CASE NOTE

*NEW SOUTH WALES LOTTERIES CORPORATION v KUZMANOVSKI**

WHEN THE LAW IS A LOTTERY

KATY BARNETT**

I INTRODUCTION

The Full Federal Court recently considered the nature and terms of an instant lottery ticket. While on the face of the ticket, the terms suggested that the consumers had won a substantial prize, the Full Federal Court decided that the consumers were bound by qualifying terms contained in an Act and rules which required the ticket to meet a verification procedure before a prize could be paid, and that the licensed corporation selling the ticket had not breached its contract by failing to pay a prize. Nonetheless, the Court considered that the incorporation of such a term constituted misleading and deceptive conduct such that an ordinary consumer could not have been expected to realise that the rules of the ticket were qualified by a verification procedure. The decision is one which strikes the layperson as intuitively unjust on its face.[1]

First, it is suggested that the Full Federal Court did not adequately consider the requirement of giving adequate and timely notice of terms to be incorporated into a contract, and instead simply emphasised the special statutory nature of lottery contracts. Moreover, the conclusion of the Court that the statutory terms with regard to validation were automatically incorporated is inconsistent with its conclusions on the misleading or deceptive nature of the terms. The Court concluded that the terms of the ticket were misleading and deceptive because an ordinary person would not have construed the 'bland reference'[2] to the statute on the rear of the ticket as qualifying the rules of the game, but surely it then follows from this that notice was not adequate to incorporate the statutory terms in the first place? If the terms were incorporated because of the special nature of gambling contracts, it is suggested that there should have been a greater consideration of the implications of this for consumers. The Full Federal Court did not consider that the *Public Lotteries Act 1996* (NSW) ('*Public Lotteries Act*') itself requires licensees or agents to give notice of terms to consumers, nor did it adequately ensure that the policy of the *Trade Practices Act 1974* (Cth) ('*Trade Practices Act*') was reflected in the regime imposed by the *Public Lotteries Act.*

* (2011) 195 FCR 234.

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1 See eg, Paul Bibby, 'Instant Karma Catches Up with Lottery Couple', *The Age* (online), 25 August 2011 <http://www.theage.com.au/nsw/instant-karma-catches-up-with-lottery-couple-20110824-1jaby.html>.

2 (2011) 195 FCR 234, 252 [111].

Consequently, the defendant in this case did not give adequate notice of the terms to be incorporated and the contract was breached, which should have given rise to expectation damages of $100 000, as the trial judge held.

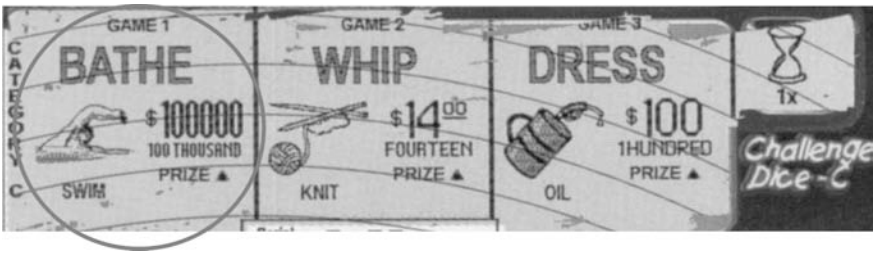
Secondly, it is suggested that the remedy awarded in this case was not adequate. The Full Federal Court merely awarded the Kuzmanovskis $20 000 for distress and disappointment arising from the misleading and deceptive conduct. However, contractual damages reflecting the purchasers' expectation damages would then have been available. It is suggested that this would have been the more appropriate remedy in the circumstances.

As the decision stands, it allows purveyors of instant lottery tickets to contract with members of the public according to one set of rules visible on the tickets, but to then eschew any liability to pay a prize because of invisible statutory verification code procedures. This is not in accordance with the stated aims of the *Public Lotteries Act*, particularly s 3(a), which states that an aim of the Act is 'to make provision for the proper conduct of public lotteries in the public interest and to minimise any harm associated with public lotteries'. Regard should also be had to the aims of the *Trade Practices Act* and the need to deter corporations in the position of the lottery ticket licensee from engaging in conduct which misleads consumers. Accordingly, it will be suggested at the end of this case note that this was a case where damages for distress should have been awarded *as well as* expectation damages.

II FACTS

A *The Purchase of the Tickets*

In July 2007, Mrs Kuzmanovski purchased two $5 instant lottery tickets (colloquially known as 'scratchies') for her husband for his birthday. The tickets were themed on the board game named 'Pictionary'. The premise of the ticket was that the purchaser would scratch off the plastic covering over each of the 15 panels on the ticket. Once the covering had been scratched off, each panel revealed a picture, a word and a sum of money.



When Mr Kuzmanovski, the first plaintiff, scratched one of the tickets, he was delighted to see that one panel contained the word 'BATHE', a picture of a man swimming and $100 000. The Kuzmanovskis immediately began to celebrate their win. Mr Kuzmanovski contemplated returning to Macedonia to visit his ailing grandmother.

However, when Mr Kuzmanovski took the ticket to his local newsagency the next day, the newsagent scanned the ticket, and the scanner produced the message that it was 'not a winning ticket'.[3] The Kuzmanovskis contacted the New South Wales Lotteries Corporation ('NSW Lotteries'), the corporation licensed to sell the ticket, to protest the decision. NSW Lotteries informed them that the picture and the word did not match, and that the ticket was not a winning ticket. The matching picture for the word 'BATHE' was supposed to be a bathtub,[4] and the matching word for the picture of the swimming man was supposed to be 'SWIM'. The small caption below the picture was intended to match the word on winning tickets, which was not the case with the Kuzmanovskis' ticket.

B *The Terms of the Ticket*

The terms written on the back of the ticket were as follows:

> **PLAY INSTRUCTIONS:**
>
> Scratch Category A, Game 1 to Game 3 to reveal a word, a picture and a PRIZE in each Game.
>
> *If the word shown in any one Game matches the picture shown in the same Game, you win the prize shown for that Game.*
>
> Repeat this process for Categories B, C, D and E. …
>
> **THIS TICKET IS GOVERNED BY THE PUBLIC LOTTERIES ACT 1996, THE REGULATIONS AND THE RULES.**
>
> 1. Prizes (maximum $1,000) are payable at any NSW Lotteries Agent. 2. Other prizes are claimable at any NSW Lotteries Agent or NSW Lotteries, 2 Figtree Drive, Homebush Bay, NSW 2127 by completing the details below (in pen in one name only). 3. Further details as to the conduct of Instant Lotteries and Promotional Instant Lotteries may be obtained by reading the Instant Lotteries Rules available at any NSW Lotteries Agent or www.nswlotteries.com.au. 4. The serial number on the front of this ticket is not part of the game. 5. You could win up to five (5) times on this ticket. Not all tickets are winning tickets. 6. The maximum prize of $100,000 may be available once on this ticket.[5]

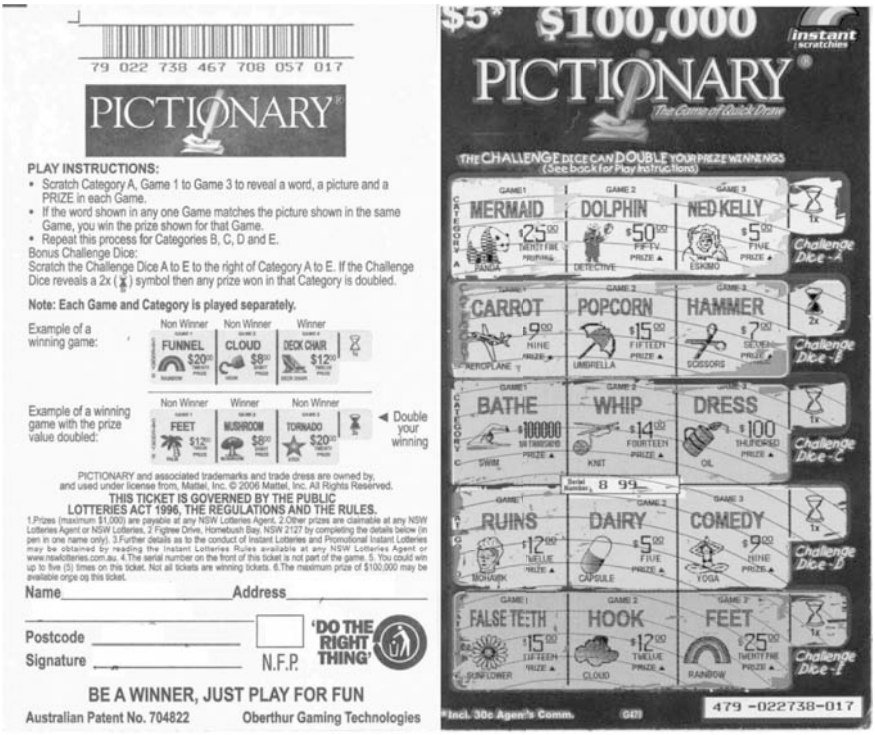
There were two main issues for determination: whether NSW Lotteries had breached the contract entered into when the Kuzmanovskis purchased the ticket, and whether NSW Lotteries was liable for misleading and deceptive conduct.

