buchanan and Nettle JJA).
[92] That the words "as and from" are inapposite to describe the content of the release is exposed, for example, in paragraph [78] where their Honours use the words "for before" in contrast to "as from the date of the deed".
[93] [2010] VSCA 245, [73] (Buchanan and Nettle JJA).
[94] The Court says at footnote 42 that "[t]he formulation 'as and from the date of this deed' appears in clause 4 of the deed", but they are mistaken. The first sentence of clause 4 in fact reads: "[MWH] undertakes to pay and accepts its liability to WS[A] to pay all moneys due and owing under the contract up to the date of this deed and to TTW as and from such date."

syntax on the one hand, and on the other hand failing to address the plain meaning of the release in cl 2, which (it warrants repeating) provides: "[MWH] releases and discharges WS[A] from all claims and demands whatsoever in respect of the contract and accepts the liability of TTW under the contract in lieu of the liability of WS[A] and agrees to be bound by the terms of the contract in every way as if TTW was named in the contract as a party thereto to [sic, in] place of WS[A]".

47 The Court effectively re-wrote the contract. To have done so only because the Court considered that its own view of the commercial common sense of the matter was "more likely" than that contended for by WSA was, with respect, a clear error of principle.

48 The error of principle that the Court made is also reflected in the series of rhetorical questions that it then asked to explain or justify its reasoning.[95] The Court was wrong, with respect, to seek to justify or explain its own untutored understanding of the business common sense of the transaction by reference to questions that purported neither to expect nor require an answer in circumstances where the questions were not the subject of evidence and submissions; and were not urged by MWH in the appeal; and do not arise if the plain meaning of the words in cl 2 is adhered to.

49 **Natural meaning of the deed does make sense:** In any event, the natural meaning of cl 2 does not produce a result that "would not appear to make a great deal of sense." Far from "lacking symmetry" or commercial reason, the plain meaning of those words is as clear as it is commercially attractive – that is, that from a date certain, MWH would look to TTW, and only TTW, for relief of whatever kind in respect of defective works, whenever they occurred. The clause is not badly drafted. Nothing about it suggests that something has gone wrong with the words.[96] And it does not produce even an unexpected, unreasonable or commercially unwise result – which, even if it did, would not represent a licence to re-write the deed. As Neuberger LJ said in *Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd*: "surrounding circumstances and commercial common sense do not represent a licence to the court to re-write a contract merely because its terms seem somewhat unexpected, a little unreasonable, or not commercially very wise. The contract will contain the words the

[95] [2010] VSCA 245, [79], [81] and [82] (per Buchanan and Nettle JJA).
[96] Other than the irrelevant and obvious typographical error in the fourth last word of cl 2:"in" should read "to".

parties have chosen to use in order to identify their contractual rights and obligations. At least between them, they have control over the words they use and what they agree..."[97]

50 ***Abandonment ground*:** The Court of Appeal erred in dismissing WSA's appeal from the judgment for damages for breach of warranty by finding that the claim had not been abandoned. It was never open to Byrne J to find in favour of MWH's breach of warranty claim because MWH did not mention, let alone, pursue the claim in final submissions (or at any other time, for that matter).

51 **MWH abandoned the warranty claim:** The Court[98] held that WSA's submission that the respondent's breach of warranty claim was abandoned was "unfounded" because "the claim was...opened, pursued in evidence at trial and dealt with in written submissions and final addresses."[99]

52 That finding is wrong. It apparently has its origins in the MWH submission which similarly asserted: "The [breach of warranty claim]... was...opened, pursued at trial, dealt with in final addresses and specifically by [MWH] in reply."[100] However, that submission was not supported. MWH did not mention, make or press the breach of warranty claim in final address or written submissions, a proposition that was made good by the sources detailed in submissions made by WSA to the Court of Appeal, but not dealt with by it.

