Study guide

FNSACCT404B Make Decisions In a Legal Context

National code:    FNSACCT404B
Unit of Competency: Make Decisions in a Legal Context
State code:    GEHR
## Table of Contents

- Introduction to Unit .................................................................................................................. 3
- Prerequisites ............................................................................................................................. 4
- Resources required .................................................................................................................. 4
  - Hardware: ............................................................................................................................. 4
  - Software: ............................................................................................................................... 4
  - Textbook: ............................................................................................................................... 4
- Unit of Competency .................................................................................................................. 5
- Learning and Assessment Guide (LAG) .................................................................................... 9
- Timetable ................................................................................................................................ 17
- Employability Skills ................................................................................................................. 19
- Assignment and Assessment Grading Guidelines ................................................................. 21
- Assessment summary ............................................................................................................... 22
  - Lecture 1 .............................................................................................................................. 25
  - Lecture 2 .............................................................................................................................. 38
  - Lecture 3 ................................................................................................................................ 56
  - Lecture 4 & 5 ......................................................................................................................... 71
  - Lecture 6 ................................................................................................................................ 115
  - Lecture 7 ................................................................................................................................ 127
  - Lecture 8 ................................................................................................................................ 149
  - Lecture 10 ............................................................................................................................. 173
  - Lecture 11 ............................................................................................................................. 235
  - Lecture 12 ............................................................................................................................. 262
  - Lecture 13 ............................................................................................................................. 287
  - Lecture 14 ............................................................................................................................. 292
Introduction to Unit

Welcome to Make Decisions in a Legal Context!

Make Decisions in a Legal Context is a core unit in the Certificate IV in Financial Services and is part of the Financial Services Training Package.

In Make Decisions in a Legal Context, students develop the competency to work and make decisions within a legal context (covering areas such as the Australian legal system, property, contract and agency).

This study guide provides the information, notes, exercises and assessments required to complete the unit.

It is important to read all the information in the study guide. Please bring the study guide with you each week to class. If you are absent from class, refer to the timetable for the work we are covering in class that week, and complete the relative reading and questions. The timetable also includes the dates of the assignments, presentation and assessments.

Correct referencing of work is essential. Assignments must be your own work. Please be aware of the University’s Plagiarism Policy.

Lecturer details

Lecturer: ...............................................................................................................................

Email: .................................................................................................................................

Contact phone number: ...................................................................................................
Prerequisites

Subjects may have required prior knowledge. A prerequisite subject must be completed before starting this subject. Occasionally there will be a co-requisite subject. This means that the subject must either be done before or at the same time as this subject.

The following table summarises the pre- or co-requisites for this subject:

<table>
<thead>
<tr>
<th>Prerequisites</th>
<th>Work in the Financial Services Industry FNSICIND301B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Co-requisites</td>
<td>Nil</td>
</tr>
</tbody>
</table>

Resources required

Hardware:
- Nil

Software:
- Nil

Textbook:

The recommended text for this unit of competency is “Australian Business Law” (latest edition)– Roger Vickery & Wayne Pendleton, Pearson Education Australia ISBN 9781442527829........
Unit of Competency

FNSACCT404B Make decisions in a legal context

Unit descriptor
This unit covers the competency to work and make appropriate decisions within a legal context.

Employability Skills
The required outcomes described in this unit of competency contain applicable facets of employability skills. The Employability Skills Summary for the qualification in which this unit of competency is packaged, will assist in identifying employability skills requirements.

Application of the unit
This unit requires the application of skills and knowledge required to make decisions within a legal context. The unit encompasses identifying the main roles and responsibilities of key bodies in the legal system, identifying compliance requirements and developing procedures to ensure compliance. The unit has application across all sectors of the financial services industry.

Relationship to other units
This unit replaces FNSACCT404A.

ELEMENT
PERFORMANCE CRITERIA

Elements define the essential outcomes of a unit of competency.
Performance Criteria describe the required performance needed to demonstrate achievement of the Element. Bold, italicised terms are elaborated in the Range Statement. Assessment of performance is to be consistent with the Evidence Guide.

1. Identify the main roles and responsibilities of the key bodies in the legal system
   1.1 The functions of the courts and other regulatory bodies are identified
   1.2 Implications of relevant legislation are identified and applied in regard to making decisions
   1.3 Implications of common law, including negligence and contract, employment law and business structures, are identified and applied in regard to making decisions

2. Identify compliance requirements
   2.1 Requirements are interpreted accurately and within prescribed time limits
   2.2 Requirements are reviewed in a comprehensive manner
   2.3 Sources are constantly reviewed to remain informed of changes and amendments to statutes and finance industry requirements

3. Develop procedures to ensure compliance
   3.1 Procedures are developed in consultation with others to address all the requirements to be met for compliance
   3.2 Compliance requirements are monitored to ensure that they are adhered to by the organisation
   3.3 Timetables to meet compliance requirements are established to align with statutory deadlines
REQUIRED KNOWLEDGE & SKILLS

Knowledge requirements include:
  - company policy and procedures
  - accounting policy and procedures
  - knowledge or awareness of relevant acts and regulations
  - legal systems and procedures
  - industry codes of practice

Skills requirements include:
  - evaluative and general analytical
  - liaise with a wide range of people on organisational requirements
  - negotiation and interpersonal
  - legal understanding and interpretation

RANGE STATEMENT

The Range Statement relates to the unit of competency as a whole. It allows for different work environments and situations that will affect performance.

The following variables may be present with training and assessment depending on the work situation, needs of the candidate, accessibility of the item, and local industry and regional contexts. If **bold italicised** text is shown in Performance Criteria, details of the text are provided in the Range Statement.

Courts and regulatory bodies may include:
- High Court
- Federal Courts
- State Courts
- Industrial Relations Court
- Australian Tax Office (ATO)
- Australian Securities and Investments Commission (ASIC)
- Stock Exchange
- Australian Consumer And Competition Commission (ACCC)

Relevant legislation may include:
- Financial Transactions Reports Act
- Consumer Credit legislation
- Taxation Act
- Trade Practices Act
- Stamp Duties Act
- Privacy Act
- Sale of Goods Acts
RANGE STATEMENT

Sources may include:
- internet
- government publications
- industry journals
- industry networks

Procedures may include:
- operations manuals
- internal control guidelines
- computer system documentation

Compliance requirements may include:
- statutory requirements
- audits
- policy and procedures
- contracts

EVIDENCE GUIDE

Assessment of performance requirements in the unit should be undertaken in an industry context. The Evidence Guide identifies the critical aspects, knowledge and skills to be demonstrated to confirm competency for the unit. Competency is demonstrated by performance of all stated criteria including the Range Statement applicable to the workplace.

Overview of assessment requirements

To achieve competency in this unit, a person must be able to demonstrate:
- knowledge of courts and regulatory bodies
- knowledge of organisational procedures
- knowledge compliance requirements
- knowledge of relevant legislation
- ability to identify the main roles and responsibilities of key bodies in the legal system
- ability to identify compliance requirements
- ability to develop procedures to ensure compliance

Critical aspects of evidence

Evidence required for demonstration of consistent performance:

Competence in this unit must be assessed over a period of time in order to ensure consistency of performance over the Range Statement and contexts applicable to the work environment.

Delivery/assessment relationship to other units:

This unit may be assessed on its own or it may be assessed with other units that cover related skills and knowledge.

Evidence is most relevant when provided through an integrated activity, which combines the elements of competency for the unit, or a cluster of units of competency.
EVIDENCE GUIDE

Assessment requirements

Method of assessment: For valid and reliable assessment of this unit, evidence should be gathered through a range of methods to indicate consistent performance.

Assessment of this unit of competence will usually include observation of processes and procedures, oral and/or written questioning on underpinning knowledge and skills and other methods as required.

Context of assessment: Assessment of performance requirements in this unit should be undertaken within the financial services industry context and should cover aspects of personal/financial responsibility and accountability.

Aspects of competency, including the attainment of relevant knowledge and skills, may be assessed in a relevant workplace, a closely simulated work environment, or other appropriate means that clearly meet industry competency requirements.

Resources required for assessment: Assessment of this unit of competence requires access to suitable resources to demonstrate competence.

Assessment instruments, including personal planner and assessment record book.

Access to registered provider of assessment services.
Learning and Assessment Guide (LAG)

Subject Name: Legal Decisions

Aim of the subject:

This unit covers the competency to work and make appropriate decisions within a legal context.

This content statement is prepared to define the range of variables expressed in the unit below to meet the requirements for the delivery of the accounting course in TAFE SA.

Unit covered by this subject

<table>
<thead>
<tr>
<th>Unit Code</th>
<th>TAFE SA Code</th>
<th>Title</th>
<th>Hrs</th>
</tr>
</thead>
<tbody>
<tr>
<td>FNSACCT404B</td>
<td>GEHR</td>
<td>Make decisions in a legal context</td>
<td>60</td>
</tr>
</tbody>
</table>

Elements in the Unit

<table>
<thead>
<tr>
<th>FNSACCT404B</th>
<th>Make decisions within a legal context</th>
</tr>
</thead>
<tbody>
<tr>
<td>Element 1</td>
<td>Identify the main roles and responsibilities of the key bodies in the legal system</td>
</tr>
<tr>
<td>Element 2</td>
<td>Identify compliance requirements</td>
</tr>
<tr>
<td>Element 3</td>
<td>Develop procedures to ensure compliance</td>
</tr>
</tbody>
</table>

Refer to the unit documentation for:

- Required knowledge and skills
- Range statement
- Evidence Guide
Learning Outcomes for the accounting workplace

Learning Outcome 1  Revise the role of courts, tribunals and other regulatory bodies in the legal system.

Learning Outcome 2  Revise the activities of business associations and the process for the establishment of a sole trader, partnership, proprietary and public company.

Learning Outcome 3  Explain the operation of agency and partnership law in South Australia.

3.1  Distinguish between the rights and obligations of principals, agents and third parties.

3.2  Identify factors to determine the existence of a partnership.

3.3  Explain the operation of partnership law in South Australia, including the rights and obligations of the partners.

Learning Outcome 4  Recognise the relevance of tortuous liabilities in the business environment.

4.1  Explain and illustrate by example, the application of negligence in the context of:

- Negligent misstatement
- Occupiers’ liability
- Product liability
- Vicarious liability
- Highway authorities
- Economic loss
- Professional liability
- Reduction of liability

4.2  Risk is assessed and procedures are put into place to reduce liability.

Learning Outcome 5  Describe and explain the formation, operation and termination of contracts as they affect business activities.

5.1  Examine and analyse general business contract documents, particularly in relation to validity, form, retention of title and performance.

5.2  Identify and explain the six essential elements of a valid contract:

- Intention to create legal relations
- Offer and acceptance
- Consideration and form
- Capacity
- Genuine consent
- Legality of purpose

5.3  Explain how these elements of a contract relate to business decisions and transactions.

5.4  Explain how a contract may be discharged and the remedies available.

5.5  Identify the e-commerce implication for the law of contracts.
Learning Outcome 6
Demonstrate an understanding of the concept of property and the nature of mortgages, including the rights and obligations of the parties.

6.1 Explain the operation of the Torrens Title system in South Australia.

6.2 Briefly explain the nature of mortgages, including the rights and obligations of the parties (including a guarantor) to a mortgage.

Learning Outcome 7
Recognise the application of contractual principles to certain specialty contracts – leases, franchises and insurance.

7.1 Define a contract for lease, identify the elements necessary for a lease, and explain the South Australian law relating to business leases.

7.2 Define the franchise agreement and the relationship of franchisor and franchisee.

7.3 Briefly explain the purpose of the Franchising Code of Practice.

7.4 Demonstrate an understanding of insurance law and explain the common forms of business insurance.

Learning Outcome 8
Recognise the application of contractual principles to employment contracts.

8.1 Describe the formation and operation of an employment contract.

8.2 Describe the reasons for termination of contracts.

Learning Outcome 9
Demonstrate an understanding of workplace relations law.

9.1 Define:

- An award
- An enterprise agreement
- A certified agreement
- An Australian workplace agreement and explain the procedures for making them

9.2 Explain the dispute resolution process within the workplace relations system.

Learning Outcome 10
Recognise and describe the statutory provisions and principles relevant to the sale of goods which accountants are required to apply in the course of business.

10.1 Define and differentiate between:

- Specific and unascertained goods
- Sale and agreement to sell
- Sale of goods and contract for work done and materials supplied

10.2 List the implied conditions and warranties in Sale of Goods legislation and recognise when such terms are excluded in the case of a sale being a “consumer sale”.
Learning Outcome 11
Describe and explain the principles of consumer protection legislation as it applies to contract law and specifically the rights and duties in relation to contracts with “consumers”.

11.1 Recognise the significance of the Trade Practices Act for consumer protection law and specifically apply the provisions of the Act in relation to:
- Unfair practices
- Implied conditions and warranties
- Remedies under the Act
- Rights against manufacturers and importers
- The role of the Australian Competition and Consumer Commission

11.2 Explain the operation of other statutes and common law relating to e-commerce, retailers and manufacturers.

11.3 Explain risk management procedures which may be used in the workplace to minimize liability.

Learning Outcome 12
Describe the operation of the Trade Practices Act in relation to restrictive trade practices.

12.1 Differentiate between the roles of the Australian Competition and Consumer Commission, the Australian Competition Tribunal, the National Competition Council and the Federal Court.

12.2 Describe the practices prohibited under Part IV of the Trade Practices Act.

12.3 Outline the enforcement procedures for breaches of the restrictive trade practices provisions of the Trade Practices Act.

12.4 Explain risk management procedures which may be used in the workplace to minimize liability.

Learning Outcome 13
Explain the types of legal protection available for intellectual property.

13.1 Define copyright, design, patent and trade mark.

13.2 Outline the processes for protection of intellectual property.

13.3 Briefly describe the remedies for breach of intellectual property legislation.

13.4 Explain “passing off”.

13.5 Discuss the elements in a common law action of breach of confidence in relation to confidential information.

13.6 Identify the e-commerce implication for the law regarding intellectual property.

Learning Outcome 14
Explain effective methods of debt collection.

Learning Outcome 15
Explain the effect of bankruptcy.

15.1 Outline the procedures when someone becomes bankrupt.

15.2 Explain the consequences of bankruptcy.

15.3 Briefly describe the alternatives to bankruptcy.
Learning Outcome 16

Formulate procedures to ensure compliance with applicable business law and to continually review legislation requirements.

16.1 Identify sources of information:
- Websites
- Newsletters
- Industry journals
- Media releases
- Legislation

Note: Learning Outcome 16 should be covered throughout the subject.

Assessment
- Employability Skills must be demonstrated as indicated below.

Summative
- 2 unsupervised assignments to cover all learning outcomes (may be provided as one assignment)
- 2 open book supervised assessments (may be provided as one assessment)

Formative
- Learning and group work activities
- Application of case study principles to learning and group work activities

Australasian Legal Information Institute
http://www.austlii.edu.au/

South Australian Office of Consumer and Business Affairs
http://www.ocba.sa.gov.au

Commonwealth Department of Workplace Relations and Small Business
http://www.dir.gov.au

Privacy Commissioner
http://www.privacy.gov.au

Courts Administration Authority

Attorney Generals’ Department
http://www.law.gov.au

East Business Enterprise Centre

Northern Adelaide Business Enterprise Centre
Tea Tree Gully Business Enterprise Centre  

Enterprise Adelaide  

Salisbury Business and Export Centre  

Law Council of Australia  
http://www.law.council.asn.au/

Family Court of Australia  
http://www.familycourt.gov.au

Australian Legal Reform Commission  

Consumers’ Online  
http://www.consumersonline.gov.au

National Competition Council  
http://www.ncc.gov.au

National Consumers Website  

Standards Australia  
http://www.standards.com.au

Federal Court of Australia  
http://www.fedcourt.gov.au

Bureau of Crime Statistics and Research  

Australian Competition Consumer Commission  

Law Society of NSW  
http://www.lawsocnsw.asn.au/legalhelp/

Legal Services Commission of South Australia  

Planning SA  
Australian Securities and Investment Commission

Australian Stock Exchange

Financial Tips and Safety Checks

Prime Minister of Australia
http://www.pm.gov.au/

Governor of South Australia

Department of Premier and Cabinet

Publications:

ACCC publications.
Dept. of Consumer Affairs (SA) publications.

This is not an exhaustive list. Students are expected to conduct their own research.

NOTE:

The Learning and Assessment Guide (LAG) is an interpretation of the unit of competency and clarifies the learning outcomes. It is approved by the Financial Services Quality Assurance Group.
## Timetable

<table>
<thead>
<tr>
<th>Lecture</th>
<th>Suggested Activity</th>
</tr>
</thead>
</table>
| 1       | The role of courts, tribunals and other regulatory bodies in the legal system  
Activities of business associations and process for establishment of sole trader, partnership, proprietary and public company |
| 2       | Explain the operation of agency and partnership law in South Australia |
| 3       | Recognise the relevance of tortuous liabilities in the business environment |
| 4       | Describe and explain the formation, operation and termination of contracts as they affect business activities  
**Case study 1 - Handout** |
| 5       | Describe and explain the formation, operation and termination of contracts as they affect business activities |
| 6       | Demonstrate an understanding of the concept of property and the nature of mortgages, including the rights and obligations of the parties |
| 7       | Recognise the application of contractual principles to certain specialty contracts – leases, franchises and insurance |
| 8       | Recognise the application of contractual principles to employment contracts.  
Demonstrate an understanding of workplace relations law |
| 9       | **Assessment Part 1 – supervised in class** |
| 10      | Recognise and describe the statutory provisions and principles relevant to the sale of goods which accountants are required to apply in the course of business  
Consumer Protection legislation applicable to contract law and rights/duties in relation to consumer contracts  
**Case Study 1 - due** |
| 11      | Operation of Trade Practices Act in relation to restrictive Trade Practices  
**Case study 2 - handout** |
<table>
<thead>
<tr>
<th>Lecture</th>
<th>Suggested Activity</th>
</tr>
</thead>
<tbody>
<tr>
<td>12&amp; 13</td>
<td>Intellectual Property protection</td>
</tr>
</tbody>
</table>
| 14      | Effective methods of debt collection  
          | Effect of bankruptcy |
| 15      | Formulate procedures to ensure compliance with applicable business law and to continually review legislative requirements  
          | Case Study 2 - due  
          | Course summary/Revision (lectures 8-12) |
| 16      | Assessment Part 2 – supervised in class |
|         | Resits |
## Employability Skills

### FNS40604 Certificate IV in Financial Services (Accounting)

The following table contains a summary of the Employability Skills required for an accounts clerk managing a small finance sector of a company. The Employability Skills facets described here are broad industry requirements that may vary depending on qualification packaging options.

<table>
<thead>
<tr>
<th>Employability Skill</th>
<th>Industry requirements for this qualification include:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Communication</td>
<td>• using effective telephone techniques and having the ability to negotiate resolutions with clients and colleagues</td>
</tr>
<tr>
<td></td>
<td>• preparing and presenting routine correspondence in appropriate electronic format</td>
</tr>
<tr>
<td></td>
<td>• developing and writing reports to specifications</td>
</tr>
<tr>
<td></td>
<td>• liaising, listening and consulting</td>
</tr>
<tr>
<td></td>
<td>• compiling data and preparing financial statements and ad hoc reports</td>
</tr>
<tr>
<td></td>
<td>• discussing and negotiating with stakeholders when preparing budgets</td>
</tr>
<tr>
<td>Teamwork</td>
<td>• contributing with others to implement policies and procedures</td>
</tr>
<tr>
<td></td>
<td>• working with others to gather information and to develop budgets</td>
</tr>
<tr>
<td></td>
<td>• referring matters to nominated person as required</td>
</tr>
<tr>
<td>Problem Solving</td>
<td>• applying estimating, forecasting and analysis skills</td>
</tr>
<tr>
<td></td>
<td>• solving discrepancies</td>
</tr>
<tr>
<td></td>
<td>• determining security protocols</td>
</tr>
<tr>
<td></td>
<td>• identifying OHS hazards and risk control</td>
</tr>
<tr>
<td></td>
<td>• checking the accuracy of calculations</td>
</tr>
<tr>
<td>Initiative and Enterprise</td>
<td>• applying referral skills</td>
</tr>
<tr>
<td></td>
<td>• applying learning about ergonomic activities to develop improved processes</td>
</tr>
<tr>
<td></td>
<td>• designing reports to effectively present workplace information</td>
</tr>
<tr>
<td></td>
<td>• referring non-routine problems to a nominated person</td>
</tr>
<tr>
<td>Planning and Organising</td>
<td>• processing accounting data and preparing reports</td>
</tr>
<tr>
<td></td>
<td>• establishing and maintaining an accounting system</td>
</tr>
<tr>
<td></td>
<td>• researching and managing data collection and testing</td>
</tr>
<tr>
<td></td>
<td>• maintaining systems, records and reporting procedures</td>
</tr>
<tr>
<td></td>
<td>• maintaining accounting records for compliance purposes</td>
</tr>
<tr>
<td>Employability Skill</td>
<td>Industry requirements for this qualification include:</td>
</tr>
<tr>
<td>---------------------</td>
<td>--------------------------------------------------</td>
</tr>
<tr>
<td>Self-management</td>
<td>• working within own defined work role&lt;br&gt;• work ethically and complying with industry Professional Code of Practice and legislative requirements&lt;br&gt;• understanding and acting upon compliance matters&lt;br&gt;• adapting to change in technology and work practices&lt;br&gt;• identifying and acting upon professional development opportunities</td>
</tr>
<tr>
<td>Learning</td>
<td>• developing and maintaining personal competence&lt;br&gt;• using online help for self learning purposes&lt;br&gt;• maintaining knowledge of relevant legislation and industry Codes of Practice</td>
</tr>
<tr>
<td>Technology</td>
<td>• using technology to assist the management of information and to establish and operate systems&lt;br&gt;• using word processing, spreadsheet and database skills to produce workplace documents and reports&lt;br&gt;• adapting to change in technology and working within ergonomic guidelines</td>
</tr>
</tbody>
</table>
Assignment and Assessment Grading Guidelines

In addition to achieving competence in the unit, you will also be graded on your work (unless the unit is an ungraded one). Grading is different from assessment. Grading is mostly about the process or how you go about achieving the performance criteria.

If you achieve competence for the unit you will be graded as a PASS (ie: you have demonstrated your ability to meet all performance criteria).

To gain a Credit or Distinction how you work in achieving the performance criteria is considered. Each category is based on the following criteria:

Fail  
A grade for not meeting all performance criteria.  
- Does not demonstrate competence in all performance criteria in the unit.

Pass  
A grade for meeting all performance criteria.  
- Demonstrates competence in all performance criteria in the unit (including employability skills)

Credit  
A grade for consistent judgement and application of theory and concepts. *To be awarded a credit grade, the student must meet the criteria for pass, and further:*  
- Appropriately relate the performance criteria to work situations and workplace standards  
- Meet all specified deadlines  
- Work with limited supervision  
- Assignments/assessments require no more than minor amendments only.

Distinction  
A grade for consistent excellence in the areas of originality, attitude and independent application. *To be awarded a distinction grade, the student must meet the criteria for pass and credit grades, and further:*  
- Demonstrate original and independent application of theory and practice  
- Demonstrate initiative and outstanding attitudes, approaches to learning and motivation  
- Where appropriate work with and lead a study group or demonstrate outstanding consultation skills  
- Assignments/assessments require no amendments

Credits and Distinctions are only awarded for excellent work. They are not given out routinely. If you are aiming to pass this unit with a grade higher than a Pass, you should ensure where appropriate that group and individual activities and assessments:
- show application of theories/concepts  
  (this should incorporate workplace examples and practices)  
- show a thorough understanding of all theories and concepts  
- are written concisely and comprehensively  
- are presented to workplace standards and on time  
- have been discussed with your work group and opinions of others have been incorporated appropriately  
- show evidence of additional research into theories/concepts.
Assessment summary

The assessment for this module consists of:

A. 2 unsupervised assignments (case studies)

B. 2 open book supervised assessments

A. UNSUPERVISED ASSIGNMENTS (CASE STUDIES)

- Case Study 1

Learning Outcomes 1 - 9

Learning Outcome 1 – Revise the role of courts, tribunals and other regulatory bodies in the legal system

Learning Outcome 2 – Revise the activities of business associations and the process for the establishment of a sole trader, partnership, proprietary and public company

Learning Outcome 3 – Explain the operation of agency and partnership law in South Australia

Learning Outcome 4 – Recognise the relevance of tortuous liabilities in the business environment

Learning Outcome 5 – Describe and explain the formation, operation and termination of contracts as they affect business activities

Learning Outcome 6 – Demonstrate an understanding of the concept of property and the nature of mortgages, including the rights and obligations of the parties

Learning Outcome 7 – Recognise the application of contractual principles to certain specialty contracts – leases, franchises and insurance

Learning Outcome 8 Recognise the application of contractual principles to employment contracts.

Learning Outcome 9 Demonstrate an understanding of workplace relations law.

