INTRODUCTION

The outbreak of COVID-19 and subsequent declaration of a pandemic by the World Health Organisation ('WHO') has led to substantial disruption of the economy, which is ongoing and likely to have long lasting effect.

Governments around the world are responding to the threat the pandemic poses to national health by introducing a range of restrictions including travel bans, quarantine and isolation periods and significant restrictions on public gatherings.

The outbreak and response have profoundly affected business by interrupting global and domestic supply chains and suppressing demand, a result of both decreased consumer confidence and restricted ability to access goods and services.

The effects are being felt by small businesses through to multinational corporations. It is expected this will lead to a growth in disputes about contractual performance. These will likely start with actions for breach which raise issues about how contractual clauses or common law principles apply where a party raises issues related to the current public health emergency.

The purpose of this document is to provide a brief overview of the law in relation to the discharge of contracts in Victoria with brief commentary on how the principles might be applied to circumstances arising from the COVID-19 pandemic.

Topics covered include:

- Force majeure clauses;
- The common law doctrine of frustration;
- Discharge by exercise of right;
    - Right to terminate for breach of contract;
    - Repudiation (anticipatory breach of contract); and
- Restitution.

FORCE MAJEURE CLAUSES

A force majeure clause ('FM clause') is a contractual mechanism that may relieve a party of contractual liability in specified circumstances, usually described as being 'beyond that party's control', which lead to an inability to fulfil their contractual obligations.

Unlike the common law doctrine of frustration (see below), a FM clause is a contractual mechanism, the scope and effect of which, and therefore its effectiveness in shielding a party from liability, is a question of construction to which the normal rules apply.[1]

[1] *Callide Power Management Pty Ltd v Callide Coalfields (Sales) Pty Ltd* [2008] QCA 182, [64] ('*Callide*').

Further, the general principle that contractual rights may only be altered in the precise manner provided for in the contract means that force majeure clauses are construed and applied strictly.[2]

The party who seeks to rely on a FM clause bears the burden of proof. Although each case is context specific and depends on the precise nature of the clause, this will often involve establishing:

1. the existence or occurrence of a force majeure event ('FM event') as defined in the FM clause;
2. a causal connection between that FM event and the inability of the party to fulfil its contractual obligations; and
3. subject to the requirements of the FM clause in question:
    a. the party has taken reasonable steps to prevent or mitigate the impact of the FM event; and
    b. the party has given notice in accordance with any requirements in the FM clause.

Establishing the existence or occurrence of a force majeure event

A FM event is defined by the FM clause. This may be generically, as with the often used, 'event beyond a party's control', or it may be constituted by a list of specific events. **Appendix A** sets out an example of a standard FM clause.

If the clause includes items such as an 'infectious disease', 'epidemic', or 'pandemic', then based on the ordinary meaning of those words the WHO declaration of COVID-19 as a pandemic should satisfy the definition of a FM event.

However, the *impacts* of COVID-19 may equally satisfy the definition of a FM event. For example, restrictions on public gatherings, increased quarantine and isolation requirements may constitute examples of 'government intervention'. Further, the impact of such government intervention might be categorised as a FM event if restrictions on public gatherings result in 'labour shortages'. If COVID-19, or its impacts, do not fall within a list of specific examples of FM events, they may fall within a typically used catch-all phrase, such as 'act of God'[3] or the omnibus provision for 'events beyond the reasonable control of the party'.

Events existing at the time the contract was made

The question of whether an event existing at the time a contract was entered into can constitute a FM event may arise in situations affected by COVID-19, particularly for contracts entered into from December 2019 onwards.

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2 *AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd* [2009] QCA 262, [113] ('*Dawson*').
3 *Sharp v Batt* (1930) 25 Tas LR 33, 49-50 (discussing the meaning of 'act of God').

Early authorities had indicated that a FM clause cannot apply to events or circumstances which existed at the time the contract was made. However, the Tasmanian Supreme Court has endorsed a series of UK cases suggesting a party is only debarred from relying upon a pre-existing cause as a FM event:

1. if the pre-existing cause was inevitably doomed to operate on the agreement; and
2. the facts showing the pre-existing cause was so doomed:
    a. were known to the parties at the time of contract, or at least to the party who seeks to rely on the exception; or
    b. should reasonably have been known to the party seeking to rely upon them and would have been expected by the other party to the contract to be so known.[4]

Consequently, it might be reasonable to conclude that in 2019 (or early in 2020), the COVID-19 outbreak in Wuhan, China was not bound to have the impact which it has had since the WHO declaration on 30 January 2020. As a result, the circumstances and knowledge of the parties at the time their contract was made will be highly relevant in determining whether COVID-19, or its impacts, could be considered a FM event for the purpose of the particular clause, and particular contract, in question.

