



When a computerisation project goes wrong

Legal liability for defective IT systems under s52 of the Trade Practices Act



Professor Andrew Terry*



Leif Gamertsfelder#

Introduction

The efficacy of s52 of the Trade Practices Act 1974 (Cth) as an effective weapon in commercial litigation needs little introduction. The influence of the misleading or deceptive conduct action has been felt in most industry sectors and the proposition that conduct in a commercial pre-contractual context which misleads or creates a misleading impression is vulnerable to this type of action is well established. In this context the decision of Hansen J in the Supreme Court of Victoria in *RACV Insurance Pty Ltd & Anor v Unisys Australia Ltd & Ors* [2001] VSC 300 (Unisys case) — another example of the impact of s52 on a significant commercial relationship — may at first glance appear unremarkable. In essence Hansen J held that Unisys Australia Ltd (Unisys) had engaged in misleading or deceptive conduct in contravention of s52 as a result of its failure to deliver, as promised, an efficient online insurance claims management system for RACV Insurance Pty Ltd (RACVI).¹ The case has nevertheless generated considerable interest because there are few precedents in the context of what Hansen J described as a ‘computerisation project that went wrong’. The case has ‘stunned the computer industry’,² ‘put the IT industry on notice’,³ ‘sent shockwaves through the IT industry’⁴ and ‘marks the beginning of a new era in litigation against hi-tech companies’.⁵

A Computerisation Project Goes Wrong

Hansen J summarised the facts of the Unisys case as follows:

‘The idea was simple enough. A substantial motor vehicle insurer with claims operations conducted at seven

locations processing 70,000 or so claims per annum involving about 1,000,000 pieces of paper, seeks to reform its work processes to produce speedier and more efficient handling of claims, cost savings and increased client satisfaction. How is this to be achieved? The answer is: re-design the processes involved in handling claims and then implement the changes by way of a new computer-based system incorporating the imaging of documents and the electronic storage and retrieval of information. That leads the insurance company to deal with a corporation of substantial size and experience in computer technology and commercial solutions, which agrees to design, supply and install the desired workflow management system based on the imaging of documents. This system, with the electronic storage and retrieval of information to a screen at the employee’s desk, would replace the existing paper-based system under which files were stored, retrieved and handled manually. Conceptually it seemed clear.

‘Yet from a contract in December 1993, to the complete failure of a system handed over as complete in March 1995, to the termination of work on the second attempt in June 1996, and then to the present litigation, there is nothing to see, apart from the bitter experience, but years of wasted money and effort.’⁶

Unisys won the RACVI tender on the basis that it could implement a system capable of storing all claims online, access online claims with a retrieval time of up to four seconds and access near-line claims in up to 20 seconds. However, Unisys adopted an inappropriate configuration for its system with the result that claims informa-

tion could not be accessed in accordance with benchmarks that RACVI argued were binding and which Unisys argued were not binding. As explained by Hansen J:

‘The problem goes back to the fact the Unisys configured the system on the basis that cache was to be used as a transitory holding area rather than to hold all current claims; in effect as an archival system with current claims going near-line. In any event, the result was that the system was never configured with sufficient cache to hold all current claim images online. To adopt the method now suggested, of adding cache to ensure that all current claim images could be held online, would have been possible but would have constituted a changed design philosophy from that adopted throughout by Unisys in applying the InfoImage product for RACVI’s business purposes.’⁷

The contract itself did not specify either the specific performance criteria as to retrieval times or that the system be delivered online. It was nevertheless accepted by Hansen J that a response time of two to four seconds is implicit in an efficient online system. Because of the configuration adopted by Unisys these response times were not achieved. In summary, Hansen J found that:

‘... the representations as to online and response times were made and were not withdrawn. ... I find that the plaintiffs acted on the basis that Unisys would observe the requirements of the representations when it designed and supplied the system. That was a reasonable expectation and was deliberately induced by Unisys. But Unisys acted in a contrary way, without explanation or approval of RACVI. It designed and supplied a system in which all current claims were not held online as defined in the RFP or even just in cache. It provided an archival near-line system using unmounted optical disks in a jukebox. The consequence, which was foreseeable by Unisys, was a system that did not conform with the representations and in which slower response times were inherent. ... The representations were broken.’⁸

RACVI’s claim against Unisys was pleaded on three alternative bases, namely:

- negligent statements;
- contravention of s52 of the Trade Practices Act; and
- breach of contract.

