Chapter 11

Implied Terms and Consumer Guarantees

[11-01] Reasons for implication. There are three main reasons for implying terms into a contract. The first reason, which gives rise to a category known as 'terms implied in fact', is the need to give business efficacy to a contract. Second, terms may be implied from the nature of the contract itself or the obligations it creates. Third, terms may be implied by statute. The second and third reasons, taken together, give rise to a category of 'terms implied by law'.

There are other, and less important, reasons for implication. Thus, reference was made above[1] to implication by course of dealing, and we later deal, briefly, with custom or usage as a reason for implying terms.[2]

The line of demarcation between the various bases for implication cannot always be sharply drawn. They tend to 'merge imperceptibly'[3] into one another.

Implied Terms in General

[11-02] Onus of proof. In the case of terms implied in fact, the presumption is that the contract is effective without the term. Accordingly, the onus of proving that a term should be implied into the contract rests on the party so alleging.[4] The onus is most difficult to discharge in detailed commercial contracts simply because the contract will look to state all the terms of the bargain.[5] If the onus is discharged the term is deemed to have been implied from the time of contractual formation.[6] The same approach is taken to terms implied by custom or usage.[7]

Where the term in question is of the implied in law variety the onus of proof is different. Once the contract (or the obligations it creates) has been

1. See [10-18].
2. See [11-25].
3. Glanville Williams, 'Language and the Law — IV' (1945) 61 *LQR* 384 at 401.
4. *Heimann v The Commonwealth* (1938) 38 SR (NSW) 691 at 695; *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at 137.
5. See *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337; 41 ALR 367. Cf *Reid v Rush and Tompkins Group Plc* [1990] 1 WLR 212 (employment contract).
6. *Frobisher (Second Investments) Ltd v Kiloran Trust Co Ltd* [1980] 1 WLR 425 at 432.
7. See [11-25].

shown to be of a nature or kind in which there is a history of implication the term is presumed to be part of the contract. It is therefore up to the party who alleges that the term should not be implied to prove this.[8] Where a term is implied by virtue of statute, there may be specific requirements for implication, and exclusion of the term by agreement may be prohibited.[9]

[11-03] Issue of law. Whether a term should be implied into a contract is an issue of law to be decided by the court on the basis of the other terms of the contract and the evidence admissible on the issue.[10]

[11-04] Admissible evidence. Where it is alleged that a term should be implied by law it appears that the court is not limited to a consideration of the contract and its surrounding circumstances. Thus, extrinsic evidence may be admissible to support or rebut the implication, even if the parol evidence rule otherwise applies.[11]

The law is not so clear with respect to terms implied in fact. The main consideration with respect to such terms is the construction of the contract.[12] However, even if the contract is in writing, regard may also be had to the circumstances surrounding the contract in order to establish the 'factual matrix' against which the parties contracted.[13] On the other hand, evidence of the parties' negotiations is not admissible for the purpose of implying such a term.[14]

[11-05] Implied legal duties. Where a term is implied into a contract it will usually embody a contractual promise and therefore create a legal duty. For example, where a sale of goods contract attracts the term requiring the goods to be fit for the buyer's purpose,[15] the term imposes a legal duty on the seller. A failure to discharge the duty will amount to a breach of contract.

A party to a contract may, however, be subject to an implied legal duty independently of a contractual term. Thus, a duty may be implied by law from the nature of the parties' relationship. For example, a customer owes a duty to exercise reasonable care in drawing cheques on an account with its banker.[16] Alternatively, the duty may be implied by statute. For example, the sale of goods legislation imposes on a seller of goods a legal duty to deliver the quantity of goods stated in the contract.[17] Some duties, such as the duty to co-operate or exercise good faith in the performance of a

8. *Heimann v The Commonwealth* (1938) 38 SR (NSW) 691 at 695–6. See also *Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd* (1987) 10 NSWLR 468.
9. See [14-22]–[14-25].
10. *Re Comptoir Commercial Anversois and Power Son & Co* [1920] 1 KB 868; *Heimann v The Commonwealth* (1938) 38 SR (NSW) 691 at 695.
11. See [12-19]. See generally on the parol evidence rule [12-19]–[12-23].
12. See the recent discussion in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at 1993ff; [2009] UKPC 10 at [19]ff.
13. See [12-13].
14. See [12-19].
15. See [11-20].
16. *Commonwealth Trading Bank of Australia v Sydney Wide Stores Pty Ltd* (1981) 148 CLR 304; 35 ALR 513 (see J W Carter (1982) 98 *LQR* 19). But there is no duty to examine accounts: *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80.

contract,[18] are sometimes based on an implied term, but on other occasions the duty has been inferred by the court solely by the construction of the contract and without the need for implying a term.[19] Generally, however, the courts have preferred to employ an implied term analysis in the creation of legal duties, rather than to imply the duty simpliciter.[20]

An implied legal duty need not be contractual in character and need not give rise to a right to claim damages if it is not discharged. An example is the common law duty of an insured to disclose material facts to an insurer.[21] And a legal duty, such as that of a bailee to take reasonable care of the bailor's goods, may arise even though there is no contractual relation, for example, because the bailment is not supported by consideration.[22] However, this work is concerned with legal duties present in contracts, and generally these arise by virtue of contractual terms.

Terms Implied in Fact[23]

[11-06] Requirements for implication. The requirements for implication in respect of terms implied in fact depend in the first instance on a classification of the contract. If the contract is expressed in a document which is complete on its face, the requirements are those stated by Lord Simon, delivering the advice of the majority of the Privy Council, in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*:[24]

> Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

17. See **ACT**: *Sale of Goods Act* 1954, s 34; **NSW**: *Sale of Goods Act* 1923, s 33; **NT**: *Sale of Goods Act* 1972, s 33; **Qld**: *Sale of Goods Act* 1896, s 32; **SA**: *Sale of Goods Act* 1895, s 30; **Tas**: *Sale of Goods Act* 1896, s 35; **Vic**: *Goods Act* 1958, s 37; **WA**: *Sale of Goods Act* 1895, s 30.
18. See [28-09].
19. See, eg *Mackay v Dick* (1881) 6 App Cas 251 at 263.
20. See, eg *Ray v Davies* (1909) 9 CLR 160 at 170; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 449; 131 ALR 422. But see *Shell UK Ltd v Lostock Garage Ltd* [1977] 1 All ER 481 at 487.
21. See *Khoury v Government Insurance Office of New South Wales* (1984) 165 CLR 622; 54 ALR 639; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233.
22. See *Port Swettenham Authority v T W Wu & Co* [1979] AC 580.
23. H K Lücke, 'Ad Hoc Implications in Written Contracts' (1973) 5 *Adel LR* 32; John McCaughran, 'Implied Terms: The Journey of The Man on the Clapham Omnibus' [2011] *CLJ* 607.
24. (1977) 180 CLR 266 at 282–3; 16 ALR 363 (approved *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 605–6; 26 ALR 567; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 347).

However, these requirements are particularly 'strict'[25] or 'stringent',[26] perhaps overly so. In *Attorney General of Belize v Belize Telecom Ltd*[27] the Privy Council regarded the *BP* requirements as no more than factors to be considered when construing the contract. However, that is not the way in which the *BP* requirements have been applied in the Australian cases, and is one reason why different rules have been adopted for informal contracts.

In relation to informal contracts which are not complete on their face, the High Court in *Byrne v Australian Airlines Ltd*[28] approved the following statement by Deane J in *Hawkins v Clayton*:[29]

> where it is apparent that the parties have not attempted to spell out the full terms of their contract, a court should imply a term by reference to the imputed intention of the parties if, but only if, it can be seen that the implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case. That general statement of principle is subject to the qualification that a term may be implied in a contract by established mercantile usage or professional practice or by a past course of dealing between the parties.

It would appear that, in applying Deane J's statement, it is both legitimate and necessary to consider the matters referred to in the *BP Refinery* case. The difference is that these are more in the nature of factors to be considered than essential requirements. Nevertheless, a term cannot be implied into an informal contract if it is unnecessary to do so, and the term must also be consistent with express terms.