In order to determine the first question, it was necessary to establish *what* the terms of the contract were. If the terms of the contract were solely those displayed on the back of the ticket, then the Kuzmanovskis could argue that they

3 (2011) 195 FCR 234, 237 [8].

4 This is surely not an apposite match, given that one is a noun and the other a verb.

5 *Kuzmanovski v New South Wales Lotteries Corporation* (2010) 270 ALR 65, 68 [6] (emphasis added).



had fulfilled the second 'Play Instruction' on the back of the ticket, as the word shown in the Game matched the picture shown in the same Game, and they were then entitled to the $100 000 prize shown for that Game. As will be explained in greater detail, NSW Lotteries sought to argue that the full terms of the ticket were not included on the back of the ticket, and that the contract should also be read as including the relevant provisions contained in the *Public Lotteries Act*, the *Public Lotteries Regulation 2007* (NSW) (*'Public Lotteries Regulation*') and the terms of the Instant Lottery Game Rules. The combined effect of these provisions and rules was that the award of a prize was determined by the verification code matching certain computerised records, not by whether the picture matched the word (contrary to the terms visible on the rear of the ticket).

The second question was whether the ticket was misleading and deceptive, as the terms visible to consumers on the rear of the ticket suggested that winning depended on matching picture and word, but in fact the incorporated statutory rules were quite different in their terms, and a valid winning ticket depended not upon establishing the conditions stated on the rear of the ticket, but upon demonstrating the correct verification code. In the event that the ticket was misleading and deceptive, the Kuzmanovskis sought to obtain damages for distress resulting from the misleading nature of the ticket.

C *The Statute and the Rules*

The relevant sections of the *Public Lotteries Act* governing the instant lottery ticket were contained in div 3 of pt 6 of the Act. Of particular relevance were ss 49, 50 and 51.

Section 49 provided that the Act had effect despite any other Act, law or contract:

> (1) This Division applies to all instant lotteries promoted or conducted before or after the commencement of this Division, whether under the *New South Wales Lotteries Act 1990* or under this Act.
>
> (2) This Division has effect despite any other Act or law or any agreement.

Section 50 provided that verification codes could be used to determine whether a ticket was a valid ticket and also whether a ticket had won a prize:

> (1) A licensee may record on a ticket in an instant lottery a verification code by which the licensee can determine after the sale of the ticket whether it is a valid ticket and also whether it has won a prize.
>
> (2) A licensee may implement other tests in respect of instant lotteries for determining whether a ticket is a valid ticket and also whether it has won a prize.
>
> (3) Those verification codes or other tests have the following purposes:
>
> (a) to prevent forgery or fraudulent alteration of tickets,
>
> (b) to provide a conclusive means of determining prizewinning tickets in accordance with the total amount allocated for prizes in that lottery.
>
> (4) A prize is not payable in respect of a ticket in an instant lottery if the ticket does not satisfy any such verification code or other test.
>
> (5) This section has effect even though the ticket may indicate that a prize has been won.
>
> (6) The regulations may make additional provisions for or with respect to the payment of prizes in instant lotteries.

Section 51 clarified the rules where a prize was won by matching three numbers, or by matching three identical numbers:

> (1) In an instant lottery, a statement that a prize is won by matching 3 numbers or by matching 3 identical numbers (or a statement to the same effect) means, and is taken always to have meant, that a prize is won if the same number appears 3 times. For example:
>
> | | | | | | |
> |---|---|---|---|---|---|
> | 7 | 1 | | 7 | 1 | |
> | 3 | 7 | wins a prize | 3 | 7 | does not win a prize |
> | 4 | 7 | | 3 | 1 | |
>
> (2) In an instant lottery, a caption to a number (for example, the word 'one' beneath the number '1') forms part of the number and does not constitute a separate number for the purposes of counting the number of numbers.

> (3) This section applies to a statement on a ticket in the instant lottery or to a statement publicly advertised or used in connection with the instant lottery.

NSW Lotteries argued that, pursuant to s 49(2) of the Act, the provisions of the Act were paramount to any contractual terms on the ticket, and that pursuant to s 50, verification codes were therefore the principal method of determining which tickets were winning tickets. Further, they argued that s 51(2) could be extended to captions on pictures to provide that the small caption underneath the picture had to match the word (on the Kuzmanovskis' ticket, the small word 'SWIM' beneath the picture of the swimming man did not match the word 'BATHE').

In addition, the Instant Lottery Game Rules had been made pursuant to s 22 of the *Public Lotteries Act* and published in the Gazette as required by s 23(2). There were four rules of particular relevance in this case: rules 3, 7, 9 and 16.

First, rule 3 provided that the rules were binding on all players, and that in the event of inconsistency with the terms of the ticket and the rules, the rules were to prevail. Secondly, rule 7 provided in subsection (b) that computer records could be used to determine whether the ticket was a winning ticket.

Thirdly, rule 9 provided that the licensee could determine the amount of tickets, the amount of money prizes and the nature and number of other prizes. Rule 9(b)(ii) provided that prizes could be awarded by a method determined by the CEO of the instant lottery provider. Rule 9(d)(ii) provided that if prizes were to be determined in a manner approved under rule 9(b)(ii), the licensee could give notice of the manner of determination by 'publicly advertising the manner of determination of the Prize'. NSW Lotteries sought to argue that rules 9(b)(ii) and 9(d)(ii) meant that the verification method of determining prizewinning was valid.

Finally, and pivotally, rule 16 provided:

> A Prize in an Instant Lottery is payable only on presentation of a Ticket in that Instant Lottery indicating that the Prize has been won and *after the Licensee has determined that the Ticket is valid and has won the Prize.* (emphasis added)

NSW Lotteries argued that rule 16 was incorporated into the ticket and meant that a prize was not payable unless the ticket met the validation procedure.

D *The Trial Decision*[6]

The trial judge, Rares J, found that the criterion for a winning ticket was contained solely in the terms on the back of the ticket. Although the ticket referred to the legislation, the regulations and the rules, Rares J held that NSW Lotteries did not give adequate notice of the terms they sought to incorporate into the contract from the legislation.

6 *Kuzmanovski v New South Wales Lotteries Corporation* (2010) 270 ALR 65.

He further held that the verification code or test was directed to the security or integrity of the instant lottery and did not operate as a 'publicly unknown, additional criterion that changed the nature of a contractually valid prizewinning ticket into a worthless piece of paper.'[7]

In light of this, Rares J found that 'BATHE' matched a picture of a person swimming, in accordance with the rules stated on the back of the ticket, as 'bathe' was a word that was synonymous with swimming. NSW Lotteries had breached its contract when it failed to pay the Kuzmanovskis the $100 000 stipulated by the terms of the ticket, and were liable to pay the Kuzmanovskis $100 000 plus interest (representing expectation damages for breach of contract).

Rares J found in the alternative that NSW Lotteries engaged in misleading and deceptive practice pursuant to ss 52 and 53 of the *Trade Practices Act* by representing that the *Public Lotteries Act* and rules were consistent with the play instructions. He found that Mrs Kuzmanovski would still have bought the ticket had the conditions on the rear of the ticket matched the actual requirements of the game. However, he held that NSW Lotteries falsely represented that the ticket had a particular standard, quality and value, whereas the standard of the goods was not determined by the terms of the Game; the quality of the goods was not of a game of chance; and the value of $100 000 had no reference to the Game but rather whether it was a winning ticket. In the event that his judgment on contractual terms was overruled, Rares J said that he would award the Kuzmanovskis $20 000 to compensate them for the disappointment and distress they suffered as a result of the misleading and deceptive conduct. This represents compensation on a reliance basis, a non-pecuniary loss.[8]

III THE APPEAL TO THE FULL FEDERAL COURT

The decision was a unanimous decision by Siopis, Cowdroy and Tracey JJ. They overturned the trial judge's decision on the contractual terms, but upheld his decision on misleading and deceptive conduct, affirming the quantum of damages awarded in relation to that cause of action.

