

# 'Other Remedies' Under the Trade Practices Act - The Rise and Rise of Section 87

DIANE SKAPINKER\*

Most applicants who allege breaches of Part IV (restrictive trade practices) or Part V (consumer protection) of the *Trade Practices Act 1974* (Cth) ('the Act') seek damages under s 82(1), and, to a lesser extent, injunctions (under s 80), as the principal remedies for those breaches. As a result the principles relevant to the grant of those remedies are well documented in the cases and textbooks on the subject. By contrast, little effort has been made to analyse the wide range of other remedies available to applicants under s 87 even though the jurisdiction to make these ancillary orders has been described as 'probably much wider than any available at common law or by statute in any other field'.<sup>1</sup> Until relatively recently, claims for 'other orders' under s 87 have tended to be confined to claims for orders declaring a contract to be void, without due consideration being given to the availability of the other types of orders for conduct contravening the Act ('contravening conduct'). The reluctance of applicants to make use of the other orders in s 87 is recognised in the following passage:

Although s 87 provides a wide range of discretionary remedies there appears to be an unfortunate reluctance on the part of applicants to seek alternatives to damages or rescission and on the part of courts to make alternative orders . . . . However, there are instances in which the court has indicated a preparedness to rewrite contracts if necessary.<sup>2</sup>

However, since the late 1980s, as the boundaries of s 52 have exploded<sup>3</sup> there has been a perceptible increase in the use of s 87 as the need for new and different remedies to compensate applicants in a wide range of cases has become apparent. Section 87, the overlooked and often forgotten remedial provision, is finally receiving the attention it deserves. As Burchett J in *Deane v Brian Hickey Invention Research Pty Ltd* noted,

section 87 confers wide powers and discretions upon the court to enable it to do more complete justice than can in some cases be done merely by an award of damages.<sup>4</sup>

The advantages to an applicant of utilising the remedies provided by the

\* BComm, LLB (Wits), LLM (Hons) (Syd). I wish to thank my colleague, Professor David Harland, for his comments and suggestions on an earlier draft of this paper.

<sup>1</sup> CCH, *Australian Trade Practices Reporter*, Vol 2, para 18-955.

<sup>2</sup> R v Miller, *Annotated Trade Practices Act* (16th ed, 1995) 442.

<sup>3</sup> Section 52 proscribes misleading or deceptive conduct in the course of trade or commerce. W Pengilly, 'Section 52 of the Trade Practices Act — A Plaintiff's New Excuse?' (1987) 15 ABLR 247; C E K Hampson, 'Blocked Contractual Arteries? Try a Section 52 By-pass' (1993) 1 TPLJ 22; D Harland, 'Misleading or Deceptive Conduct: the Breadth and Limitations of the Prohibition' (1991) 4 JCL 107; W Pengilly, 'But You Can't Do That Any More! — The Effect of Section 52 on Common Negotiating Techniques' (1993) 1 TPLJ 113.

<sup>4</sup> (1988) ATPR 40-889, 49,612.

Act, as opposed to general law remedies, are well known.<sup>5</sup> Briefly, however, such advantages include the following:

- the right to claim damages for innocent misrepresentation, irrespective of the intention of the representor;
- the fact that action can be taken not only against the representor but also against those 'involved' in the contravention of the Act (allowing actions to be taken against directors and agents of corporations);
- the fact that contractual exclusion clauses will not negate statutory liability for precontractual representations unless they break the chain of causation between the contravening conduct and the claimed loss;<sup>6</sup>
- a right of action without the need for any contractual relationship between the parties. A majority of the Full Federal Court (Lockhart and Gummow JJ, Northrop J dissenting) in *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* referred to this advantage in the following terms:

Standing to seek remedies under Part VI, such as those provided for in ss 82 and 87, is not limited to parties in contractual relations with the party which contravened s 52. . . . It is no objection to relief under these provisions that the misleading conduct is found in the making of a contractual provision, and the complainant does not have contractual privity with the defendant. This may be contrasted with the uncertain (and perhaps unsatisfactory) state of the general law.<sup>7</sup>

However, for present purposes, the availability of the extremely wide remedies available under s 87 constitutes one of the greatest advantages to an applicant in bringing an action under the Act. In fact, the advantages of the statutory causes of action and remedies over those existing under the general law often result in a refusal by courts which find a statutory cause of action to have been established to consider an alternatively pleaded general law cause of action. Northrop J in *Crisp v Australia and New Zealand Banking Group*, in finding it unnecessary to deal with a mortgagor's alternative claim that execution of a mortgage (found to have been induced by contravening conduct) had been procured by the unconscionable conduct of a bank, referred to the conflict between statutory and general law causes of action and remedies in the following terms:

Where a statute imposes a legal obligation on a corporation, in trade or commerce, not to engage in conduct which is misleading or deceptive . . . and confers a remedy on a person who suffers loss by reason of that conduct, and that case is established, *it is unwise for a Court to consider an equitable*

<sup>5</sup> See generally French, 'A Lawyer's Guide to Misleading or Deceptive Conduct' (1989) 63 ALJ 250, 265-6; P H Clarke, 'The Hegemony of Misleading or Deceptive Conduct in Contract, Tort or Restitution' (1989) 5 *Aust Bar Rev* 109.

<sup>6</sup> *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83, 98-9; ATPR 40-850, 49, 155-6 (Lockhart J); *Benlist Pty Ltd v Olivetti Australia Pty Ltd* (1990) ATPR 41-043, 51, 590-1; *Lezam Pty Ltd v Seabridge Australia Pty Ltd* (1992) 35 ALR 535, 557; ATPR 41-171, 40, 356 (Burchett J); A Terry, 'Misleading or Deceptive Conduct in Commercial Negotiations' (1988) 16 ABLR 189; French, 'A Lawyer's Guide to Misleading or Deceptive Conduct' (1989) 63 ALJ 250, 261-4; Clarke, *op cit* (fn 5) 123.

<sup>7</sup> (1993) 42 FCR 470, 506; ATPR 41-269, 41,647.

*claim which has technical difficulties, both of law and of fact, and which would result in no greater remedy to the claimant.* This view is strengthened when consideration is given to subsequent actions which could constitute a good defence to the claim under the . . . Act.<sup>8</sup>

The purpose of this article is to provide a detailed analysis of subsections (1), (1A) and (2) of s 87, to compare the remedies available under the section with common law remedies and to consider briefly the consequences of the use of s 87 for the law of contracts generally. For, as Brennan J (as he then was) in the Full Federal Court in *Trade Practices Commission v Milreis Pty Ltd* noted:

Contracts are the very stuff of trade and commerce, and a statute which seeks to regulate the trading practices of corporations inevitably touches the conduct of a corporation in entering into, enforcing or performing contracts.<sup>9</sup>

Although most of the cases in which relief under s 87 is sought involve breaches of s 52, the substantive requirements of s 52 will not be discussed. Nor will this article analyse the remedial provisions in Part IV of the Act unless those provisions are relevant to an application of s 87.

## 1 SECTIONS 87(1) AND 87(1A) DISTINGUISHED

Section 87(1) provides as follows:

Without limiting the generality of section 80, where, in a proceeding instituted under, or for an offence against this Part,<sup>10</sup> the Court finds that a person who is a party to the proceedings has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in . . . in contravention of a provision of Part IV,<sup>11</sup> IVA<sup>12</sup> or V,<sup>13</sup> the Court may . . . 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.

In addition, s 87(1A) provides:

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 . . . 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

<sup>8</sup> (1994) ATPR 41-294, 41,940 (emphasis added).

<sup>9</sup> (1977) 29 FLR 144, 158; ATPR 40-028, 17,376.

<sup>10</sup> Part IV, enforcement and remedies.

<sup>11</sup> Restrictive trade practices.

<sup>12</sup> Unconscionable conduct.

<sup>13</sup> Consumer protection.

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.

The main distinction between these rather convoluted provisions (apart from the obvious distinction that s 87(1) applies to contraventions of Part IV whereas s 87(1A) does not) is that under s 87(1) an order for ancillary relief may be made in favour of a person who has instituted proceedings for relief under one of the other remedial provisions of the Act, whether or not the court grants an injunction or orders damages whereas, on the other hand, under s 87(1A), an order for ancillary relief may be made even though proceedings have not been instituted under any other remedial provision of the Act.<sup>14</sup>

In proceedings under s 87(1A) a finding of fact made in proceedings under ss 77,<sup>15</sup> 80,<sup>16</sup> 80A<sup>17</sup> or 81<sup>18</sup> or for an offence against s 79 is prima facie evidence of that fact.<sup>19</sup>

As originally drafted s 87(1A) raised two important issues. First, did it confer an independent cause of action for relief on an applicant or did it merely provide for forms of relief ancillary to and dependent upon other relief being granted? Secondly, unlike s 82(2) which provides that an action for damages under s 82(1) must be commenced within three years after the date on which the cause of action accrues, s 87(1A) contained no provision limiting the time for the bringing of proceedings. Did this omission mean that an applicant who was precluded by s 82(2) from seeking damages under s 82(1) could seek damages under s 87(1A) outside the three year limitation period?

At first the Full Federal Court regarded s 87(1A) as providing an applicant with an independent cause of action regardless of whether the applicant had sought relief under any other provision in Part VI.<sup>20</sup> In addition, it allowed proceedings for damages to be brought under s 87(1A) outside the three year limitation period prescribed by s 82(2)<sup>21</sup> although delay in the institution of proceedings could be taken into account by a court in the exercise of its discretion under s 87(1A).<sup>22</sup> Subsequently, however, doubts were expressed about the correctness of the Full Federal Court's approach to the second question.<sup>23</sup> In 1986 the High Court in *Sent v Jet Corporation of Australia Pty*

<sup>14</sup> In addition, in prosecutions under s 79 or in injunction proceedings instituted by the Trade Practices Commission ('the Commission') or the Minister, the Commission may apply under s 87(1A) for a remedial order on behalf of identified persons who have consented in writing to the application: s 87(1B).

<sup>15</sup> Pecuniary penalties.

<sup>16</sup> Injunctions.

<sup>17</sup> Information disclosure orders.

<sup>18</sup> Divestiture orders.

<sup>19</sup> Section 83.

<sup>20</sup> *Fenech v Sterling* (1984) 57 ALR 98, 103; (1984) ATPR 40-496, 45,708.

<sup>21</sup> *Fenech v Sterling* (1984) 57 ALR 98; ATPR 40-496; *International Computers (Australia) Pty Ltd v Bate* (1985) ATPR 40-533.

<sup>22</sup> *Fenech v Sterling* (1985) ATPR 40-629.

<sup>23</sup> See for example the comments of Toohey J in *James v Australia and New Zealand Banking Group Ltd* (1986) 64 ALR 347, 395; ATPR (Digest) 46-005, 53,038.

*Ltd*<sup>24</sup> finally dealt simultaneously with both these questions. It answered the first question by holding that,

compensatory relief under sub-sec. (1A) can be applied for and granted only if a proceeding is instituted or has been instituted under or for an offence against a provision of Pt VI other than sec. 87 in respect of conduct engaged in in contravention of Pt V.<sup>25</sup>

It distinguished s 87(1A) from s 87(1) as follows: s 87(1) provides for the discretionary granting of compensatory relief in favour of parties to proceedings for relief instituted under some other provision of Part VI; s 87(1A) provides for the discretionary granting of compensatory relief in favour of persons who may not be parties to such proceedings but who make applications in such proceedings.

Having concluded that s 87(1A) did not provide an independent cause of action the High Court had no difficulty in finding that, although s 87 contained no time limitation, relief under s 87 will not be available if proceedings are instituted outside the time limits imposed by the relevant provision upon which the proceedings are based.<sup>26</sup> This means that since claims for damages under s 82(1) must be brought within three years after the date on which the cause of action accrues,<sup>27</sup> claims for 'other relief' under s 87(1) also must be brought within that time.

As a result of the controversy surrounding the independence of and time limitations on s 87(1A), ss 87(1C) and 87(1CA) were inserted in the Act in 1986.<sup>28</sup> Where the institution of proceedings for principal relief is required to be made within a specified time (such as for damages under s 82(2)), the application for ancillary relief under s 87(1) is similarly restricted. But not all remedies in Part VI contain time limits for the institution of actions (for example, ss 80 and 80A provide no time limits in relation to proceedings for injunctions and information disclosure orders respectively). This appears to have the result that applications under s 87(1) for ancillary relief dependent

<sup>24</sup> (1986) 160 CLR 540.

<sup>25</sup> *Id* 545.

<sup>26</sup> *Id* 546.

<sup>27</sup> Section 82(2). The Australian Law Reform Commission in its report on *Compliance with the Trade Practices Act 1974*, tabled in federal Parliament on 29 June 1994, recommended that s 82(2) be amended to allow a court to extend the period in which a claim for damages may be commenced if the court considers it appropriate to do so: para 7.13.

<sup>28</sup> Section 87(1C) provides that an application may be made under s 87(1A) for a contravention of Part IVA or V notwithstanding that proceedings are not instituted under another provision of Part VI. Section 87(1CA)(b) provides that an application under s 87(1A) may be commenced, in the case of conduct in contravention of the Act other than Part IVA, 'at any time within 3 years after the day on which the cause of action accrued'. It is interesting to note that under s 87(1CA)(a), proceedings under s 87(1A) relating to unconscionable conduct under Part IVA, including actions for damages under s 87(2)(d), must be brought within two years of the cause of action accruing, even though no right to claim damages for unconscionable conduct exists under s 82(1). The Australian Law Reform Commission in its report on *Compliance with the Trade Practices Act 1974*, tabled in federal Parliament on 29 June 1994, recommended that s 82 be amended to allow recovery of damages for a contravention of Part IVA (para 7.28) and that s 87(1C) be amended to provide that the court has a discretion to extend the three year time limit under s 87(1A) if it considers it appropriate to do so (para 7.16).

upon claims for injunctions or information disclosure orders may be brought outside the limitation period prescribed in s 87(1C).<sup>29</sup>

Of course, s 87(1CA) still raises the difficult matter of determining when a cause of action can be said to accrue. This issue was considered most recently by the High Court in *Wardley Australia Ltd v State of Western Australia*<sup>30</sup> in relation to a contingent loss or liability arising from a contravention of s 52 and a claim for damages under s 82(1). It is obviously impossible to state exactly when different causes of action will accrue: each case will depend on its own facts. However it can be said that a cause of action will accrue at the earliest time at which an action may be brought. It follows that where there is more than one cause of action in a proceeding, causes of action may accrue at different times.<sup>31</sup>

In considering a defence of delay by a respondent it will be a question of fact in each case whether proceedings under s 87(1A), which are brought within the time limits prescribed by s 87(1C), should have been brought earlier. However, as Sheppard J noted in *Lezam Pty Ltd v Seabridge Australia Pty Ltd*,

where Parliament has prescribed a specific limitation period, it will never be easy for a party resisting relief to raise delay as a defence, at any rate unless that party has in some way altered its position to its detriment.<sup>32</sup>

## 2 ORDERS AVAILABLE UNDER SECTIONS 87(1) AND 87(1A) — SECTION 87(2)

Sections 87(1) and (1A) empower courts<sup>33</sup> to make 'such order or orders as the Court thinks appropriate . . . (including all or any of the orders mentioned in subsection (2)).'<sup>34</sup> Section 87(2) then goes on to provide that 'the orders referred to in subsections (1) and (1A) are'<sup>35</sup> as follows:

An order declaring the whole or any part of 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;<sup>36</sup>

an order varying such a contract or arrangement in such manner as is

<sup>29</sup> CCH, *The Laws of Australia*, Unfair Dealing, Vol 35, ch 2, para 19.