Impact of Force Majeure Event

A FM clause will also set out the impact the FM event must have on the ability of the parties to fulfil their contractual obligations before it will operate to provide relief.

The requirement for a party to be 'prevented' from performance or for the performance to be 'hindered', 'delayed', or 'impaired', etc, implies there must be a causal connection between the FM event and the parties' ability to perform the relevant contractual obligation.[5] Where words such as 'prevent' are used, the impact on the ability to fulfil contractual obligations must effectively amount to impossibility. However, where words such as 'impair', 'impede', 'delay' or 'hinder' are used something less than impossibility, albeit still significant, may be sufficient.[6]

Courts have drawn a distinction between practical impossibility and commercial impracticability by repeatedly stating that a reduction in profitability due to a FM event will not attract the operation of a FM clause.[7] Even when performance has become significantly more expensive or less profitable, it does not mean that a contractual obligation cannot be performed.[8]

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4 *Asia Pacific Resources Pty Ltd v Forestry Tasmania (No 2)* [1998] TASSC 50, [6] ('*Forestry Tasmania*').
5 *Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd* (2006) 236 ALR 115, 130-31 [62] ('*Dartbrook*').
6 See, eg, *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] AC 495, 510.
7 *Dartbrook* 130 [60].
8 *Gardiner v Agricultural and Rural Finance Pty Ltd* [2007] NSWCA 235, [93], [227].

Often the failure of a supplier to deliver goods to a seller is put forward as a FM event. The seller claims in such circumstances the FM clause protects them from liability to the buyer. However, unless the source of supply has been stipulated in the contract between the buyer and the seller, or there is no other source of supply available, it is unlikely that the failure of the seller's supplier will constitute a FM event. That is because there are alternative methods of fulfilling the contractual obligation (i.e., by obtaining supply from another source) even though this may not be as commercially advantageous.[9]

This principle has been applied even where the parties may have shared a mutual expectation that the contractual obligation be performed in a particular way.[10]

Similarly, a reduction in demand as a result of a FM event does not necessarily mean a buyer cannot fulfil their contractual obligation to take delivery of the product, no matter how commercially unfeasible this obligation may have become in light of significant reductions in demand. Consequently, the fact that many caterers, restaurants or cafes may be unable to make use of previously ordered stock because of the impacts of COVID-19 and social distancing measures may not mean they will be relieved from the obligation to accept and provide consideration for the stock previously ordered.

Requirement to use reasonable endeavours

A FM clause may include a requirement that the affected party use reasonable endeavours or exercise reasonable diligence to overcome the effects of a FM event on their ability to discharge their contractual obligations. Terms such as these might restrict the availability of relief entirely or to a point in time at which it is assessed that no reasonable action could overcome the impact of the FM event.[11]

Effect of FM clause

A FM clause might provide for a range of different outcomes including:

- Suspension of contractual obligations for a set period or for the time the FM event affects the party's ability to perform (possibly with a right to terminate if the FM continues for a specified period);
- A re-negotiation process;[12]
- Relief from liability to the extent that the impact of the FM event prevents performance (full or partial discharge from obligations).[13]

9 *Dartbrook* 130 [61].
10 *European Bank Ltd v Citibank Ltd* (2004) 60 NSWLR 153, 157 [9], 165 [72].
11 See, eg, *Channel Island Ferries Ltd v Sealink UK Ltd* [1998] 1 Lloyds Rep 323, 327.
12 See *Forestry Tasmania*.
13 *Callide* [46].

The party affected by a FM event is usually relieved from liability to the extent it is unable to perform its contractual obligations due to occurrence of that FM event.

Notification requirements

A FM clause may impose notification obligations on the party seeking to invoke it. These often require notice of the nature and cause of the FM event, its impact, the anticipated duration, any means adopted to overcome its effects and evidence that the party has implemented those means.

The relevant question is whether the notification requirement is to be construed as a condition precedent, so that failing to comply with it precludes reliance on the FM event, or an intermediate term. If the notification requirement is an intermediate term, the question becomes whether its breach is serious enough to prevent reliance on the FM clause.[14]

The more comprehensive and precise the notification requirements, the more likely it will be seen as constituting a condition precedent.[15]

Consequently, if the notice requirement is considered a condition precedent (or if an intermediate term and the breach is serious enough), the party seeking to rely on the FM clause for relief of liability will be prevented from doing so and will be liable for damages for breach of contract.

Further information on conditions and intermediate terms is included below at **Common law right to terminate for breach of a contractual term**.

COMMON LAW DOCTRINE OF FRUSTRATION

The common law doctrine of frustration relieves the parties of liability by automatically discharging their obligations for the future performance of a contract.