The Full Federal Court found that the provisions of the *Public Lotteries Act* were unambiguously terms of the contract. They considered that the trial judge had not correctly applied s 49(2) of the Act, which provided that the Division of the Act dealing with instant lotteries had 'effect despite *any other Act or law or any agreement*'.[9] Further, the effect of s 50 of the Act and rule 16 of the rules was that NSW Lotteries was not obliged to pay a prize despite the terms on the back of the ticket. The terms of the Act and the rules were held to be incorporated into the contract and were paramount to the terms on the back of the ticket. Pursuant to

7 Ibid 81 [57].

8 See, eg, Sirko Harder, 'Recent Developments in the Assessment of Damages' (2011) 25(2) *Commercial Law Quarterly* 15.

9 *Public Lotteries Act 1996* (NSW) s 49(2) (emphasis added).

s 50 and rule 16, NSW Lotteries had lawfully determined that the ticket was not valid and had not won the prize, and consequently, they were not in breach of the terms of the ticket.

Nonetheless, the Full Federal Court upheld the finding of misleading and deceptive practice on the part of NSW Lotteries pursuant to ss 52 and 53 of the *Trade Practices Act*.[10] On appeal, NSW Lotteries attempted to argue that the rules of the Game should be interpreted in the context of the contractual provisions. It contended that the Kuzmanovskis purchased a ticket that stated in plain terms that the Game was 'governed'[11] by the Act and the rules, but did not know what the Act and the rules said, and 'chose'[12] not to find out.

The Full Federal Court confirmed that whether a representation was misleading and deceptive was to be assessed by reference to the meaning the representation would convey to the ordinary and reasonable member of the class of consumers to whom the representation was addressed.[13] Their Honours held that

> the bland reference on the ticket to the *Lotteries Act* and the Rules was not sufficient to apprise the consumer of the qualification to the representation in the second play instruction, and, therefore, to the true circumstances in which the prize would be paid.[14]

The broader context of the contractual provisions did not render the representation accurate. It followed that the ticket was misleading and deceptive.[15] The Full Court thus upheld the trial judge's award of $20 000 damages for distress resulting from the misleading and deceptive conduct.[16]

Finally the Full Federal Court held that ss 8, 50(2)(b), 50(4), 50(5) and 51 of the *Public Lotteries Act* and rules 7 and 9 were not inconsistent with the *Trade Practices Act* and did not constitute an expropriation of contractual rights.[17] The sections were not rendered invalid by s 109 of the *Constitution*, which holds that where there is an inconsistency between state law and Commonwealth law, Commonwealth law is to prevail and the relevant state law is invalid.[18]

I will first examine the Full Federal Court's conclusions with respect to the nature and terms of the lottery ticket.

10 This Act has now been replaced by the *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*') which is in substantially similar terms.

11 *New South Wales Lotteries Corporation v Kuzmanovski* (2011) 195 FCR 234, 251 [102].

12 Ibid.

13 Ibid 251 [104], citing *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45, [103].

14 *New South Wales Lotteries Corporation v Kuzmanovski* (2011) 195 FCR 234, 252 [111].

15 Ibid 252–3 [114].

16 Ibid 253–4 [122]–[123].

17 Ibid 254–9 [125]–[162].

18 *Australian Constitution* s 109.

IV THE TERMS OF THE LOTTERY TICKET

It was essential to ascertain whether the contract was analogous to a ticket, in which case the law with regard to incorporation of terms into tickets would have applied, or whether the contract was a peculiar statutory contract to which different rules applied. The Full Federal Court gave conflicting indications on this. It implied that the latter was the case,[19] but nonetheless, at another point in the judgment, seemed to suggest that the statutory terms had been incorporated by reason of the notice given.[20] One's view of this case very much depends on whether one sees the lottery ticket as analogous to other tickets (in which case it would be necessary to give adequate notice of the incorporated terms, which was absent on the facts) or whether one sees such lottery tickets as a special statutory contract where the terms of the statute and accompanying rules and regulations were paramount, regardless of whether there was notice or not.

I will first consider the special nature of lottery tickets, and whether, if the statutory terms applied because of the special nature of the contract, the policy issues for consumers were adequately canvassed by the Full Federal Court. I will then consider the law with regard to tickets and incorporation of terms because it is suggested that, notwithstanding the special statutory nature of the contract, some consideration of notice was necessary where the statutory terms were unusual and the terms on the rear of the ticket were misleading.

A *Lottery Tickets: A Special Statutory Contract?*

The Full Court seemed to find that a contract made between a participant in a lottery and the lottery provider is a special kind of statutory contract, regulated by an Act of Parliament and the attendant rules. They cited *Brown v Petranker*, in which Clarke JA said:

> The Court is not dealing with a contract freely negotiated between two parties. On the contrary, while it can be accepted for present purposes that upon the facts alleged by the respondent the appellants came under a duty which may be described as contractual to send the validated coupon to the Lotto offices, the relationship between the parties was governed by an Act of Parliament and rules passed thereunder which imposed the terms and conditions under which the duty arose. The question which arises is not the same as the one which arises in the construction of a written private agreement. In that instance the Court is concerned to ascertain the presumed intention of the parties from the written words. In the present case the Court is concerned with the proper interpretation of a rule passed pursuant to a rule making power contained in an Act of Parliament. Accordingly, the line of cases dealing with the effectiveness of exclusion clauses in contracts to exclude liability for negligence

19 *New South Wales Lotteries Corporation v Kuzmanovski* (2011) 195 FCR 234, 248 [83].

20 Ibid 245 [61].

> exemplified in *Canada Steamship* and discussed in *Bright v Sampson and Duncan Enterprises Pty Ltd* … has no application.[21]

The Court seems to suggest that *Brown v Petranker* stands for the proposition that, even without notice of the statute in the terms of the contract, the verification procedures would be incorporated into the contract because of the nature of the contract and s 49(2) of the *Public Lotteries Act*.[22] However, this is inconsistent with its later treatment of the case as one of incorporation by notice, as it says it is 'required, *by virtue of the clear notification*, to treat the *Lotteries Act*, the Regulations and Rules as being *incorporated* into the agreement between Lotteries and the Kuzmanovskis.'[23]

First, *Brown v Petranker* does not necessarily stand for the proposition that statutory rules governing gambling contracts will be automatically incorporated into a contract. The case dealt only with the *interpretation* of the statutory rules applying to the game of Lotto. Incorporation was not in issue in the case, and Clarke JA noted that the case was conducted on the agreed basis that the statutory rules bound all participants in the game.[24] The Court was considering a statutory rule which purported to exempt a newsagent for neglect in losing the plaintiff's winning Lotto ticket before it could be validated. The Court said an exclusion clause of this type should be interpreted according to well-established principles of statutory construction, not according to common law rules (and, in particular, not in accordance with the doctrine of *contra proferentem*).[25]

Nonetheless, there is a significant body of Australian case law which holds that statutory rules and Acts governing gambling contracts are automatically incorporated into lottery contracts regardless of notice or otherwise. In *Reinhold v New South Wales Lotteries Corporation*,[26] it was assumed by the judge and the parties that Oz Lotto tickets simply incorporated the Oz Lotto Rules made pursuant to the *Public Lotteries Act*. In effect, the contract was a statutory one whose terms were regulated by the rules.[27] Barrett J noted that the Victorian Act then in force expressly incorporated the rules governing lotteries into lottery contracts,[28] but that the New South Wales *Public Lotteries Act* did not expressly do so. Nonetheless, his Honour was satisfied that the rules were part of the contract, particularly as the parties had agreed this was the case.[29]

21 *Brown v Petranker* (1991) 22 NSWLR 717, 722 (Clarke JA) (citations omitted).

22 *New South Wales Lotteries Corporation v Kuzmanovski* (2011) 195 FCR 234, 245, [59].

