SUPREME COURT OF QUEENSLAND

CITATION:	*Queensland Taxi Licence Holders v State of Queensland* [2020] QSC 94
PARTIES:	**QUEENSLAND TAXI LICENCE HOLDERS** (plaintiffs) **v** **STATE OF QUEENSLAND** (defendant)
FILE NO/S:	BS No 2381 of 19
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	8 October 2019
JUDGE:	Bradley J
ORDER:	**1. Judgment for the defendant against the plaintiffs on the claim for equitable compensation and the claim for damages for breach of contract, pursuant to r 293(2).** **2. Paragraphs [67] to [71] of the further amended statement of claim filed on 25 September 2019 are struck out, pursuant to r 171(2).** **3. The plaintiffs have leave to replead a claim for relief pursuant to s 238 of the Australian Consumer Law (ACL) for contravention of s 20 and/or s 21 of the ACL, within 28 days, pursuant to r 366(2).** **4. The plaintiffs pay the defendants' costs of the application filed on 30 August 2019 and the amended application filed by leave on 8 October 2019.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR DEFENDANT OR RESPONDENT: STAY OR DISMISSAL OF PROCEEDINGS – where the plaintiffs hold taxi service licences issued under the *Transport Operations (Passenger Transport) Act* 1994 (Qld) (the **Act**) – where the plaintiffs allege the defendant, by failing to enforce the Act, permitted persons who did not hold taxi service licences to conduct ride booking operations between April 2014 and September 2017 – where the plaintiffs allege the

defendant amended the Act, with effect from October 2017, to "render lawful" the conduct of ride booking operations by persons who do not hold taxi service licences – where the plaintiffs claim damages for breach of contract, equitable compensation based upon a promissory estoppel and statutory damages under the *Australian Consumer Law* (**ACL**) against the defendant – where the defendant applied for summary judgment in respect of all three of the claims – whether summary judgment should be entered in respect of the claims because they have no real prospect of succeeding and need not proceed to trial in the ordinary way

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – DISCLOSING NO REASONABLE CAUSE OF ACTION OR DEFENCE – where the defendant applied for summary judgment in respect of the plaintiffs' claims for damages for breach of contract, equitable compensation based upon a promissory estoppel and statutory damages under the ACL – whether, if summary judgment should not be entered in respect of any of the plaintiffs' claims, those claims should be struck out because they do not disclose a reasonable cause of action– whether, if any of the plaintiffs' claims should be struck out, the plaintiffs should be allowed leave to replead those claims

Australian Consumer Law, s 20, s 21, s 238
Transport Operations (Passenger Transport) Act 1994 (Qld), s 2, s 216
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 149, r 171, r 293, r 366

Agar v Hyde (2000) 201 CLR 552, cited
ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue (NSW) (2012) 245 CLR 338, cited
Ansett Transport Industries (Operations) Pty Ltd v Commonwealth (1977) 139 CLR 54, cited
Attorney-General (NSW) v Quin (1990) 170 CLR 1, considered
Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106, cited
Brickworks Ltd v Warringah Shire Council (1963) 108 CLR 568, considered
Byrne v Australian Airlines Ltd (1995) 185 CLR 410, cited
Callide Power Management Pty Ltd v Callide Coalfields (Sales) Pty Ltd [2014] QSC 205, cited
Churchill Fisheries Export Pty Ltd v Director-General of Conservation [1990] VR 968, considered
Commonwealth v Hazeldell Ltd (1918) 25 CLR 552, cited
Commonwealth v Verwayen (1990) 170 CLR 394, cited
Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594, considered
Corrections Corporation of Australia Pty Ltd v Commonwealth (2000) 104 FCR 448, considered

DHJPM Pty Ltd v Blackthorn Resources Ltd (2011) 83 NSWLR 728, cited
Dockpride Pty Ltd v Subiaco Development Authority [2005] WASC 211, distinguished
Federal Commissioner of Taxation v United Aircraft Corporation (1943) 68 CLR 525, cited
Glenco Manufacturing Pty Ltd v Ferrari [2005] 2 Qd R 129, cited
J S McMillan Pty Ltd v Commonwealth (1997) 77 FCR 337, considered
LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd [2011] QCA 105, cited
Lee v Abedian [2017] 1 Qd R 549, cited
Legione v Hateley (1983) 152 CLR 406, cited
Madden v Kirkegard Ellwood & Partners [1975] Qd R 363, cited
Minister for Immigration & Ethnic Affairs v Kurtovic (1990) 21 FCR 193, considered
Murphy v State of Victoria (2014) 45 VR 119, cited
NSW Rifle Association Inc v Commonwealth (2012) 293 ALR 158, distinguished
NT Power Generation Pty Ltd v Power & Water Authority (2004) 219 CLR 90, cited
Petersen v Nolan [2020] QCA 56, cited
Port of Portland v Victoria (2010) 242 CLR 348, applied
Rederiaktiebolaget Amphitrite v The King [1921] 3 KB 500, cited
Searle v Commonwealth (2019) 100 NSWLR 55, distinguished
Te Runanga o Wharekauri Rekohu v Attorney-General [1993] 2 NZLR 301, approved
United Grocers, Tea & Dairy Produce Employees' Union (Vic) v Linaker (1916) 22 CLR 176, cited
Village Building Co Ltd v Canberra International Airport Pty Ltd (2004) 134 FCR 422, cited
West Lakes Ltd v South Australia 1980) 25 SASR 389, applied
Williams v Commonwealth (2012) 248 CLR 156, applied

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M Brennan QC and D Marckwald for the defendant

SOLICITORS: O'Sullivans Law Firm acting as Town Agent for Maitland Lawyers for the plaintiffs
Crown Law for the defendant

[1] The plaintiffs hold taxi service licences (**taxi licences**) issued under the *Transport Operations (Passenger Transport) Act* 1994 (Qld) (the **Act**) and carry on businesses providing taxi services and booked hire services, which are types of public passenger transport services under the Act. They claim to have suffered losses in the capital value of their taxi licences and the plant, equipment and vehicles they use in connection with the licences, and to have lost earnings.

[2] The plaintiffs hold the State of Queensland (the **State**) liable for their losses. They sue the State for equitable compensation, statutory damages, and damages for breach of contract. Each of these causes of action involves allegations that the State permitted ride booking operators (such as Uber) to conduct businesses and make arrangements with ride booking drivers (such as Uber drivers) to carry passengers for reward in Queensland, without holding a taxi licence.

[3] The claim covers two periods. In the first, from April 2014 to September 2017, the plaintiffs allege the State permitted businesses to conduct ride booking operations and took no action against ride booking operators to stop or restrain their operations. They also allege that the State permitted persons without a taxi licence to make arrangements with ride booking operators to carry passengers by road for reward. By this they mean the State had the legal capacity to enforce the provisions of the Act and took no action such as obtaining an injunction to prevent Uber breaching the Act. They say any action the State took against ride booking drivers was limited to "collecting revenue by the imposition of fines". The plaintiffs claim loss of earnings during what they refer to as "the period of unlawful activity by the rideshare drivers".

[4] The second period begins on about 1 October 2017, when amendments to the Act commenced.[1] According to the plaintiffs, the State amended the Act "to render lawful the actions of the ride-booking operators and the ride-booking drivers in carrying passengers by road for reward in Queensland." The plaintiffs claim a loss of earnings "as a consequence of the amendments to the legislation whereby the carriage of passengers by the rideshare drivers was authorised" by the State. They also claim for a loss of future earnings.

Principles about summary judgment and striking out pleadings

[5] On 30 August 2019, the State filed an application for summary judgment against the plaintiffs or an order striking out parts of the plaintiffs' statement of claim. The application was made pursuant to r 293 and r 171 of the *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**).

[6] In the course of exchanging written submissions, the parties resolved some issues. The plaintiffs deleted substantial parts of their pleading, significantly amended others and added additional allegations and particulars.[2] The parties were content for the court to determine the State's application on basis of the plaintiffs' latest pleading: a further amended statement of claim (**FASOC**).[3] At the hearing, the State was given leave to file an amended application, identifying the challenged parts of the FASOC.

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1 The *Transport and Other Legislation (Personalised Transport Reform) Amendment Act* 2017 (Qld) (the **2017 Amendment Act**) was passed by the Queensland Parliament on 27 May 2017. It received royal assent on 5 June 2017. The relevant amendments, which omitted the former chs 7, 7A and 8 of the Act and inserted a new ch 7, were enacted by ss 17 and 18 of the 2017 Amendment Act. Most provisions in the new ch 7 commenced on 1 October 2017, although some did not commence until 15 January 2018.

2 The deleted parts include those advancing claims of estoppel by convention and one of the claims based on promissory estoppel.

3 The FASOC was filed on 25 September 2019. The other documents containing current pleadings and particulars are the plaintiffs' further and better particulars of the amended statement of claim (**FBP**) filed 1 July 2019, the State's amended defence (**AD**) filed on 30 August 2019 (see also the State's further and better particulars of the defence filed on 9 August 2019) and the plaintiffs' reply (**Reply**)

[7] There was no controversy about the principles of summary judgment and striking out pleadings; so these may be briefly stated.

Summary judgment

[8] The court may give judgment for a defendant against a plaintiff for all or part of the plaintiff's claim if the court is satisfied that the plaintiff has "no real prospects of succeeding" on all or that part of the plaintiff's claim and that "there is no need for a trial" of the claim or that part of the claim.[4] The genealogy and development of the court's power to summarily determine a claim or a defence was explained by Williams JA in *Deputy Commissioner of Taxation v Salcedo*,[5] and need not be repeated. The power to give summary judgment for a defendant arises from and is to be exercised according to the clear language of r 293.[6] The rule is to be applied with the objective of avoiding undue delay, expense and technicality and facilitating the just and expeditious resolution of the real issues at a minimum of expense.[7] The just resolution of the issues is understood against the historical framework in which it is "well accepted" that ordinarily "a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes".[8]

[9] A plaintiff's prospects and the need for a trial are separate questions. The first question has been posed as: whether there exists a real, as opposed to a fanciful, prospect of success.[9] The court may consider the need for a trial arises for various reasons. The most obvious is where the facts upon which the parties' respective rights depend are disputed, so there should be a trial to determine those facts. There may be other instances where the matters in issue should be determined only after the parties have an opportunity to complete interlocutory steps, adduce evidence, and test the evidence of witnesses in the usual way.

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filed on 16 August 2019. The summary of the plaintiffs' claim in paragraphs [3] and [4] of these reasons is drawn from the FASOC at [56A], [57](a), [59], [64] and [66], and the FBP at [76].

4 r 293(2).

5 [2005] 2 Qd R 232 at 234-237 [11]-[17] (McMurdo P and Atkinson J agreeing). The same passage was quoted with approval in *Dupois v Queensland Television Ltd & Ors* [2015] QCA 160 at [13]-[14] (North J, Holmes and Fraser JJA agreeing).

6 *LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd* [2011] QCA 105 at [30] (White JA, Wilson AJA and Ann Lyons J agreeing); *Gray v Morris* [2004] 2 Qd R 118 at 133 [46] (McMurdo J, McPherson JA agreeing). See also *Equititrust Ltd v Gamp Developments Pty Ltd & Ors* [2009] QSC 115 at [12] (McMurdo J).

7 UCPR, rr 5(1)-(2).

8 *Agar v Hyde* (2000) 201 CLR 552 at 575-576 (Gaudron, McHugh, Gummow and Hayne JJ), cited with approval in *Batistatos v Road & Traffic Authority of New South Wales* (2006) 226 CLR 256 at 275 (Gleeson CJ, Gummow, Hayne and Crennan JJ) and *Spencer v Commonwealth* (2010) 241 CLR 118 at 132 (French CJ and Gummow J).

9 *Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)* [2003] 1 Qd R 259 at 264-265 [7] (Holmes J, Davies JA and Mullins J agreeing).

Striking out pleadings

[10] The different ways in which a party may challenge an opponent's pleading under r 171, and their derivation, were explained by Jackson J in *Callide Power Management Pty Ltd v Callide Coalfields (Sales) Pty Ltd*.[10] In this application, the State seeks to strike out parts of the plaintiffs' pleading on the basis that the impeached parts do not disclose a reasonable cause of action,[11] meaning the facts, maters and circumstances pleaded by the plaintiffs are not capable in law of giving rise to an entitlement to the relief they seek. The court uses the power to strike out a pleading (or parts of it) on this basis "sparingly and only in clear cases".[12] The onus rests on the party seeking a strike out order.

[11] The court is enjoined to avoid undue technicality. Defects of form, omissions and inaccuracies may be cured by amendment. Where adding missing elements or amending erroneous ones appears possible, if a strike out order is made, the court would ordinarily give leave to replead. Where there is nothing in the material before the court to suggest that a party could plead a cause of action known to law, leave to replead would be refused. Indeed, a logical consequence may be to give judgment for the defendant.[13] Between these ends of a spectrum, where a defendant's challenge to a pleading is successful, the court must consider whether allowing the plaintiff leave to deliver a new or amended pleading in its place facilitates the just and expeditious resolution of the real issues at a minimum of expense. The time, resources and opportunities that have been available to a plaintiff, as well as the extent of care and skill required to formulate a properly pleaded case, may be relevant to this consideration.

Assumptions about facts and pleadings about the law

[12] In its own pleading, the State denies or does not admit many of the plaintiffs' allegations.[14] However, in this application the State did not adduce evidence to challenge any fact alleged by the plaintiffs. Similarly, the plaintiffs did not adduce evidence of the existence of facts which, if proved, would establish their right to relief. For the purpose of the State's application, the State accepted the facts pleaded by the plaintiffs. So, in this decision, the court may assume the plaintiffs could prove at a trial the facts they allege.

[13] The plaintiffs also plead a number of matters about the effect of the Act and the regulations, and a number of conclusions of law. These are challenged by the State. The challenged matters include the allegations: that the State and each plaintiff are parties to a legally binding agreement; that the agreement includes implied terms; that the terms of the agreement are valid, legally enforceable and render the State liable to pay damages for breach; that by conduct the State made representations; that assumptions or expectations were reasonably made by the plaintiffs; and that conduct of the State was in the course of trade or commerce and of carrying on a business within the meanings of certain Acts. The court is not required to determine this application on the basis that the plaintiffs' pleas about matters of law are correct. The

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10 [2014] QSC 205 at [17]-[32].

11 UCPR, r 171(1)(a).

12 *Lee v Abedian* [2017] 1 Qd R 549 at 559 [38] (Bond J), citing *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129-130 (Barwick CJ).

13 *Petersen v Nolan* [2020] QCA 56 at [20] (Mullins JA, McMurdo JA and Bond J agreeing).

14 See, eg, AD, [14]-[29], [57]-[66], [67]-[71], [72]-[75].

court may decide any dispute about the true effect of the Act, the regulations, the legal effect of alleged conduct and other statutes and instruments,, the principles of equity or the common law. However, applying r 293, the court will not grant summary judgment on this application unless the plaintiffs' case on the law has no real prospect of success and there is otherwise no need for a trial. Similarly, the court will not strike out parts of the pleading under r 171 unless the plaintiffs' case is clearly wrong as a matter of law.