<sup>30</sup> (1992) 175 CLR 514.

<sup>31</sup> *Magman International Pty Ltd v Westpac Banking Corporation* (1992) 104 ALR 575, 593; ATPR 41-161, 40, 201 per Hill J.

<sup>32</sup> (1992) 35 FCR 535, 553; ATPR 41-171, 40,353. Justice Hill agreed with the judgment of Sheppard J.

<sup>33</sup> Although the sections refer to the powers of 'courts', an appropriately worded arbitration clause is capable of conferring upon an arbitrator the power to give the relief permitted by the Act, including that permitted by s 87: *National Distribution Services Ltd v IBM Australia Ltd* (1991) ATPR 41-0772 (New South Wales Supreme Court); *IBM Australia Ltd v Distribution Services Pty Ltd* (1991) ATPR 41-094 (New South Wales Court of Appeal).

<sup>34</sup> Emphasis added.

<sup>35</sup> Emphasis added.

<sup>36</sup> Section 87(2)(a).

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;<sup>37</sup>

an order refusing to enforce any or all of the provisions of such a contract;<sup>38</sup>

an order directing the person who engaged in the conduct or a person who was involved in the contravention . . . to refund money or return property to the person who suffered the loss or damage;<sup>39</sup>

an order directing the person who engaged in the conduct or a person who was involved in the contravention . . . to pay to the person who suffered the loss or damage the amount of the loss or damage;<sup>40</sup>

an order directing the person who engaged in the conduct or a person who was involved in the contravention . . . at his own expense, to repair, or provide parts for, goods that had been supplied;<sup>41</sup>

an order directing the person who engaged in the conduct or a person who was involved in the contravention . . . at his own expense, to supply specified services;<sup>42</sup> and

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 . . . to execute an instrument that —

- (i) varies, or has the effect of varying, the first-mentioned instrument; or
- (ii) terminates or otherwise affects . . . the operation or effect of the first-mentioned instrument.<sup>43</sup>

Although both subsections (1) and (1A) appear to confer a general power upon a court to make 'such orders' as it 'thinks appropriate' and describe such orders as 'including' all or any of the orders mentioned in s 87(2), the introductory words to s 87(2), in particular the fact that the orders referred to 'are' as set out, suggest that the list of orders is limited to those described. In fact, those orders were described as an 'exhaustive list' by Wilcox J in *Covcat Pty Ltd v Clark Equipment Australia Ltd*<sup>44</sup> which prevented his Honour from making an order requiring a respondent to indemnify an applicant against the claim(s) of a second respondent.<sup>45</sup>

However this issue cannot be regarded as settled. The contrary view that the

<sup>37</sup> Section 87(2)(b).

<sup>38</sup> Section 87(2)(ba).

<sup>39</sup> Section 87(2)(c).

<sup>40</sup> Section 87(2)(d).

<sup>41</sup> Section 87(2)(e).

<sup>42</sup> Section 87(2)(f).

<sup>43</sup> Section 87(2)(g).

<sup>44</sup> (1986) ATPR 40-717, 47, 873. This issue was not discussed by the Full Federal Court in an unsuccessful appeal: (1987) 71 ALR 367; ATPR 40-768.

<sup>45</sup> It should be noted that in *Collins Marrickville Pty Ltd v Henjo Investments Pty Ltd* (1987) ATPR 40-822 Wilcox J granted an indemnity as part of an order to vary a lease under s 87(2)(g) and in this way distinguished his finding in *Covcat*. In *Australian Bridal Centre Pty Ltd v Dawes Corporation* (1991) ATPR 41-072 where a lessee and its managing director were ordered to indemnify guarantors, the apparent limitation on s 87(1A) which prevents an order for indemnity being made was not raised or discussed.

power of courts is not intended to be limited to the orders set out in s 87(2) has been expressed by a number of commentators.<sup>46</sup> In fact, in some cases, orders not expressly authorised by s 87(2) have been sought or granted without the issue of the court's power to make the order being raised.<sup>47</sup>

An interesting question which arises in this context is whether s 87 can be used to grant an order for specific performance. Young J of the Supreme Court of New South Wales answered this question in the affirmative in *Milchas Investments Pty Ltd v Larkin* but noted that no such orders have been made, damages usually being the appropriate remedy:

There is certainly provision in sec. 87 for such an order to be made. . . . It is significant that there is not one reported case that I have found where even an order varying a contract has been made under the *Trade Practices Act*, *Fair Trading Act*, *Contracts Review Act* or sec. 88F of the *Industrial Arbitration Act*. . . . It is rather unusual then that after so many years of courts having power to vary contracts or to make an order in the nature of specific performance none has ever been made in any reported decision. . . . Ordinarily the courts find that damages or setting aside contracts is the appropriate remedy or possibly a restraining injunction and it is only in very rare circumstances that the court will think that one of the other discretionary remedies is appropriate.<sup>48</sup>

Branson J in *Andreas Angelatos v National Australia Bank* touched on this issue in considering whether an order for specific performance of a contract to repay money could be granted under s 87:

In my view the rule that ordinarily specific performance will not be granted when the contract is one to lend money does not necessarily restrict the powers of a court under section 87 to frame such order or orders as the section envisages.<sup>49</sup>

However, his Honour did not say whether the orders envisaged by s 87 include orders for specific performance. On the other hand, the statement by Young J was interpreted by Ormiston J of the Supreme Court of Victoria in *Futuretronics International Pty Ltd v Gadzhis* as rejecting the possibility that specific performance is available:

<sup>46</sup> CCH, *The Laws of Australia*, Remedies, Vol 35, ch 2, para 26; Taperell, Vermeesch and Harland, *Trade Practices and Consumer Protection* (3rd ed, 1983) para 379; CCH, *Australian Trade Practices Reporter*, Vol 2, para 18-955.

<sup>47</sup> *Morenita Pty Ltd v AGC (Advances) Ltd* (1986) ATPR 40-689 (interim injunction restraining AGC from appointing a receiver to a chargor's assets together with an order that the chargor, pending the hearing, not dispose of any of its assets except in the ordinary course of its business and keep proper accounts and make them available to AGC on request; *Switzerland Australia Health Fund Pty Ltd (trading as Health Australia) v Shaw* (1988) 81 ALR 111; ATPR 40-866 (order sought but refused under s 87 to require the respondent to publish a correction of a misleading letter); *Munchies Management Pty Ltd v Belperio* (1988) 84 ALR 700; ATPR 40-926 (agent of a vendor of a restaurant bar and cafeteria ordered to indemnify the purchaser against any claim by the lessor for unpaid rental, council and water rates and other charges, the Full Federal Court referring to the indemnity without comment).

<sup>48</sup> (1989) 96 FLR 464, 476-7; ATPR 40-956, 50,441. In fact, in the circumstances of the case his Honour similarly refused to make an order for specific performance, or indeed any order at all, in favour of a prospective purchaser of land.

<sup>49</sup> (1994) ATPR 41-333, 42,403.



No authority was cited for the proposition that specific performance of the promise could be obtained and the only relevant authority (under the *Trade Practices Act*) *Milchas Investments Pty Ltd v Larkin* . . . suggests the contrary. I am not persuaded that there is power to make an order that a promise . . . should be specifically performed.<sup>50</sup>

Some commentators have taken the view that the remedies obtainable under the Act do not include specific performance.<sup>51</sup>

The possibility of different orders being made against different defendants was accepted in principle by Pincus J in the Full Federal Court in *Haydon v Jackson*:

There was considerable discussion before us as to the propriety of making an order for compensation against one party held liable under sec. 52 . . . different from that made against another party so held liable, there being but one loss. Although it is not necessary to reach a final conclusion on the point, I see no reason to read the broad terms of sec. 87 of the Act down so as to restrict the Court's power to making the same order for compensation against each respondent in respect of a single loss.<sup>52</sup>

It is submitted that the opportunity which s 87 confers on a court to offset the effects of contravening conduct in any way it considers 'appropriate' should not be restricted by the opening words of s 87(2). As long as a court is empowered by the statute under which it is constituted to make the relevant order it should be free to do so. Such an approach appears to accord with recent judicial statements regarding the interpretation of s 87.

### 3 GENERAL PRINCIPLES GOVERNING USE OF SECTION 87

Although an analysis will be made of each of the paragraphs in s 87(2) it is possible to identify some basic principles governing the use of s 87 which have emerged from the cases:

- 3.1 The overriding qualification on the type of order which may be made under ss 87(1) or (1A) is that the order must 'compensate' the applicant 'in whole or in part for the loss or damage' suffered, or 'likely to be suffered', as a result of the contravening conduct or which will 'prevent or reduce' that loss or damage.

The compensatory policy behind s 87 has always been stressed by the courts. For instance Hodgson J of the Supreme Court of New South Wales in *Carlton & United Breweries Ltd v Tooth & Co Ltd* noted in 1986:

The powers of the Federal Court under s 87 to, inter alia, vary agreements, are to be exercised only if an order to that effect would compensate the person seeking relief or prevent or reduce his loss or damage. It is not something which can be done in order to alleviate the

<sup>50</sup> [1992] 2 VR 217, 245; (1990) ATPR 41-049, 51,656.

<sup>51</sup> C E K Hampson, 'Blocked Contractual Arteries? Try a Section 52 By-pass' (1993) 1 TPLJ 22, 28.

<sup>52</sup> (1988) ATPR 40-845, 49,107.

effect of the *Trade Practices Act* in relation to the person or corporation against whom the relief is sought.<sup>53</sup>

The compensatory nature of s 87(2)(d) damages is emphasised in a series of cases dealing with the issue whether s 87 empowers a court to order a Mareva injunction. Although the Federal Court initially held that s 87 is wide enough for this purpose<sup>54</sup> it has now been decided by the Full Federal Court that s 87 does not permit the making of such an injunction.<sup>55</sup> Bowen CJ explained the reason for this decision in the following terms:

I have difficulty with the notion that a Mareva type injunction designed to prevent frustration of some final order of the court falls within the description of an order which will 'compensate' the applicant for loss or damage or an order which will 'prevent or reduce' loss or damage. When a Mareva injunction is granted the relief is directed not at compensating the applicant nor is it directed at preventing or reducing his loss or damage. Rather, where compensation is in question, it is directed to ensuring that if a court does make an order for compensation in respect of loss or damage the enforcement of the court's order will not be frustrated.<sup>56</sup>

3.2 Before an order will be made under s 87 an applicant must establish that the loss or damage suffered or likely to be suffered is caused 'by' the contravening conduct of another. Ellicott J in *Smolonogov v O'Brien* made the following observations about the scope of s 87:

When ss 82 and 87 are read together the court's power to compensate for such loss or damage is clearly not restricted to an order for pecuniary damages. Section 87(1A) and (2) make it clear that it can include an order declaring the contract void and directing a refund of the deposit in addition to or in lieu of pecuniary damages. However, the power to make such orders is dependent on it being shown that the loss or damage was caused by or resulted from the contravening conduct.<sup>57</sup>

It is unnecessary for an applicant seeking relief under s 87 to establish that the contravening conduct was the immediate or only cause of the loss or damage suffered provided that conduct contributes to the loss or damage.<sup>58</sup> However, the relief awarded under s 87 need not redress the

<sup>53</sup> (1986) 5 NSWLR 1, 15-16; ATPR 40-677, 47,483.

<sup>54</sup> *Hiero Pty Ltd v Somers* (1983) 47 ALR 605; ATPR 40-380; *Sterling Industries Ltd v NIM Services Pty Ltd* (1986) 66 ALR 657; ATPR 40-688.

<sup>55</sup> *Jackson v Sterling Industries Ltd* (1986) 69 ALR 92; ATPR 40-735.

<sup>56</sup> Id 96; 47,998. Justice Jackson reached the same conclusion (118; 48,014-15) but Woodward J dissented on this issue (108; 48,007). The High Court subsequently reversed the Full Federal Court decision in this case but not on this issue: (1987) 162 CLR 612.

<sup>57</sup> (1982) 44 ALR 347, 362; ATPR 40-312, 43,848. Ellicott J made orders declaring a contract for the sale of land induced by the vendor's contravening conduct to be void and for the vendor to refund the purchaser's deposit. The vendor's appeal to the Full Federal Court ((1983) 53 ALR 107; ATPR 40-418) was allowed on the basis that the vendor's conduct was not conduct 'in trade or commerce' and thus fell outside the scope of Pt V of the Act. The Full Federal Court did not comment on the scope of s 87.

<sup>58</sup> *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83, 96; ATPR 40-850, 49,153-4; *Consolidated Bearing Company (SA) Pty Ltd v Molnar Engineering Pty Ltd* (1994) ATPR (Digest) 46-122, 53,592.

whole of an applicant's loss or damage: only that part which the court considers 'appropriate'.<sup>59</sup>

3.3 An applicant who alleges that loss or damage is 'likely to be suffered' must establish a real chance or possibility of loss or damage being incurred before relief will be granted under s 87.<sup>60</sup>

3.4 Under s 87 the court has a discretion as to whether to grant relief to an applicant and as to the type of relief which may be granted. Some indication of the factors which a court will entertain in exercising the discretion conferred by s 87(1) is provided in the following dictum of Ipp J of the Supreme Court of Western Australia in *Reg Russell & Sons Pty Ltd v Buxton Meats Pty Ltd*:

The court has a very wide discretion under s 87(1). . . . In exercising its discretion the court will take into account whether there is a causal link between the loss or damage suffered or likely to be suffered by the plaintiff, whether and to what extent the plaintiff is the author of his or her own misfortune, and whether another remedy is or was at hand to recover the loss or damage in question.<sup>61</sup>

3.5 Courts may make interim orders to protect the value of any remedies which may be available under s 87.<sup>62</sup> In *George McGregor Auto Service Pty Ltd v Caltex Oil (Aust) Pty Ltd*<sup>63</sup> an injunction was granted restraining Caltex from terminating a lease, alleged to have been induced by conduct contravening s 52, even though an injunction could not have been granted under s 80(2) because the alleged contravening conduct had ceased by the time of the application. As Northrop J explained:

Different considerations apply with respect to the claim based on s.87 of the Act. Under those provisions the conduct need not be of a continuing nature. *The court is empowered by that section [s 87] to make orders in the form of giving remedies.* In those circumstances, in my opinion, the court has power under s.23 *Federal Court of Australia Act 1976 (Cth)*, as amended, to grant an interlocutory injunction. . . . If the injunction is not granted, the company may not be able to gain the benefit from any order that it might be entitled to under s.87 of the Act.<sup>64</sup>

3.6 The 'loss or damage' which an applicant must suffer before a remedial

<sup>59</sup> *Sent v Jet Corporation of Australia Pty Ltd* (1986) 160 CLR 540.

<sup>60</sup> *Pognand v NZI Securities Australia Ltd* (1992) 109 ALR 213, 222; ATPR 41-181, 40, 469 (Gummow J). An order preventing or reducing loss or damage suffered was made by the Supreme Court of South Australia (and affirmed by the Full Court) in *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1994) ATPR 41-316.