23 Ibid 245, [61] (emphasis added).

24 *Brown v Petranker* (1991) 22 NSWLR 717, 721.

25 The '*contra proferentem*' rule is a rule of contract interpretation, which stipulates that the party providing the document is responsible for any ambiguities it contains and that ambiguities should be resolved against that party.

26 [2008] NSWSC 5 (30 January 2008) ('*Reinhold*'). See Barbara McDonald and John Carter, 'The Lottery of Contractual Risk Allocation and Proportionate Liability' (2009) 26 *Journal of Contract Law* 1.

27 McDonald and Carter, above n 26, 6.

28 *Public Lotteries Act 2000* (Vic) s 7(5).

29 *Reinhold* [2008] NSWSC 5 (30 January 2008) [28].

In the Victorian case of *Abdelrehim v Tattersall's Ltd*, Senior Member Vassie similarly said that the statutory rules applying to Tattslotto tickets were automatically incorporated into the ticket, regardless of whether the purchaser knew of the terms of the rules or not.[30] Section 7(5) of the *Public Lotteries Act 2000* (Vic) provided that:

> Lottery rules for a public lottery, as in force when an entry to the public lottery is accepted, form part of the contract between the licensee and the player.[31]

The cases which presume statutory rules and Acts are automatically incorporated into lottery contracts can be contrasted with *State Lotteries Office v Burgin*.[32] This case also involved a 'scratchie' ticket with unclear instructions.[33] The consumer purchased a ticket which contained three pairs of matching numbers. The instructions were ambiguous, as '"MATCH 3 NUMBERS AND WIN" could mean either: (a) Match three numbers by finding a pair for each of the three; or (b) Match three of an identical number.'[34] The latter was intended by the State Lotteries Office. However, a majority of the New South Wales Court of Appeal found that the consumer was entitled to the stipulated prize.[35] The Court rejected the argument that the validation procedures provided by regulation determined the matter. Regulation 12(1) of the *State Lotteries (Instant Lotteries) Regulations 1983* (NSW) provided that a ticket in an instant lottery was void and no prize was payable, inter alia, 'if any prize amount is inconsistent with any security, validation or verification number on the ticket'[36] or 'if it fails any confidential or other security test'.[37] Kirby P said that the 'purpose of the [regulations was] … to provide assurance for the integrity of the ticket',[38] and given that the ticket was valid in this case, it was enforceable. His Honour was of the opinion that governments were not entitled to deprive plaintiffs of rights under an otherwise valid contract by unknown and unknowable tests.[39]

The reason why courts assume such provisions are incorporated into lottery contracts and the like arises from the peculiar status of gambling contracts

30 [2007] VCAT 756, [25].

31 The *Public Lotteries Act 2000* (Vic) was later replaced by the *Gambling Regulation Act 2003* (Vic), but s 5.2.2(5) of the new Act is identical to the former s 7(5).

32 (Unreported, New South Wales Court of Appeal, Kirby P, Meagher and Sheller JJA, 19 May 1993) ('*Burgin*').

33 There are at least two other cases involving problematic 'scratchie' instructions, or flaws in competition design: *Roebuck v Golden Casket Lottery Corporation Ltd* [2000] QCA 289 and *O'Brien v MGN Ltd* [2001] EWCA Civ 1279 ('*O'Brien*').

34 *Burgin* (Unreported, New South Wales Court of Appeal, Kirby P, Meagher and Sheller JJA, 19 May 1993) 9.

35 Ibid (Kirby P and Sheller JA) (Meagher JA dissenting).

36 *State Lotteries (Instant Lotteries) Regulations 1983* (NSW) reg 12(1)(d).

37 Ibid reg 12(1)(e).

38 *Burgin* (Unreported, New South Wales Court of Appeal, Kirby P, Meagher and Sheller JJA, 19 May 1993) 19.

39 Ibid 20. One must wonder whether *Public Lotteries Act 1996* (NSW) s 49(2) was intended to prevent cases such as *Burgin* recurring, although there is no indication of this in the second reading speeches to the Act.

at law. At common law, gambling contracts were valid,[40] but legislation in all Australian states renders gambling contracts void in certain circumstances.[41] Gambling contracts which contravene these legislative provisions are not illegal per se, but the law will not enforce them.[42] Clearly, however, contracts such as the lottery ticket contract in this case are exceptions to that general rule because they are authorised by statute (in this case, the *Public Lotteries Act*).[43] Thus, it is argued that because the statute is the only basis upon which such contracts are enforceable, this is really a special kind of statutory contract, not a ticket at all.[44] The terms emanate not only from the purveyor of the ticket, but from the terms of statute which enable the contract to be legally enforced. Consequently, the terms of the contract cannot prevail over the terms of the statute, because it is the statute alone that enables the contract to be enforced in the first place. Neither NSW Lotteries nor the Kuzmanovskis would have any power to contract out of the rules in the *Public Lotteries Act*, as this would render their contract void, or at the least, unenforceable.

In this case, the Full Federal Court noted the special nature of lottery contracts, and also emphasised the notice given on the rear of the ticket. It is not clear from the judgment whether the statutory provisions would have formed part of the contract without notice, although from the body of cases mentioned above, the Court may have held that the term was part of the contract because of the special statutory nature of the contract. However, if the contract was a special statutory contract, the Court should have undertaken consideration of how the stated aims of the *Public Lotteries Act* sat with an inconsistent term imposed on a consumer who would have found it difficult to discover the term, and moreover, how such a statutory contract sits with aims of the *Trade Practices Act*, and whether the *Trade Practices Act* should be used to remove any misleading or deceptive aspects of the statutory contract.

The policy behind the *Public Lotteries Act* is to set in place strict controls for the conduct of lotteries which would otherwise be open to fraud and abuse.[45] The fraud and abuse could emanate from consumers (eg, those who sought to falsely claim winning tickets) or from the lottery providers (eg, by rigging lotteries, or by falsely stating prizes were available where they were not). The general argument that the statutory rules should be incorporated into gambling contracts to allow governance of the contracts is appropriate. As can be seen from the variety of cases which arise in relation to lost and defaced tickets, the rules are necessary to

40 *Carlill v Carbolic Smoke Ball Co* [1892] 2 QB 484, 490 (Hawkins J), affirmed in *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

41 *Unlawful Gambling Act 2009* (ACT) s 47; *Unlawful Gambling Act 1998* (NSW) s 56; *Racing and Betting Act 1983* (NT) s 135; *Racing Act 2002* (Qld) s 341; *Lottery and Gaming Act 1936* (SA) ss 50, 50A; *Racing Regulation Act 2004* (Tas) s 103; *Gambling Regulation Act 2003* (Vic) ss 2.4.1, 2.4.2; *Gaming Betting (Contracts and Securities) Act 1985* (WA) s 4.

42 *Defina v Kenny* (1946) 72 CLR 164, 171 (Rich J in dissent).

43 See, eg, *New South Wales Lotteries Corporation v Kuzmanovski* (2011) 195 FCR 234, 238 [17]–[21]. See also *Public Lotteries Act 1996* (NSW) s 6.

44 See, eg, McDonald and Carter, above n 26, 6.

45 *Public Lotteries Act 1996* (NSW) s 3; New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 September 1996, 4280–1 (Mr Face).

govern disputes between ticket producers, ticket sellers and consumers. Perhaps, however, ticket sellers should be required to display notices at outlets drawing the attention of consumers to any special clauses and the fact that a consumer can return the ticket after they have paid for it and get a refund if they do not agree with any term.[46] Indeed, in both Victoria and New South Wales, lottery providers are required to place a notice stating that lottery rules are available for inspection by consumers at venues where tickets are purchased.[47]

However, the situation in *Kuzmanovski* is importantly different to cases such as *Reinhold* and *Brown v Petranker.* The rules stated on the back of the ticket omitted a vitally important condition for ascertaining a winning ticket, and thus the rules were *inconsistent* with the requirements set out in the statutory rules and the Act. As the trial judge held, to allow NSW Lotteries to impose a verification code that results in the disqualification of the ticket, despite the fact it is valid and prizewinning on its face, would seem to suggest that Parliament intended the *Public Lotteries Act* to allow misleading or deceptive conduct, which seems entirely inappropriate.[48] To allow misleading or deceptive terms to be incorporated into the lottery ticket could be said to allow a 'fraud on the statute'.[49] In other words, by enforcing the statutory term derived from the *Public Lotteries Act*, the Full Federal Court failed to uphold the intent and spirit of the *Trade Practices Act*, which is to protect consumers from fraud and abuse. Thus, the *Public Lotteries Act* should not be construed in such a way as to allow misleading or deceptive conduct because this is not within the spirit and intendment of the *Trade Practices Act.*

Moreover, there are provisions in the *Public Lotteries Act* and the rules which require licensees and agents to give notice of the terms and conditions which bind consumers.[50] Consequently, despite ss 49(2) and 50 of the *Public Lotteries Act*, it is important to determine whether or not NSW Lotteries gave notice of the statutory terms, because these rules and provisions indicate that Parliament intended that licensees and agents should give notice of the terms.