Legislative regulation of taxis in Queensland

[14] The first legislative intervention by the Queensland Parliament requiring licensing of taxis was the *Brisbane Traffic Act* 1895 (Qld) (the **1895 Act**). During the second reading debate, the Hon Patrick Perkins MLC expressed the view that:

> "Vagabonds and ruffians have been allowed to ride and drive horses through the streets at a furious pace, and the police have winked at it. It should be someone's duty to look after these things, and I am glad the Government has taken the matter in hand."[15]

[15] The Hon Dr William Taylor MLC shared an anecdote with the chamber:

> "Only to-day I was informed of a case where a stranger, arriving from Melbourne, hired a cabman to take him to a house in Montague road, South Brisbane. This cabman, knowing the man was a stranger, drove him all round Norman Creek, and kept him about three hours before he reached his destination."[16]

[16] The 1895 Act placed the licensing of cabs and all other vehicles in the district[17] under the power of the Metropolitan Transit Commissioners. Beyond the metropolitan district, any licensing was in the hands of local authorities.

[17] The *Brisbane Traffic Act 1905* (Qld) commenced on 1 January 1906.[18] It repealed the 1895 Act and placed the Commissioner of Police in charge of taxi-cab regulation. It authorised the Governor in Council to make regulations on topics of current relevance: requiring owners of vehicles used, kept or let for hire to obtain licences; requiring drivers of the vehicles to obtain licences; prescribing the form, construction and equipment in such vehicles; appointing and regulating public cab ranks; prohibiting driver misconduct and touting; fixing fares and prohibiting charging more than the authorised fare; inspection of vehicles; limiting the number of licenced vehicles; regulating licence applications, transfers, terms and renewals; prescribing licence conditions; and prescribing licence fees.[19]

[18] Responsibility for licensing vehicles to carry passengers on traffic routes passed to the State Transport Commission under the *State Transport Act* 1938 (Qld) (the **1938**

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15 Queensland, *Parliamentary Debates*, Legislative Council, 19 December 1895, 2133.

16 Ibid.

17 The Governor in Council directed that the district comprised "the Municipalities of Brisbane and South Brisbane, the Shires of Coorparoo, Ithaca, Toowong and Windsor, the Divisions of Booroodabin, Hamilton and Stephens, and so much of the Division of Balmoral as lies to the west of Bulimba Creek": Queensland, *Queensland Government Gazette*, No 65, 4 January 1896, 4.

18 It was amended from time to time eventually to become the *Traffic Acts* 1905-1933 (Qld).

19 *Traffic Acts* 1905-1933 (Qld), ss 5-6, sch items 2, 4, 10, 13-16, 38-40.

Act).[20] It provided for the Commission to issue a licence by submitting it "for sale by public tender".[21] Licences were to be issued subject to prescribed terms and conditions and the payment of licensing fees.[22] These parts of the 1938 Act were repealed by the *State Transport Facilities Act* 1946 (Qld) (**STFA**). The STFA permitted a vehicle to be used as a "taxi-cab or private hire car" if it was licensed as "a taxi-cab or private hire car carrying passengers for a distance not exceeding twenty-five miles from the principal post office of the city, town, or place where such vehicle is so licensed",[23] perhaps indicating the origin of the present taxi service areas.

[19] The *State Transport Act* 1960 (Qld) (**STA**) repealed the STFA. It authorised the Commissioner for Transport to issue "licences to hire" by submitting them for sale by public tender or at a price fixed by the Commissioner.[24] If there were two or more applications to purchase at a fixed price that were equally "advantageous in the public interest", then the Commissioner was to decide the grant of the licence by ballot.[25] A licence to hire was required for a person to keep, let or use a vehicle to stand for hire, ply for hire or carry passengers on a road.[26] These licences were issued for a term of up to 12 months and were renewable.[27] They could not be assigned, transferred, leased, encumbered or otherwise dealt with without the prior written approval of the Commissioner; and any such dealing without the Commissioner's approval was "absolutely void".[28] The STA provided for another type of licence: a hire driver's licence for a driver of the vehicle for hire (other than the holder of the licence to hire).[29] Different provisions applied to each type of licence.

[20] The present Act commenced on 7 November 1994. It repealed all provisions in the STA about the licensing of vehicles for hire. The Act provided for the issue, renewal, transfer, suspension and cancelation of taxi licences (now called "taxi service licences"), for the inclusion of licence conditions and for the making of regulations and standards. The Act abolished fixed price licence sales and associated ballots. All new licences would be issued through open tenders. As noted at paragraph [137](c) below, before the Act commenced, the then Minister for Transport observed about this change:

> "In some cases, successfully winning a ballot for a new licence has been like winning the casket. These licences have been so undervalued by the department that new holders enjoyed windfall profits simply by winning a new licence ballot. In future, taxi service licences will be issued through open tender."

[21] A person who held a licence to hire immediately before the Act commenced could continue to operate a taxi service under it and the STA continued to have effect for the purpose of the licence for one year or until the licence to hire expired or a

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20 There were some other shorter-lived legislative measures in the 1930's.
21 *State Transport Act* 1938 (Qld), s 16(2).
22 Ibid, ss 17, 20.
23 *State Transport Facilities Act* 1946 (Qld), ss 23(1)(d), 24(8).
24 *State Transport Act* 1960 (Qld), ss 17(1), 18(1).
25 Ibid, s 18(4).
26 Ibid, ss 15(2), 20.
27 Ibid, s 17(3).
28 Ibid, s 17(6).
29 Ibid, s 16.

corresponding taxi licence was issued under the Act.[30] The plaintiffs plead that some of them were issued a taxi licence "for a prescribed licence fee in lieu of an existing licence which pre-dated the Act".[31] Whether the position of such plaintiffs is different to the others may depend upon how the plaintiffs might seek to prove any claimed capital losses on their taxi licences.

[22] Since the commencement of the Act, only the chief executive has been able to issue a new taxi licence.[32] Each taxi licence has been issued for a taxi service area, being one of 20 geographic areas in Queensland.

[23] Another change introduced by the Act was the ability of the holder of a taxi licence to transfer it freely to another person.[33] So, once issued, a taxi licence was able to be traded.

[24] The Act assumed a market for taxi licences. It required the chief executive to give public notice of an intention to issue new taxi licences for a taxi service area, inviting offers to purchase.[34] In the public notice, the chief executive was obliged to include information about any recent sales of taxi licences for the taxi service area.[35] It might be inferred that these steps were intended to encourage competitive bids for new taxi licences, informed by recent prices in the market, and so achieve a market price for each new licence. In this way the Act acknowledged the logical link between the price at which a person might tender for the issue of a new licence and the price at which the person could acquire an existing licence in the market.

[25] The plaintiffs' claims proceed on the basis that those to whom the chief executive issued a new taxi licence paid an amount arrived at according to an open tender process.[36] The plaintiffs say it was "comparable with market prices for licences", "equivalent to or exceeding those most recent prices" and usually in excess of $200,000, and sometimes in excess of $500,000, depending on the taxi service area.[37] The plaintiffs who purchased a taxi licence from another holder may be assumed to have paid a market price.[38]

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30 See s 152 of the Act as enacted.

31 FASOC, [10].

32 See, eg, s 70 of the Act as enacted, s 69 of the Act prior to its amendment by the 2017 Amendment Act, and s 91D of the Act as currently in force.

33 See, eg, s 22(1) of the *Transport Operations (Passenger Transport) Regulation* 1994 (Qld) (**1994 Regulation**), s 54(1) of the *Transport Operations (Passenger Transport) Regulation* 2005 (Qld) (**2005 Regulation**) prior to its amendment by the *Transport and Other Legislation (Personalised Transport Reform) Amendment Regulation (No. 2) 2017* (Qld), and s 161(2) of the *Transport Operations (Passenger Transport) Regulation* 2018 (Qld) (**2018 Regulation**). The STA provision rendering an unapproved transfer "absolutely void" was repealed.

34 See ss 72(1)(a)(i) and (b) of the Act prior to its amendment by the 2017 Amendment Act.

35 Ibid, s 72(1)(a)(ii).

36 FASOC, [10].

37 FASOC, [13A](a); Reply, [3](c).

38 The plaintiffs plead no special features of the market. It may be assumed the market price was determined by the prices at which taxi licence holders were prepared to sell and those at which potential purchasers were prepared to buy, in competition with each other. The market for taxi licences would comprise the area of actual and potential interaction between those who could sell and those who could buy a taxi licence.

[26] The Act authorised the chief executive to issue taxi licences for a term of five years. A taxi licence holder could renew the taxi licence for successive terms of five years, provided there had been compliance the licence conditions.[39]

The relevant times for considering the legislation

[27] The Act was amended at least 77 times between its enactment in 1994 and the filing of the plaintiffs' claim on 6 March 2019. Over that period there have been three principal regulations made pursuant to the Act,[40] each amended numerous times.

[28] The plaintiffs' pleading proceeds on the assumption that each of the plaintiffs held their taxi licence (or licences) by "at least April 2014", when the knowledge and conduct alleged against the State is said to have commenced.[41] They assert that their "rights and proprietary entitlements" were breached by the State's conduct from that time and, by that conduct, they suffered loss and damage.[42]

[29] In the circumstances, these reasons consider the plaintiffs' claims against the statutory framework as at 1 April 2014. For this purpose, I have referred to the reprint of the Act current from 23 September 2013 to 30 June 2014[43] and the reprint of the 2005 Regulation current from 10 February 2014 to 30 June 2014.[44] Some relevant amendments after 30 June 2014 are considered separately below. Where it is necessary to consider the plaintiffs' position after the pleaded legislative changes had commenced, I have referred to the reprint of the Act current from 1 December 2017 to 4 January 2018[45] and the reprint of the 2005 Regulation current from 1 to 31 December 2017.[46]

The plaintiffs' three causes of action

[30] The present pleading is the third formal statement of the material facts and contentions on which the plaintiffs rely for relief against the State.[47] In it, the plaintiffs present three causes of action: equitable compensation based upon a

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39 See ss 73(1) and (3) of the Act prior to its amendment by the 2017 Amendment Act. The chief executive was authorised to issue a licence on a non-renewable basis, under s 73(2), but no such licence is pleaded in the plaintiffs' claim. The lengthening of the licence term, from 12 months under the STA to five years under the Act may have enhanced the market for taxi licences. See also s 91E of the Act as currently in force.

40 The 1994 Regulation was repealed on 16 December 2005. The 2005 Regulation commenced on 16 December 2005 and expired on 30 August 2018. The current 2018 Regulation commenced on 1 September 2018 and continues in force. In these reasons, regulations promulgated under the Act are referred to as the **Regulations**.

41 FASOC, [56A]-[57].

42 FASOC, [64]-[66]. Nothing is pleaded about the position of any plaintiff who acquired a taxi licence after that date. If any did, then, on the plaintiffs' case, the price they paid may have been affected by the State's alleged conduct and their claim for loss and damage may also be affected.

43 In these reasons the reprint is referred to as **Act (R2014)**.

44 In these reasons the reprint is referred to as **2005 Regulation (R2014)**.

45 In these reasons the reprint is referred to as **Act (R2017)**. Nothing in this case turns on the amendments to the Act that commenced after 1 December 2017.

46 In these reasons the reprint is referred to as **2005 Regulation (R2017)**. By 1 December 2017, all material amendments to the 2005 Regulation had commenced.

47 A statement of claim was filed with the claim on 6 March 2019. An amended statement of claim (**ASOC**) was filed on 11 April 2019. The FBP were filed on 1 July 2019. As noted above, the FASOC was filed on 25 September 2019.

promissory estoppel; statutory damages under the *Australian Consumer Law* (**ACL**); and damages for breach of contract. The State seeks summary judgment in respect of all three. Its alternative relief is an order to strike out the key allegations for the equitable compensation claim,[48] the ACL claim[49] and the contract claim.[50]

[31] Although they appear in a different order in the pleading, it is convenient to deal with the contractual damages claim, then the equitable compensation claim, and finally the claim for statutory damages under the ACL.

The contract claim

[32] The plaintiffs say each of them entered into a contract with the State that included certain conditions, that the State breached those conditions by the conduct of which they complain, and that they suffered loss and damage as a result. It is convenient to consider the existence of the alleged contracts, then the alleged contract terms, then the plaintiffs' true position as holders of taxi licences under the Act, and finally the alleged breaches of contract.

The existence of the alleged contracts

[33] The plaintiffs contend that the State "created a contract" between each plaintiff and the State, which they designate a **Taxi Licence Agreement**.[51] They say this occurred whether the chief executive issued a taxi licence to a plaintiff or whether the plaintiff purchased the taxi licence by way of a transfer from another person who previously held it.[52] They say the relevant contract was partly in writing "in the terms set out in the licence granted to the original licensees" and in "the wording of the relevant legislation", and that it was partly implied.[53]

[34] The plaintiffs' contentions about the existence of the Taxi Licence Agreements are found in a number of places in the FASOC. They may be considered under three general topics.

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48 FASOC, [14]-[29], [56A]-[66].
49 FASOC, [14], [18], [57]-[62], [64]-[71].
50 FASOC, [66], [72]-[75].
51 FASOC, [72].
52 FASOC, [8], [22] and [72]. Paragraph [72] also pleads an alternative contention that the Taxi Licence Agreement was created "by the novation and/or assignment of a licence" from the person to whom it was issued to a transferee "together with the collateral obligation of each licensee to enter into a taxi serviced agreement for the performance of minimum standards of service delivery". This is considered later in these reasons.
53 FASOC, particulars to [72].

The application for and issue of a taxi licence

[35] The plaintiffs contend the existence of a Taxi Licence Agreement is to be inferred from certain conduct of the State, including "calling for expressions of interest in the purchase of taxi licences" and "from the purchase price of those licences".[54] They say some of them applied for and were granted a taxi licence pursuant to the Act.[55] It may be assumed that these contentions are relied on to establish the existence of such contracts between those plaintiffs and the State.

[36] The Act required the chief executive to invite offers to purchase a new licence.[56] It precluded the chief executive from being bound to accept any offer.[57]

[37] The chief executive may have contracted with a person wishing to purchase a new licence about the purchase. The plaintiffs give an example of a tender process conducted on conditions that required the payment of a deposit with the tender application, and made the deposit forfeitable in certain circumstances.[58] The purchase price, like the tender process, may indicate a contract to purchase a new licence.