[11-07] Reasonable and equitable. Although it is not sufficient to justify an implication that it be reasonable to imply a term,[30] any term which is sought to be implied must operate reasonably and equitably between the parties. For example, in *Peter American Delicacy Co Ltd v Champion*[31] a contract between manufacturers and a retailer of ice cream provided: 'Prices are subject to alteration on giving customer seven days' notice in writing'. It was argued that the clause was governed by an implied term entitling the manufacturers to fix 'reasonable' prices. But a majority of the court said that such a term would be both unfair and unreasonable from the manufacturers' standpoint, since they might be required, by litigation 'to enter into a full examination of … manufacturing costs and expenses'[32] in order to prove that any price was reasonable. It would also have been

25. *Wright v TNT Management Pty Ltd* (1989) 85 ALR 442 at 459.
26. *Vroon BV v Foster's Brewing Group Ltd* [1994] 2 VR 32 at 68.
27. [2009] 1 WLR 1988 at 1995; [2009] UKPC 10 at [27]. See Kelvin F K Low and Kelry C F Loi, (2009) 125 *LQR* 561; Elizabeth Macdonald, (2009) 26 *JCL* 97; Chris Peters, [2009] *CLJ* 513.
28. (1995) 185 CLR 410 at 422, 442 (see Gregory Tolhurst and J W Carter, 'The New Law on Implied Terms' (1996) 11 *JCL* 76). See also *Breen v Williams* (1996) 186 CLR 71; 138 ALR 259 (see J W Carter and G J Tolhurst (1997) 12 *JCL* 152; Jane Swanton and Barbara McDonald (1997) 71 *ALJ* 332 and 413).
29. (1988) 164 CLR 539 at 573; 78 ALR 69. See also *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 121.
30. See, eg *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 139.
31. (1928) 41 CLR 316.
32. (1928) 41 CLR 316 at 324. Contrast *Finchbourne Ltd v Rodrigues* [1976] 3 All ER 581.

unfair to the retailer to oblige him to pay any price considered reasonable by the manufacturers.[33]

[11-08] Necessary to give business efficacy. At the heart of factual implication is the idea that a term should only be implied if it is necessary[34] to make the contract effective in a business sense. If the contract is commercially effective without the term, the court will not imply it.[35] But a term will be implied if without it the contract would be unworkable.[36]

The leading authority on business efficacy is *The Moorcock*,[37] where the plaintiff's vessel suffered damage when lying at the defendants' jetty. The defendants had agreed to allow the plaintiff to discharge and load his vessel at their wharf and for that purpose to be moored alongside the jetty. During low tide the vessel, as the parties contemplated, rested on the mud at the bottom of the River Thames. Damage to the vessel was found to have been occasioned by a ridge of hard ground beneath the mud and the plaintiff claimed compensation. The English Court of Appeal said that a term had to be implied into the contract imposing an obligation on the defendants to see that the bottom of the river was reasonably fit, or to exercise reasonable care in finding out its condition, and to advise the plaintiff of its condition. Bowen LJ said:[38]

> In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.

Since the parties knew that the vessel would rest on the bottom at low tide, it was obvious that the contract could not be performed unless the ground was safe. Moreover, the plaintiff was entitled to assume that the defendants, who could be assumed to know the state of the river, had accepted responsibility. Accordingly, the plaintiff was able to recover damages for breach of contract.[39]

It is common for a contract to involve co-operation between the parties and it requires little imagination to imply a term creating the duty to co-operate or at least not to do anything which will frustrate the operation of the contract.[40] In fact, the need for business efficacy may give rise to an implication which imposes an obligation on both parties. For example, in

33. See also *O'Donnell v Thor Industries Pty Ltd* (1977) 136 CLR 296; 14 ALR 61; *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 95.
34. *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41; *Hughes v Greenwich London Borough Council* [1994] 1 AC 170.
35. See, eg *Bell v Lever Bros Ltd* [1932] AC 161 at 226; *Heimann v The Commonwealth* (1938) 38 SR (NSW) 691 at 695; *Australian Meat Industry Employees' Union v Frugalis Pty Ltd* [1990] 2 Qd R 201; *CGU Workers Compensation (NSW) Ltd v Garcia* (2007) 69 NSWLR 680 at 706; [2007] NSWCA 193 at [143].
36. *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 66.
37. (1889) 14 PD 64.
38. (1889) 14 PD 64 at 68.
39. See also *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359.
40. See [28-09]–[28-10].

Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd[41] a lease conferred an option of a further term on the lessee, and provided for the payment of 'such rental as may be mutually agreed … and failing agreement then such rental as may be fixed by an arbitrator' nominated in accordance with the lease. The High Court held that a term should be implied requiring both parties to do all that was reasonably necessary to procure the nomination of an arbitrator. Therefore, once the lessee had exercised the option for renewal, and only the rental was left to be determined, the parties were required to follow the procedure for nomination provided for by the lease and an order for specific performance was made.[42]

[11-09] Obviousness. In *Shirlaw v Southern Foundries (1926) Ltd*[43] Mackinnon LJ said:[44]

> Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'

The operation of the requirement can be seen by contrasting two cases on commission agency contracts. In *Luxor (Eastbourne) Ltd v Cooper*[45] the plaintiff sought to recover the payment alleged to be due under a contract with the defendants which provided for the payment of commission on 'completion' of the sale of two leasehold cinemas with a purchaser introduced by the plaintiff. A prospective purchaser, able and willing to buy the properties, was found by the plaintiff, but no draft contract was ever submitted to the defendants who ultimately sold the properties to another person. The plaintiff alleged that a term should be implied to the effect that the defendants would do nothing to prevent completion of a sale and deprive the plaintiff of commission, at least without 'reasonable cause'. The House of Lords held that no such term could be implied as it would have prevented the defendants dealing with their own property. It was by no means obvious that the defendants were giving up their freedom of disposal, particularly in view of the fact that the agent did not promise to find a purchaser, or even to use due diligence.

On the other hand, in *Alpha Trading Ltd v Dunnshaw-Patten Ltd*[46] the defendants agreed to pay the plaintiffs commission out of the proceeds of a contract for the sale of goods if a purchaser was introduced by the plaintiffs. The plaintiffs introduced a company which entered into a contract with the defendants. However, owing to the default of the defendants under the contract of sale, this contract was not completed and no proceeds were received. The English Court of Appeal, distinguishing *Luxor v Cooper*

41. (1982) 149 CLR 600; 43 ALR 68.
42. See also *Butts v O'Dwyer* (1952) 87 CLR 267.
43. [1939] 2 KB 206 (affirmed sub nom *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701).
44. [1939] 2 KB 206 at 227.
45. [1941] AC 108. Cf *L J Hooker Ltd v W J Adams Estates Pty Ltd* (1977) 138 CLR 52; 13 ALR 161.
46. [1981] QB 290 (see J W Carter (1982) 45 *MLR* 220). See also *Moneywood Pty Ltd v Salamon Nominees Pty Ltd* (2001) 202 CLR 351 at 359–60, 374–5; 177 ALR 390 at 395–6, 407 (terms implied *in law* in estate agency contracts). See further [37-02].

where no contract of sale had been entered into, implied a term to the effect that the defendants would not do anything which would prevent the plaintiffs receiving commission. Because in *Alpha Trading* a contract of sale had been agreed with a purchaser introduced by the plaintiffs, it was obvious that the defendants could not have complete freedom in the matter, and could not deprive the plaintiffs of the benefit of their labours.[47] Accordingly, the plaintiffs recovered the agreed commission by way of damages for breach of the term implied into the agency contract.

Even the requirement of obviousness may lead to debate. For example, in the *Southern Foundries* case the House of Lords was split three to two on the implication of the term when affirming the decision of the English Court of Appeal where there had also been a difference of opinion.[48]

[11-10] Clarity of expression. For a term to be implied it must be capable of clear expression and reasonably certain in its operation.[49] There is a link with the requirement of obviousness since a term which is unclear is not likely to be obvious to both parties. For example, in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*[50] the High Court refused to imply a term into a construction contract because it was impossible to say, with any degree of certainty, what the term would have said. The parties had contracted under the misapprehension that construction work could proceed on a three shifts per day basis. Although an injunction obtained by local residents made this impossible, it was by no means clear what term the parties would have included to deal with the eventuality.