The report must be word processed and correctly referenced.
Case Study 2

Learning outcomes 10 – 15 and 16

Learning Outcome 10 – Recognise and describe the statutory provisions and principles relevant to the sale of goods which accountants are required to apply in the course of business

Learning Outcome 11 – Describe and explain the principles of consumer protection legislation as it applies to contract law and specifically the rights and duties in relation to contracts with “consumers”

Learning Outcome 12 – Describe the operation of the Trade Practices Act in relation to restrictive trade practices

Learning Outcome 13 – Explain the types of legal protection available for intellectual property

Learning Outcome 14 – Explain effective methods of debt collection

Learning Outcome 15 – Explain the effects of bankruptcy

Learning Outcome 16 - Formulate procedures to ensure compliance with applicable business law and to continually review legislation requirements.

The report must be word processed and correctly referenced.

B. SUPERVISED ASSESSMENTS

Assessment 1

Learning Outcomes 2 – 9 and 16

Learning Outcome 1 – Revise the role of courts, tribunals and other regulatory bodies in the legal system

Learning Outcome 2 – Revise the activities of business associations and the process for the establishment of a sole trader, partnership, proprietary and public company

Learning Outcome 3 – Explain the operation of agency and partnership law in South Australia

Learning Outcome 4 – Recognise the relevance of tortuous liabilities in the business environment

Learning Outcome 5 – Describe and explain the formation, operation and termination of contracts as they affect business activities
Learning Outcome 6 – Demonstrate an understanding of the concept of property and the nature of mortgages, including the rights and obligations of the parties.

Learning Outcome 7 – Recognise the application of contractual principles to certain specialty contracts – leases, franchises and insurance.

Learning Outcome 8 - Recognise the application of contractual principles to employment contracts.

Learning Outcome 9 - Demonstrate an understanding of workplace relations law.

Learning Outcome 16 - Formulate procedures to ensure compliance with applicable business law and to continually review legislation requirements.

**Supervised open book assessment – 1.5 hours duration**

Students can have access to all reference material including study guides, text books and notes.

- **Assessment 2**

  Learning outcomes 10 – 15 and 16

  Learning Outcome 10 – Recognise and describe the statutory provisions and principles relevant to the sale of goods which accountants are required to apply in the course of business.

  Learning Outcome 11 – Describe and explain the principles of consumer protection Legislation as it applies to contract law and specifically the rights and duties in relation to contracts with “consumers”.

  Learning Outcome 12 – Describe the operation of the Trade Practices Act in relation to restrictive trade practices.

  Learning Outcome 13 – Explain the types of legal protection available for intellectual property.

  Learning Outcome 14 – Explain effective methods of debt collection.

  Learning Outcome 15 - Explain the effect of bankruptcy.

  Learning Outcome 16 - Formulate procedures to ensure compliance with applicable business law and to continually review legislation requirements.

**Supervised open book assessment – 1.5 hours duration**
Lecture 1

<table>
<thead>
<tr>
<th>Learning Outcome</th>
<th>Learning Outcome 1</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Revise the role of courts, tribunals and other regulatory bodies in the legal system.</td>
</tr>
</tbody>
</table>

| Required Reading | Vickery and Pendleton 6th ed - Review Chapters 1 and 2 |

| Activities | Activities in workbook |

**Key Terms**

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Act of Parliament / Statute Law</td>
<td>Law developed by the parliament, often referred to as statute law, or legislation.</td>
</tr>
<tr>
<td>Arbitration</td>
<td>The process of dispute resolution where a solution is reached to the agreement of both parties as a result of the actions of an arbitrator. The process of dispute resolution is formal, attendance is compulsory and the decision is binding. e.g. Court.</td>
</tr>
<tr>
<td>Civil Law</td>
<td>The branch of law that concerns disputes between private parties (i.e. individuals).</td>
</tr>
<tr>
<td>Committal Hearing</td>
<td>A hearing where the Magistrate decides whether or not there is sufficient evidence to warrant a trial.</td>
</tr>
<tr>
<td>Common Law</td>
<td>The body of judge made law (case outcomes). Based on the principle that a similar case (i.e. similar set of facts) should have a similar outcome.</td>
</tr>
<tr>
<td>Conciliation</td>
<td>Dispute resolution process where a third party is used to help the disputing partied to reach a solution. The outcome is not usually binding.</td>
</tr>
<tr>
<td>Delegated Legislation</td>
<td>Laws made by subordinate bodies that have been delegated with the power to make the laws. E.g. rules, by-laws, regulations and ordinances.</td>
</tr>
<tr>
<td>Equity</td>
<td>The law of “fairness”. Enabled judges to use a variety of alternative orders in deciding a case other than damages. E.g. injunction.</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
</tr>
<tr>
<td>------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Injunction</td>
<td>An order to stop something from continuing to occur, or to prevent altogether.</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>The power of authority of a court to hear a particular case.</td>
</tr>
<tr>
<td>Mediation</td>
<td>Dispute resolution where a third part helps to facilitate discussion between disputing parties. Attendance and the outcome is not compulsory.</td>
</tr>
<tr>
<td>Ombudsman</td>
<td>Independently appointed official who investigates complaints made by people about the action of government.</td>
</tr>
<tr>
<td>Precedent</td>
<td>A decision or principles of a superior court that lower (inferior) courts from the same hierarchy are bound to follow. Based on the principle similar case = similar outcome.</td>
</tr>
<tr>
<td>Tribunal</td>
<td>Specialised body, distinct form a court that resolves specialised disputes.</td>
</tr>
</tbody>
</table>

**The Adversarial System**

The judicial system in Australia is based on the adversarial model. This model requires the participation of two sides that argue before the court their opposing versions of the facts.

- **Each party** decides whether to institute or defend proceedings, what points are in issue, what evidence is to be presented and what arguments are to be made. This freedom to decide how the trial will proceed is limited only by the rules of evidence, procedure and case flow management.
- **An independent and impartial judge** or magistrate acts as the decision maker, or the umpire as to questions of law and of fact (if there is no jury).
- **Witnesses** are used to elicit evidence orally, by a process of examination in chief and cross-examination so their reliability and credibility may be tested and judged.
- **The burden of proof** lies with the party whose job it is to convince the decision maker of their case. In a criminal action, the burden lies with the prosecution and with a civil action; the burden lies with the plaintiff.
- **The standard of proof** is the extent to which the decision maker must be convinced to find in favour of the party bringing the action. The standard of proof borne by the prosecution in a criminal case is **beyond reasonable doubt**. The standard of proof borne by the plaintiff in a civil case is **on the balance of probabilities**.
Alternative Dispute Resolution (ADR).

- Going to court is stressful, complicated and costly.
- There are alternatives to courts including the following:

Abandon the claim

- Only usually viable if the dispute is unimportant, or the person with whom you have the claim against does not have the means to be able to meet the claim.

Out of court settlement

- Sometimes a party would rather compensate an injured party rather than go to the expense, adverse publicity and/or inconvenience of contesting the issues.

Ombudsman

- an independently appointed official who investigates complaints made by people about the action of government.

Conciliation / Mediation

- A third party is used to help the disputing parties to reach a solution. The outcome is not usually binding.

Arbitration

- Arbitration is frequently used to settle commercial and employment disputes.
- The two disputing parties contract to abide by the decision of an arbitrator (an umpire).

Commissions and Tribunals

- Complimentary to both the state and federal court hierarchies are quasi-judicial bodies known as tribunals.
- Tribunals are primarily created under specific legislation to deal with specific matters.
- The members of the tribunals are usually specialists in their areas and may not be legally trained.
- The proceedings before a tribunal do not have the evidentiary restrictions or the formality of a court and are intended to operate at a much lower cost.
- There is frequently a right of appeal from a decision of a tribunal to a court.
For example the **Australian Competition and Consumer Commission** is a specialist body set up under the *Trade Practices Act*. It has three main functions:

(a) publicity - research consumer matters, and to publicise the law;
(b) adjudication - parties can apply to the ACCC to get authorisation of a particular activity (i.e. like a ruling);
(c) enforcement - prosecute offenders under the Act, i.e. bring proceedings in the Federal Court. It has detailed powers to get information, evidence for prosecution, etc.

**Delegated Legislation**

- Powers of Parliament to make laws may be delegated where there is agreement that that a task must be performed and it cannot be performed by the Parliament.
- Parliament is often simply not the best place to make highly technical decisions.
- Delegated legislation is made by the Executive Council (Government of the day), by government departments, by local councils, and by statutory authorities.
- Delegated legislation is also known as regulations, by-laws, ordinances and statutory rules.

Examples:

*Executive Council* - includes the ability to respond to emergency situations (e.g. declaration of state of emergency or natural disaster) or to declare war.

*Local Councils* – fencing requirements, parking regulations, rubbish collection, etc.

*Government departments* – operating rules and procedures e.g. applications /fees

*Statutory Authorities* – e.g. South Australian Housing Trust or the Electoral Commission.
Activities

1. What role does the judiciary play in the legal system?
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

2. The Commonwealth Government’s powers are set out in the Australian Constitution. Discuss whether the Commonwealth government has the constitutional power to regulate the conduct of the accounting profession.
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

3. What are the key differences between a tribunal and a court?
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
4. Explain the meaning of the term ‘alternative dispute resolution’ using examples.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

5. Explain the process of an appeal from a decision of a federal tribunal to the High Court of Australia.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

6. What is the difference between regulation and legislation?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

7. Explain the doctrine of precedent and how this doctrine is used in the Australian legal system.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
### Learning Outcome 2
Revise the activities of business association and the process for the establishment of a sole trader, partnership, proprietary and public company.

### Required Reading
Vickery and Pendleton – Review Chapters 5, 6 and 7

### Activities
Activities in workbook

### Key Terms
<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agent</td>
<td>A relationship whereby one person (the principal) authorises another person (the agent) to do certain acts on the principal’s behalf, the purpose being to bring a contractual relationship with the principal.</td>
</tr>
<tr>
<td>Bankruptcy</td>
<td>Where a natural person has been declared insolvent.</td>
</tr>
<tr>
<td>Dissolution</td>
<td>How a business may be ended.</td>
</tr>
<tr>
<td>Fiduciary Duties / Relationship</td>
<td>A relationship which requires the ‘utmost good faith’ – i.e. a relationship requiring trust</td>
</tr>
<tr>
<td>Joint Liability</td>
<td>Liability is shared between the partners of the business</td>
</tr>
<tr>
<td>Joint Venture</td>
<td>One off enterprise similar to a partnership in structure, but where the members receive profits separately, and do not intend for the business to be continuing.</td>
</tr>
<tr>
<td>Partnership</td>
<td>A relationship, which subsists between persons carrying on a business in common with a view to making a profit.</td>
</tr>
<tr>
<td>Perpetual Succession</td>
<td>Where the business continues to operate even with a change in ownership.</td>
</tr>
<tr>
<td>Separate Legal Entity</td>
<td>A company is regarded as a separate legal person – i.e. An entity separate from its owners, shareholders and directors.</td>
</tr>
<tr>
<td>Several Liability</td>
<td>Liability is individual.</td>
</tr>
<tr>
<td>Sole Trader</td>
<td>One person retains all the profits but also bears all the losses in regards to the business.</td>
</tr>
<tr>
<td>Tort</td>
<td>A civil wrong e.g. Negligence</td>
</tr>
<tr>
<td>Trusts</td>
<td>Relationship whereby one person (the trustee) holds the trust property on behalf of another (the beneficiary).</td>
</tr>
<tr>
<td>Unlimited Liability</td>
<td>Personal assets may be used to satisfy business debts.</td>
</tr>
<tr>
<td>Veil of Incorporation</td>
<td>Once a company is incorporated the owners and directors are shielded from liability (in most cases).</td>
</tr>
</tbody>
</table>
SOLE TRADER

- Advantages
- Disadvantages
  - Unlimited liability

PARTNERSHIP

- Definition – section 1 of the Partnership Act (SA) 1891
- Advantages
- Disadvantages
- Number of partners
- Creation of a partnership
  - By deed under seal
  - Written partnership agreement;
  - Verbal agreement;
  - Partnership by estoppel;
  - Implied from the conduct of the parties
- Liability of the partners
  - Joint liability
  - Several liability
  - Limited liability partnerships
- Relationship of partners to third parties
  - Actual authority
  - Apparent Authority
  - Implied authority
- Dissolution of partnerships
  - Dissolution by expiry of time
  - Dissolution by giving of notice
  - Dissolution by death of a partner
  - Dissolution by insolvency of a partner
  - Dissolution where partnership property has been charged
  - Dissolution by the court – Section 32 – 35 of the Partnership Act.
- Distribution of assets of the partnership upon dissolution
  - Partnership Agreement may outline
  - Government monies owed
  - Expenses of selling up the assets
  - Creditors
    - Employees
    - Secured Creditors
    - Unsecured Creditors
  - Loans by partners to partnership
  - Repay capital invested by partners
  - Remaining assets divided by partners
Novation

Liability under a contract (such as a partner’s liability) can be transferred from one party to another party. This transfer of legal duties (including the partners liability for debts) occurs if all the parties agree to rescind the original contract and replace it with a new one in which the same terms of the contract apply, but the parties responsibilities and liabilities are now between one of the original contractors (partner) and the third party (in place of the other original contracting party).

Example: A partner wished to leave the partnership. Instead of dissolving the partnership and distributing debts between the existing partners, a new partner into the business takes on the liability of the partner leaving the business (due to the change of partners a new partnership is created – but the advantage of novation is that all assets do not need to be realised in order to pay out existing debts).

JOINT VENTURE

- Joint venture v partnership
- Key features

COMPANIES

- **Definition** - Corporation Act 2001 (Commonwealth)
- **Incorporation**
- **Advantages**
- **Disadvantages**
- **Separate legal entity**
  - Saloman v Saloman (1897) AC 22
- **Veil of Incorporation / Corporate Veil**
  - Piercing / lifting the corporate veil
  - Duties of directors
- **Perpetual succession**
- **Limited liability**
  - companies limited by shares
  - companies limited by guarantee
  - unlimited liability companies
  - no liability companies
- **Classification of companies** – proprietary or public
- **Directors and shareholders**
- **Role of the Australian Securities and Investment Commission (ASIC)**
Activities

1. What legal requirements exist (if any) for the formation of:

(a) A sole trader

___________________________________________________________________________
___________________________________________________________________________

(b) Partnership

___________________________________________________________________________
___________________________________________________________________________

(c) Corporation / Companies

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

2. From your knowledge of companies, what requirements do you believe that a company must comply with during its operation (e.g. documentation requirements)?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

3. Discuss how the three business structures discussed in this section can be dissolved.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
4. Discuss a case when the corporate veil has been lifted. Include in your discussion why you believe the corporate veil was pierced.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

5. Discuss the difference between a fixed charge and a floating charge in regards to the raising of capital.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

6. What are the key differences between a proprietary company and a public company?
7. In what order are partnership assets distributed upon dissolution of a partnership?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

8. Why is it important that partners agree to enter into a comprehensive partnership agreement?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

9. Visit the ASIC web site and discuss the role of ASIC.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

10. Whilst visiting the ASIC website please visit the “FIDO” section. What is the role of ASIC in regards to fraud?
Lecture 2

<table>
<thead>
<tr>
<th>Learning Outcome</th>
<th>Learning Outcome 3</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Explain the operation of agency and partnership law in South Australia.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Required Reading</th>
<th>Vickery and Pendleton 6th ed – Chapters 6 and 7</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Activities</th>
<th>Activities in workbook</th>
</tr>
</thead>
</table>

Key Terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agency</td>
<td>The relationship which exists between two parties whereby one party, the principal, authorizes another party, the agent, to do on their behalf acts which will bring the principal into legal relations with a third party.</td>
</tr>
<tr>
<td>Agency by necessity</td>
<td>An emergency situation creates the need for an agency relationship.</td>
</tr>
<tr>
<td>Express</td>
<td>Agreement is clearly outlined either in written or verbal form.</td>
</tr>
<tr>
<td>General Agent</td>
<td>Agent with authority to authorise contracts within a specific area of business.</td>
</tr>
<tr>
<td>Implied</td>
<td>A relationship exists due to the circumstances of the relationship. The relationship has not been expressly stared.</td>
</tr>
<tr>
<td>Principal</td>
<td>The person who engages an agent to represent them. The principal will be bound to the contract with a third party.</td>
</tr>
<tr>
<td>Ratification / Affirmation</td>
<td>Where a person contracts on behalf of another without authority. The person whom the contract is made on his / her behalf agrees to be bound by the agreement after the agreement has been entered into.</td>
</tr>
<tr>
<td>Remuneration</td>
<td>The right to be paid for services performed.</td>
</tr>
<tr>
<td>Renunciation</td>
<td>To declare the authority or position given to another (in this case the agent) is no longer in place.</td>
</tr>
<tr>
<td>Revocation</td>
<td>To take away authority to contract on another’s behalf.</td>
</tr>
<tr>
<td>Special Agent</td>
<td>Agent appointed for a specific task, or a limited purpose.</td>
</tr>
<tr>
<td>Universal Agent / Power of Attorney</td>
<td>Agent with power to act for the principal in any matter i.e. has full contractual capacity.</td>
</tr>
</tbody>
</table>
INTRODUCTION

Agency is generally the relationship which arises where one person is appointed to act as the representative of the other. Commercially, people may not have the time or inclination to do all their contracting personally in all places, so appointing a contractual agent is common.

Agency may be defined as the relationship which exists between two parties whereby one party, the principal, authorizes another party, the agent, to do on their behalf acts which will bring the principal into legal relations with a third party.

There are therefore two contracts involved – one creating the agency, the internal relationship, and the second where the agent contracts on behalf of the principal with a third party, the external relationship. The contractual agent is essentially a facilitator who used the delegation of the principal’s contractual authority to create a contract between the principal and the third party.

AGENCY DISTINGUISHED FROM OTHER RELATIONSHIPS

Some relationships may appear to be contractual agency relationships when in truth they are not, and must be distinguished from the contractual agency relationship.

Employer – employee relationships

- Employees usually lack the authority to make contracts on behalf of their employers.
- Employees are not usually liable to the third party for what they do or fail to do, provided their conduct takes place in the ordinary course of their employment, as a result of the doctrine of vicarious liability which we have previously examined.
- However, the employment contract may specifically grant contractual agency to an employee.

Independent contractor

An independent contractor is hired by a client to perform specific work. Whether such a person is an agent will depend upon the terms of hire and the facts in each case. However, given that the client has little control as to how the work is carried out, an independent contractor is less likely to be a contractual agent than an employee, although there are exceptions. E.g. when an auctioneer accepts a final bid, that acceptance binds the auctioneer’s client to a contract with the successful bidder.
TYPES OF AGENTS

Agents are classified under common law by the extent of their authority to bind the principal.

Special agent

A special agent is appointed by the principal for a specific or limited purpose, they are commonly only authorized to make a particular contract, e.g. to buy a particular item, to negotiate a particular sale.

General agent

A general agent has wider authority and is authorized to make contracts of a particular class, often in relation to a specified trade or business, or acts in the principal’s ordinary course of business. E.g. a solicitor or an accountant could be a general agent of their client.

Universal agent

A universal agent has the authority to act for the principal in any matter. Practically, the agent can enter any arrangement that the principal could personally enter. Universal agents are appointed under a power of attorney which is required by statute to be a written document, signed by the principal and witnessed by an independent adult. A power of attorney may be general, or limited.

- A **general power of attorney** covers all financial and domestic responsibilities.
- A **limited power of attorney** may include limitation to its application and delegation of authority covering geographical extent, purpose or duration.

A power of attorney may be terminated by the principal at any time, and under common law, it must terminate when the principal or agent dies or becomes mentally incapable. However, all states and territories have legislated to allow for enduring powers of attorney where the principal gives a specified agent the right to act on their behalf if they become incapable due to disease or accident.

CAPACITY OF THE AGENT

An agent has the contractual capacity of the principal due to the delegation of contractual capacity by the principal to the agent. Thus, where an agent that is a minor, or a bankrupt, contracts on behalf of a principal with full capacity, they have full capacity. Where an agent that has full capacity contracts on behalf of a principal that is a minor or a bankrupt, they have the limited capacity of the principal.
CREATION OF AGENCY

There is no particular form that an appointment of an agent must take in order to be valid, although some legislation does require agents in certain circumstances to be appointed in writing. The appointment of an agent may be done expressly between the parties, or in certain situations may be implied.

Expressly created agency

An agency may be created expressly where agreement clearly indicates that an agent has the power to act on behalf of the principal in contractual or other business dealings and the principal will be legally bound by the agent’s authorized conduct.

(a) **By deed** – namely by a contract under seal, such as a power of attorney

(b) **In writing** – namely by a simple contract. Statutes in all jurisdictions regulate the activities of many groups of agents, including travel agents, employment agents, private enquiry agents, auctioneers and real estate agents and usually require that such agency agreements be expressed in writing in a particular form.

(c) **Verbally** – a verbal appointment is just as enforceable as a written appointment (other than when specific legislation to the contrary applies), however as with any verbal contract, the problem is that if a dispute arises, there may be little evidence to clearly identify the terms of the agency.

Impliedly created agency

Sometimes agency is not expressly created by the parties, but is instead implied from The conduct of the parties and the surrounding circumstances in which that conduct takes place.

(a) **Agency by necessity** – Sometimes a person may be bound to a contract made by another if “urgent necessity” can be established. The courts are reluctant to find that such circumstances exist and require the following elements to be proved;

- that there was an existing contractual relationship, of that the contracting party had been put in a position where they were entrusted with the property of another, (e.g. goods or land);
- an immediate expense was reasonably necessary in the circumstances to preserve the property;
- it was virtually impossible to contact the owner of the property; and
- that the agent acted in the best interest of the principal and not in their own best interests or the best interests of others.
Great Northern Railway Co v Swaffield (1874) LR 9 EXCH 132

The plaintiff contracted with the defendant to transport a horse by rail. On arrival at the designated railway station, there was no-one to receive the horse. The plaintiff contracted with commercial stables to care for the horse. The court held that the plaintiff had contracted as agent of the horse owner and that an agency of necessity had been created so the owner was bound to the contract with the stables. The court found that the plaintiff was entitled and bound to incur the expenses reasonably necessary to keep the horse alive and in health; therefore as there was no way of communicating with the horse owner before nightfall and no accommodation at the station, the plaintiff had acted as the owner’s agent.

(b) By ratification

Where a person contracts on behalf of another without express authority, provided certain conditions are met, the act can be ratified or affirmed to create a principal agency relationship with respect to the subject contract. In effect this is a retrospective delegation of authority.

Ratification can arise in one of two ways;

- where a person enters into a contract for the principal without any authority the principal can ratify the action; or
- where a person enters into a contract for an existing principal and in so doing exceeds their authority, the principal can ratify the action.

The following conditions must be satisfied to achieve a valid ratification:

- The agent, when contracting, must be clearly acting as an agent, not for themselves, and the third party must be aware that they are acting as an agent. If the third party is not so aware, then the third party can not later enforce the contract against the principal, but will have action against the agent only.
- There is a common law rule that the principal must exist when the agent contracts.
- The principal must have the capacity to contract for the object at the time of the contract and at the time of ratification.
- The principal must ratify the whole contract, to ratify only part of the contract is not possible.
- By the time of the ratification, the principal must have full knowledge of the transactions between the agent and the third party, namely the principal must know all the relevant details to enable them to make the decision to ratify or not.
- Ratification can only be by the principal for whom the agent was acting when the contract was made.
- Ratification must be made within a reasonable time.
(c) By estoppel

Estoppel occurs where a principal by words or conduct, gives an impression that they have given an agent authority to act as their agent. If a third party contracts with the agent based on the impression created by the principal, then the principal will be bound, even if the alleged agent was not in fact the agent of the principal. The principal will be estopped from arguing that no actual authority had been given to the agent.

Tooth v Laws (1888) 9LR (NSW) 154

Laws allowed his name to be kept posted over a hotel door, although he no longer had any interest in the business carried on there. Tooth supplied liquor in bulk to the persons carrying on the business and those people did not pay. Tooth sued Laws for the money owed and succeeded. The court held that Laws had made no indication to Tooth that he was not the principal of the business, so he was estopped from denying that the persons carrying on the business were his agents.

(d) By position or status

This is where a person is particularly placed in a position such as an officer of a company or a partner in a firm, and a third party contracts with them believing them to have the authority that the position normally carries. In this situation the third party can rely upon the agent’s apparent authority.

EXTENT OF AGENT’S AUTHORITY

Just as the creation of an agency can be express or implied, the extent of an agent’s authority can be created expressly or impliedly. The agent will bind the principal, if the acts are within the agent’s actual authority or the agent’s apparent authority.

Actual authority

Actual authority is the real authority that the principal has delegated to the agent. It may be expressly stated verbally or in writing, or it may be implied where circumstances imply that the authority is extended, for example, authority to sell land implies authority to negotiate to sell land in the normal manner.