53 The single transcript reference relied on by MWH before the Court of Appeal[101] contains passing reference to the word "warranty", but it is obviously made in relation to the respondent's s 52 case, as Warren CJ recognized.[102]

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[97] [2006] EWCA Civ 1732, [21].
[98] Per Buchanan and Nettle JJA (Warren CJ agreeing)
[99] [2010] VSCA 245, [113] (per Buchanan and Nettle JJA), [58] (Warren CJ, agreeing).
[100] Respondent's Outline of Submission dated 12 March 2009 at paragraph 1.
[101] The reference in the respondent's written submissions in the Court of Appeal reads: "Levin QC reply submissions: AB 4204 (Transcript)." The relevant exchange between counsel and the learned trial judge (which commences at the foot of the previous page) reads: "COUNSEL: Your Honour, we have addressed the issue in relation to misrepresentation at paragraph 7 and we have referred to the *Sellars* case that was referred to earlier [to]day. HIS HONOUR: This is the misrepresentation contained in the acknowledgment? COUNSEL: Indeed. HIS HONOUR: In clause 4 of the novation agreement? COUNSEL: Indeed. Your Honour, we stress that the warranty or term of the agreement may amount to conduct contrary to section 52 of the Trade Practices Act. HIS HONOUR: Not much has been said about that; do you press that? COUNSEL: Not much has been said but, Your Honour, we do press it. We certainly haven't resiled from it."
[102] [2010] VSCA 245, [41] (per Warren CJ).

54 The applicable legal principles (to which Buchanan and Nettle JJA made no reference and to which Warren CJ referred only in the context of the TPA ground of appeal) preclude MWH from obtaining judgment for breach of warranty. A party is bound by the conduct of its case,[103] including abandonment by making no submissions on a point.[104] If the parties choose to restrict the pleadings, it is impossible to hark back to the pleadings and treat them as governing the area of contest.[105] Relief is confined to the pleadings or the different basis deliberately chosen on which to conduct the case.[106] For the same reason, it is not open to assert points on appeal which did not arise for determination by the trial judge having regard to the manner in which the trial was conducted.[107] Those principles are derived from the public policy in securing finality of litigation[108] and principles governing estoppel by election in the conduct of litigation.[109]

55 Byrne J's warning at the outset of the trial that he would treat issues not pressed in final submission as being not pursued[110] was unambiguous. The claim for breach of warranty was thus abandoned when counsel for MWH finished his closing submissions in chief, having traversed every single pleaded cause of action, except that one.[111]

56 **Case management principles:** Warren CJ correctly identified, with respect, in the context of her consideration of the s52 TPA appeal ground, the principles of efficient administration of the justice system applicable to foreclose a claim which has not been pursued.[112] When a trial court has, in accordance with principles of case management,[113] warned parties that it will only decide issues both pleaded and pressed in final submissions and no objection is taken, a claim not mentioned in final submissions must thereby be abandoned.

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[103] *Gould v Mount Oxide Mines Ltd* (1916) 22 CLR 490, 517; *Banque Commerciale SA v Akhil Holdings Ltd* (1990) 169 CLR 279, 286-8; *University of Wollongong v Metwally (No 2)* (1995) 59 ALJR 481; *Coulton v Holcombe* (1986) 162 CLR 1; *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447.
[104] *Austwide Institute of Training Pty Ltd v Dalman* [2009] VSCA 25, [67] (per Warren CJ).
[105] *Gould v Mount Oxide Mines Ltd* (1916) 22 CLR 490, 517.
[106] *Banque Commerciale SA v Akhil Holdings Ltd* (1990) 169 CLR 279, 286-7. See also *Stead v SGIO* (1986) 161 CLR 141, 145; *Water Board v Moustakas* (1988) 180 CLR 491, 497-8.
[107] *Chen v Chan* [2008] VSCA 280, [42]–[48].
[108] *University of Wollongong v Metwally (No 2)* (1995) 59 ALJR 481; *Coulton v Holcombe* (1986) 162 CLR 1.
[109] *Banque Commerciale SA v Akhil Holdings Ltd* (1990) 169 CLR 279, 284 (per Mason CJ and Gaudron J).
[110] See paragraph [13], *infra*.
[111] Given that the draft summary of pleadings Byrne J distributed referred to the warranty claim, it is not to be supposed that the omission was accidental (assuming that matters).
[112] [2010] VSCA 245, [47]-[48] (per Warren CJ).
[113] Cf *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175.

57 ***Lack of Procedural Fairness Ground:*** **Contractual construction**: If a court contemplates determining the case on a basis different to that on which it has been conducted by the parties, it must inform the parties of this prospect so they have an opportunity to address any new or changed issues that may arise. A failure to inform the parties will ordinarily result in a denial of procedural fairness.[114] MWH did not contend for a construction of the deed of novation adopted by the Court. WSA was not informed of, and did not have an opportunity to make submissions about, that construction. Nor did it have an opportunity to make submissions about any evidence which (for the reasons submitted above) may have been relevant to the content of 'business commonsense' in the circumstances of this case. The Court thus denied WSA procedural fairness.