The negligence and s52 pleas related to both pre-contract and post-contract conduct, the post-contract pleas being an attempt to avoid exclusionary or limiting provisions in the contract.⁹ The focus of the case was nevertheless the pre-contract s52 claim. The negligent statement case was embraced by the s52 case and was not specifically addressed (the plaintiff conceding that if they could not succeed on the s52 claim they would not succeed in negligence). The contract and post-contract s52

claims were ‘subsidiary’ or ‘fallback’ claims which, it was agreed, the judge would deal with only if the pre-contract s52 claim was not successful.

Hansen J held that Unisys had contravened s52 in respect of its pre-contract conduct and, citing *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR1 and *Marks v GIO Australia Holdings Ltd* (1999) 196 CLR494, awarded damages of over \$4m (including interest) on the basis that the plaintiff be put in the position they would have been had the contravention not taken place.¹⁰

The Factual Background

The bare proposition that Unisys engaged in misleading or deceptive conduct in failing to deliver an efficient online insurance claims management system disguises a complex factual background which is set out in the first 420 paragraphs of the judgment. The salient facts are set out below. A general understanding of the more significant facts in this case is essential if one is to fully appreciate why the court came to the decision it did with the s52 issue.

In March 1993 RACVI prepared a 71-page Request for Information (RFI) document the purpose of which was to provide relevant information concerning the project to 10 selected potential vendors. Hansen J explained that:

‘The purpose of the RFI was to provide relevant information concerning the project to the potential vendors, including the requirements of the demonstration and the criteria by which they would be assessed. It provided a common basis to facilitate a comparative evaluation of the demonstrations. Hence it set out the background to the project and the intention of RACVI to provide a more efficient service for clients by approving the claims process and developing and implementing a computerised workflow management system. It stated time goals to be attained in handling claims. It described the existing system and with diagrams and narrative referred to a new proposed process.’¹¹

Section 4 of the RFI was concerned with technical requirements. These included online storage of all current, active claims and near-line-storage of all inactive claims within a predetermined time frame.

In May 1993 Unisys presented its demonstration to RACVI and later that month RACVI drafted a 66-page Request for Proposal (RFP) for Unisys and four other short-listed parties. The RFP provided potential vendors with information as to the workplace management system project and specified matters on which it required responses. The RFP included the requirement that:

The Image Services environment must provide the following minimum functionality: ...

14. *Online storage of all current, active claims and*

near-line storage of all inactive claims within a pre-determined time frame ...

Hansen J noted that the word 'must', which was used in stating these minimum requirements was defined in the RFP as 'mandatory'. The RFP defined 'near-line' as image access from local optical storage with expected response times in the vicinity of 20 seconds maximum and 'Online' as high speed image access from local server cache, magnetic storage or online optical drive, with expected response times in the vicinity of two to four seconds.'

In July 1993 Unisys forwarded its RFP Response, a document of 120 pages, with a covering letter stating that: 'to enable Unisys to provide a complete and fully researched solution "we will require an intensive and detailed analysis be performed to complete the existing study".' The Response commenced with an Executive Summary which stated that:

'As Unisys has had limited access to RACV, this document does not represent a firm recommendation nor final proposal to RACV Insurance. Unisys strongly recommends, however, that RACV and Unisys undertake a joint Requirements Definition Study in order that Unisys may gain a comprehensive understanding of the RACV insurance requirements, and so deliver a proposal based on a clear financial business case.'

The Response concluded with a section titled Product, Support and Service, which was to feature prominently in the ensuring litigation over seven years later, Hansen J recorded that:

'The first page of this section is 10-1 and it extends to 10-19. Page 10-1 has a sub-heading Terms and Conditions. It commences by stating that the response has been prepared in accordance with Unisys' understanding of RACV's requirements, that all recommendations are the best estimates based on RACV supplied data, that Unisys will submit a firm proposal after completion of an agreed Requirements Definition Study by Unisys and RACV, and that the final determination as to the suitability of the proposed products and services is RACV's responsibility. ... It then concluded with the following paragraph on p.10-1:

"Unisys is not at this stage able to commit to any response time or availability levels as set out in this request for response as we will require further information regarding response time criteria including number of users, definition of what is being measured etc. With respect to availability we will need to review availability in the context of the support plan being contracted for and the configuration over which availability is being measured. Any response times or availability levels which are finally negotiated will only be measured on the system we are contracting to supply".¹²

In August 1993 Unisys conducted a demonstration for RACVI at which it stated that it believed it could meet RACVI's requirement. The demonstration itself showed document retrieval to be virtually instantaneous. Hansen J accepted the evidence of RACVI officers that 'documents were accessed instantly, functionality was seamless and no qualification was expressed about the capability of the system'.¹³

In October 1993 Unisys, in response to an invitation from RACVI to submit a final submission for provision of the workflow and imaging system, submitted a 100-page document which stated that it built on information provided in earlier documents. After further correspondence and a further demonstration Unisys was selected as the preferred vendor and the matter proceeded towards a contract.