It is probably true to say that if the court can see, for example, from the arguments of counsel, that various terms *could* be implied, it will be reluctant to reach the conclusion that one particular formulation was a necessary implication.

[11-11] Consistency. The requirement of consistency has two aspects:

(1) the term sought to be implied must not contradict the express terms of the contract,[51] and

(2) the term must not deal with a matter already sufficiently dealt with by the contract.[52]

For example, in *Shepherd v Felt and Textiles of Australia Ltd*[53] a term was implied into an agency contract requiring the agent to render faithful and

47. But cf *L French & Co Ltd v Leeston Shipping Co Ltd* [1922] 1 AC 451.
48. See also *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266.
49. See, eg *Terkol Rederierne v Petroleo Brasileiro SA (The Badagry)* [1985] 1 Lloyd's Rep 395 at 401.
50. (1982) 149 CLR 337 (see J W Carter [1983] *CLJ* 199). See also *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 24; 64 ALR 481. Cf *Shell UK Ltd v Lostock Garage Ltd* [1977] 1 All ER 481.
51. See, eg *Sanders v Snell* (1998) 196 CLR 329; 157 ALR 491.
52. See also *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 36; 266 ALR 462 at 484; [2010] HCA 19 at [92].
53. (1931) 45 CLR 359. Contrast *Moorhouse v Angus and Robertson (No 1) Pty Ltd* [1981] 1 NSWLR 700.

loyal service to his principal. This was implied, even though there was an express term requiring the agent to use his 'best endeavours' to obtain orders for the principal, because there was no inconsistency between the terms.[54] Nor could it be said that the express term had dealt exhaustively with the obligations of the agent.

In *Hart v MacDonald*[55] a written contract for the erection of a dairy plant and butter factory provided: 'It is to be understood that there is no agreement or understanding between [the parties] not embodied' in the document. The High Court held that this did not preclude the implication of a promise by the defendant to commence the business of dairying upon the erection of plant, and to carry on that business so that he would be able to pay for the plant. This term was necessary because the contract provided for payment out of the proceeds of butter manufactured within the butter factory. The term stating that there was no agreement other than that embodied in the contract did not contradict this implication. Griffith CJ said[56] that the implication was 'necessary', and arose 'upon a proper construction of the express words'; O'Connor J said[57] that the implication was 'embodied in the contract just as effectively as if it were written therein'; and Isaacs J explained[58] that the express term only excluded what was 'extraneous' to the written contract, and did not exclude an implication arising on a 'fair construction of the agreement itself'.

Terms Implied in Law

[11-12] Requirements for implication. Where a term is implied as a matter of law, rather than because of the factual circumstances of the case, it is usually implied because of the nature of the contract itself: because the same term has been implied in contracts of this nature in the past. Usually the contract is a very informal type, often with no written terms at all. However, because the terms are in the nature of default rules,[59] applicable because the parties have not agreed otherwise, existence of writing does not of itself preclude an implication by the court.

The list of contracts which attract terms implied in law is not closed,[60] and a term may therefore be implied in law in a new situation. However, it must be *necessary* to make the new implication.[61]

54. The term may have been of the implied in law variety, but the position is the same with regard to consistency; see [11-16].
55. (1910) 10 CLR 417.
56. (1910) 10 CLR 417 at 421.
57. (1910) 10 CLR 417 at 427.
58. (1910) 10 CLR 417 at 430. Cf *Lewis v Bell* (1985) 1 NSWLR 731 at 736.
59. See *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 at 458–9.
60. *Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd* (1987) 10 NSWLR 468 at 487.
61. See *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 (see Peter Brereton (1992) 5 *JCL* 264); *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 450; *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10; 128 ALR 391; *University of Western Australia v Gray* (2009) 259 ALR 224 at 254; [2009] FCAFC 116 at [142]. See Elisabeth Peden, 'Policy Concerns in Terms Implied in Law' (2001) 117 *LQR* 459.

[11-13] Distinguishing legal from factual implication.[62] Although the implication of any term is a question of law for the court,[63] there are two quite significant distinctions between factual and legal implication.

First, there is a difference in the onus of proof.[64] Where a term is implied in fact the onus is on the party alleging the implication. The onus is on the other party when the term is implied in law, assuming that, in the past, the term has been implied into the type of contract before the court.

Second, there are important differences in the factors relevant to implication. In particular, 'reasonableness' is more important to legal implication and a term may be implied by law, on the ground that it is reasonable to do so, even though the 'business efficacy' and 'obviousness' criteria of terms implied in fact are not satisfied.[65] It is also the case that a term may be implied in law even though it lacks the necessary precision of a term implied in fact.[66]

It is sometimes said that there is a third distinction, namely that the *presumed* intention of the parties is the rationale for terms implied in law, whereas *actual* intention is the rationale of terms implied in fact.[67] Even if this distinction is helpful, which may be doubted, it is impossible to find any consistent approach in the cases.[68]

Nevertheless, once a term has been implied, it is often difficult to tell whether the court's decision is based on factual or legal implication. Thus, some terms which have been based on the requirement of business efficacy look, in the final analysis, to be terms implied in law, because they involve the 'imposition of legal duties in cases where the law thinks that policy requires it'.[69] Moreover, where an informal contract is in issue it may now be very difficult to draw the line between factual and legal implication.

[11-14] Illustrations. To decide whether a term is implied in law it is necessary to classify the contract. By way of illustration, reference can be made to terms usually implied in employment contracts, bailment contracts and contracts for work and materials.[70]

Where an employment contract exists the court will, in the absence of express exclusion (or the imposition of a more onerous duty), imply a term requiring the employee to exercise 'proper or reasonable care' in the

62. See J F Burrows, 'Implied Terms and Presumptions' (1968) 3 *NZULR* 121.
63. *Re Comptoir Commercial Anversois and Power Son & Co* [1920] 1 KB 868; *Heimann v The Commonwealth* (1938) 38 SR (NSW) 691 at 695.
64. See [11-02].
65. See, eg *Liverpool City Council v Irwin* [1977] AC 239.
66. *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 576.
67. *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] 1 WLR 1095 at 1099. Cf *Central Exchange Ltd v Anaconda Nickel Ltd* (2001) 24 WAR 382 at 391.
68. See, eg *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at 137; *Khoury v Government Insurance Office of New South Wales* (1984) 165 CLR 622 at 635–6; *Australis Media Holdings Pty Ltd v Telstra Corp Ltd* (1998) 43 NSWLR 104 at 123. For discussion see Jane Swanton, 'Implied Contractual Terms: Further Implications of Hawkins v Clayton' (1992) 5 *JCL* 127.
69. *Simonius Vischer & Co v Holt* [1979] 2 NSWLR 322 at 348. See also *University of Western Australia v Gray* (2009) 259 ALR 224 at 255; [2009] FCAFC 116 at [145].
70. For the impact of statute see [11-23]–[11-24].

discharge of duties under the contract.[71] Where the contract is for the provision of services by a professional person, such as a solicitor, insurance broker or engineer, the term will require the exercise of the degree of care expected of a person in the profession, trade or industry possessing the particular special skill.[72]

A bailment contract imposes on the bailee an obligation not to convert the bailor's goods and to exercise reasonable care.[73]

Where a contract involves the execution of work and the supply of materials, such as in the building of a house, the law implies terms requiring the contractor to use reasonable care in doing the work and to supply materials which are of 'good quality' and 'reasonably fit for the purpose' for which they are supplied.[74]

[11-15] Unjust or unreasonable terms not implied. A term will not be implied in law if, in the circumstances of the case, it is unjust or unreasonable to imply it. For example, in *Gloucestershire County Council v Richardson*,[75] a builder was employed by the council to build extensions to a technical college and in doing so used concrete supplied by a supplier nominated, as required in the contract, by the County architect. The cement was defective and delays occurred in the building of the extensions. As the council would not provide compensation for the builder in respect of the defects he abandoned the work. One issue before the House of Lords was whether the implied term of quality, normally present in a work and materials contract,[76] was implied in the contract between the builder and the council. It was held that the term was not implied because it would have been unjust to imply it. The supplier had been nominated by the council, the builder had no right to veto the nomination and was bound by terms which, as between the builder and the supplier, severely restricted the builder's rights in respect of defective supply. The restriction would effectively have prevented the builder obtaining compensation from the supplier and it would therefore have been unjust to hold the builder liable to the council on an implied term.