58 **Inferred inducement:** The majority did not give adequate reasons for the facts supporting the characterisation of the representation as material and likely to induce.[115] The obligation to provide reasons is a normal incident of the judicial process, and the court is required to give reasons for rejecting at least the principal submissions of the losing party which relate to the issues upon which the result of the proceeding depends.[116]

59 The finding of reliance and causation by Buchanan and Nettle JJA is articulated in a single sentence, after setting out the pleading,[117] the respondent's contention for inferring reliance,[118] and certain authorities on issues of principle.[119] Despite invoking the language of "relevant surrounding facts and circumstances and the course of conduct leading up to the execution of the deed"[120], nothing was identified.

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[114] *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208, [78]–[79] (per Ipp JA); see also *Stead v State Government Insurance Commission* (1986) 161 CLR 141; *Escobar v Spindaleri* (1986) 7 NSWLR 51; *Pantorno v R* (1989) 166 CLR 466, 473 (per Mason CJ and Brennan J); *Ucar v Nylex Industrial Products Pty Ltd* (2007) 17 VR 492; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, [132]–[133]; *Parker v Comptroller-General of Customs* (2009) 252 ALR 619.

[115] [2010] VSCA 245, [106] (per Buchanan and Nettle JJA).

[116] *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247; *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd (No 2)* (2002) 6 VR 1; *Waterways Authority v Fitzgibbon* (2005) 221 ALR 402, [129]–[130] (per Hayne J); *Camden v McKenzie* [2008] 1 Qd R 39; *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110, [56]–[67]; see also *Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA 255; *cf Gordian Runoff Ltd v Westport Insurance Corporation* (2010) 267 ALR 74.

[117] [2010] VSCA 245, [94]–[95] (per Buchanan and Nettle JJA).

[118] [2010] VSCA 245, [96]–[99] (per Buchanan and Nettle JJA).

[119] [2010] VSCA 245, [99]–[105] (per Buchanan and Nettle JJA).

[120] [2010] VSCA 245, [106] (per Buchanan and Nettle JJA).

60 In relation to the exercise of discretion under s 87 of the TPA, Buchanan and Nettle JJA did not identify (and the respondent did not identify in argument)[121] the considerations that would allow the Court "to do what is practically just between the parties".[122] The decision does not enable the applicant to understand how it was just in the circumstances of this transaction to preclude the applicant from reliance on one provision of the deed. In the absence of any grounds propounded by MWH, relief should have been refused (as Byrne J correctly held).

61 **Abandoned breach of warranty claim:** The obligation to consider substantial and serious submissions is part of the judicial process of adjudication and providing adequate reasons.[123] The Court did not address the detailed arguments made by WSA which demonstrated the breach of warranty claim had not been the subject of final submissions by the respondent (including a schedule of the various claims and references for written and oral submissions on each), and the authorities. It initially overlooked the submissions, and did not supplement the reasons when the oversight was identified. The reasons given with respect to that appeal ground are self-evidently insufficient.

62 This Court is in a position to determine afresh the merits of the issues raised above. For the reasons submitted above, each should be determined in WSA's favour.

Part VII: Applicable statutes

63 Annexed to these submissions are s 87 of the TPA, certain amendments made in 2010, and substituted provisions in the *Australian Consumer Law*.

Part VIII: Orders sought

64 The applicant seeks the following orders in each of Proceeding Nos M158 and M159 of 2010:

1 Special leave to appeal be granted.

2 The appeal is allowed.

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[121] Despite direct and repeated inquiry from the trial judge (29 March 2007, T30–31, 34–36, 38, 40–43) and Warren CJ (10 November 2009, T41).

[122] *Alati v Kruger* (1955) 94 CLR 216, 223. See also *Yorke v Ross Lucas Pty Ltd* (1982) 69 FLR 116; *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274, 284; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546, 564–5 (per Lockhart J).

[123] *Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA 255, [74].