Where a principal, being the owner of land, appointed an agent to sell the land, it was held that the agent had implied authority to describe the property and to state any fact or circumstance that might affect the value of the property. As the actions of the agent in doing so were within the implied actual authority of the agent, the actions bound the principal, even if the statements made were false.
Apparent authority

This is the authority that the agent appears to have to the third party, which binds the principal. This authority is not the authority that is expressly or impliedly actually given to the agent. Whether an agent has apparent authority to act is a question of fact in each case. For example, did the principal allow the impression, by words, writing or conduct, to be created that the agent had authority? If so, then the principal will be prevented from denying that such authority existed. Did the principal appoint the agent to a position or status that carries a certain amount of authority but in reality restrict that authority? If so, but they did not inform the third party of the restrictions on the authority granted, then the principal will be bound to any contract entered into by the third party in reliance on the apparent authority of the agent.

If acts are outside the agent’s actual or apparent authority, then the principal will not be bound.

Panarama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd (1971) 2QB 711

A company secretary hired expensive cars as if they were for the company, but they were in fact for his own pleasure. The third party, the supplier, sued the company for the hire charges. The company had refused to pay as the company secretary had no authority to hire cars for the company. The court held that modern company secretaries usually have the authority to hire such items and therefore the company secretary had the apparent authority to act as agent for the company. The company was bound as a principal by the actions of the company secretary, as agent wielding apparent authority.

THE DUTIES OF AN AGENT TO THEIR PRINCIPAL

Duty to follow the principal’s lawful and reasonable instructions

What the instructions are is a question of fact in each case. If the agent does not follow the principal’s instructions, the agent may be responsible for any resulting loss.

Bertram Armstrong & Co v Godefray (1830) Knapp 381

The principal instructed the agent a stock broker, to sell the principal’s stock when the market price reached a certain figure. The agent decided to hold the stock when it reached the specified price. The market dropped and the agent was forced to sell at a loss. The court held that the agent did not follow the principal’s instructions and was personally responsible to pay the principal the difference between the instructed price and the sale price.
Duty to act personally

An agent must carry out lawful instructions personally unless the principal has agreed that the tasks can be delegated to someone else. It is acceptable for an agent to seek expert assistance, such as from an accountant or a solicitor, and that they delegate minor administrative tasks. If an agent delegates their authority against the wishes of the principal, they will not be able to claim commission.

Duty to act in the principal’s best interests

The agent has a fiduciary duty towards the principal, which means they owe the principal duties of good faith, loyalty and trust, and must always act in the best interests of the principal. Agents must fully disclose any interest they have which may be in conflict with the interests of the principal. If their fiduciary duty is breached, an agent will not be entitled to claim their commission.

Hewson v Sydney Stock Exchange (1967) 81 WN (NSW) 422

The court held that a stock broker, who was acting as agent for clients, could not trade on the stock market in competition with his clients.

Duty to exercise reasonable care, skill and diligence

The extent of this duty depends on the circumstances, and what is reasonable in the circumstances. Agents who have, or claim to have special skills or qualifications must display the level of care, skill and diligence which could reasonably be expected from their trade or profession.

The extent of this duty may also be affected by whether the agent is paid or not for their work:

- **A gratuitous agent**, an agent that is not paid, is not expected to exercise any special degree of skill. The agent must use the same degree of care and skill they would use in their own affairs. If the non-paid agent has some special knowledge, they are expected to use it.
- **A non-gratuitous agent**, an agent that is paid, must exercise a degree of skill that a reasonable person would expect an agent of that type to exercise.

If an agent fails to meet these standards, they will be liable to the principal for any loss caused by their breach of duty.

Duty to keep proper accounts of all money and property received on behalf of the principal

This duty requires the agent to hand over all moneys received and to provide full explanations as to how the principal’s money and property has been managed.
Accounts must be kept up to date and available for inspection.

**Duty to keep all money and property of the principal separate from that of the agent**

**Duty of confidentiality**

The agent must not disclose any confidential information received as a result of being the principal’s agent.

**Duty not to make a secret profit**

The agent must not be making any other profit out of the actions done on behalf of the principal, which duty is as a result of the fiduciary duty owed by the agent to the principal. The principal can sue the agent for any loss suffered as a result of the agent receiving a secret commission or secret profit.

---

**Rogier v Campbell- Stuart (1939) 1 Ch 766**

Rogier, the principal, instructed Campbell –Stuart, her agent, to find a property for her to buy. Campbell –Stuart found a property, asked his brother in turn to buy it for $2000, purportedly bought it from his brother for $4500, and then offered it to Rogier for $5000. Rogier was able to sue Campbell –Stuart for the secret profit made.

---

There is also the *Secret Commissions Prohibition Act (SA) 1920*, which prohibits secret commissions.

**RIGHTS OF AGENTS**

**Right to remuneration – to be paid as agreed**

Usually amount and method of remuneration is fixed in the agency agreement. In some cases, it may be fixed by regulation or custom within the trade or industry of the principal or agent. One method of payment is for the agent to be paid a percentage of the purchase price of the contract with the third party, as commission.

**Right to indemnity and reimbursement**

The agent is entitled to be paid or indemnified for any losses or expenses incurred while carrying out the principal’s instructions. This right occurs only when acting within authority and instructions.
Right to a lien over the principal’s property in the agent’s possession until the agent’s remuneration and expenses are paid

The agent is entitled to keep possession of any of the principal’s goods or documents until paid, if the agent’s acts are relevant to that property – the agent could not keep something unrelated, unless a prior agreement entitles the agent to a general lien over any of the principal’s property in the event of non-payment.

Right to redirect the goods in order to possess and retain them

This right of stoppage in transit allows the agent who has become an unpaid seller to stop goods being delivered by a carrier to the principal, or to a third party and to redirect them to a place where they will come under the agent’s control.

To utilize this right, the agent must establish the following:
- that they purchased the goods on behalf of the principal;
- that they have paid for the goods or are personally liable for the purchase price; and
- that the principal is unwilling or unable to pay their debts.

AGENT’S LIABILITY TO THE PRINCIPAL

The agent will only be responsible to the principal if the agent does not comply with the principal’s instructions, or breaches a duty owed, in which circumstances, they will be responsible for any loss.

AGENT’S LIABILITY TO A THIRD PARTY

A third party who wishes to take legal action over a contract that was arranged by an agent usually only has rights against the principal. This situation applies even if the principal who breached the contract is unable to pay damages, but the agent is in a financial position to do so.

The principal and not the agent will be liable to a third party for any torts committed by the agent whilst acting within the scope of their actual or apparent authority, even if the principal gained no benefit from the agent’s conduct. However, an agent may be responsible to a third party in the following situations:

The principal is disclosed and named but special factors make the agent liable

Under common law, an agent who discloses to third party that they are acting on behalf of a principal cannot be liable unless;
- the named principal does not exist
- the agent agreed to be liable
- it is standard practice in a trade or industry that an agent becomes liable
- the agent executed a deed or bill of exchange in their own name instead of that of the principal
- the agent acts outside actual or apparent authority (breach of warranty of authority)
Existence but not name of the principal is disclosed

The agent will not be liable in these circumstances unless;

- the agent acts outside actual authority
- the agent specifically agrees to be liable

Existence of principal not disclosed

If the existence of the principal is not disclosed, and later there is a dispute over the contract, the third party can choose whether they sue the agent or the principal, usually based on who will be more able to pay any judgment sum. A third party who obtains a judgment against one party, loses all rights against the other.

Breach of warranty of authority

This action may exist where the agent has falsely claimed to have authority they do not in truth possess. Thus, warranty of authority will be breached if the agent;

- falsely claims to be acting with the principal’s authority – the claim may be made directly or indirectly, fraudulently or innocently;
- the claim of authority induced the third party to enter into the subject contract with the principal;
- the third party was not aware of the lack of authority; and
- the third party suffered loss.

The agent’s possible liability under consumer protection legislation

An agent, who with or without the authority of the principal breaches the Trade Practices Act or related legislation, may be liable for breach of misleading and deceptive conduct and the like. It is not necessary in these instances to prove that a contract was actually entered into, nor is it a legal defence for the agent to claim they were acting only on the principal’s instructions.

In the High Court case of *Butcher v Lachlan Elder Realty Pty Ltd [2004]* an agent distributed a sales brochure issued by the vendor which included a survey diagram showing a line marked ‘MHWM’ (mean high water mark). The agent also included a disclaimer that although it believed the information in the brochure to be reliable it could not guarantee the accuracy.

Before the auction, the purchasers were advised by an architect that the location of this mark (as per the brochure) made it feasible to move the swimming pool and create an entertaining area. Consequent to buying the property, the purchasers found the survey diagram to be inaccurate and (amongst other issues) took action against the agent for misleading and deception conduct under s52 of the Trade Practices Act.

It was held by the Court that the agent was not liable. The disclaimer made it clear to any purchaser that the agent was merely passing on information which was provided by the vendors and it could not guarantee that this was in fact accurate.
TERMINATION OF AGENCY

Performance of the agency contract as agreed

As in any contract, the most common way by which the agency contract is terminated is by performance of the contract as agreed.

Mutual agreement

The agency agreement can be terminated while it is still in force if both parties agree this should happen.

Revocation of the agent’s authority

The principal may revoke the agent’s authority to act on their behalf at any time, after which the principal will not be bound by the agent’s acts, provided they have acted speedily to inform any third parties of the revocation. The revocation may lead to an action for damages for breach of contract by the agent against the principal.

Renouncement of authority by the agent

The agent has the right to renounce their authority to act as agent on behalf of the principal at any time during their agreement, but as with the revocation by the principal, this may lead to a damages action for breach of contract.

Acceptance of secret commission

An acceptance by the agent of a secret commission is a serious breach of the agency contract and a principal may immediately terminate the agency agreement on such grounds. The agent usually has rights to any outstanding fees, but must hand over any benefit to the principal.

By operation of law

Such termination may include;

- lapse of a set time period for the life of the agency
- death, bankruptcy or insanity of the agent or principal
- frustration of the contract
- object of the contract becomes illegal

REMEDIES OF A PRINCIPAL

If an agent breaches the agency agreement, the principal may seek remedies including the following:

- rescission of the agency agreement;
- refusal to pay commission;
- damages;
- recovery or secret commission; and/ or
- criminal charges laid for accepting a secret commission
Agency and Partnership Law

Every partner is an agent of the firm and the other partners for the purpose of the partnership business, but because the partnership agreement is not a public document, it is difficult for third parties to know the limitations placed on the authority of partners. The authority of a partner may be actual or apparent. The limitations or restrictions upon a partner’s power may have an effect upon the validity of the dealings between the third party and the firm.

Agency

Every partner is regarded as an agent and principal of every other partner. Section 5 of the Act provides;

“Every partner is an agent of the firm and his other partners for the purpose of any business of the partnership and the acts of every partner who does any act for the carrying on in the usual way business of the kind carried on by the firm, bind the firm and his partners, unless the partner has in fact no authority to act in the particular matter and the person with whom he is dealing either knows that he has no authority; or does not know or believe him to be a partner.”

Note the three elements which must be present for the partner’s conduct to bind the firm;

- the transaction must be within the scope of the business carried out by the firm;
- the transaction must be undertaken in the usual way; and
- the other party must either know or believe the person dealing with them is a partner
- and must be unaware of any lack of authority to act.

Actual authority – express or implied

Actual authority is the real authority held by a partner to undertake particular conduct and so bind the firm in dealings with a third party. This authority may be expressly stated or implied and may be contained in the partnership agreement or the Act. If a partner’s authority is limited in any way it should be clearly stated in the partnership agreement and those who deal with the firm should be notified.

Apparent or ostensible authority

Apparent authority of a partner is the authority that the partner appears to have to third parties external to the partnership relationship. This therefore only arises if actual or real authority is lacking and may be sufficient to bind the firm. Matters which fall within a partner’s apparent or ostensible authority are listed include;

- buying and selling of goods usually used by the firm,
- receipt of payment of debts,
- drawing of cheques and insurance,
- entry into contracts on behalf of the firm.
Matters not within a partner’s apparent authority include opening bank accounts and the giving of a guarantee. **Section 6 of the Act states that if a person acts within actual or apparent authority the firm is bound but if a person acts outside actual or apparent authority the firm is not bound.**

If a **third party** is relying on **apparent authority** to succeed against the firm they must establish that:

- the partner was acting within the scope of the business of the kind normally carried on by the firm;
- the transaction was carried out in the usual way;
- they knew or reasonably believed that the partner was a partner; and
- they were not aware that the partner did not have the authority to bind the firm.
1. Explain agency in your own words.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

2. Discuss the ways in which agency may be created.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

3. What is a special agent?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
4. Explain how the contractual capacity of an agent is determined.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

5. List the elements which must exist for an agency of necessity to be created.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

6. What two classes of authority are possessed by agents and what is their effect upon transactions with third parties?

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________
7. Explain the relevance of the decision in *Tooth v Laws*.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

8. List the eight main duties of an agent.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

9. Explain the ways in which agency may be terminated.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________
10.  Bob, a partner in ‘Bob and Pete’s Graphic Designs’, buys stationary once a week for the partnership from ‘Pens R Us’. Xena from Pen’s R Us knows that while Bob uses his own name to make the purchases, he is acting for the partnership and the partnership has always paid the bills. Bob and Pete fall out over Bob’s irresponsible behaviour and end the partnership. Bob continues buying stationary from Pens R Us, but neither Bob or Pete inform them that the partnership has dissolved. Bob becomes seriously financially challenged and cannot pay the mounting stationary bills he continues to incur. Pens R Us finally sue Pete for the account. Discuss the rights involved.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

11.  Jeremy is employed as an agent for a small dress fabric shop owned by Janice. Jeremy is authorized to act as Janice’s agent in purchasing inexpensive fabrics which are in constant demand. While ordering new season’s fabrics from his normal supplier, he is dazzled by an expensive, gorgeous, silk organza. Jeremy is convinced that it will sell hugely, and purchases three rolls for the shop. When Janice receives the bill, she is not similarly enraptured and is furious that Jeremy has purchased the fabric and refuses to pay the bill. Is Janice responsible for the bill? Explain.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________
Lecture 3

<table>
<thead>
<tr>
<th>Learning Outcome</th>
<th>Learning Outcome 4</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Recognise the relevance of tortuous liabilities in the business environment.</td>
</tr>
</tbody>
</table>

| Required Reading | Vickery and Pendleton 6th ed – Chapters 3 and 4 |

| Activities       | Activities in workbook |

### Key Terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
<th>In my own words….</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contributory negligence</td>
<td>Where a persons actions or inactions where a contributing factor to their own loss suffered. A plea to mitigate (reduce) damages awarded as the plaintiff was partly to blame in their own downfall.</td>
<td></td>
</tr>
<tr>
<td>Duty of Care</td>
<td>A legal obligation to avoid causing harm to another. The duty arises when it is foreseeable that harm may be suffered.</td>
<td></td>
</tr>
<tr>
<td>Gravity of injury</td>
<td>The severity of possible harm should a breach occur must be considered, and if the activity in which the plaintiff is concerned is particularly hazardous, a warning should be given.</td>
<td></td>
</tr>
<tr>
<td>Foreseeability</td>
<td>The ability to be aware or acknowledge that action or inactions could cause harm or loss to another.</td>
<td></td>
</tr>
<tr>
<td>Likelihood of injury</td>
<td>The risk associated with an act or inaction, which could potentially cause a harm or loss. If the act or inaction is so remote in that it would cause a loss the defendant is not found to have breached their duty of care.</td>
<td></td>
</tr>
</tbody>
</table>
| Negligence               | An action in Tort law. The elements are
  1. A duty of care must be owed
  2. A breach of the duty of care must result
  3. Damage or loss is suffered as a direct result of the breach in the duty of care.                                                                 |                  |
<p>| Negligent Misrepresentation / Misstatement | A statement of fact, advice or opinion made in a business context, which is inaccurate or misleading. Where the representor of the statement ought to have known that another would rely on the statements and that person suffers harm or a loss as a result. |                  |</p>
<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
<th>In my own words….</th>
</tr>
</thead>
<tbody>
<tr>
<td>Occupiers Liability</td>
<td>The legal responsibility of an occupier of premises towards visitors who have lawfully or unlawfully enters the premises and suffered injury on the premises.</td>
<td></td>
</tr>
<tr>
<td>Proximity</td>
<td>A situation in which persons are so closely and directly affected by another’s act or inaction that the person intending to act or not to act should reasonably foresee that a harm may result.</td>
<td></td>
</tr>
<tr>
<td>Remoteness of Damage</td>
<td>The damages awarded must be to compensate for the direct loss suffered as a result of the breach of duty of care. The damages must not be remote to the actual cause of the loss.</td>
<td></td>
</tr>
<tr>
<td>Tort</td>
<td>A wrong by an individual against another that is not a crime.</td>
<td></td>
</tr>
<tr>
<td>Vicarious Liability</td>
<td>The liability imposed on one person for the wrongful act of another on the basis of a legal relationship between them, usually an employer and employee.</td>
<td></td>
</tr>
<tr>
<td>Volenti non fit injuria - voluntary assumption of risk</td>
<td>A defence to a claim of negligence by which a plaintiff is denied damages (or damages are reduced) as a result of the fact that they voluntarily exposed themselves to the risk of being injured. The plaintiff needs to have knowledge of the risk they are exposing themselves to.</td>
<td></td>
</tr>
</tbody>
</table>

INTRODUCTION

- A tort means a wrong by an individual against another that is not a crime.
- The law of tort protects individuals against infringements of their rights against person, property or reputation.
- The purpose of the law of tort is to compensate those who have suffered as a result of a tort.

NEGLIGENCE

- In certain situations the law imposes a duty on a person to act with care towards others.
- If this duty exists and there is a failure to act carefully and another suffers injury or loss, then the tort of negligence has been committed.
- Therefore, to establish the tort of negligence, three prerequisites must exist;
  (i) a duty of care must be owed by one person to another;
  (ii) there must be a breach of that duty; and
  (iii) loss, injury or damage must have resulted as a result of that breach.

Existence of Duty of Care

(a) The good neighbour principle

Donoghue v Stevenson (1932) AC 562.

A friend bought a woman (the plaintiff) an ice-cream soda made with a bottle of ginger beer. The bottle itself was opaque. When the plaintiff was adding further ginger beer to the ice cream soda, she noticed the decomposed and vile remains of a snail in the ginger beer bottle. She successfully sued the manufacturer of the ginger beer for damages as a result of suffering gastroenteritis and nervous shock.

As she had not herself purchased the product, she could not sue on the basis of breach of contract. However, she was successful on the basis that the manufacturer owed the ultimate consumer of the product a duty of care that the bottle would not contain “noxious matters”, and that that duty had been breached.
Some typical duty of care relationships are as follows:

- where there is provision of defective goods and services – duty of care is owed by the provider to the consumer;
- negligent misstatement - where for example a provider of professional/expert advice owes duty to recipient/consumer of that advice;
- road users owe a duty to other road users;
- occupiers of land owe a duty to protect entrants to that land from harm;
- school authority owes a duty to students;
- a local council owes a duty of care to persons to whom the council provides information regarding zoning;
- a cigarette company owes a duty of care to potential customers to warn of the dangers of smoking when advertising its product

Rules for determining when a duty of care exists include:

(i) Foreseeability- the ‘reasonable’ person

- For a duty of care to exist it must be shown that it was reasonably foreseeable that the defendant’s action could have caused the harm suffered by the plaintiff.
- The question asked is - would a reasonable person in the position of the defendant have foreseen that damage might result from the defendant’s action, not whether the defendant personally could have foreseen.

**Wyong Shire Council v Shirt (1980) 146 CLR 40**

The plaintiff council had dredged a channel in the south lake of Tuggerah Lakes. The lake was normally very shallow. The council erected signs that stated “Deep Water”. An inexperienced water skier fell near one of the signs and suffered serious injury as the water was very shallow, only 1.2m in that area, and sued the council, claiming negligence. It was held that the sign was ambiguous and that a reasonable person might conclude that beyond the sign was also deep water and thus the damage to the water skier was reasonably foreseeable by the defendant.
(ii) Proximity

- Until the late 1990s, the duty of care relied heavily on proximity or some relationship between the plaintiff and defendant as per the case below:

**Jaensch v Coffey (1984) 155 CLR 549**

The defendant caused an accident in which a motorcycle policeman was injured. The defendant was ordered to pay damages to the wife of the injured policeman for the anxiety disorder and nervous shock she suffered from witnessing the pain of her husband’s injuries. It was held that the shock was reasonably foreseeable and there was sufficient causal proximity between the defendant’s conduct and the wife’s injury.

However, proximity is no longer a common law test for duty of care. Today it is determined by the application of the ‘foreseeability’ test and whether there was a vulnerable relationship between Defendant and Plaintiff.

**Breach of Duty of Care**

In order to determine whether the defendant has in fact breached the duty of care, the particular standard of care applied in each case needs to be substantiated and compared to that which a reasonable and prudent person would have employed. The defendant is expected to have assessed the risk and taken reasonable precautions to prevent it occurring.

(a) Likelihood of injury

If the risk is so small that a reasonable person would have disregarded it, there is no breach of duty of care.

**Bolton v Stone (1951) AC 850**

The plaintiff was struck by a cricket ball that was hit over a fence from a cricket ground during a match. Given the unusual circumstances there was no negligence as the likelihood of harm was negligible.

(b) Gravity of injury

The severity of possible harm should a breach occur must be considered, and if the activity in which the plaintiff is concerned is particularly hazardous, a warning should be given.
If the plaintiff has a pre-existing condition increasing her/his vulnerability to harm, this will increase the gravity of the risk which must be considered and perhaps heighten the care needed to be taken.

*Paris v Stepney Borough Council (1951) AC 367*

A council worker had sight in only one eye, a fact known to his employer, the council. The plaintiff was not given protective goggles by his employer during work where there was the possibility of injury. The worker lost sight in his good eye due to injury and his employer was held liable.

*Chappel v Hart (1998) HCA 55*

Dr Chappel, an ear, nose and throat specialist, advised Mrs Hart to undergo an operation essential to her health. Mrs Hart did make enquiries about possible risk, but Dr Chappel failed to warn her of some possible side effects if she contracted an infection as a result of the operation. Despite the skill with which the operation was performed, Mrs Hart did suffer a post operative infection. It was held that Dr Chappel had been negligent in failing to warn her of all the risks involved.

(c) The effort required to remove the risk

Whether the standard of care has been met requires consideration of the balance of risk against the steps necessary to eliminate the risk.

(d) Social utility of the defendant’s conduct

The benefit of the conduct may outweigh the risk of injury.

**Damage Must be Caused by the Breach of Duty of Care**

Once breach of the duty owed has been established, the third element needed to make out negligence is causation - did the act or omission of the defendant cause the damage that has been suffered. It is essential for this link to be substantiated (in addition to those mentioned above) if a negligence claim is to succeed.

*Modbury Shopping Centre v Anzil and Anzil No S335 (1999) SASC 335*

It was held that a landlord of a shopping centre had to pay damages of $205,000 to a worker who was bashed by unknown youths at 10pm as he walked through the centre’s unlit car park. The landlord was liable because there was a clear connection between his failure to light the car park and the likelihood of violent attacks.
**Remoteness of Damage**

The defendant will not be liable for damages that are too remote from the cause of damage. In other words, not liable for loss or injury that was not reasonably foreseeable. (see *The Wagon Mound No 1 Case* [1961] Vickery & Pendleton p97)

**Assessment of Damages**

- The aim of damages in the law of torts is to place the plaintiff in the position they would have been had the tort not occurred but not in a better position!
- Damages are assessed under the following ‘Heads of Damage’:
  - Non economic loss (pain and suffering);
  - Past economic loss (eg loss of actual earnings);
  - Loss of future earning capacity
  - Gratuitous services (eg home help etc provided by only certain family members, does not extend to friends providing assistance);
  - Future care (eg future paid help such as ‘Dial-an-Angel’ or ‘Jim’s Mowing’);
  - Past medical treatment – known as ‘special damages’. This is a quantifiable amount for things such as prescriptions, medical consultations;
  - Future medical treatment

**Defences to Negligence Actions**

(a) **Contributory negligence**

- A partial defence to a negligence action, *whereby although the defendant is admitting fault* (or liability as it is also known) at the same time he/she is seeking to attribute a portion of the fault to the plaintiff.
- The defendant must establish that the plaintiff failed to take reasonable care for their own safety, or their own property and that the failure to take care contributed to the damage suffered.
- The burden of proof falls upon the defendant, and the court *apportions* the damages awarded to the plaintiff based on the comparison of the plaintiff’s degree of lack of care from the standard of the reasonable person.

  For example, a plaintiff may be awarded $100,000.00 compensation. However, if found 40% to blame for their injury, that is the amount by which their $100,000.00 is reduced, leaving them with total compensation of $60,000.00.

(b) **Volenti non fit injuria - voluntary assumption of risk**

- This is a particularly difficult defence to establish but is a complete defence. Therefore, the defendant is accepting no liability or blame for the plaintiff’s injuries.
• The defendant must prove that the plaintiff has voluntarily assumed the risk of negligence - that the plaintiff was specifically aware of the risk and danger of injury of the defendant’s conduct and accepted that risk.
• “No wrong is done to the person who consents”.