<sup>61</sup> (1994) ATPR (Digest) 46-127, 53,614. In this case a creditor unsuccessfully sought a declaration under s 87(1) that a debenture it had registered over the assets of a company to secure moneys owing to it had priority over a prior registered debenture. An alternative claim that the prior registered debenture holder should be estopped from asserting any priority was also unsuccessful.

<sup>62</sup> However, French J in *Western Mail Securities Pty Ltd v Forrest Plaza Developments Pty Ltd* (1987) ATPR 40-765, 48,283 queried whether s 87 confers on a court the power to make an interim variation of a contract.

<sup>63</sup> (1981) 51 FLR 458; ATPR 40-214.

<sup>64</sup> *Id* 462, 464; 43-936, 42,937 (emphasis added).

order can be made under ss 87(1) or 87(1A) is not necessarily the same 'loss or damage' for which an award of damage is made under s 82(1).

Under s 82(1) a person who suffers 'loss or damage' by the contravening conduct of another person may recover 'the amount of the loss or damage'. In ss 87(1) and 87(1A) where a court finds that a person suffers 'loss or damage' by contravening conduct it may make such order or orders which it considers appropriate to compensate that person for the 'loss or damage' or to prevent or reduce the 'loss or damage'. Section 87(2)(d) stipulates that one of the orders a court may make is an order directing the respondent to pay to the person who suffered the 'loss or damage' the amount of the 'loss or damage'.

It would not be unreasonable to expect that a phrase used so frequently in the same Part of the Act<sup>65</sup> would have the same meaning wherever it appeared in that Part. However, the Full Federal Court in *Demagogue Pty Ltd v Ramensky*,<sup>66</sup> in considering the meaning of 'loss or damage' in ss 87(1) and 87(1A), has rejected this assumption and, it would seem, has identified one of the most significant distinctions between an award of damages under s 82(1) and orders under s 87.

Until fairly recently the phrase 'loss or damage' tended to be construed rather narrowly, requiring proof of some pecuniary damage. For example, in *Wildsmith v Dainford Ltd*<sup>67</sup> the issue arose whether damages were available to an applicant who, at the date of entry into a contract induced by conduct contravening s 52, acquired rights of *greater* value than had been paid for, even though, at some later date the value of those rights declined. In rejecting an argument that an applicant could be said to have suffered any 'loss or damage' in those circumstances, Smithers J concluded,

notwithstanding that obligations of the parties to the contract would be performed in the future, the reciprocal right and obligations under the contract were established when it was entered into. From that time the decision to dispose of or retain or otherwise deal with his rights under the contract was that of the party entitled to them. The loss, if any, suffered by retaining such rights, is the consequence of that decision. That is not to say that such a loss would never constitute a loss which would qualify the person concerned to seek relief under the statutory provisions of sec. 87. But to do so, it would be necessary for him to establish that, apart altogether from entering into the contract under some wrongful inducement, he had made the decision, not to dispose of his rights under the contract promptly but to retain them during the relevant period by reason of misleading or deceptive conduct.<sup>68</sup>

Some expansion of the meaning of 'loss or damage' was foreshadowed by the Full Federal Court in *Munchies Management Pty Ltd v Belperio*<sup>69</sup> for the purposes of ss 82 and 87:

<sup>65</sup> Part VI.

<sup>66</sup> (1992) 39 FCR 31; (1993) ATPR 41-203.

<sup>67</sup> (1983) ATPR 40-419.

<sup>68</sup> Id 44-864.

<sup>69</sup> (1989) 84 ALR 700, 713; ATPR 40-926, 50,038 (Fisher, Gummow and Lee JJ).

It remains to be seen whether the phrase 'loss or damage' in ss 82 and 87 is sufficient to support not only a compensatory remedy in the sense of injury to the plaintiff's interests, as generally understood in the law of torts, but also a restitutionary remedy to disgorge the respondent's gains and profits at the expense of the applicant, as 'the loss' of the applicant in the language of the section.<sup>70</sup>

The High Court also touched upon the meaning of 'loss or damage' in *Wardley Australia Ltd v State of Western Australia* in relation to s 82 and in the context of determining when a cause of action accrues:

When a plaintiff is induced by a misrepresentation to enter into an agreement which is, or proves to be, to his or her disadvantage, the plaintiff sustains a detriment in a general sense on entry into the agreement. That is because the agreement subjects the plaintiff to obligations and liabilities which exceed the value or worth of the rights and benefits which it confers upon the plaintiff. *But . . . detriment in this general sense has not universally been equated with the legal concept of 'loss or damage'. And that is just as well.* In many instances the disadvantageous character or effect of the agreement cannot be ascertained until some future date when its impact upon events as they unfold becomes known or apparent and, by then, the relevant limitation period may have expired.<sup>71</sup>

Despite the fact that only pecuniary damages were assumed to constitute 'loss or damage' for the purposes of ss 82 and 87, the Full Federal Court in *Demagogue Pty Ltd v Ramensky*<sup>72</sup> had no qualms about interpreting the phrase in s 87 much more widely. In that case a purchaser of a home unit 'off the plan' in a multi-level complex was not informed by the vendor that the driveway to the complex did not form part of the common property. At the trial the purchaser successfully sought a declaration that by not disclosing this fact the vendor had breached ss 52 and 53A of the Act and an order under s 87(1A) that the contract was void ab initio. The vendor's cross-claim for specific performance of the contract and damages for breach of contract failed. One of the arguments raised by the vendor on appeal was that the purchaser had not suffered loss or damage so as to attract the making of an order under s 87(1A) as he had not established that the property sold was worth less than the contract price. In rejecting this argument the Full Federal Court made some important observations about the distinction of the meaning of 'loss or damage' for the purposes of ss 82 and 87 respectively. It is useful to set out the relevant passages from the judgments in detail. In Chief Justice Black's opinion:

<sup>70</sup> Id 713; 50-038. The possible use of s 87 to facilitate restitution where the amount received by a respondent from contravening conduct exceeds the loss actually suffered by the applicant (and so not being recoverable under s 82(1)) has been recognised: P H Clarke, 'The Hegemony of Misleading or Deceptive Conduct in Contract, Tort or Restitution' (1989) 5 *Aust Bar Rev* 109, 128 after *Housing Loans Insurance Corporation v Central Mortgage Registry of Australia Pty Ltd* (1984) ATPR 40-476.

<sup>71</sup> (1992) 175 CLR 514, 527 (Mason CJ, Dawson, Gaudron and McHugh JJ) (emphasis added).

<sup>72</sup> (1992) 39 FCR 31; (1993) ATPR 41-203.

I consider it to be clear that the loss or damage contemplated by s 87(1A) is not limited to loss or damage in the s 82 sense but *was intended to include the detriment suffered by being bound to a contract unconscionably induced*. . . . In my view, the loss or damage for the purposes of both ss 87(1) and 87(1A) will *include the detriment suffered by being bound to a contract induced by misleading or deceptive conduct in contravention of s 52*. Proof of loss or damage of the sort that would be an 'amount of . . . loss or damage' for the purpose of s 82 is not a prerequisite for the grant of relief under either subsection.<sup>73</sup>

Cooper J expressed the position as follows:

In my opinion 'loss or damage' in s 87(1) means no more than the disadvantage which is suffered by a person as the result of the act or default of another . . . in the circumstances provided for in the section.

The phrase 'loss or damage' in s 87(1) does not involve any concept of quantum or assessment of damages. . . . This is to be contrasted with the context of the phrase in s 82 where it is 'the amount of the loss or damage' which is recoverable by action. . . . The limitations under the general law as to the assessment of damages and the measure of damage ought not to be imported into a definition of 'loss or damage' in s 87 to limit the category of actionable loss or damage.<sup>74</sup>

A similar point was made by Gummow J (as he then was):

The phrase 'the loss or damage', at least in s 87, may be concerned with more than pecuniary recovery as understood in the law of damages of tort; tort law postulates the commission, already accomplished, of a wrong.<sup>75</sup>

In Justice Gummow's opinion the very entry into a contract, in reliance upon conduct which contravened s 52, was capable of constituting loss or damage within the meaning of s 87, regardless of whether a pecuniary detriment was suffered or not.<sup>76</sup> However, even if pecuniary detriment is required in all s 87 cases, his Honour had no difficulty in finding such pecuniary detriment (being a 'real chance' or 'presently existing' detriment) on the facts of the case, namely, the loss which the purchasers would suffer should the vendor's claim for specific performance of the contract succeed since the value of the property had declined since the date of the contract.<sup>77</sup>

Apart from these principles governing the application of s 87 it is also possible to extract from the cases a judicial perspective about the general

<sup>73</sup> Id 33; 40-845 (emphasis added).

<sup>74</sup> Id 47-8; 40-856-7.

<sup>75</sup> Id 43; 40-853.

<sup>76</sup> Id 43; 40-854.

<sup>77</sup> Id 44; 40-854. His Honour referred to the *Munchies Management* case (1988) 84 ALR 700; ATPR 40-926 as an example of a case where the phrase 'loss or damage' in s 87 was given an elastic meaning so as to accommodate a wide range of circumstances and to the New South Wales Court of Appeal case of *Demetrios v Gikas Dry Cleaning Industries Pty Ltd* (1991) 22 NSWLR 561, 573 which accepted the reasoning of the Full Federal Court in *Munchies Management*.

scope of the s 87 remedies. Early judicial comments regarding the scope of a court's powers under s 87 were fairly tentative and tended to stress that, in the exercise of its powers, courts ought not to depart from established common law principles. However, even those early comments recognised that the s 87 powers, being statutory, were not necessarily subject to the same restrictions as common law remedies. This underlying tension between the perceived need to conform to accepted principles, on the one hand, and the recognition of unique statutory powers, on the other, is apparent in the following rather contradictory statement made in 1981 by Northrop J in *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd*:

Section 87 confers a discretion upon the Court, a discretion to make orders which it considers will compensate the applicant in whole or in part for the loss or damage. *That discretion must be exercised according to law.* . . . Section 87 confers upon the court a wide discretion to do justice between the parties. *The court should not restrict the exercise of that discretion by imposing upon itself technicalities which might defeat the policy of the section.* . . . The court is required to consider all matters properly before it and to make such orders under ss 82 and 87 as it considers appropriate. It must apply the law, but in doing that it must do justice between the parties. It must do what is fair between the parties.<sup>78</sup>

Gradually, over the years, judicial statements about the scope of s 87 have become bolder as the courts have recognised the potential of s 87 for doing justice between the parties in the wide variety of cases falling within s 52. As the courts have analysed the differences between common law misrepresentation and liability under s 52 and between common law damages and damages under s 82(1) so they have appeared more willing to throw off the shackles of the common law in relation to remedies generally. This attitude is reflected in the following comments of Pincus J:

The Court's power to give relief under sec. 87 . . . where it has found . . . that there has been a breach of sec. 52, is much wider than, and not necessarily trammelled by, the restrictions which exist under the general law.<sup>79</sup>

Also in the comments of Sheppard J in the Full Federal Court:

The remedy [under s 82 or s 87] being a statutory one, the court may take the view that assistance is not to be gained from any reference to or application of general law principles. Each case will require the court to have regard to the terms of the statute and the facts and circumstances of the case and to exercise its discretion appropriately.<sup>80</sup>

However, even as the courts assert their ability to order relief under the Act freed from common law restrictions, cautionary and contradictory judicial statements will be found, sometimes by the same judges who advocate these increased powers, warning of the dangers of proceeding too far or too fast.

Wilcox J in *Pont Data Australia Pty Ltd v ASX Operations Pty Ltd* explicitly

<sup>78</sup> (1981) 36 ALR 23, 56; ATPR 40-226, 43,065 (emphasis added).

<sup>79</sup> *Tompkin v Nossida (No 1) Pty Ltd* (1986) ATPR 40-662, 47,347.

<sup>80</sup> *Lezam Pty Ltd v Seabridge Australia Pty Ltd* (1992) 35 FCR 535, 551-2; ATPR 41-171,

noted, in relation to the court's power to order a variation of a contract, that:

The court ought not to use its power under s 87(2)(b) in such a manner as to force upon a party a commercially unreasonable result.<sup>81</sup>

This point was endorsed on an appeal to the Full Federal Court:

No doubt . . . the court has power under s 87 to vary the contract in question, even as to matters of price payable thereunder. Nevertheless, the court must be slow to impose upon the parties a regime which could not represent a bargain they would have struck between them.<sup>82</sup>

The conflict between the relative certainty of the common law remedies and the uncertainty of the wide discretion vested in courts under s 87 will be referred to again in the following examination of the specific orders which a court is expressly empowered to make under s 87(2). Although in most cases courts specify the relevant paragraphs under which their orders are made, in some cases courts make orders without specifying their bases. In those cases one can only conjecture as to the basis of the courts' power.

#### 4 SECTION 87(2)(a) — DECLARING A CONTRACT VOID

A declaration under s 87(2)(a) that a contract is void is only a particular kind of declaration within the generic concept of declarations.<sup>83</sup>

For many years courts appeared to assume that in exercising the power conferred by s 87(2)(a) to declare a contract void, either ab initio or from a specified date, they were merely exercising the general law power of rescission (even though s 87(2)(a) does not refer to the remedy of 'rescission' as such).<sup>84</sup> In many cases an order declaring a contract void under s 87(2)(a) or an order that a contract is rescinded under the general law will produce the same results. This is illustrated by the facts in *Sau Wai Lau v Roymancorp (Australia) Pty Ltd*,<sup>85</sup> a case involving a contract for the purchase of a restaurant business which was found to have been induced by contravening conduct regarding the term of the lease of the business premises. Prior to completion of the transaction the purchaser purported to terminate the contract for the vendor's breach. The vendor denied the purchaser's right to terminate, treated the purported termination as a repudiation (which it accepted) and

<sup>81</sup> (1990) 21 FCR 385, 427; ATPR 41-007, 51,132.

<sup>82</sup> *Sub nom ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 2)* (1991) 27 FCR 492, 503; ATPR 41-109, 52,666 (Lockhart, Gummow and von Doussa JJ). This dictum was referred to with approval by Murray J in *Allied Westralian Finance Ltd v Wenpac Pty Ltd* (1992) ATPR (Digest) 46-082. Similar sentiments have been expressed about the need for caution in expanding the scope of s 52 (see for example Spender J in *Jacques v Cut Price Deli Pty Ltd* (1993) ATPR (Digest) 46-102, 53,440; Davies J in *Park v Allied Mortgage Corporation Ltd* (1993) ATPR (Digest) 46-105, 53,471).

<sup>83</sup> *Kinna v National Australia Bank Ltd* (1988) 81 ALR 410, 414; ATPR 40-878, 49,531 (Northrop J).

<sup>84</sup> *Squibb & Sons Pty Ltd v Tully Corporation Pty Ltd* (1986) ATPR 40-691, 47,606.