3 The orders made by the Court of Appeal on 3 November 2010 are set aside.

4 The orders made by the Honourable Justice Byrne on 1 May 2007, 4 May 2007 and 14 December 2007 are set aside.

5 In lieu thereof, there be orders that:

(a) the appeal to the Court of Appeal by MWH Australia Pty Ltd is dismissed;

(b) the appeal to the Court of Appeal by Wynton Stone Australia Pty Ltd (in liquidation) is allowed;

(c) the claim by MWH Australia Pty Ltd against Wynton Stone Australia Pty Ltd (in liquidation) in proceeding number 7091 of 2000 is dismissed; and

(d) the respondent pay the appellant's costs of the trial, the appeal to the Court of Appeal and the appeal, in each case including any reserved costs.

Dated: 8 April 2011

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IN THE HIGH COURT OF AUSTRALIA **Nos M158 and M159 of 2010**
MELBOURNE REGISTRY

WYNTON STONE AUSTRALIA PTY LTD
(IN LIQUIDATION)
(ACN 065 625 498) Applicant

and

MWH AUSTRALIA PTY LTD
(FORMERLY MONTGOMERY WATSON AUSTRALIA PTY LTD)
(ACN 007 820 322) Respondent

ANNEXURE TO APPLICANT'S SUBMISSIONS

Applicable statutes

Annexed are copies of s 87 of the *Trade Practices Act 1974* (Cth) with the following provisions:

(a) **as at 6 May 1997:** s 87 of the *Trade Practices Act 1974* (Cth);

(b) **amendment:**[124] items 88-99 of Schedule 5 of the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (**Amending Act**);[125]

(c) **current amended form:** s 87 of the *Competition and Consumer Act 2010* (Cth);[126]

(d) **transition:** items 6 and 7 of schedule 7 of the Amending Act; and

(e) **substitution:** ss 237 and 243 of the *Australian Consumer Law*, being Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

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[124] There were several amendments between 1997 and 2010 which are not presently relevant: No 36, 1998; Nos 31 and 63, 2001; No.118, 2004; No 11, 2006; No 59, 2009; No 44, 2010.

[125] By operation of ss 2 and 3 of the Amending Act, s 87 was amended with operation from 1 January 2011, so as not to apply to Part V or to the *Australian Consumer Law*. Item 49 of the Amending Act repealed Part V of the TPA.

[126] Note 2 of the current compilation of the *Competition and Consumer Act 2010* (dated 1 January 2011, taking into account amendments up to Act No 148 of 2010) states that, relevantly, items 90 and 96 of Schedule 5 of the Amending Act were misdescribed and are not included in the text of s 87 in the compilation.

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(e) appeals lie from judgments of the Family Court given in and in relation to the proceeding as if the judgments were judgments of the Federal Court constituted by a single Judge of that Court, and do not otherwise lie; and

(f) subject to paragraphs (a) to (e) (inclusive), this Act, the regulations, the *Federal Court of Australia Act 1976*, the Rules of Court made under that Act, and other laws of the Commonwealth, apply in and in relation to the proceeding as if:

(i) a reference to the Federal Court (other than in the expression ***the Court or a Judge***) included a reference to the Family Court;

(ii) a reference to a Judge of the Federal Court (other than in the expression ***the Court or a Judge***) included a reference to a Family Court Judge;

(iii) a reference to the expression ***the Court or a Judge*** when used in relation to the Federal Court included a reference to a Family Court Judge sitting in Chambers;

(iv) a reference to a Registrar of the Federal Court included a reference to a Registrar of the Family Court; and

(v) any other necessary changes were made.

(4) Where any difficulty arises in the application of paragraphs (3)(c), (d) and (f) in or in relation to a particular proceeding, the Family Court may, on the application of a party to the proceeding or of its own motion, give such directions, and make such orders, as it considers appropriate to resolve the difficulty.

(5) An appeal does not lie from a decision of the Federal Court in relation to the transfer of a proceeding under this Act to the Family Court.

87 Other orders

(1) Without limiting the generality of section 80, where, in a proceeding instituted under, or for an offence against, this Part, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in (whether before or after the commencement of this subsection) in contravention of a provision of Part IV, IVA or V, the Court may, whether or not it grants an injunction under section 80 or makes an order under section 80A or

82, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2) of this section) if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.

(1A) Without limiting the generality of section 80, the Court may, on the application of a person who has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in (whether before or after the commencement of this subsection) in contravention of a provision of Part IVA or V or on the application of the Commission in accordance with subsection (1B) on behalf of such a person or 2 or more such persons, make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2)) if the Court considers that the order or orders concerned will compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage, or will prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person.