In December 1993 Unisys prepared a Project Management Plan (PMP), a document of 42 pages which stated that it would form the terms of reference for all contributing parties to the project and that the purpose of the plan was to present a statement of all deliverables, work allocations and responsibilities, an overview of resources, schedules and costs, identify activities to be undertaken, assumptions and commitments. The PMP included a heading, Major Gaps Identified, which contained a list of 15 matters, broadly expressed, which were identified by Unisys as 'missing or deficient for the purpose of progressing to detail design and implementation of the system'. Included in this list was 'Performance Objective', a key issue in Unisys' defence.

On December 24, 1993 the contract, called the Consolidated Agreement, was signed. The contract included product and services schedules, the latter providing that the RFP Response and the PMP formed part of the contract and were to be read in conjunction with it. With the exception of the RFP Responses the attachments were to prevail, in the event of inconsistency, over the terms of the contract. The RFP Responses were to be read subject to the contract terms.

In March 1995 the system went live. However, functionality and performance problems were encountered from the outset and became worse in nature and magnitude as the number of users and volume of material on the system increased.¹⁴ Unisys conceded at an early stage of the trial that it had delivered a system which 'did not work and which had to be redesigned and re-engineered'.

In June 1996 the contract was terminated by RACVI and the project was abandoned. In December 1996 the plaintiffs filed the writ commencing the proceedings. In the period between March 1995 and termination in June 1996 Unisys had worked on re-designing and re-engineering the system but it failed RACVI's acceptance tests by the dead-

line for the system to be operational (a date 'reluctantly agreed to [by RACVI] for completion of development and integration of the system') and led directly to the termination of the contract and abandonment of the project.

The s52 Claim

Much of the interest in *RACVI v Unisys* lies in the identification of the particular conduct alleged to be misleading or deceptive. Hansen J noted that 'the rival submissions approached the s52 case in different ways'.¹⁵

RACVI argued its case in two ways — the proposal representations case and the configuration case.

Its proposal representation case argued a series of representations said to be contained in Unisys' responses, correspondence, brochures, demonstrations and conversations. Included among the proposal representations were that Unisys would provide:

- high speed image access for online claims with a retrieval time in this vicinity of two to four seconds;
- image access for near-line claims with an expected response time in the vicinity of 20 seconds maximum;
- adequate storage capacity to provide, on a 'date-forward' basis, for all open claims online, all claims near-line for three months following closure, and closed claims older than three months offline.

The latter claim, the configuration case — that the system was never properly configured to hold all claims online — became RACVI's primary submission. The argument was, in essence, that the system did not meet the business requirements of RACVI simply because Unisys adopted an inappropriate configuration. The configuration case was explained by Hansen J in more detail:

'Unisys knew that RACVI entered upon the WMS project with the aim of re-organising the claims handling process so as to produce more efficient and productive systems including document imaging that involved fewer staff and lower cost. ... To achieve this, the computer imaging system had to be functional and stable. It also had to be efficient in terms of speedily retrieving images to the screen of the claims officer. Unless there was an appreciable improvement in this respect the business purpose of RACVI in entering into the contract with Unisys would not be met. To meet this business purpose the system had to be one which enabled images to be retrieved in a time consistent with an efficient online system. It happened that retrieval under such a system was in the vicinity of two to four seconds. Hence, it was submitted, Unisys had to configure the system as an online system for current claims. Timely image retrieval would follow as a consequence. Thus, the primary way in which the case was put was on the basis of this configuration requirement rather than on

the basis of a representation (or term of the contract) as to a retrieval or response time in the vicinity of two to four seconds. Notwithstanding its awareness of these matters Unisys configured a system in which current claims were partly online and partly near-line. ... The foreseeable consequence was response times of 20 seconds or so to minutes or more depending on the circumstances. The effect of response times of that magnitude on the ability to handle telephone inquiries without unreasonable delay, and the need to return calls, and otherwise for claims officers to work in an efficient way, is obvious. The system did not meet the business requirements of RACVI simply because Unisys adopted an inappropriate configuration. In seeking to establish a functional and stable system Unisys overlooked the fundamental requirement that information pertaining to current claims be retrieved more speedily and efficiently than under the existing system.'¹⁶