<sup>85</sup> (1986) ATPR 40-743 (Federal Court); (1987) ATPR 40-828 (Full Federal Court). See also *Byers v Dorotea Pty Ltd* (1986) 69 ALR 715; (1987) ATPR 40-760.



itself terminated the contract and forfeited the deposit. Wilcox J held that the purchaser had validly rescinded the contract and was entitled under the general law to a refund of his \$3000 deposit and a part payment of \$10 000 and damages of \$2,162.76 (for legal costs and other incidental expenses). In the course of an unsuccessful appeal by the vendor, the Full Federal Court made the following observation:

The primary Judge dealt with the return of the deposit under the general law. In all the circumstances it would also have been open to him to have ordered that the contract be set aside pursuant to sec. 87(1) of the Act. Under that provision also, his Honour could have ordered that the deposit be repaid. Further, it would have also been open to his Honour to treat the payment of the deposit as part of the loss suffered by the respondent for the purposes of sec. 82(1).<sup>86</sup>

Section 87(2)(a) is couched in very wide terms and appears to entitle a court to declare any contract to be void. However, in 1977, soon after the commencement of the Act and at a time when the constitutional validity of s 87 was under challenge, a narrow interpretation was given to s 87(2)(a) by the Full Federal Court in *Trade Practices Commission v Milreis Pty Ltd.*<sup>87</sup> In that case the Commission had issued a writ against a number of corporations and persons retailing liquor from licensed premises in New South Wales alleging they had been parties to an arrangement in restraint of trade, in breach of s 45(2), controlling the price at which liquor was to be sold to the public from licensed hotel premises. One of the defences raised by most of the defendants was that the provisions of s 45(2) were void on constitutional grounds because of the total or partial invalidity of ss 87(1) and 87(2), with which s 45(2) was interdependent. It was argued that s 87 was invalid because it invested the court with powers which were not judicial.<sup>88</sup> The Full Federal Court rejected this argument on the basis that, as a matter of the construction of the Act as a whole, the total or partial invalidity of s 87 would not affect the meaning of s 45(2), the two provisions not being interdependent.

However, in deciding whether contracts made in contravention of s 45 were statutorily void, or were valid until declared void by the court, Brennan and Deane JJ (as they then were) made certain comments about the scope of s 87(2)(a). Brennan J held:

Section 87(2)(a) purports to confer a declaratory power upon the court, but it says nothing as to the validity of a contract before a declaration is made. . . . The language of s 87(2)(a) does not, in my view, require the declaratory power to be understood as other than a familiar judicial power to make a declaration consonant with the legal status of the contract. . . . A declaration of voidness made in respect of a time when the contract was in truth valid would be, to say the least, a curial novelty. Section 87(2)(a) does not set the court on a course of adventurous destruction. . . . A contract which is valid

<sup>86</sup> (1987) ATPR 40-828, 48,945 (Neaves, Beaumont and Gummow JJ).

<sup>87</sup> (1977) 29 FLR 144; ATPR 40-028.

<sup>88</sup> Prior to 1977 s 87(1) provided that a court could, in any proceeding for a contravention of Parts IV or V, in addition to imposing penalties, granting damages or awarding damages, make such orders as it thought fit to redress injury to persons caused by the conduct to which the proceedings related or any like conduct engaged in by the defendant.

at its inception may well become void before completion by reason of supervening circumstances and para (a) authorizes the declaratory recognition of the change in its legal effect.<sup>89</sup>

Deane J, too, was explicit about the effect of s 87(2)(a):

The conferring upon a court of a power to declare a contract void does not carry with it any inference that the court is entitled to declare or make void what is otherwise valid. The power, if the court thinks fit, to declare the whole or any part of a contract to have been void ab initio or at all times on and after a designated date . . . is explained by the fact that the provisions of a contract which were not initially avoided by the Act can become void either by reason of the coming into operation of new or altered provisions of the Act or by reason of an alteration in circumstances without any change in the relevant provisions of the contract. . . . The words 'if it thinks fit' make explicit that, in a case where the court is of the view that a declaration of invalidity should be made, the court possesses a further judicial discretion to decide whether it is appropriate . . . to declare the time from which the whole or any part of a contract . . . has been void. Courts commonly possess such a discretion in granting or withholding declaratory relief.<sup>90</sup>

The Full Federal Court in *Milreis* therefore restricted the use of s 87(2)(a) to declaring void contracts which, under general contractual principles relating to statutory illegality, are illegal because impliedly prohibited by the Act, or which become illegal subsequently because of the manner in which they are performed.<sup>91</sup>

Although the question of the constitutional validity of s 87 was not decided by the Full Federal Court, s 87(1) was amended in 1977 to ensure that the party in whose favour an order under s 87(1) is made is a party to the proceedings.<sup>92</sup> Notwithstanding this amendment the power of courts to declare contracts void under s 87(2)(a) appears to remain subject to the restriction identified in *Milreis*. The effect of the 1977 amendments on s 87 was considered by the Supreme Court of New South Wales in *Carlton & United Breweries Ltd v Tooth & Co Ltd*.<sup>93</sup> It was there argued that contracts made in breach of s 45 were not automatically void and unenforceable but rather that the status of such contracts had to be determined by the court when appropriate remedies were sought under Part VI. It was further argued that the decision in *Milreis* was distinguishable as a result of the 1977 amendments. In rejecting this argument and finding that contracts made in breach of the specific prohibitions in Part IV are illegal and void, Hodgson J held:

It was submitted that the 1977 amendments caused the statutory scheme of the Act to be now quite different. Prior to those amendments, s 87 gave power to the Court to declare any part of a contract to be void and to make an order varying a contract, which arose only where a proceeding was instituted under or for an offence against Pt VI. In 1977, s 87 was amended so as

<sup>89</sup> (1977) 29 FLR 144, 160-1; ATPR 40-028, 17,377-8.

<sup>90</sup> *Id* 168; 17-383.

<sup>91</sup> Taperell, Vermeesch and Harland, *Trade Practices and Consumer Protection* (3rd ed, 1983) para 1651.

<sup>92</sup> Section 87(1A) was inserted at the same time.

<sup>93</sup> (1986) 5 NSWLR 1; ATPR 40-677.

to make it clear that the powers under s 87 were independent. In *Milreis* . . . Deane J . . . indicated that had s 87 conferred a 'primary and independent power upon the Court' then the interrelationship sought to be established between s 45 and s 87 would have 'great persuasive force'. The suggestion is that his Honour would have held that s 45 did not itself make contracts void. . . . In my view, these submissions should be rejected.<sup>94</sup>

However, until 1993, in utilising the power conferred by s 87(2)(a) to declare contracts void, courts have tended to ignore the *Milreis* qualification that only illegally created contracts may be avoided: contracts valid or voidable at their date of creation have been declared void. It seemed as though the *Milreis* qualification would pass into obscurity, a creature of its time and distinguishable on its facts. Unfortunately the *Milreis* qualification has been resurrected by the High Court in *Webb Distributors (Aust) Pty Ltd v The State of Victoria*.<sup>95</sup> That case raised two interrelated issues: was the liquidator of three Victorian building societies liable for damages to shareholders of a company who had been induced to purchase shares by the fraudulent misrepresentation of the company, and could the contracts to purchase such shares be rescinded by the shareholders? At common law once a company is wound up, a shareholder is not entitled to rescind the purchase of shares induced by the fraudulent misrepresentation of the company or claim damages for the misrepresentation.<sup>96</sup> This common law rule was reflected in s 360(1) of the *Companies Code*, the applicable legislation at the time of the case. The shareholders argued before the High Court that even if that common law rule were still applicable, that rule did not preclude a claim under the Act. In rejecting this argument a majority of the High Court reaffirmed the *Milreis* qualification:

The *Trade Practices Act* is unquestionably a piece of innovative legislation. But it is not to be seen as eliminating 'by a side-wind', the detailed provisions established for more than a hundred years to govern the winding up of a company. Furthermore, in *Trade Practices Commission v Milreis Pty Ltd* Brennan J and Deane J, as members of the Federal Court, made it clear that s 87(2)(a) is not to be understood as conferring a power to declare void a contract which was valid at its inception, other than through the operation of some other provision of the *Trade Practices Act* or by reason of some alteration in circumstances.<sup>97</sup>

On the other hand, the sole dissenter, McHugh J, saw no reason for restricting the scope of the Act in this manner and held:

I can see no justification for reading into the unambiguous words of ss 82 and 87 some implied limitation on their use in relation to companies in liquidation. The *Trade Practices Act* is a fundamental piece of remedial and protectionist legislation. Such legislation should be construed broadly so as 'to give the fullest relief which the fair meaning of its language will allow'. . . . The Court also has a wide power to grant relief under s 87. . . . In enact-

<sup>94</sup> Id 14; 47-481.

<sup>95</sup> (1993) 179 CLR 15.

<sup>96</sup> *Houldsworth v City of Glasgow* (1880) 5 App Cas 317 (House of Lords).

<sup>97</sup> (1993) 179 CLR 15, 37 (Mason CJ, Deane, Dawson and Toohey JJ) (emphasis added).

ing s 82 Parliament gave a court . . . the power to award damages against a company whether or not it was in liquidation. Furthermore, it gave such a court the power, in the exercise of its discretion, to vary or set aside any contract or contractual provision upon proof of a breach of the Act. In these circumstances, this Court should give effect to the terms of those sections.<sup>98</sup>

It is most unfortunate that a majority of the High Court relied on *Milreis* in refusing to allow the shareholders' contracts to be avoided, especially since an argument based on overriding legislation arguably could have achieved the same effect. As Harland has noted:

It is perhaps surprising that the majority of the High Court should, in a very brief reference to s 87, have thrown doubt on the settled practice of the Federal Court in setting aside contracts (those orders seeming to rely essentially on paragraph (2)(a)) though without referring to this consequence of what is at least arguably a quite unnecessarily restrictive reading of the legislation.<sup>99</sup>

Harland goes on to suggest that the *Webb Distributors* case might not have the effect of limiting the power of courts under ss 87(1) and (1A) because para (2)(ba) (which was inserted in 1986) enables a court to make 'an order refusing to enforce any or all of the provisions' of such contracts as are referred to in paras (a) and (b). An order which refuses to enforce the terms of a contract may well have the same effect as one declaring it to be void ab initio. In fact, courts have found it unnecessary to resort to s 87(2)(ba) and, even after *Webb Distributors*, have declared contracts void under s 87(2)(a).<sup>100</sup> However some legislative amendment to s 87(2)(a) may be the only way to finally lay the *Milreis* qualification to rest.

The remainder of the discussion of s 87(2)(a) proceeds on the basis that all contracts made as a result of conduct contravening the Act are liable to be avoided under para (a) and not merely those which are statutorily prohibited.

Despite the similarities between an order declaring a contract void under s 87(2)(a) and an order for rescission of a contract, courts have begun stressing the distinction between these two remedies. It is accordingly useful to distinguish the nature and effect of an order for rescission of a contract and an order under s 87(2)(a):

4.1 At common law rescission is not available for a mere innocent misrepresentation (namely, one not involving any element of fraud or deceit), although equity allows rescission in such a situation. The effect of a rescission under the general law is that the contract is set aside, all money paid under the contract is refunded and both parties are released from future obligations under the contract. In cases involving deceit or negligence damages may be available in tort.

<sup>99</sup> D S Harland, 'The Statutory Prohibition of Misleading or Deceptive Conduct in Australia and its Impact on the Law of Contract' (1995) 111 LQR 100, 124.

<sup>100</sup> Examples of such orders are provided at the end of the section dealing with s 87(2)(a).

On the other hand, any contract induced by contravening conduct may be avoided under s 87(2)(a) irrespective of the state of mind of the misrepresentor.

- 4.2 Rescission for misrepresentation under the general law is the act of the party themselves. A court's function in proceedings for rescission is 'to adjudicate upon the validity of a purported disaffirmance as an act avoiding the transaction *ab initio*, and, if it is valid, to give effect to it and make appropriate consequential orders'.<sup>101</sup> This means that a valid rescission of a contract involving a transfer of legal title will be insufficient *per se* to revest the legal title in the transferor. However, 'if a court of equity would treat it [the rescission] as effectual the equitable title to such property reverts upon the rescission'.<sup>102</sup>

On the other hand, the avoidance of a contract under s 87(2)(a) is the result of the court order.<sup>103</sup> In addition this paragraph empowers a court, not to 'rescind' a contract but to make an order declaring it void *ab initio* or 'from a specified date'. If the contract so avoided has involved a transfer of legal title an order may be made under s 87(2)(g) directing the parties to execute a further instrument to vary or terminate the effect of the former contract. A similar result may be achieved by varying the contract under s 87(2)(b).

In addition, s 87(2)(a) enables a court to declare 'any part of a contract made between the parties' to be void. This right to declare only part of a contract to be void does not exist under the general law. This power was utilised in *Frith v Gold Coast Mineral Springs Pty Ltd*<sup>104</sup> where purchasers were induced by contravening conduct to purchase a business involving the drilling of bores for water. Fitzgerald J made orders that the contract be varied (presumably under s 87(2)(b)) from the date of contract so as to reduce the purchase price (of \$123 000) payable by the purchaser to the sum actually paid to the vendor (\$68 000), and that any provision in the contract obliging the purchaser to pay any further sum be declared void *ab initio* (presumably under s 87(2)(a)). His Honour also ordered the vendor to pay to the purchaser damages of \$30 000 under s 82(1). An appeal by the vendor to the Full Federal Court was unanimously dismissed without any detailed discussion of the relief granted.

- 4.3 At common law rescission is not available to a representee who, with knowledge of the misrepresentation, affirms the contract or is unable to restore the other party to his or her precontractual position. The latter qualification on the right of rescission is tempered in equity which allows rescission even though precise restitution is not possible, provided that the parties are capable of being restored substantially to the status quo.

By way of contrast it is not a precondition to the making of an order

<sup>101</sup> *Alati v Kruger* (1955) 94 CLR 216, 224.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Duralla Pty Ltd v Plant* (1984) 54 ALR 29.

<sup>104</sup> (1983) 65 FLR 213; ATPR 40-339. An appeal to the Full Federal Court was unanimously dismissed: (1983) ATPR 40-394.

under s 87(2)(a) that the applicant is able to make full or even substantial restitution. It is this factor which has been emphasised as most distinguishing an order under s 87(2)(a) from rescission under the general law.<sup>105</sup>

In addition, a court exercising its discretion under s 87(2)(a) is not restricted by other factors qualifying the general law right of rescission, such as the delay of the applicant in rescinding the contract or the conduct of the parties after acquiring knowledge of the misleading conduct, although it may take these factors into account in the exercise of its discretion.<sup>106</sup> The relevance of these factors was recognised by Northrop J in *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd* who, while conceding that affirmation of a contract will not necessarily preclude an order under s 87(2)(a), went on to hold that:

Nevertheless some consideration and weight must be given to the actions of the parties after knowledge of the existence of misleading or deceptive conduct. Section 87 enables the court to overcome many of those types of difficulties, but at the same time the conduct of the parties . . . is relevant to be considered in the exercise of the discretion conferred by s 87 of the Act.<sup>107</sup>

In that case Northrop J refused to declare void leases for shops in an uncompleted shopping centre induced by the contravening conduct of the lessor's agent (because of the delay of the lessees in seeking relief) and instead awarded the lessees damages under s 82(1) for their loss or damage. His Honour did however make orders varying the leases from the date of their commencement by reducing the amount of the rent payable and by deleting the rent review clause (under s 87(2)(b)).