[38] A contract to participate in a tender process and, if successful, acquire a new taxi licence, is not the taxi licence itself. Such a contract is not a Taxi Licence Agreement as alleged by the plaintiffs.[59] It is what the plaintiffs refer to as "an agreement for the issue of an original licence"[60] or a contract on what the plaintiffs refer to variously as the "Conditions of Offer", the "Conditions of Application" or the "Tender conditions" for a new taxi licence.[61]

Taxi licence conditions

[39] The plaintiffs contend a Taxi Licence Agreement should be inferred "from the financial and regulatory obligations imposed on the Plaintiff licensees" and "from the terms of the legislation".[62] They allege that:

> "prior to obtaining the licence, the applicant was, in practice, required to agree to onerous conditions stipulated by the Chief Executive including that the taxi must incorporate certain equipment and must be operated for prescribed hours each day."[63]

[40] The Act provides that each taxi licence is subject to the conditions stated in it by the chief executive.[64] The chief executive was required to state in the licence conditions both the taxi service area and the vehicle to be used under the licence.[65] In at least

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54 FASOC, particulars to [72]. I have disregarded the statement in the particulars that the contract "was to be implied in order to give business efficacy to" the contract, as obviously misconceived.
55 FASOC, [8].
56 Act (R2014), s 69; Act (R2017), s 91F(1).
57 Act (R2014), s 73(2); Act (R2017), s 91F(3).
58 FASOC, [11A](b)-(e).
59 FASOC, [72].
60 FASOC, [9].
61 FASOC, [11A].
62 FASOC, particulars to [72].
63 FASOC, [13A](b).
64 Act (R2014), s 74(1); Act (R2017), s 91O(1).
65 Act (R2014), ss 74(2)(b), (d)(i).

two important respects, the other licence conditions were quite unlike terms or conditions that might be agreed in a contract between the State and the holder of the taxi licence.

[41] *First*, the licence conditions bound not to the taxi licence holder, but to an *operator* of the vehicle the subject of the taxi licence. An operator might not hold the taxi licence but instead might lease the taxi licence or manage the vehicle under an arrangement with the licence holder.[66]

[42] The Act did not authorise the chief executive to include any conditions binding on the taxi licence holder.

[43] The taxi licence conditions required the *operator* to use a particular type of vehicle, or a type approved by the chief executive, to not charge more than the maximum fares prescribed by regulation, and to display a distinctive registration plate on the vehicle.[67] The Act authorised the chief executive to state other conditions for the *operator*, e.g. to require the *operator* to have a continuously operating booking service, and to cooperate with a person holding a taxi service contract from the chief executive.[68] The taxi licence conditions about operating the taxi on a stated day or at a stated time were imposed on the *operator*, not the taxi licence holder.[69]

[44] Even the obligation not to contravene a taxi licence condition was imposed on the *operator* of a taxi service under the licence, not on the licence holder.[70]

[45] In respect of equipment, the statutory instruments imposed different obligations on a taxi licence holder, the operator of the taxi service and the driver of the taxi.

[46] It was not the taxi licence holder, but the *operator* who could be required by a licence condition to install and maintain stated equipment.[71] The *operator* was obliged to ensure the vehicle was fitted with a taximeter[72] and an air conditioner.[73] It was also the *operator* who had to ensure the vehicle complied with the regulatory requirements about preventing luggage or goods entering the passenger compartment from the luggage compartment, about passengers having control over opening and shutting of doors independently of the driver, and about having a distress light, a hail light and a child restraint anchorage bolt.[74]

[47] The *driver* of the vehicle had the obligations: not to refuse a hiring; not to charge more than the maximum fare; and not to activate the taximeter early, to stop it from registering a charge when the vehicle is unable to continue, and to de-active it before asking for or receiving payment at the destination.[75]

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66 The Act recognised this ability, including by authorising a regulation to limit the number of licences held, leased or managed by a single operator (and the operator's associates) in a taxi service area: Act (R2014), s 78.

67 Act (R2014), ss 74(2)(a), (c), (d)(ii).

68 This type of agreement will be considered below.

69 Act (R2014), s 74(3)(d).

70 Act (R2014), s 74(4).

71 Act (R2014), s 74(3)(c).

72 2005 Regulation (R2014), s 64(1).

73 Act (R2014), s 69(1).

74 2005 Regulation (R2014), s 118, sch 5 (2).

75 2005 Regulation (R2014), ss 62, 63, 65.

[48] Each obligation, whether onerous or not, arose by statute and was enforced by a penalty. There were few such obligations for a taxi licence holder. No contract was necessary to give legal effect to the licence conditions. None could do so, unless the operator and the drivers were also parties to the contract. No contract was necessary for the other regulatory requirements. The juristic source of all these obligations was not contract, but statute.[76]

[49] The *second* important characteristic of the taxi licences was that the chief executive was authorised to amend the licence conditions, if satisfied the amendment would result in a higher quality of service or would better meet the needs of users.[77]

[50] For this, the Act prescribed a process. The chief executive was to give the taxi licence holder written notice about the proposed amendment and invite the holder to show why the amendment should not be made. If, after considering all written representations, the chief executive was satisfied grounds existed to make the proposed amendment, then the chief executive could amend the taxi licence conditions by giving a notice to the holder.[78] A taxi licence holder was able to seek a review of the chief executive's decision to impose a condition.[79]

[51] In each of these respects, a taxi licence has the characteristics of a statutory permit, rather than a contract or, to use an example cited by the plaintiffs, a licence to occupy land.[80]

Transferability

[52] The plaintiffs also infer a Taxi Licence Agreement "from the transferability of the licence." However, in this respect also, a taxi licence was quite unlike a contract.

[53] The alleged terms of the Taxi Licence Agreement are set out at paragraphs [72] to [81] below. If a taxi licence holder had these alleged contractual rights, it is unlikely they would be assignable without the chief executive's consent. This is because the rights are dependent upon the licence holder performing its alleged promises which require personal service and qualifications on the part of the licence holder. Each plaintiff would have to obtain and maintain operator accreditation and perhaps driver authorisation. If the taxi licence holder's "rights" could be assigned, as a separate chose in action,[81] the assignment would not result in the assignee becoming a party to the Taxi Licence Agreement, as the plaintiffs contend.

[54] Generally, contractual obligations are not assignable without agreement.[82] For a plaintiff to become burdened by the alleged contractual obligations in a Taxi Licence Agreement (and for the former holder to be released), it would be necessary for all

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76 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 421 (Brennan CJ, Dawson and Toohey JJ).

77 Act (R2014), s 75; 1994 Regulation, s 21.

78 2005 Regulation (R2014), s 56.

79 Act (R2014), s 102, sch 2; Act (R2017), s 91O(1), sch 2. The chief executive could also amend a taxi licence for a formal or clerical reason, or in a way not adverse to the licence holder's interests, or if the licence holder asked. Such an amendment is made by written notice to the licence holder, without the show cause process noted above: see 2005 Regulation (R2014), s 60.

80 *NSW Rifle Association Inc v Commonwealth* (2012) 293 ALR 158 (White J).

81 Perhaps with notice pursuant to s 199(1) of the *Property Law Act* 1974 (Qld).

82 *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 26 (Windeyer J).

the parties ("transferor", "transferee" and the State) to novate a Taxi Licence Agreement – that is, to create a new contract.[83]

[55] Neither Parliament by the Act nor the Governor in Council by any regulation provided for the chief executive to enter into an agreement with the transferor and transferee of a taxi licence. No pleaded facts establish that a novation occurred when a taxi licence was transferred.

[56] The plaintiffs do allege that "[i]n practice, the transfers were only made with the approval of the Chief Executive if and when the transferee agreed to comply with the conditions attaching to the licence."[84] No particulars were provided of this allegation.

[57] The Act repealed the former STA provisions that had required the Commissioner's prior written approval for a transfer of a licence to hire and had made a transfer without approval "absolutely void". Until 1 October 2017, the holder of a taxi service licence was able to transfer the licence to any other person, provided they were accredited to provide the service.[85] There was no statutory provision for the chief executive to approve or agree to a transfer. The only obligation was for a person who transferred a taxi licence to give notice to the chief executive in writing.[86] A failure to give notice was punishable by a penalty. Such a failure did not invalidate or qualify the transfer. As the conditions in a taxi licence were principally imposed on the operator, not the licence holder, and were imposed by the Act and the Regulations, there was no cause for the chief executive to require and no provision for a transferee to agree to comply with the licence conditions.

[58] The ability of a taxi licence holder to transfer a licence without the approval or agreement of the chief executive tells decisively against a conclusion that a taxi licence is a contractual instrument as the Taxi Licence Agreement is alleged to be.

[59] The plaintiffs also plead in the alternative:

> "the novation and/or assignment of a licence … together with the collateral obligation of each licensee to enter into a taxi service agreement for the performance of minimum standards of service delivery created a contract between the licensee Plaintiff and the [State]."[87]

[60] There are four different concepts operating in this clause of the pleading. They are expressed as if they relate in two pairs.

[61] The first concept is the taxi licence, which is to be transferred from one person to another. The plaintiffs say this is done by the second concept, "novation and/or assignment". This part of the plaintiffs' case is circular: if the taxi licence to be transferred is a contract, then it needs to be novated and assigned; and, if it needs to be novated and assigned, it must be a contract. As noted at paragraph [58] above, the

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83 See *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2012) 245 CLR 338 at 349 [26] (French CJ, Crennan, Kiefel and Bell JJ), citing *Olsson v Dyson* (1969) 120 CLR 365 at 388 (Windeyer J).

84 FASOC, [22A].

85 Act (R2014), s 76; 2005 Regulation (R2014), s 54(1).

86 2005 Regulation (R2014), s 54(2).

87 FASOC, [72].

plaintiffs' taxi licences were freely transferable without any agreement by the chief executive.

[62] The third and fourth concepts are a "collateral obligation" to enter into a "taxi service agreement".

[63] The chief executive was authorised to enter into a "service contract" on behalf of the State with an accredited operator, under which the operator was required to provide certain services for an area "in a way that meets or exceeds performance levels stated in the contract."[88] Taxi services were not able to be the subject of such a service contract. However, "services for the administration of taxi services" could be the subject of a service contract.[89]

[64] The administration of a taxi service is the carrying on of a business that accepts bookings for taxi services and assigns taxis to customers.[90] A person had to be an accredited operator to carry on such a business,[91] but a taxi licence was not required. This appears to have been because a booking service was not a service provided "with the vehicle." A person could not provide a booking service for a taxi service area where there was a service contract unless they were entitled to do so under a service contract or had an agreement with the holder of a service contract.[92] It seems service contracts for the administration of taxi services were in place for all taxi service areas in Queensland. In many areas, there was only one operator with a service contract. That operator had the exclusive right to operate the administration services.

[65] As noted at paragraph [43] above, the chief executive was authorised to state a condition in a taxi licence that required the *operator* of the taxi to cooperate with the holder of the service contract for the taxi service area.[93] The inclusion of such a condition, which the plaintiffs say was common, would have linked the operators of the plaintiffs' vehicles to booking services and allowed the administrators to assign the plaintiffs' vehicles to members of the public. It would not make a taxi licence "collateral" to the service contract in any sense that might inform a determination of whether the taxi licence was itself a contract between the taxi licence holder and the State, as the plaintiffs allege.

Contracting with the State

[66] A further consideration is relevant to the plaintiffs' contention that each of their taxi licences is a contract with the State.

[67] A private person may do anything the law does not prohibit. The State, or the chief executive representing the State, is in a different position. Like the Commonwealth, it may be said that the State is not "just another legal person like a private corporation

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88 Act (R2014), ss 38(1), 38B.
89 Act (R2014), s 39(b).
90 Act (R2014), s 64.
91 Act (R2014), sch 3 (definition of "operator").
92 Act (R2014), s 44.
93 The operator could also be required to comply with all the service contract holder's reasonable requests and not to act in a way likely to prevent the service contract holder complying with the conditions of the service contract: Act (R2014), s 74(3)(b).

or a natural person with contractual capacity".[94] An action by the State must be justified by law, whether positive law or prerogative power. The power of the State to contract is constrained by the need for an appropriation, the requirements of political accountability and, of present significance, the need for a legislative source of authority – as the power to enter into a contract is not a prerogative power.[95]

[68] The Act made provision for the chief executive to enter into particular agreements related to the regulation of passenger transport. Service contracts have been noted at paragraphs [63] and [64] above. Chapter 6 dealt with service contracts in great detail, across 57 sections.[96] These included a specific provision authorising the chief executive to enter into a service contract,[97] and a mechanism for the transfer and novation of a service contract.[98]

[69] As noted above, the Act required and authorised the chief executive to include certain conditions in a taxi licence, being conditions imposed on the *operator* of the taxi. The inclusion or exclusion of a condition, and the language in which a condition was expressed, might have raised or lowered the obligation on an operator. The Act included no provisions authorising the chief executive to bind the State or take on legal obligations on the State's behalf by inserting them in a taxi licence.

[70] In short, Parliament made no provision for a taxi licence to be entered into as a contract, or for the State to deal by a contract with rights or obligations created by the issue of a taxi licence or for any contractual terms, promises or rights to be agreed with the holder or a transferee of a taxi licence.

[71] The State, through the chief executive, could do all things necessary or reasonably incidental to the execution and maintenance of the Act. No fact, matter or circumstance is pleaded that would make it necessary for the chief executive to contract with the plaintiffs as alleged. It is doubtful that the plaintiffs would succeed at trial in establishing such contracts were reasonably incidental in the relevant sense, but that is not the test to be applied for the purpose of the State's application.

The alleged contractual terms

[72] The plaintiffs allege that the terms of each Taxi Licence Agreement comprised eight promises by the plaintiff, one promise by the State, and four implied terms (each about the future conduct of the State).

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94 *Williams v Commonwealth* (2012) 248 CLR 156 at 193 [38] (French CJ) (***Williams***). See also at 239 [159] (Gummow and Bell JJ).

95 In a description favoured by Brennan J in *Davis v Commonwealth* (1988) 166 CLR 79 at 107-109, the prerogative powers were described by Blackstone as "those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects: for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer": *Commentaries on the Laws of England* (Clarendon Press, 1765) bk 1, 232. In *Williams*, Crennan J observed at 344 [488]: "This restrained approach to the prerogative is consistent with Australia's legal independence from Britain, the constraints of federalism and the paramountcy of the Commonwealth Parliament, and respect under our democratic system of government for the common law rights of individuals." Her Honour's first, second and fourth considerations are readily applicable to the Crown in right of the State.

96 Act (R2014), ss 37-67F.

97 Act (R2014), s 38B.

98 Act (R2014), s 48.

The plaintiffs' alleged promises

[73] The plaintiffs' alleged promises are: promises to pay the initial licence fee, the annual licence fee, and the registration fees for the relevant vehicles; a promise to maintain minimum standards of cleanliness of the driver and the vehicle; a promise to maintain the vehicle to minimum standards of safety; a promise to install equipment mandated by the State from time to time for the purpose of maintaining minimum levels of passenger safety and comfort; a promise to provide taxi services to the public to the standards required by the State; and a promise to provide those services at the times stipulated by the State (including 24 hours per day and seven days per week).[99]

[74] The plaintiffs say each of their eight promises was "in writing and … contained in each taxi licence and in the Act and the regulations promulgated pursuant to the Act."[100]

[75] The person obliged to pay the initial licence fee is the person to whom the taxi licence is issued. The renewal fee is payable by the person holding the licence at the renewal date, if that person wishes to renew it. This might be the original licence holder or it might be another to whom the taxi licence has been transferred. The Act provided that if the chief executive considered any of the fees payable for the taxi licence remained unpaid after the date by which payment was required to be made, then the chief executive could suspend or cancel the taxi licence.[101] These provisions were not expressed as contractual terms. The remedy for breach was not *in personam* against the counterparty to an agreement, but *in rem* against the taxi licence itself.