[11-16] Consistency and concurrent duties. The requirement of consistency between express and implied terms also applies where the term is the subject of legal implication. Thus, in *Gemmell Power Farming Co Ltd v Nies*[77] the defendant alleged the breach of a contract of hire on the basis of

71. *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555. See also *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 (implied duty of good faith or fidelity). There may also be an obligation to provide a safe system of work: *Wright v TNT Management Pty Ltd* (1989) 85 ALR 442 at 459.
72. See, eg *Breen v Williams* (1996) 186 CLR 71 (doctor); *Carew Counsel Pty Ltd v French* (2002) 4 VR 172 at 185; 190 ALR 690 (solicitor). See further [29-17].
73. See, eg the discussion in Palmer, *Palmer on Bailment*, 3rd ed, 2009, pp 47ff.
74. *G H Myers & Co v Brent Cross Service Co* [1934] 1 KB 46 at 55 (approved *Young & Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454; adopted *Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd* (1968) 120 CLR 516).
75. [1969] 1 AC 480.
76. See [11-14].
77. (1935) 35 SR (NSW) 469. See also *Helicopter Sales (Australia) Pty Ltd v Rotor-Work Pty Ltd* (1974) 132 CLR 1; 4 ALR 77. Contrast *Criss v Alexander* (1928) 28 SR (NSW) 297.

an implied term relating to the fitness of a tractor for the hirer's purpose. It was held that the existence of an express warranty (cl 7) and an exclusion of liability (cl 8) combined to exclude the alleged implied term by virtue of their inconsistency with the term sought to be implied.[78]

Where there is a duty under the law of tort, for example, to exercise reasonable care, the courts have in recent years been reluctant to imply a contractual term which would have the effect of increasing one party's obligations under a contract which is not obviously incomplete.[79] However, these cases do not deny the ability to imply a term to *define* the standard of care.[80]

The cases also indicate that a tortious duty of care — which would frequently operate in a similar way to a term implied in law — will not be imposed where the contract is intended to be a complete statement of the parties' obligations.[81] The converse is not, however, correct. Thus, it is now clear that a term may be implied to create a contractual duty which mirrors the tortious duty.[82] Since the contract provides the setting for the tortious duty, it would be peculiar for the tortious duty to displace the term which would otherwise be implied as a matter of law. Thus, generally, a professional person will be subject to concurrent duties of care in both contract and tort.[83]

Terms Implied by Statute

[11-17] Extent of legislative intervention. The category of terms implied by statute is a large one, and it is beyond the scope of this work to give any more than an outline of the relevant provisions. The treatment will not extend beyond contracts for the supply of goods and services, and emphasis will be given to supply by way of sale. It should perhaps be pointed out that many of the terms now implied by statute were at one time implied at common law.

Sale of Goods

[11-18] Implied terms relating to title. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, s 17 of the *Sale of Goods Act* 1923 (NSW)[84] provides that there is:

78. Cf *May and Butcher Ltd v R* (1929) [1934] 2 KB 17n.
79. See, eg *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80; *Hawkins v Clayton* (1988) 164 CLR 539; *Scally v Southern Health and Social Services Board* [1992] 1 AC 294. Cf *University of Western Australia v Gray* (2009) 259 ALR 224 at 252; [2009] FCAFC 116 at [138].
80. See [29-15].
81. See also *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233.
82. See *Astley v Austrust Ltd* (1999) 197 CLR 1 at 21–3; 161 ALR 155 (approving *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 193–4 and disapproving *Hawkins v Clayton* (1988) 164 CLR 539 at 585). See Barbara McDonald, 'Solicitors' Liability: Tort, Contract or Both?' (1991) 4 *JCL* 121.
83. See further [29-17].

(1) an implied condition on the part of the seller that in the case of a sale the seller has a right to sell the goods, and that in the case of an agreement to sell the seller will have a right to sell the goods at the time when the property is to pass;

(2) an implied warranty that the buyer will have and enjoy quiet possession of the goods; and

(3) an implied warranty that the goods are free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

Because the first implied term is a condition, proof that the seller had no right to sell will justify termination of the contract by the buyer.[85] On the other hand, because the applicable implied terms are warranties where the buyer's quiet possession of the goods is interfered with, or there is a charge or encumbrance on the goods, the buyer must be satisfied with a claim for damages.[86]

[11-19] Correspondence with description.[87] Under s 18 of the *Sale of Goods Act* 1923 (NSW)[88] a condition is implied into a contract for the sale of goods by description, requiring the goods to correspond with that description. For the term to be implied the buyer must rely on the description when entering into the contract.[89]

Two main issues may arise in the application of s 18:

- whether the sale is *by description*; and
- whether the goods delivered (or tendered) correspond with that description.

In *Wallis v Pratt*[90] sellers agreed to sell goods described in the contract as 'common English sainfoin'. The sale was by description because the description was the means by which the subject matter of the contract had been identified.[91] Where the goods are selected by a consumer from a retailer's stock, as in the normal retail sale, the transaction need not be a sale by description. However, if, for example, the consumer asks to buy 'a hot water bottle', the sale will be by description because the goods are being chosen on the basis of a particular description.[92]

Correspondence with description is more complex. The court must first identify the words which actually describe the goods. Words directed solely

84. See also **ACT**: *Sale of Goods Act* 1954, s 17; **NT**: *Sale of Goods Act* 1972, s 17; **Qld**: *Sale of Goods Act* 1896, s 15; **SA**: *Sale of Goods Act* 1895, s 12; **Tas**: *Sale of Goods Act* 1896, s 17; **Vic**: *Goods Act* 1958, s 17; **WA**: *Sale of Goods Act* 1895, s 12.
85. See, eg *Rowland v Divall* [1923] 2 KB 50 (see [38-06]).
86. For the distinction between conditions and warranties see [13-03]–[13-07].
87. See Brian Coote, 'Correspondence with Description in the Law of Sale of Goods' (1976) 50 *ALJ* 17.
88. See also **ACT**: *Sale of Goods Act* 1954, s 18; **NT**: *Sale of Goods Act* 1972, s 18; **Qld**: *Sale of Goods Act* 1896, s 16; **SA**: *Sale of Goods Act* 1895, s 13; **Tas**: *Sale of Goods Act* 1896, s 18; **Vic**: *Goods Act* 1958, s 18; **WA**: *Sale of Goods Act* 1895, s 13.
89. See *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1991] 1 QB 564 (see Ian Brown (1990) 106 *LQR* 561).
90. [1911] AC 394.
91. It was, in addition, a sale by sample.
92. See *Grant v Australian Knitting Mills Ltd* [1936] AC 85 at 100.

to quality are not part of the goods' description,[93] whereas the elements used to identify the goods usually are. Thus, in *Wallis v Pratt* the descriptive words were 'common English sainfoin'. The sellers were in breach of contract because they delivered goods of another description, namely, 'giant sainfoin'. There is a tendency to distinguish commercial contracts, for example, for the sale of commodities such as wheat, from other types of contracts.[94] In the former, every detail of the description may be essential and the slightest deviation a breach of condition.[95] But in other contracts the non-correspondence must relate to a substantial ingredient of the 'identity' of the goods sold before there is a breach of the implied condition.[96]

[11-20] Fitness for purpose. Under s 19(1) of the *Sale of Goods Act* 1923 (NSW),[97] a condition requiring the goods to be fit for the buyer's purpose will be implied if:[98]

- the buyer made a particular purpose known to the seller;
- the purpose was made known in such a way as to show reliance on the seller's skill or judgment; and
- the goods were of a description which it was in the course of the seller's business to supply (as manufacturer or otherwise).