The same point was reasserted more recently by Lockhart J in the Full Federal Court in *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* in the following terms:

In granting a remedy under s 87, the court is not restricted by the limitations under the general law of a party's right to rescind for breach of contract or misrepresentation. Nevertheless, in exercising its discretion under s 87, the court will consider the conduct of the parties after they had knowledge of the misleading quality of the conduct.<sup>108</sup>

Justice Foster, dissenting on the relief to be granted, held that under s 87 a court 'is not tied to the principles of equitable relief, however persuasive they might have been'.<sup>109</sup>

Similar views were expressed by members of the Full Federal Court in

<sup>105</sup> See for example *Squibb & Sons Pty Ltd v Tully Corporation Pty Ltd* (1986) ATPR 40-691, 47,606.

<sup>106</sup> *Byers v Dorotea Pty Ltd* (1986) 69 ALR 715; (1987) ATPR 40-760.

<sup>107</sup> (1981) 36 ALR 23, 60; ATPR 40-226, 43,068.

<sup>108</sup> (1988) 39 FCR 546, 564; ATPR 40-850, 49,158-9. Justice Burchett agreed with Lockhart J.

<sup>109</sup> *Id* 571; 49-163.

*Munchies Management Pty Ltd v Belperio* who, after referring to *Henjo's* case held:

In the exercise of the discretion in these matters given the Court by sec 87, the equitable principles concerning rescission give safe, if not necessarily exclusive, guidance.<sup>110</sup>

This point was reiterated by Fisher J in *Platz v Creative's Landscape Design Centre Pty Ltd*,<sup>111</sup> a case involving the sale of a garden centre business and two leases of business premises induced by the misleading conduct of the vendor. The vendor denied that the purchaser was entitled to rescind the contract either because he had affirmed the contract or because restitution was not possible. In holding that the purchaser had validly rescinded the contract at a time when effective restitution was still available Fisher J, at first instance, commented:

There was no attempt by either counsel to refer to the alternative argument that it was open to the Court, if the circumstances be appropriate, to exercise its powers under sec 87 unrestricted by the general law bars of affirmation, lapse of time and restitution. It can however be argued that *these restrictions are not fetters on the exercise of the powers under the section but matters to be taken into account in the exercise of the Court's discretion*, namely whether and in what manner the powers should be exercised. To my mind this more relaxed approach is preferable.<sup>112</sup>

His Honour accordingly made orders declaring the contract for sale and the leases to be void ab initio, that the vendor refund the purchase price of the stock and plant (together with simple interest) less an adjustment for prior use, and compensation representing the excessive rent paid. On appeal<sup>113</sup> the Full Federal Court referred to previous dicta on this issue and pointed out:

No judgment decides that the general law principles provide exclusive guidance to the Court's approach, but there are, perhaps, different shades of emphasis to be found in the various statements . . . [W]e indicate our agreement with the way the matter was put by Fisher J in the judgment under appeal.<sup>114</sup>

It is quite clear from these statements that although courts in exercising the discretion under s 87(2)(a) may take into account those factors which would disentitle a plaintiff from rescinding a contract under the common law they are not obliged to refuse relief simply because those factors have been shown to exist.

4.4 A further advantage in seeking relief under s 87(2)(a) is that an order avoiding a contract may be made against a person 'involved' in the con-

<sup>110</sup> (1989) 84 ALR 700, 714; ATPR 40-926, 50,038 (Fisher, Gummow and Lee JJ).

<sup>111</sup> (1989) ATPR 40-947.

<sup>112</sup> Id 50-312-13 (emphasis added).

<sup>113</sup> (1989) ATPR 40-980 (Bowen CJ, Sheppard and von Doussa JJ).

<sup>114</sup> Id 50-697. These principles were referred to also by Burchett J in *Benlist Pty Ltd v Olivetti Australia Pty Ltd* (1990) ATPR 41-043, 51,593-4.

travention. This advantage is recognised in the following passage by Gummow J in *Demagogue Pty Ltd v Ramensky*:

Further, unlike the position at general law with the administration of the equitable remedy of rescission of contracts, *orders under s 87 may be made not only against parties to the contract but also against third parties*, being persons involved . . . in the contravention as a result of which the plaintiff entered into the contract.<sup>115</sup>

Under s 75B a reference to 'a person involved in a contravention' of specified Parts of the Act is defined as a reference to a person who has aided, abetted, counselled or procured the contravention, has induced the contravention, 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. This wide definition enables orders to be made not only against a party primarily responsible for the contravention but against that party's directors and agents.

- 4.5 It is not a general law requirement for an effective rescission that the party induced to enter into a contract by a misrepresentation must have suffered any pecuniary loss or damage. Chief Justice Black in *Demagogue Pty Ltd v Ramensky* said that it would be 'surprising' if s 87 contained a limitation which did not exist at common law and which would 'seriously limit the usefulness of the section'.<sup>116</sup>

The power to declare a contract, or part of a contract, to be void has been used quite extensively by the courts, usually together with orders for the repayment of money and damages (under ss 82 or 87(2)(d)). The circumstances in which such orders have been made include contracts involving an investment scheme for the growing and processing of guavas;<sup>117</sup> a contract for the purchase of a turf business;<sup>118</sup> the purchase of a second-hand luxury car, described as being in an 'excellent' condition and subject to an NRMA inspection, which was unroadworthy and even after rectification required further attention;<sup>119</sup> the sale of an imported car at an auction;<sup>120</sup> a contract for guarantee and mortgage or bill of sale;<sup>121</sup> a contract for lease or sub-lease and personal

<sup>115</sup> (1992) 39 FCR 31, 43; (1993) ATPR 41-203, 40,853-4 (emphasis added).

<sup>116</sup> Id 32; 40-845.

<sup>117</sup> *Milner v Delita Pty Ltd* (1985) 61 ALR 557; (1986) ATPR (Digest) 46-003.

<sup>118</sup> *P J Berry Estates Pty Ltd v Mangalore Homestead Pty Ltd* (1984) ATPR 40-489.

<sup>119</sup> *Hogarth Galleries Pty Ltd v City Automobile Holdings Pty Ltd* (1986) ATPR (Digest) 46-007.

<sup>120</sup> *Treloar v Ivory* (1991) ATPR 41-123 (Supreme Court of Western Australia).

<sup>121</sup> *Leveson-Gower v Esanda Ltd* (1986) ATPR 40-647; *Nobile v The National Australia Bank Limited* (1987) ATPR 40-787; (1988) ATPR 40-856; *Haydon v Jackson* (1988) ATPR 40-845; *Nolan v Westpac Banking Corporation* (1989) 51 SASR 496; ATPR 40-982; *Crisp v Australia and New Zealand Banking Group* (1994) ATPR 41-294.



guarantees;<sup>122</sup> the purchase of forged paintings;<sup>123</sup> the sale of a farm and a mortgage back to the vendor;<sup>124</sup> a purchase of land in a subdivision;<sup>125</sup> an agreement for migration under the Business Migration Plan and the purchase of a house and land.<sup>126</sup>

## 5 SECTION 87(2)(b) — VARYING A CONTRACT OR ARRANGEMENT

Section 87(2)(b) empowers a court to vary 'such' a contract or arrangement in the manner specified in the order. The word 'such' in this paragraph appears to relate to contracts, or parts of contracts, declared void under s 87(2)(a). This suggests that the power of variation in paragraph (b) was designed to enable courts to prevent the failure of contracts declared void in part under paragraph (a). It appears to authorise courts to effectively rewrite contracts if such action is considered appropriate to compensate a party who has suffered loss or damage as a result of contravening conduct or to reduce or prevent that loss or damage.

One unfortunate (and it is submitted, unjustifiable) qualification on the power of a court under this paragraph was imposed by the Full Federal Court decision in *Trade Practices Commission v Milreis Pty Ltd*,<sup>127</sup> the facts of which are discussed in relation to s 87(2)(a). In that case Brennan and Deane JJ confined the courts' power of variation under s 87(2)(b) to contracts unenforceable under the general law rules relating to statutory illegality.<sup>128</sup>

In the view of Brennan J:

The better view is that the power of variation under either paragraph [s 87(2)(b) and s 45(3)] is to be exercised with respect to contracts which are unenforceable by reason of the trading practices provisions of the Act.<sup>129</sup>

Deane J, in rejecting the argument that the power conferred by s 87(2)(b) was a 'wide-ranging power which served the purpose of ameliorating the effect of other provisions of the Act by enabling the court to prevent total invalidity in, for example, cases where the ordinary operation of the common law rules regarding severability would lead to the whole of a contract being avoided by

<sup>122</sup> *Dibble v Aldan Nominees Pty Ltd* (1986) ATPR 40-693; *Musca v Astle Corporation Pty Ltd* (1988) 80 ALR 251; ATPR 40-855; *The Tubby Trout Pty Ltd v Sailbay Pty Ltd* (1994) ATPR (Digest) 46-120; *Jeldiver Pty Ltd v Nelumbo Pty Ltd* (1993) ATPR (Digest) 46-097.

<sup>123</sup> *Plummer v The Saints Gallery Pty Ltd* (1988) ATPR 40-840 although the orders for relief were set aside on appeal on the basis that no contravention of s 82 had been established: (1988) 80 ALR 525; ATPR 40-882.

<sup>124</sup> *Morton v Black* (1988) ATPR (Digest) 46-037.

<sup>125</sup> *Supetina Pty Ltd v Lombok Pty Ltd* (1986) 11 FCR 563; ATPR 40-716.

<sup>126</sup> *Wan v McDonald* (1992) 33 FCR 491; ATPR 46-088.

<sup>127</sup> (1977) 29 FLR 144; ATPR 40-028.

<sup>128</sup> Taperell, Vermeesch and Harland, *Trade Practices and Consumer Protection* (3rd ed., 1983) para 1651.

<sup>129</sup> (1977) 29 FLR 144, 163; ATPR 40-028, 17,379.

reason of part of it being contrary to the provisions of the Act<sup>130</sup> stressed that:

The scope of operation of s 87(2)(b) is, in fact, much narrower than that given to it in the course of the defendants' argument . . . [I]t is an ancillary power for the enforcement or vindication of the substantive provisions of Parts IV and V of the Act. It is not a general power to alleviate the effect or consequences of the operation of all or any particular one of those substantive provisions.<sup>131</sup>

As discussed in relation to paragraph (a), it must be remembered that *Milreis* was decided at a time when s 87 was not seen as conferring a primary and independent power and when the constitutional validity of s 87 was still in doubt. Since that decision s 87(1) has been amended and s 87(1A) has been inserted. When s 87 was recently examined by the High Court in *Webb Distributors (Australia) Pty Ltd v The State of Victoria*<sup>132</sup> a majority reaffirmed the narrow interpretation of s 87(2)(a) in *Milreis* but made no specific reference to its effect on paragraph (b).

In fact, the *Milreis* qualification on s 87(2)(b) has not been referred to in any of the cases in which the power of variation has been exercised, even those cases dealing with contracts prohibited by s 45.<sup>133</sup> Although strong arguments exist to curtail a court's power under s 87(2)(b) those raised in *Milreis* are not convincing. However, like paragraph (a), paragraph (b) may require legislative amendment to finally overcome the vestiges of *Milreis*.

The power of a court to vary a contract declared void in part has no common law counterpart.<sup>134</sup> At common law while courts, in certain circumstances, are entitled to sever void terms of contract, they have no power to positively vary the terms of a contract. Under general principles of contract law, void terms of a contract may be severed only if they are not so connected with the rest of the contract that their removal would have the effect of altering the very nature of the contract. In equity, contracts may be rectified by courts but only so as to reflect the common intention of the parties. In fact, courts have traditionally been loathe to rewrite contracts for the parties. A judicial power which allows the variation of contracts has the potential to revolutionise the law of contracts by enabling courts to impose standards of good faith and reasonableness upon contracting parties. Although courts, to date, have exhibited signs of reluctance to exercise this power too liberally, paragraph (b) provides an opportunity for judicial involvement in the making of contracts.

Like all other s 87 orders, an order for the variation of a contract can only be made if it will compensate an applicant for loss or damage suffered as a result of contravening conduct or if it will prevent or lessen that loss or damage. The

<sup>130</sup> Id 168; 17-382.

<sup>131</sup> Id 168, 169; 17-382, 17,383.

<sup>132</sup> (1993) 117 ALR 321; ATPR 46-113.

<sup>133</sup> For example *Pont Data Australia Pty Ltd v ASX Operations Pty Ltd* (1990) 21 FCR 385; ATPR 41-007 (Federal Court); (1990) 27 FCR 492; (1991) ATPR 41-109 (Full Federal Court) discussed in detail in this section.

<sup>134</sup> *Alexander v Tse* [1988] 1 NZLR 318.

compensatory nature of an order under s 87(2)(b) was stressed by Murray J of the Supreme Court of Western Australia in *Allied Westralian Finance Ltd v Wenpac Pty Ltd*.<sup>135</sup> In that case a vendor of a mine sought a declaration that various goods described in a chattel lease assignment to the purchaser of the mine were the vendor's property, an injunction restraining the purchaser from selling or dealing with the goods and a mandatory injunction that the goods be delivered up to it. Although the chattel lease had expired and an option to purchase the goods had not been exercised, the purchaser refused to allow the vendor to take possession of the goods. The purchaser alleged that although it had taken an assignment of the chattel lease it was unaware (as a result of the vendor's contravening conduct) that some of the goods described in that lease were not on the mine site or were claimed by a third party. It accordingly sought damages and an order to vary the chattel lease by reducing the option price to take account of the fact that it had paid rent under the lease for about a year for chattels in respect of which it had not had the benefit.

In rejecting the purchaser's arguments and granting the mandatory and interlocutory injunctions sought by the vendor, Murray J dealt with the purchaser's claim for a variation of the option price as follows:

Whilst under s 87(2)(b) it is clear that among the orders generally contemplated by the section is an order varying a contract or agreement between the parties . . . it is clear that such action should only be taken to the extent it is necessary to provide proper compensation for the particular loss of which complaint is made and, the court so it has been held, 'must be slow to impose upon the parties a regime which could not represent the bargain they would have struck between them' . . . [H]aving searched out examples of the application of the *Trade Practices Act* s 87(2)(b) for myself, I have discovered none which exemplifies the type of order sought by the defendant in this case.<sup>136</sup>

Relatively few orders for variation of contracts have been made under s 87(2)(b). Examples of variations which have been made include orders for a reduction in purchase price or rental (to reflect an award of damages made by the court) and the deletion of terms requiring payment of the full price or rent;<sup>137</sup> a release of a party from further liability under a contract for restoration of a motor car;<sup>138</sup> termination of a lease from the date a lessee vacated the premises;<sup>139</sup> the deletion of an obligation by an insured to make payments under an insurance policy;<sup>140</sup> and that vendors not pursue amounts owing under franchise agreements and related documents.<sup>141</sup> In addition, there have

<sup>135</sup> (1992) ATPR (Digest) 46-082.

<sup>136</sup> *Id* 53-310.

<sup>137</sup> *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd* (1981) 36 ALR 23; ATPR 40-226; *Lubideneuse v Bevanere Pty Ltd* (1984) 3 FCR 1; ATPR 40-487 (Federal Court); (1985) ATPR 40-565 (Full Federal Court); *Howell v Bostaran Pty Ltd* (1994) ATPR (Digest) 46-125.