[76] There was no obligation to renew a taxi licence, so a licence holder could allow it to expire at the end of its term.

[77] Each of the other alleged contractual promises was relevantly the subject of a statutory obligation or an exercise of regulatory power. However, as noted at paragraphs [40] to [44] above, each was imposed on the accredited *operator* or approved *driver* of the vehicle, not on the taxi licence holder. So, while the plaintiffs assert the taxi licences, the Act and the Regulations record the things they promised to do, in fact the Act and the Regulations make those things the responsibility of others.

[78] The plaintiffs do not extract any licence "terms" in their pleading. No taxi licence was tendered adduced as evidence at the hearing of the State's application. It may seem inherently unlikely that the chief executive would have included "written terms" in taxi licences that were not authorised by and even contrary to the Act and the Regulations.[102] However, in the absence of evidence, which could have been adduced by the State, it is not possible to conclude that the plaintiffs' prospects of establishing the allegation are fanciful.[103]

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99 FASOC, [72A](a).

100 FASOC, particulars to [72A](a).

101 Act (R2014), s 79(2)(c); 2005 Regulation (R2014), s 55(2)(c).

102 On the plaintiffs' case this occurred more than 956 times.

103 Decisions of the courts in administrative law matters demonstrate that, from time to time, odd, illogical, unreasonable and even unlawful things occur in the public sector.

The State's alleged obligations

[79] The plaintiffs allege that, in consideration of each plaintiff complying with its promises, the State agreed to bind itself by a contractual obligation to "permit the relevant Plaintiff as a licence holder (and only such Plaintiffs) to provide a taxi service and exercise the taxi licence privileges".[104]

[80] The plaintiffs also allege that each "Taxi Licence Agreement" contained implied terms that:

(a) the State "would do all things necessary to enable the licence holder to have the benefit of the [Taxi Licence] Agreement";[105]

(b) subject to "the licensee complying with the terms of the licence" and paying the annual licence fee, "the licence – as least after October 2008 – would be renewed at the expiration of its current term and would be renewed at the expiration of each subsequent term";[106]

(c) in the course of exercising the taxi licence privileges, a licence holder would only need to compete with other persons holding a licence;[107] and

(d) any licences to operate a taxi service granted by the State would be subject to restrictions, regulations and controls identical with or similar to the restrictions, regulations and controls imposed on the licence holder.[108]

[81] The plaintiffs say the implication of these terms:

> "arises by reason of operation of law and in order to give business efficacy to the agreement and they derive from the universally implied term to co-operate, act in good faith, and do all things necessary to enable the other party to have the benefit of the contract".[109]

[82] That contention is inapt to explain the second, third and fourth alleged implied terms. There is no alleged term to which the latter three implied terms would give business efficacy. The Act was sufficient to establish the plaintiffs' rights and obligations as taxi licence holders. The plaintiffs do not allege that the implied terms satisfied the other conditions necessary to ground their implication, such as being reasonable and equitable, and "so obvious that it goes without saying".[110] The implied terms are not

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104 FASOC, [72A](b). No particulars of this alleged agreement were included in the pleading and none were provided in the FBP. From the FBP, it does not seem the plea was the subject of any request by the State. The allegation – that only plaintiffs would be permitted to provide a taxi service and exercise the privileges – would seem to deny non-plaintiff taxi licence holders such rights and privileges. This anomaly could be corrected by an amendment to the FASOC.

105 FASOC, [73](a).

106 FASOC, [73](b).

107 FASOC, [73](c).

108 FASOC, [73](e).

109 FASOC, particulars to [73]. The particulars also refer to these implied terms being "in writing" and "contained in each taxi licence and in the Act and the regulations promulgated pursuant to the Act." This appears to have been included in error.

110 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283 (Lord Simon, also for Viscount Dilhorne and Lord Keith), cited with approval in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 347 (Mason J). This omission might be cured by an amendment to the FASOC.

obligations of good faith. They are not necessary to enable each of the plaintiffs to have the benefit of any other alleged clause.

[83] The alleged terms (including the second, third and fourth implied terms) would bind the State to act in the future in a particular way with respect to persons who held taxi licences and those who did not. Such action could be undertaken only if authorised by statute and, if a statute were in force, would involve the State acting to compel compliance with the statute.

[84] It has been doubted that a government is competent:

> "to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State."[111]

[85] In *Commissioners of Crown Lands v Page*,[112] Devlin LJ said:

> "When the Crown, or any other person, is entrusted, whether by virtue of the prerogative or by statute, with discretionary powers to be exercised for the public good, it does not, when making a private contract in general terms, undertake (and it may be that it could not even with the use of specific language validly undertake) to fetter itself in the use of those powers, and in the exercise of its discretion."

[86] In *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth*,[113] Mason J cited the above passage before concluding that "in the absence of specific words, an undertaking which would affect the exercise of discretionary powers to be exercised for the public good, should not be imputed to the Commonwealth". His Honour explained that such a provision "could not be implied without involving a collision between the suggested contractual obligation and the law, a consequence that cannot have been intended by the parties".[114]

[87] The plaintiffs' prospect of succeeding in its case on the alleged second, third and fourth implied terms may be appropriately assessed as fanciful.

[88] The contractual terms alleged by the plaintiffs go further than fettering or affecting the exercise by the executive of discretionary powers under the Act. They purport to bind the State not to make an alteration to the Act and not to enact any other measure that would result in the plaintiffs, as taxi licence holders, needing to compete – in the course of exercising their "taxi licence privileges"[115] – with other persons who did not hold a taxi licence, or would result in the restrictions, regulations and controls applying to a taxi licence not being "identical with or similar to" those imposed on the plaintiffs. These matters are considered at paragraphs [111] to [114] below. Before turning to that topic, it is convenient to consider the true position of the plaintiffs as holders of taxi licences at the times it is alleged the terms were agreed.

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111 *Rederiaktiebolaget Amphitrite v The King* [1921] 3 KB 500 at 503 (Rowlatt J).
112 [1960] 2 QB 274 at 291.
113 (1977) 139 CLR 54 at 78.
114 Ibid at 74.
115 See FASOC at [6](a), and paragraphs [93]- [94] of these reasons.

The plaintiffs' true position as holders of taxi licences

[89] The alleged contractual obligations of the State under the Taxi Licence Agreements are consistent with the plaintiffs' contention that their taxi licences "entitled" each of them to operate a taxi service in a particular area, subject to compliance with the Act and the applicable regulation.[116] For the reasons set out below, this was not their true position. For the same reasons, if the alleged contractual terms had been agreed between each plaintiff and the State, they would not be enforceable by the plaintiffs against the State and damages would not be recoverable for their breach.

"Entitled"

[90] The Act contained no positive expression of a taxi licence holder's rights. It expressed the position in the negative, namely that a person *must not* provide a taxi service using a vehicle *unless* they have a taxi licence to provide the service with the vehicle.[117] This was enforced by a penalty for contravention. So, it was not that each of the plaintiffs was "entitled"; rather, holding a taxi licence for the relevant taxi service area provided "an excuse for an act which would otherwise be unlawful".[118]

[91] Each taxi licence was limited to a particular vehicle, as well as to a particular area. An offence would be committed if one of the plaintiffs provided a taxi service using a vehicle not associated with their taxi licence,[119] or if they provided a taxi service in an area outside the taxi service area stated on their taxi licence.[120]

[92] In the period before April 2014, two exceptions were introduced. In 2007, the Act was amended to exempt from the general prohibition a person providing a taxi service prescribed by regulation.[121] At the same time, the 2005 Regulation amended to prescribe a cross-border taxi service, being one that originated outside Queensland, for the purpose of the exemption.[122] In 2010, the Act was amended to add a person with a "peak demand taxi permit to provide the service with the vehicle" as a person who would not breach the prohibition on providing a taxi service using a vehicle.[123] No complaint is raised in the proceeding about either of these changes. This may be due to the expiry of a relevant limitation period. However, in addition to the provisions considered below, each of these inserted provisions is inconsistent with the terms the plaintiffs allege.

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116 FASOC, [12].

117 Act (R2014), s 70(1)(a).

118 *Federal Commissioner of Taxation v United Aircraft Corporation* (1943) 68 CLR 525 at 533 (Latham CJ).

119 The Act authorised a regulation to allow the use of a substitute taxi in stated circumstances and on stated conditions: Act (R2014), s 74B(a).

120 Act (R2014), s 74AB(1)(a).

121 A new s 70(2) was inserted by s 4 of the *Transport Operations Legislation Amendment Act* 2007 (Qld).

122 A new s 96A was inserted by s 7 of the *Transport Operations (Passenger Transport) and Other Legislation Amendment Regulation (No 2)* 2007 (Qld).

123 A new s 70(1)(b) was inserted by s 20(2) of the *Transport Legislation Amendment Act* 2007 (Qld), which commenced on 26 October 2010.

A "taxi service"

[93] A taxi service was a defined service, focussed on the vehicle. It was a "public passenger service",[124] provided by a motor vehicle,[125] under which the vehicle:

> "(a) is able, when not hired, to be hailed for hire by members of the public; and
>
> (b) provides a demand responsive service under which members of the public are able to hire the vehicle through electronic communication; and
>
> (c) may ply or stand for hire on a road."[126]

[94] The definition identified three activity-based components of taxi services: taxis hailed from the street; pre-booked taxis; and taxis hired from a rank. A taxi licence covered all three types of services. The plaintiffs refer to these three types of services as the "taxi licence privileges".[127]

[95] The Act did not provide for the chief executive to issue any other type of licence for public passenger services under which a vehicle could be hailed from the street or hired from a rank. It did provide for the chief executive to issue limousine service licences covering pre-booked services with luxury vehicles, or other licensed special purpose vehicles.[128] The alleged contractual terms for exclusive privileges and restricted competition were inconsistent with the Act in this respect.

Not a general licence

[96] Finally, and most importantly, a taxi licence was not a general licence to provide services that might be thought part of the "taxi industry" (to use the plaintiffs' description).

[97] A taxi licence was not a licence to receive and dispatch bookings for taxi services. It was not a licence to operate a business managing multiple taxi vehicles and taxi drivers. It was not a licence to operate even a single taxi vehicle as a business. Nor was it a licence to drive a taxi. The Act governed each of these, and many other activities, in different ways and to differing extents, principally by providing for service contract for the administration of taxi services, the accreditation of operators, the bailment of vehicles and the authorisation of drivers.[129]

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124 Defined as "a service for the carriage of passengers" that is "for fare or other consideration" or "in the course of a trade or business" or "a courtesy or community transport service": Act (R2014), sch 3 (definition of "public passenger service").

125 Other than community transport, courtesy transport, limousine services and unscheduled long distance passenger services: Act (R2014), sch 3 (definition of "excluded public passenger service").

126 Act (R2014), sch 3 (definition of "taxi service").

127 FASOC, [6](a).

128 Act (R2014), ch 8, sch 3 (definition of "limousine service").

129 Act (R2014), ch 3 (Operator Accreditation) ss 11-22B, ch 4A (Taxi service bailment agreements), ch 6 (Service Contracts), ch 7 (Taxi service licences) ss 74(2)(a), (c), (d)(ii), (3), 74AA, 74AB(1), 78, ch 7A (Peak demand taxi permits) ss 80G(2)(a)-(b), (3)-(4), 80H-80I.

[98] A taxi licence holder could not operate a business of providing a taxi service using the vehicle, unless they were also an accredited operator.[130] To do otherwise was an offence, punishable by a penalty.[131] Operator accreditation was a qualification a person had to attain and maintain to provide taxi services.[132] It was the subject of standards made by the chief executive under the Act and approved by the Governor in Council as subordinate legislation.[133] As noted at paragraphs [41] to [44] and [46] above, operators were the subject of most of the taxi licence conditions and other provisions in the Act and the Regulations. This was acknowledged by the plaintiffs.[134]

[99] The importance of operator accreditation might be measured by the fact that if a taxi licence holder was an accredited operator and their operator accreditation was suspended or cancelled, then their taxi licence would also be suspended, automatically and immediately.[135]

[100] A taxi licence holder could enter into operating arrangements with an accredited operator about the vehicle the subject of the licence.[136] In turn, the accredited operator could place the vehicle with an authorised driver under a contract of bailment.[137] If a taxi licence holder was also an accredited operator, then they could lease their taxi licence and vehicle to someone else in return for lease payments, or place the vehicle with an authorised driver under a bailment agreement.[138] If the taxi licence holder was an individual and an authorised driver, they could drive the vehicle themselves.

[101] A taxi licence was not a licence to accept bookings for taxi services from customers and assign taxis to customers in the course of a business, such as a telephone- or web-based booking and dispatch service. Booking and dispatch services are functionally distinct from transport services. Such services are, in a sense, provided to accredited operators whereas taxi services are provided to members of the public. As noted at paragraphs [63] and [64] above, booking services were regulated by the chief executive in an entirely separate manner under the Act.

[102] In short, the only thing a taxi licence holder could do – without other accreditation, authorisation or a service contract – was enter into an arrangement with an accredited operator for the operator to use the vehicle associated with the taxi licence in the operator's business.

Summary

[103] For the reasons set out above, the plaintiffs' case about Taxi Licence Agreements is contradicted by the Act on which it is purportedly based. The plaintiffs were not in a position where they could exercise lawfully all the "taxi licence privileges" simply

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130 Act (R2014), s 15(a).
131 It was the same as the penalty for providing a taxi service without a taxi licence for the vehicle.
132 Act (R2014), s 12(1).
133 Act (R2014), s 92.
134 Reply, [2].
135 Act (R2014), s 79(4).
136 2005 Regulation (R2014), s 54(1)(b).
137 Act (R2014), s 35M. In Act (R2014), ch 4A dealt with taxi service bailment agreements.
138 Act (R2014), s 35Q.

by holding a taxi licence. There were other persons without a taxi licence[139] who could do lawfully many of the things the plaintiffs allege were their exclusive privileges. To the extent that the plaintiffs could do things within the scope of these privileges, they would have to compete with others who did not hold a taxi licence.

[104] The State could not grant the plaintiffs a dispensation from compliance with the Act.[140] If the chief executive agreed with each of the plaintiffs, that – as they allege – they were permitted to do things they could not do without the accreditation or authorisation required by the Act and that they would not have to compete with others who had accreditation or authorisation, then that conduct was plainly *ultra vires* and the purported terms are unenforceable.

The alleged breaches of contract

[105] The plaintiffs contend that the State breached each of the alleged implied terms[141] by:

(a) not requiring "ride-booking drivers and/or the ride-booking operators to pay for, or obtain, a taxi licence";[142]

(b) not requiring "ride-booking drivers and/or the ride-booking operators to comply with the rules and regulations governing taxi licence holders";[143] and

(c) allowing ride-booking "drivers and/or the ride-booking operators to exercise rights previously held only by licenced taxi drivers and taxi licence holders without complying with the rules and regulation which fetter and control and regulate the owners of taxi licences".[144]

[106] The plaintiffs neither plead nor identify in their submissions any lawful means by which the State could have required a ride booking operator or a ride booking driver to pay for or obtain a taxi licence. Nor do they propose how the State could have required persons who did not hold a taxi licence to comply with the "rules and regulations governing taxi licence holders." The Act contained no such provisions and did not authorise the Governor in Council to make any regulations to that effect.