(1B) Where, in a proceeding instituted for an offence against section 79 or instituted by the Commission or the Minister under section 80, a person is found to have engaged (whether before or after the commencement of this subsection) in conduct in contravention of a provision of Part IVA or V, the Commission may make an application under subsection (1A) on behalf of one or more persons identified in the application who have suffered, or are likely to suffer, loss or damage by the conduct, but the Commission shall not make such an application except with the consent in writing given before the application is made by the person, or by each of the persons, on whose behalf the application is made.

(1C) An application may be made under subsection (1A) in relation to a contravention of Part IVA or V notwithstanding that a proceeding has not been instituted under another provision of this Part in relation to that contravention.

(1CA) An application under subsection (1A) may be commenced:

(a) in the case of conduct in contravention of Part IVA—at any time within 2 years after the day on which the cause of action accrued; or

(b) in any other case—at any time within 3 years after the day on which the cause of action accrued.

(1D) For the purpose of determining whether to make an order under this section in relation to a contravention of Part IVA, the Court may have regard to the conduct of parties to the proceeding since the contravention occurred.

(2) The orders referred to in subsection (1) and (1A) are:

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

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

(ba) an order refusing to enforce any or all of the provisions of such a contract;

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

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

(e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his or her own expense, to repair, or provide parts for, goods that had been supplied by the person who engaged in the conduct to the person who suffered, or is likely to suffer, the loss or damage;

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

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

(i) varies, or has the effect of varying, the first- mentioned instrument; or

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

(3) Where:

(a) a provision of a contract made, or a covenant given, whether before or after the commencement of the *Trade Practices Amendment Act 1977*:

(i) in the case of a provision of a contract, is unenforceable by reason of section 45 in so far as it confers rights or benefits or imposes duties or obligations on a corporation; or

(ii) in the case of a covenant, is unenforceable by reason of section 45B in so far as it confers rights or benefits or imposes duties or obligations on a corporation or on a person associated with a corporation; or

(b) the engaging in conduct by a corporation in pursuance of or in accordance with a contract made before the commencement of the *Trade Practices Amendment Act 1977* would constitute a contravention of section 47;

the Court may, on the application of a party to the contract or of a person who would, but for subsection 45B(1), be bound by, or entitled to the benefit of, the covenant, as the case may be, make an order:

(c) varying the contract or covenant, or a collateral arrangement relating to the contract or covenant, in such manner as the Court considers just and equitable; or

(d) directing another party to the contract, or another person who would, but for subsection 45B(1), be bound by, or entitled to

the benefit of, the covenant, to do any act in relation to the first-mentioned party or person that the Court considers just and equitable.

(4) The orders that may be made under subsection (3) include an order directing the termination of a lease or the increase or reduction of any rent or premium payable under a lease.

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

(6) In subsection (2), ***interest***, in relation to land, has the same meaning as in section 53A.

87A Power of Court to prohibit payment or transfer of moneys or other property

(1) Where:

(a) proceedings have been commenced against a person for an offence against section 79;

(b) an application has been made under section 80 for an injunction against a person in relation to a contravention of a provision of Part IVA or V;

(c) an action has been commenced under subsection 82(1) against a person in relation to a contravention of a provision of Part V; or

(d) an application for an order under subsection 87(1A) or (1B) has been or may be made against a person in relation to a contravention of a provision of Part IVA or V;

the Court may, on the application of the Minister or the Commission, make an order or orders mentioned in subsection (2) if the Court is satisfied that:

(e) it is necessary or desirable to do so for the purpose of preserving money or other property held by or on behalf of a person referred to in paragraph (a), (b), (c) or (d), as the case may be (in this section referred to as the ***relevant person***), where the relevant person is liable or may become liable under this Act to pay moneys by way of a fine, damages, compensation, refund or otherwise or to transfer, sell or refund other property; and

Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010

No. 103, 2010

An Act to amend the *Trade Practices Act 1974* and the *Australian Securities and Investments Commission Act 2001*, and for other purposes

Note: An electronic version of this Act is available in ComLaw (http://www.comlaw.gov.au/)

Repeal the section.

85 Subsection 86E(1B)

Repeal the subsection.