An example is provided by *Frost v Aylesbury Dairy Co Ltd*[99] where milk was supplied by the defendants who were dealers in milk. A breach of the implied condition of fitness for purpose was established by proof that the milk contained typhoid fever germs. The sellers said that they had taken special precautions to ensure that only pure milk would be supplied. The milk was obtained for the purpose of human consumption and in the circumstances it was clear that the buyer had relied on the sellers' skill or judgment. There was no doubt that it was in the course of the sellers' business to supply goods described as 'milk'. The case also illustrates that the liability of sellers is strict in relation to purpose (and quality) since the defect in the goods was latent.[100]

In order for the condition to be implied the buyer need not rely exclusively on the seller's skill or judgment.[101]

93. See *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441.
94. See *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 998.
95. See, eg *Arcos Ltd v E A Ronaasen & Son* [1933] AC 470.
96. *Couchman v Hill* [1947] KB 554 at 559, as interpreted in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989.
97. See also **ACT**: *Sale of Goods Act* 1954, s 19(2); **NT**: *Sale of Goods Act* 1972, s 19(a); **Qld**: *Sale of Goods Act* 1896, s 17(1); **SA**: *Sale of Goods Act* 1895, s 14(a); **Tas**: *Sale of Goods Act* 1896, s 19(a); **Vic**: *Goods Act* 1958, s 19(a); **WA**: *Sale of Goods Act* 1895, s 14(i).
98. This is, however, subject to a proviso 'that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose'. The proviso has been narrowly interpreted. See, eg *Grant v Australian Knitting Mills Ltd* [1936] AC 85 at 99.
99. [1905] 1 KB 608.
100. See generally on standard of duty [29-13]–[29-17].
101. *Cammell Laird & Co Ltd v Manganese Bronze and Brass Co Ltd* [1934] AC 402.

[11-21] Merchantable quality. Section 19(2) of the *Sale of Goods Act* 1923 (NSW)[102] states that where goods are bought by description from a seller who deals in goods of that description there is an implied condition that the goods purchased are of 'merchantable quality'. The provision is subject to a proviso that if the buyer has examined the goods there is no implied condition as regards defects which such an examination 'ought to have revealed'.

The requirement that the goods be 'bought' by description means that there must have been a sale by description;[103] and the requirement is the same as in s 19(1). Thus, the seller's business must include a willingness to accept orders for goods of that description.[104] The proviso indicates that a buyer who has not examined the goods will be in a better position than one who has. However, the proviso will not prevent the condition being implied, and a breach established, in relation to latent defects in the goods, that is, those not discoverable by an examination of the goods.

For example, in *Grant v Australian Knitting Mills Ltd*[105] the plaintiff purchased woollen underwear from a retailer and contracted dermatitis because of the presence of a chemical irritant in the garments. The implied condition was established, and a breach proved, even though the defect in the goods could not have been discovered by any examination by either the buyer or the retailer. Moreover, liability was established without any proof by the buyer that the retailer had failed to exercise reasonable care. The Privy Council said:[106]

> [W]hatever else merchantable may mean it does mean that the article sold, if only meant for one particular use in ordinary course, is fit for that use; merchantable does not mean that the thing is saleable in the market simply because it looks all right; it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination …

The statement indicates that 'merchantable' means 'saleable', but also indicates that the purpose to which the goods are put is relevant in determining whether the goods are merchantable. It can therefore be inferred that in cases where goods can be put to more than one use it may be difficult to decide whether the goods are merchantable. Where a range of purposes is possible it would seem that, at common law, regard must be had to the description of the goods, the price at which they are sold and the range of purposes.[107] Generally, goods are merchantable if fit for at least one of the range of purposes to which the goods are usually put.

The fact that purpose is relevant to both fitness for purpose and merchantable quality indicates that there is an overlap between ss 19(1)

102. See also **ACT**: *Sale of Goods Act* 1954, s 19(4); **NT**: *Sale of Goods Act* 1972, s 19(b); **Qld**: *Sale of Goods Act* 1896, s 17(2); **SA**: *Sale of Goods Act* 1895 s 14(b); **Tas**: *Sale of Goods Act* 1896, s 19(b); **Vic**: *Goods Act* 1958, s 19(b); **WA**: *Sale of Goods Act* 1895, s 14(ii). Cf *Sale of Goods Act* 1979 (UK), s 14(2), under which an implied term of 'satisfactory quality' replaces the merchantable quality term.
103. See [11-19].
104. See *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441.
105. [1936] AC 85.
106. [1936] AC 85 at 99–100.
107. See, eg *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31.

and 19(2). For example, in *Grant v Australian Knitting Mills Ltd* a breach of both implied conditions was established. It is also fair to say that the decisions have tended to widen the fitness for purpose provision at the expense of the merchantable quality provision.[108]

In respect of 'consumer' sales covered by Pt VIII of the *Sale of Goods Act* 1923 (NSW) there is no implied condition of merchantable quality as regards 'defects brought to the buyer's notice before the contract was entered into'.[109] There is also, in s 64(3), a definition of 'merchantable quality' in the following terms:[110]

> Without limiting the meaning of the expression 'merchantable quality', goods of any kind which are the subject of a contract for a consumer sale are not of merchantable quality if they are not as fit for the purpose or purposes for which goods of that kind are commonly bought as is reasonable to expect having regard to their price, to any description applied to them by the seller and to all other circumstances.

An important question of interpretation arises in respect of the statutory definition of merchantable quality.[111] At common law goods commonly used for more than one purpose would clearly be unmerchantable only if of no use for any of the range of purposes.[112] Suitability for one such purpose may therefore be sufficient. Although, in theory, the effect of the definitions may be to narrow the common law, by emphasising purpose for use rather than saleable quality, s 64(3) of the *Sale of Goods Act* (NSW) is at least as wide as the common law because it is introduced by words which preserve any wider meaning. One view is that these definitions merely reproduce the common law.[113] There is, however, authority to suggest that the law has been changed, and that the effect of the definitions is to require goods, commonly used for a number of purposes, to be suitable for all of those purposes.[114]

[11-22] Sale by sample. Section 20 of the *Sale of Goods Act* 1923 (NSW)[115] provides that, in the case of a sale by sample, there are three implied conditions, requiring:

(1) that the bulk correspond with the sample in quality;

(2) that the buyer have a reasonable opportunity of comparing the bulk with the sample; and

108. See, eg *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441.
109. Section 64(4).
110. See also *Goods Act* 1958 (Vic), s 89(2).
111. In England, the implied term of 'satisfactory quality' (which replaces the merchantable quality term) is described in s 14(2A) of the *Sale of Goods Act* 1979 (UK).
112. See *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31.
113. See *M/S Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 WLR 1 at 14. See also *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1991] 1 QB 564.
114. See *Rogers v Parish (Scarborough) Ltd* [1987] QB 933; *Cavalier Marketing (Australia) Pty Ltd v Rasell* (1990) 96 ALR 375 (see Kenneth Sutton (1991) 4 *JCL* 235).
115. See also **ACT**: *Sale of Goods Act* 1954, s 20; **NT**: *Sale of Goods Act* 1972, s 20; **Qld**: *Sale of Goods Act* 1896, s 18; **SA**: *Sale of Goods Act* 1895, s 15; **Tas**: *Sale of Goods Act* 1896, s 20; **Vic**: *Goods Act* 1958, s 20; **WA**: *Sale of Goods Act* 1895, s 15.

(3) that the goods be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

A contract is one for sale by sample if there is an express or implied term to that effect.[116]

Further Illustrations

[11-23] Supply of goods other than by sale. Where no legislative provisions deal with the implication of terms in contracts for the supply of goods, the common law must be relied on for the implication of terms. In *Derbyshire Building Co Pty Ltd v Becker*[117] Kitto J said:[118]

> The authorities concerning the nature of an implied term in a contract of bailment … are not uniform. But the weight of judicial opinion is, I think, in favour of applying to all contracts for the supply of chattels, including contracts of bailment, the principles laid down with respect to sales in s 14 of the *Sale of Goods Act* 1893 (UK).

For example, where goods are hired there is, at common law, an implied term that the goods are fit for the hirer's purpose provided, of course, that the hirer has communicated the specific purpose in such a way as to indicate reliance on the supplier's skill or judgment.[119]

[11-24] Supply of services. Under the common law terms are implied into contracts for the provision of 'services'. There is, therefore, an implied term that the services will be rendered with due care and skill,[120] and also implied terms regulating the quality and fitness of any goods supplied.[121] Although conventionally described as 'warranties' the terms relating to goods ('materials') supplied with services are usually implied as 'conditions'.[122]

Terms Implied by Custom or Usage

[11-25] Requirements for implication. A term may sometimes be implied into a contract by reason of a custom or usage in the market. The phrase 'custom or usage' includes established mercantile usage or professional practice.[123] The parties are regarded as having contracted on the basis of any custom or usage applicable and the term is implied in accordance with the custom or usage.