[107] The third alleged breaching conduct is problematic in other ways.

[108] The "rights previously held only by licenced taxi drivers" are particularised as "the rights to carry passengers for hire or reward".[145] Using the term broadly, this could cover the "rights" of an accredited operator and of an authorised driver, but not the

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139 Such as accredited operators who had arrangements with taxi licence holders, lessees of taxi licences, and taxi drivers.

140 It is an aspect of the rule of law in Australia, derived from art 1 of the *Bill of Rights* (1688), that there is no power of executive dispensation: see *Port of Portland v Victoria* (2010) 242 CLR 348 at 358-360 [9]-[13] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). The position may be said to be "reinforced" by s 5 of the *Imperial Acts Application Act* 1984 (Qld).

141 FASOC, [74A].

142 FASOC, [74](a). The pleading refers to "rideshare operators" rather than "ride-booking operators", but both appear to refer to the same persons.

143 FASOC, [74](b). The pleading refers to "rideshare operators" rather than "ride-booking operators", but both appear to refer to the same persons.

144 FASOC, [74](c). The pleading refers to "drivers" rather than "ride-booking drivers", but it appears the latter is meant.

145 FBP, [88].

"rights" of a taxi licence holder. The rights of a taxi licence holder are described at paragraph [102] above. One apprehends that those are not the "rights" to which the plaintiffs intended to refer.

[109] It is reasonable to infer the "rights previously held only by … taxi licence holders" are rights the plaintiffs contend they ceased to hold exclusively when amendments to the Act and the 2005 Regulation commenced from 1 October 2017.[146] It follows that the plaintiffs' complaint is that the State allowed ride booking drivers and operators to exercise rights no longer held only by taxi drivers and taxi licence holders. The plaintiffs pleading does not allege any fact, matter or circumstance by reason of which the State could have lawfully prevented (i.e. not allowed) the ride booking drivers and operators to do such things once the alleged exclusivity had passed away.

[110] It follows the plaintiffs' case is that the State was contractually bound to act without legal authority or to alter the law to bring about the position for which the plaintiffs say they bargained.[147] Nothing more need be said about the first alternative, save that it has no real prospect of success. The second alternative may be dealt with briefly.

[111] In *Te Runanga o Wharekauri Rekohu Inc v Attorney-General*,[148] the New Zealand Court of Appeal considered a clause in a deed "worded as an agreement by the Crown that it will introduce legislation to give effect to various proposals". Cooke P, for the court, explained:

> "There is an established principle of non-interference by the Courts in parliamentary proceedings. Its exact scope and qualifications are open to debate, as is its exact basis. Sometimes it is put as a matter of jurisdiction, but more often it has been seen as a rule of practice; …
>
> Closely allied is the conclusion that the Courts would not compel a Minister to present a measure to a representative assembly for consideration. Surely in a democracy it would be quite wrong and almost inconceivable for the Courts to attempt to dictate, by declaration or a willingness to award damages or any other form of relief, what should be placed before Parliament. … The point that does matter, in our opinion, is that public policy requires that the representative chamber of Parliament should be free to determine what it will or will not allow to be put before it. Correspondingly Ministers of the Crown must remain free to determine, according to their view of the public interest, what they will invite the House to consider.
>
> Accordingly the clause purporting to be an agreement by the Crown to introduce legislation to a described effect cannot have any legal effect. …
>
> …

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146 As noted at paragraphs [90] to [104] of these reasons, the plaintiffs were mistaken about their true rights and privileges under the Act.

147 Understood in this way, the alleged contractual terms go well beyond the scope of what might be categorised as a fetter on the exercise of discretion by the State.

148 [1993] 2 NZLR 301 at 307.

> Parliament is free to enact legislation on the lines envisaged in the deed or otherwise. Whether or not it would be wise to do so and whether there is a sufficient 'mandate' for any such legislation are political questions for political judgment. The Court is not concerned with such questions."[149]

[112] I accept the logic of the President's reasons, which were more recently cited, without challenge but with apparent approval, by the majority of the Supreme Court of New Zealand in *Ngāti Whātua Ōrākei Trust v Attorney-General*.[150]

[113] In *West Lakes Ltd v State of South Australia*,[151] King CJ explained:

> "Ministers of State cannot … by means of contractual obligations entered into on behalf of the State fetter their own freedom, or the freedom of their successors or the freedom of other members of parliament, to propose, consider and, if they think fit, vote for laws, even laws which are inconsistent with the contractual obligations. To enter into a contract containing a provision purporting to fetter members of parliament in their deliberations and to attempt to enforce any such contractual provision would, in my opinion, be the clearest breach of the privileges of the parliament and of the members thereof. The Ministers of State are members of parliament."

[114] The freedom of speech, debate and proceedings in Parliament found in art 9 of the *Bill of Rights* (1688) remains part of the law of Queensland.[152] It follows that no contractual term to the effect of those pleaded by the plaintiffs could be valid, binding or enforceable.

Conclusion on the breach of contract claim

[115] If, as alleged,[153] the plaintiffs suffered loss and damage because the State did not require ride booking drivers and operators to pay for and obtain a taxi licence and comply with the rules and regulations governing taxi licence holders and allowed the drivers and operators to exercise rights previously held by licensed taxi drivers and taxi licence holders (without complying with the rules and regulations applying to taxi licence holders), then it is possible to conclude, with a high degree of certainty, that the plaintiffs would not succeed to recover their loss and damage in a cause of action for breach of contract, if it were allowed to go to trial in the ordinary way. The plaintiffs' prospects may be accurately described as fanciful.

[116] It is appropriate to consider whether the plaintiffs' pleading of its cause of action for damages for breach of contract should be struck out, and the plaintiffs allowed a further opportunity to plead the claim, instead of entering judgment on a summary basis for the State.

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149 Ibid at 307-309.

150 [2019] 1 NZLR 116 at 135 [36] (Ellen France J, also for William Young, O'Regan, and Arnold JJ). Their Honours also cited *Comalco Power (New Zealand) Ltd v Attorney-General* [2003] NZAR 1 and *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 at [98].

151 (1980) 25 SASR 389 at 390, Zelling J concurring at 406-407. The latter cited *Bradlaugh v Gossett* (1884) 12 QBD 271 at 278-279 (Stephens J).

152 *Parliament of Queensland Act* 2001 (Qld), s 8.

153 FASOC, [75].

[117] Expressed in the most basic terms, their claim is that the State is liable for damages for breach of a contract by failing to enforce a law, and then by acting in accordance with an amended law. There is no apparent path the plaintiffs might take to frame a claim for the relief they seek in the form of damages for breach of contract. None was identified by the plaintiffs in their submissions. Such a claim must fail. There is no reason such a claim should proceed to trial in the ordinary course when the result may be ascertained at this time.

[118] In the circumstances, applying r 293 with the objective of facilitating a just and expeditious resolution of the real issues at a minimum of expense, the State is entitled to summary judgment on the contract claim.

Equitable compensation claim

[119] The plaintiffs' next cause of action is for equitable compensation based on a promissory estoppel. As Meagher JA observed in *DHJPM Pty Ltd v Blackthorn Resources Ltd*:[154]

> "it is necessary, as the judgments in *Waltons Stores v Maher*, *Silovi v Barbaro* and *Austotel v Franklins* demonstrate, to attend carefully to the identification of the assumption or expectation which the object of the estoppel is said to be estopped from denying or asserting. This also directs attention to the relevant doctrine which must then be applied in a disciplined and principled way."

[120] The plaintiffs allege that the State represented to each of them that they "would only need to compete in the provision of their services with other persons who held licences entitling them to exercise the taxi licence privileges" (the **representation**).[155] In this, the representation mirrors some of the alleged contract terms considered above. Ms Brennan QC and Mr Marckwald for the State submitted that the representation is to the effect that, in perpetuity, the State would ensure the plaintiffs had no competition from persons without a taxi licence.[156] The accuracy of this characterisation is confirmed by the plaintiffs' plea that each had (or reasonably believed they had) "an ongoing right to operate a taxi service", subject to "abiding by the requirements of the existing legislation and complying with the terms upon which the licence was granted".[157]

[121] This belief, the plaintiffs say, was "coupled with" a number of assumptions or expectations. These were:

> "a. only persons holding taxi licences would be permitted to exercise any or all of the taxi licence privileges, and the Plaintiffs, by virtue of their licences, would only need to compete with such person;

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154 (2011) 83 NSWLR 728 at 739 [44], cited with approval in *Doueihi v Construction Technologies Australia Pty Ltd* (2016) 92 NSWLR 247 at 278 [161] (Gleeson JA, Beasley P and Leeming JA agreeing).

155 FASOC, [14], [23], [63](a). Although the plaintiffs allege representations were made to each of them at different times and on two different kinds of occasion (the issue of a new taxi licence and the transfer of an existing licence), each representation is said to be the same and to the same effect. In these reasons, it is convenient to refer simply to all and each of these as the **representation**.

156 State's reply submissions filed 4 October 2019, [11].

157 FASOC, [15], [24].

b. only licensed taxis would be permitted to carry passengers for reward by road;

c. the exclusive right to carry passengers for reward in the State of Queensland was, and would be, limited to licensed taxi owners;

d. any licences granted to any other person that would permit them to exercise all or any part of the taxi licence privileges would be granted in accordance with, and subject to, the controls and limitations provided for in the Act as they applied to the Plaintiffs".[158]

[122] The plaintiffs also say they each adopted another assumption, namely that the taxi licence issued (or transferred) to them "was a permanent asset of value recognised" by the State.[159] They say the State also adopted this assumption; the State and each plaintiff "conducted their relationship on the basis of that common assumption"; and the State "knew or ought to have known, and/or intended that each [plaintiff] would act on that basis".[160]

[123] It is plain that the representation and each of the assumptions or expectations is expressed to operate without limit or end.

[124] The plaintiffs plead that they incurred expenditure in purchasing their taxi licences, complying with the Act and the Regulations, and continuing "the taxi operation" in accordance with legislation and "mandated requirements" about safety and cleanliness.[161] They say the State was "aware of the scale of expenditure".[162] They say they incurred this expenditure "[i]n reliance upon the said assumptions or expectations" as well as "in performance of the obligations placed upon [them] pursuant to the terms of the licence".[163]

[125] For the purposes of the State's application, it may be assumed that the decisions of the plaintiffs to acquire their taxi licences, at significant cost, were made on the faith of the alleged assumptions or expectations.[164]

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158 FASOC, [15](a)-(d).

159 FASOC, [19](a), [28](a). A taxi licence might be said to have the characteristics of property noted by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1248, being "definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability."

160 FASOC, [19](b)-(d), [28](b)-(d).

161 FASOC, [17], [26].

162 FASOC, [18](c), [27](c).

163 FASOC, [17], [26].

164 Once they had acquired the taxi licences, the plaintiffs had to comply with the law. The plaintiffs say that they complied with the law in reliance on the representation, assuming they could have chosen to contravene the Act or the Regulations. Observing the law was not optional. However, the plaintiffs could have avoided continuing compliance costs by transferring their licences to others or allowing them to expire, without renewal, at the end of their terms. It is not possible to reach a conclusion on this aspect of the plaintiffs' claim to the standard of certainty required in this application. It is not necessary to do so.

Understanding the representation

[126] The plaintiffs say the State made the representation by conduct in "accepting payment of the licence fee" and issuing each taxi licence,[165] and in "accepting payment of the duty payable upon the transfer" of each taxi licence.[166] They say each of the plaintiffs relied upon the representation.[167] Finally, they say "it would be unconscionable if the [State] was permitted, without remedy to the Plaintiffs, to depart from [the representation] and cause detriment to the Plaintiffs".[168]

[127] The representation and the first assumption or expectation were erroneous. As noted at paragraphs [41], [44] and [46] above, it was never the case that the plaintiffs would need to compete in the provision of taxi services only with other persons holding a taxi licence. It was never the case that only persons holding taxi licences would be permitted to exercise any or all of the "taxi licence privileges". Other persons, who did not hold a taxi licence, could do so. An accredited operator, by arrangement with a taxi licence holder, could exercise all of the taxi licence privileges, as described by the plaintiffs. A person with a peak demand taxi permit or a person providing a cross-border taxi service had the same right, within the relevant time and geographic limits. The holder of a limousine licence had as much right as a taxi licence holder to exercise one of the privileges, namely to provide a demand responsive service under which members of the public could hire the vehicle through electronic communications.[169]

[128] The taxi licences the plaintiffs acquired did not give any of them a right to operate a taxi service or carry on business by the provision of a taxi service. Without operator accreditation, they could not do so.

[129] The second and third assumptions (or expectations)[170] are broader and more erroneous than the first. At no relevant time was it the case that "only licensed taxis would be permitted to carry passengers for reward by road." Like the third alleged assumption or expectation – about the exclusive right to carry passengers for reward – it was never an accurate assessment of the Act. The "rights" of a taxi licence holder were limited and not exclusive. There were always other persons who were permitted to carry passengers by road for reward. At the simplest level, the Act provided for the accreditation of operators of scheduled bus services, charter bus services, tourist services and limousine services, each could carry passengers for a fare or other consideration.[171] There were also holders of operator accreditation, lessees of taxi licences, authorised drivers, and the holders of peak demand taxi permits and operators of cross-border taxi services mentioned above.

[130] If the plaintiffs did have the alleged belief, they were mistaken. If the plaintiffs made the alleged assumptions or had the alleged expectations, they were also in error.

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165 FASOC, [14]. I have assumed by the plaintiffs' reference to "licence fee" is to the amount paid to acquire a taxi licence issued by the chief executive. A fee is payable for a taxi licence and also for the renewal of the licence.

166 FASOC, [23].

167 FASOC, [24], [63](a).

168 FASOC, [63](b).

169 Of course, like a taxi licence holder, the limousine licence holder would also need to be qualified as an accredited operator.

170 FASOC, [15](b)-(c).

171 Act (R2014), s 14(1).

[131] When any of the plaintiffs tendered the fee (or the purchase price) for the issue of a taxi licence, the chief executive was bound to pay it to the credit of a departmental financial institution account.[172]

[132] Accepting, as the plaintiffs allege, that the plaintiffs who acquired taxi licences by transfer paid the transfer duty, they were doing no more than discharging their legal obligation. Transfer duty was imposed on the amount payable for the transfer of the taxi licence, because it was a "transfer transaction" pursuant to the *Duties Act* 2001 (Qld).[173] The parties to a transfer transaction were obliged to pay the transfer duty.[174] It was payable no later than when the taxi licence was transferred.[175] The payment obligation arose by law because of the transfer transaction.

[133] The conduct by which the representation is alleged to have been made could not have amounted to a representation that the Act was to the effect alleged. The plaintiffs do not plead any means by which the State's conduct[176] could have represented that the plaintiffs, as holders of taxi licences, would be subject to legal obligations different from those provided for in the Act and the Regulations or that other persons (not holding taxi licences) would be subject to legal restrictions that were not found in the statutory instruments. It could convey nothing about the permanence or entrenchment of any erroneous view of the Act.