Frustration occurs whenever a contractual obligation, through no fault of either party, cannot be performed because circumstances have made it a thing 'radically different from that which was undertaken by the contract'.[16] More precisely:

> [A] contract is not frustrated unless a supervening event:
>
> a) confounds a mistaken common assumption that some particular thing or state of affairs essential to the performance of the contract will continue to exist or be available, neither party undertaking responsibility in that regard; and

[14] See *Dawson*.

[15] Ibid [36]–[37], [95]–[111].

[16] *oOh! Media Roadside Pty Ltd v Diamond Wheels Pty Ltd* (2011) 32 VR 255, 273 [63] ('*oOh!*'), citing *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 357 ('*Codelfa*'). See also *Chinatex (Australia) Pty Limited v Bindaree Beef Pty Limited* [2018] NSWCA 126, [44] ('*Chinatex*').

b) in so doing has the effect that, without default of either party, a contractual obligation becomes incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.[17]

A contract that includes a force majeure clause might operate to exclude the doctrine of frustration if it sufficiently identifies and governs the impact of the frustrating event.[18]

If a contract is frustrated, the future performance of any contractual obligation by all parties is automatically discharged. However, accrued rights and liabilities will survive. At common law, this means a claim for restitution might be made following a discharge by frustration. In Victoria, there is a statutory scheme of adjustments and the consequences of frustration are regulated by Division 3 of Part 3.2 of the *Australian Consumer and Fair Trading Act 2012* (Vic) (discussed below).

Foreseeability of frustrating event

As when applying a force majeure clause, a preliminary question concerns the nature of the supervening event. Under the doctrine of frustration, the event must generally have been 'unforeseeable' at the time the contract was entered into.

Some cases have suggested that if an event was foreseeable, the parties could have provided for it within the contract, and so, if no such provision was made, it may be assumed the parties intended to bear the risk the foreseeable event might occur.[19]

However, the Victorian Court of Appeal has considered the application of the doctrine in these circumstances and said it is important to be precise about the nature and degree of foresight. While the parties may have foreseen an event they may not have foreseen its nature or extent, and the degree of foreseeability necessary to exclude the doctrine of frustration is high. An event is relevantly foreseeable only if a person of ordinary intelligence would have regarded it as likely to occur or which the parties could reasonably have foreseen as a real possibility.[20]

Consequently, whether COVID-19 or its effects might be considered sufficiently foreseeable to exclude the doctrine of frustration will depend on the timing and nature of the relevant contract, and what the parties might reasonably be thought to have foreseen as a real possibility at that time.

Notably, the Queensland District Court has held, in an Australian first, that a contract for the sale of a bar and lounge is not frustrated where the parties entered into it with full knowledge

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17 *oOh!* 273 [70].

18 *Thanluntha Pty Ltd v Citic Pacific Mining Management Pty Ltd* [2019] WASC 196, [107].

19 See, eg, Nick Seddon and Rick Bigwood, *Cheshire & Fifoot's Law of Contract* (LexisNexis, 11th Australian ed, 2017) 19.12.

20 *oOh!* 273-74 [72]-[74].

that progressive government restrictions on public gatherings had been imposed and must have foreseen there was a real likelihood that others might follow.[21]

Whether frustrated – a question of construction and circumstance

The critical issue is whether the situation resulting from the unforeseen event is 'fundamentally different from the situation contemplated by the contract on its true construction in light of the surrounding circumstances'.[22]

In other words, the key question is whether the unforeseen event, such as a pandemic, makes performance of the contract impossible or radically different. If it only delays performance or makes it more difficult or costly it will not likely be considered frustrating.[23]

Increased burden of performance

An increase in the burden of performing contractual obligations, such as one party's need to incur additional costs, does not frustrate a contract. The doctrine does not relieve parties of the consequences of imprudent commercial bargains.[24] The increased burden would need to be so significant that it transforms the obligation into something radically different to that which was agreed upon.[25]

Delay

COVID-19 and its impacts are likely to lead to the temporary unavailability of goods and services, but only time will tell whether these disruptions will be sufficient to amount to frustration. The inability to source materials may amount to frustration if it means the parties are unable to perform their obligations.

> However disruption due to labour shortages associated with sickness and travel restrictions, and lost productivity due to social distancing and other working restrictions, may not amount to frustration where these impediments are able to be addressed through additional time or costs. Australian courts have acknowledged that frustration may arise by operation of law, but for the threshold to be reached from COVID-19 restrictions, it is likely that the restrictions would have to continue and work

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21 *Happy Lounge Pty Ltd v Choi & Lee Pty Ltd* [2020] QDC 184, [35] ('*Happy Lounge*').

22 *Codelfa* 360.

23 Teresa Torcacio, Basimah Memon, Zoe Vise 'Coronavirus and Commercial Contracts – No Force Majeure Clause? Can the Doctrine of 'Frustration' Assist?', *HWL Ebsworth Lawyers* (Blog Post, 26 March 2020) 2 <https://hwlebsworth.com.au/coronavirus-and-commercial-contracts-no-force-majeure-clause-can-the-doctrine-of-frustration-assist/>. See also *Happy Lounge* [33]-[34].