Insurance Commissioner v Joyce (1948) 77CLR 39

The claimant suffered injuries in a motor vehicle accident when they were a passenger in a car driven by a drunk driver. As the claimant had voluntarily accepted a lift with a driver they knew to be drunk they were not entitled to any compensation.

Vicarious Liability

This is not a tort. Vicarious liability is where one party is liable for the actions of another, because of the relationship between the wrongdoer and the person held responsible. For example, an employer will be responsible for an employee’s acts and omissions which occur within the employee’s normal employment duties.

Product Liability

• Omissions or defects in the production process which result in the product not being used as it is intended are the most common forms of negligence in the marketplace.
• The form and design of the product may be unsafe, for example, coating a child’s toy with lead-based paint or manufacturing children’s garments using highly flammable materials.
• The duty to take reasonable care in the design of a product includes a duty to take care in choosing component parts.

A manufacturer will be responsible in the tort of negligence if;

(i) the manufacturer knows of the defect and still releases the product; or
(ii) the manufacturer produces a product that is inherently dangerous and does not give an adequate warning; or
(iii) the manufacturer owes a duty of care to the user, breaches its duty of care and the user consequently suffers damage.

A manufacturer owes a duty of care when:

the manufacturer sells the product in a form that shows the manufacturer intends the product to reach the consumer in the same form;
there is no reasonable possibility of intermediate examination;
the manufacturer knows that an absence of a reasonable standard of care in manufacture will result in injury to the consumer or their property.
Cases since Donoghue v Stevenson have extended the duty of care principle so that:
the duty is owed to any person that the goods could foreseeable harm;
applies to all classes of goods;
includes property damage as well as personal injury;
applies not only to manufacturers (but to repairers, importers, retailers, hirers, etc).

There are five important points about the duty of care in relation to product liability:

1. **Intention to reach the consumer in the same form.**
   - The manufacturer escapes liability if the goods have been tampered with by anyone after leaving the manufacturer.

   **Grant v Australian Knitting Mills (1933) 50 CLR 387**
   In this case the plaintiff, Grant, purchased a quantity of underwear from the defendant. To the plaintiff’s irritation, the underwear retained a residue of bi-sulphite which caused the plaintiff to suffer dermatitis. The manufacturer argued that consumers normally wash their underpants before wearing them. The court disagreed, saying it was normal just to buy and wear them.

2. **Intermediate Examination**
   - If the defect should be obvious to the consumer then the manufacturer escapes liability.
   - If the manufacturer puts the consumer on guard, drawing reasonable attention to potential defects, the manufacturer will generally not be liable.
   - A manufacturer will be liable if they fail to adequately warn potential customers of any risks or dangers associated with a product. In assessing the adequacy of a warning the court will generally consider;
     - the wording used,
     - the prominence or intensity of the warning,
     - the location of the warning.

   **Norton Australia Pty Ltd v Streets Ice Cream (1968) 120 CLR 635**
   Norton manufactured an adhesive with a clear warning “highly inflammable”. Workers used the adhesive near an open flame, with a resulting fire that damaged Streets’ factory. The High Court held that the warning was adequate.

3. **Standard of Care**
   - This raises the question of just how careful does the manufacturer have to be?
   - The manufacturer has to use reasonable skill and care in the circumstances (i.e. if the possible injury is very serious then the manufacturer will have a heavier duty).
Vacwell Engineering Co Ltd  BDH Chemicals (1969) 3 All ER 1681

BDH marketed a powerful chemical. They researched the properties of the chemical in one standard reference book. As it turned out the chemical would explode when mixed with water. And it did, causing damage. The court held that given the gravity of the possible consequences, the duty of care was very great. The marketers (defendants) should have extensively researched the properties of the chemical and provided an adequate warning.

4. **Res Ipsa Loquitur (The facts speak for themselves)**

When the facts indicate some negligence, the consumer does not have to prove how the manufacturer was negligent. The manufacturer has to prove that they did meet the standard of care. That is:

- that the manufacturing/handling system is foolproof, and
- its employees have not been negligent in operating the system.

5. **Avoidance of liability and contributory negligence**

The manufacturer will escape liability if it can show for example, that the retailer was negligent or contributory negligent in handling the goods. However, the manufacturer still has duties regarding handling, such as suitable packing that will be likely to reach the consumer unaltered.

**Occupier’s Liability**

Occupiers of premises owe a duty of care to all entrants to those premises to ensure they are not dangerous. This duty arises because of the occupier’s control over the premises.

**Shoeys Pty Ltd v Allan (1991) Australian Torts Reports 81-104**

A customer in the defendants store slipped on a piece of cabbage leaf. The defendant was found negligent due to a breach of their duty as an occupier.

**Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479**

The plaintiff, a shopper, slipped on the tiled floor of the foyer of a Safeways supermarket on a wet morning. Safeways was held to have breached the occupiers’ duty of care. Since this case the ordinary rules of negligence have applied to occupiers as they do to other persons who owe a duty of care.
Negligent Misstatement

If a person is giving advice in a professional capacity or holding himself or herself out as an expert, they owe a duty of care to the person being advised.

L Shaddock and Associates Pty Ltd v Parramatta City Council (1981) 55 ALGR 713.

In this case, incorrect advice was given by the Council to a developer concerning road widening proposals upon which the developer acted to his detriment. It was held that liability for the giving of information is not limited to commercial business activities. It extended to those supplying information and advice to others whom they knew would rely on it in circumstances which were reasonable to do so. Here, a public body had in its possession information inaccessible through other means and of importance to those by whom it was sought. Thus the Council had a duty to take reasonable care that the information it supplied was correct.

Motor vehicle accidents

Every driver on the road owes every other road user a duty of care.

DEFAMATION

“Defamation is the publication of a false statement (or other communication) that is likely to damage a person’s reputation”. (Vickery & Pendleton 2006).

Libel v Slander

When defamation is contained in a permanent form (eg letters, pictures, newspaper or films etc) it is libel;

When defamation is contained in a non permanent form (eg gestures or spoken word) it is slander.

Actual Loss

In an action for libel, actual loss (ie financial loss due to a downturn in business) does not need to be proved. However, in an action for slander which is less serious due to the fact that the defamation reaches only a small number of people, actual loss must be proved by the plaintiff.

Uniform Laws

The Federal Parliament has no constitutional power to make defamation laws – this is a residual power and as such lies with the individual states and territories. Uniform defamation laws have now been enacted with each state and territory passing its own Defamation Act 2005.
Prior to this there were eight defamation regimes (one for each state and territory) which led to ‘forum shopping’ where plaintiffs could choose to sue in the jurisdiction where they had the best chance of success.

As discussed in Vickery and Pendleton 2008, some of the main legislative changes are:-

- early settlements of actions are encouraged;
- a one year limitation period (from the date of the alleged defamation) for the commencement of legal action;
- damages for non economic loss capped at $250,000.00; and
- distinction between libel and slander no longer exists.

Establishing Defamation

- the statement must be capable of being defamatory.
- the statement must refer to the plaintiff
- the statement must be published (i.e. communicated in a form).
- the defendant must be unable to rely on a valid defence.

All of the above tests must be satisfied for a claim of defamation to be made out.

Defences to defamation

- Consent
- Substantial truth
- Fair comment
- Absolute privilege
- Qualified privilege
1. What is a tort? What are the possible remedies?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

2. In the law of negligence, what is the difference between the duty of care and the standard of care?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

3. Jerry has miscalculated the steady ongoing effort required to successfully complete his Legal Decisions subject, and is desperately cramming for his in-class test. Elaine is very sympathetic and orders and pays for the delivery of a “gourmet basket” containing Jerry’s favourite foods, including “Liver’s Grand Marnier Pate”. Ravenous and exhausted, Jerry immediately opens the sealed can of pate and consumes the contents immediately. Some 24 hours later, in gut-wrenching agony, he is admitted to hospital with chronic food poisoning which causes permanent damage. As a consequence he is unable to complete his in-class test, and lacks the qualifications to obtain the promotion he has long desired.

Advise Jerry and Elaine

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

___________________________________________________________________________
4. Lily has opened a shop named “Name of the Lily”. Whilst restocking the shelves, she drops a crate of Evening Lily Oil, which shatters and spills the oil upon the floor. The telephone rings and Lily answers the call. Meanwhile, a customer, Herman, enters the shop and slips on the oil, breaking his leg. Advise Herman.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

5. Mulder is a particularly creative person and is constantly producing new inventions, particularly in the field of electronic games. His main competitor, Mary is infuriated by the success of his most recent product, an electronic game based on alien invasion of the earth, targeted at children under 10. Mary begins to spread evil and untrue rumours about Mulder’s private and professional life. The rumours appear to be affecting the sales of the game. Advise Mulder.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________
6. Using case examples, explain the meaning of negligent misstatement, and its importance to the conduct of business.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

7. Explain the meaning and importance of the term ‘vicarious liability’.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

8. Briefly explain what liability, if any, an auditor owes a person who invests in a company because they rely on the auditor’s report.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

9. Outline at least three defences that may be available to a person who has made defamatory comments about a work colleague via e-mail.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________
### Lecture 4 & 5

<table>
<thead>
<tr>
<th>Learning Outcome</th>
<th>Learning Outcome 5</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Describe and explain the formation, operation and termination of contracts as they affect business activities.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Required Reading</th>
<th>Vickery and Pendleton 6th ed. - Chapters 8-17</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Activities</th>
<th>Activities in workbook</th>
</tr>
</thead>
</table>

### Key Terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Breach</td>
<td>The failure of a party to a contract to perform contractual obligations. The commission of the breach of contract provides one of the contracting parties (the promisee) with a right to claim damages.</td>
</tr>
<tr>
<td>Civil Law</td>
<td>The branch of law that concerns disputes between private parties (i.e. individuals).</td>
</tr>
<tr>
<td>Common Law</td>
<td>The body of judge made law (case outcomes).</td>
</tr>
<tr>
<td>Condition</td>
<td>An important term in a contract for which a breach may give one party the right to rescind the contract.</td>
</tr>
<tr>
<td>Consideration</td>
<td>The notion of something for value that passes between parties to a contract. It is a necessary element for a simple contract to exist.</td>
</tr>
<tr>
<td>Contract</td>
<td>A legal agreement.</td>
</tr>
<tr>
<td>Damages</td>
<td>An award of money made by a Judge.</td>
</tr>
<tr>
<td>Deed</td>
<td>An instrument that has been signed, sealed and delivered which passes an interest, right or property, onto another.</td>
</tr>
<tr>
<td>Disclaimer Clause (also referred to as an Exclusion Clause or Waiver)</td>
<td>A statement or written clause that allows one party to exclude / reduce liability or responsibility.</td>
</tr>
<tr>
<td>Distinguishing</td>
<td>Where a court avoids following a precedent on the basis that the material facts differ in the case before it.</td>
</tr>
<tr>
<td>Duress</td>
<td>An act done by one person to another for the purpose of applying pressure or undue persuasion to enter into a contract, or other benefit.</td>
</tr>
<tr>
<td>Formal Contract</td>
<td>A document, which is sealed and delivered and intended to take effect as a deed in compliance with legislative requirements. Does not need to have consideration present to be binding.</td>
</tr>
<tr>
<td>Frustration</td>
<td>The situation where a contractual obligation has, without the fault of either contracting party, becomes incapable of being performed. E.g. as a result of an “Act of God”.</td>
</tr>
<tr>
<td>Genuine Consent</td>
<td>Parties to the contract have been able to reach a meeting of the minds. i.e. those parties to the contract have fully informed consent as to the nature and contents of the contract.</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Injunction</td>
<td>An order to stop something.</td>
</tr>
<tr>
<td>Intention</td>
<td>Parties to the contract wish to enforce the contract (i.e. intend to create a legally binding relationship.</td>
</tr>
<tr>
<td>Invitation to Treat</td>
<td>A request to others to make an offer to engage in negotiations with a contract in mind. E.g. Auction, tender</td>
</tr>
<tr>
<td>Legality</td>
<td>The contract contents are not in conflict with common or statute law.</td>
</tr>
<tr>
<td>Legal Capacity</td>
<td>Where the parties to a contract have full capacity to contract in the law (i.e. sober, solvent adults).</td>
</tr>
<tr>
<td>Misrepresentation</td>
<td>A representation, which is not, based on true facts and thus renders the contract voidable.</td>
</tr>
<tr>
<td>Mistake</td>
<td>The situation where a parties error or misapprehension will affect the validity and enforceability of a contract.</td>
</tr>
<tr>
<td>Negligent Misstatement</td>
<td>A statement of fact, advice, or opinion made in a business context, which is inaccurate or misleading.</td>
</tr>
<tr>
<td>Non Est. Factum</td>
<td>“Not my deed”. Where the contract is argued to be fundamentally different to a previous document, or the belief in the contents of the document they are signing.</td>
</tr>
<tr>
<td>Presumption</td>
<td>A starting point in law (similar to a rule but not applied as strictly).</td>
</tr>
<tr>
<td>Quantum Meruit</td>
<td>“As much as he/she has earned” An award of compensation for work performed under a contract, which has not been completed as a result of a breach.</td>
</tr>
<tr>
<td>Restraint of Trade</td>
<td>Contract, which contain a clause, which restricts the contracting parties’ ability to apply their trade.</td>
</tr>
<tr>
<td>Seal</td>
<td>An impression or mark attached to a document to indicate authenticity and formal nature of document.</td>
</tr>
<tr>
<td>Simple Contract</td>
<td>Everyday contracts. May be in writing or oral. Must contain the six essential elements to be binding on the contracting parties.</td>
</tr>
<tr>
<td>Specific Performance</td>
<td>An order by the court requiring the performance of contractual obligations.</td>
</tr>
<tr>
<td>Unconscionable Conduct</td>
<td>This may arise if a party in a superior bargaining position has gained an unfair advantage by overcoming the will of a weaker person or a person with a disability and has deprived that person of independent judgement.</td>
</tr>
<tr>
<td>Undue Influence</td>
<td>Undue influence is the improper use of influence by a dominant party to obtain consent to a contract by the weaker party, which will benefit the dominant party.</td>
</tr>
<tr>
<td>Unenforceable contracts</td>
<td>A contract, which may be valid in substance but cannot be enforced because of some technical defect.</td>
</tr>
<tr>
<td>Void</td>
<td>A contract, which will not be enforceable due to an essential element missing in the contract.</td>
</tr>
<tr>
<td>Voidable</td>
<td>Because of the conduct of one party, or certain circumstances, one party may have the option to withdraw from the contract.</td>
</tr>
<tr>
<td>Warranty</td>
<td>Minor clause / term in a contract that if breached, may give rise to an action for damages.</td>
</tr>
</tbody>
</table>

**FORMATION OF A CONTRACT**

A valid contract is an agreement between two or more parties, whereby legal rights and obligations are created that the law will enforce.

- All contracts are agreements but not all agreements are contracts. There are two types of contract – **formal** contracts and **simple** contracts. For an agreement to be a valid contract, and therefore create rights and obligations enforceable by law, six essential elements must be present.
Intention to Create Legal Relations

The parties must have intended to create a legal relationship, rather than simply a domestic or social agreement.

Offer and Acceptance or Agreement

The agreement must be reached as a result of the offer made by one party being accepted by the other party.

Consideration or Form

Consideration or form must be present. A simple contract requires the presence of consideration. Consideration is the exchange of a benefit and burden by each party. It is the exchange of something of value, and is essentially the price of the bargain struck. If the contract is a formal contract it does not require the element of consideration to be valid, but instead requires that the contract be written in a particular form, being a deed.

Legal Capacity

The parties to the contract must have full legal capacity to contract. Basically, solvent, sober adults have full capacity. A company is a separate legal entity and thus has legal capacity under the guidance of its directors. Partners may contract on behalf of the partnership. Minors, intoxicated or insane people, bankrupts and hostile aliens do not have full contractual capacity.

Genuine Consent

A legally enforceable contract is about fully informed parties reaching a meeting of minds as to the essence and terms of an agreement. If, for some reason, the consent given to the agreement is not genuine the contract may not be valid. Consent may not be genuine due to a variety of reasons including mistake, misrepresentation, duress undue influence or unconscionable conduct.

Legality of Object

The object of the contract must be legal for the rights contained within it to be enforceable. If the parties contract to enter into an activity that is illegal, then the contractual arrangement may not be valid.

- These elements will be examined in greater detail following our discussion of the classification of contracts and relevant contractual terminology.
CLASSIFICATION OF CONTRACTS

Contracts may be classified in various ways including;
- by the manner of their formation,
- by the status of their validity, or
- by the extent of performance of the parties’ obligations.

Classification as to the manner of formation

(a) Simple Contracts:
- Depending on the subject matter of the contract, formation of the contract may be implied by conduct, may be verbal, ‘evidenced in writing’ or in writing.
- Formation of the contract does not require witnesses.
- **Must have consideration to be valid.**
- Pursuant to the South Australian *Statute of Limitations Act*, action may be taken upon breach of the contract up to 6 years from the time the cause of action arose.
- Some simple contracts must be in writing or they will be void, for example negotiable instruments, assignments of copyright, contracts involving consumer credit and contracts involving real property.

(b) Formal Contracts:
- A formal contract must be in writing and conform to specific requirements to be valid.
- A formal contract may be either;
- a **contract of record** – wherein the court, usually against the wishes of one party, imposes certain obligations upon them; or
- a **deed or contract under seal** – a contract which must be signed and witnessed by at least one person who is not a party to the deed. The document no longer needs to physically have a seal upon it, but it commonly bears the words ‘under seal’.
- Once a contractual obligation is contained in a formal contract, the parties usually have no legal grounds to dispute their obligations.
- A formal contract **does not require consideration to be valid**, although consideration may be present.
- Pursuant to the South Australian *Statute of Limitations Act*, action may be taken for breach of the contract up to 15 years from the time the cause of action arose.
- Examples include promises of gifts, powers of attorney and certain company contracts.
Classification as to validity

(a) Valid contracts

A valid contract is legally binding upon all parties concerned. All essential elements are present and the rights and obligations agreed to are enforceable at law.

(b) Void contracts

A void contract has an essential element missing from the alleged agreement, and consequently the alleged agreement has no legal effect.

(c) Voidable contracts

A voidable contract can be enforced by only one party against the other. Essentially, because of the conduct of one party, or certain circumstances, one party may have the option to withdraw from the contract, (to avoid it), or instead to compel the other party to continue with the contract.

For example, if one party has entered the contract relying on a misrepresentation made by the other party, the innocent party has the choice whether to continue with, or withdraw from the contract. If the innocent party chooses to continue with the contract it has the same effect as a valid contract.

(d) Unenforceable contracts

An unenforceable contract may be valid in substance but cannot be enforced because of some technical defect, such as a requirement that the contract be in writing or witnessed.

(e) Illegal contracts

An illegal contract is void due to its purpose or form contravening common law or a statutory provision.

Classification as to performance

This has reference to the extent to which the parties have commenced or completed the performance of their contractual obligations.

(a) Executed contracts - where at least one party has performed their side of the bargain

(b) Executory contracts – where both parties still have obligations to perform; neither party has completely fulfilled their side of the bargain.
INTENTION TO CREATE LEGAL RELATIONS

The intention to create a legal relationship is the intention to undertake legal action and eventually perhaps litigation if the contract is breached in any way. As previously stated, not all agreements are contracts. It is necessary for the first of these essential elements to be present. Where there is a dispute as to the presence of the required intention, the law has adopted the following two presumptions or starting points:

(a) In domestic and social agreements the parties do not intend to create a legal relationship unless there is evidence to the contrary.

(b) In commercial or business agreements the parties do intend to create a legal relationship unless there is evidence to the contrary.

Domestic and Social Agreements

Agreements between husbands and wives who have not legally separated are likely to lack legal intention, although agreements made after separation may be sufficient to overcome the presumption.

Balfour v Balfour (1919) 2KB 571

The defendant was a civil servant working in Ceylon. When he was home on leave in England it was agreed that his wife would not return with him to Ceylon, due to her poor health. The defendant promised to pay his wife $30 a month as maintenance while he was in Ceylon. When he failed to do so, the plaintiff sued for breach of contract. It was held that no contract existed as there was no evidence to rebut the presumption that there was no intention to create and enforce legal relations in these circumstances.

Friends and colleagues often combine to purchase lottery tickets and the like, and all contributors’ names are not necessarily registered with the lottery organiser. Do they have a contract with their friends that they can enforce to ensure they receive a share of the winnings? Courts have tended to say yes, there is sufficient intention to overcome the presumption.

Simpkins v Pays (1955) 1WLR 975

A lottery ticket holder was ordered to share his winnings with two other contributors to the group owned tickets.
When one intends to enter into a contract with a family member or friend, the agreement should be made very clear and preferably its terms should be recorded in writing. To overcome the presumption, the court will examine each party’s conduct and apply an objective test, namely, what would a reasonable person in those circumstances have concluded. Factors which will be taken into consideration to rebut the domestic presumption include;

- severity of consequences if the agreement is not upheld,
- clarity of terms of the agreement,
- any legal assistance obtained,
- evidence of a strong commercial flavour to the agreement.

These factors were identified in the case of *Wakeling v Ripley (1951) 51 SR (NSW) 183*. Briefly, the defendant was a bachelor living in Australia and the plaintiffs were his sister and brother-in-law who agreed to move from England to Australia at the defendant’s request. The defendant promised via letters between the parties that if the plaintiffs came to Australia, they would be given a home and a living, and the defendant’s property would be inherited by his sister upon his death. Subsequent to the move to Australia, the defendant disinherited his sister. It was held that a contract did exist in this case.

**Business Agreements**

Business or commercial agreements raise the presumption that there is an intention to create legal relations. This presumption can be rebutted by evidence that there was clearly no intention to create a legally binding agreement. The most effective way of rebutting this presumption is by including an express term in the agreement that no legal relationship was intended, such as an ‘honour clause’.

**Rose & Frank Co v Crompton Bros Ltd (1925) AC 445**

Three companies entered into a written agreement for supply of various product. The agreement contained a clause which stated that the agreement was not a legal one and ‘shall not be subject to legal jurisdiction in the law courts’, but was instead merely a pledge ‘based on mutual loyalty and friendly cooperation’. When one of the companies was sued for breach of contract it was held that the honour clause was sufficient to rebut the presumption that a legal relationship had been intended between the parties.

A similar clause, asserting that the agreement was ‘binding in honour only’ was relevant in the case of *Jones v Vernon’s Pools Ltd (1938) 2 All ER 626*. The plaintiff sued to recover money on a winning pools coupon which he alleged he had posted and the defendant had lost. The honour clause was relied on successfully by the defendant; therefore the plaintiff had no contract upon which to sue. Today, such a situation may have been successfully resolved by the plaintiff by the use of the *Trade Practices Act* and its provisions regarding misleading and deceptive conduct and unfair trade practices.
OFFER AND ACCEPTANCE

For an agreement or a meeting of minds that forms the basis of a contract to exist, one party must have made an offer which the other party has accepted. A contract cannot be valid unless the parties agree on the essential terms. Agreement exists where the offeror makes an offer to the offeree and the offer is accepted by the offeree.

An offer is a definite intention to be bound on certain terms if those terms are accepted by the offeree. Offers and acceptances may be either express or implied. The following rules have been developed

Offer

(a) The offer must be communicated to the offeree. It may seem obvious, but until the offer is communicated, the offeree cannot act upon it. Further, all terms of the offer must be communicated, or there cannot be held to have been a true meeting of minds. Offers by post are deemed not to have been communicated until received by the offeree.

(b) To whom may the offer be made?

- to a particular person, in which case only that person can accept;
- to a particular class or group of persons, in which case only a member of that class or group can accept;
- to the world at large, in which case anyone can accept providing they satisfy the conditions of the offer.

Carll v Carbolic Smoke Ball Co (1893) 1 QB 256

The defendant placed an advertisement in various newspapers offering a $100 reward to any customer who used their product in accordance with the instructions but who nevertheless contracted a cold or influenza. The defendant also placed $1000 in a special bank account to establish it’s sincerity. The plaintiff purchased and used the product, and still caught influenza. She sued the defendant for the promised reward. The defendant argued that there was no offer. It was held that there had been a clear offer made to the world at large.

(c) An offer must be distinguished from an invitation to treat. An invitation to treat is an invitation to make an offer. For example, the display of merchandise in a shop window or supermarket shelf is not an offer by the shopkeeper. It is in fact an invitation to the customer to make an offer to purchase those goods, which offer is usually made by the customer presenting the goods to the shop assistant for purchase, and, accepted by the act of the shop assistant ringing up the sale and receiving payment.
Thus, invitations to treat cannot be accepted to conclude an agreement – they must be responded to with an offer, which then could be accepted to form the agreement. The following is a leading case on point.

**Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd.**
(1952) 2 QB 795

The defendant established the first self service chemist shop in Britain. The plaintiff sued the defendant for breaching health regulations that required certain prescribed drugs to be sold under the supervision of a qualified pharmacist. The plaintiff claimed that the display of the goods on the shelves was an offer, and when the customer took goods from the shelf, there was acceptance, and hence the sale was not supervised. It was held that the display of the goods was merely an invitation to treat, the offer being made by the customer when the goods were presented for purchase at which point the pharmacist could accept or reject the offer.