<sup>138</sup> *Adams v Classic Autocraft (Australia) Pty Ltd* (1985) ATPR 40-612.

<sup>139</sup> *Pavich v Bobra Nominees Pty Ltd* (1988) ATPR (Digest) 46-039.

<sup>140</sup> *Warnock v Australia and New Zealand Banking Group Limited* (1989) ATPR 40-928.

<sup>141</sup> *Jacques v Cut Price Deli Pty Ltd* (1993) ATPR (Digest) 46-102.

been a series of cases in which mortgagors have sought orders varying the terms of security documents and orders restraining mortgagees from appointing receivers under those documents without providing security as required under the common law.<sup>142</sup> The Full Federal Court has indicated that it is prepared to grant such orders provided the applicant can establish a 'clearly arguable' case that the security document was induced by contravening conduct or an 'obvious nexus' between the contravening conduct and the formation of the security document.<sup>143</sup>

One interesting use of the power of variation was made in *Money v Westpac Banking Corporation*<sup>144</sup> where a mortgage and other security documents, executed as a result of a mortgagee's contravening conduct, were varied by limiting the mortgagor's liability and interest. The mortgagee, however, subsequently sought to rely on the terms of the mortgage to recover its solicitor and client costs incurred in the court proceedings. It argued that its right to such costs could only be lost by such inequitable conduct as would amount to violation or culpable neglect of its duty under the mortgage. In rejecting this claim French J held:

It plainly offends common concepts of justice that a mortgagee, having failed in litigation brought against it by its mortgagor, should nevertheless be able to recover its costs of the proceedings against him by virtue of the terms of the mortgage.

Common concepts of justice may not, of course, be sufficient to overcome the language [of the mortgage]. If there be a liability on the part [of the mortgagor] . . . accruing by reason of the need to bring these proceedings, that is recoverable by him as loss or damage flowing from the contravention of sec 52 that he has established. It would be pointless, in my opinion, to make an award for damages to, in effect, offset that liability. The same result will be achieved if I direct that under sec 87 that the terms of . . . the mortgage be so varied in relation to the applicant as to exclude costs, charges and expenses incurred by the first respondent in connection with these proceedings and I will so order.<sup>145</sup>

However, as a general rule, it is apparent that, apart from ordering the reduction of price or rent, courts are reluctant to interfere in on-going contractual relationships. In *McPhillips v Ampol Petroleum (Victoria) Pty Ltd* Woodward J declined to vary a franchise agreement by ordering that its term be extended so as to enable the franchisee to remain in possession on the ground that damages were an appropriate and adequate remedy and because he thought that:

<sup>142</sup> *Inglis v Commonwealth Trading Bank of Australia* (1971) 126 CLR 161.

<sup>143</sup> *Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd* (1988) 20 FCR 540; ATPR 40-911 at 49,787. See also *Glandore Pty Ltd v Elders Finance & Investment Co Ltd* (1984) 4 FCR 130; (1985) ATPR 40-517; *Atkinson v Hastings Deering (Queensland) Pty Ltd* (1985) 6 FCR 103; ATPR 40-566; *Health & Life Care Ltd v Central Management Services Pty Ltd* (1988) ATPR 40-888; *Mainbanner Pty Ltd v Dadincroft Pty Ltd* (1988) ATPR 40-896; *Graham v Commonwealth Bank of Australia* (1988) ATPR 40-908; *Contractor Services Pty Ltd v Esanda Finance Corporation Ltd* (1990) ATPR 41-020.

<sup>144</sup> (1988) ATPR 40-894. See also (1988) ATPR (Digest) 46-034.

<sup>145</sup> (1988) ATPR 40-894, 49,654.

It is generally undesirable to order parties who have fallen out to remain in a contractual relationship. It is not difficult to imagine problems arising over such questions as maintenance of the premises and levels of rent.

Further, to refuse to allow the respondent to sell its property might cause it unintended and excessive damage. And there is no evidence before me to show that there would be any great benefit to the applicants in extending their franchise for what would have to be an arbitrary period.<sup>146</sup>

Practical difficulties of the nature envisaged by Woodward J were experienced in the one case in which the court exhibited a willingness to rewrite a contract under s 87(2)(b). The problems associated with the imposition of a price unrelated to damages and unnegotiated by the parties is well illustrated by *Pont Data Australia Pty Ltd v ASX Operations Pty Ltd*.<sup>147</sup> The Australian Stock Exchange Ltd ('ASX') and its subsidiary, ASX Operations Pty Ltd ('ASXO') were alleged to have infringed Part IV of the Act in the supply to data processors of information involving dealings on the Sydney and Melbourne Stock Exchanges and of information about listed companies trading on other Australian stock exchanges and the Sydney Futures Exchange. The applicant ('Pont'), itself a supplier of electronic financial information, received the information relayed by ASXO in an electronic signal known as Signal C ('the Signal'). Pont alleged that it had been forced to enter into certain contracts ('the contracts') for the Signal on unacceptable and unfair terms because the only alternative was to lose access to the Signal and accordingly its only source of information regarding the Sydney and Melbourne Stock Exchanges.

At first instance Pont established a breach by ASXO of ss 46, 45 and 49 of the Act and that the terms of the contracts required it to engage in misleading or deceptive conduct in relation to its own customers in contravention of s 52. However, a difficult question arose as to the type of relief to which Pont was entitled. The primary judge, Wilcox J, held that it was unsatisfactory to merely grant injunctions restraining ASXO from committing breaches of the relevant sections of the Act without specifying what it had to do to comply with the Act. In his Honour's opinion, the better approach was to identify, and declare void, the particular contractual terms which offended the Act and to then grant injunctions restraining ASXO from enforcing those terms and restraining any future breach of the relevant statutory provisions. Even then, what would be the position of the parties in relation to the balance of the contractual terms? Pont did not seek a declaration declaring the contracts completely void as that would leave it without any entitlement to receive the Signal. Instead, it sought declarations that the contracts were void ab initio except insofar as they provided for the supply of the Signal, and a refund of all moneys paid under the contracts (it being argued that ASXO incurred no extra cost in providing the Signal).

In determining whether the terms of the contract which contravened the Act could be severed from the rest of the contract his Honour referred to s 4L

<sup>146</sup> (1990) ATPR 41-014, 51,527.

<sup>147</sup> (1990) 21 FCR 385; ATPR 41-007 (Federal Court); (1991) 27 FCR 492; ATPR 41-109 (Full Federal Court).

of the Act<sup>148</sup> and the test for severance laid down by the Privy Council in *Carney v Herbert*.<sup>149</sup> According to that test terms will not be regarded as severable if they 'are in substance so connected with the others as to form an indivisible whole which cannot be taken to pieces without altering its nature'. Applying this test to the facts of the case Wilcox J concluded that the relevant terms were so connected with the other terms in the contracts that their deletion would change the nature of the contracts. His Honour nevertheless held that he could vary the terms of contracts to prevent or reduce loss or damage to Pont under s 87(2)(b):

The power conferred by s 87(2)(b) is extremely wide. In terms, the discretion is unlimited. But the Court would not be justified in varying a contract beyond the extent necessary to provide a result which conformed with the Act and was reasonable between the parties.<sup>150</sup>

For this reason he considered it appropriate to make orders declaring the offending provisions in the contracts to be void and restraining ASXO from offering to supply the Signal to Pont (or refusing to supply it) except upon conditions to the same or similar effect as those terms declared void. His Honour also ordered ASXO to repay to Pont almost all money already paid by Pont to ASXO and envisaged that Pont would be entitled to damages under s 87(2)(d).

These orders still left unresolved the price at which ASXO was to supply the Signal to Pont. On the facts his Honour felt that ASXO was entitled to supply the Signal at a price reflecting the cost of supplying it, together with a margin of profit similar to that charged by competitive suppliers in the data industry. He gave ASXO one month to submit to the court material relating to the costs associated with supplying the Signal. Although ASXO subsequently tendered additional information his Honour, in unreported supplementary reasons delivered on 18 May 1990, concluded that it contained no useful relevant material. Despite his recognition of the undesirability of forcing upon parties 'a commercially unreasonable result'<sup>151</sup> his Honour ordered ASXO to supply the Signal to Pont at a nominal price, with the proviso that ASXO be permitted to make application for variation.

ASXO appealed to the Full Federal Court on a number of issues, including the nature of the relief granted by Wilcox J.<sup>152</sup> ASXO's principal complaints concerned the effect of the orders made under s 87 in re-formulating the con-

<sup>148</sup> Section 4L provides that if the making of a contract contravenes the Act by reason of the inclusion of a particular provision in the contract, then subject to any order made under ss 87 or 87A (relating to the power of a court to prohibit the payment or transfer of moneys or other property) nothing in the Act affects the validity or enforceability of the contract otherwise than in relation to that provision in so far as that provision is severable.

<sup>149</sup> (1985) AC 301, 311 (approving the dictum of Jordan CJ in *McFarlane v Daniell* (1938) 38 SR (NSW) 337, 345 and approved by the High Court in *Thomas Brown & Sons Ltd v Fazal Deen* (1962) 108 CLR 391).

<sup>150</sup> (1990) 21 FCR 385, 426; ATPR 41-007, 51,131.

<sup>151</sup> *Id* 427; 51,132.

<sup>152</sup> *Sub nom ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1991) 27 FCR 460 and *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 2)* (1991) 27 FCR 492; ATPR 41-109. The issue of relief was dealt with in the latter appeal.

tracts and imposing upon the parties an inappropriate fee structure. In particular, ASXO argued that the effect of the orders was to penalise ASXO rather than to compensate Pont. Whilst ASXO was successful in proving that it had not contravened ss 49, 45(2) and 46(1)(b), the Full Federal Court affirmed that it had contravened ss 46(1)(c) and 45(2). This decision meant that some of the orders made by the trial judge were inappropriate. In particular ASXO argued that it was entitled to charge a reasonable price for the supply of the Signal. The appeal was stood over pending further submissions on the question of relief.

While noting that the anti-trust laws of the United States do not contain an equivalent to s 87(2)(b), which might explain why federal courts in that jurisdiction are reluctant to rewrite contractual provisions as to price, Lockhart, Gummow and von Doussa JJ held:

The presence of s 87(2)(b) may thus mean that this reluctance should not necessarily translate to the Australian position. . . . No doubt . . . the court has power under s 87 to vary the contract in question, even as to matters of price payable thereunder. Nevertheless, the court must be slow to impose upon the parties a regime which could not represent a bargain they would have struck between them.<sup>153</sup>

The Full Court concluded that Pont would be compensated, partially if not fully, for its loss or damage suffered by ASXO's conduct in contravention of the Act if the contracts were declared void *ab initio* but,

on terms designed to attain broad and substantial justice between the parties.

In that regard, relief may be granted under s 87 on terms dealing with allowances and payment of moneys as part of a process of rescission *ab initio*; the equitable principles concerning rescission give some guidance here, in a general sense.<sup>154</sup>

The Full Court then ordered Pont to pay to ASXO a fee for the Signal calculated in accordance with the rates for its supply which had applied between the parties immediately prior to the execution of the contracts under earlier contracts, together with other unpaid moneys, with interest. Further, ASXO was ordered to repay to Pont moneys paid by it under the contracts (with interest) which could be set off against moneys payable to it by Pont. The Full Federal Court did note that:

After the conclusion of this litigation, it is to be expected that the parties will enter into fresh contractual arrangements regulating their future relationship, and when this has been done, the provisions for the rate of payment specified in the orders . . . will come to an end, as the terms of the orders themselves will contemplate.<sup>155</sup>

The complicated orders made in this case serve to demonstrate that the imposition of terms under s 87(2)(b) which are unacceptable to one or more of

<sup>153</sup> (1991) 27 FCR 492, 503; (1991) ATPR 41-109, 52,666.

<sup>154</sup> *Id* 503; 52-667.

<sup>155</sup> *Id* 505; 52-668.

the parties is likely to generate further litigation. It is particularly in relation to paragraph (b) that the following remarks are appropriate:

Courts have ever been reluctant to accept such wide powers to interfere with consensual arrangements. Granted the power to make declarations declaring contracts void for uncertainty, illegality and so on has existed, but the Court's order there can be seen as flowing inevitably from the substantive law, and not involving any interventionist role.<sup>156</sup>

Justice French in *Western Mail Securities Pty Ltd v Forrest Plaza Developments Pty Ltd*<sup>157</sup> raised the issue, which his Honour described as a 'real question', of whether s 87 confers on the court the power to make an interim variation of a contract (in that case to extend prescribed time limits). His Honour expressed 'serious reservations about the propriety of effecting, as it were, a holding position' by varying the terms of the contract in this manner.

## 6 SECTION 87(2)(ba) — REFUSING TO ENFORCE ANY OR ALL OF THE PROVISIONS OF A CONTRACT

Paragraph (ba) was inserted into the Act in 1986. It provides that an order may be made refusing to enforce any or all of the provisions of 'such a contract'. The use of the word 'such' is most confusing and is open to different interpretations. On the one hand 'such' might suggest that the power to refuse to enforce a contract relates only to contracts declared void in whole or in part under s 87(2)(a). On the other hand, the fact that the paragraph is numbered (ba) might suggest that the power applies only to contracts varied in whole or in part under paragraph (b). However, as paragraph (b) itself refers to 'such' contracts in paragraph (a) there may not be much of a difference between these two interpretations. If this power is restricted to contracts declared void or varied it is difficult to see the practical usefulness of the paragraph at all.

It has been suggested that an order made under this paragraph has the same effect as an order under s 87(2)(a) declaring a contract void.<sup>158</sup> However, depending on the interpretation given to the word 'such' in this paragraph, it might be necessary for the court to vary a contract before this power can be exercised. It is also possible that an order under this section has the same effect as an injunction restraining the exercise of a contract.

To date there have been no reported cases in which a court has expressly utilised the power conferred by s 87(2)(ba). It may be that injunctions which

<sup>156</sup> CCH, *Australian Trade Practices Reporter*, Vol 2, para 18-955.

<sup>157</sup> (1987) ATPR 40-765, 48,283.

<sup>158</sup> D Harland, 'The Statutory Prohibition of Misleading or Deceptive Conduct in Australia and its Impact on the Law of Contract' (1995) 111 LQR 100, 124-5.



have been granted under ss 87(1) or 87(1A) have been made under this paragraph.<sup>159</sup>

## 7 SECTION 87(2)(c) — DIRECTING THE REFUND OF MONEY OR RETURN OF PROPERTY

Paragraphs (c) and (d) of s 87(2) were described by Brennan J in *Trade Practices Commission v Milreis Pty Ltd* in the following terms:

These paragraphs create new remedies which may arise out of the making of a contract or the giving of effect to a contract, but they are remedies which do not depend upon the validity or voidness of the contract in question.<sup>160</sup>

The power of the court to order the refund of money or the return of property has been used primarily to order vendors of businesses, goods or land to return deposits or instalments of purchase price to purchasers.<sup>161</sup> More exceptionally, in *Trade Practices Commission v Glen Ion*<sup>162</sup> consent orders were made which included an order under paragraph (c) for the refund of money to consumers. The reason why an order for the refund of money is not made more often under this section is that a similar result is achieved by an order for damages (under either ss 82(1) or 87(2)(d)) or as part of a common law order for rescission of a contract.