24 *Codelfa* 379, citing *Pioneer Shipping Ltd v BTP Tioxide Ltd* (1982) AC 724, 752. See also *Idameneo (No 123) Pty Ltd v Ashraf* [2015] VSC 317, [154] ('*Idameneo*'); *Chinatex* [47].

25 *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] 2 All ER (Comm) 634, [82] ('*Edwinton*'). See also *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 729.

sites be placed in caretaker mode for an extended period of time so as to fundamentally alter the nature of the contract.[26]

Instances of frustration

Frustration may result when the subject of the contract or its means of performance have become illegal,[27] since a contract to do what has become illegal cannot be legally enforced.[28] The COVID-19 public health emergency has resulted in legislative and regulatory restrictions on the movement of people which have profoundly affected a range of industries from hospitality to fitness and the way in which essential services are provided. But it too remains to be seen whether these new laws will be held to have frustrated a contract. For example, an agreement to host a wedding for 100 guests on a date that now falls within the time during which public gatherings are prohibited might be deemed frustrated. However, there may be terms within the contract that govern delay or temporary unavailability of the venue.

Death or incapacitation of a person may frustrate a contract if it specifies that person's involvement, at a specified time, as fundamental to the nature of the contractual obligation.[29]

Applicability to leases

The doctrine of frustration is generally applicable to leases however it is difficult to establish because a lease 'is more than a contract, it conveys an estate in land'. Frustration will therefore rarely arise because the tenant will still have the leasehold interest, which may be of considerable value.[30] Early authorities held that the doctrines of frustration and repudiation did not apply to an executed demise under which an interest in land had passed to the tenant.[31] However, the increase in use of shorter term commercial leases 'framed in the language of executory promises of widening content and diminishing relevance to the actual demise' led to a 'clear trend of common law authority to deny any general immunity of contractual leases from the operation of those doctrines of contract law'.[32] Consequently, for the doctrine of frustration to operate upon a lease, it would need to be established that 'the rights of the parties are, as a matter of substance, essentially defined by executory covenant

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26 Scott Jackson, Glen Warwick, Tom Webb 'COVID-19 Australia: Managing the impact of a global pandemic on projects and construction', *Clyde & Co* (Blog Post, 24 April 2020) 3 <https://www.clydeco.com/en/insights/2020/04/covid-19-australia-managing-the-impact-of-a-global>.

27 *Codelfa* 383.

28 *Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd* (1944) AC 265, 272.

29 See, eg, *Idameneo* [155]. See also *Lobb v Vasey Housing Auxiliary (War Widows Guild)* [1963] VR 239.

30 *City of Subiaco v Heytesbury Properties Pty Ltd* (2001) 24 WAR 146, 164 [68] ('*Subiaco*'). See also *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17, 51 ('*Progressive*'); *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2010] NSWDC 29, [214]-[220]; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, 688-689.

31 *Progressive* 52.

32 Ibid.

or contractual promise' rather than 'by reference to their character as an estate',[33] or where the frustrating event left the estate 'unusable and unsaleable'.[34]

In Australia, leases have been held to have been frustrated where health requirements prevent occupation of the building leased.[35] The doctrine has also been applied in the United States when a change in law has rendered a use illegal, the use being the sale of alcohol from the premises.[36]

The duration and nature of the lease and of the allegedly frustrating event, and the purpose of the agreement, must be considered in determining if the contractual obligation cannot be performed. For example, the Queensland District Court has just held that a contract for the sale of licenced premises is not frustrated where the assigned lease would allow them to operate for 12 years, even though government regulations then in effect temporarily limited that ability.[37] In *Li Ching Wing v Xuan Yi Xiong*[38] a Hong Kong court rejected a tenant's claim that their tenancy agreement had been frustrated by an isolation order issued due to the outbreak of SARS which meant the property could not be inhabited for 10 days. As the lease agreement was for a term of two years, the court held the unforeseeable outbreak of SARS did not significantly change the circumstances of the contract.[39]

The doctrine of frustration may be more easily established in relation to licences or agreements for lease as no legal estate passes with the agreement.[40]

Liability after frustration

At common law, frustration discharges all future obligations. But rights which accrued prior to frustration continue to exist and may be enforced. It may therefore be difficult to recover money paid or expenditures incurred prior to the frustration of the contract although parties might seek to recover these through a claim for restitution based on unjust enrichment. However, expenses incurred in preparing for performance would not necessarily give rise to a claim for restitution. For more on the common law position see **Restitution**.