Unisys objected to RACVI's primary way of putting the s52 case:

'[Counsel for Unisys] described the submission as the plaintiffs' "narrow" case as distinct from the "wide" case. The narrow case was that the system was never properly configured to hold all current claims online. The wide case, which was the case pleaded, was that the system could never be made to work. Counsel submitted that the wide case was flawed on the evidence and that the narrow case had been introduced to salvage something from the wreck of the wide case.'¹⁷

The reasons for Unisys' objections to the plaintiff's narrow case are patent:

'However the plaintiffs might seek to base the representations it might have seemed odd to deny them or at least a number of them. For instance, to deny that Unisys represented that its proposal would provide a technically sound solution and platform capable of meeting the business requirements of RACVI might not only seem odd in the circumstances but to have little point.'¹⁸

Hansen J held both that the narrow case could be argued¹⁹ and that there was such a representation which was relied on in entering the contract.

His Honour dealt with the rival submissions by considering the proposal representations as put by the plaintiffs commencing with the representation as to open claims being stored online and then proceeds to deal with such of them in sequence as may be necessary. He held that the proposal representations including the configuration representation that the system would be configured to store all current claims online 'were made with clarity by the written and oral statements relied on down to and including the August 1993 demonstration'²⁰ and that they were misleading or deceptive in contravention of s52.

In holding that Unisys contravened s52 Hansen J addressed a number of related issues:

- exclusion of response times

The purported disclaimers in Unisys documentation were not effective to exclude the represented response times, an issue discussed in more detail below.

- reasonable grounds for future statements

Hansen J noted that the representation as to configuring the system to store current claims online was as to a future matter in that it concerned the system to be implemented for RACVI:

‘In these circumstances the onus is on Unisys to adduce evidence that it had reasonable grounds for making the representation. Under s51A(2) of the Trade Practices Act, unless Unisys did adduce evidence to the contrary, it shall be deemed not to have had reasonable grounds for making the representation. If it does not have reasonable grounds the representation shall be taken to be misleading; see s.51A(1).’²²¹

Hansen J concluded that:

‘... at all times, pre and post-contract, Unisys never configured the system so that all current claims would be stored online, that it intended to hand the system over on that basis, and that it never had reasonable grounds for so configuring the system contrary to the representation. Quite simply, but unfortunately, conformity with the representation was put aside. I conclude that Unisys did not have reasonable grounds for the representation.’²²²

Unisys further submitted that none of this mattered as the critical consideration concerning cache was that it be scalable, that is, that it can be increased to meet the requirements as they may be from time to time. One wonders if this solution was readily available why it was not implemented by Unisys. Hansen J nevertheless rejected this argument:

‘In my view this submission does not meet the point. ... It may be that at some time in the future, following delivery of the system to RACVI, extra cache might have been added to the system but the possibility of that occurring can not affect the configuration in fact adopted and intended to be supplied to RACVI. The consequence was a system which provided slow retrieval times inherent in a near-line system.’²²³

- reliance

Hansen J held that RACVI:

‘... would not have countenanced further discussions let alone contracting with Unisys if it had understood Unisys to be making no commitment to the matters represented.’²²⁴

There was thus the required ‘reliance’ to support the award of damages under s82(1).

- time for performance

Unisys argued that the time for performance had not

arrived when the contract was terminated. Hansen J summarised the argument as follows:

‘The time when the future matter (compliance with the representations) was to come to pass was on delivery of the system. It is at that time that the falsity of the representation is to be tested. If it is false or broken the issue of reasonable grounds arises. It is clear there was a delivery in March 1995. It was then submitted that the problem with June 1996 (when the contract was terminated) was that ‘there had been no delivery of the system’ which “was still to be completed, particularly as regard to response times”.’

This argument was rejected:

‘There were not two contracts or two contractual obligations, there was one contract with one delivery of a system which failed and which was subsequently worked on in an effort to bring to it a production state.

