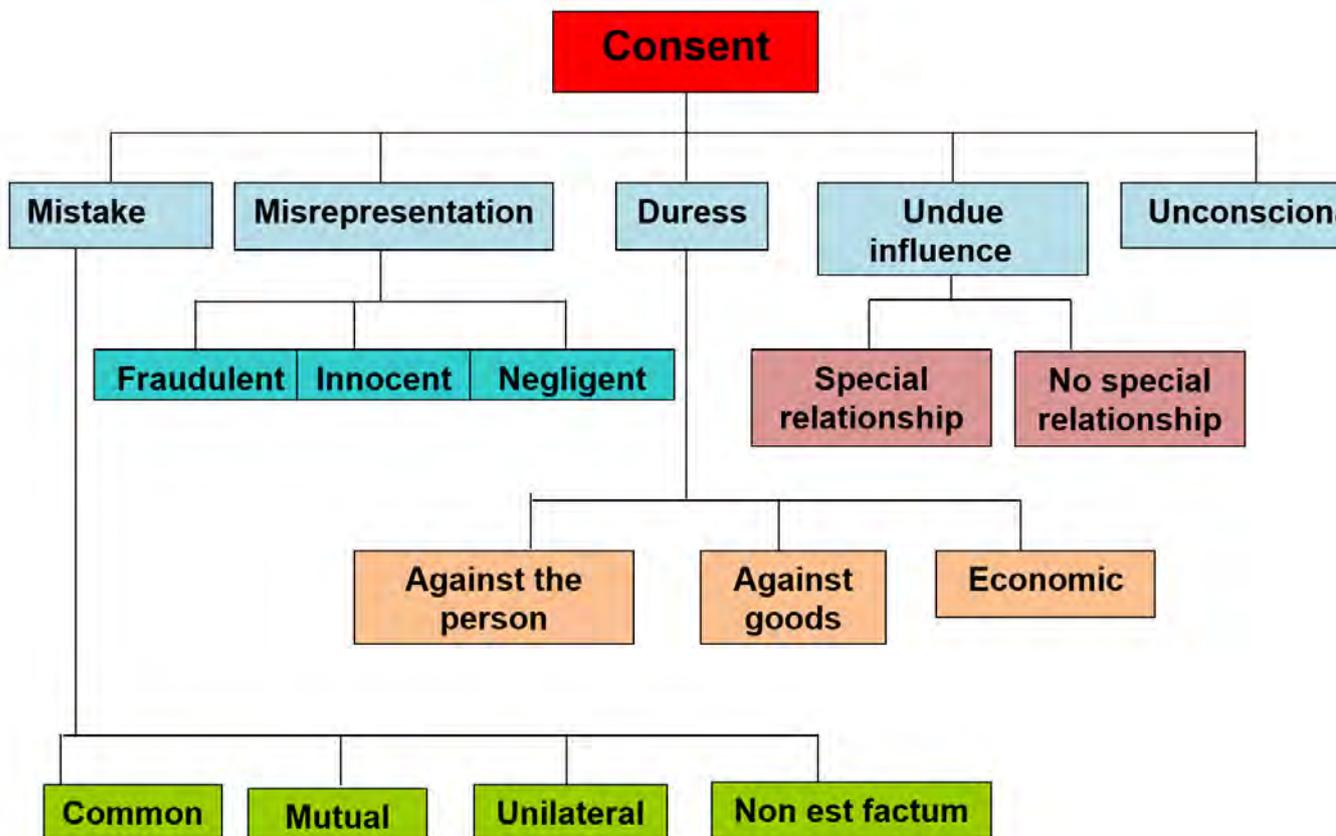


Genuine Consent

*Mistake*

- **Common Mistake** – Both parties mistaken about same thing – not available to void the contract where a party acts in reliance on another party's promise to their detriment – **Mcrae v. commonwealth disposal commission**
- **Unilateral Mistake** – only one party mistaken but other is aware of this and does nothing to correct it. However not available to avoid contract if the other party is unaware of the first party's mistaken belief
- **Mutual Mistake** – Misunderstanding or parties at cross – purposes

Misrepresentation

- The representation must be a statement of fact that is false and induces entry into the contract
- Misrepresentation can be:
 - **Innocent**
 - **Fraudulent** – needs to show intention to deceive
 - **Negligent** – this will arise where there is a special (often business) relationship between the parties and is similar to duty of care situations in negligence law
- The following representations are **generally excluded under the common law**: statements as to **future conduct or intentions**. Statements of **opinion, mere 'puffs'** (extreme advertising), **silence or non-disclosure, statements of law**
- Note though that the **Australian Consumer Law** will be relevant
- For example, relevant sections under the Australian Consumer Law (ACL) include:
 - **Section 18** – misleading or deceptive conduct

- Section 1317H – this section applies where there is a breach of the civil penalty provisions and enables the court to order a person to **compensate the company for damage** resulting from the contravention
- Section 206C – provides for **disqualification** where a civil penalty provision is breached

Criminal Penalties

Section 184

- Where a director fails to act in good faith or for a proper purpose (as in section 181), or misuses their position (section 182) or information (section 183) for gain and where the conduct is reckless or dishonest then this will be in breach of section 184
- The criminal penalty provisions apply to a breach of section 184:
 - There are several sections of the Corporations Act that result in criminal penalties – **a list of these sections and the specific penalties can be found in Sch 3** and include: imprisonment and fines (monetary penalties)
 - **Where Sch 3 does not set out a specific** monetary penalty section 1311B will be relevant to the calculation of any monetary penalty payable