In Victoria, the difficulties have been largely remedied by the introduction of a statutory scheme which governs adjustments between parties to frustrated contracts. The relevant provisions are set out in Part 3.2 of the *Australian Consumer and Fair Trading Act 2012* (Vic) ('the Act').

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33 Ibid 53.

34 *Subiaco*, [68]; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, 688–689.

35 *Robertson v Wilson* (1958) 75 WN (NSW) 503.

36 See, eg, *Hooper v Mueller* 123 NW 24 (1909); *Doherty v Monroe Eckstein Brewing Co* 191 NYS 59 (1921).

37 *Happy Lounge* [36]. See also *Subiaco*.

38 [2004] 1 HKLRD 754.

39 Cf *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 (charter party contract clearly frustrated when vessel requisitioned for an indefinite period).

40 See, eg, *oOh! Media.*

Part 3.2 of the Act applies where the parties have been discharged from further performance because:

(a) the performance of the contract becomes impossible;

(b) the contract is otherwise frustrated; or

(c) the contract is avoided by the operation of section 12 of the *Goods Act 1958* (where goods perish after an agreement to sell, without fault on the part of the seller or the buyer and before risk passes to the buyer).

There are exceptions set out in s 35(3) which include charter-party, contract for carriage of goods by sea and a contract of insurance (except as provided for in s 40 of the Act).

Division 2, Part 3.2 sets out the statutory consequences applicable to the relevant frustrated contract. Importantly, pursuant to s 36(1), all amounts paid to any party under a discharged contract before the time of discharge are recoverable and all amounts payable under a discharged contract before the time of discharge cease to be payable. This essentially facilitates the return of the parties to their pre-contract position in terms of money paid and payable. However, s 37 provides the court with discretion to allow a party to whom amounts were paid or payable under the contract before the time of discharge and who has incurred expenses before the time of discharge for the purpose of performance, to retain or recover the whole or any part of the amount paid or payable (not exceeding the amount of expenses incurred). The discretion is to be exercised if the court 'considers it just to do so having regard to all the circumstances of the case'.

Section 38 provides for payments to be made where a party has obtained a valuable benefit other than the payment of money (to which sections 36 and 37 apply).

Further, the contract itself might provide for the consequences of frustration.[41]

DISCHARGE BY EXERCISE OF RIGHT

A supervening event which prevents a party performing its contractual obligations, but which does not come within a FM clause or attract the operation of the doctrine of frustration may give rise to a contractual, statutory or common law right to terminate.

Neither discharge by agreement nor discharge by frustration involve the exercise of a right.

Forms of discharge which do involve the exercise of a right are:

(1) discharge in exercise of an express *contractual* or *statutory right*;

(2) discharge for breach of a condition or a sufficiently serious breach of an intermediate term (*common law right*),

[41] See, eg, *Advanced Constructions Pty Ltd v Lainson Holdings Pty Ltd* [2019] NSWSC 1484, [9]. See also *Thors v Weekes* (1989) 92 ALR 131, 142.

(3) discharge for repudiation or anticipatory breach (*common law right*).

Contractual and statutory rights to termination

The contract itself may provide for a right of termination upon a breach of a particular term or terms or some other event. It does not necessarily follow that the terms of an agreement relating to termination will oust the application of common law. It will turn on construction of the contract.[42]

Termination clauses generally require the invoking party to serve a notice on the other party and may require a grace period in which the party on notice can seek to rectify the situation or perform the relevant obligation.

In addition, a statute may confer a right to terminate in specified situations. For example, see the *Competition and Consumer Act 2010* (Cth) s 82 in relation to unsolicited consumer agreements.

Common law right to terminate for breach of contractual term

There are three bases for a common law right to terminate for breach of contract:

1. Breach of condition or essential term;[43]
2. Sufficiently serious breach of an intermediate term;[44]
3. Repudiation: an absence of readiness or willingness to perform constituting a repudiation or capable of being treated as an anticipatory breach of contract.[45]

In order to determine whether the common law provides a right to terminate for breach of a contractual term, the court must classify the relevant term.

A term may be a condition, an intermediate term, or a warranty.

Term	Effect of Breach
Condition (sometimes referred to as an 'essential term')	Right to termination
Intermediate term (sometimes referred to as a 'non-essential term')	Right to termination if breach is 'sufficiently serious'
Warranty	No right to termination

Condition ('Essential Term')

42 *Dover Fisheries Pty Ltd v Bottrill Research Pty Ltd* (1994) 63 SASR 557.

43 *Command Energy Pty Ltd v Nauru Phosphate Royalties Trust* [2003] VSC 261, [817], citing *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 ('*Laurinda*').

44 *Civoken Pty Ltd v Madden Grove Developments Pty Ltd* [2006] VSC 283, [605]; *ZX Group Pty Ltd v LPD Corp Pty Ltd* [2013] VSC 542, [99]–[102], quoting *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 ('*Koompahtoo*').