‘After a time, and not surprisingly in my view having regard to the elapse of time, the labour and costs involved, and ongoing difficulties, RACVI required a date by when the system would be handed over. To that time RACVI had been patient in the face of an ongoing failure of Unisys to perform the contract. Somehow the situation had to be dealt with and a commercial solution achieved under which the computer system would either be delivered or it would not. ...

‘It is clearly seen that RACVI notified Unisys that the system must be implemented or delivered on or by June 24. There was clear notice that Unisys must bring the system to that stage by that date and that if Unisys failed to do so RACVI would exercise its rights against Unisys as it be advised. The communications reflect an awareness of immediate termination and compensation as action that might follow. Furthermore, Unisys accepted the June 24 deadline, although in correspondence it is seen to seek to protect its position lest it not be met.’²²⁵

The Contract and the Context

RACVI v Unisys clearly demonstrates that in deciding s52 cases the courts will look beyond a contract to conduct and documents prior to a contract’s formation. As noted above the Consolidated Agreement, the contract, did not expressly incorporate the RFP which specified retrieval times. Hansen J commented on this in these terms:

‘Curiously, although the responses referred to the RFP and reference is required to be made to it to properly understand the responses and the engagement, the RFP was not incorporated as a contract document. Further, the PMP also referred to the RFP, again emphasising that the RFP was a document to which reference may need to be made to understand a relevant matter and the basis on which the parties contracted.’²²⁶

Hansen J nevertheless closely examined the entire factual matrix in holding that RACVI was not delivered what was promised.

His Honour expressly noted that the contract was a 'narrow document' and reference had to be made to other documentation:

'It seems tolerably clear that the Consolidated Agreement was with some adaptations, originated in a set of terms and conditions of contract developed by Unisys. If one was to look only at the Agreement itself one would not be informed as to the substance of the contract in the sense of being informed as to what the venture was that the parties was setting out on and the purpose they were seeking to achieve. Regard must be had to the RFP responses to seek to understand what the engagement was about and what Unisys and RACVI were setting out to achieve.'²⁷

Exclusionary Devices

Another clear lesson from *RACVI v Unisys* is that representations made during the sales process cannot be contracted out of through the convenient device of exclusionary provisions buried in the contractual documents.

Unisys put forward two main arguments to support its contention that it was not bound to response times:

'The contention of Unisys was that these references were intended to and did exclude from the contract any requirement as to performance or response times that the system must meet. Unisys also submitted that the RFP, which RACVI relied on for the specification of an online system for current claims with response times in the vicinity of two to four seconds, was not incorporated as a contract document and hence could not be the source of any relevant contractual obligation on Unisys.'²⁸

It first argued that the RFP which contained RACVI's required response times was not a contractual document:

On its analysis thus far Unisys submitted that on the proper construction of the documents there were no performance criteria in the contract. The matters relied on by RACVI in annexure A either were not incorporated in the contract or, if they were, they had no meaningful content as performance criteria. It was implicit in this conclusion that there was no contractual performance criteria regarding response times, that is, the time taken to retrieve an image from storage to the user's desktop computer. On this basis the case must fail insofar as it relied on establishing that Unisys had not complied with contractual performance criteria.²⁹

This argument failed. As noted above, the contract was a 'narrow document' and reference could be made to other negotiations and documentation to determine the representations made and acted upon. Regard had to be

had to a wider factual matrix to understand what the engagement under the December contract was about and what Unisys and RACVI were setting out to achieve:

'The contract was non-informative in that it did not state what the parties were setting out to achieve. The content or substance of what the system was to be able to do had to be found elsewhere. The contract documents which inform a reader of those matters are the July/October responses and that is perhaps why they were incorporated as contract documents, although that is speculation. But neither response is complete in itself. Each is responsive to and refers to the RFP. The responses cannot be fully understood or given full meaning without also reading and having regard to the contents of the RFP. It is thus correct in my opinion that even if the RFP does not possess the character of a contract document yet regard must be had to it to understand and give meaning to the responses. No amount of sophistry can avoid that consequence. It means that even if the RFP is not to be regarded as a contract document, it yet has effect in that way in explaining and giving content to the responses and hence understanding the nature of the task entered upon. The consequence is inescapable in my view that as a result of reading the responses with the RFP a contractual obligation may be identified or discerned with greater clarity than might otherwise have been the case. That is so, I consider, whether, strictly speaking, the RFP is considered as a contract document in itself as a result of necessary incorporation by reference in the responses (or perhaps even the PMP) or as a document to which necessary reference may be had to give content and meaning to a specified contract document otherwise uncertain, incomplete or lacking in understanding of the content or subject matter. The entire agreement clause does not stand in the way of that approach in this case.'³⁰