The Duty of Care and Diligence

Arises under:

General Law

- ✓ Under general law whether a director had breached the duty of care and diligence depended on a largely subjective assessment of the director's own skills and knowledge
- ✓ This general law standard (as applied in *Re city equitable*) is no longer relevant – assessing care and diligence is an objective exercise today

Statue Law

- ✓ Section 180
 - Section 180 (1) – act with reasonable care and diligence
 - Section 180 (2) – business judgement rule (BJR)

Care and Diligence

- Accountability and objectivity have altered the application of the general law standard in regards to a director's duty of care.
- In **Daniels v. Anderson** the Court of Appeal found the executive directors of AWA limited had been negligent and that directors must understand the nature of duty they are required to perform and be familiar with the business of the company
- Directors must be **pro-active** in their approach to management
 - **Keeping themselves informed** about company matters
 - **Regular attendance** at meetings
 - **Making their own inquiries** and not merely relying on the information of others
 - **Participating in the decision making processes**

Directors cannot simply rely of the fact that systems are in place and have an objective duty to be able to read and understand the company's financial statements (**ASIC v. Healey**)

- ✓ Must include all information that shareholder and their advisers would reasonably require to make an informed assessment whether to accept the offer under the bid
- ✓ Directors of a target company who do not make recommendation in the targets statement must give reasons as to why a recommendation is not made.

Section 670A

- Section 670A specifically focuses on upon takeover situations and prohibits misleading and deceptive statements in takeover documentation
- Section 670A imposes criminal and civil liability on certain people for false or misleading material in documents and statements issued in relation to takeover bids
- Those who may be exposed to the liability during takeover
 - Directors if they prefer their own interest
 - Experts who provide reports containing material omissions

Takeover Panel

- Set up under the ASIC Act
- Deals with takeover disputes arising during the bid period
- Applications to the Panel may be made by bidders, targets, ASIC or any other affected party
- The Panel has the power to make declarations of unacceptable circumstances and as a result it can make orders to protect the rights of interested parties, or orders as to the manner in which the takeover proceeds.
- The constitutional position of the Takeovers Panel has come under scrutiny in the past in a number of cases however its ability to make declarations has been confirmed

Financial Services and Markets

- The regulatory scheme in Chapter 7 Corporations Act applies to:
 - Financial products (securities, managed investments, and derivatives) financial investments, financial services, financial risk, financial markets
- Financial service providers must:
 - Hold a license section 911A
 - Comply with disclosure and other obligations
 - Not engage in prohibited conduct

NOTE 912A sets out general obligations which include efficiency, honesty and fairness, competence, absence of conflict of interest, dispute resolution systems for retail clients, risk management.

Regulating Market Conduct

- The following conduct is prohibited:
 - **Short Selling (section 1020B)**
 - Selling securities or other financial products not yet owned or possessed
 - For example, short-sellers sell securities at current price, in the anticipation that the price will fall and they will be able to buy in at lower price
To avoid breaching of section 1020B the seller must have an exercisable and unconditional right to vest the securities in the buyer
Breach of section 1020B is an offense (section 1311)
 - **Market Manipulation (section 1041A)** creating an artificial price for trading in financial products on a financial market

Defences to voidable transactions

- Protection available for third parties under Section 588FG
- No order which materially prejudices a person's right or interest will be made:
 - (a) If the person received no benefit because of the transaction
 - (b) If he or she did receive a benefit:
 - a. It was received in good faith
 - b. When received the person had no reasonable grounds for suspecting that the company was insolvent or would become insolvent and
 - c. A reasonable person in the person's circumstances would have had no such grounds for suspecting

Insolvent Trading

The proceedings can be brought by:

- The liquidators (section 588M) – here the amount is a debt owing to the company – [note that, although not common, in some cases the liquidators may give consent to a creditor to bring proceedings and here the debt is due to the creditor]
- ASIC – section 588G is both a civil penalty and a criminal penalty section (where dishonesty is found)

Insolvent trading (section. 588G):

- A director may be personally liable for debts incurred by the company if the company is insolvent when the debt occurs or becomes insolvent by incurring debt and
 - (a) The director suspects, or is aware there are grounds for suspecting insolvency or
 - (b) A reasonable person in a like position and in the company's circumstances would suspect, or be aware there are grounds for suspecting insolvency

Defences to insolvent trading (section 588H)

- Director and reasonable grounds to expect and did expect solvency
 - Metropolitan v. Miller
- Reliance on a competent and reliable person
 - ASIC v. Plymin, Metropolitan Fire
- Absence of management when the debt was incurred due to illness or other good reason
- Director took reasonable steps to prevent debt being incurred

Safe Harbour Defence

Section 588GA provides a defence to insolvent trading in relation to a particular debt where:

1. When the director begins to suspect the company may be or become insolvent, they take a course of action reasonable likely to lead to a better outcome (that is, better than appointment of an administrator or liquidator) and
2. The particular debt is incurred directly or indirectly in connection with that course of action
One of the factors relevant to determining whether the director's course of action is reasonably likely to lead to a better outcome is whether advice was obtained from suitably qualified entity.