45 *Sopov v Kane Constructions Pty Ltd* (2007) 20 VR 127.

Classification of a term as 'essential' is an issue of construction:

> It is the common intention of the parties, expressed in the language of their contract, understood in the context of the relationship established by that contract and … the commercial purpose it served, that determines whether a term is 'essential', so that any breach will justify termination.[46]

To determine the common intention of the parties in relation to the essentiality of a term, a court will look to a range of factors. Courts prefer to construe contracts in a way that encourages performance rather than the avoidance of contractual obligations, and so will not lightly construe a term as imposing a condition.[47]

It will consider whether there was an express agreement as to the essentiality of the term (although, in itself, the term may not seem important).[48] The use of the word 'condition' is not necessarily conclusive.[49] In the absence of an express agreement, a court will consider whether there is an implied agreement as to the essentiality of the term. Subject to the parol evidence rule, it may consider:

- essentiality of the term to the entry into the contract (whether the promisee would have entered the contract unless assured of strict and literal performance);[50]
- the form and structure of the term and contract including the presence of a contractual right to terminate in respect of breaches of other terms and requirements to give notice of default;[51]
- the nature of the term, the contract and its subject matter;[52]
- whether construing the term as a condition will achieve a reasonable result;[53]
- the likely effects of a breach (without regard to the actual consequences of a breach which has occurred) and whether a term is capable of being breached in various

46 *Koompahtoo* 138 [48].
47 *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549, 556–57 ('*Ankar*').
48 A stipulation may be a condition though called a warranty in the contract. See *Shevill v Builders Licensing Board* (1982) 149 CLR 620, 627 ('*Shevill*'); *Natwest Markets Australia Pty Ltd v Tenth Vandy Pty Ltd* (2008) 21 VR 68, 77 [38], *Ankar* 555, 557; *Goods Act 1958* (Vic) s 15(2).
49 *Australia and New Zealand Banking Group Ltd v Beneficial Finance Corp Ltd* [1983] 1 NSWLR 199 ('*Beneficial Finance*').
50 *Ankar* 557; *Koompahtoo* 138 [48]; *Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322, 337.
51 *Ankar* 557; *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423, 430.
52 *Ankar* 557.
53 *Oaktech Pty Ltd v Legion Heights Pty Ltd* [2008] VSCA 145, [20] ('*Oaktech*').

ways, with varying degrees of seriousness, or whether every breach would justify a termination;[54]

- whether the party not in breach will be adequately compensated by an award of damages for every breach.[55]

The NSW Supreme Court has heard what appears to be the first Australian case involving the breach of an express term since the WHO declaration. In *Sneakerboy Retail Pty Ltd v Georges Properties Pty Ltd*[56] the respondent lessor exercised its right to re-enter and terminate a commercial lease following the tenant's default in paying rent, which it had a history of doing. The exercise of this right occurred shortly before the implementation of legislative restrictions (which somewhat similar to Victoria's)[57] designed to deal with leasing issues arising from the coronavirus pandemic ('the COVID-19 Regime').

The court granted the tenant relief from forfeiture on well-established grounds, most significantly the lessors having obtained payment from a bank guarantee the tenant was required to maintain under the terms of the lease. The court noted that a condition for granting relief against the forfeiture of a commercial lease may require reinstatement of a bank guarantee even though the lessors might be impeded from calling upon it during the period of the COVID-19 Regime. However, the court also said that in the present economic climate, it may not be fair to require the guarantee's immediate replacement where the effect of calling on the guarantee was to leave the lessee in credit in relation to future rental payments.[58]

The court was also concerned that granting relief against forfeiture would immediately subject the parties to the COVID-19 Regime, which, in addition to foreseen impacts such as the amount and timing of rental payments, will likely have unforeseen effects. It determined that in the circumstances the court should not simply publish its reasons and be done, but it was instead proper to call upon 'the parties to agree a suitable and efficient process for implementing the COVID-19 regime in a timely way'.[59]

Similarly, the Queensland District Court has held that a vendor's failure to obtain the mortgagee's consent to the lease and to provide evidence proving the value of stock were breaches of express terms that allowed the purchasers to terminate the contract for sale.[60] Notably, however, the court also held that the requirement that the vendor operate the business as a going concern until the date of settlement could not serve as a basis for

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54 *Ankar* 557; *Trans-Pacific Insurance Co (Aust) Ltd v Grand Union Insurance Co Ltd* (1989) 18 NSWLR 675, 702.
55 *Ankar* 557; *Beneficial Finance* 204; *Oaktech* [20].
56 [2020] NSWSC 996 ('*Sneakerboy*').
57 See, eg, *COVID-19 (Emergency Measures) (Commercial Leases and Licences) Regulations 2020* (Vic).
58 *Sneakerboy* [115]-[116].
59 Ibid [118]-[119].
60 *Happy Lounge* [48]-[71].