Unisys also placed particular reliance on p10-1 of its RFP Response and point 12 of p7 of the PMP. The former provided that:

'Unisys is not at this stage able to commit to any response time or availability levels as set out in this request for response as well will require further information regarding response time criteria including number of users, definition of what is being measured etc. With respect to availability we will need to review availability in the context of the support plan being contracted for and the configuration over which availability is being measured. Any response times or availability levels which are finally negotiated will only be measured on the system we are contracting to supply.'

The later identified 'performance objectives' as a 'major gap' missing or deficient for the purpose of progressing to detail design and implementation of the system.

In relation to this argument Hansen J noted that:

‘In summary, the defence relied on the passage on p10-1 and point 12 to establish that there was no representation or term as to response times from the system. The defence also stated that response times were to be negotiated once the system required by the functional specifications was installed.’³¹

‘... in the result the plaintiff sues on matching representations and terms of contract as to response times and the defendant relies, inter alia, on the passage on p10-1 and point 12 to exclude any such representation or term.’³²

Hansen J posed the question directly:

‘To put it more precisely, on their proper construction, did either reference exclude any commitment by Unisys to provide a system that would give response times that accorded with the mandatory requirements in the RFP?’³³

His Honour answered this question resoundingly in the negative and commented on the placement of the exclusionary devices relied upon:

‘At the appropriate point in the response Unisys stated the product it offered met the online and near-line requirements in the RFP, which meant the configuration would provide the response time stipulated in the definitions. I reject the argument that the appropriate place to negative this commitment was at p10-1. That was some 64 pages on, on my count, and in a different section. Neither commonsense nor a sense of fair dealing or reasonableness which one might have considered Unisys brought to the task of preparing the response, nor the wording of the RFP ..., required that the passage be placed at p10-1, assuming that in fact it was intended to exclude any commitment or preparedness to commit to the time in which the system would respond to the request of a user and bring an image to his or her screen. If the response was that it would not or could not commit to the online and near-line requirements it would surely, acting reasonably and responsibly, have then and there said so. It beggars belief that Unisys would have offered the commitment in Section Four but sought to negative it in a later section much further on without a specific statement that that is what it was doing. Moreover, to so structure the response carried the risk that a reasonable reader might have been misled. I would assess that risk as real and foreseeable. ...

‘In my view, if the passage was truly intended to have the meaning contended for by Unisys its placement in Section Ten carried a real risk, indeed probability, of misleading and deceiving RACVI. The fact is that if the passage was intended to have and convey that meaning it would surely have appeared in appropriate terms in Section Four so as to clearly inform RACVI that Unisys would not or could not commit to the technical requirements of the online and near-line system stipulated in the RFP. Further, if the passage was

meant to have the effect contended for, it was not merely stating “additional information”. Rather, it was negating the position stated in Section Four. So understood it seems incredible that Unisys could have intended to have indicated one thing in direct response and, much later, said the opposite in indirect response.’³⁴

Hansen J also noted that:

‘... the qualification had not been regarded by those who read it (and I find it had been observed) as carrying the meaning contended for by Unisys at the trial. Nor had Unisys directed the attention of the plaintiffs to it to ensure they appreciated the basis on which Unisys was acting.’³⁵

Hansen J concluded that:

‘... the passage at p10-1, on its proper construction, was not intended to mean and did not mean that Unisys was thereby excluding any commitment to response times in the sense of the online and near-line requirements of RACVI or otherwise concerning the time it would take a user to retrieve an image to his or her screen.’

In relation to point 12 on page 7 of the PMP which stated that a gap in the information existed in respect of ‘performance objectives’, Hansen J was equally dismissive:

‘I reject the contention that this statement negated any representation or term with respect to response times. The quoted expression is not defined. It could well have been intended to refer to matters concerning performance of the system other than in respect of response times. It should not therefore be construed so as to impliedly negative an earlier specific representation as to response times.’³⁶