For a term to be implied the custom or usage must be proved to be 'notorious, certain, legal and reasonable'.[124] For example, in *Sagar v H Ridehalgh & Son Ltd*[125] the defendants, who employed the plaintiff as a

116. See, eg *J S Robertson (Aust) Pty Ltd v Martin* (1956) 94 CLR 30.
117. (1962) 107 CLR 633.
118. (1962) 107 CLR 633 at 649.
119. See further Carter, *Carter's Breach of Contract*, 2011, §2-51.
120. See [11-14].
121. See [11-23].
122. See [13-11].
123. See *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 440.

weaver, made deductions from the plaintiff's wages in respect of cloth which had not been properly woven. A usage in the Lancashire region, where the plaintiff worked, was established which justified the deduction. The fact that some mill-owners in the region did not make deductions did not prevent the usage being applied because there was evidence that over 85 per cent of the mills in the county made such deductions.

Evidence of actual market practices is nevertheless crucial. Thus, in *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd*[126] the appellants before the High Court failed to establish a term alleged to be implied into contracts between themselves and their insurers on the basis of commercial custom or usage. The implied term would have precluded the insurer making any claim against the appellants if the broker to whom they paid a premium did not pass it on, or would have required the insurers to look to the broker for payment whether or not the premium had been paid to the broker. There was no proof that insurers in the market invariably, or even regularly, abstained from making claims against insureds in cases where the broker defaulted and in the absence of such proof there was no basis for implication on the ground of custom or usage. However, the court made it clear that universal acceptance of a custom is not essential.

A term which is inconsistent with the express terms of the contract will not be implied even if the custom or usage is established. Thus, in *Summers v The Commonwealth*[127] a contract was entered into for the supply of 671 cubic feet of marble for Australia House, London. The contract required the size of each block to be full enough to admit of its being worked and polished in London without blemish on every side if need be, to the size set out in the schedule' to the contract. The supplier alleged the existence of a trade usage under which it was sufficient for him to supply blocks of marble from which a number of the schedule sized blocks could be cut. The court was not satisfied that the usage was established; but said that, even if this was the case, no term could have been implied because the usage was inconsistent with the express term.[128] Similarly, a term cannot be implied if the trade usage establishes a matter dealt with sufficiently by the express terms.[129]

Establishing a course of conduct in a given market does not indicate that a term giving contractual effect to that course of conduct can be implied. It is necessary for the course of conduct to have a binding effect in the market, that is to say, the merchants who operate in the market must regard themselves as bound by the usage unless it has been expressly *excluded*.[130]

124. *Halsbury's Laws of England*, 4th ed, 1974, Vol 9, para 353. See also *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd* (1973) 129 CLR 48 at 61; 1 ALR 1.
125. [1931] 1 Ch 310.
126. (1986) 160 CLR 226. See also *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 423.
127. (1918) 25 CLR 144 (affirmed (1919) 26 CLR 180).
128. See also *Rosenhain v Commonwealth Bank of Australia* (1922) 31 CLR 46 at 53; *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 236–7.
129. *Re Nudgee Bakery Pty Ltd's Agreement* [1971] Qd R 24.
130. See *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria* [1983] QB 856. See also *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728.

Consumer Guarantees[131]

General

[11-26] Introduction. Terms were formerly implied by Pt V, Div 2 of the *Trade Practices Act* 1974 (Cth) and corresponding provisions of the fair trading legislation into contracts for the supply of goods and services to 'consumers'. That regime has been replaced. For contracts for the supply of goods and services to consumers entered into from 1 January 2011, the consumer guarantees regime of the *Australian Consumer Law* applies.[132]

Consumer guarantees imposed by the *Australian Consumer Law* create specific statutory duties. They are not implied terms. If goods or services do not comply with a consumer guarantee, the rights and remedies available to a consumer against a supplier (or a manufacturer) are based on the idea of breach of statutory duty, rather than breach of a term of the contract. However, the fact that goods or services do not conform to a consumer guarantee is not a contravention of the *Australian Consumer Law.*

In some cases, failure to comply with a consumer guarantee will also be a breach of contract, as where a supplier of services breaches an express undertaking to exercise reasonable care and skill when providing services. The *Australian Consumer Law* does not explain the impact of the rights and remedies which are available under the general law of contract. Similarly, nothing is said about the impact on rights and remedies available where a condition or warranty implied by the sale of goods legislation is breached.[133]

[11-27] Definition of 'consumer'. The definition of 'consumer' in s 3 of the *Australian Consumer Law* is modelled on s 4B of the *Trade Practices Act* 1974 (Cth). The bases on which a person can be a consumer under a contract for the supply of goods or services are therefore broadly the same under the new law as they were under the old law. Unlike the position under the sale of goods legislation, supply of goods is not limited to supply by way of sale.

The impact of s 3 of the *Australian Consumer Law* is to create a number of categories of consumer, that is, situations in which a supply of goods or services is to a 'consumer'. The two main categories[134] are:

(1) a supply of goods or services at a price which does not exceed $40,000; and

(2) a supply of goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.

It follows that where the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption, price is irrelevant. Therefore, a contract for the supply of goods at a price of, say

131. See Carter, *Contract and the Australian Consumer Law: A Guide*, 2012, ch 2.
132. On the *Australian Consumer Law* see [1-21]–[1-22].
133. However, that may be addressed in State and Territory legislation adopting the *Australian Consumer Law.*
134. A person may be a consumer with respect to part, but not all, of the goods and services supplied under a mixed supply contract. See further [11-32].

$1 million, may be a supply to a consumer. A corporation may be a consumer, even though the goods or services are acquired in the course of a business, and for business purposes (other than resupply).[135] For example, a contract for the supply of services to a large corporation at a price of $1 million may be a supply to a 'consumer'. The one significant exception under the definition in s 3 of the *Australian Consumer Law* is that people who acquire *goods*, or hold themselves out as acquiring goods, for the purpose of resupply, are not consumers. There is no concept of acquisition for the purpose of resupply in relation to services.

In order for a supply to be a supply to a consumer, the supply must relate to goods or services (including a contract that relates to goods *and* services) as defined. Section 2(1) of the *Australian Consumer Law* defines 'goods' to include:

- ships, aircraft and other vehicles;
- animals, including fish;
- minerals, trees and crops whether on, under or attached to land or not;
- gas and electricity;[136]
- computer software;
- second-hand goods; and
- any component, part of, or accessory to goods.

There are specific and general exceptions or qualifications in relation to some of the consumer guarantee provisions relating to goods.[137]

When compared with the *Trade Practices Act* 1974 (Cth), computer software, second-hand goods and any component, part of, or accessory to goods, are new categories. It is doubtful whether every contract by which software is licensed to a person is capable of being characterised as a supply of goods under the *Australian Consumer Law* definition. However, where it cannot be so characterised, it will be a supply of services.

The definition of services is also broadly expressed.[138] However, the concept does not include rights or benefits which involve the supply of goods, or the performance of work under a contract of service. There are also specific exceptions.[139]

Where it is alleged that a supply is a supply of goods or services to a consumer, the onus of proving that the person was not a consumer rests on the supplier.[140]

The definition of consumer is also important to the use of exclusion clauses, as discussed in Chapter 14.

135. This is subject to another exception (in s 3(2) of the *Australian Consumer Law*), applicable where goods are acquired for the purpose of using them up, or transforming them, in trade or commerce.
136. But see *Australian Consumer Law*, s 65.
137. See [11-28].
138. See *Australian Consumer Law*, s 2(1).
139. See *Australian Consumer Law*, s 63.
140. See *Australian Consumer Law*, s 3(10).