The relationship between paragraph (c) and the general law remedy of rescission was discussed in *Karmot Auto Spares Pty Ltd v Dominelli Ford (Hurstville) Pty Ltd*.<sup>163</sup> In that case it was found that a purchaser would not have purchased an 'after market' automotive spare parts business and stock in trade (the largest component of that stock being water pumps) without the misleading or deceptive conduct of the vendor (including a failure to disclose that a considerable percentage of the water pumps were defective and unsaleable). Although Heerey J did not declare the purchase agreement to be void he did order the vendor to refund the purchase price paid by the purchaser (after deducting the amount for spare parts sold by the purchaser) and the purchaser to return (and the vendor to accept) the remaining water pumps in its possession. His Honour also ordered the purchase agreement to be varied to enable the vendor to deal with the pumps returned and to use the trading name of the business.

<sup>159</sup> For example in *Morenita Pty Ltd v AGC (Advances) Ltd* (1986) ATPR 40-689 an interim injunction restraining the appointment of a receiver to a chargor's assets was apparently issued under s 87. If the argument that the orders which can be made under ss 87 and 87(1A) are exhaustively defined in s 87(2) is accepted, then the issue of such an injunction may be justified under s 87(2)(ba).

<sup>160</sup> (1977) 29 FLR 144, 163; ATPR 40-028, 17,379.

<sup>161</sup> For example *Myers v Transpacific Pastoral Co Pty Ltd* (1986) ATPR 40-673; *Byers v Dorotea Pty Ltd* (1986) 69 ALR 715; (1987) ATPR 40-760; *Platz v Creative's Landscape Design Centre Pty Ltd* (1989) ATPR 40-947.

<sup>162</sup> (1975) ATPR 40-008.

<sup>163</sup> (1992) 35 FCR 560; ATPR 41-175.

In the course of his judgment Heerey J made the following comments about s 87(2)(c):

This power [under s 87(2)(c)] is not conditioned on a finding that the contract under which the money was paid has been rescinded, nor is it in terms necessarily excluded where there has been conduct which might amount at common law to an affirmation of that contract. . . . I approach this issue bearing in mind that provisions in the Act should not be read down to conform with former common law or equitable requirements.<sup>164</sup>

The vendor argued that an order should not be made for the return of the water pumps because they were defective. In rejecting this argument his Honour commented:

I do not think that the language of s 87 prevents an order for mutual return of purchase price and goods sold unless it can be shown that all the goods were defective in a way relevant to the misleading and deceptive conduct.<sup>165</sup>

An appeal by the vendor to the Full Federal Court was dismissed, except in a minor respect (ordering the purchaser to return other spare parts which had passed on the sale and which accounted for a substantial part of the purchase price), the Full Court not commenting on s 87(2)(c).<sup>166</sup>

Although not expressly stated, it is implicit in s 87(2)(c) that an order for the refund of money or the return of property should only be made against the party in receipt of the money or in possession of the property. This point was made in *Haydon v Jackson*<sup>167</sup> where a contract for the purchase of a leasehold interest in a motel was found to have been induced by conduct contravening s 52. At first instance orders were made discharging a second bill of sale and a mortgage over other property owned by the purchaser to secure the balance of the purchase price. It was also found that the rent payable under the lease was excessive and should be reduced. All three respondents to the action (namely, the vendor, a corporate estate agency and the estate agent representing the agency) were ordered to repay the amount of rent overpaid.

The corporate estate agency and the estate agent appealed to the Full Federal Court on various grounds, one of which related to the relief ordered. The Full Court allowed the appeal in part by providing that the order for the repayment of the overpaid rent should have been directed only to the vendor and not to the other two respondents who had not received any part of that rent.

As Fisher J explained:

Having made the appropriate order for variation it is proper to order the person who received the earlier overpayments to return the same . . . .

Although on the face of it there is a discretion in the provision as to who is to be ordered to refund, there is little doubt that that person should be the person who has received the money which is ordered to be refunded. Any

<sup>164</sup> Id 572-3; 40,393.

<sup>165</sup> Id 573; 40, 394.

<sup>166</sup> (1992) 38 FCR 471; ATPR 41-198.

<sup>167</sup> (1988) ATPR 40-845.

other person would be more appropriately ordered to make payment in accordance with subsec (d) which follows.<sup>168</sup>

It follows that in each case it will be necessary to determine to whom the money ordered to be refunded has been paid. In *Deane v Brian Hickey Invention Research Pty Ltd*<sup>169</sup> Burchett J made orders declaring contracts for the purchase of a roof restoration business (and guarantees in respect of the amounts payable under those contracts) to be void ab initio. His Honour also ordered the vendor and its director to refund the total amount paid under the void contracts, with interest, together with the amount of the excess paid by the purchaser to the vendor for resin which the purchaser could have purchased from a leading supplier had the applicant not been misled into purchasing it from the respondent. As his Honour noted:

In pursuance of sec 87(1A) and 2(c), it is appropriate to order Mr Hickey's company and Mr Hickey (in this case, an order against the company alone might well be fruitless), and I think the two subsections are wide enough to allow me to order both the company and Mr Hickey, as a party involved to make the required payments . . . to refund . . . the total of the amounts which it has paid under the deeds declared void . . . together with the excess of the amount paid by DHC . . . for drums of resin over the amount for which the resin could have been purchased . . . if DHC had not been misled.<sup>170</sup>

Relief under s 87(2)(c) has also been refused on the basis that some other form of relief, such as injunctive relief, is more appropriate than an order for the return of property.<sup>171</sup>

## 8 SECTION 87(2)(d) — DIRECTING THE PAYMENT OF THE AMOUNT OF LOSS OR DAMAGE

The principal remedy sought by most applicants for a breach of Parts IV or V of the Act is damages. The right to claim damages for such breaches is provided in s 82(1) which is in the following terms:

A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

It must be remembered, however, that a court may make an order under s 87(1) whether or not damages are awarded under s 82(1). It is clear also (under s 87(1C)) that the court may make an order under s 87(1A) whether or

<sup>168</sup> Id 49,101. Justice Lockhart agreed with Fisher J.

<sup>169</sup> (1988) ATPR 40-889.

<sup>170</sup> Id 49-611.

<sup>171</sup> *Hoover (Australia) Pty Ltd v Email Ltd* (1991) 104 ALR 369; ATPR 41-149.

not proceedings for damages are instituted under s 82(1).<sup>172</sup> Section 82(1) has come under intense scrutiny by judges and commentators as the principles relevant to the assessment of damages have been developed.<sup>173</sup>

For many years it was assumed that the damages available under s 87(2)(d) were assessed on the same basis as those available under s 82(1). Although differences between s 87(2)(d) and s 82(1) damages have recently begun to emerge many of the principles relevant to s 82(1) damages are equally applicable to s 87(2)(d) damages. Although it is not intended in this article to examine in detail all the principles upon which damages are awarded under s 82(1) the principles common to both sections may be stated briefly.

In the first place, although neither s 82 nor s 87(2)(d) provides any standard for the recovery of damages, the High Court in *Gates v Mutual Life Assurance Society Ltd*<sup>174</sup> affirmed that the tortious measure of damages is, as a general rule, the appropriate standard for the assessment of damages recoverable under s 82(1), especially in those cases involving misleading or deceptive conduct and the making of false statements. Damages in tort are designed to restore applicants to the position they would have been in had the contravening conduct not been committed (reliance loss). This may be compared with the contractual measure of damages which attempts to place applicants in the position they would have been had the contract been performed (reliance loss and expectation loss).

Although the tort standard has been applied in numerous cases in assessing damages under both ss 82 and 87(2)(d) there has been an increasing demand for an independent statutory test for this purpose.<sup>175</sup>

The High Court in *Wardley Australia Ltd v The State of Western Australia*<sup>176</sup> appears to have recognised that the tortious standard does not provide the absolute yardstick for the assessment of damages under the Act by

<sup>172</sup> *Demagogue Pty Ltd v Ramensky* (1993) 39 FCR 31, 32; ATPR 41-203, 40,845 (Black CJ). The nature of a right to claim damages under ss 82 or 87 was described recently as 'a bare right of action which cannot be assigned . . .' (*Park v Allied Mortgage Corporation Ltd* (1993) ATPR (Digest) 46-105, 53,469).

<sup>173</sup> See for example *Gates v Mutual Life Assurance Society Ltd* (1986) 160 CLR 1; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1987) ATPR 40-782 (Federal Court); (1988) 79 ALR 83; ATPR 40-850 (Full Federal Court); *Munchies Management Pty Ltd v Belperio* (1989) 84 ALR 700; ATPR 40-926; *Sellars v Adelaide Petroleum NL* (1994) 120 ALR 16; ATPR 41-301; (1994) 68 ALJR 313; Aitken, "'Loss or Damage" under Section 82 of the Trade Practices Act' (1989) 1 *Bond LR* 107; C E K Hampson, 'Blocked Contractual Arteries? Try a Section 52 By-pass' (1993) TPLJ 22; CCH, *The Laws of Australia, Remedies*, Vol 35, ch 2; Price, 'Opening Gates: The Measure of Damages under the Trade Practices Act' (1994) 1 CCLJ 257.

<sup>174</sup> (1986) 160 CLR 1, 7 (Gibbs CJ), 14 (Mason, Wilson and Dawson JJ).

<sup>175</sup> See for example *Frith v Gold Coast Mineral Springs Pty Ltd* (1983) 65 FLR 213, 232; ATPR 40-339, 44,086; *Elna Australia Pty Ltd v International Computers (Australia) Pty Ltd* (1987) 16 FCR 410, 419; ATPR 40-795, 48,678, 48,679; *Myers v Transpacific Pastoral Co Pty Ltd* (1986) ATPR 40-673, 47,423-4; *Holt v Biroka Pty Ltd* (1988) 13 NSWLR 629, 637; *Zoneff v Elcom Credit Union Ltd* (1990) 94 ALR 445; ATPR 41-009 (Federal Court); (1990) ATPR 41-058 (Full Federal Court); *McMahon v Pomeray Pty Ltd* (1991) ATPR 41-125, 52,858; *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526, 528-9; ATPR 41-186, 40,545; French, 'A Lawyer's Guide to Misleading or Deceptive Conduct' (1989) 63 ALJ 250, 267; Price, 'Opening Gates: The Measure of Damages under the Trade Practices Act' (1994) 1 CCLJ 257.

<sup>176</sup> (1992) 175 CLR 514, 526 (Mason CJ, Dawson, Gaudron and McHugh JJ).

describing it as providing an 'appropriate guide' to damages recoverable under s 82(1) but noting that 'it will always be necessary to look to the provisions of the Act with a view to ascertaining the existence of any relevant legislative intention'. The Australian Law Reform Commission has recently recommended that in assessing damages under s 82(1) a court should do 'what is reasonable and appropriate in the circumstances' and should not be constrained by the common law principles of the law of contracts and torts.<sup>177</sup>

Under the tort measure of damages a plaintiff is entitled to damages for immediate and consequential losses provided they represent the 'actual damage directly flowing' from the contravening conduct.<sup>178</sup> Justice Toohey in *James v Australia and New Zealand Banking Group Ltd*<sup>179</sup> noted that suggestions have been made that damages may be awarded under s 82(1) for consequential loss or damage which either is reasonably foreseeable<sup>180</sup> or which is sufficiently direct even though not foreseeable.<sup>181</sup> However the High Court has left open the question whether foreseeability applies to a claim for consequential damages under s 82(1).<sup>182</sup>

Damages for a lost opportunity may be compensable in tort if the court is able to assess the prospects of success of that opportunity had it been pursued<sup>183</sup> provided the applicant can establish that the opportunity offers 'a substantial, and not merely speculative, prospect of acquiring a benefit'.<sup>184</sup>

Secondly, like s 82(1), damages under s 87(2)(d) are recoverable for loss or damage caused 'by' the contravening conduct of the respondent. To recover damages under either section it is not necessary for the contravention to be the immediate or only cause of the loss or damage suffered provided it contributes to the loss.<sup>185</sup>

Thirdly, under both sections an applicant must take reasonable steps to mitigate the loss or damage suffered,<sup>186</sup> although an applicant is not required to elect to affirm or rescind a contract immediately upon learning of the con-

<sup>177</sup> Australian Law Reform Commission report on *Compliance with the Trade Practices Act 1974*, tabled in federal Parliament on 29 June 1994, para 7.21

<sup>178</sup> *Wardley Australia Ltd v The State of Western Australia* (1992) 175 CLR 514, 526.

<sup>179</sup> (1986) ATPR (Digest) 46-005, 53,037.

<sup>180</sup> *Steiner v Magic Carpet Tours Pty Ltd* (1984) 64 ALR 347; ATPR 40-490.

<sup>181</sup> *Frith v Gold Coast Mineral Springs Pty Ltd* (1983) 65 FLR 213, 233; ATPR 40-339, 44, 086, 44,087.

<sup>182</sup> *Gould v Vaggelas* (1985) 157 CLR 215, 224 (Gibbs CJ), 266 (Dawson J); *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 7 (Gibbs CJ), 12 (Mason, Wilson and Dawson JJ); *Wardley Australia Ltd v The State of Western Australia* (1992) 175 CLR 514, 526 (Mason CJ, Dawson, Gaudron and McHugh JJ). See also the statement by Wilcox J in the Full Federal Court in *Netaf Pty Ltd v Bikane Pty Ltd* (1990) 26 FCR 305, 313; ATPR 41-011, 51,232-3.

<sup>183</sup> *Sellars v Adelaide Petroleum NL* (1994) 120 ALR 16, 30; ATPR 41-301, 42,004 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638, 639-40 (Brennan and Dawson JJ), 642-3 (Deane, Gaudron and McHugh JJ).

<sup>184</sup> *Sellars v Adelaide Petroleum NL* (1994) 120 ALR 16, 37; ATPR 41-310, 42,009 (Brennan J).

<sup>185</sup> *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83, 96; ATPR 40-850, 49,155 (Lockhart J).

<sup>186</sup> *Brown v Jam Factory Pty Ltd* (1981) 53 FLR 340, 351; ATPR 40-213, 42,929-30; *Munchies Management Pty Ltd v Belperio* (1989) 84 ALR 700, 713; ATPR 40-926, 50, 037.

travening conduct.<sup>187</sup> It follows that if a contract is affirmed an applicant may recover as damages subsequent trading losses reasonably incurred provided they can be proved to have been caused by the contravening conduct of the respondent, rather than by the applicant's own unreasonable conduct.<sup>188</sup>

Fourthly, neither s 82(1) nor s 87(2)(d) authorises the award of exemplary damages for the reasons given by French J in *Musca v Astle Corporation Pty Ltd*:

These are damages of a punitive, rather than compensatory, character. They are intended to punish a defendant for conduct showing a conscious and contumelious disregard for a plaintiff's rights and to deter him from committing like conduct again. . . .