Tenders, auctions and some advertisements may also be considered to be invitations to treat.

(d) **A request for information or response to a request for information is not an offer.** See *Harvey v Facey* (1893) AC 552 (ABL 195)

(e) **An offer may be conditional.** For example, the offeror may specify conditions to be followed by the offeree, such that acceptance is to be received by courier within 24 hours of the offer being made.

(f) **An offer may be revoked at any time prior to acceptance.** Revocation occurs when it is communicated to the offeree prior to acceptance. Revocation by post takes place when it received by the offeree. Revocation does not have to be communicated by the offeror personally, it can be done by another person on behalf of the offeror or it can be done unintentionally.

**Dickinson v Dodds** (1876) 2 Ch D 463

On June 10, Dodds offered to sell his house to Dickinson for a certain price and indicated that the offer would close on 9.00am June 12. On 11 June, Dodds sold the house to someone else. On 11 June, Dickinson was informed of the sale of the house by Berry. Dickinson ignored the message from Berry and attempted to accept the offer a few minutes before 9.00am on June 12. It was held that acceptance had not occurred as Dodds had revoked the offer to Dickinson by selling it to someone else and the revocation had been communicated to Dickinson prior to his attempted acceptance, by the reliable third party, Berry.
Therefore, even if an assurance has been given that an offer will remain open for a particular period this is not binding upon the offeror. **At this point, an offer must be distinguished from an option.** An option is a means by which an offer may be kept open for a specific period of time without fear of revocation or withdrawal. An option is a contract which exists beside the primary offer. It is a separate contract supported by consideration to ensure the primary offer remains open to the offeree for a specified period.

For example, Jerry offers to sell George his car for $1000. George wishes to consider the matter and requests that Jerry refrain from selling the car to anyone else for three days, (i.e. to keep the offer open for three days). However, even if Jerry agrees, if there is no consideration to support the agreement, there is no legal obligation upon Jerry to refrain from selling. However, if George offers Jerry $10 to keep the primary offer open for three days, and Jerry accepts, a simple option contract exists. Jerry is legally obligated to abide by his agreement.

**Ebay**

Goods listed on eBay are likely to be regarded an as offer rather than an invitation to treat.

**(g) An offer may lapse:**

(i) Through non acceptance within the specified time, or if no time is specified, within a reasonable time. What amounts to a reasonable time will be determined by the nature of the subject matter and the manner in which the offer was communicated.

(ii) Through rejection of the offer.

(iii) When a counter offer is made. For example, if B offers to buy A’s car for $500, A says no, I’ll take $700, and B then says no. A says, I’ll accept your offer of $500, we have a deal. There is no contract because the original offer of $500 has lapsed due to the making of the counter offer of $700.

(iv) On the death of either party prior to acceptance.

(v) By loss of contractual capacity by either party – eg by bankruptcy, insanity etc

**Acceptance**

**(a) Acceptance must be made in response to and in reliance upon the offer.**
Crown v Clarke (1927) 40 CLR 227

Clarke was arrested and charged with murder. He then gave information that led to the conviction of the real murderers. Before Clarke was arrested he was aware that the state government had offered a $1000 reward for information leading to the conviction of the murderers. After the conviction, Clarke claimed the reward. It was held that he was not entitled to the reward because he had given the information to escape the murder conviction and was not relying on the offer of the award when he gave the information.

(b) Acceptance must be unconditional and unqualified. If the offeree qualifies the offer, for example, introduces another term or changes a term in the offer, a counter offer is made and the original offer lapses.

(c) Only the person or class of persons to whom the offer has been made (or their agent) can accept the offer.

Powell v Lee (1908) 99 LT 284

Powell applied to become the headmaster of a school. The school board decided to appoint him, and one of the board members, without the knowledge of the others, informed Powell. When the board reversed its decision and appointed another applicant, Powell sued for breach of contract. He argued that acceptance of his offer to become headmaster had been communicated to him by an authorised agent of the school. It was held that no contract existed because the acceptance had not been communicated to him by a properly authorised agent of the school.

(d) Acceptance cannot be revoked without consent of the offeror. Once acceptance to an offer has been given, there is no longer an ‘offer’ and an ‘acceptance’ – there is instead a merging of the two to form an agreement.

(e) Acceptance must be communicated to the offeror to be valid in most instances. Acceptance must be expressed in words or implied by conduct. Silence does not constitute acceptance.

Felthouse v Bindley (1862) 11 CB (NS) 869

The plaintiff’s uncle sent a telegram to the plaintiff stating ‘I will buy your horse for $30 and if I hear no more I will consider it mine’. The nephew decided to sell the horse to the plaintiff but did not communicate this to him. There was some confusion and the horse was in fact sold to Bindley. The issue was whether the nephew had accepted the offer. It was held there was no acceptance, as silence cannot constitute acceptance.
There are some exceptions to the rule re communication of acceptance, including instances as in the Carbolic Smoke Ball case, where the offer was made to the world at large or when the offer in question is accepted by the doing of some act.

Acceptance by instantaneous communication generally occurs when it is received – when parties negotiate by telephone, telex or fax, they are deemed to reach agreement when the offeror receives advice of the offeror's acceptance.

Fax and E-mail acceptances may be summarised as follows:

- An acceptance by fax sent during regular business hours probably occurs when it reaches the offeror’s fax machine, not when it is read by the receiver.
- If the parties agree to negotiate by e-mail, acceptance would most likely be communicated when the offeror ‘logs into’ the e-mail system.

(f) **Acceptance must be made in the manner specified in the offer to be valid.** If no manner is specified in the offer, then any form reasonable in the circumstances will be valid.

(g) **Acceptance must be made within the time specified in the offer to be valid,** or if no time is specified, within a reasonable time having regard to the circumstances.

(h) **The postal rule exception** provides that when acceptance is made by post, the acceptance is deemed to be effective from the time at which it is placed in the post box and not at the time at which it is ultimately received by the offeror. The postal rule exception applies only if the post is contemplated as a mode of acceptance of the offer, the letter has been carefully addressed and the required postage fees have been paid. Today, usual business practice provides that where offer and acceptance is conducted by post, the offeror usually includes a term that acceptance will not be effective until actually received. Note also that the Consumer Credit Code now provides that any consumer credit document will be considered delivered either on the date it bears or the date on which it would normally have been received by post.

---

**Elizabeth City Centre Pty Ltd v Corralyn Pty Ltd (1994) 63 SASR 235**

Corralyn sought to renew its sub-lease of shop premises by sending a letter of acceptance to Elizabeth City Centre within the specified time. The letter was allegedly never received by the company and the sub-lease was not extended. The sub-lease provided that a notice sent by certified or registered mail was deemed to be served on the third business day next, following the day on which it was posted.

It was held that the clause governing notification by mail had the effect of impliedly excluding the operation of the postal acceptance rule. The notice had not been received by Elizabeth City Centre and therefore Corralyn had not exercised its option to renew the sublease. The court said that the postal acceptance rule will be excluded where an uncommunicated acceptance was not intended by the parties.
CONSIDERATION

(a) **Consideration is essential to the validity of every simple contract**

(b) **Consideration is the exchange of a benefit and burden by parties to a contract.**
    For example, a simple contract of sale and purchase of a loaf of bread. The customer accepts the burden of relinquishing money to the shopkeeper and in exchange receives the benefit of the ownership of the bread. The shopkeeper in turn accepts the burden of relinquishing a loaf of bread, but receives the benefit of the ownership of the customer’s money.

(c) **Consideration is therefore the bargained for price.** Consideration is something of value promised, given or foregone.

Consideration may be:

1) A promise for a promise. This is known as future or executory consideration, because both parties promise to carry out their agreed conduct at a later date. If all other essential elements are present, the contract is formed when the promises are made
2) An act for a promise. This could include paying money, performing a service or handing over property. This is known as present or executed consideration.
3) Forbearance, where something of value is foregone, or by the promisee (the person to whom the promise is made) refraining from doing something which they have a legal right to do, such as refraining from bringing a court action. Here consideration may be present or future depending on the circumstances.

(d) **Consideration must be present or future but not past.** Past consideration is of no legal effect and no value.

**Roscorla v Thomas** (1842) 3 QB 234

After Thomas sold Roscorla his horse, Roscorla demanded and received a promise from Thomas that the horse was sound and free from vice. When the horse proved vicious, Roscorla sued for breach of contract. It was held that as the promise had been given after the sale had been completed, no consideration had flowed to Thomas and he could not be held liable for breach of contract.

(e) **As long as consideration exists, the court is not concerned with its adequacy.** It is up to the parties to determine the nature of their bargain. As long as there exists an exchange of a benefit and burden between the parties, the court has no interest in the commercial proportionality of that exchange.
Chappel & Co Ltd v Nestlè Co Ltd (1960) AC 87

The defendant company had an advertising promotion for chocolate bars which offered to consumers a choice of records in exchange for a set cash payment plus the wrappers of three chocolate bars. There was a dispute with the owner of the copyright of one of the songs on one of the records. The issue was whether the selling price of the record, on which royalties payable were calculated, included the value of the three empty chocolate wrappers or whether the selling price referred to the cash sum only. The owners of the copyright claimed that the wrappers doubled the value upon which the royalties were calculated.

The defendant company argued that the sending in of the wrappers was simply a condition that had to be met in buying the records, since the wrappers were of no value to Nestle.

It was held that the wrappers were part of the selling price of the records. The fact that the wrappers were of no value to Nestle was irrelevant. The consideration for the contract was the money and the value of the three chocolate bars. By making them an essential part of the promotion Nestle had given them the status of good consideration.

(f) Consideration must not be unlawful.

(g) Consideration must be possible to perform.

(h) Consideration must not be too vague or indefinite.

(i) The performance of an existing contractual or legal duty is not good consideration. This is because the party would be doing nothing more than they were already required to do.

(j) Consideration must move from the promisee to the promisor, or to someone nominated by the promisor.

(k) Generally, part payment of a debt is not regarded as sufficient consideration to discharge the party’s obligations. See Foakes v Beer (1884) 9 App Cas 605. Exceptions to this rule include;

- where payment of a lesser sum is made before the due date,
- where transfer of ownership of a tangible item or part payment plus transfer of a tangible item takes place,
- where a lesser amount is paid at a different place or in a different currency,
- where a lesser amount is paid by a third party not bound by the contract,
- by reliance on the defence of promissory estoppel, in some circumstances a contract can be altered despite a lack of consideration being provided for the altered promise.
LEGAL CAPACITY OF PARTIES

There are certain classes of people who are considered at law to lack full capacity to contract. This may have serious consequences for the party with whom they have entered into an apparent contract.

Minors

The age of 21 historically had special significance. Legally it was at that age a person obtained their majority and its consequent rights and obligations. Further it was until this age that the common law considered that a person needed legal protection because of their supposed inexperience, vulnerability and lack of understanding of legal rights and duties. The age of majority was lowered in South Australia to 18 by the age of Majority (Reduction) Act 1970-74.

The significance of commercially dealing with a minor is that a contract with a minor is unenforceable against him or her and is voidable by the minor except in limited circumstances. In South Australia the rules are as follows;

(a) **A minor can enforce the contract against the adult party.**

(b) **Contracts which do not fall within the categories of exception are voidable at the option of the minor.** It is the responsibility of the adult party to ensure the capacity of the party with whom they are dealing.

(c) **Contracts which fall within the categories of exception are;**
   - cash contracts
   - contracts for necessaries
   - beneficial contracts of service

(d) **A minor cannot avoid a cash contract.**

(e) **A minor can make valid contracts for the “supply of necessaries”**.

   The goods must be necessary to the minor’s “station in life”;
   (a) the minor must not already have an adequate supply of the goods;
   (b) necessaries include such things as food, clothing, transportation, medical and hospital attention.

---

*Nash v Inman (1908) 2 KB1*

The defendant ordered several embroidered waist coats. They were held not to be necessaries, because although waist coats were required for the defendant’s ‘station in life’, he already possessed an adequate supply.
**Bocjczuk v Gregorcewicz (1961) SASR 12**

An 18 year old Polish girl wished to immigrate to Australia even though she had a good job. She persuaded a relative, Bocjzuk to forward her the money for the passage to Australia and promised to repay him. When she did not, he sued for breach of contract for necessaries. It was held not to be a contract for necessaries because the defendant had satisfactory employment in Poland.

(c) **A minor can make a valid contract for a “beneficial contract of service”**. These include contracts for employment deemed to be for the benefit of the minor and for the education of the minor. The adult wishing to enforce the contract has the burden of establishing that the contract as a whole benefits the minor.

**Roberts v Gray (1913)1 KB 520**

The defendant, a minor, agreed to take part in a world billiard playing tour with other players and then wished to cancel the agreement. It was held to be a beneficial contract of service as the defendant would have received valuable instruction from the other players.

**In South Australia**, contracts with minors are also regulated by the *Minors’ Contracts (Miscellaneous Provisions) Act 1979*. The Act provides that in relation to contracts which may be considered at common law to be voidable by minors, a minor is bound if he or she affirms in writing the unenforceable contract after reaching 18 years of age. The contract remains unenforceable if the minor does not affirm the contract.

The Act also provides that a person who guarantees a minor’s contractual obligations will be bound by that guarantee, as if the minor had been an adult when making the contract that establishes the liability.

**Insanity and Intoxication**

If a person is insane or intoxicated when they enter into a contract for non-necessary items, the contract is voidable by that person if –

(a) that person can show that she or he did not understand what they were doing as a consequence of their condition and

(b) the other party was aware of that condition and

(c) they withdraw from the contract within a reasonable time of their regaining their sanity or sobriety.

If the contract is for necessary items, the contract is valid in any event, although only a reasonable sum can be charged for the items.
Bankrupts

A declaration of bankruptcy does not deprive a person of their capacity to enter into contracts, however the *Bankruptcy Act 1966 (Cmth)* provides that a bankrupt must disclose their bankruptcy if –

- business is carried on in other than the bankrupt’s name or
- credit in excess of $3360 is sought.

Corporations

As you are aware, a corporation is a separate legal entity and has its own contractual capacity. It can sue, be sued and own property but cannot enter a contract for personal service.

Hostile Aliens

An alien is any person who is not an Australian citizen. ‘Friendly’ aliens during war or peace time have no relevant restrictions upon their contractual capacity. Hostile aliens, i.e. persons against whom Australia may be at war, cannot enter into a contract or exercise rights or remedies under existing contracts.

REALITY OF CONSENT

Genuine consent or reality of consent means that all parties to the contract honestly and genuinely agree to the terms of the contract, that they have reached a true meeting of minds. Without consent there is no agreement and therefore the contract may be either void or voidable. Genuine consent may be absent because of;

1. Mistake of fact
2. Non est. factum
3. Fraudulent or innocent misrepresentation
4. Undue influence
5. Duress
6. Unconscionable conduct

Mistake of fact

Firstly, mistake of law has no effect upon a contract. Each person is deemed to be aware of the law and its effect – ignorance of the law is no excuse.

Mistake of fact may affect the validity of the contract. However, if a person misunderstands the subject matter of a contract or makes an error of judgement, that person has no right to be released from the contract as a result. The following mistakes of fact are recognised by common law.
(a) **Common Mistake**

This occurs where each party makes the same mistake and the mistake concerns a basic fact of the contract. For example, both parties believed that the subject matter existed when the contract was made, but unknown to them, it had been destroyed. In this instance, the contract would be void.

**Pritchard v Merchant’s and Tradesman’s Mutual Life Assurance Society** *(1858) 140 ER 885*

Here a life assurance contract was held to be void for common mistake of fact because the person paying the premium and the insurance company wrongly believed that the person being insured was alive when they made the agreement.

**McRae v Commonwealth Disposals Commission** *(1950) 84 CLR 377*

In this case the defendant could not rely on common mistake as its conduct implied a promise made to McRae that the sunken vessel, for which he tendered to recover, actually existed.

**Leaf v International Galleries** *(1950) 2KB 86*

Leaf purchased a painting from the defendant believed by both parties to be a Constable. When he tried to sell it five years later, it was discovered that it was not. He claimed the contract was void for common mistake. The court held that mistake as to the quality of the item, (i.e. who painted the picture) did not effect the validity of the contract.

(b) **Mutual Mistake**

This occurs where both parties make a mistake but it is a different mistake. If the mistakes go to the essence of the contract, if the mistakes are such that it can be said there has been no true meeting of minds, then the contract may be void.

**Raffles v Wichelhause** *(1864) 2 H&C 906*

The plaintiff contracted with the defendant for the transport of a quantity of cotton from Singapore to England. The cotton was to sail on the vessel *The Peerless*. Unfortunately there were two vessels named *The Peerless* having sailing dates three months apart. There was held to be no binding contract, as due to confusion over the two ships bearing the same name, there was no true meeting of minds.
(c) **Unilateral Mistake**

In this situation, only one party makes a mistake of fact, but the other party knows or ought reasonably to know of the mistake, and does not inform the mistaken party. If the mistake has substantially effected the bargaining position of the mistaken party, the contract may be voidable at the option of the mistaken party, or, in some instances, simply void.

The mistake may involve the existence or content of a term, or be as to the identity of the party with whom the other party is dealing.

**Hartog v Colin & Shields** *(1939) 3 ALL ER 566*

A supplier who had negotiated to supply 30,000 hare skins for an agreed price per skin, mistakenly contracted to supply them for a price based on weight. This meant that the supplier would have received only one third of the negotiated price. The supplier refused to deliver the skins at that price and the buyer sued for breach of contract. It was held that since the buyer must have been aware of the mistake, the contract was void.

**Cundy v Lindsay** *(1878) 3 AC 459*

Lindsay received an order by letter for a quantity of handkerchiefs from Blenkarn, who claimed to represent a well known and reputable company Blenkiron and gave an address similar to that of the company. After Lindsay delivered the goods to the address, Blenkarn failed to pay, and sold the goods to Cundy, who knew nothing of the fraud. It was held that Cundy had not acquired good title to the goods, because the apparent contract between Blenkarn and Lindsay was void on the grounds of unilateral mistake, as Lindsay had clearly intended to deal with the Blenkiron company and not Blenkarn.

**Non est. factum**

*Non est. factum* literally means “not my deed”, and may arise where a person has been mistaken about the nature of the document they are signing, ie. they think they are signing a guarantee but the document is really a mortgage.

The defence is very limited and is only available if:

- the person believes the document they have signed is fundamentally different to the actual document; and
- the person is unable to read owing to blindness or illiteracy and must rely on others for advice as to what they are signing and through no fault of their own are unable to have any understanding of the purport of a particular document; and
- the person must not have been careless or negligent is signing the document.
**Misrepresentation**

A representation is a statement of fact. Misrepresentation in contract occurs when a person is induced to enter a contract because of reliance on a false statement of fact, as a consequence of which they suffer loss.

The following do not normally qualify as misrepresentations at common law;

- statements of law,
- statements of opinion
- advertising “puffs”, which are obvious exaggerations of the attributes of an item or service for the purpose of advertising,
- silence, (although there are exceptions, including where there exists a duty of full disclosure or if the statement maker subsequently discovers the statement made is no longer true.)

There are three types of misrepresentation;

- fraudulent (deliberate) misrepresentation,
- innocent misrepresentation, and
- negligent misrepresentation.

(a) **Fraudulent Misrepresentation**

   (i) it must be a statement of past or present fact, not opinion or judgement;
   (ii) it must be false;
   (iii) the party who made it must know it is false or must not care whether it is true or false;
   (iv) the party who makes it must intend the other party to act in reliance upon it;
   (v) the other party does act in reliance upon it;
   (vi) the innocent party must suffer loss or damage.

(b) **Innocent Misrepresentation**

   (i) It must be a statement of past or present fact, not opinion or judgement;
   (ii) it must be false;
   (iii) the party who makes the misrepresentation must believe that the misrepresentation is true;
   (iv) the party who makes the statement must intend the other party to act in reliance upon it;
   (v) the other party does act in reliance upon it;
   (vi) the innocent party must suffer loss or damage.
(c) Negligent Misrepresentation or Negligent Misstatement

(i) a duty of care must be owed by one party to the other, for example, solicitor/client, accountant/client;
(ii) the party owing the duty of care must negligently provide erroneous advice to the innocent party;
(iii) the innocent party acts in reliance upon that advice;
(iv) the innocent party suffers loss or damage

**Shaddock & Associates Pty Ltd v Parramatta City Council (1981) 150 CLR 225**

A developer acted upon erroneous information regarding road widening proposals given to him by the local council and as a result suffered damage. It was held that the council had breached its duty of care which it owed to the developer as the information it gave could be obtained from no other source.

**Esso Petroleum Co Ltd v Mardon (1976) QB 801**

Mardon leased a service station from Esso in reliance upon statements made Esso representatives as to the profitability of the lease based upon existing facts. It was held that he could recover damages for negligent misstatement.

**Remedies for misrepresentation**

Remedies for fraudulent misrepresentation at common law allow the contract to be voidable at the option of the innocent party together with damages due to the element of deceit. Remedies for negligent misstatement are based not on a contractual action but an action in torts, the remedy for which is damages. Historically, at common law, the remedies available for innocent misrepresentation were limited to rescission. However, in South Australia, the Misrepresentation Act 1972 expanded the remedies available for innocent and fraudulent representation so that;

(i) damages may be recovered for innocent misrepresentation,
(ii) the courts can decide whether damages are more appropriate than avoidance of the contract.

In today’s legal environment, if parties fall within the ambit of the relevant consumer protection legislation it is likely they will utilise such legislation instead of mistake and misrepresentation actions.

The **Trade Practices Act (Cmth) 1974** (the TPA), provides civil remedies where misrepresentation by a corporation constitutes misleading and deceptive conduct pursuant to s52(1). A person may consequently recover the amount of loss or damage suffered as a result of contraventions of s52.
Further s53 provides civil remedies and penal sanctions where misrepresentations are made in connection with the supply of goods and services, as does s53A regarding the advertising and sale of land. The TPA may be used if a corporation is a party to the contract, but if not, the parallel provisions in the South Australian Fair Trading Act 1987 may be invoked.

Pursuant to both Acts, the courts have the power to rescind, vary or correct a contract, award damages or order injunctions, specific performance or corrective advertising.

**Duress**

(a) **Physical duress**

Physical duress is actual physical violence or the threat of physical violence to obtain consent to a contract. The violence or threat may be directed towards the coerced party or their family. The person who has allegedly suffered the duress must prove it took place and if so, the contract is voidable at that person’s option.

(b) **Duress to goods**

Where a party is coerced into entering a contract because of threats to seize or destroy property, the contract is voidable on the grounds of duress to goods.

(c) **Economic duress**

Where illegitimate pressure is brought to bear on business people to enter a contract, it may be voidable on the grounds of economic duress. It is very difficult to distinguish between legitimate and illegitimate commercial pressure, and therefore this action is rare, or dealt with under the TPA.

**Undue Influence**

Undue influence is the improper use of influence by a dominant party to obtain consent to a contract by the weaker party which will benefit the dominant party. Consequently, there is no true meeting of minds. The common law recognises two types of undue influence actions and requires a different standard of proof for each.

(a) If the defendant occupied a legally recognised position of influence over the plaintiff, there is a presumption of undue influence. It is viewed by the court as an abuse of confidence and trust arising from the special relationship that exists between the parties. The special relationships currently recognised include; parent and child, trustee and beneficiary, doctor and patient, solicitor and client, guardian and ward and priest and followers. The defendant can rebut the presumption by proving the plaintiff understood the contract and entered it voluntarily, otherwise the contract is voidable at the option of the innocent party.
(b) If no legally recognised relationship exists there is no presumption of undue influence but the plaintiff may prove that undue influence led to their entry into the contract. The plaintiff must establish that they were dominated by the defendant and did not enter into the contract freely.

**Unconscionable conduct**

In equity, a contract may be voidable on the grounds of unconscionable conduct. Broadly, this may arise if a party in a superior bargaining position has gained an unfair advantage by overcoming the will of a weaker person or a person with a disability and has deprived that person of independent judgement. Typically, this remedy has been granted when an inexperienced consumer with poor language skills has been coerced into accepting unreasonable terms in a contract and has not been encouraged to obtain independent advice.

**Commercial Bank of Australia v Amadio (1983) 151 CLR 447**

Mr and Mrs Amadio guaranteed to pay back a business loan made by their son to the Commercial Bank. Although the parents were both elderly, had a poor understanding of written and spoken English, and little business experience, the bank did not advise them to seek independent legal advice. Nor did the bank admit that the son’s finances were unstable. They both believed their liability was much more limited than it actually was. When the son’s business failed and the bank sought to act on the guarantee, the court held they were unable to do so because of their unconscionable conduct.