B *The General Law regarding Tickets, Incorporation of Terms and Notice*

A ticket is evidence of an unsigned contract where it can be difficult to ascertain whether the consumer has signalled their assent to the terms and conditions. Courts are concerned when those who purvey tickets to consumers attempt to

46 Aviva Freilich and Eileen Webb, 'The Incorporation of Contractual Terms in Unsigned Documents — Is it Time for a Realistic, Consumer-Friendly Approach?' (2009) 34 *University of Western Australia Law Review* 261, 272.

47 *Gambling Regulation Act 2003* (Vic) s 5.2.4(2); *Public Lotteries Act 1996* (NSW) s 24.

48 *Kuzmanovski v New South Wales Lotteries Corporation* (2010) 270 ALR 65, 80–1 [54]–[55].

49 Sir Edward Coke expressed this with the following maxim: *Quand oaliquid prohibetur fieri ex directo, prohibetur et per obliquum* or 'when anything is prohibited directly it is also prohibited indirectly'. See Edward Coke, *The First Part of the Institutes of the Laws of England, or, a Commentary upon Littleton* (J & W Clarke, 18th ed, 1823) 223b.

50 *Public Lotteries Act 1996* (NSW) s 24; *Instant Lotteries Rules* rr 7(h)(i), 9(b)(ii), 9(d).

limit liability by reference to terms of which a consumer may not have been given adequate notice at the time of accepting the ticket.

The first way in which a consumer may be bound by contractual terms is when the ticket contains the full terms and conditions upon its face. By purchasing the ticket, the consumer is held to have assented to the terms of the ticket.[51] Of course, this analysis is rather forced. Most consumers do not read standard form contracts, and on the rare occasion that consumers do read such terms, they do not understand them.[52] Randy Barnett has argued that standard form contracts can be regarded as voluntary because one party has manifested its consent to be legally bound to perform that commitment. He argues that the assent that is critical to the issue of formation or enforceability is not the assent to perform or refrain from performing a certain act (the promise) but the manifested assent to be legally bound to do so.[53] Nonetheless, Aviva Freilich and Eileen Webb have convincingly queried whether Barnett's analysis can realistically apply to the ticket cases, and argue that the consumer's acceptance of their own powerlessness in ticket transactions precludes any realistic acceptance or otherwise of standard form terms.[54]

The other way in which purveyors of tickets attempt to bind consumers with terms not present on the face of the ticket is by giving *notice* that additional terms apply. Notwithstanding the special statutory nature of gambling contracts, the scratchie ticket here was analogous to the tickets in the ticket cases, and the unusual and onerous terms should have been brought to the attention of consumers in a more effective manner, a conclusion bolstered by the fact that the statute and the rules themselves indicated that notice should be given to consumers.

There were two potential ways in which notice was given of the terms of the ticket in this case. First, there was a generalised reference to the statute, regulations and rules governing the issue of the ticket on the rear of the ticket which read, 'THIS TICKET IS GOVERNED BY THE PUBLIC LOTTERIES ACT 1996, THE REGULATIONS AND THE RULES.' By including this generalised reference, NSW Lotteries apparently purported to incorporate the statutory terms contained in s 50 of the *Public Lotteries Act* and rule 16 of the Instant Lottery Game Rules by naming the relevant Act, regulations and the rules.

Courts sometimes allow parties to incorporate statutory terms into a contract by reference or citation of a particular statute.[55] However, a generalised reference is not always adequate to incorporate inconsistent or contradictory terms, particularly in ticket cases.[56] Unfortunately, there is a dearth of case law in relation to the incorporation of statutory terms into contracts. It is accepted that terms may be

51 *Thompson v London, Midland and Scottish Railway Company* [1930] 1 KB 41.

52 Andrew Robertson, 'The Limits of Voluntariness in Contract' (2005) 29 *Melbourne University Law Review* 179, 188–90.

53 Randy E Barnett, 'Consenting to Form Contracts' (2002) 71 *Fordham Law Review* 627, 628–9.

54 Freilich and Webb, above n 46, 264.

55 N C Seddon and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract* (LexisNexis Butterworths, 9th Australian ed, 2008) [10.27], 426.

56 See especially *eBay International AG v Creative Festival Entertainment Pty Ltd* [2006] FCA 1768, [52]–[54] ('*eBay*').

incorporated in some standard forms: for example, a reference to 'the usual terms of the Real Estate Institute'[57] or 'the conditions of the *Transfer of Land Act*'[58] is sufficient to incorporate terms into sale of land contracts. Similarly, in bills of lading, a reference to 'the Hague Rules' will be sufficient to incorporate such terms into the contract.[59] Other references to terms generally applicable to a particular transaction have also been held to be incorporated into a contract,[60] but general references to other complex documents, Acts or regulations will not always be sufficient to incorporate them.[61] In the present case, the generalised reference did not give consumers clear notice of the need to consult the Act, regulations and rules in order to ascertain the true terms of the ticket, but merely said that the ticket was 'governed' by these instruments, and thus should not be effective.

Secondly, s 24(1) of the *Public Lotteries Act* provides that the licensee or agent who accepts rules in a public lottery must display a complete copy of the rules in a prominent position where entries are accepted, *or* make available a complete copy of the rules for inspection by consumers. Further, pursuant to s 24(2), the licensee or agent must also display an extract of the rules if the Minister directs. Unfortunately, this was not explored by the New South Wales Court of Appeal. Presumably the intention of s 24 is to obviate the harshness of ss 49 and 50 by allowing consumers to access the rules which govern the terms of the ticket.[62] It is not clear as a matter of fact whether the agent displayed a copy of the rules in the Kuzmanovskis' newsagency, nor whether the agent had complete copies of the rules available for consumers.

To complicate matters further, rule 7(h)(i) of the Instant Lottery Game Rules required the ticket to specify the manner in which it was determined whether a prize was payable, and rules 9(b)(ii) and (d) required NSW Lotteries to indicate on the ticket what the method of determining the prize was, or alternatively to advertise this. The trial judge said, '[t]here was no evidence of any notice or advertisement for this purpose [ie compliance with the rules].'[63]

In this context, the preferred position should have been that NSW Lotteries was required to give notice of the terms in order to incorporate them, notwithstanding ss 49 and 50 of the *Public Lotteries Act*, because the Act and the rules clearly contemplated that notice ought to be given to consumers.

57 *Trustees Executors & Agency Co Ltd v Peters* (1960) 102 CLR 537, 547–8; but cf *Fitzgerald v Masters* (1956) 95 CLR 420; *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57; *Giliberto v Kenny* (1983) 48 ALR 620.

58 *Godecke v Kirwan* (1973) 129 CLR 629.

59 See, eg, *Brown v Boveri (Australia) Pty Ltd v Baltic Shipping Co* (1989) 94 FLR 425; *China Ocean Shipping Co Ltd v PS Chellaram Co Ltd* (1990) 28 NSWLR 354; *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation, Berhad* (1998) 196 CLR 161.

60 See, eg, *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 ('*Marks*'); *Metal Roofing and Cladding Pty Ltd v Amcor Trading Pty Ltd* [1999] QCA 472; *Piper Ellis Pty Ltd v Farmland Pty Ltd* [2000] QSC 157; *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193.

61 See, eg, *University of Western Australia v Gray [No 20]* (2008) 246 ALR 603, [90] (French J) upheld on appeal in *University of Western Australia v Gray* (2009) 259 ALR 224. See also *Pondcil Pty Ltd v Tropical Reef Shipyard Pty Ltd* (1994) ATPR (Digest) 46–134.