The Guarantees

[11-28] Introduction. Under the *Australian Consumer Law*, consumer guarantees operate in relation to the supply of goods and services to consumers. Generally, except for the consumer guarantees relating to title, they apply only to supplies made in 'trade or commerce'.[141] Similarly, with the same general exception, they do not apply to a supply which occurs by way of 'sale by auction'.[142]

Many of the consumer guarantees use the same concepts as under the sale of goods legislation discussed above.[143] However, the requirements which must be satisfied for the consumer guarantees to apply are much more easily established than those which apply under the sale of goods legislation.

[11-29] Consumer guarantees in relation to goods. Under the *Australian Consumer Law*, the consumer guarantees in relation to goods supplied to a consumer relate to:

- the supplier's title to goods, including freedom from encumbrances, and so on (ss 51, 52 and 53);
- the quality of the goods — a guarantee that the goods are of 'acceptable quality' (s 54);
- the reasonable fitness of goods for their intended purpose (s 55);
- compliance of goods sold by description with their description (s 56);
- conformity of goods with a sample or demonstration model by reference to which they were supplied (s 57);
- reasonable action by a manufacturer to ensure that facilities for the repair of the goods, and parts for the goods, are reasonably available (s 58(1)); and
- compliance with any express warranty given by a supplier or manufacturer in relation to the goods (s 59).

Consumers will not have the benefit of all of the consumer guarantees provided for by the *Australian Consumer Law* in respect of every contract for the supply of goods into which they enter. For example, there may be no supply by reference to a sample or demonstration model (s 57). Most of the consumer guarantees are subject to particular requirements. For example, the consumer guarantee in relation to the description of goods applies only in the case of a supply by description (s 56). Most importantly, except in relation to the title guarantees (*Australian Consumer Law*, ss 51, 52 and 53), it is essential that the supply occur 'in trade or commerce'. Accordingly, the other consumer guarantees do not apply to private transactions.

If a consumer guarantee is not complied with, for example, because goods are not of 'acceptable' quality, the consumer will have rights and remedies against the supplier.[144]

141. See [11-29].
142. This is defined as 'a sale by auction that is conducted by an agent of the person (whether the agent acts in person or by electronic means)': *Australian Consumer Law*, s 2(1).
143. See [11-18]–[11-22].

[11-30] Acceptable quality. Perhaps the most important consumer guarantee under the *Australian Consumer Law* is the consumer guarantee that goods supplied are of 'acceptable quality' (s 54).

Section 54(2) of the *Australian Consumer Law* defines 'acceptable quality' in terms of whether goods are:

- fit for all the purposes for which goods of that kind are commonly supplied;
- acceptable in appearance and finish;
- free from defects;
- safe; and
- durable.

The goods must satisfy *all* those requirements. Goods are 'acceptable' only if a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods) would regard them as acceptable. Regard may be to the matters listed in s 54(3) of the *Australian Consumer Law*.

[11-31] Express warranties. Where an express warranty is given, it will take effect as a consumer guarantee under the *Australian Consumer Law*.[145] The concept of 'express warranty' is applicable only to contracts for the supply of goods. Although it may include express terms (whether or not described in a contractual document as 'warranties'), it is not limited to those terms. The concept is also applicable to manufacturers of goods.

The definition of express warranty in s 2(1) requires 'an undertaking, assertion or representation':

(a) that relates to:
  (i) the quality, state, condition, performance or characteristics of the goods; or
  (ii) the provision of services that are or may at any time be required for the goods; or
  (iii) the supply of parts that are or may at any time be required for the goods; or
  (iv) the future availability of identical goods, or of goods constituting or forming part of a set of which the goods, in relation to which the undertaking, assertion or representation is given or made, form part; and
(b) that is given or made in connection with the supply of the goods, or in connection with the promotion by any means of the supply or use of the goods; and
(c) the natural tendency of which is to induce persons to acquire the goods.

These requirements may be satisfied in relation to statements made in the promotion or negotiation of a supply of goods to a consumer. The statement may be made orally or in advertising or other material. That material may be made available or provided by the supplier, or by the manufacturer of the goods.

144. See [11-33]–[11-37].
145. See *Australian Consumer Law*, s 59.

Because it is sufficient that the statement is a 'representation', the provision departs from the common law, under which an intention to guarantee the truth or accuracy of the statement is required.[146] In addition, under the general law it is not a sufficient test of 'warranty' that a statement would have induced a reasonable person to enter into a contract. However, under the *Australian Consumer Law*, the element expressed in terms of a 'tendency' to induce persons to acquire the goods not only serves to ensure that the 'undertaking, assertion or representation' need not be the sole inducement, it also applies an objective standard. The consumer is not required to prove reliance on the 'undertaking, assertion or representation'.

[11-32] Consumer guarantees in relation to services. The *Australian Consumer Law* states four consumer guarantees where the contract is for the supply of services to a consumer:

- a guarantee of due care and skill by the supplier (s 60);
- a guarantee that the services and any product resulting from the services will be reasonably fit for any particular purpose that the consumer made known to the supplier (s 61(1));
- a guarantee that services and any product resulting from the services will be of such a nature and quality that they might reasonably be expected to achieve any result that the consumer made known (s 61(2)); and
- if no fixed time for supply is specified, a guarantee of supply within a reasonable time (s 62).

The concept of 'product' is not defined.

Under the *Australian Consumer Law*, there is no reference to a separate category of consumer guarantees for goods or materials supplied with services. It would appear that in a supply of both work and materials,[147] the contract is for a 'mixed supply'.[148] For example, if a contractor agrees to supply and install a timber floor, the contract is for a mixed supply. The result is that, in so far as the supply of materials is a supply of goods to a consumer, consumer guarantees in relation to goods may apply. And in relation to the services element of the contract ('work'), the consumer guarantees in relation to services may apply, provided the contract is for the supply of services to a consumer. That would seem to include any end 'product' which those services may have, in the example the completed floor.

Rights and Remedies

[11-33] Introduction. The *Australian Consumer Law* states a unique — and extremely complex and intricate — set of rights and remedies in relation to consumer guarantees. Several important features may be noted.

146. See Chapter 10.
147. For the common law, see [11-14].
148. See *Australian Consumer Law*, s 3(11) (there is a 'mixed supply' if goods or services are purchased or acquired together with other property or services, or together with both other property and other services).

First, because the consumer guarantees are not classified as conditions or warranties, whether a consumer is entitled to reject goods, or entitled to terminate a contract for the supply of services, is not predetermined. The *Australian Consumer Law* draws a distinction between a major failure to comply with a consumer guarantee and a failure which is not a major failure.

Second, under the *Australian Consumer Law*, a consumer's right to damages is statutory, not contractual. However, unlike the position where the *Australian Consumer Law* is contravened,[149] the assessment of damages is not left to be determined entirely by the courts. The *Australian Consumer Law* includes statements as to the measure of damages to which a consumer is entitled, as well as a criterion for remoteness of damage.

Third, the *Australian Consumer Law* introduces further ideas, such the right of a consumer to terminate a connected contract. It also attempts to put in place a more sophisticated approach than the common law. For example, there is an express right to require a supplier to remedy defects in goods.

[11-34] Impact of a failure to comply. The failure of goods or services to comply with one or more consumer guarantees activates the remedial regime of the *Australian Consumer Law*.

Rights and remedies under the *Australian Consumer Law* include:

- damages;
- repair of goods;
- rejection of goods;
- termination of a contract for the supply of services;
- termination of a connected contract;[150] and
- damages for what are conceived of as 'consequential losses'.

Of course, not all these rights and remedies are available for every failure by a supplier to comply with a consumer guarantee, or in respect of every consumer guarantee.

In relation to goods, s 259(1) provides:

> (1) A consumer may take action under this section if:
>
> (a) a person (the ***supplier***) supplies, in trade or commerce, goods to the consumer; and
>
> (b) a guarantee that applies to the supply under Subdivision A of Division 1 of Part 3-2 (other than sections 58 and 59(1)) is not complied with.

In relation to services, s 267(1) states:

> (1) A consumer may take action under this section if:
>
> (a) a person (the ***supplier***) supplies, in trade or commerce, services to the consumer; and

149. See Chapter 19.

150. See *Australian Consumer Law*, s 265 (termination of contracts for the supply of services that are connected with rejected goods) and *Australian Consumer Law*, s 270 (termination of contracts for the supply of goods that are connected with terminated services).