[134] The plaintiffs contend that the State made the representation, in part, by "the wording of the relevant legislation".[177] That contention has some obvious short-comings. However, it highlights the plaintiffs' serious difficulty of contending that the State made a representation that, in effect, the Act was in different terms to those enacted by the Parliament and would remain in those terms.

The public statements

[135] In particulars of the allegations of the representation, the plaintiffs say the representation "was partly in writing and partly to be implied".[178] These particulars are inconsistent with the pleaded allegation that the representation (in each case) was made by specific conduct. As best they might be understood for the purpose of the State's application, the particulars could be a contention that certain public statements gave detail or content to each representation by conduct.

[136] The plaintiffs rely upon: extracts from three 1994 documents attributed to the then Minister for Transport, the Hon David Hamill MLA (**1994 statements**); part of a Ministerial Statement to the Parliament made by the then Minister for Transport and Minister for Main Roads, the Hon Stephen Bredhauer MLA on 10 September 2003 (**Ministerial Statement**);[179] and seven passages from the *Queensland Taxi Strategic*

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172 *Financial Accountability Act* 2009 (Qld), ss 65(1), 69(1), 83(2).

173 ss 8, 9(a), 10(d), 34, 35(1)(b), 35(2)(a)(i), 36.

174 Ibid, s 17(2).

175 Ibid, s 16, sch 2.

176 The chief executive in accepting payment of the licence fee or the Under Treasurer in accepting payment of the transfer duty payable upon the transfer of each taxi licence.

177 FASOC, particulars to [14] at (i). The same particulars are at [6] of the FBP.

178 FASOC, particulars to [14] at (i). The particulars to [23] contain a cross-reference to "the Particulars subjoined to paragraphs 14 and 18."

179 Queensland, *Parliamentary Debates*, Legislative Assembly, 10 September 2003, 3371.

Plan 2010-2015, which was tabled in the Parliament on 25 November 2010 by the then Minister for Transport, the Hon Rachel Nolan MP (**Strategic Plan**).[180]

[137] The 1994 statements are:

(a) The following extracts from a letter from the then Minister, dated 29 April 1994, to taxi licence holders:

(i) "the Government's position has been consistent and clear. There will be no deregulation of the taxi industry in this State";

(ii) "the existing cap on taxi licences will be retained, thus preserving the general value of licences"; and

(iii) "I hope this clarifies the Government's preferred approach to taxi industry reform in Queensland, and puts to rest fears in the industry that a policy of deregulation may be introduced".

(b) Part of an open message from the same Minister published in the January/February 1994 edition of *Queensland Taxi*, stating:

> "it is stressed that the reforms applying to taxis do not include de-regulation. The number of operators entering the industry will continue to be controlled by government by the sale of taxi licences through open tender".

(c) Part of an address by the Minister to a Queensland taxi conference, published in the same edition of *Queensland Taxi*, stating:

> "the review highlighted the considerable debate about the number of taxi licences and the cost of them, varying last year from about $150,000 in Brisbane to almost $300,000 on the Gold Coast. In some cases, successfully wining a ballot for a new licence has been like winning the casket. These licences have been so undervalued by the department that new holders enjoyed windfall profits simply by winning a new licence ballot. In future, taxi service licences will be issued through open tender."

[138] The part of the Ministerial Statement reads:

> "Mr Speaker the Beattie Government is committed to doing what is right for Queensland. Our decision last week to not de-regulate Queensland's taxi industry is about delivering the best for Queensland – and not simply following the line of Canberra's economic rationalists. Other states have tried it and are now looking at ways to reverse deregulation – as waiting times climb and service standards decline. The Beattie Government is prepared to stick up for the interests of the industry and Queensland passengers. Through a regulated industry we can continue to ensure that Queensland taxis are safe and comfortable, they arrive at the time they are expected and are driven by drivers who know where they are going."

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180 Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2010, 4343.

[139] The seven passages extracted from the Strategic Plan are:

(a) "Government plays a critical role by providing new taxi licences in response to demand. The state government has finalised a review of the taxi service licence model in order to ensure that the system which maintains a critical balance between quick response times and industry viability is modern and efficient."

(b) "We need to plan ahead and continue to work closely with our stakeholders to improve the taxi system into the future. Simply put, a strategic plan helps us understand where we want the taxi system to be in the future and how we are going to get there. For consumers and other purchasers of taxi services, this plan tells them what government will be doing to ensure that taxi system continue to deliver the services that they want, when they want them, to a standard and a value to their satisfaction. For taxi industry stakeholders, this plan spells out the future direction for the taxi system, with a clear set of objectives and initiatives for the industry to plan against and to respond to and outlines how this is to be done on a sustainable basis. For TRM, this plan will inform taxi policy development and guide better decision making into the future. The result will be a taxi system where all stakeholders will know the future direction, objectives, strategies and initiatives that will guide the system to 2015 and beyond."

(c) "The core elements of the taxi system are … market entry restrictions."

(d) "From an economic or market regulation perspective TOPTA establishes a regulatory regime that empowers TMR to fix the number of taxi licences within each declared taxi service area to match demand and set maximum taxi fares."

(e) "Under TOPTA, TRM sets the number of taxi licences for each declared taxi service area. The single most important determinant of reliable waiting times for all taxi users then, is the department's ability to strike and maintain the right balance between the number and mix of taxi licences within each taxi service area and the underlying demand of taxi services. Too few licences and waiting times will deteriorate. Too many licences and the underlying commerciality of the taxi system itself might be put at risk."

(f) "Under the existing regulatory framework, new taxi licences can only be issued for purchase by public tender and, other than for the voluntary surrender of licences by current licence holders, there is no mechanism for reducing the total number of licences afoot in the event of a sustained decline in the demand for taxi services. This lack of flexibility together with the high asset value of taxi licences under the current arrangements, is a significant barrier to new entrants to the taxi industry especially, but not solely, for existing drivers wanting to become owner/ drivers. The way in which the regulatory framework seeks to deal with this problem is to enable taxi licences, once purchased to be leased by the licence holder to a third party willing to operate the licence … independent research undertaken by LEK Consulting found that subleasing through taxi booking companies provides industries stability in that owners have a greater certainty around lease payments and booking companies have greater certainty about the number of taxis in their fleet which, in turn, stabilises affiliation fees for operators.

> Benefits also include more stable lease values and consequently a reduced likelihood that inexperienced operators would agree to excessive lease payments. While there is no intention to ban sub-leasing, ways to encourage active participation in the industry will be explored. For example, this might include alternate options to perpetual licences that will remove barriers to licence ownership and placing certain conditions on licences that will ensure active participation of licence owners in the industry. The introduction of a peak demand taxi product may improve the capacity of government to be flexible in its response to changes in the demand for taxi services. The potential impact upon the value of existing licences and the financial viability of existing operators will need to be taken into account."

(g) "The commercial viability of the taxi system is fundamental to the system's financial sustainability."

[140] Unlike the pleaded representation, which is alleged to have been made at the time each plaintiff acquired a taxi licence,[181] the public statements were made on specific dates, which may have been before or after some or all of the plaintiffs acquired their taxi licences. If the public statements were made after the plaintiffs acquired their taxi licences, they could not have given detail or content to the representation alleged to have been made at an earlier time.[182] Nor could the plaintiffs have relied on them in acquiring their taxi licences.

[141] Neither party led evidence of the date each plaintiff acquired each taxi licence. For the purpose of determining the State's application, I have adopted the simplifying assumption that each of the plaintiffs acquired their taxi licence or licences after 25 November 2010, when the last of the public statements was made.[183]

[142] The last of the public statements is also used by the plaintiffs in their allegation that the State "continued to endorse" their alleged belief.[184] They say this was "evidenced" by "the continuation of the scheme created by the Act, the sale by the [State] of licences by tender based upon prevailing market values and the promulgation of the [Strategic Plan]".[185]

[143] The plaintiffs also plead that their equity arises not only from the alleged representation, but also from it being unconscionable to permit the State to depart from the alleged representation (and so cause detriment to the plaintiffs "without remedy"), in circumstances where, amongst other things, the State "gave assurances

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181 FASOC, [15], [24]. The plaintiffs' pleading proceeds on the basis that the representation was made as each taxi licence was acquired and was the reason for the plaintiffs each forming the alleged belief and assumptions or expectations.

182 They would also have occurred after the plaintiffs had incurred the expenses of acquiring their licences and, where relevant, paid any transfer duty. To the extent that acquiring a licence imposed any of the alleged legal obligations on a plaintiff, the public statements would have been made after that obligation was imposed.

183 This assumption – which favours the plaintiffs by maximising the possible effect of the public statements – cannot apply to all the plaintiffs, because some of them acquired licences under the first transitional provisions in the Act: see FASOC, [10] and paragraph [21] above. For completeness, it is noted that 1 April 2014 is the date by which all the plaintiffs are assumed to have acquired their taxi licences.

184 FASOC, [18](b), [27](b).

185 FASOC, particulars to [18], particulars to [27].

… that the industry would continue to be regulated".[186] The plaintiffs provided no particulars of the alleged assurances.[187] The concept that "the industry would continue to be regulated" is not sufficiently clear and unambiguous to give rise to an estoppel.[188] (The industry continues to the regulated, albeit not as the plaintiffs would have preferred.) Perhaps some or all of the public statements are the assurances. In the plaintiffs' written submissions, the public statements are described as "promises made to the industry".[189]

[144] The 1994 statements were made by a Minister in a government proposing significant change to the law applying to taxi services, including by the repeal of all existing regulation and the enactment of the Act and making of new regulations. The plaintiffs allege these comments, about forthcoming changes in the law, inform a representation that there would never be any further change affecting the "taxi licence privileges", or were assurances to that effect.

[145] The Ministerial Statement was made in the context of a Commonwealth government policy (the National Competition Policy), which required all levels of government to review legislation, policies and practices in light of the national policy. As the Ministerial Statement made clear, the decision of the Queensland government not to "de-regulate Queensland's taxi industry" was a decision about a matter of political controversy. Leaving aside the vagueness of the statement, the Minister speaks only of a (then) present decision. The plaintiffs rely on the statement to support a representation about the State's intentions indefinitely and possibly as an assurance to that effect.

[146] The Strategic Plan was for the period from 2010 to 2015. It does not prescribe what will occur after that period. It referred to "taxi policy development". It raised the "significant barrier to new entrants" presented by the "lack of flexibility" to increase or decrease the number of taxi licences and by the "high asset value of taxi licences under current arrangements". It stated that between 2010 and 2015, "ways to encourage active participation in the industry will be explored" and explained as an example:

> "this might include alternative options to perpetual licences that will remove barriers to licence ownership and placing certain conditions on licences that will ensure active participation of licence owners in the industry."

[147] Another example was the "introduction of a peak demand taxi product". As noted at paragraph [92] above, the Act was amended in 2010 to permit a person with a "peak demand taxi permit" to provide a taxi service. The Strategic Plan observed that, for any such changes, "[t]he potential impact upon the value of existing licences and the financial viability of existing operators will need to be taken into account."

[148] Notwithstanding these matters, the plaintiffs rely on the Strategic Plan to support the representation that no changes would be made to the Act that might affect the value

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186 FASOC, [63](b)(i).

187 The plaintiffs pleaded the assurances only in the FASOC and so the assurances were not the subject of the State's earlier request for particulars or the plaintiffs' FBP.

188 *Legione v Hateley* (1983) 152 CLR 406 at 435-437 (Mason and Deane JJ).

189 Submissions of the plaintiffs filed 26 September 2019, [39].

of the plaintiffs' taxi licences and as an endorsement and, perhaps, an assurance to that effect.

[149] Neither each of the statements individually nor the combination of them all conveys the representation. Nor is any or all of them able to convey the assumptions or expectations alleged. Each lacks the clarity necessary to found an estoppel.[190] None purports to speak for any future government. This is unsurprising, given their nature.

Public statements by Ministers

[150] Each of the public statements was made by a Minister. The government in which a Minister serves is the circumference of their responsibilities. At the end of each term, the Governor will dissolve the Parliament, or allow it to expire, and issue a writ for an election for a new Parliament. Afterwards, the Governor will commission a person to form a new government. A Minister cannot speak for or bind any future government – whether they might hope to serve in it or not – for the obvious reason that the new government will be formed following the electorate's choice of the members of the new Parliament.

[151] Within the life of the government in which a Minister serves, public statements about matters within a Minister's portfolio do not have the same legal quality as statements by persons, say, in the professions, in commerce or in trade, or even of ordinary members of the public. As a Minister of the Crown, each of the authors of the public statements had particular responsibilities. Individually, each was responsible to the Parliament for the administration of their department. Together with their Cabinet colleagues, the Minister shared collective responsibility to the Parliament for the whole conduct of the administration of the government in which they held office.[191] It was to the Parliament that each Minister was responsible and accountable for any public policy proposed or pursued.

[152] The Government is not the Parliament and the Parliament is not the State.[192] The Government governs in the name of the State and provides the advice on which the sovereign acts. In the person of the sovereign, it might be said the State is one part of the Parliament, but not the whole of it. The independence and separate rights of the Legislative Assembly are those inherited from the House of Commons.[193] The State does not exercise legal control over the Parliament and cannot be responsible for the conduct of the Parliament. A proper understanding of the relationship begins with the principle that, when the Parliament enacts laws, they are binding on the State. Legal rights and obligations arising from legislation are independent of the actions of a Minister or departmental officer.[194] The State cannot change or add to the law; it can only execute it.[195] This separation of powers is the foundation of our

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190 A vague or general statement cannot be made clear or specific by pleading that is had a clear or specific meaning, as the plaintiffs attempt to do at [14A] of the FASOC.

191 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 364 (Mason J).

192 The FASOC contains allegations at [4], [5], [60], [61] and probably [62] that confuse or conflate the State or the Government with the Parliament.

193 *Constitution of Queensland Act* 2001 (Qld), s 9.

194 See Patrick McDonald, 'Contradictory Government Action: Estoppel of Statutory Authorities' (1979) 17(1) *Osgoode Hall Law Journal* 160 at 161, cited with approval by Gummow J in *Minister for Immigration & Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 209 (***Kurtovic***).

195 *R v Kidman* (1915) 20 CLR 425 at 441 (Isaacs J).

constitutional monarchy. It is the basis upon which the courts review the lawfulness of executive action.