S51AB of the *Trade Practices Act* also prohibits a corporation in trade or commerce, engaging in unconscionable conduct when supplying goods or services to customers. The court’s powers to remedy are broad, including varying the contract and awarding damages. The provisions are mirrored in the *Fair Trading Act*. Matters to be considered by court include:

- Were the consumer and corporation in an unequal bargaining position?
- Was the form and wording of the documents clear?
- Was there any undue influence, pressure or use of unfair tactics?
- Would a consumer who obtained equivalent goods or services have paid a similar sum?
- Were the terms of the contract difficult to meet, and were they reasonably necessary to protect the interests of the corporation?

S51AC raises similar issues and protections in relation to unconscionable conduct by big business against smaller business in contract dealings of up to $1 million.
The object of the contract must be legal to support a valid and enforceable contract. The purpose of the contract may be unlawful because it contravenes the provisions of a statute or principles established in common law.

A contract that has an unlawful purpose will be classified as either void or illegal. A contract which only affects the parties to the contract is merely void. A contract is illegal when its legal effect spreads beyond the contract itself.

For example, a contract to commit fraud affects the defrauded party. In this instance the contract is not only void, but penalties may also be imposed against the parties.

**Contracts illegal under Common Law**

(a) Contracts to commit a crime or tort  
(b) Contracts which hinder the administration of justice  
(c) Contracts to restrain or discourage marriage  
(d) Contracts which are sexually immoral  
(e) Contracts which damage the relationship of one country with another  
(f) Contracts which encourage unnecessary litigation  
(g) Contracts to defraud public revenue  
(h) Contracts in respect of restraint of trade unless exceptional.

**Contracts illegal by Statute Law**

(a) Contracts in restraint of trade barred by the *Trade Practices Act*  
(b) Contracts to pay secret commissions  
(c) Various contracts which require licences if not obtained

**Doctrine of severance**

If a contract is partly legal and partly illegal, and the legal part can be separated, the illegal part will be severed by the court and the legal part will be enforced.

**Contracts in restraint of trade**

Contracts in restraint of trade are those which restrict an individual in some manner and are void on their face unless the terms can be proven reasonable as between the parties and as to the public.

Contracts in restraint of trade arise in contracts of employment and in the sale of businesses. The responsibility is on the party seeking to enforce the contract to prove that the restraint of trade terms are reasonable.

At common law, the court cannot vary the wording of a restraint of trade clause, it only has the power to 'sever' the clause and see if the contract remains able to achieve its original purpose without it. Consequently, contracts for the sale of business may include a 'ladder' of alternative restraints allowing the court to choose the most appropriate and sever the others.
a) **Contract for sale of business**
Tests applied to determine whether a contract in restraint of trade regarding a sale of business include;

(i) What is the nature of the business?
(ii) What is the geographic trade area of the business and the geographic area of restriction?
(iii) Can the purchaser of the business enjoy what has been bought?
(iv) Is the seller of the business prevented from starting another business?
(v) Is the restraint against the public interest?
(vi) Is there a time restraint, and if so is it reasonable?
(vii) Good will test. Does the seller of the business induce the customers to remain with him or her? Can the purchaser enjoy what has been bought?

---

**Nordenfelt v Maxim-Nordenfelt Guns and Ammunition Co (1894) AC 535**

Clauses were included in a contract for sale of a munitions business that had worldwide customers. Nordenfelt agreed to refrain from establishing a similar business in Europe and North America within the next 25 years. Nordenfelt breached the agreement by opening a competing business. The company sought to enforce the agreement and the issue arose as to whether the clauses were too restrictive. It was held that this was a reasonable restraint, given the nature of the business.

---

**CONTENTS OF CONTRACT**

The terms of a contract are its substance – the rights and obligations of each party to the bargain. Terms may be written or verbal, express or implied. Sound business practice recommends contractual terms always be reduced to writing, and that all parties read and understand clearly all the terms prior to agreement. It is very important to ensure that all parties understand and agree upon the ‘vocabulary’ of the terms. Express terms are those clearly expressed by the parties, either verbally or in writing, whereas implied terms are those implied by legislation, the courts or by custom or usage.

Terms must be classified depending upon their importance to the contract.

a) **A condition is a term of fundamental and vital importance.** It goes to the heart of the contract and must be complied with exactly. A breach of a condition entitles the injured party not only to claim damages, but also to rescind the contract.

b) **A warranty is a term of less importance.** A breach of a warranty may entitle the injured party to damages, but not to rescind the contract.

Surprisingly, contracts frequently fail to indicate whether terms are conditions or warranties. Generally, if a party would not have entered the contract but for the existence of the term, it indicates it is a condition.
Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd  (1938) 61 CLR 286

The plaintiff contracted with the defendant for the defendant’s trams to display advertising for the plaintiff for a period of 8 hours a day for the term of the contract. The advertising appeared, but not for 8 hours daily. The particular term as to the time for which the contracted advertising was displayed was held to be a condition.

Determining the Terms of a Contract

Whilst it may be easy to identify the terms of a contract if they are clearly written or stated, what if there is a dispute about whether a statement or representation made during negotiation has actually become a term of the contract?

The following six tests are applied;

(a) How important is the statement to the parties to the contract? The party must be shown to rely upon the statement for it to become a term.
(b) At what stage in the negotiations was the statement made? The closer the statement was made to the making of the final agreement the more likely it will be a term.
(c) Was the statement made to prevent the other party from discovering information that might stop them from entering into the contract?
(d) Did one party enter into the contract only because of the statement made by the other?
(e) Did one party accept a statement made by the other because she or he relied on the special skills or knowledge of that party?

Dick Bentley Productions Ltd V Harold Smith (Motors) Ltd  (1965) 1WLR 623

A customer bought a used car from a motor dealer who stated that it was in good mechanical condition and had only travelled 20,000 miles. The car failed to perform adequately and the real mileage turned out to be 100,000 miles. The customer sued for breach of a term and it was held that because of his special knowledge and skill, the motor dealer was in a position to know the mechanical condition of the car. The customer relied on the dealer’s representation and therefore it became a term of the contract.

(f) Was the statement made during the negotiations left out of the subsequent contract? If the statement has been left out of a subsequent written contract, it is more likely to be only a representation although there are some exceptions.
The Parol Evidence Rule provides that usually, statements that have been made verbally will not be taken into account in a dispute if they add, vary or contradict the contents of the written agreement. There are five main exceptions to this rule:

(a) Where custom and usage would indicate that the parties intended the statement to form part of the contract.
(b) Where there is evidence that the written document only contains part of the agreement.

### Van Den Esschert v Chappel (1960) WAR 114

Just before signing a contract for the purchase of a residential property the purchaser asked the seller whether there were any white ants in the house. The seller said no, the sale went ahead, but the written contract contained no mention of white ants. Later, the house was found to be riddled with white ants, which the purchaser had exterminated, and then sued the seller. It was held that the seller’s assurance as to the white ants was intended to form a term of the agreement as a reasonable purchaser would have relied upon the assurance and it was made just prior to the agreement in writing.

(c) Where the statement amounted to a separate contract that was made prior to the written one – this exists as a collateral contract and may be enforced independently by the parties.

(d) Where the statement clarifies or corrects ambiguous language within the written contract.

(e) Where the true intentions of the parties were not expressed in the written contract.

**Implied terms**

(a) **Implied by the court**

It is possible for the court to imply a term into a contract where clearly the parties intended there to be such a term, but for some reason it was not expressly contained in the contract. The courts will only imply such terms reluctantly and if the following tests are met. The term must be –

- reasonable and equitable;
- be necessary to give business efficacy to the contract;
- be obvious;
- be capable of clear expression;
- be consistent and not contradict any express term of the contract.

(b) **Implied by statute**

Some statutes, particularly consumer protection statutes, imply specific terms into contracts. For example, the Trade Practices Act implies terms as to
fitness for purpose and merchantable quality into contracts for sale of goods, and implied terms as to the diligent and skilful provision of services. These implied terms can not be excluded by the parties.

(c) **Implied by custom or trade usage**

Courts will imply terms into a contract where there is an established practice or custom with respect to certain agreements. Three conditions must be met however;

(i) the custom or usage is certain, reasonable and notorious (well known);
(ii) it will not be implied if it is inconsistent with any express term of the contract;
(iii) the custom or usage must not offend any statutory principle.

**Exclusion clauses**

An exemption or exclusion clause is a term of a contract which limits or excludes altogether a liability to which one party to the contract would otherwise be subject. Exclusion clauses are particularly common in “standard form” contracts. The courts are reluctant to enforce them and will require evidence that they are clearly included within the contract, either by virtue of being included in the written terms or by clear evidence of notice being given prior to the parties entering into the contract.

Further, the clause must have been well within the contemplation of the parties and must clearly indicate what is excluded or limited.

If identical clauses have been used in earlier contracts, then sufficient notice of the exclusion clause will be deemed to have been given. A court may also find that an exclusion clause is not valid because it seeks to avoid liability for an act or omission which goes beyond the scope and terms of the contract.

---

**Olley v Marlborough Court Ltd (1949) 1 KB 532**

The plaintiffs were guests at the defendant’s hotel. When they checked in they paid for a week in advance. They did not see an exclusion clause regarding theft until they went to their room and it was exhibited on the back of the door. When items were stolen from their hotel room, the defendant could not rely on the exclusion clause as no notice had been given before or at the time of the contract being made.

**Sydney City Council v West (1965) 114 CLR 481**

Before West entered a car park he was issued with a ticket stating that the Council would not be liable for any loss or damage no matter how it occurred. It also stated “This ticket must be presented for time stamping and payment before taking delivery of the vehicle.” A thief stole West’s car and bluffed the attendant into providing him a duplicate ticket, so allowing him to exit the car park. It was held that the Council was liable for the loss as it was not reasonably within West’s contemplation that his car would be released to a stranger without ticket or identification.
CONCLUSION OR DISCHARGE OF A CONTRACT

Discharge of the contract is the term commonly used to describe the conclusion of the contract. A contract may be discharged in many ways including:

- by performance
- by agreement
- by frustration
- by operation of law
- by breach

Discharge by performance

Discharge by performance is the most common way to conclude a contract. Essentially this means that each party properly performs their contractual obligations. Generally, performance must be strictly in accordance with the terms of the contract, although very minor obligations may be acceptable.

Where the contract is divisible, part performance may be accepted. For example, frequently provision may be made in a construction project for various progress payments to be made to the contractor at various stages of the total project. As those stages are completed, the contractor can claim payment for performance of that portion of the total contract.

Attempted performance takes place, when one party to the contract rejects the other party’s attempt to perform their contractual obligations.

In this situation, if the tender of performance has been offered at a reasonable place and time, the tendering party is discharged from any further obligations under the contract, except if the obligation is to pay money. If payment of money is the performance required, payment will still be necessary, but the debtor does not have to seek the creditor out.

Discharge by agreement

(a) Discharge by mutual agreement

If neither party has fulfilled their contractual obligations they can agree to abandon the contract and discharge each other. They are in effect making a new contract to cancel the original contract by each agreeing to forgo something of value, thus providing consideration.

(b) Discharge by release

If only one party has fulfilled their obligations, the party who has fulfilled their obligations may release the other party from theirs. This discharge is not legally effective unless it is recorded in a formal contract as there is no consideration moving between the parties.
(c) **Discharge by novation**

Novation is an agreement between three parties. A contract between two parties is rescinded in consideration of a new contract being entered. The contract is between one of the parties and the third party. The terms of this contract are the same as the original contract. An example occurs where a creditor allows one debtor to be replaced by another.

(d) **Discharge by accord and satisfaction**

Again one party has fulfilled their obligations and the other has not. The who has not may offer payment or other consideration (satisfaction) in return the agreement of the other party to release them from their previous obligations (accord). The essence of the accord and satisfaction is that one party accepts something else instead of suing the defaulting party for breach of contract.

**Discharge by frustration**

A contract may be discharged by frustration if an unforeseen event occurs, the fault of neither party, which makes it impossible to perform the contract, or that would alter performance radically from that which the parties had originally agreed. The contract is discharged from the time the frustrating event takes place. Any rights and obligations arising prior to that time remain. Ways in which frustration may occur include;

- the subject matter of the contract is destroyed;
- an event on which the contract is based does not occur;
- a substantial change in circumstances occurs such that performance of the contract will be radically different to that of the original agreement;
- a change to the law occurs such that to perform the contract as agreed would be to perform an illegal act;
- the contract is one for personal services and the performer dies, is too ill to perform, is conscripted or imprisoned.

**Krell v Henry** *(1903) 2KB 740*

A flat was rented for the specific purpose of viewing the coronation procession of Edward VII. When the coronation was postponed, the lessee was successful in claiming frustration and therefore did not have to pay rent.

**Codelfa Construction Pty Ltd v State Rail Authority of NSW** *(1982) 41 ALR 367*

Codelfa contracted with the State Rail Authority to build part of an eastern suburbs railway line in Sydney for a specific price within 136 weeks. To fulfil the deadline, Codelfa had calculated on working 24 hours a day, 7 days a week. Codelfa failed to meet the deadline after local residents were successful in obtaining injunctions which restricted night working hours because of the noise. Codelfa claimed the contract had been frustrated and that as such they could claim for the extra expenses involved. It was held that the contract had been frustrated because “there had been a fundamental or radical change in the surrounding circumstances and in the significance of the obligations undertaken”.

---

*FNSACCT404B Make Decisions in a Legal Context (GEHR)*  
*FNS51204 Diploma of Financial Services (Banking) GEY*  
*July 2009 Version 1*  
*Copyright TAFESA*  
*Page 100 of 292*
In South Australia the *Frustrated Contracts Act 1988* attempts to ensure that parties to particular classes of contract are not unfairly disadvantaged or advantaged by frustration of a contract. The value of benefits and performances is subjected to calculations by the court to ensure fairness to the parties.

**Discharge by operation of law**

A contract can be discharged irrespective of the wishes of the parties by the operation of law in the following situations.

(a) **Bankruptcy** – a debtor obligated to pay money under a contract who becomes bankrupt pursuant to the *Bankruptcy Act 1966* is relieved of their obligations and the contract is considered discharged.

(b) **Material alteration** – where one party to a written contract makes a material alteration to the contract without the other party’s consent, the other party can regard the contract as discharged.

(c) **Merger** – of a simple contract into a formal contract discharges the simple contract.

(d) **Death** – of either party to a contract for personal services will discharge the contract.

(e) **Lapse of Time** – where statutory time limitations apply will also discharge a contract.

**Discharge by breach**

Discharge by breach of contract occurs when a party to a contract fails to complete their performance. An *actual breach* occurs where one party fails to perform their obligations and the other is entitled to treat the contract as finished. This is also the situation where a condition has been breached. The innocent party may treat the contract as discharged and sue for damages. If the breach is of a warranty only, the contract is not discharged, but the injured party may sue for damages.

An *anticipatory breach* occurs where one party demonstrates by words or conduct that they intend to commit a fundamental breach, such as informing the party that they will not undertake performance next week, as required by the terms of the contract. This threatened failure to perform allows the innocent party to take action immediately and not wait until the due time for performance has passed.

**REMEDIES FOR BREACH OF CONTRACT**

The purpose of ensuring that an agreement has the essential elements to be a valid contract, is to make sure that legal enforcement is available should a breach occur. The remedies for a breach of contract are as follows.
Damages

Damages simply means monetary compensation. It is the most common remedy for breach of contract. The measure of damages will be assessed such that the injured party will be in the position they would have been in had the contract been properly performed. Three tests must be met for damages to be awarded.

(i) Has there been a breach of contract? Has one party failed to meet their contractual obligations.
(ii) Has loss or injury occurred?
(iii) Is the loss or injury too remote? The test of remoteness is whether a reasonable person could foresee the consequences of the breach, that the sort of injury that has occurred could have flowed from the breach – those losses which have resulted directly from the breach may be compensated.

As in tort, the principle of mitigation of damages applies, providing that a party who suffers loss or damage resulting from a breach of contract must attempt to minimise their loss. Losses that could have been avoided through reasonable effort cannot be recovered.

There are various classes of damages which include the following..

(i) Liquidated damages – a genuine pre-estimate of damages to be paid in event of breach which is specified in the contract.
(ii) Unliquidated damages – if the contract does not specify the amount to be awarded the court must use its discretion and assess the amount to be awarded.
(iii) Nominal damages – in cases in which breach has been proved but only trivial loss has resulted from the breach, the court may award nominal damages.

Quantum Meruit

Where one party has fulfilled part of their contractual obligations and the other party breaches the contract, it may be appropriate for the injured party to seek the equitable remedy of quantum meruit, which literally means, ‘as much as he has earned’. Essentially the remedy is available on the basis that reasonable payment should be made by one party to another when they are receiving the benefit of the work done by that party.

Rescission

If a condition of a contract has been breached by one party, the injured party can either affirm the contract by continuing to meet their obligations or rescind the contract. Rescission of the contract means that the party is no longer bound by the contract, that the contract is void.

A rescission will only be granted under the following conditions;

- The parties can be restored to their original positions.
- The injured party has not affirmed the contract.
- The injured party has not delayed in seeking the remedy.
Injunction

An injunction is an order by the court to prohibit or restrain particular conduct. As an injunction is an equitable remedy it will only be granted if damages are an inadequate remedy.

Order for Specific Performance

An order for specific performance is an order by the court requiring the performance of contractual obligations, and again, as an equitable remedy will only be granted when damages would be an inadequate remedy. The courts will not grant an order for specific performance for personal services, and such an order will usually only be granted for contracts involving land or unique items.
1. What are the differences between a simple contract and a formal contract?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

2. What is the meaning of a legal ‘presumption’? What are the two presumptions that are used to determine whether parties intended an agreement to be legally enforceable? How may these presumptions be rebutted?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

3. Briefly explain the meaning of ‘an invitation to treat’.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
4. What rules apply to offers?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

5. What rules apply to acceptances?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

6. What is a ‘misrepresentation’? What effect does it have on the validity of a contract?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

_____________________________________________________________________________
7. Under what circumstances may contracts in restraint of trade be upheld?
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

8. What is the difference between a condition and a warranty?
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

9. Describe three methods by which a contract may be discharged.
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
10. By what methods are contractual damages assessed?
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

11. Under what circumstances would you seek an equitable remedy for a breach of contract?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

12. Buffy is a full time accounting student. Her mother owns a real estate business and her accounting executive becomes ill. Buffy’s mother asks Buffy to ‘fill in’ for four weeks at $600 per week. At the end of the four weeks, Buffy asks for her wages and her mother says that she has changed her mind about paying her. Can Buffy enforce the agreement?
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
13. Gilligan offers to sell his boat to Ginger for $10,000. Ginger excitedly accepts, then says she will pay the $10,000 in 5 instalments over a 6 month period. The next day, Ginger hears that Gilligan sold the boat to Mary Anne. Can Ginger enforce her contract?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

14. Beverly promises to give her son Wesley $10,000 on his 21st birthday. The birthday arrives and Wesley receives only a guitar worth considerably less from his mother. Can Wesley enforce his mother’s promise?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
15. George Jetson was a talented cartoonist who had created a popular comic strip character. He entered into a 5 year contact with Consolidated Press to publish his comic strip daily on the front page of the comic section. During a newsprint shortage, the comic strip was published on the third page, and this continued for 12 weeks. George refuses to submit further strips and enters his strip with a rival newspaper. Consolidated Press threatens to sue for breach of contract. Advise George.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

16. A bakery decided to extend their business since there was a great demand for their products in the district. The bakery also hoped to secure a lucrative baking contract from the Health Department, to supply public hospitals with bread and cakes. A firm which manufactured industrial ovens, and who knew the nature of their existing business, but not about the possible Health Department contract, agreed to sell and install a new oven capable of meeting the required workload. During the installation, the manufacturing firm damaged the oven and the bakery had to wait five months whilst it was repaired. The bakery is claiming the following damages for breach of contract:

- $550 per week loss of profits, on the extended baking business they would have been able to handle with the extra oven,

- $2200 per week, being the estimated profits they would have obtained from the Health Department contract.

What damages should be awarded and why?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
17. You have been asked to write a tender for a government contract. Is a tender an offer or an invitation to treat? Discuss the key differences.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

18. A local business intended to advertise in a major supermarket. In the contractual negotiations stage the major supermarket stated, “Acceptance to our offer will be when we have received notice of acceptance.” The local business posted a response to his offer on the 3rd of March. The major supermarket did not receive the letter until the 5th of March. The major supermarket had sent a letter on the 4th of March withdrawing the offer. Discuss if there is a contract.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________
19. After extensive negotiation Bart signed a contract for accounting services. During the contractual negotiations Armstrong made threats of violence, which were used to induce Bart to sign the contract. Bart claims he felt real fear for the safety of himself and his family. Discuss if Bart would be bound by this contract (and why / why not).

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

20. During business negotiations Steve became aware that his client did not understand the contractual negotiations. Steve decided to write all contractual terms in a deed and asked the client to sign. The client is now claiming that the contract is void on the grounds that he is a non-Australian citizen and could not read the contract. Discuss if these are valid grounds and what Steve could have done to prevent a legal dispute.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
21. Julie entered into a contract with Tricia to buy an oil painting by Picasso for $155,000. After the transaction was complete, Julie took it to an art gallery to have it valued for insurance purposes. The art gallery informed Julie that it was not an original painting, as she had thought, but merely an expert reproduction.

Advise Julie.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

22. Arrow is a well known celebrity. She has been contracted to represent Jazz Cola in advertising campaigns. In her contract she is not able to advertise any other brand of soft drink for the next three (3) years. Arrow does not like to drink Jazz Cola and would like to work for Jazz’s main rival, Pop. Can Arrow do this? What can Jazz Cola do to prevent this occurring?
Circle the most appropriate answer in the following multiple choice questions.

1. A condition of a contract is:
   a) a fundamental term of the contract
   b) a minor term of the contract
   c) a term of the contract which is only in the mind of one party
   d) identical to a warranty of a contract

2. A voidable contract is:
   a) one which cannot be enforced in court because of a technical defect
   b) one which has no legal effect
   c) where one of the parties to the contract, with the right to do so, can avoid the contract or elect to continue with it
   d) one where both parties have fulfilled their contractual obligations

3. The doctrine of severance or the ‘blue pencil test’ allows the court to:
   a) alter the wording of the contract
   b) delete certain words in the contract
   c) add words to the contract
   d) make the contract voidable

4. A contract may still be valid if consideration is absent in:
   a) simple contracts provided that they are in writing
   b) verbal contracts
   c) formal contracts
   d) contracts performed by way of conduct

5. When parties to a contract are unable to perform their contractual obligations as originally agreed to because of an unforeseen event (which has occurred through no fault of either party) the contract is said to be discharged by:
   a) agreement
   b) frustration
   c) performance
   d) lapse of time

6. The courts will probably grant specific performance when:
   a) it is a contract for personal services
   b) the subject of the contract is of a personal nature, e.g. an original painting
   c) it is a gratuitous promise
   d) damages would not be an alternative and adequate remedy
7. Henry considered entering into a business deal. He asked the advice of his accountant, Steve. After Steve had considered all the facts, he told Henry to go ahead. Henry lost thousands of dollars. It was discovered that Steve had made a careless error and had not taken into account an important and obvious fact. Henry could sue Steve for:

a) fraudulent misrepresentation
b) innocent misrepresentation
c) common mistake
d) negligent misrepresentation

8. Chris is aged 17. Which of the following contracts would be valid if he entered into them?

a) buying a boat on credit
b) Working in an office and earning $20,000 a year
c) Purchasing 600 shares
d) Becoming a partner in a business.

9. An invitation to treat is:

a) a legal commitment to enter into a contract
b) an offer made to the world at large
c) goods on display in a shop window
d) an offer which can only be made by self-serving stores which are open to the public at specified times.
Lecture 6

Learning Outcome 6
Demonstrate an understanding of the concept of property and the nature of mortgages, including the rights and obligations of parties.