Technical Specifications v Business Issues

Oversimplification of complex commercial litigation is unwise and dangerous. However, it is of the nature of the extremely broad prohibition of misleading or deceptive conduct that the underlying essential feature may be more significant than the technical complexities engrafted thereon. *RACVI v Unisys* is an example. As the earlier discussion of the s52 claim itself makes clear, much of the long judgment is devoted to the parties’ identification of the issues. The focus of RACVI’s claim was business requirements — the ability of a system to quickly and reliably retrieve files and documents to facilitate its efficient handling of claims. The focus of Unisys’ argument was on technical configuration specifications — the fact that Unisys would implement a system configured in a certain way but which may not meet certain performance criteria.³⁷ The contrasting positions of the parties is particularly clear in correspondence immediately prior to termination. RACVI argued that ‘Unisys must complete the work that it agreed to carry out — that is supply a Workflow Management System that is fully operational and meets RACVI’s business requirements’.³⁸ Unisys on the other

hand argued that 'Unisys' commitment under our agreement is to deliver a system which meets the Functional Specification. The purpose of the Acceptance Tests is to measure the system's compliance with those Functional Specifications. The Functional Specifications do not include any performance commitments'.³⁹

In the final analysis RACVI was successful on both the narrow technical specification as to retrieval times and also the wider system design issue which assumed retrieval times consistent with RACVI's expectation. It is a significant point that the complex technical specifications and detailed contractual and associated documentation erected around the relationship could not obscure the basic and underlying proposition that RACVI in its preliminary tender documentation wanted a system capable of processing all open claims online with response times in the vicinity of two to four seconds. Hansen J emphasises throughout his judgment that RACVI would not have 'countenanced further discussions let alone contracting with Unisys' if it had understood Unisys to be making no commitment to such a system. Such a system was not delivered and it was no defence that by further adapting the delivered system by adding more cache such responses times could have been achieved'.

In the final analysis RACVI's argument that Unisys represented that they would provide a technically sound platform was successful:

'... to deny that Unisys represented that its proposal would provide a technically sound solution and platform capable of meeting the business requirements of RACVI might not only seem odd in the circumstances, but to have little point. ... In fact there was such a representation and it was relied on in entering into the contract. ...'⁴⁰

Lessons from the Litigation

A passage towards the end of Hansen J's long judgment best enshrines the lessons to be learned from it:

'I find that if RACVI had understood the position of Unisys to be that it was not committing itself to provide a system that met the requirements of these representations it would not have dealt with Unisys. It would not have entered into the contract. The statement of the mandatory requirement in the RFP was clear and understandable as fundamental to a system to meet RACVI's need for a more efficient system. In direct terms in the July response Unisys stated it would provide a system which 'allows for the online and near-line storage requirements outlined in the RFP', and that Unisys had "configured a system which can comfortably handle the committal and retrieval rates expected from the volumes outlined in the RFP [and RFI]". Nothing could have been clearer. It seems a singular way to conducting business to then bring in aid some general state-

ments as to the need for more precise information (which in itself was understandable) and a supposed qualification in a different section to negate the commitment. If that was truly the way in which Unisys approached the matter, to say one thing in direct response to induce the other party to have comfort in dealing with you, and at the same time, but without then and there squarely saying so, you use words elsewhere to give you the option of setting the system up how you like and contrary to the earlier commitment, then the seeds of contention were sewn early. But that is not how the plaintiffs read the RFP and, in my view, that is not how it was reasonably to be read and understood. It seems difficult to countenance that Unisys intended by the qualification on p10-1 to negate the earlier direct statement, and I have concluded against that construction. But if that was the intention there is room for the inference in my view that it was positioned where it was, up the back of the document and far removed from the earlier section, and obliquely expressed, in order that it not be seen for what it was and where it would not be expected. The misleading or deceptive nature of such a course is apparent. Further, in my view the other general words elsewhere in the July response were not reasonably to be understood, whether considered alone or in context with other Unisys statements, as negating the statements as to configuration as being statements of no intent or on which no reliance could be placed.

'It is thus, I find, that RACVI came to the contract. As I say, I find that RACVI would not have countenanced further discussions let alone contracting with Unisys if it had understood Unisys to be making no commitment to the matters represented.'⁴¹

RACVI v Unisys is a compelling example of the efficacy of s52 in complex commercial dealings. From a vendor's perspective it is a compelling illustration of the dangers of marketing that is ahead of product development and of, in effect, 'promising' more than can be delivered. From the purchaser's perspective it is also provides a compelling lesson to enshrine those issues of fundamental significance clearly and directly in the contract. Hansen J at several stages commented that 'RACVI was not as attentive to its interests in the contract negotiation as it should have been'.⁴² RACVI's successful s52 action was of course not without considerable cost to both parties. Hansen J commented that:

'... from a contract in December 1993, to the complete failure of a system handed over as complete in March 1995, to the termination of work on the second attempt in June 1996, and then to the present litigation, there is nothing to see, apart from the bitter experience, but years of wasted money and effort. As it that was not enough, these two corporations, apparently possessed of sufficient if not spare resources to enable them to do so, have now devoted rela-

tively huge amounts of time and money in logging it out in court of 32 days in an unedifying and possibly pointless fight over past events, in a contest as to who was at fault.’