86 Subsection 86E(2)

Omit ", (1A) or (1B)", substitute "or (1A)".

87 Subsection 86E(3)

Omit "or (1B)".

88 Subsection 87(1)

Omit "Subject to subsection (1AA) but without limiting", substitute "Without limiting".

89 Subsection 87(1)

Omit "or Part VC".

90 Subsection 87(1)

Omit "Part IV, IVA, IVB, V or VC or of the Australian Consumer Law", substitute "Division 2 of Part IVB".

91 Subsection 87(1A)

Omit "Subject to subsection (1AA) but without limiting the generality of section 80 or 87AAA", substitute "Without limiting the generality of sections 51ADB and 80".

92 Paragraph 87(1A)(a)

Omit "Part IVA, IVB, V or VC, or a provision of the Australian Consumer Law", substitute "Division 2 of Part IVB".

93 Paragraph 87(1A)(b)

Omit ", IVA, IVB, V or VC, or a provision of the Australian Consumer Law", substitute "or Division 2 of Part IVB".

94 Subsections 87(1AA) to (1AC)

Repeal the subsections.

95 Paragraph 87(1B)(a)

Omit ", IVA, IVB, V or VC, or a provision of the Australian Consumer Law", substitute "or Division 2 of Part IVB".

96 Subsection 87(1C)

Omit "Part IV, IVA, IVB, V or VC, or a provision of the Australian Consumer Law,", substitute "Part IV or Division 2 of Part IVB".

97 Subsections 87(1D), (2A) and (5A)

Repeal the subsections.

98 Subsection 87(6)

Repeal the subsection, substitute:

(6) In subsection (2), ***interest***, in relation to land, means:

(a) a legal or equitable estate or interest in the land; or

(b) a right of occupancy of the land, or of a building or part of a building erected on the land, arising by virtue of the holding of shares, or by virtue of a contract to purchase shares, in an incorporated company that owns the land or building; or

(c) a right, power or privilege over, or in connection with, the land.

99 Subsection 87(7)

Repeal the subsection.

100 Sections 87AAA, 87AAB, 87A, 87AB, 87AC and 87CAA

Repeal the sections.

100A Subsection 87CB(1)

Omit "section 82", substitute "section 236 of the Australian Consumer Law".

101 Subsection 87CB(1)

Omit "section 52", substitute "section 18 of the Australian Consumer Law".

102 Section 87D (paragraph (a) of the definition of *plaintiff*)

Competition and Consumer Act 2010

Act No. 51 of 1974 as amended

This compilation was prepared on 1 January 2011
taking into account amendments up to Act No. 148 of 2010

Volume 1 includes: Table of Contents
Sections 1 – 119

The text of any of those amendments not in force on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Volume 2 includes: Table of Contents
Sections 10.01 – 178

Volume 3 includes: Table of Contents
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Table A

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Definition

(4) In this section:

penalty includes forfeiture.

87 Other orders [*see* Note 2]

(1) Without limiting the generality of section 80, where, in a proceeding instituted under this Part, or for an offence against section 44ZZRF or 44ZZRG, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in (whether before or after the commencement of this subsection) in contravention of a provision of Part IV, IVA, IVB, V or VC, or of the Australian Consumer Law, the Court may, whether or not it grants an injunction under section 80 or makes an order under section 82, 86C, 86D or 86E, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2) of this section) if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.

(1A) Without limiting the generality of sections 51ADB and 80, the Court may:

(a) on the application of a person who has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of Division 2 of Part IVB; or

(b) on the application of the Commission in accordance with subsection (1B) on behalf of one or more persons who have suffered, or who are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of Part IV (other than section 45D or 45E) or Division 2 of Part IVB; or

(ba) on the application of the Director of Public Prosecutions in accordance with subsection (1BA) on behalf of one or more persons who have suffered, or who are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of section 44ZZRF or 44ZZRG;

make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2)) if the Court considers that the order or orders concerned will:

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

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

(1B) The Commission may make an application under paragraph (1A)(b) on behalf of one or more persons identified in the application who:

(a) have suffered, or are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of Part IV (other than section 45D or 45E) or Division 2 of Part IVB; and

(b) have, before the application is made, consented in writing to the making of the application.

(1BA) The Director of Public Prosecutions may make an application under paragraph (1A)(ba) on behalf of one or more persons identified in the application who:

(a) have suffered, or are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of section 44ZZRF or 44ZZRG; and

(b) have, before the application is made, consented in writing to the making of the application.