Required Reading
Vickery and Pendleton 6th ed - Chapter 18 and 19

Activities
Activities in workbook

Key Terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
<th>In my own words….</th>
</tr>
</thead>
<tbody>
<tr>
<td>Caveat</td>
<td>Notification to persons intending to deal with the land that an interest in the land exists which is not registered on the title</td>
<td></td>
</tr>
<tr>
<td>Fittings</td>
<td>Those items ‘attached’ to the land by their own weight, or which are intended not to be sold with the land. E.g. personal items.</td>
<td></td>
</tr>
<tr>
<td>Fixtures</td>
<td>Those items, which are attached to, the land and which will pass with the title of the land. E.g. pool, spa, cupboards, light fixtures and curtains.</td>
<td></td>
</tr>
<tr>
<td>Foreclosure</td>
<td>An order, which states that the mortgagor ceases to have an interest in the property. Ownership vests (transfers) to the mortgagee. The property can then be utilised to satisfy all debts.</td>
<td></td>
</tr>
<tr>
<td>Forfeiture</td>
<td>The immediate loss of the lease interest due to a breach of a condition or where the landlord takes possession.</td>
<td></td>
</tr>
<tr>
<td>Four unities</td>
<td>The interest that may be shared in land. Ownership usual is for all four, namely: possession, interest, title and time.</td>
<td></td>
</tr>
<tr>
<td>Frustration</td>
<td>The situation where a contractual obligation has, without the fault of either contracting party, becomes incapable of being performed. E.g. as a result of an “Act of God”.</td>
<td></td>
</tr>
<tr>
<td>Indefeasibility of title</td>
<td>The Torrens Title system of registration provides that the registered proprietor has an unquestionable title to the land upon</td>
<td></td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
<td>In my own words…</td>
</tr>
<tr>
<td>--------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>Licence</td>
<td>A landowner gives a person permission to use the land but not to enjoy the exclusive possession that is the right of the tenant.</td>
<td></td>
</tr>
<tr>
<td>Mortgage</td>
<td>A contract whereby one person borrows money from another and gives rights over real property to the lender as security for the repayment of the loan.</td>
<td></td>
</tr>
<tr>
<td>Mortgagee</td>
<td>The lender of the funds. I.e. The bank / Financial institution.</td>
<td></td>
</tr>
<tr>
<td>Mortgagor</td>
<td>The person to whom the loan is made, i.e. the person borrowing the funds.</td>
<td></td>
</tr>
<tr>
<td>Real property</td>
<td>Land and anything fixed to the land. As distinguished from personal property.</td>
<td></td>
</tr>
<tr>
<td>Receiver</td>
<td>When the mortgagor defaults the mortgagee appoints a receiver to oversee the interests of the secured creditor at a time when the security is threatened.</td>
<td></td>
</tr>
<tr>
<td>Right of survivorship</td>
<td>The property right whereby on the death of one of the joint tenants, their interest in the land passes to the other joint tenants.</td>
<td></td>
</tr>
</tbody>
</table>

**INTRODUCTION**

The term ‘property’ has two meanings. It refers to the physical things you can own, such as land or furniture and the rights you can exercise over physical and non-physical things. The distinction is important because several persons may have property rights over the same thing.

In this section we will examine the difference between real property and personal property, between ownership and possession, between varying estates in land, between old system title and Torrens title and the varying nature of mortgages and the rights associated with them.

**REAL AND PERSONAL PROPERTY**

Property is classified into either real or personal property.

**Real property**

Real property refers to land and anything which is fixed or attached to the land, such as a building or in-ground swimming pool. Those items which have become fixed to the land are referred to as fixtures and transfer with the land when ownership of the land is transferred.
Personal property

Personal property may also be referred to as chattels and refers to all other types of property and can be divided into the following classes;

(a) leases over land, also known as chattels real;
(b) tangible objects such as cars, books and furniture, also known as choses in possession;
(c) intangible things, such as shares in a company or intellectual property rights, also known as choses in action.

Fixtures or non-fixtures

As real property includes the land and anything fixed to the land, there is sometimes a dispute as to whether an item is a fixture and so passes with the land, or merely a fitting, which does not pass with the land unless specifically negotiated to do so. The following basic rules have evolved to deal with such a dispute.

(a) For what purpose has the item been attached? If it is only for the enjoyment of the item? If so the item is likely to be a fitting only.

(b) In what manner is the item attached? If it is attached in a permanent manner it is likely to be a fixture, but if for example it is only attached by its own weight resting upon the land, then it is likely to be a fitting.

(c) What damage if any will be caused by the removal of the item? If major damage will result it is more likely to be a fixture.

APA Ltd v Coroneao (1938) 38 SR (NSW) 701

This case involved the sale of a cinema in which the purchaser claimed that the switchboard, a projector and seats were fixtures. The switchboard and the projector were firmly attached to the building and were held to be fixtures, but the seats could be unbolted and stacked away and were held to be fittings.

Leigh v Taylor (1902) AC 157

The dispute was whether a valuable tapestry was a fitting or a fixture. The tapestry was fastened to canvas by tacks that were nailed to strips of wood. These strips of wood were in turn nailed to the wall. The court held that the tapestry was a fitting only as the method of attaching the tapestry to the wall was only done so that the tapestry could be enjoyed.
OWNERSHIP AND POSSESSION

The law draws a distinction between ownership of property and possession of property. Ownership establishes that the owner has legal rights over that property or title over that property and that the owner may transfer ownership or possession of that property to another.

Possession of property simply means that the person has physical control over the property and has the intention to assert exclusive control over the property possessed. It is possible for a person to have ownership and not possession, or possession and not ownership.

INTERESTS IN LAND

Doctrine of Tenure

As historical principles and traditional terminology have given rise to modern property law, a brief examination of these principles is necessary. The doctrine of tenure arose from the feudal system of land holding imposed following the Norman Conquest of England in 1066. William the Conqueror who claimed the English throne, seized all land and redistributed it to his followers if they would swear allegiance to him. The followers became holders or tenants of the land as the land was not granted by outright transfer but only granted from the Crown to the tenant on certain conditions.

The doctrine of tenure continues to be a fundamental principle of our legal system, namely that no person can be the absolute owner of the land because all land is owned by the Crown. Instead, land owners have an estate in the land.

Estates in land

As a person was unable to own land absolutely, the common law instead recognised that a person owned an estate in the land which was separate from the land that the person held and that that estate could be dealt with as the owner chose. An estate in land describes the type of interest a person has in real property.

Estates in land are broadly divided into freehold estates and leasehold estates, according to the duration of the estate. Also, since the decision of the High Court in the Mabo Case, the law recognises a type of native title to the land which can be claimed by the descendants of the original inhabitants of the land if a special relationship is established between the subject land and its occupiers. A ‘continuing connection’ with the land must be established. Native title can be extinguished by the Crown if the Crown appropriates or alienates the land.
Freehold estates

A freehold estate is an interest in land which is of an uncertain duration, and may be either a fee simple estate or a life estate. A fee simple estate is the most common form of freehold estate and this type of interest continues as long as there is an heir to receive the estate, and may be transferred during the life of the owner or be devised after their death by will. If there is no will the rules of intestacy will apply.

A life estate is an interest in land that is created only for the life of a particular person, which person may be the person receiving the estate or some other person. This interest most commonly occurs as a result of a will where a deceased spouse wishes to provide for their spouse for their life. A life estate can also be ended by the occurrence of some specified event, i.e. ‘to Xena for life on the condition she does not remarry’.

Leasehold estates

A leasehold interest is created by the formation of a lease between the lessor or land owner and the lessee or tenant. A lease gives the lessee exclusive possession of real property for a fixed period in exchange for rent. Thus whereas a freehold estate is for an uncertain duration a leasehold estate is for a fixed period.

TITLE TO LAND

‘Title’ to land describes a person’s right to ownership of land. In Australia, there are two systems for recording and regulating ownership of title to land. About 97% of land is owned pursuant to the Torrens System of Land Title which is regulated by statute in all states and territories. The remaining 3%, primarily land in New South Wales is regulated by what is known as ‘Old System Title’ derived from common law. There is a provision in each jurisdiction for old system land to be converted into Torrens title when the land changes hands.

Old System Title

Title or ownership to land under this system is proved by production of all documents describing or dealing with the land and particularly all deeds or contracts transferring or conveying land from one person to another, for at least the previous 30 years to establish a chain or root of title. There may be serious problems if a document is missing or if for example an owner fails to register a discharge of mortgage etc. Thus the major inadequacy of this system is that deeds can be lost, forged or stolen which therefore makes proving ownership very difficult.
Torrens Title

(a) The Torrens system of land title provides a state controlled and state guaranteed title to land, supported by an assurance fund. This system was introduced in South Australia by Sir Robert Torrens in 1858 to overcome the difficulties of old system title and was quickly adopted throughout Australia and in many other countries.

(b) The system provides for the issue of a ‘certificate of title’ for each piece of land, which has traditionally required the printing of an original and duplicate certificates – one which is held by the Land Titles Office and may be inspected by the public and one by the owner or mortgagee of the property. Every dealing in respect of the land should then be registered upon that one certificate – transfer, lease or mortgage. Jurisdictions are now moving toward computerising their land registration systems where the concept of original and duplicate certificates has been superseded by a data base register and hard copy of the title which is held by the registered proprietor of the land.

(c) The system operates on the basis that the relevant state government will guarantee that a registered proprietor of land shown on the land is the true owner of the land. That person has a good title to the land subject to any encumbrance (eg, a mortgage) that is registered on the title. Title to land can thus only be obtained and is obtained by registration. Due to the state guarantee it is not necessary to prove the paper chain.

(d) The Torrens system creates the concept of indefeasibility of title which means that the registered proprietor has an unquestionable title to the land upon which title they are registered. A person who purchases land can disregard any unregistered interests in respect of the land.

(e) Priority between competing interests in respect of Torrens title land is determined by the date of registration of the interest on the title. It is therefore possible for an interest to receive priority under the Torrens system even if it is created later in time than an unregistered interest as the date of registration is the vital date.

(f) Advantages of the Torrens system include;

- a single document replaces numerous documents required to prove title;
- all relevant information in respect of particular land can be discovered easily and inexpensively from a central register;
- security is provided because the state guarantees the accuracy of the information contained on the title and provides compensation under an assurance fund;
- protection is provided to those who register an interest on the title.
Legal and equitable interests in land

There is a difference between common law interests in land which may be registered upon the certificate of title and equitable interests in land which cannot. For example, the interests of beneficiaries where the trust property is land and the registered proprietor is the trustee, or where there are beneficiaries under a will where the land first vests in the executor of the estate, or where there is an equitable mortgage.

The vital point here is that whilst the holder of the legal interest can enforce their proprietary right against any other person, the holder of the equitable interest cannot enforce their claim against an innocent third party who is purchasing the legal interest in the land if the purchaser provides consideration and has no knowledge of the equitable interest.

Whilst the Torrens system does not allow the registration of equitable interests, it does allow the registration of a caveat which is a notification to persons intending to deal with the land that the equitable interest exists. A caveat is a document that is lodged at the Land Titles Office and noted on the certificate of title which prevents registration of any dealing with the land unless the dealing is expressed to be subject to the interests of the caveator.

JOINT OWNERSHIP OF PROPERTY

Property which is jointly owned is commonly owned either as a joint tenancy or a tenancy in common.

Joint tenants

Joint tenants have separate rights between themselves, but are in the position of a single owner against the rest of the world. The two main elements of a joint tenancy are;

- the right of survivorship, whereby on the death of one of the joint tenants, their interest in the land passes to the other joint tenants, and this process continues until there is only one survivor, who then holds the land as the sole owner; and

- the four unities, of possession, interest, title and time. All joint tenants must be holders of an identical legal or equitable interest in land in equal parts that has been created at the same time, giving each joint tenant entitlement to possession of the whole property.

Tenants in common

Tenants in common have a unity of possession, but not necessarily the other three unities. The size of each tenant’s share is fixed once and for all and is not affected by death, so that each can dispose of their undivided share however they wish either during their life time or by their will after their death. This is a common form of commercial ownership.
MORTGAGES OVER REAL PROPERTY

The definition of a mortgage is “a contract whereby one person (the mortgagor) borrows money from another and gives rights over real property to the lender (mortgagee) as security for the repayment of the loan.”

Since November 1996, mortgages have been regulated by the national Consumer Credit Code where the mortgagor is a natural person who has entered a loan that is wholly or predominantly for personal, domestic or household use.

Torrens System Mortgage

A Torrens system mortgage is simply created by registration on the title and has the following features:

- The mortgagor retains the registered title to the property.
- The mortgagee receives a statutory charge or right to payment over the property. Instead of the mortgagee receiving legal title to the land, the land secures the loan that has been made, and the mortgagee usually takes possession of the duplicate title as security. If other mortgages are registered subsequently they create legal interests that ‘queue’ behind the earlier mortgagees in the event of loan default. For example, first mortgage, second mortgage…

Mortgagee’s Remedies

Statutes in each state and territory grant the following powers to the mortgagee to take action if the mortgagor defaults:

- The power to sue for breach of contract.
- The power to appoint a receiver.
- The power of sale, the most commonly used remedy.
- The power to seek an order of foreclosure.

(a) Power to sue for breach of contract – as a mortgage is simply a contract between the mortgagor and the mortgagee, the mortgagee may sue for breach of contract if the mortgagor defaults on their repayments as this will amount to a fundamental breach of contract. The problem here is that the remedy sought would be payment of the outstanding amounts and if the mortgagor has no money to pay the repayments it is unlikely they have money to pay the arrears.

(b) Power to appoint a receiver – this remedy is most commonly exercised when the land the subject of the mortgage is an income producing property such as a farm or business. When the mortgagor defaults the mortgagee appoints a receiver to oversee the interests of the secured creditor at a time when the security is threatened.
(c) **Power of sale** – the mortgagee will sell the property in the event of default by the mortgagor, a mortgagee sale. Generally the mortgagee must give the mortgagor one month’s notice of their intention to exercise this right and the mortgagee is obliged to obtain the best possible price for the land. As in a Torrens title mortgage the mortgagor retains legal title to the land, if the proceeds of sale exceed the amount owing to the mortgagee, the mortgagor must receive the surplus.

---

**Cuckmere Brick Co Ltd. v Mutual Finance Ltd (1971) Ch 949**

The plaintiffs were the owners of land, mortgaged to the defendants for $50 000. The plaintiffs had obtained planning permission to build on the land but failed to develop the land. After a period of two years without development the defendants were entitled to exercise a statutory power of sale over the land and did so. They advertised the land for auction but no mention was made of the planning permission. The property was sold for only $44 000 and the plaintiffs sued, alleging that had the planning permission been made known to purchasers, the price obtained would have been $75 000.

It was held that a mortgagee when exercising a power of sale owed a duty to the mortgagor to take reasonable care to obtain a proper price which the mortgagee had here failed to do.

**National Commercial Banking Corporation of Australia Ltd v Solanski (1984) NSW Conv R 55-194**

After Solanski defaulted on mortgage repayments for his rural property the mortgagee bank exercised its power of sale. He owed $8000 and the property was valued by two real estate agents engaged by the bank as between $14 000 and $15 000. The bank cancelled an auction sale because the date was too close to Christmas and asked the appointed agent to sell it by private treaty. The agent placed an advertisement in the Sydney Morning Herald which described the property as ‘unattractive, subject to flooding, filthy, but has good sandy soil, backs on to permanent creek and has development consent to build. Would clear into excellent grazing land. Will go cheap.’

The land was sold for $8000 and Solanski sought an injunction to stop completion of the sale claiming that the bank had wilfully or recklessly neglected his best interests. It was held that the fair market value of the land was between $14 000 and $15 000 and that the bank was in breach of its duty to take reasonably adequate steps to ensure that a fair market price was obtained.

**Tse Kwong Lam v Wong Chit Sen (1983) 1 WLR 1934**

A mortgagee exercising the power of sale over a Hong Kong property advertised it for sale through public auction. He decided that his family company, in which he and his wife were directors would bid up to $1.2 million. The mortgagee set the reserve price at that amount which was below that which the mortgagor owed. On the day of the auction there were over 30 people present but the mortgagee’s wife was the only bidder and she secured the property for $1.2 million. The mortgagee then claimed the outstanding loan amount from the mortgagor who counterclaimed that the mortgagee had breached his duty of good faith.
It was held that the mortgagor was entitled to damages as a company associated with a mortgagee may bid for a property at a forced sale as long as the mortgagee can prove that they protected the interests of the mortgagor by acting reasonably to obtain the best price. This could be done by obtaining the advice of independent experts as to the reserve price and method of sale.

(d) **Power of foreclosure** – a mortgagee has the power to apply for an order of foreclosure when a mortgagor fails to repay the loan. It is the most serious and most infrequently used of the Torrens title remedies because the effect of the order is that the mortgagor will cease to have an interest in the property, ownership instead vesting in the mortgagee. The property is taken in full satisfaction of the debt and the mortgagee may decide to retain ownership of the property, sell it later or lease it. Legislation in each state strictly regulates the procedure for foreclosure and the general rule is that an order for foreclosure may only be applied for if certain conditions are satisfied;

- that the mortgagor has failed to repay the mortgage for a six month period after receiving one month’s notice by the mortgagee; and
- the property must be offered for sale at public auction and bids must have been insufficient to satisfy the outstanding debt; and
- the value of the property is insufficient to satisfy the debt, the shortfall cannot be recovered from the mortgagee; and
- the court must grant the order.

**Mortgagor’s rights**

Under the Torrens title system, the mortgagor has the right to sell, lease or transfer rights in the property, but in practice the rights of the mortgagor are usually restricted by the terms of the mortgage providing they are clearly explained prior to the mortgage contract. Restrictions can include limits on early redemption and mortgagee consent required for transfer.

**Equitable mortgages**

In the Torrens title system, a legal mortgage is a mortgage that is registered on the certificate of title. If a Torrens title system mortgage is unregistered, it will be an equitable mortgage as only the law of equity will recognise it. As only registered interests will bind a subsequent purchaser, the protection for an unregistered mortgagor will be for the mortgagor to lodge a caveat notifying potential dealers of the land of their interest.

Any registered interest has priority over any unregistered interest, even if the unregistered interest was created at an earlier time. Priority between competing unregistered mortgages will be determined by the date on which the instrument was executed.
Activities

1. Identify and describe the difference between real property and personal property.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

2. A person may have possession of property but not ownership. Explain what is meant by this statement.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

3. Identify and describe the differences between fee simple estates and life estates.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________
4. Describe the main elements of the Torrens System of Land Title. What are the benefits of this system?

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

5. Define a mortgage.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

6. Identify and describe the remedies available to a mortgagee under the Torrens title system.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________
Lecture 7

<table>
<thead>
<tr>
<th>Learning Outcome</th>
<th>Learning Outcome 7</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Recognise the application of contractual principles to certain specialty contracts leases, franchises and insurance.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Required Reading</th>
<th>Vickery and Pendleton 6th ed – Chapters 19 and 29</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Activities</th>
<th>Activities in workbook</th>
</tr>
</thead>
</table>

Key Terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
<th>In my own words….</th>
</tr>
</thead>
<tbody>
<tr>
<td>Covenants</td>
<td>Common Law terms of the lease contract.</td>
<td></td>
</tr>
<tr>
<td>Fixed Term Tenancy</td>
<td>A lease of a specified duration (i.e. start and end date are nominated).</td>
<td></td>
</tr>
<tr>
<td>Foreclosure</td>
<td>An order, which states that the mortgagor ceases to have an interest in the property. Ownership vests (transfers) to the mortgagee. The property can then be utilised to satisfy all debts.</td>
<td></td>
</tr>
<tr>
<td>Forfeiture</td>
<td>The immediate loss of the lease interest due to a breach of a condition or where the landlord takes possession.</td>
<td></td>
</tr>
<tr>
<td>Four unities</td>
<td>The interest that may be shared in land. Ownership usual is for all four, namely: possession, interest, title and time.</td>
<td></td>
</tr>
<tr>
<td>Frustration</td>
<td>The situation where a contractual obligation has, without the fault of either contracting party, becomes incapable of being performed. E.g. as a result of an “Act of God”.</td>
<td></td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
<td>In my own words….</td>
</tr>
<tr>
<td>-----------------------</td>
<td>-----------------------------------------------------------------------------</td>
<td>-------------------</td>
</tr>
<tr>
<td>Lessee</td>
<td>The person granted the lease to the property (and therefore granted possession of the land).</td>
<td></td>
</tr>
<tr>
<td>Lessor</td>
<td>Owner of the property to be leased.</td>
<td></td>
</tr>
<tr>
<td>Right of survivorship</td>
<td>The property right whereby on the death of one of the joint tenants, their interest in the land passes to the other joint tenants.</td>
<td></td>
</tr>
<tr>
<td>Surrender</td>
<td>The landlord agrees to release the tenant from the lease agreement.</td>
<td></td>
</tr>
<tr>
<td>Tenancy at Sufferance</td>
<td>A tenancy at sufferance occurs where the tenant remains in possession after the tenancy has expired, without the landlord’s permission and without paying rent.</td>
<td></td>
</tr>
<tr>
<td>Tenancy at Will</td>
<td>A tenancy at will is without fixed duration and will arise where a tenant enters or remains in possession of property with the consent of the landlord but without paying rent.</td>
<td></td>
</tr>
</tbody>
</table>

INTRODUCTION

Having examined the various elements needed to be present to form and enforce a valid contract, we will now examine three special types of contract relevant commercially, namely leases, hire purchase agreements and franchise agreements.

LEASES

Definition

Under common law a lease is a contract in which an owner of property (the lessor) grants another person (the lessee) the right to exclusive possession of the property for a specific period of time in return for consideration, which is usually monetary rental. Any tangible property may be leased or licensed.

Leases of real property

In leases of real property, the lessor may be known as the landlord, the lessee as the tenant and the terms of the lease contract as covenants.
Leases are generally categorised as being either commercial or residential, and common law concerning leases has been modified by both state and federal legislation.

**Registration of Leases**

Under common law a lease contract may be a simple contract, written or spoken, or a formal contract. Statute law requires that leases be ‘evidenced’ in writing. A lease may be registered on the certificate of title, thereby becoming a ‘legal’ lease placed on the public record which will bind subsequent purchasers of the land.

In South Australia, under statute law, a lease over Torrens Title land must be registered on the certificate of title if it has a term of one year or more, be in writing and fulfil other statutory requirements.

**Equitable leases**

An unregistered lease is often referred to as an equitable lease. A purchaser of a property subject to an equitable lease is usually obliged to recognise the contract and the rights of the tenant if the purchaser has direct or indirect notice of the lease before entering the contract.

**Comparison between a lease and a licence**

We have already defined a lease. A licence occurs where a landowner gives a person permission to use the land but not to enjoy the exclusive possession that is the right of the tenant. A licence therefore gives a person permission to do something on the land that would otherwise be unlawful, for example to drive across it.

- Unlike a licence, a lease gives to the tenant an interest or estate in the land and can be registered upon the title.
- At common law a licence can be revoked at any time, whereas a lease will provide exclusive possession and cannot be revoked without cause.
- A licence cannot be assigned, but a lease may be assigned or sublet with the lessor’s permission.

**Types of leases**

Leases may be categorised according to the way in which they are created, as in the most common categories identified below.

(a) **Fixed Term Tenancy**

A fixed term lease is expressly created for a fixed period. The exact date at which the lease will end is either known at the start of the lease or is ascertainable by the parties. A fixed term lease often includes an option to renew for a specific period.
(a) **Periodic Tenancy**

A periodic lease is one that continues indefinitely from one period to another. It is determined by one party giving notice to the other, and is usually referred to as weekly, monthly etc having regard to the rental period to which it pertains. It is most likely to occur when a tenant is given permission by the landlord to remain in possession of the property after the fixed term has expired.

(b) **Tenancy at Will**

A tenancy at will is without fixed duration and will arise where a tenant enters or remains in possession of property with the consent of the landlord but without paying rent. Either party can determine the tenancy at any time.

(c) **Tenancy at Sufferance**

A tenancy at sufferance occurs where the tenant remains in possession after the tenancy has expired, without the landlord’s permission and without paying rent.

**Lease Covenants**

The terms or covenants in a lease agreement can be expressly stated in the agreement or implied by common law, the courts, or statute law. The main covenants are as follows.

(a) **Tenant’s covenants under common law**

- To pay the agreed rent.
- To keep and deliver up the premises to the landlord at the end of the term in their ‘state of repair’ at the commencement of the lease.
- To permit the landlord to enter and inspect the premises, (usually reasonable notice is required).
- To refrain from conducting any illegal activity on the premises.
- To refrain from subletting or assigning the lease without the prior consent of the landlord.
- To pay rates and taxes if the lease is commercial.

(b) **Landlord’s covenants**

- To allow the tenant quiet possession of the premises.
- To refrain from conduct which would render the premises unfit for their purpose.
- To repair the premises.
- To pay rates and taxes if the lease is residential.
Termination of a Lease under Common Law

(a) By expiry of time, if a fixed term lease.
(b) By breach of a covenant, if it is an essential term of the lease such as a failure to pay rent.
(c) By surrender, if the landlord agrees to release the tenant from the lease agreement.
(d) By frustration, which occurs when the continuation of the lease becomes impossible due to some unforeseen external event.
(e) By a notice to quit, either party may give such a notice, and the length of the notice must be commensurate to the length of the tenancy – ie, if a monthly tenancy, one month’s notice must be given. A yearly tenancy is an exception, requiring only 6 months notice.
(f) By forfeiture, a tenant’s right to occupation may be lost if the tenant breaches a condition or, the landlord takes possession in a usual manner, usually by a court order. A landlord cannot exercise the right of forfeiture without re-entering the premises.