Exemplary damages do not compensate for loss. They are therefore not recoverable under sec 82 of the Act. . . . Nor does it appear that the court can award such damages under sec 87, for the orders that may be made under that section are essentially compensatory in character.<sup>189</sup>

Fifthly, for a person 'involved in the contravention' to be held liable for damages under ss 82(1) or 87(2)(d) it must be established that the person intentionally participated in the contravention and therefore knew of the essential matters constituting the contravention.<sup>190</sup>

Sixthly, both ss 82(1) and 87(2)(d) suffer from the same deficiency, namely, the lack of power by a court to make an order for indemnity or contribution against one co-contravenor (or person involved in the contravention) in favour of another (or other) contravenor(s).<sup>191</sup> As French J noted in *Re La Rosa; Norgard v Rodpat Nominees Pty Ltd*:

In my opinion, there is no mechanism in s 87, nor in the Act generally which would enable the Court to make orders for contribution or indemnity against other contravenors of the Act of persons involved in the primary contravention.<sup>192</sup>

However in *Lee Gleeson Pty Ltd v Sterling Estates Pty Ltd*<sup>193</sup> Brownie J of the Supreme Court of New South Wales found the answer to this lack of authority in equitable principles. His Honour there held that a court administering both equity and common law may give a judgment against two or more defendants, declaring that satisfaction by one defendant will bring about an equitable assignment to that defendant of the plaintiff's rights against the other defendant(s). This possibility was also raised but left open by

<sup>187</sup> *Finucane v New South Wales Egg Corporation* (1988) 80 ALR 486, 519; ATPR 40-863, 49,346; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1989) 89 ALR 539, 549; ATPR 40-968, 50,579 (Burchett J).

<sup>188</sup> *Bateman v Slatyer* (1987) 71 ALR 553; ATPR 40-762; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1989) 89 ALR 539; ATPR 40-968.

<sup>189</sup> (1988) 80 ALR 251, 262; ATPR 40-855, 49,226-7. This dictum was approved by the Full Federal Court in *Munchies Management Pty Ltd v Belperio* (1989) 84 ALR 700, 713; ATPR 40-926, 50,038.

<sup>190</sup> *Yorke v Lucas* (1985) 158 CLR 661.

<sup>191</sup> Campbell QC, 'Contribution, Contributory Negligence and Section 52 of the Trade Practices Act' (1993) 67 ALJ 117; *Covcat Pty Ltd v Clark Equipment Australia Ltd* (1986) ATPR 40-717, 47,873.

<sup>192</sup> (1991) ATPR 41-139, 52,999.

<sup>193</sup> (1991) 23 NSWLR 571.

Lee J in *Trade Practices Commission v Manfal Pty Ltd (in liquidation)*.<sup>194</sup> Justice Sheppard in *Lezam Pty Ltd v Seabridge Australia Pty Ltd*<sup>195</sup> confirmed the courts' lack of authority to make an order for indemnity under s 87. His Honour did refer to the possibility of the equitable doctrine of contribution being used for this purpose but expressed the view that it would be 'difficult to justify the order in this way'. The Australian Law Reform Commission has recommended recently that the Act be amended to provide expressly that courts may make orders for contribution and indemnity and that contribution and indemnity may be claimed in the proceedings in which a plaintiff claims damages from the respondent.<sup>196</sup>

These, broadly speaking, are the principles applicable to both ss 82(1) and 87(2)(d). Although most of the commentaries and articles dealing with the question of damages under the Act concentrate almost exclusively on s 82(1), some differences between the sections have become apparent over the years. It is possible to identify the following distinctions between damages under ss 82(1) and 87(2)(d):

- 8.1 Under s 82 damages to compensate a person for loss or damage suffered are available as of right. By contrast, s 87(2)(d) confers upon a court a discretion to make an award of damages which it considers appropriate for the purposes set out in ss 87(1) and 87(1A). As Lockhart J noted in *Finucane v New South Wales Egg Corporation*:

[Section 82] requires the court to assess the quantum of loss, and makes no express provision for any discretionary element within that assessment. The court's limited powers under s 82 are to be contrasted with the discretion authorised by s 87.<sup>197</sup>

- 8.2 It has been said that concepts such as contributory negligence and remoteness have no application to s 82(1).<sup>198</sup>

By contrast, the reduction of an applicant's damages under s 87(2)(d) for contributory negligence remains a possibility. This issue was raised by Pincus J in *S & U Constructions Pty Ltd v Westworld Property Holdings Pty Ltd* who awarded a purchaser of land damages under s 87(2)(d) for part only of the loss it had suffered:

*Gates'* case has nothing to say about the possibility of divided responsibility for a loss . . . but under sec 87 it appears to me to be within the power of the Court, in an appropriate case, to award only part of the loss actually suffered, on the basis that it had two causes.<sup>199</sup>

The possibility of reducing damages under s 87 on the basis of contribu-

<sup>194</sup> (1992) 33 FCR 382; ATPR 41-160.

<sup>195</sup> (1992) 35 FCR 535, 553; ATPR 41-171, 40,355. Justice Hill agreed with Sheppard J.

<sup>196</sup> Australian Law Reform Commission report on *Compliance with the Trade Practices Act 1974*, tabled in federal Parliament on 29 June 1994, para 7.23.

<sup>197</sup> (1988) 80 ALR 486, 519; ATPR 40-863, 49,346.

<sup>198</sup> French, 'A Lawyer's Guide to Misleading or Deceptive Conduct' (1989) 63 ALJ 250, 264-5; CCH, *Laws of Australia*, Remedies, Vol 35, ch 2, para 9; Campbell QC, 'Contribution, Contributory Negligence and Section 52 of the Trade Practices Act — Part II' (1993) 67 ALJ 177, 187-90.

<sup>199</sup> (1988) ATPR 40-854, 49,216-17.

tory negligence has since been rejected by Hodgson J of the Supreme Court of New South Wales in *Tefbao Pty Ltd v Stannic Securities Pty Ltd*.<sup>200</sup> After referring to the above dictum in *S & U Constructions Pty Ltd* his Honour held:

Pincus J reached that result on the ground that s 87 . . . gave the court power, in an appropriate case, to award only part of the loss actually suffered. However, as pointed out by J C Campbell, QC in 67 ALJ at 188, this seems to involve a view that s 87 modifies the effect of s 82. Certainly, it seems that s 82 has been recognised as not importing any concept of contributory negligence: see *Henjo . . . , Pavich & Anor v Bobra Nominees Pty Ltd* (1988) ATPR (Digest) 46-039. As I understand it, in no case other than *S & U Constructions* has it been suggested that apportionment of responsibility and consequent reduction of damages can be applied to claims under s 82; and with respect to Pincus J, I do not think s 87 does disclose an intention to take away or qualify the right to damages given by s 82. The same would apply to the claim brought under the Fair Trading Act.<sup>201</sup>

This appears to be an unduly restrictive interpretation of s 87 and one which ignores the independent nature of the two sections. There seems to be no valid reason for qualifying the clear wording of s 87 in an attempt to uphold the integrity of s 82.

As a matter of principle, the approach adopted by Richardson J in the New Zealand Court of Appeal in *Goldsbro v Walker*,<sup>202</sup> in discussing the equivalent (although admittedly differently worded provision) in the *Fair Trading Act* 1986 (NZ), appears to apply equally to the interpretation of s 87(2)(d):

The Fair Trading Act is important economic and social legislation. In exercising the powers under the statute it is a matter of doing justice to the parties in the circumstances of the particular case and in terms of the policy of the Act. In many cases there may be no reason why the plaintiff should not obtain full recovery in respect of his or her loss but in others the culpability of third parties, the gross carelessness of the consumer, the minor role of the contravenor . . . may lead to the conclusion that the justice of the case does not require that the full loss sustained by the consumer be visited on the contravenor.

Considerations of that kind suggest that Parliament cannot have intended that the Court should adopt an all or nothing approach . . . by either directing that the full amount of the loss be paid by the infringer or by declining to make any order at all in respect of that loss. Rather I would read the power to order payment of the full amount of the loss or damage as encompassing the power to order payment of part of the amount.

However, in the end, even if damages under s 87(2)(d) are able to be reduced to reflect an applicant's contributory negligence, the impact of this distinction will be negated for all practical purposes if an applicant,

<sup>200</sup> (1993) 118 ALR 565; (1994) ATPR (Digest) 46-114.

<sup>201</sup> *Id* 575-6; 53-533.

<sup>202</sup> [1993] 1 NZLR 394, 404.



by making a claim for damages under s 82, is able to preclude a court, of its own volition, from awarding damages under s 87(2)(d). Although s 87(1) expressly provides that a court may make orders under that section 'whether or not it . . . makes an order under section . . . 82' the question remains whether relief under s 87 is available to an applicant who does not seek that relief but confines its application to an order under s 82. Justice Northrop in *Mister Figgins Pty Ltd v Centrepont Freeholds Pty Ltd*<sup>203</sup> rejected the applicant's suggestion that the form of order which could be made was limited to the form of relief claimed by the applicant. However, in that case the applicant had claimed, in addition to damages under s 82, other orders under s 87(2). The question whether a court may make orders under s 87(2) where damages under s 82 only are claimed remains open. To avoid arguments on this issue some legislative amendment is required.

- 8.3 Damages for unconscionable conduct under Part IVA are not available under s 82(1) whereas damages for such conduct may be claimed under ss 87(1A) and 87(2)(d) (although such a claim must be commenced within two years after the date on which the cause of action accrued under s 87(1CA)(a), rather than the three year limitation period for conduct contravening Part V under s 87(1CA)(b)).

The Australian Law Reform Commission has recommended that s 82 be amended to allow recovery of damages under that section for a contravention of a provision of Part IVA.<sup>204</sup>

- 8.4 Section 82(1) damages may be awarded for loss 'suffered' by the conduct of another person; damages may be awarded under s 87(2)(d) if either they will compensate an applicant for loss or damage suffered by contravening conduct or *will prevent or reduce* that loss or damage. Damages are not available under s 87(2)(d) if neither of these purposes will be achieved.

The distinction between awarding damages under s 82(1) as compensation for actual loss suffered, and the likelihood of preventing or reducing potential or likely damage under s 87(2)(d) was recognised by the High Court in *State of Western Australia v Wardley*<sup>205</sup> and *Sellars v Adelaide Petroleum NL*<sup>206</sup> and by the Full Federal Court in *Demagogue Pty Ltd v Ramensky*.<sup>207</sup> In the last mentioned case Gummow J noted:

Whilst s 82 is concerned with the recovery of an *amount* representing the loss or damage, s 87 is concerned with compensation, whether in whole or in part, for loss or damage and with the reduction of loss and

<sup>203</sup> (1981) 36 ALR 23, 56; ATPR 40-226, 43,065.

<sup>204</sup> Australian Law Reform Commission report on *Compliance with the Trade Practices Act 1974*, tabled in federal Parliament on 29 June 1994, para 7.28.

<sup>205</sup> (1992) 175 CLR 514, 526 (Mason CJ, Dawson, Gaudron and McHugh JJ), 543 (Deane J), 550 (Toohey J).

<sup>206</sup> (1994) 120 ALR 16, 25; ATPR 41-301, 42,000 (Mason CJ, Dawson, Toohey and Gaudron JJ).

<sup>207</sup> (1992) 39 FCR 31; (1993) ATPR 41-203.

damage, . . . and with the prevention of loss or damage which is likely to be suffered . . . .

One significant distinction between ss 82 and 87 is the *quia timet* operation of s 87.<sup>208</sup>

- 8.5 The 'loss or damage' which an applicant must suffer before a remedial order can be made under ss 87(1) or 87(1A) is not necessarily the same 'loss or damage' for which an award of damage is made under s 82(1).<sup>209</sup> However, as s 87(2)(d), like s 82(1), refers to 'the amount of the loss or damage' it is likely that in determining the amount of damages to be awarded under s 87(2)(d) the phrase will be interpreted in the same way as it is under s 82(1).

## 9 SECTION 87(2)(e) — SUPPLYING SERVICES

There have been very few cases in which this power has been used. One reason for this appears to be that most of the cases instituted under s 87 have involved contracts for the purchase of land or businesses and orders for the supply of services have not been appropriate. Another reason may be that an order made under this section is tantamount to an order for specific performance of a positive obligation which courts are always reluctant to make.

Justice Pincus in *Tompkin v Nossida (No 1) Pty Ltd*<sup>210</sup> acknowledged the power of the court to avoid a contract for the sale of a new BMW motor car in mint condition which was not delivered in that condition (although the imperfections were not of a serious nature). However on the facts of the case, and particularly because the purchaser had driven the car for 2000 km without returning it (believing that the car's condition would be corrected by the vendor at a 20 000 km service), his Honour refused to make such an order. He did however accept the vendor's undertaking to repair the vehicle and to supply a suitable replacement vehicle during the time of such repairs.

## 10 SECTION 87(2)(g) — EXECUTING AN INSTRUMENT WHICH VARIES, TERMINATES OR OTHERWISE AFFECTS ANOTHER INSTRUMENT CREATING OR TRANSFERRING AN INTEREST IN LAND

Although there have been many cases in which leases, mortgages or contracts for the sale of land have been declared void under s 87(2)(a) there have been very few reported cases in which this power has been expressly applied. In *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd*<sup>211</sup> an indemnity was granted under this paragraph as part of an order varying a lease. It should

<sup>208</sup> Id 43; 40-853.

<sup>209</sup> This issue is considered in 3.6 supra.

<sup>210</sup> (1986) ATPR 40-662.

<sup>211</sup> (1987) 72 ALR 601; ATPR 40-822.

however be noted that this paragraph does not confer on a court the power to order an indemnity between respondents.

It seems that this section is often overlooked by courts in making orders to avoid dealings involving the transfer or creation of interests in land which may or may not be registered. The procedural problems arising from such orders are not to be discussed in the cases.

## 11 CONCLUSION

It should be apparent from the above analysis that the remedies available under s 87 for loss or damage caused by contravening conduct are far more extensive and far-reaching than common law remedies. A court acting under s 87 is not restricted by 'preordained hierarchies in remedies and preordained links between particular doctrines and remedies'<sup>212</sup> under which, for example, damages are not available in equity or for innocent misrepresentation or unilateral mistake. Its only task, after determining a breach of the Act, is to determine whether the prescribed relief is appropriate for the purposes set out in s 87. Of course, since the introduction of the cross vesting legislation in 1987<sup>213</sup> the same judges are often required to apply common law rules in some cases and statutory rules in others. When this happens it is suggested that judges tend to apply 'similar underlying values' in each type of case.<sup>214</sup> This necessarily leads to the prospect of the principles governing the wide remedial powers conferred by s 87 influencing the application of common law remedies.<sup>215</sup> For this reason contract lawyers can no longer afford to overlook the interpretation and application of s 87.

<sup>212</sup> P Finn, 'Statutes and the Common Law' (1992) 22 UWALR 7, 29.

<sup>213</sup> See ss 86 and 86A of the Act.

<sup>214</sup> CCH, *The Laws of Australia*, Vol 35, Unfair Dealings, p xi.

<sup>215</sup> The ways in which the common law might deal with novel statutory doctrines have been considered by various commentators: R Pound, 'Common Law and Legislation' (1908) 21 *Harv L Rev* 283; Atiyah, 'Common Law and Statute' (1985) 48 *MLR* 1; P Finn, 'Statutes and the Common Law' (1992) 22 *UWALR* 7. Conversely, the possibility also exists for common law concepts such as remoteness of damages and contributory negligence to influence the interpretation of statutory provisions such as ss 82(1) and 87(2)(d).