termination because subsequent government regulation had made operation of the business illegal.[61]

Intermediate term

Similarly, the question of whether a breach of an intermediate term provides a basis for a right of termination, is 'determined primarily upon a construction of the contract, after which a judgment about the seriousness of the breach and the adequacy of damages is made'.[62]

The court may conclude that a term cannot be classified as a condition because not every breach of it will justify termination, but that it may be breached seriously enough to 'go to the root of the contract'. The High Court has accepted such 'intermediate terms', thereby recognising that, although as a matter of construction, not every breach of the term will entitle the other party to terminate, some breaches of the term may do so.[63]

Repudiation

The term repudiation is broad and used in different ways.[64] In relation to the right of termination, the term means 'repudiation of an obligation' or the 'absence of either readiness or willingness to perform the obligation'.[65] Consequently, repudiation is sometimes referred to as 'anticipatory breach' if the absence of readiness or willingness to perform is evident prior to the time for performance.[66] However, if repudiation relates to inability to perform, it must be shown that the party was wholly and finally disabled from the required performance at the time it was due.[67]

The test is whether the conduct of one party would convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.[68] Repudiation 'is a serious matter and is not to be lightly found or inferred'.[69] A court 'must be very careful to see that nothing but a substantial incapacity or definitive resolve or decision against doing in the future what the contract requires counted as an absence of readiness and willingness'.[70] Repudiation may be shown by reference to words and conduct, and by reference to the promisor's actual position (inability to perform).[71]

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61 Ibid [72]–[73].
62 *Koompahtoo* 136–37 [47].
63 Ibid 138 [48].
64 See, eg, *Shevill* 627; *Koompahtoo* 135–36 [44].
65 *Koompahtoo* 135–36 [44]
66 Ibid.
67 *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245, 263–64 ('*Sunbird*'). See also *Roadshow Entertainment Pty Ltd v ACN 053 006 269 Pty Ltd* (1997) 42 NSWLR 462, 480.
68 *Koompahtoo* 135–36 [44]. See also *Loughridge v Lavery* [1969] VR 912 ('*Loughridge*').
69 *Shevill* 633. See also *Dainford Ltd v Smith* (1985) 155 CLR 342, 350, 365– 66.
70 *Rawson v Hobbs* (1961) 107 CLR 466, 481 ('*Rawson*').
71 *Sunbird* 263–64.

It must be shown that the repudiation is sufficiently serious in order to give a right to terminate. This requirement has been expressed in different ways including that the repudiation must relate to an essential term,[72] and that it must go to the root of the contract.[73]

Repudiation on the basis of unwillingness can be established where a party shows that it intends to fulfil the contract but only in a manner substantially inconsistent with the party's obligations.[74] A repudiation can therefore take the form of asserting an erroneous interpretation of the contract or erroneously asserting that there is no contract.[75]

If the repudiation is sufficiently serious, it will provide a basis for termination by the non-repudiating party. The non-repudiating party must elect to discharge the contract and absent that election, both parties remain bound by the contract.[76] In relation to their own readiness and willingness to perform, the non-repudiating party electing to terminate for breach of repudiation may need to show that they were not incapacitated from fulfilling their end of the bargain, and had not resolved against doing so.[77]

Where there has been a wrongful repudiation of the contract, the non-repudiating party must make an election whether to affirm or terminate the contract. An election to terminate the contract is often referred to as rescinding the contract, or election rescission, however this does not function as rescission ab initio.[78] Any accrued rights and liabilities prior to the election remain intact as with the doctrine of frustration.[79] However, unlike the doctrine of frustration, the innocent party who has elected to bring the contract to an end on the basis of the other party's wrongful repudiation is entitled to sue for damages for failure to perform the contract.[80]

Actual breach

A repudiation may also involve an actual breach of contract as opposed to an anticipatory breach. For example, 'there may be cases where a failure to perform, even if not a breach of an essential term…manifests unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the contract will not be performed substantially according to its requirements.'[81] As explained by the High Court:

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72 *Laurinda* 642; *Loughridge* 924. See also *Foran v Wight* (1989) 168 CLR 385, 395, 416, 432, 441 ('*Foran*'); *Rawson* 480.
73 *Francis v Lyon* (1907) 4 CLR 1023, 1035, 1040-41, 1044. See also, *Foran* 441.
74 *Shevill* 627.
75 *Koompahtoo* 135-36 [44].
76 *Foran* 398, 416.
77 Ibid 408-9. See also *Rawson* 481.
78 *Shevill* 627.
79 Ibid. See also *Mann v Paterson Constructions Pty Ltd* (2019) 373 ALR 1, 5 [8]-[9] ('*Mann*').
80 *Shevill* 627.
81 *Foran* 398, 408-9.