(1C) An application may be made under subsection (1A) in relation to a contravention of Part IV, IVA, IVB, V or VC, or of a provision of the Australian Consumer Law, even if a proceeding has not been instituted under another provision in relation to that contravention.

(1CA) An application under subsection (1A) may be made at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

(2) The orders referred to in subsection (1) and (1A) are:

(a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the

loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the Court thinks fit, to have been void *ab initio* or at all times on and after such date before the date on which the order is made as is specified in the order;

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

(ba) an order refusing to enforce any or all of the provisions of such a contract;

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

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

(e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his or her own expense, to repair, or provide parts for, goods that had been supplied by the person who engaged in the conduct to the person who suffered, or is likely to suffer, the loss or damage;

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

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

(i) varies, or has the effect of varying, the first-mentioned instrument; or

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

(3) Where:

(a) a provision of a contract made, or a covenant given, whether before or after the commencement of the *Trade Practices Amendment Act 1977*:

(i) in the case of a provision of a contract, is unenforceable by reason of section 45 in so far as it confers rights or benefits or imposes duties or obligations on a corporation; or

(ii) in the case of a covenant, is unenforceable by reason of section 45B in so far as it confers rights or benefits or imposes duties or obligations on a corporation or on a person associated with a corporation; or

(b) the engaging in conduct by a corporation in pursuance of or in accordance with a contract made before the commencement of the *Trade Practices Amendment Act 1977* would constitute a contravention of section 47;

the Court may, on the application of a party to the contract or of a person who would, but for subsection 45B(1), be bound by, or entitled to the benefit of, the covenant, as the case may be, make an order:

(c) varying the contract or covenant, or a collateral arrangement relating to the contract or covenant, in such manner as the Court considers just and equitable; or

(d) directing another party to the contract, or another person who would, but for subsection 45B(1), be bound by, or entitled to the benefit of, the covenant, to do any act in relation to the first-mentioned party or person that the Court considers just and equitable.

(4) The orders that may be made under subsection (3) include an order directing the termination of a lease or the increase or reduction of any rent or premium payable under a lease.

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

(6) In subsection (2), ***interest***, in relation to land, means:

(a) a legal or equitable estate or interest in the land; or

(b) a right of occupancy of the land, or of a building or part of a building erected on the land, arising by virtue of the holding of shares, or by virtue of a contract to purchase shares, in an incorporated company that owns the land or building; or

(c) a right, power or privilege over, or in connection with, the land.

87AA Special provision relating to Court's exercise of powers under this Part in relation to boycott conduct

(1) In exercising its powers in proceedings under this Part in relation to boycott conduct, the Court is to have regard to any action the applicant in the proceedings has taken, or could take, before an industrial authority in relation to the boycott conduct. In particular, the Court is to have regard to any application for conciliation that the applicant has made or could make.

(2) In this section:

boycott conduct means conduct that constitutes or would constitute:

(a) a contravention of subsection 45D(1), 45DA(1), 45DB(1), 45E(2) or 45E(3) or section 45EA; or

(b) attempting to contravene one of those provisions; or

(c) aiding, abetting, counselling or procuring a person to contravene one of those provisions; or

(d) inducing, or attempting to induce, a person (whether by threats, promises or otherwise) to contravene one of those provisions; or

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of one of those provisions; or

(f) conspiring with others to contravene one of those provisions.

industrial authority means:

(a) a board or court of conciliation or arbitration, or tribunal, body or persons, having authority under a law of a State to exercise any power of conciliation or arbitration in relation to industrial disputes within the limits of the State; or

(b) a special board constituted under a law of a State relating to factories; or

Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010

No. 103, 2010

An Act to amend the *Trade Practices Act 1974* and the *Australian Securities and Investments Commission Act 2001*, and for other purposes

Note: An electronic version of this Act is available in ComLaw (http://www.comlaw.gov.au/)

6 Acts or omissions that occurred before commencement

(1) The *Trade Practices Act 1974* as in force immediately before the commencement of this item continues to apply, after that commencement, in relation to acts or omissions that occurred before that commencement.

(2) Without limiting subitem (1), action may be taken, under or in relation to Part VC or VI of that Act as so in force, in relation to those acts or omissions.