[153] For the reasons noted at paragraphs [111] to [114] above, a Minister cannot speak for or bind the Parliament. As Mason CJ explained:

> "The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act."[196]

[154] Even the Parliament cannot bind its own future proceedings.[197]

[155] The Ministerial Statement and the Strategic Plan present the additional issue that they are proceedings in the Legislative Assembly.[198] It may be that they cannot be impeached or questioned in this court,[199] and that the Ministers and the governments in which they served were protected "against legal inquiry or sanction in a court" and "answerable, on matters of truth, motive, intention or good faith, only to the [Assembly] and through it to the electors."[200]

[156] A commission to serve as a Minister does not give a person any relevant authority beyond that conferred by statute. Statements by Ministers about the intention of the government cannot be treated as if they are promises as to future conduct made by any other legal person.[201] The process of making promises by (and extracting promises from) Ministers who seek to continue in office, and those who would replace them, is not at all like conduct in consumer or commercial relationships. As was observed in a different context, "seeking, directly or indirectly, to contrive or influence outcomes by representations made in public debate" is an activity of a political, not of a commercial or trading, character, even when "informed by a degree of self-interest."[202]

[157] This is consistent with the long-accepted position that the principles of estoppel by representation and promissory estoppel, which "evolved largely in the context of private law", usually have no place with respect to the administration of government and the enforcement of laws, but are confined to situations where the relevant government authority is acting in a proprietary, private, or operational capacity.[203] Where the State is engaged in conduct conventionally subject to the ordinary private

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196 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 138.

197 *West Lakes Ltd v South Australia* (1980) 25 SASR 389 at 413 (Zelling J). No manner and form issue is raised by the plaintiffs. None appears in the Act.

198 *Parliament of Queensland Act* 2001 (Qld), ss 9(1), (2)(d).

199 Ibid, s 8(1).

200 *Egan v Willis* (1998) 195 CLR 424 at 490-491 [133] (Kirby J).

201 In any event, "a mere expression of intention" may not be sufficient for estoppel by representation: *Franklin v Manufacturers Mutual Insurance Ltd* (1935) 36 SR (NSW) 76 at 82 (Jordan CJ).

202 *Village Building Co Ltd v Canberra International Airport Pty Ltd* (2004) 134 FCR 422 at 439 [61] (Finn J). As his Honour noted, "Altruism is often a stranger to political action".

203 *Kurtovic* at 208, 215-216 (Gummow J).

law rules dealing with contract, tort and property, such "entrepreneurial activities" may be subject to the same private law rules.[204]

Representations about legislation and policy

[158] The representation, and each of the alleged assumptions or expectations, was about the effect of legislation, principally the Act, and was unlimited by any time period. It might be expressed as a proposition that for so long as the State exists the plaintiffs would be able to do the things they believed and assumed or expected they could do with their taxi licences and, in doing so, they would not have to compete with any person who did not hold a taxi licence issued subject to conditions equivalent to those held by the plaintiffs. In the context of their claim for equitable compensation, the representation (and the alleged assumptions or expectations) may be understood as promise, assumption or expectation that the State will exercise its rights to enforce the Act and regulations against those who might seek to compete the plaintiffs and will not exercise its "rights" to alter the legislation in any manner that would adversely affect the plaintiffs as taxi licence holders.

[159] The State relied on the following parts of the judgment of Mason J in *Attorney-General (NSW) v Quin*:[205]

> "… I am unable to perceive how a representation made or an impression created by the Executive can preclude the Crown or the Executive from adopting a new policy, or acting in accordance with such a policy, … so long as the new policy is one that falls within the ambit of the relevant duty or discretion … The Executive cannot by representation or promise disable itself from, or hinder itself in, performing a statutory duty or exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way in advance of the actual performance of the duty or exercise of the power.
>
> No doubt the principle gains some of its force from the circumstance that the discretion has a legislative foundation and it is not readily to be supposed that the legislature intended that a proper exercise of the discretion in the public interest was to be frustrated, hindered or circumvented by Executive action. Nonetheless there is no reason why the same principle should not apply to common law powers and functions of the Crown or the Executive when they invoke the making of decisions in the public interest.
>
> What I have just said does not deny the availability of estoppel against the Executive, arising from conduct amounting to a representation, when holding the Executive to its representation does not significantly hinder the exercise of the relevant discretion in the public interest. And, as the public interest necessarily comprehends an element of justice to the individual, one cannot exclude the possibility that the courts might in some situations grant relief on the basis that a refusal to hold the Executive to a representation by means of estoppel will occasion greater harm to the public interest by causing grave injustice

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204 *Kurtovic* at 214 (Gummow J).

205 (1990) 170 CLR 1 at 17-18.

> to the individual who acted on the representation than any detriment to that interest that will arise from holding the Executive to its representation and thus narrowing the exercise of discretion: see the observations of Lord Denning MR in *Laker Airways v Department of Trade* [1977] QB 643, at page 707; but see also the criticism of this approach by Gummow J in *Kurtovic*, at pages 121 – 122."

[160] The State also relied upon the following conclusion of Beach J in *Churchill Fisheries Export Pty Ltd v Director-General of Conservation*:[206]

> "I consider it cannot be argued that estoppel by representation can prevent the performance of a statutory duty or the exercise of a statutory discretion … Accepting the plaintiff's case, as I do for the purpose of the present application, the defendants' change of policy is obviously unfair to the plaintiff and will cause the plaintiff financial loss. But that unfairness cannot be a reason for restraining the Crown enforcing the law … The principles of law to which I have referred are so clear that in my opinion there is no serious issue to be argued in the present proceeding."

[161] In *Brickworks Ltd v Warringah Shire Council*,[207] Windeyer J had "no doubt" about the principle that estoppel by representation cannot prevent the performance of a statutory duty or the exercise of a statutory discretion.

[162] The object of the Act was "provision of the best possible public passenger transport at reasonable cost to the community and government, keeping government regulation to a minimum"[208] and the express purpose of taxi licences was similarly directed for the benefit of "the communities served by taxis".[209] The Act recognised the possible need for "market entry restrictions" but only "in the public interest."[210]

[163] The discretion to prosecute alleged offenders, or to commence legal proceedings to enforce a statute by injunction or other means, is one to be exercised in the public interest. To bind the State to exercise it in a particular way, in the interest of taxi licence holders, would more than significantly hinder the exercise of the discretion; it would remove the discretion entirely.

[164] In the different context of attempts to judicially review decisions about criminal indictments, it has been recognised that:

> "the function of bringing alleged offenders to justice is reposed entirely in the hands of the executive branch of government who must answer politically for the decisions which they make – not only decisions to prosecute in particular cases but decisions relating to the commitment of resources to the detection, investigation and prosecution of crime generally. These are decisions which courts are

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206 [1990] VR 968 at 988.
207 (1963) 108 CLR 568 at 577.
208 Act (R2014), s 2(1).
209 Act (R2014), s 68.
210 Act (R2014), s 2(2).

> ill-equipped to make and, so far as they relate to the commitment of resources, powerless to enforce."[211]

[165] For the plaintiffs it was submitted that they could assert the promissory estoppel against the State and obtain relief in the form of equitable compensation without fettering the State's discretion in any manner that infringed the principles considered above. The plaintiffs relied on *Searle v Commonwealth*,[212] in which the New South Wales Court of Appeal awarded damages against the Commonwealth for breach of a training contract with a plaintiff who had enlisted in the Royal Australian Navy. Bathurst CJ concluded that, as the contract was not one in respect of which a court would order specific performance, it was unnecessary to consider when and in what circumstances the "fettering doctrine" would operate to deny a decree of specific performance.[213] Bell P, with whose reasons Bathurst CJ and Basten JA agreed, found that the contract was not ultra vires or void. His Honour was not satisfied "that an award of damages would have fettered or would fetter the future exercise of discretion reposed in Naval Command" by the Constitution and the *Defence Act* 1903 (Cth).[214]

[166] The plaintiffs' equitable compensation claim goes further than the claims considered in *Quin*, *Churchill Fisheries* and *Brickworks*. There the claimants sought to bind the relevant official in the exercise of a statutory discretion. Here, the plaintiffs would hold the State to the alleged representation, not only in respect of the exercise of any discretion to enforce the Act, but also by requiring the State proceed as if the Act contained provisions different from those it actually contained at the time the representation is alleged to have been made, and different from those it contained after the 2017 amendments. Unlike *Searle*, here the plaintiffs seek compensation for a failure of the State to act in a manner not authorised by the Act and for failing to interfere with the exercise by the Parliament of its law-making power. These circumstances fundamentally different to those of the contractual damages claim in *Searle.*

[167] An estoppel cannot operate to require the State to enforce a law that has not been enacted or has been repealed; nor can it require the State to penalise conduct that is not unlawful or has been made lawful by an amendment. As was observed more than a century ago, "no estoppel will prevail against the law".[215] Erroneous assumptions about legal rights and obligations cannot give the plaintiffs a right denied to them by statute.[216] In purporting to hold the State to a position they believed prevailed when they acquired their taxi licences, or rather to prevent the State departing from it without compensation, the plaintiffs assert rights arising from an equity they never had. They would be compensated for an alleged departure from rights they did not have.

[168] The State cannot legislate by representation. The power of the State (or its officers) cannot be extended by making representations beyond power, which they are then

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211 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 39 (Brennan J)

212 (2019) 100 NSWLR 55.

213 Ibid at 59 [2]-[3].

214 Ibid, at 90-91 [156].

215 *United Grocers, Tea & Dairy Produce Employees' Union (Vic) v Linaker* (1916) 22 CLR 176 at 179 (Griffith CJ).

216 *Glenco Manufacturing Pty Ltd v Ferrari* [2005] 2 Qd R 129 at 131 [7] (Douglas J).

estopped from denying. The plaintiffs would bring about such a result by asserting an estoppel arising from the alleged representation, assumptions or expectations.

Reliance

[169] The reasonableness of the plaintiffs in acting on the representation, and the alleged assumptions or expectations is relevant consideration, along with the detriment consequent upon a departure.[217] Sensibly, in oral submissions, Mr Atkinson QC and Mr Ribbands for the plaintiffs did not contend that "if a minister says something it binds the State in perpetuity." Their submission was said to be "slightly different", namely:

> "that if a minister makes an unqualified assurance that a certain state of affairs will continue then one might expect as a citizen that subsequent administrations will honour that. They won't be bound by it. They will honour it because they have a moral and civil obligation to do so."[218]

[170] The plaintiffs submitted that the expectation was supported by the "large amount of money" they had paid for each taxi licence.

[171] The plaintiffs sought to draw support from the decision in *Waltons Stores (Interstate) Ltd v Maher*.[219] There, it was within the power of the owner of the property to execute the lease within a few days, as it had represented it would do. In the present case, it was never within the power of the State (or the Minister or the government) to give taxi licence holders (and future taxi licence holders) the "taxi licence privileges" presently or in perpetuity. That depended upon the Parliament.

[172] The representation (and each alleged assumption or expectation) depended upon legislation being in force, not being relevantly amended or repealed, and being enforced. The plaintiffs' taxi licences were created pursuant to the Act, subject to the conditions authorised by the Act, and concerned conduct that was the subject of control and even prohibition by the Act and by delegated legislation, authorisations, accreditations, approvals, directions and standards. The term of each taxi licence and the ability to renew it were also prescribed by the Act.

[173] The plaintiffs themselves explain that:

> "The value of a licence was derived from the restrictions imposed by the State of Queensland since the introduction of the Act in 1994 and the continuation of that licensing system thereafter, which minimised competition and by the provisions of s 73 of the Act … provided for continual renewal of a licence".[220]

[174] A reasonable person holding a taxi licence by April 2014 would have known they did so in circumstances where changes to the law could occur. There could be changes

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217 *Commonwealth v Verwayen* (1990) 170 CLR 394 at 445 (Deane J), cited with approval in *Giumelli v Giumelli* (1999) 196 CLR 101 at 123 (Gleeson CJ, McHugh, Gummow and Callinan JJ).

218 Transcript, 1-58 line 45 to 1-59 line 2.

219 (1988) 164 CLR 387.

220 FBP, [42](k).

in the Act or regulations with immediate effects on taxi licence holders. In another jurisdiction this has been expressed as "an implied condition that the law may change [the licence] conditions."[221]

[175] Given the material consideration paid for the taxi licences, a decision to acquire one was far from trivial. If acting reasonably, each of the plaintiffs must have accepted there was an inherent risk of changes in the law at some future date. In particular, it was inherent in the nature of a taxi licence that legislative change might affect the ability of a person to earn income from its use or exploitation, and so affect its value. The risk that a change in the law might occur (and affect the value of the taxi licence) was increased by the fact that the taxi licences could be continually renewed. A relevant change could occur over a very long period. It would not have been reasonable for a person acquiring a taxi licence, by issue or transfer, to assume there was no risk of any such change.

[176] Once these aspects of the plaintiffs' claim are understood, they lead inevitably to the conclusion that reliance on the representation was unreasonable. The same may be said about making the alleged assumptions or adopting the alleged expectations.

[177] Accepting the undesirability of Ministers making representations of the kind alleged by the plaintiffs, which purport to bind the State beyond the term of the Government and constrain the power of the Parliament, the courts could seek to deter such conduct by requiring the State to compensate persons "taken in". Alternatively, the conduct could be discouraged by making it plain that such promises are empty and worthless. A choice between the damage caused by such conduct being borne by the community – to the detriment of other necessary public works – or the persons foolish enough to be taken in, is a difficult one. On balance, the Psalmist's sanction, "Put not your trust in princes" has much to recommend it. The alternative would have an equally undesirable tendency to unfortunate undermine settled constitutional principles and even the rule of law.

Exclusion of compensation by the Act

[178] The State advanced an argument based on s 216 of the Act. That provision was introduced by the 2017 Amendment Act. It provides:

> "**216 No compensation**
>
> Compensation is not payable by the State because of the amendment of this Act by the amending Act."

[179] The State submitted this was "a complete answer" to the plaintiffs' equitable compensation claim.

[180] As the plaintiffs correctly identified, the common law requires clear words in a statute to extinguish existing property rights or valuable rights relating to their exercise.[222]

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221 *Hempenstall v Minister for the Environment* [1994] 2 IR 20, 28 (Costello J).

222 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at 443 [172] (Heydon J), citing *Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552 at 561 (Griffith CJ and Rich J).

[181] The word "compensation" is not defined in the Act. Elsewhere in the Act it is used: to allow a person to claim compensation from the State for costs incurred in complying with an essential infrastructure direction;[223] to allow a service contract to provide for the holder to pay compensation to the State for a contravention of a condition of the contract;[224] to make compensation not recoverable from the State for or in relation to the termination of a service contract for failure to take steps to remedy an inadequacy of performance;[225] to allow a service contract holder to claim compensation from the State for a cost, damage or loss because of an amendment, suspension or cancelation of the service contract;[226] to allow an existing operator to claim compensation when not awarded a service contract to provide a new or amended service;[227] to make compensation "not payable" by the State in certain circumstances relating to the change of taxi service areas;[228] and to allow a person to claim and be paid compensation under the Act for a loss or expense because of the exercise of an enforcement power.[229]

[182] Given this context, the compensation that is "not payable" by the State, by operation of s 216, is likely compensation to which a person might otherwise be entitled under the Act. The provision is not sufficiently clear to extinguish rights that arise independently of the Act, including any right to claim equitable compensation.

Conclusion on the equitable compensation claim

[183] The plaintiffs' equitable compensation claim has no real prospect of success. There was no clear and unambiguous representation to the effect alleged. The representation is not one that could have been conveyed by the alleged conduct, whether construed narrowly as accepting payment for the new taxi licences and accepting transfer duty for the transfers of existing taxi licences – as it is actually pleaded – or more broadly as informed by or even including the public statements, the Act and the Regulations.