> This overlapping between renunciation and failure of performance may appear conceptually untidy, but unwillingness or inability to perform a contract often is manifested most clearly by the conduct of a party when the time for performance arrives. In contractual renunciation, actions may speak louder than words.[82]

RESTITUTION

Private law remedies generally respond to wrongs. However, equitable remedies such as restitution can respond to events which are not considered wrongs, such as a mistaken payment of money. The following claims are recognised as a basis for restitution in Australia:

1. An action for money had and received;[83]
2. Quantum meruit (value of services);[84] and
3. Quantum valebat (or valebant) (value of goods).[85]

Each may be relevant to circumstances where a contract has been frustrated or terminated. However, it is important to consider whether any accrued contractual rights exist in relation to the relevant benefit as neither termination nor frustration result in rescission ab initio and a party cannot elect to rely on restitution where accrued contractual rights exist.[86]

Unjust Enrichment

Historically, these forms of action were based on the theory of an 'implied contract' or 'quasi-contract' and were the common counts of an action of assumpsit alleging a debt owed to the plaintiff in the absence of an express promise. The implied contract theory has now been rejected and it is commonly understood that restitutionary obligations are imposed by reference to unjust enrichment, 'a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff.'[87]

However, while conceptually accepted, the High Court has also plainly stated there is no 'all-embracing theory of restitutionary rights and remedies founded upon a notion of 'unjust enrichment''.[88] Consequently, the extent to which unjust enrichment operates as a cause of action is unclear and parties may need to specifically plead one of the actions noted above. In

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82 *Koompahtoo* 135–36 [44].
83 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 ('*David Securities*').
84 *Mann* 44 [167]. See also *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 ('*Pavey*').
85 *Mann* 44 [167].
86 Ibid 5 [8]–[9]. As Kiefel CJ, Bell and Keane JJ explained at [14]: 'Restitutionary claims must respect contractual regimes and the allocations of risk made under those regimes'.
87 *Pavey* 256–57. See also *Australia and New Zealand Banking group Ltd v Westpac* (1988) 164 CLR 662.
88 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 544 [72]. See also *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 665 [85] ('*Lumbers*'). Cf *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 516 [30]; *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 579 [20] (French CJ), 604–05 [105], 615–19 [130]–[142] (Gageler J). But see ibid 596–97 [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

any event, the facts giving rise to the unjust enrichment must be pleaded. On that basis, it does appear that the elements of a restitutionary claim should generally be founded on the components of unjust enrichment being an enrichment obtained at the plaintiff's expense, the retention of which would be unjust.

Claims for restitution in relation to a benefit conferred under a contract discharged by frustration as well as repudiation have been upheld on the basis of unjust enrichment.[89]

A framework for analysing whether there has been an unjust enrichment should include the following questions:

(1) Has the defendant been enriched? A benefit may be tangible or intangible. It may be in the form of money, property, a discharge of a debt, use of property or information or saving on an expense. There is a requirement that the benefit have been requested, otherwise accepted or is an incontrovertible benefit.[90]

(2) Was the enrichment at the claimant's expense?

(3) Was the enrichment unjust? This might involve mistake, compulsion, failure of consideration or failure of basis (such as in the context of frustration). These have been referred to as 'qualifying or vitiating factors'.[91] The acceptance of a benefit might also establish that the enrichment is unjust.

(4) Are there any defences available to the defendant? For example, has the defendant, in good faith, changed position to the extent that the defendant would suffer detriment if required to make restitution?[92]

Questions as to the approach to valuing an enrichment, which is not purely monetary, have arisen in a number of cases and were recently considered by the High Court in *Mann,* which included an analysis of applying a 'contractual ceiling' to a *quantum meruit* claim following termination by repudiation.[93]

89 *Mann* 51–52 [189]–[191]. See also *Baltic Shipping Co v Dillon (The Mikhail Lermontov)* (1993) 176 CLR 344, 355–56, 375.
90 See, eg, *Pavey*; *Lumbers.*
91 See *David Securities* 379.
92 Ibid 405–6.
93 *Mann.*

APPENDIX A

AS 4902—2000 Australian Standard – General conditions of contract for design and construct

force majeure event means:

(a) storm surge, earthquake, tsunami, typhoon, tornado, cyclone, dust storms, flood, fire, explosion, washaway, landslide, catastrophe, ***and/or other natural calamity*** or physical disaster;

….

(f) embargo or sanctions arising from any act of any government or other authority or agency;

(g) epidemic, pandemic, or quarantine restriction

…

but only to the extent that:

(m) it is beyond the reasonable control of (and not caused by) the party claiming the force majeure event (including any *subcontractor* or any agent or employee of any of them); and

(n) the risk is not expressly assumed elsewhere in the Contract by one of the parties