62 New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 September 1996, 4281 (Mr Face).

63 *Kuzmanovski v New South Wales Lotteries Corporation* [2010] FCA 876, [50].

The general question as to what kind of notice is adequate to incorporate terms into ticket contracts has vexed courts since the 19th century, which witnessed the growth of tickets containing incorporated terms.[64] It is now settled that whether or not a person will be bound by additional terms sought to be incorporated into a ticket by notice depends upon whether:

1. Notice of terms was given *before* the contract was formed; and
2. Reasonable steps were taken to bring the terms to the notice of the party to be bound.[65]

The terms to which you agree when you purchase a ticket depends upon whether adequate notice has been given. Courts consider that it is not fair to bind people to terms when they have no easy way of finding out what they have agreed to, or had no opportunity of finding out what the terms were until the contract was already formed. Despite this, as long as notice is given, courts hold that the consumers are bound by the terms of the ticket, regardless of whether the consumer actually understood the terms.[66]

The English Court of Appeal set out the requirements for reasonable notice of incorporated terms in *Thornton*.[67] In that case, the defendant, Shoe Lane Parking owned a multi-storey car park. After the plaintiff, Mr Thornton, was severely injured as a result of the defendant's negligence when he went to retrieve his car, the defendant sought to disclaim liability on the basis of an exclusion clause contained on a notice inside the premises. The notice at the entrance simply said 'All Cars Parked at Owner's Risk'. The ticket stated 'this ticket is subject to the conditions of issue as displayed on the premises'. However, the additional terms displayed on the notice inside the car park stated that Shoe Lane Parking was not liable for injury to property *or persons* on the premises. The Court found that the additional terms were not incorporated into the contract with Mr Thornton, and that he was not given reasonable notice of them. Lord Denning MR further found that notice of the term was given too late, as the contract was concluded by the time Mr Thornton took the ticket from the automatic machine.[68]

64 *Parker v South Eastern Railway Co* (1877) 2 CPD 416 ('*Parker*'); *Hood v Anchor Line Limited* (1918) AC 837. Lord Hodson in *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125, 129 said *Parker* posed 3 questions: (1) Did the passenger know there was printing on the ticket? (2) Did the passenger know that the ticket contained or referred to conditions? (3) Did the company do what was reasonable in the way of notifying prospective passengers of the existence of conditions and where terms might be considered?

65 *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 ('*Thornton*'); *Oceanic Sun Line Special Shipping Company Inc v Fay* (1998) 165 CLR 197 ('*Oceanic Sun Line*'); *eBay* [2006] FCA 1768.

66 See, eg, *Thompson v London, Midland and Scottish Railway Company* [1930] 1 KB 41, where a passenger was bound by the terms of a railway ticket which contained an exclusion clause, despite the fact that she was unable to read.

67 [1971] 2 QB 163.

68 Lord Denning's speech contains one of the finest and funniest passages in contract law on this point — ibid 169:

> The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it. But it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money into the machine. The contract was concluded at that time.

The Court noted the unreasonableness of presuming that the standard 'offer and acceptance' contractual paradigm applies in ticket cases (particularly where tickets are dispensed by a machine).[69] *Thornton* is on point with the present case, as in both cases, there was a significant difference between the brief terms which the consumer first saw when the consumer received the contract, and the more detailed terms which were simply adverted to by a brief reference on the rear of the ticket. Once the consumers entered into the contract, it was difficult to back out.

However, it should be noted that *Thornton* was distinguished in *O'Brien*,[70] an English Court of Appeal case which bears some similarity to the present case. In *O'Brien*, the claimant thought he had won £50 000 after he received a 'scratchie' ticket in his copy of the *Daily Mirror* on 3 July 1995. Once scratched, the ticket contained two sums of £50 000, and the claimant telephoned the 'mystery hotline' as required, whereupon he was informed that he had won the stipulated sum. It transpired that there had been a 'mix up' and too many winning cards were produced, and 1472 other people were also purported winners. The newspaper announced that there would be a special draw for the purported winners, and the winner of that draw would receive the £50 000. An additional £50 000 would be divided equally amongst the unsuccessful purported winners. The claimant did not succeed in the special draw, but received £33.97 as his share of the distribution among the unsuccessful purported winners. The claimant sued the newspaper, arguing that he was entitled to win according to the terms printed on the ticket. The defendant newspaper argued that the ticket incorporated certain 'Instant Scratch Rules' which had been published in the newspaper at various intervals. Rules 2 and 5 provided as follows:

> 2. The prizes for each game will be awarded to the player or players who make a successful claim. ...
>
> 5. Should more prizes be claimed than are available in any prize category for any reason, a simple draw will take place for the prize.

The trial judge and the Court of Appeal concluded that as only one £50 000 prize was available for the draw on 3 July 1995, rule 5 applied and the newspaper had been entitled to hold a draw for the prize. The claimant had attempted to argue that rule 5 had not been incorporated into the contract, as there had simply been a reference in the newspaper to the effect that the 'rules as previously published' applied, and a further statement in the box dealing with the telephone game that 'Normal Mirror Group rules apply'. The ticket itself said 'FULL RULES AND HOW TO CLAIM SEE DAILY MIRROR'. The Court applied *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*, in which Dillon LJ made the following observation about *Thornton*:

> In the ticket cases the courts held that the common law required that reasonable steps be taken to draw the other parties' attention to the printed conditions or they would not be part of the contract. It is, in my judgment,

69 Ibid 173–4 (Megaw LJ).

70 [2001] EWCA Civ 1279 (CA). See Jesse Elvin, 'Incorporating Particularly Onerous or Unusual Terms' [2002] 61(1) *Cambridge Law Journal* 19.

> a logical development of the common law into modern conditions that it should be held, as it was in *Thornton v Shoe Lane Parking* [1971] 2 QB 163, that, if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party.[71]

The Court of Appeal accepted the argument of the newspaper that rule 5 was not onerous or unusual. Hale LJ said:

> In my view, although Rule 5 does turn an apparent winner into a loser, it cannot by any normal use of language be called 'onerous' or 'outlandish'. It does not impose any extra burden upon the claimant, unlike the clause in *Interfoto.* It does not seek to absolve the defendant from liability for personal injuries negligently caused, unlike the clause in *Thornton v Shoe Lane Parking.* It merely deprives the claimant of a windfall for which he has done very little in return. He bought two newspapers, although in fact he could have acquired a card and discovered the hotline number without doing either. He made a call to a premium rate number, which will have cost him some money and gained the newspaper some, but only a matter of pennies, not pounds.
>
> The more difficult question is whether the rule is 'unusual' in this context. The judge found that the claimant knew that there was a limit on the number of prizes and that there were relevant rules. Miss Platell's evidence was that these games and competitions always have rules. Indeed I would accept that this is common knowledge. ... Such evidence as there is was to the effect that such rules are not unusual.
>
> In any event, the words 'onerous or unusual' are not terms of art. They are simply one way of putting the general proposition that reasonable steps must be taken to draw the particular term in question to the notice of those who are to be bound by it and that more is required in relation to certain terms than to others depending on their effect. In the particular context of this particular game, I consider that the defendants did just enough to bring the Rules to the claimant's attention. There was a clear reference to rules on the face of the card he used. There was a clear reference to rules in the paper containing the offer of a telephone prize. There was evidence that those rules could be discovered either from the newspaper offices or from back issues of the paper. The claimant had been able to discover them when the problem arose.[72]

Sir Anthony Evans 'reluctantly' agreed with Hale LJ and Potter LJ, although he thought that the rules should have been published in each edition of the newspaper in which tickets for the game had been provided, or at the very least, there should have been some reference to the most recent edition of the paper where the rules

71 [1989] 1 QB 433 (CA) 438–9 (Dillon LJ); see also 443 (Bingham LJ).

72 *O'Brien v MGN Ltd* [2001] EWCA Civ 1279 (CA), [21]–[23] (Hale LJ with whom Potter LJ agreed).

could be found.[73] As Elvin notes, the case is a salutary reminder that a clause can be unusual without being onerous or unreasonable.[74]

Although it would not be binding on an Australian court, the *O'Brien* case can be distinguished from the present case because, while the rules in *O'Brien* were not published in conjunction with the distribution of the ticket, it was at least clear that the ticket holders had to consult the rules in order to ascertain the full terms. By contrast, in the present case, while the Act, regulations and rules were stated on the rear of the ticket to 'govern' the ticket, it was not made clear to consumers that those instruments contained contractual terms, and that the consumers were required to consult specific sections of the Act, regulations and rules to ascertain those terms.