(b) a guarantee that applies to the supply under Subdivision B of Division 1 of Part 3-2 is not complied with; and

(c) unless the guarantee is the guarantee under section 60 — the failure to comply with the guarantee did not occur only because of:

(i) an act, default or omission of, or a representation made by, any person other than the supplier, or an agent or employee of the supplier; or

(ii) a cause independent of human control that occurred after the services were supplied.

The rights and remedies available to consumers — including corporations who are consumers — are very extensive.

[11-35] Supply of goods. Rights and remedies in relation to goods are stated in s 259 of the *Australian Consumer Law.*

Strangely, the *Australian Consumer Law* does not speak in terms of termination of the contract. In relation to goods, the concept is *rejection* of the goods. The general rule under s 259 is that a consumer is entitled to reject goods only if there is a major failure to comply with a consumer guarantee in relation to the goods. If the failure to comply with a consumer guarantee in relation to goods is not a major failure, s 259(2) of the *Australian Consumer Law* applies. Under that provision, the consumer may require the supplier to remedy the failure within a reasonable time. Even though the failure to comply with a consumer guarantee in relation to goods may not be a major failure, if the supplier refuses or fails to remedy the failure, the consumer is entitled to reject the goods. And under s 259(3), if the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may choose between rejection of the goods and recovering damages, measured on a difference in value basis.

The *Australian Consumer Law* does not provide any certainty as to when a consumer can reject goods without first providing the supplier with an opportunity to remedy defects. Apart from the issue of how it is determined that goods can (or cannot) be repaired, there is also the issue of how a consumer determines that there is a major failure. Section 260 deals with when a failure to comply with a guarantee is a major failure. In order to be able to be able to reject goods, consumers must prove matters such as that:

- 'goods depart in one or more significant respects' from description or sample;
- 'goods are substantially unfit' and they cannot 'easily' be made fit; or
- that 'goods … cannot, easily and within a reasonable time, be remedied' to make them fit for a disclosed purpose.

The impact of the *Australian Consumer Law* is to give to consumer guarantees characteristics similar to 'intermediate terms' under the general law.[151] Unlike the breach of a condition, the breach of an intermediate term does not confer a right to terminate a contract (which would include a rejection of goods the subject of a supply by way of sale) unless the breach is 'sufficiently serious'. That is a concept of performance being substantially different.

151. See Chapter 13.

Further restrictions are placed on a consumer's right of rejection by s 261 of the *Australian Consumer Law*. These include a time limit on rejection.

The consequences of the rejection of goods are stated in s 263 of the *Australian Consumer Law*. In broad outline:

- the consumer must return the goods to the supplier (s 263(2));
- at the election of the consumer, the supplier must refund any money paid by the consumer for the goods, or replace the rejected goods with goods of the same type, and of similar value (s 263(4)); and
- if the property in the rejected goods had passed to the consumer before the rejection was notified, the property in those goods revests in the supplier (s 263(6)).

Given those consequences, the contract of supply must be regarded as terminated by a rejection of goods.

[11-36] Supply of services. Rights and remedies in relation to services are stated in s 267 of the *Australian Consumer Law*. There are three basic rules which apply where a supplier fails to comply with a consumer guarantee under a contract for the supply of services.

First, the consumer is entitled to damages.

Second, if the failure to comply with a consumer guarantee imposed by the *Australian Consumer Law* is a major failure, the consumer is entitled to terminate the contract.

Third, if the failure to comply with a consumer guarantee is not a major failure, the consumer is entitled to require the supplier to remedy the failure.

What amounts to a 'major failure' to comply with a consumer guarantee imposed on a supplier of services is stated in s 268 of the *Australian Consumer Law*. The rules stated in s 268 are more complex than the rules stated in s 260 in relation to supplies of goods. The more straightforward situations include:

- the services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure;
- the services are substantially unfit for a purpose for which services of the same kind are commonly supplied and they cannot, easily and within a reasonable time be remedied to make them fit for such a purpose; and
- the supply of the services creates an unsafe situation.

Section 267(3) of the *Australian Consumer Law* also confers a right of termination where failure to comply with a consumer guarantee cannot be remedied. Section 267(3) provides:

> (3) If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may:
>
> (a) terminate the contract for the supply of the services; or

(b) by action against the supplier, recover compensation for any reduction in the value of the services below the price paid or payable by the consumer for the services.

Therefore, s 267(3) confers a right of termination where failure to comply with a consumer guarantee cannot be remedied. In addition, the impact of s 267(2)(b) of the *Australian Consumer Law* is to entitle a consumer to terminate a contract for the supply of services where the supplier does not comply with a requirement (by the consumer) that the supplier remedy the failure to comply with the consumer guarantee within a reasonable time.

Section 269 of the *Australian Consumer Law* states how termination of a contract for the supply of services to a consumer takes effect under the *Australian Consumer Law.*

When a supplier of services fails to comply with a consumer guarantee, several rights to compensation are conferred by the *Australian Consumer Law.* First, under s 267(2), the consumer may recover all reasonable costs incurred in having the failure remedied where the supplier refuses to do so.

Second, where there is a major failure, or a failure which cannot be remedied, s 267(3) confers an option on the consumer to terminate the contract, or to recover compensation for any reduction in the value of the services below the price paid or payable by the consumer for the services.

A third right to compensation is stated in s 269(3) of the *Australian Consumer Law*, which applies if a contract for the supply of services to a consumer is terminated.

[11-37] Consequential loss. So far as damages under the *Australian Consumer Law* are concerned, in addition to specific measures of loss, a consumer is entitled to recover what are conceived of as damages for 'consequential loss' — although that description is not used in the legislation.

In relation to a failure of goods to comply with a consumer guarantee, s 259(4) of the *Australian Consumer Law* states:[152]

> The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.

Exactly the same words are used, in relation to contracts for the supply of services, in s 267(4) of the *Australian Consumer Law.*[153]

Therefore, in addition to a consumer's other entitlements to recover as damages (to the extent stated in the *Australian Consumer Law*) general and specific losses, the consumer is entitled to recover consequential loss. In ss 259(4) and 267(4) this is expressed in the right of the consumer to

152. Section 259(5) of the *Australian Consumer Law* states that s 259(4) does not apply if the failure to comply with the guarantee occurred only because of a cause independent of human control that occurred after the goods left the control of the supplier. But s 259(6) of the *Australian Consumer Law* states that s 259(4) applies in addition to s 259(2) and (3).

153. Section 267(5) of the *Australian Consumer Law* states that s 267(4) applies in addition to s 267(2) and (3).

recover 'any loss or damage … it was reasonably foreseeable that the consumer would suffer'.

'Reasonably foreseeable' loss or damage is a very broad concept more familiar in the context of breach of a duty of care than the breach of a strict duty analogous to a contractual duty. It is generally considered that the test of remoteness of damage under the rule in *Hadley v Baxendale*[154] is narrower than that applicable where damages are sought in tort for breach of a duty of care.[155] But most of the consumer guarantees in the *Australian Consumer Law* create strict duties. Two other points of difficulty may be noted.

First, there is no indication of whether the *Australian Consumer Law*'s criterion of 'reasonably foreseeable' loss or damage is applied at the time when the contract for the supply of goods or services was entered into, or at the time when the consumer guarantee is not complied with. A contract analogy suggests the former.

Second, when the concept of 'reasonably foreseeable' loss or damage is applied to the tort of negligence, the impact is to enable a plaintiff to recover out-of-pocket losses and consequential loss. But assessment is generally on a reliance basis, rather than on an expectation basis. In contrast, in a breach of contract claim the plaintiff is entitled to have damages assessed on an expectation basis. The *Australian Consumer Law* is unclear whether a consumer is entitled to recover damages on an expectation basis for failure to comply with a consumer guarantee. For 'genuine' consumers that is hardly likely to be an issue, even in relation to economic loss. However, where the consumer is a corporation which has acquired goods or services in the course of a business, it will generally prefer to have damages assessed on an expectation basis.

154. (1854) 9 Ex 341 at 354; 156 ER 145 at 151.
155. See Chapter 35.