7 Proceedings already commenced

(1) The *Trade Practices Act 1974* as in force immediately before the commencement of this item continues to apply to or in relation to any proceedings, under or in relation to that Act, that were commenced, but not concluded, before that commencement.

(2) However, to the extent that any such proceeding are proceedings for an injunction under section 80 of that Act as so in force, the proceedings are taken, after that commencement, to be proceedings for an injunction under section 232 of the Australian Consumer Law.

8 Unfair contract terms

(1) Part 2-3 of the Australian Consumer Law applies to a contract entered into on or after the commencement of this item.

(2) That Part does not apply to a contract entered into before that commencement. However:

(a) if the contract is renewed on or after that commencement—that Part applies to the contract as renewed, on and from the day (the ***renewal day***) on which the renewal takes effect, in relation to conduct that occurs on or after the renewal day; or

(b) if a term of the contract is varied on or after that commencement, and paragraph (a) has not already applied in relation to the contract—that Part applies to the term as varied, on and from the day (the ***variation day***) on which the variation takes effect, in relation to conduct that occurs on or after the variation day.

(3) If paragraph (2)(b) applies to a term of a contract, subsection 23(2) and section 27 of the Australian Consumer Law apply to the contract.

Competition and Consumer Act 2010

Act No. 51 of 1974 as amended

This compilation was prepared on 1 January 2011
taking into account amendments up to Act No. 148 of 2010

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The text of any of those amendments not in force on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

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

Subdivision A—Compensation orders etc. for injured persons

237 Compensation orders etc. on application by an injured person or the regulator

(1) A court may:

(a) on application of a person (the ***injured person***) who has suffered, or is likely to suffer, loss or damage because of the conduct of another person that:

(i) was engaged in a contravention of a provision of Chapter 2, 3 or 4; or

(ii) constitutes applying or relying on, or purporting to apply or rely on, a term of a consumer contract that has been declared under section 250 to be an unfair term; or

(b) on the application of the regulator made on behalf of one or more such injured persons;

make such order or orders as the court thinks appropriate against the person who engaged in the conduct, or a person involved in that conduct.

Note 1: For applications for an order or orders under this subsection, see section 242.

Note 2: The orders that the court may make include all or any of the orders set out in section 243.

(2) The order must be an order that the court considers will:

(a) compensate the injured person, or any such injured persons, in whole or in part for the loss or damage; or

(b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the injured person or any such injured persons.

(3) An application under subsection (1) may be made at any time within 6 years after the day on which:

(a) if subsection (1)(a)(i) applies—the cause of action that relates to the conduct referred to in that subsection accrued; or

(b) if subsection (1)(a)(ii) applies—the declaration referred to in that subsection is made.

(2) The regulator must not make an application under section 237(1)(b) on behalf of one or more persons unless those persons have consented in writing to the making of the application.

243 Kinds of orders that may be made

Without limiting section 237(1), 238(1) or 239(1), the orders that a court may make under any of those sections against a person (the ***respondent***) include all or any of the following:

(a) an order declaring the whole or any part of a contract made between the respondent and a person (the ***injured person***) who suffered, or is likely to suffer, the loss or damage referred to in that section, or of a collateral arrangement relating to such a contract:

(i) to be void; and

(ii) if the court thinks fit—to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);

(b) an order:

(i) varying such a contract or arrangement in such manner as is specified in the order; and

(ii) if the court thinks fit—declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);

(c) an order refusing to enforce any or all of the provisions of such a contract or arrangement;

(d) an order directing the respondent to refund money or return property to the injured person;

(e) except if the order is to be made under section 239(1)—an order directing the respondent to pay the injured person the amount of the loss or damage;

(f) an order directing the respondent, at his or her own expense, to repair, or provide parts for, goods that had been supplied by the respondent to the injured person;

(g) an order directing the respondent, at his or her own expense, to supply specified services to the injured person;

(h) an order, in relation to an instrument creating or transferring an interest in land, directing the respondent to execute an instrument that:

(i) varies, or has the effect of varying, the first mentioned instrument; or

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

244 Power of a court to make orders

A court may make an order under Subdivision A or B of this Division whether or not the court:

(a) grants an injunction under Division 2 of this Part; or

(b) makes an order under section 236, 246, 247 or 248.

245 Interaction with other provisions

Subdivisions A and B of this Division do not limit the generality of Division 2 of this Part.