More recently in Australia, in the *eBay* case,[75] Rares J (the trial judge in the *Kuzmanovski* case) found that a concert promoter could not incorporate a new and unusual condition into tickets for the Big Day Out. Applying *Oceanic Sun Line*, he found that if the concert promoter wanted to insert a new condition into tickets, it needed to bring notice of the condition to the attention of the purchaser *at the time of* purchase. The concert promoter had sought to argue that a general reference to the terms of the ticket in Ticketmaster's Purchase Policy meant that the condition in question was incorporated into the contract where consumers had purchased from the Ticketmaster website. To purchase tickets online, the purchaser was required to become a 'member' of Ticketmaster, and it was a condition of membership that the Purchase Policy governed the purchase of tickets. The Purchase Policy stated that tickets were sold 'subject to conditions of sale on the back' but the tickets (which contained the new and unusual term printed on the back) were not mailed to purchasers until a few weeks later. Rares J held that

> [t]he vague and general reference in Ticketmaster's purchaser policy to terms being on tickets, cannot substitute for the necessity to draw specifically to someone's attention unusual or significant terms affecting the proposed relationship, if it is sought to claim that the contract contains those terms.[76]

The concert promoter failed to bring the new term to the notice of consumers with regard to almost all methods of purchasing the ticket (whether from websites or over the counter), and consequently it failed to incorporate the new condition into the ticket in those cases. The only category in which the condition was successfully incorporated into the contract was that of tickets purchased over the counter at Ticketmaster or other outlets after 16 November 2006, where the outlets displayed a notice setting out the conditions with the new condition in red font.

The question is then whether terms in this case were so onerous and unusual that NSW Lotteries should have done more to bring them to the attention of the

73 Ibid [25]–[29] (Sir Anthony Evans).

74 Elvin, above n 70, 21.

75 *eBay* [2006] FCA 1768.

76 Ibid [50].

Kuzmanovskis. Let us presume for present purposes that the agent who sold the ticket to the Kuzmanovskis had the rules readily available for inspection as required by s 24(1)(a) of the *Public Lotteries Act.* As noted earlier, it is unclear whether the advertisement required by the rules was undertaken.

The Full Court found — in the context of misleading and deceptive conduct — that 'an ordinary and reasonable member of the class of consumers to whom the writing on the ticket was addressed, would have understood it to convey the same meaning as it conveyed to Mr Kuzmanovski.'[77] In other words, a reasonable person would not have realised that the qualifying conditions contained in the *Public Lotteries Act* were inconsistent with the play instructions, and would have found such a condition to be unusual. As Brennan J in *Oceanic Sun Line* notes, '[i]n differing circumstances, different steps may be needed to bring an exemption clause to a passenger's notice, especially if the clause is an unusual one.'[78] Although this was not an exemption clause, it was an unusual term which was inconsistent with the terms on the face of the ticket.

There is no evidence that any notice was given of the statutory terms, and given the unusual nature of the term, special measures should have been taken to draw consumers' attention to the fact that the terms on the rear of the ticket were misleading and omitted to mention the validation criteria contained in the Act and rules. Even if there had been copies of the rules available at the outlet as required by s 24 of the *Public Lotteries Act*, the notice would have been insufficient because of the misleading nature of the terms on the rear of the ticket. In the words of Denning LJ, this may have been a contract where it 'would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.'[79]

V MISLEADING AND DECEPTIVE CONDUCT

In light of the foregoing, it may seem that the finding that the terms on the rear of the ticket were misleading and deceptive is mutually inconsistent with the Court's finding that the mere reference to the Act was sufficient to incorporate the terms of the Act into the contract. If the provisions as to verification were validly incorporated into the contract, then how could the Court justify holding that the Kuzmanovskis were misled? In part, as I have explored above, one reason why the Full Court came to such a different conclusion was because of the special nature of lottery contracts, which were said to be special (statutory) lottery contracts to which ordinary common law rules did not apply. However, for the reasons I have stated above, by the terms of the Act and rules themselves, licensees and agents were required to give notice of the rules governing the lottery tickets. Accordingly, notwithstanding the statutory nature of the contracts involved,

77 *New South Wales Lotteries Corporation v Kuzmanovski* [2011] FCAFC 106, [107].

78 *Oceanic Sun Line* (1998) 165 CLR 197, 229 (Brennan J).

79 *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461, 466 (Denning LJ). See also *Thornton* [1971] 2 QB 163, 170 (Denning LJ).

reasonable notice was still required before the terms could be incorporated into the contract.

The key to ascertaining how the Full Federal Court could conclude the terms were validly incorporated yet misleading lies in the way that the trial judge formulated his judgment with respect to misleading and deceptive conduct:

> In this case, (on the hypothesis that my opinion that Lotteries was in breach of its contract to pay the prize is wrong) Mr and Mrs Kuzmanovski were not misled into the purchase of the ticket. Rather the terms of the ticket, once purchased and scratched, misled them as to its inherent characteristics. The loss or damage suffered by them was caused by Lotteries having failed to state on the ticket the true nature of how it operated. In other words, the purchase of the ticket was like a purchase of a defective product with a hidden fault that was revealed when it was used or consumed. In each case the purchaser wanted to buy the ticket or product, but suffered a consequence because of a hidden defect in the particular product selected, that would not have been present in similar or identical versions of the same thing available at the same time.[80]

Rares J found that the Kuzmanovskis would have still purchased the ticket even if the ticket had displayed the true rules of the game.[81]

Consequently, the Full Federal Court held that *even though* the verification procedure had been validly incorporated into the ticket, the terms on the rear of the ticket were misleading and deceptive because they were intended to convey a meaning to an ordinary class of consumers that (a) a customer would win the stipulated prize 'if the word shown in any one Game matches the picture shown in the same Game' and that (b) the terms of the *Public Lotteries Act*, the regulations and the rules were consistent with these rules. Presumably the Full Federal Court would rationalise the differing conclusions in contract and in misleading and deceptive conduct by referring to s 49(2) of the *Public Lotteries Act*, which provides that the terms of the Act prevail over any agreement. However, s 49(2) should be read down to coincide with both the aims of the Act stated in s 3 and the aims of the *Trade Practices Act* and the state *Fair Trading Act* (the relevant Acts in force at that time which governed misleading and deceptive conduct). Surely it cannot have been intended by Parliament that s 49 would allow a lottery company to commit misleading and deceptive conduct?

The broader policy implications of the Full Federal Court's decision are troubling. Not only is the decision with respect to contractual terms directly inconsistent with the policy of consumer law regimes, it also overlooks the need to deter companies such as NSW Lotteries from this kind of conduct. Notice should be particularly clear in consumer transactions because of the lack of experience

80 *Kuzmanovski v New South Wales Lotteries Corporation* [2010] FCA 876, [101].

81 Ibid [99].

and legal expertise of many consumers.[82] Indeed s 24 of the *Public Lotteries Act* recognises this.

As noted previously, the Court concluded that there was no inconsistency between the *Public Lotteries Act* and ss 52 and 53 of the *Trade Practices Act* such as to engage the operation of s 109 of the *Constitution* to invalidate the state legislation. The Court focussed on whether or not the *Public Lotteries Act* sought to remove the statutory remedies for misleading or deceptive conduct for breach of ss 52 and 53 of the *Trade Practices Act*, and naturally enough, the *Public Lotteries Act* did not purport to remove those remedies. However, the operation of ss 52 and 53 extends beyond the availability of remedies for breach, and an inquiry into inconsistency should not simply focus on whether remedies were allowed.

The Court held that the Kuzmanovskis failed to establish 'that it was not possible for Lotteries to comply with both the Commonwealth and the State statutory requirements.'[83] The focus should have been on whether the entire statutory scheme (*including* the regulations and the rules under the *Public Lotteries Act*)[84] was directly inconsistent with ss 52 and 53 of the *Trade Practices Act*. Pursuant to the power conferred by s 50 of the *Public Lotteries Act*, Lotteries set up a scheme of rules which provided that consumers would be bound by the verification codes notwithstanding that the face of the ticket and its terms indicated that a prize had been won. While it might be *possible* to create a scheme which was not inconsistent with the *Trade Practices Act*, this was not such a scheme. It was intrinsically misleading or deceptive to consumers and necessarily impaired the federal regulation of misleading and deceptive conduct by ss 52 and 53 of the *Trade Practices Act*. The consumer protection purposes of the *Trade Practices Act* should be kept in mind when an allegation of inconsistency is made, and it should be ensured that the operation of the *Trade Practices Act* is not undermined by state laws limiting liability.[85] There was a real question of whether, at the very least, the rules which governed the ticket were constitutionally invalid, if not s 50 of the *Public Lotteries Act* itself, and the Full Federal Court's decision on this issue is unsatisfactory.