[184] If it was not clear that the plaintiffs had no real prospect of succeeding at trial on whether the alleged representation was made by the State, their equitable compensation claim would still fail. The content of the representation (being about the making and enforcing of legislation) was not, as a matter of law, able to give rise to an estoppel against the State. Also, the plaintiffs' reliance was so unreasonable that they may be said to have no real prospect of succeeding in their equitable compensation claim.

[185] I have considered whether to strike out the part of the FASOC in which the plaintiffs plead the equitable compensation claim and allow them time to replead. The plaintiffs original pleading was settled by three leading counsel and two junior counsel, who also settled the ASOC and the Reply. The FASOC was settled by two of the leaders and one of the juniors. Matters of belief, reliance on representations, adoption of assumptions and holding of expectations are peculiar to the persons concerned. The plaintiffs have made their case in the particular terms of the FASOC, with

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223 Act (R2017), s 36F.
224 Act (R2017), s 41(1)(k)
225 Act (R2017), s 46(10).
226 Act (R2017), s 47(4).
227 Act (R2017), s 62AAH.
228 Act (R2017), s 91ZV.
229 Act (R2017), s 132.

professional assistance and, no doubt, after some review and consideration. Although none of the plaintiffs swore to the facts they allege, it might be thought that serious credit issues would arise if they were to plead that they held different beliefs, they acted on different representations, or that they made and acted on different assumptions or had different expectations. Aside from that matter, the central obstacle would remain – that their claim proceeds on the basis that, by some equity, they could hold the State liable, perhaps in perpetuity, not to depart from a representation, an assumption or an expectation that it would enforce and not alter the Act and the Regulations in respect of taxi licences, without rendering the State liable to compensate them. The prospects of success of such a claim may be accurately described as fanciful.

[186] In the circumstances, a just and expeditious resolution of the real issues at a minimum of expense is best achieved by granting the State summary judgment on the plaintiffs' equitable compensation claim.

The ACL claim

[187] The plaintiffs' third cause of action is for damages pursuant to the ACL. This statutory cause of action arises where a person suffers loss or damage because of conduct by another that contravened a relevant provision of the ACL.

[188] The plaintiffs allege that the State contravened s 20 or s 21 of the ACL. These two provisions prohibit a person engaging in conduct "in trade or commerce" that is unconscionable in one or more relevant senses.

[189] The ACL applies as a law of Queensland[230] and binds the State, within the legislative power of the Parliament, so far as the State carries on a business.[231] Certain conduct does not amount to carrying on a business, including relevantly "imposing or collecting taxes; or levies; or fees and authorisations" and "granting, refusing to grant, revoking, suspending or varying authorisations (whether or not they are subject to conditions)".[232] An authorisation is "a licence, permit, certificate or other authorisation that allows the holder of the authorisation to supply goods or services".[233]

Contentions about carrying on a business and conduct in trade or commerce

[190] The State submitted the ACL did not apply to it in respect of its alleged conduct, because that conduct was not in the course of the State carrying on a business and was not conduct in trade or commerce. The State's submissions were directed to the sufficiency of the plaintiffs' pleading of the ACL claim in these respects. That pleading was, undoubtedly, defective at the time the State filed its application and when its written submissions were prepared. The later FASOC included the additional pleas set out below.

[191] The plaintiffs allege that the State "acted in the course of trade or commerce" and carried on a business by:

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230 *Fair Trading Act* 1989 (Qld), s 16(1).
231 Ibid, s 24.
232 Ibid, ss 26(1)(a)-(b).
233 Ibid, s 26(3).

- "the sale of taxi licences at market rates;"
- "the imposition of stamp duty at ad valorem rates on the transfers of licences;"
- "promotion of the value of licences and the benefits that enure [sic] to licence holders by participating in the scheme created by the Act;"
- the "representations" made by way of the 1994 statements, Ministerial Statement and Strategic Plan;
- the "recognition and/or acknowledgment since at least 1994 of the cost to licence holders of procuring a licence and/or the significance of their investment in procuring a licence;" and
- "profiting from the sale of taxi licences at market rates as opposed to the actual costs to the [State] of issuing such licences".[234]

[192] The plaintiffs also plead that the operation of the alleged business "in relation to taxi licences" consisted of "effecting sales of taxi licences; regulating the market for the said licences; maintaining the integrity of the said market; and approving the transfer of other licences".[235]

Consideration of the contentions

[193] At the hearing, the submission for the plaintiffs was that the relevant business was "a broader umbrella of maintaining the integrity of the market … and maintaining the value of the product [the State has] been selling".[236] In this respect the plaintiffs relied on the approach explained by the High Court majority in *NT Power Generation Pty Ltd v Power & Water Authority*,[237] asking what business was the State carrying on; and so far as it was carrying on business, whether it contravened s 20 or s 21 of the ACL. The plaintiffs also cited *Dockpride Pty Ltd v Subiaco Development Authority*,[238] in which Le Miere J held that a government authority's statements in the course of conducting a tender process for the sale and development of land were made in trade or commerce.

[194] The State relied on two Federal Court decisions on the application of these laws, in a former configuration, to the Commonwealth. In *J S McMillan Pty Ltd v Commonwealth*,[239] Emmett J held that when the Commonwealth conducted a tender to replace the publishing operations, previously conducted by the Department of Administrative Services as the Australian Government Publishing Service , it was not carrying on a business. His Honour considered the expression "in so far as it carries on a business":

> "signifies that the Commonwealth is to be bound only where the conduct complained of is engaged in, in the course of carrying on the business. In other words, persons dealing with the Commonwealth in

234 FASOC, [67].
235 FASOC, [67A](a).
236 Transcript, 1-73 line 30 to line 32.
237 (2004) 219 CLR 90 at 118 [70] (McHugh ACJ, Gummow, Callinan and Heydon JJ).
238 [2005] WASC 211 at [208]-[209].
239 (1997) 77 FCR 337.

> relation to the actual conduct of a business will have the same protection as when dealing with a private trader who is carrying on such a business but will not have protection when entering into other dealings with the Commonwealth." [240]

[195] In *Corrections Corporation of Australia Pty Ltd v Commonwealth*,[241] Finkelstein J quoted the above part of the reasons of Emmett J, with apparent approval, and held that, in the context of a tender conducted by the Commonwealth for the operation of detention centres:

> "by the Request for tenders and the processing of the proposals that were submitted in response, the Commonwealth was seeking to find an appropriate person who would provide it with services at its detention centres; however, it was not itself attempting to trade in goods or provide any services. So it would always be difficult to characterise the tender process as a business."[242]

[196] Neither decision is on all fours with the plaintiffs' case. In *J S McMillan*, it was not contended that the Commonwealth was "engaged in a business of selling assets" as the tender and sale process was a "one off decision". Here, the plaintiffs do contend the State's business involved the sale of taxi licences. In *Corrections Corporation of Australia*, the Commonwealth was seeking the supply of services. As Finkelstein J observed:

> "It is in any event difficult to see how the process of selecting a person to provide services to the Commonwealth can be described as conduct that has a commercial flavour, when looked at from the point of view of the Commonwealth." [243]

[197] The plaintiffs must also contend with the requirement that the unconscionable conduct be in trade or commerce. In *Concrete Constructions (NSW) Pty Ltd v Nelson*,[244] the majority determined that, in the context of the then s 52 of the *Trade Practices Act* 1974 (Cth), the expression "in trade or commerce" should be:

> "construed as referring only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character. So construed, to borrow and adapt words used by Dixon J in a different context [in *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 381], the words 'in trade or commerce' refer to 'the central conception' of trade or commerce and not to the 'immense field of activities' in which corporations may engage in the course of, or for the purposes of, carrying on some overall trading or commercial business."

[198] Their Honours continued, explaining that a provision which applied to conduct "in trade or commerce":

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240 Ibid at 356E-357A.
241 (2000) 104 FCR 448.
242 Ibid at 452 [16].
243 Ibid at 452-453 [16].
244 (1990) 169 CLR 594 at 603 (Mason CJ, Deane, Dawson and Gaudron JJ).

> "… was not intended to extend to all conduct, regardless of its nature, in which a corporation might engage in the course of, or for the purposes of, its overall trading or commercial business. Put differently, the section was not intended to impose, by a side-wind, an overlay of Commonwealth law upon every field of legislative control into which a corporation might stray for the purposes of, or in connection with, carrying on its trading or commercial activities. What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character. Such conduct includes, of course, promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers, be they identified persons or merely an unidentifiable section of the public. In some areas, the dividing line between what is and what is not conduct 'in trade or commerce' may be less clear and may require the identification of what imports a trading or commercial character to an activity which is not, without more, of that character."[245]

[199] As Toohey J explained:

> "The words 'trade or commerce' are of wide import. But their focus is on commercial activity, the providing of goods and services for reward … The question is not whether the conduct engaged in was *in connexion with* trade or commerce or *in relation to* trade or commerce. It must have been *in* trade or commerce."[246]

[200] The plaintiffs allegation that the State "acted in the course of trade or commerce" is not an allegation that the conduct was "in trade or commerce", as the ACL provisions would require. This might be corrected by amendment of the pleading. Some parts of the additional pleas are plainly hopeless. Perhaps the clearest example is the allegation that "the imposition of stamp duty at *ad valorem* rates on the transfers of licences" was conduct in trade or commerce and amounted to the State carrying on a business. The allegations that the State carried on a business by "regulating the market" for the taxi licences and "maintaining the integrity" of that market are ambitious contentions.

[201] The plaintiffs' additional allegations give a fuller picture of their approach. They do not answer, in an effective way, the State's complaints. It is beside the point whether the State engaged in other conduct that amounted to carrying on a business or was in trade or commerce. It is the allegedly unconscionable conduct that must have been conduct *in* trade or commerce. If the plaintiffs do not or cannot plead that the conduct said to have been unconscionable was conduct in trade or commerce, they have no claim that the State contravened s 20 or s 21 of the ACL and so have no cause of action for damages under s 238.

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245 Ibid at 603-604.

246 Ibid at 613-614 (citations omitted, emphasis in original).

[202] For the present application, the State must show that the plaintiffs have no real prospect of proving such an allegation. This is no easy task, as the precise conduct the plaintiffs contend was unconscionable is quite unclear.

[203] As best it might be discerned the conduct encompasses everything pleaded in paragraphs [57] to [62] and [64] to [67] of the FASOC.[247] These broad swathes of the pleading include not only the conduct alleged in each of the two relevant time periods, but also the representation alleged as the basis for the equitable compensation claim. I have concluded that the latter claim has no reasonable prospect of success, in part because the prospect that at a trial the matters pleaded could establish the State made the representation is fanciful. It follows that claim that the State acted unconscionably in making the representation has the same doleful prospect.

[204] A clearer expression of the plaintiffs' complaint may be that the State "has allowed and permitted other persons to exercise the taxi licence privileges without requiring that those persons obtain taxi licences".[248] This is about conduct in the two periods. In the first, the alleged conduct is the failure to take action to stop or restrain ride booking operators and the failure to take action other than imposing fines on ride booking drivers. This alleged conduct is plainly about the enforcement or failure to enforce the Act and regulations. In the second period, the alleged conduct is the amendment of the Act.

[205] If it is the plaintiffs' case that the manner in which the State enforced (or failed to enforce) the Act and regulations was conduct in trade or commerce, then the plaintiffs have no real prospect of succeeding. Leaving aside the issue about whether the State amended the Act (or whether the Parliament did so), the prospects of the plaintiffs succeeding in a contention that the enactment of amending legislation was conduct in trade or commerce is also hopeless. The alleged conduct in the first period is distinctively governmental. In the second period it is distinctively parliamentary.

[206] The further or alternative allegation is simply that "by reason of the matters set out in paragraphs [[57] to [62] and [64] to [67] of the FASOC] the State "in the course of trade or commerce" and "in connection with the supply or possible supply of goods or services" or "the acquisition or possible acquisition of goods or services" in either case "to or by one or more of the Plaintiffs" has "engaged in conduct that is in all the circumstances unconscionable within the meaning of the provisions of [s 21 of the ACL]".

[207] This is little more than the repetition of the words in the ACL. It fails to meet the standard required by r 149(b). In parts, it is plainly wrong, e.g. nothing in the referenced paragraphs could be said to be conduct in connection with the supply or acquisition of goods to or by any of the plaintiffs.[249] Like the pleading considered by Dunn J in *Madden v Kirkegard Ellwood & Partners*,[250] one might confess to understanding parts of it, but adopt his Honour's conclusion:

> "Its condition is such that no 'surgery' can save it. It will be an act of mercy to terminate its existence. It should be re-pleaded in such a way

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247 FASOC, [69]-[70].

248 FASOC, [69].

249 ACL, s 2 (definition of "goods"). See also *ASX Operations Pty Ltd v Pont Data Aust Pty Ltd (No 1)* (1990) 27 FCR 460 at 468 (Lockhart, Gummow and von Doussa JJ).

250 [1975] Qd R 363.

> as to make it clear to the first defendant and to the Court, what the plaintiffs' case really is."[251]

[208] The question of whether conduct, alleged to have been unconscionable, was engaged in by the State in trade or commerce (and whether it was done in the course of carrying on a business) is a question of fact and degree.[252] Like the question of unconscionability, it may turn on a consideration of all the relevant facts and circumstances. The broad generality of the plaintiffs' pleading may conceal rather than reveal their true case. The most recent additions to the pleading do not assist, but rather make it more difficult to connect the conduct with the facts that are said to place it in trade or commerce and in the course of carrying on a business. Even the scope of the alleged unconscionable conduct is not certain. It may be, if the plaintiffs' case were more clearly pleaded, it could not be determined without resolving questions of fact at a trial. Alternatively, it may then be clear that the conduct the subject of complaint is unquestionably, as a matter of law, not conduct in trade or commerce or not conduct in the course of carrying on a business.

Conclusion on the ACL claim

[209] As presently formulated, the plaintiffs' pleading does not disclose a reasonable cause of action for damages under the ACL. Careful consideration of the facts and the law might lead to a refinement of the claim and reveal a cause of action and one that is not fanciful, in the relevant sense, or that otherwise calls for exploration at a trial. Against the possibility that some arguable cause of action lies hidden, I am reluctant to give summary judgment for the State on the ACL claim at this time. However, paragraphs [67] to [71], in which the plaintiffs plead the ACL claim, should be struck out and the plaintiffs should be given time to replead, if they can, an ACL claim that might survive a challenge under r 171 or r 293.

Final disposition

[210] For the reasons set out above, the State should have summary judgment against the plaintiffs in respect of the claims for damages for breach of contract and for equitable compensation.

[211] Paragraphs [67] to [71] of the FASOC should be struck out. The plaintiffs should have 28 days to replead any claim for statutory damages pursuant to s 236 of the ACL for alleged contravention of s 20 and/or s 21 of the ACL.

[212] The State has substantially succeeded in its application. There is no reason costs should not follow the event. The plaintiffs should pay the State's costs of the application and the amended application.

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251 Ibid at 366E.

252 *Murphy v State of Victoria* (2014) 45 VR 119 at 130 [42] (Nettle AP, Santamaria and Beach JJA).