Disputes in relation to subject matter as complex as that aired in the RACVI/Unisys litigation will inevitably be complex⁴³ with each side ‘engaging in a deal of considered forensic finessing and adversarial position taking’.⁴⁴ The broad general standard of ‘misleading conduct’ nevertheless invites lengthy factual inquiries which could be more efficiently dealt with in the interests of the parties and the court system by more rigorous contractual drafting.

Writing in the context of then looming Y2K issues, Ian Grayson noted that ‘If there is one word people in the IT industry fear more than non-compliance it’s litigation’.⁴⁵ The RACVI/Unisys litigation provides cogent support for this proposition.



* Andrew Terry is a Professor at the School of Business Law & Taxation at the University of NSW, and a Special Counsel for Deacons, Sydney.

Leif Gamertsfelder is a Senior Associate at Deacons, Sydney.

1 An appeal has been lodged.

2 James Thomson, *Business Review Weekly*, Oct 4-10, 2001

3 Nicole Lindsay, *Australian Financial Review*, Sept 24, 2001

4 Tony Boyd, *Australian Financial Review*, Sept 12, 2001

5 Kate Mackensie, *The Australian*, Aug 28, 2001

6 At para 368.

7 At para 368.

8 At para 516.

9 Contract provisions limited the amount of damages payable by Unisys (cl.19(a)(ii)); required termination to be preceded by a notice of default and a failure to rectify within 60 days (cl.22(a)(ii)); and contained an entire agreement provision which excluded from the contract written or oral communications not in the written document (cl.24(d)).

10 Prior to trial the plaintiffs reached a confidential settlement with Deloitte an accounting firm engaged by the plaintiff to assist and advise it on the matter of the new workflow management and imaging systems both prior and subsequent to the engagement of Unisys.

11 At para 69.

12 At para 93.

13 At para 134.

14 At para 161.

15 At para 440.

16 At para 273.

17 At para 274.

18 At para 525.

19 At para 278 to 280

20 At para 499.

21 At paras 456, 7.

22 At para 460.

23 At para 461.

24 At para 504.

25 At paras 518-9.

26 At para 140.

27 At para 140.

28 At para 285.

29 At para 301.

30 At para 320.

31 At para 282.

32 At para 284.

33 At para 303.

34 At para 311.

35 At para 505.

36 At para 314.

37 Hansen J accepted the evidence of RACVI’s claims service manager that ‘the RFP accurately reflected RACVI’s business requirements, his focus of course being on those requirements rather than technical issues. A most critical business requirement was the ability to quickly and reliably retrieve files and documents’ (at para 25)

38 At para 235.

39 At para 262.

40 At para 525.

41 At paras 503, 4.

42 At para 289.

43 Hansen J noted that: ‘The evidence was of a factual and technical nature concerning the computer system. To the close of evidence the transcript ran to 2,731 pages. It extended to 3,178 pages by the close of final address in which counsel spoke to written submissions which ran to 378 pages and five supporting files of authorities. ... At the outset of the trial the court book consisted of 49 lever arch files (vol.1 devoted to the pleadings) which contained 18,935 pages. ... When finally tendered at the conclusion of evidence the court book was reduced, by the agreed discarding of thousands of pages, to 28 volumes including vol.1 containing the pleadings. I am, however, left with many thousands of pages of oral and documentary evidence. In the practical world, in which other litigants are prevented, by litigation such as the present indulged in by parties with deep pockets, from getting their cases on, or whose cases are refiled because of limited judicial resources, there must be a limit on the extent of the time I can take to discuss and analyse the documents and the evidence in this judgment, let alone scour the thousands of pages to see what is there to which little or not reference has been made. I am, as I must be, guided by counsel’s final addresses in identifying the issues and the relevant materials.’

44 At para 15.

45 *The Australian*, March 9, 1999