Perhaps it could also be argued that the contract (particularly the application of s 50 in this case) should be varied or amended using *Trade Practices Act* provisions; but this would involve the Federal Court overriding express provisions in a state Act. The Full Court held that ss 79 and 80 of the *Judiciary Act 1903* (Cth) were applicable to the present case. Consequently, it is not possible that the application of the *Public Lotteries Act* be varied or amended. However, s 50(5) of the *Public Lotteries Act* could be read in conjunction with s 24, and in accordance with the aims of the Act stated under s 3, namely:

82 Freilich and Webb, above n 46, 261, 267.

83 *New South Wales Lotteries Corporation v Kuzmanovski* [2011] FCAFC 106, [139].

84 Subordinate legislation may be invalid by reason of s 109 inconsistency: see discussions in *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565; *Council of the Municipality of Botany v Federal Airports Corporation* (1992) 175 CLR 453.

85 See also *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (1994) 179 CLR 388.

> (a) to make provision for the proper conduct of public lotteries in the public interest and *to minimise any harm* associated with public lotteries, and
>
> (b) to ensure that revenue derived from the conduct of public lotteries is accounted for in a proper manner, and
>
> (c) to ensure that, on balance, *the State and the community as a whole benefit from the conduct of public lotteries.* (emphasis added)

Further, the aim of the *Trade Practices Act* itself is clearly to protect consumers, and reading down s 50 of the *Public Lotteries Act* to reflect this policy concern would ensure that a fraud on the statute did not occur.

VI REMEDIES

If the terms with regard to validation procedures were not incorporated into the contract because the notice given was inadequate, then, as the trial judge found, the appropriate measure of damages would be $100 000, representing the expectation interest of the Kuzmanovskis arising from the breach of contract. The only query would be if a court entered into an analysis similar to that of Hale LJ in *O'Brien*, ie the Kuzmanovskis were no worse off than they were before the contravention occurred, and they were merely deprived of a 'windfall' for which they had done very little.[86]

However, a remedy with a greater deterrent component may have been appropriate in a case such as this. The policy of the common law is to ensure that consumers are given adequate notice of unfair terms; the policy of the *Trade Practices Act* which governs misleading and deceptive representations is to prevent consumers from being misled and finally, the aim of the *Public Lotteries Act* is to ensure that public lotteries are conducted fairly in a way which is in the best interests of the public. Thus, courts should award remedies which encourage lottery ticket licensees to give adequate notice of the terms of the contracts they present to the public. Not only should the Kuzmanovskis have been awarded $100 000 as expectation damages for breach of contract, but they should *also* have been awarded the $20 000 sum for emotional distress. It is clear that damages under s 82 of the *Trade Practices Act* can be awarded for distress arising from a breach of s 52.

Alternatively, it is also clear that damages could be available for mental distress arising from the breach of contract pursuant to *Baltic Shipping Co v Dillon*.[87] It could be argued that the object of the gambling contract was to provide pleasure and relaxation from a game of chance (as exemplified by NSW Lotteries' slogan of 'scratch yourself happy') but that the contract failed to provide this benefit, and that accordingly, damages should be given to reflect that. On the other hand,

86 See *O'Brien* [2001] EWCA Civ 1279 (CA), [21] (Hale LJ).

87 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 359–66 (Mason CJ).

it could be countered that a natural incident of a gambling contract is that it will frequently be a contract where a consumer will not win a prize, and that a gambling contract is not the kind of contract for which distress damages are available because its purpose is not one of providing enjoyment; its purpose is simply to provide a chance of winning, but disappointment or resignation is a far more likely outcome than enjoyment.

The Kuzmanovskis may have found it difficult to claim distress damages for breach of contract in any case if the Court had been prepared to find that s 16 of the *Civil Liability Act 2002* (NSW) applied to an award of this kind.[88] The New South Wales Supreme Court has held in a variety of *Baltic Shipping*-type cases that the plaintiffs were not entitled to damages for distress because this was a form of personal injury damages and the plaintiffs did not meet the threshold requirements of s 16.[89] By contrast, there would be no problem with an award of distress damages under the *Trade Practices Act*; as Spigelman CJ has noted in obiter dicta in *Young*, pt 2 of the *Civil Liability Act* should not apply to awards of damages for distress under s 52 of the *Trade Practices Act*.[90] This kind of a case is distinguishable from cases like *Young* in the contractual context in any event because it was not a breach of care and skill and therefore not analogous to negligence in any case.

VII CONCLUSION

Contracts are about managing the expectations of parties. NSW Lotteries could have saved itself a lot of trouble if it had included a term on the back of the ticket to the following effect: 'A prize is not payable in respect of a ticket in this instant lottery if the ticket does not satisfy a verification code test. This has effect even though the Play Instructions contained on the ticket may appear to indicate that a prize has been won.'[91] There was a possibility that the Kuzmanovskis would have scratched the ticket, thought it was a winning ticket, then turned it over and read the rules. Upon reading the rules, they might have realised, 'this is *actually* governed by verification processes, not just the Play Instructions, and we don't get a prize unless the newsagency machine tells us that the verification code checks out'. It was legitimate for the Kuzmanovskis to feel cheated and duped when it transpired that the real procedure for determining a winning ticket was stipulated by statutory provisions and obscure statutory rules contained in a

88 Section 16, which is within pt 2 of the Act, says that no damages may be awarded in cases of non-economic loss 'unless the severity of the non-economic loss is at least 15% of a most extreme case.' Section 11A(1) specifies that pt 2 is to apply to 'personal injury damages' and s 11A(2) states that the Part applies 'regardless of whether the claim for the damages is brought in tort, *in contract*, *under statute* or otherwise' (emphasis added).

89 See, eg, *Insight Vacations Pty Ltd v Young* [2010] NSWCA 137 ('*Young*'); *Flight Centre v Janice Louw* [2011] NSWSC 132.

90 *Young* [2010] NSWCA 137, [75] (Spigelman CJ).

91 Incidentally, a Victorian 'scratchie' ticket I recently purchased entitled 'Pyramid Bingo' has the following qualification on its rear: 'The Val No does not form part of the game. However, winning tickets and prizes are subject to validation by Intralot.'

Government Gazette when this was not evident from the bland reference to the Act, regulations and rules on the rear.

However, as discussed earlier in the note, many consumers do not read standard form contracts. In any event, the notion that placing terms on the rear of a ticket is sufficient to incorporate those terms is forced because consumers do not have a chance to read them until after purchase. Thus, in this case, the Kuzmanovskis would not have had a chance to consult the terms until *after* they had bought the ticket. Simply having copious rules as to validation available in a folder or having a multitude of rules displayed on the wall as required by s 24 of the *Public Lotteries Act* is not sufficient where a term which was inconsistent with the written terms is concerned. Rather, the requisite 'red hand' level of notice would be met by clear brief notices in plain English alerting consumers as to the validation process, with such notices being required on display in shops where lottery tickets were sold so that consumers would have some idea of the terms of the product they were purchasing in advance.

The Full Federal Court should have used common law contractual principles to reject the argument that statutory validation terms were incorporated into the contract. Despite the fact that the ticket was a gambling contract, and that s 49(2) of the *Public Lotteries Act* said that the terms of the Act overruled any other agreement, it is good legal policy to require purveyors of lottery tickets to give actual notice when the terms of the rear of a ticket directly contradict the statutory rules and provisions in force at the time. Section 24 of the *Public Lotteries Act* itself and the rules both recognise the importance of giving notice of terms in gambling contracts, and this should have been recognised by the Court when determining the appropriate principles. Courts should be cognisant of the powerlessness of consumers and the lack of voluntariness present in many standard form ticket purchases. Such an approach is consistent with the policy of the law of incorporation of terms and the consumer law regime in Australia.