Residential Tenancies

A residential tenancy is a fixed term lease for the purpose of providing people with a place to live, and such residencies are the subject of legislation in all states. In South Australia the relevant legislation is the Residential Tenancies Act 1978 which varies the common law rights and obligations of landlords and tenants. Provisions common to residential tenancies legislation in all states include;

- commercial residences are excluded, eg hotels and nursing homes
- standard form lease agreements must be used, although they may be varied and added to in compliance with statute
- the landlord must give at least 60 days written notice of a rent increase
- adequate security must be provided on the premises

Further, the legislation provides for the operation of the Residential Tenancies Tribunal which hears disputes between landlord and tenant and has various powers including;

(i) power to declare that a rent is excessive and give orders of adjustment
(ii) power to order re-entry by the landlord
(iii) power to order performance of obligations by either party
(iv) power to terminate a residential tenancy agreement
(v) power to decide disputes over security deposits
(vi) power to enforce a landlord’s duty to repair premises.
Commercial tenancies

A commercial tenancy is one where the premises are leased for the purpose of running a business. Such a tenancy may be regulated by common law, or, if the lease is for a retail tenancy, the state based retail tenancy legislation. A retail tenancy is one where the premises are predominantly used for carrying on business for the sale or hire of goods or services. The main features of retail tenancies include:

- prior to the lease the landlord must provide a disclosure statement, setting out the main features of the property and any costs to the tenant;
- lease documents must be in plain English;
- landlords must pay compensation to tenants for failure to repair plant or equipment or to comply with any statutory requirement;
- landlords must give three months notice to the tenant prior to expiry of the lease of their intentions to renew and on what terms.
- dispute resolution focuses on mediation and conciliation;
- commercial landlords must provide premises that are reasonably clean at the outset of the lease and must disclose any defects in the premises.

HIRE PURCHASE AGREEMENTS

A hire purchase agreement exists where the owner of goods agrees to hire them to another person for a fixed period and gives to the hirer an option to purchase the goods at the end of the period. The hirer agrees to pay rent by instalments towards the total purchase price. The key element is that ownership in the goods does not pass to the hirer until the final payment on the agreement has been made. Hire purchase has been abolished in relation to consumer contracts but still exists in some commercial dealings.

FRANCHISE AGREEMENTS

A franchise agreement is a contract made between the franchisor and the franchisee. The franchisor is the supplier of a product or service, or an owner of a copyright or trademark and the franchisee is the reseller of that property, wishing to do business under the franchisor’s name.

Franchising agreements provide advantages to both parties. Advantages to the franchisor include rapid market penetration, access to capital resources and risk sharing. Advantages to the franchisee include an existing business reputation and system, and the continuing interest of the franchisor in the business.
Types of franchise

- **Product franchise**, where the franchisee acts as the distributor for a particular product, eg. Wendy’s
- **System franchise**, where the franchisee operates a ‘packaged’ business concept, eg. Fasta Pasta
- **Process or manufacturing franchise**, where the franchisor provides an essential ingredient or knowledge to a processor or manufacturer.

Regulation of franchises

Briefly, a franchise agreement will contain terms as to;

- the key intellectual property involved,
- rights and obligations of each party;
- franchisor’s degree of control over marketing, equipment and fixtures;
- duration of the agreement and its geographical location;
- rights of a franchisor to inspect the accounts of the franchisee;
- the conditions of termination.

Franchise agreements made, transferred, renewed or extended on or after 1 October, 1998 are protected by a federal compulsory code of conduct, namely the *Trade Practices (Industry Codes – Franchising) Regulations 1998*, forming part of the *Trade Practices Act*. Included is the following:

1. **Requirements prior to the making of the agreement**
   - full disclosure by the franchisor, via a disclosure document
   - the disclosure document must be received by the franchisee at least 14 days before they enter the contract and they are entitled to a 7 day cooling off period
   - proof of independent advice, or proof of waiver of independent advice must be given by the franchisee to the franchisor
   - copies of retail leases must be provided if the landlord is the franchisor or an associate of the franchisor.

2. **Requirements during the life of the agreement**
   - free association of franchisees
   - mandatory mediation regarding disputes
   - notification of the franchisee of changes in the ownership of the franchise or any litigation which the franchisor is facing
   - marketing funds must be audited if franchisees contribute to them
   - a franchisor wishing to terminate the franchise must give reasonable notice.

Note that the Code does not apply to franchisors who do not reside in Australia and to companies that grant only one franchise within Australia.
Franchising Policy Council

This body is responsible for the implementation of the Code. Its main duties are;

- to monitor and enforce the Code; the main remedies for a breach of the code are orders for damages, corrective advertising and compliance programmes.
- appoint a Franchising Code Mediation Adviser;
- to provide information and training packages to small business franchisees.

Franchises and the Trade Practices Act

The TPA Consumer Protection provisions may also assist a franchisee, including s52 which prohibits a corporation engaging in misleading and deceptive conduct and also the unconscionable conduct provisions s51AA and s51AC.

Since franchisors control the supply, marketing and distribution aspects of a franchise, they may be at risk from breaching s47 and s48 of the TPA which deal with exclusive dealing and resale price maintenance respectively.

INSURANCE

An insurance contract is concerned with the relationship of two persons – the insurer who agrees to compensate or indemnify the insured for any loss or damage suffered on the happening of a certain event. The six basic contractual elements must be present. Offer may be found in the proposal which the applicant is required to complete which contains a series of questions. The answers to these questions form the basis of the insurer’s decision whether to accept the offer and the risk of insuring the applicant. If the offer is accepted, a policy is issued which contains the terms of the contract. The consideration for the contract is the premium paid by the insured.

An indemnity policy aims to place the insured in the same position to that if the subject loss had not happened. The insured is not entitled to make a profit from their loss and the indemnity may be in the form of money or replacement or repair of the damaged property. Indemnity policies include those for fire, burglary and property damage.

A compensation policy is one covering death or accident, where money cannot restore the insured to their previous position, but may ease their situation.

Insurance is clearly a necessary commercial concern and is regulated both by common law and the federal Insurance Contracts Act (1984), (hereafter the Act) which does modify some of the relevant common law principles.
Cover notes

A cover note is a form of immediate, interim insurance that protects the insured for a short time, generally not exceeding one month, usually whilst a proposal is being considered by the insurer. Alternatively, a cover note may be taken out over the telephone without completion of a proposal. A cover note is a contract of insurance with all the rights and obligations of the insurer’s policy.

Regulation of Australian Insurance

(a) The Australian Prudential Regulation Authority (APRA) regulates the management and financial practices of insurance companies and financial institutions. It sets guidelines for insurers, inspects insurance offices and may prevent unacceptable promotional material or policies.

(b) The Australian Securities and Investment Commission (ASIC) is responsible for regulating investment products and financial advisers and for protecting consumers.

(c) Voluntary Industry Regulation There are industry managed resolution schemes and ethical codes. All insurers must have an internal dispute resolution service and respond to complaints within a reasonable time.

Common law doctrines of insurance

Historically, case law relating to insurance has given rise to five distinctive doctrines, namely:

(a) insurable interest  
(b) utmost good faith  
(c) indemnity  
(d) subrogation  
(e) proximate cause

All of these doctrines have been affected by statute law and in particular the Act.

(a) Insurable interest

Under common law an insured must have an insurable interest in the subject matter of the contract. A person will have such an interest if they will benefit from the property being preserved and suffer detriment if the property is damaged or destroyed. The main purpose of requiring the possession of an insurable interest is to prevent the insured from deliberately damaging the subject matter and then claiming on the insurance. If an insured did not have an insurable interest when the contract was made and when the loss occurred, the insurer could avoid or fail to pay any claim.
Macaura v Northern Insurance Co (1925) AC 619

Macaura was the owner of a timber business and plantation which was covered by an insurance policy. He sold the business to a company of which he was the only director and major shareholder, but failed to inform the insurance company that he was no longer the legal owner. He continued to pay the premiums in his own name. When the plantation was destroyed by fire, the insurance company was successful in avoiding the claim on the basis that Macaura did not possess an insurable interest at the time of the loss.

This position has been modified by the Act which provides that a contract of general insurance will not be regarded as void just because the insured lacked an insurable interest in the subject matter at the time of making the contract. It is sufficient that the insured suffered an economic or pecuniary loss as a result of damage to or destruction of the subject matter of the existing insurance contract. (s16 and s17 of the Act).

Similarly, s18 of the Act provides that a life insurance contract is not void solely because the insured did not have an interest at the time the contract was made. Beneficiaries have never been required to have an insurable interest when a payout is due under a policy.

(b) Utmost good faith

All contracts of insurance are contracts uberrimaes fidei, which means they impose a duty of utmost honesty, good faith and disclosure. This duty is owed by the insured to the insurer and to the insurer by the insured.

The duty falls most heavily on the insured, as they have a far greater knowledge than the insurer of the risks involved. The duty requires the insured to;

- disclose all material facts and
- make truthful representation about material facts.

At common law, if a breach of good faith was fraudulent, the insurer could avoid the contract and refuse to pay the claim, but if the breach was innocent, usually the insurer could only reduce the pay out claim.

(i) The duty of utmost good faith arises;

- during negotiations of the contract;
- prior to any renewal, extension, variation or reinstatement of a contract; and
- during the lifetime of the policy.
(ii) Duty of disclosure under common law

An insurer could avoid a claim if the insured failed to disclose a material fact, namely a fact that would have influenced a prudent insurer when that person was deciding whether or not to accept the risk. (See *Marene Knitting Mills v Greater Pacific General Insurance Pty Ltd* (1976) 11 ALR 16.

(iii) Duty of disclosure under the Act

The prudent insurer test has been abolished by the Act, and the insured is now only obliged to disclose matters that they know are material to the decision of the actual insurer involved, whether or not to accept the risk, and if so on what terms, (s21(1)(a)).

If an insured claims to be unaware that a fact was material the test is: Could a reasonable person in the same circumstances be expected to know that the fact was material?. (s21(1)(b)). If the answer is yes the insured has failed the duty of disclosure.

The insured is not required to disclose matters:

- that diminish the risk,
- that are common knowledge,
- that the insurer knows or ought to know in the ordinary course of their business,
- where the insurer has waived the insured’s duty of disclosure.

Examples of facts considered to be material are the number and size of material claims, rejected claims, previous refusals to cover the insured and previous convictions. The insured is responsible for non-disclosure by their agents.

---

**Lindsay v CIC Insurance Ltd** (1989) 16 NSWLR 673

Lindsay and twelve others owned a small block of shops and offices. The real estate agent told Lindsay of his belief that two of the shops were being used as a brothel. Lindsay did not disclose this to his insurance brokers before they arranged a new policy over the premises. When the block was destroyed by fire the insurance company refused to pay on the basis of non-disclosure of a material fact. The insurance company was successful because:

- Lindsay had fraudulently breached s 21(1)(b) – a reasonable person would have known the presence of the brothel increased the risk of arson, threats and fights.
- Lindsay would have been in breach even if the agent had not advised him because the knowledge of the agent is deemed to be the knowledge of the insured.
- As Lindsay was effectively an agent for the other owners, they too were liable for his breach.
(iv) The duty to make truthful representations

At common law, an insurer may avoid a claim if the insured made either a fraudulent misrepresentation or an innocent misrepresentation about a material fact.

Under the Act, an insured must not make an untrue statement about a fact that the person knows was material, or that a reasonable person in the same circumstances should have known was material. An untrue statement is not a misrepresentation if the insured:
- honestly and reasonably believed the statement to be true;
- failed to answer a question; or
- provided an answer that was incomplete or irrelevant

(v) Remedies for breach of utmost good faith

Pursuant to s28 (2) of the Act, if the breach was fraudulent, the insurer may avoid the contract. This right applies even where the breach involved facts that were not connected to the type of claim made by the insured, as at ABL 403, a claim for flood damage could be rejected if the insured fraudulently failed to disclose that the premises were being used to store stolen property.

Pursuant to s 28(3) of the Act, if the breach was innocent, or the insurer decides not to avoid the claim, it may reduce the payout by a sum that will return the insurance company to the financial position it would have been in if the breach had not occurred. This may result in the higher premiums the insured should have been paying being deducted from the payout figure. If the insurer would not have entered the contract at all, there may be a nil payout, with the return of any premiums paid to the insured.

Pursuant to s28(1) and 29(1), general and life insurers are not entitled to the remedies available for fraudulent or innocent breaches of utmost good faith if they would have entered the same contract, with the same premiums and conditions, even if they had known the same facts concealed by the breach.

Pursuant to s31 an insurer that has the right to avoid a contract for a fraudulent breach may be ordered to pay by the court in any event if;
- it would be harsh and unfair not to do so, and
- the insurer suffered little or no harm as a result of the breach.

Insurer’s Obligations

- To be prompt in admitting liability and paying claims.
- To inform the insured in writing and in plain English about the general nature and effect of the duty of disclosure before the contract is made.
- To provide consumers with notices about their rights at pre-sale, point of sale and post sale.
- To allow consumers a 14 day cooling off period before formally entering a contract of insurance.
Indemnity

The purpose of an indemnity policy is to restore the insured to the position they occupied prior to the actual loss specified in the policy. The doctrine does not apply to life, accident or sickness policies, which are compensation policies, and pay an amount on the happening of a specified event. The indemnity principle applies in the following situations.

(a) **Under - insurance** – people who insure something for less than its worth are usually paid only a proportion of their loss.

(b) **Over – insurance** – people who insure something for more than its worth will only be compensated for the actual value of their loss.

(c) **Double insurance** – this occurs when an insured insures the same property with more than one insurer. Insurers cannot limit or exclude their liability in this situation, but an insured is only entitled to receive compensation for the actual loss. If more than one insurer is involved, each must pay proportionately.

Where a policy contains a **subject to average clause** and the insured underestimated the value of the property, the insurer is only liable to pay a proportion of the loss. Such a clause may be enforced only if the insurer gave notice of the clause and its consequences in writing, prior to entry into the contract. The Act also provides that an insurer cannot invoke an average clause and reduce the payout on loss to a personal residence if the insured underestimated its value by 20% or less.

Subrogation

**Subrogation** is the substitution of one person or thing for another. The same rights and duties attached to the original person or thing attach to the substituted person or thing. One person ‘stands in another’s shoes.’ The doctrine of subrogation applies to indemnity contracts and entitles the insurer, on payment of **full compensation** for a loss, to all the rights that the insured had with respect to the injured property. The insurer also has the right to sue a third party if that third party caused the loss. The insurer may retain any sum that exceeds the sum paid in compensation to satisfy the indemnity doctrine.

Proximate cause

The proximate cause is the **initial cause of loss** which may lead to a chain of events. In order to claim on an insurance policy, the claimant must be insured for the initial cause. For example, a flood may cause a stobie pole to collapse against a house and hit an electrical wire, which in turn, causes a fire. The house burns down. The insured must be covered, not against fire, but against flood to be able to claim on an insurance policy.
Insurance Agents

An insurance agent must be appointed in writing by the insurer, and negotiate the terms of the policy on behalf of the insurer. Agents are usually paid by a commission that is deducted from the premiums.

Duties of Agents

- An agent owes a fiduciary duty to the insurer and must act in its best interests.
- An agent must disclose to the insured which company they represent.

Liabilities of Agents

- The *Insurance (Agents and Brokers) Act 1984 (Cth)* provides that an insurer may be liable for the conduct of its agents or employees even where they act outside the scope of their authority or employment.
- Providing the insured acted honestly and reasonably relied upon the agent, the insurer cannot avoid the claim or cancel the policy.

Insurance Brokers

Insurance brokers are persons who act for those who are seeking insurance. The role of a broker is to arrange the best rate from a reputable insurer on behalf of their client. The broker receives payment for their services, as they receive a percentage of the premium paid by the client from the insurer.

Duties of a Broker

- Brokers must be registered by the Australian Securities and Investment Commission
- They owe their clients a duty to exercise reasonable skill and care.

Liabilities of a Broker

- If the broker fails to exercise reasonable skill in advising their client, the broker is liable – the insurance company bears no responsibility should the broker fail to obtain a policy as instructed by the client.
- If a broker has a preferred association with a particular insurer they must disclose this to the client.

Section 14 of the *Insurance (Agents and Brokers) Act 1984*, provides that if an insured pays the correct premium to an independent agent or broker, the payment is regarded as having been made to the insurer. However, insurers may not be liable if the payment that an independent broker failed to pass to them was a renewal policy.
In *Manufacturers Mutual Insurance Ltd v John H Boardman Insurance Brokers Pty Ltd* (1994) 68 ALJR 385 (ABL 415), it was held that where a broker fails to follow the conditions of acceptance of the renewal notice it is likely that no insurance contract was formed. Therefore, it is the broker and not the insurer who is liable to compensate the insured.

**Insurance cover for commercial enterprises**

**Property insurance**

(a) **Fire and extraneous risks**, covers damage to property arising from fire and ‘perils’, ie. storm and tempest, aircraft accidents, explosion, earthquake, malicious damage, fusion and water damage.

(b) **Loss of profits**, covers loss of business arising directly from fire and specified perils.

(c) **Burglary**, covers loss to stock, plant and equipment as a result of forced entry to buildings

(d) **Theft**, covers loss of contents when there is no forced entry.

(e) **Fidelity guarantee**, covers loss of money as a result of misappropriation by an employee.

(f) **Cash in transit**

(g) **Engineering**, covers loss or damage resulting directly from explosions and break down of machinery.

(h) **Multi-risks**, loss of or damage to valuables arising directly out of fire, theft or accidental loss.

**Liability insurance**

(a) **Public Liability**, covers claims by a third party for death, injury, loss or damage arising directly from the negligent acts or omissions by the insured or their agents or employees.

(b) **Product Liability**, covers claims by a third party for death, injury loss or damage arising directly from defects in a product for which the insured is liable.

(c) **Professional Indemnity**, covers claims by the clients of professionals for loss or damage arising directly form negligence or breach of contractual duty by the insured or their employees or agents.

**Motor vehicle insurance**

(a) **Compulsory Third Party**, covers claims for injury of or death to others arising out of negligent driving of a specified vehicle.

(b) **Property Damage(Comprehensive)**, covers loss or damage to specified vehicle or to another’s property arising out of driving a specified vehicle.

(c) **Third Party Property**, covers loss or damage to another person’s property arising out of a specified vehicle
Life insurance

Life insurance provides for the payment of a specific sum on the death, and death only of the insured.

Accident and sickness insurance

An agreed sum is paid if an accident causes the insured to lose his or her life or limbs, organs or eyes, and/or an agreed regular sum is paid to the insured who is partly or totally disabled as a result of an accident. This is particularly vital to those persons such as the self employed, partners and company directors who may be excluded from workers compensation provisions.
Activities

1. What is a lease?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

2. Define a fixed term tenancy, a periodic tenancy and a tenancy at will.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

3. State three covenants in a lease with which the tenant must comply.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

4. Explain the regulatory system of residential tenancies. How does this differ from the regulatory system for commercial tenancies?

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

5. Define a franchising agreement:

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

6. What are the advantages to the parties involved in a franchising agreement?

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________
7. Briefly explain the purpose of an insurance contract. What is a cover note?

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

8. Briefly explain, with examples, the difference between an indemnity insurance contract and a compensation insurance contract.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________


___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________
10. Is it possible for an insured who has two policies for the same purpose to legally make a profit? Give reasons for your answer.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

11. Briefly explain the doctrine of subrogation and its consequences to the parties to an insurance contract.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

12. Briefly explain the doctrine of proximate cause and its consequences.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
13. Buffy and Willow own a gift shop specialising in unusual and occult items. They insure their property and its contents against fire. Sadly, one evening there is a mighty thunderstorm and the premises and much of the stock are destroyed by fire. The insurance company pays out for a total loss. Miraculously, approximately 10% of the gift items are salvaged and Buffy and Willow hold a fire sale. Are they entitled to keep the proceeds of the sale? Explain your answer.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

14. Buffy and Willow re-open their gift shop at new premises, and forward their policy application to Zander, the insurance agent. The policy application states that the shop premises contain a storage area where “various tins, including paint tins are stored”. Buffy and Willow do not disclose that the other tins contain various oils and flammable chemicals used in the manufacture of some of their gift items. Zander, in a lethargic mood, approves the policy without reading the application.

In a second unfortunate incident, the flammable chemicals ignite, and the new premises are burnt out. The insurance company rejects the claim alleging that Buffy and Willow fraudulently failed to disclose the existence of the chemicals and the degree of risk involved. Advise Buffy and Willow as to the likely outcome. Explain whether your answer would be different if;

- Buffy and Willow had also failed to disclose the fire at the previous premises; and, alternatively;
- Zander was their broker and not an agent of the insurer?
### Lecture 8

<table>
<thead>
<tr>
<th>Learning Outcome</th>
<th>Learning Outcome 8</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Recognise the application of contractual principles to employment contracts</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Required Reading</th>
<th>Vickery and Pendleton 6th ed – Chapter 30</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Activities</th>
<th>Activities in workbook</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
<th>In my own words….</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contract of service</td>
<td>Contract of employment between employer and employee.</td>
<td></td>
</tr>
<tr>
<td>Express terms</td>
<td>Terms of employment agreed to by the employer / employee. May be in writing or verbal.</td>
<td></td>
</tr>
<tr>
<td>Implied terms</td>
<td>Terms of a contract which are not specified by the employer / employee. These terms are implied by law to be included in employment contracts.</td>
<td></td>
</tr>
<tr>
<td>Independent contractor</td>
<td>A person contracted to complete a set work task. The contractor retains control over how the service is performed.</td>
<td></td>
</tr>
<tr>
<td>Termination of employment</td>
<td>The act of terminating (ending) a employment contract.</td>
<td></td>
</tr>
<tr>
<td>Unfair dismissal</td>
<td>Termination of employment that is seen to be ‘harsh, unjust, or unreasonable’.</td>
<td></td>
</tr>
<tr>
<td>Unlawful termination</td>
<td>Termination of employment where the terms of the contract (express or implied) have been breached.</td>
<td></td>
</tr>
</tbody>
</table>
Formation and Operation of Employment Contracts

All employees have an employment contract, which can be written or verbal or a combination of both. An employment contract arises when an employer offers, and an employee accepts, employment. Work can be undertaken on a casual, part-time or full-time basis, whether an individual is employed for a short time, or for a number of years.

If an employee is covered by an award or agreement (discussed in the next chapter), it is normal to rely on a verbal contract with a letter of confirmation because the actual conditions of employment are set out in the award or enterprise agreement.

If an employee is not covered in this way it is wise to prepare a written contract of employment which should expressly refer to the following matters:

- The main duties of the employee.
- The location of the employment site.
- Whether the employee is casual, permanent, part-time etc.
- Any entitlements to overtime or payment in lieu.
- Any entitlements to pay rises or increments on any grounds.
- Whether the employment is ongoing or for a fixed period.
- Whether there is a probationary period.
- Where there is a probationary period, or where the position is renewable, the details of the review process and period.
- If over award payments are to be made, on what terms.

As noted by Vickery & Pendleton (2009) ‘these contractual terms must comply with any relevant legislation, award or enterprise agreement’. Therefore, the individual contract although able to improve on these, must not fall below them.

Making employment conditions clear

An employer has an obligation to make certain terms and conditions of employment clear to employees. This should cover:

- which award (if any) and / or agreement covers the employee
- the employee’s classification and rate of pay
- the employee’s employment status (e.g. casual, full-time, permanent etc), job description and performance expectations
- hours of work, including overtime and shift work and any requirements for reporting absences
- details of any probationary period
- pay arrangements, including the pay day and how deductions from pay are made
- superannuation contributions and benefits
- if initial training is required, the form it will take (e.g. on-the-job or off-the-job), when it will be completed and what the employee is expected to be able to do thereafter
- the period of notice required for termination of employment
- any special rules and procedures, including unacceptable conduct, confidentiality, and disciplinary, grievance and consultative-committee procedures
Minimum conditions which apply to most employees include:

- Wages – set by your award, agreement or industrial law
- Annual Leave – you receive 4 weeks of paid holiday leave
- Sick Leave – You can take up to 10 days sick leave but you must be able to provide evidence that you were sick
- Public Holidays – If you don't work on a public holiday because your employer closes the business on the day you would usually work you should still get paid that day. This doesn't apply to part-time workers who usually don't work that day
- Bereavement Leave – if someone in your family dies you can take up to 2 days paid leave
- Unpaid Parental Leave – parents who work are allowed to take unpaid leave to care for their newborn or adopted child

Some workers are not covered by the minimum conditions. These include:

- Casuals
- Commission only workers who receive a percentage of the sales results achieved.
- Piece rate workers who earn a set rate for completing a task that can be measured or counted (e.g. fruit pickers).

**Probationary Periods**

An employee’s contract of employment may specify a probationary period. Where the period of probation is determined in advance of the employment and the period or maximum period is three months or less (or longer, if reasonable given the nature and circumstances of the job), dismissal of the employee during the probationary period is exempt from the termination of employment provisions (i.e. Unfair Dismissal requirements).

**Restraint of Trade Regarding Employment**

A contract may prohibit a tradesperson exercising their particular trade for a period of time within a particular locality after leaving the firm with which they are employed, as a condition of obtaining that employment. These contracts may be found to be void if they are harsh and unfair if it does not genuinely protect the legitimate interests of the employer.

Therefore if an employer legitimately wishes to restrict the competitive activities of an employee after leaving their employment, the narrower the restriction, the more likely it will be upheld. An employer cannot restrict an employee from using the general skills and knowledge they have obtained during their employment, however, an employee always has a duty to maintain the confidentiality of relevant intellectual property and information such as client lists etc.
The courts will use the following tests to determine whether a restraint of trade clause in an employment contract is reasonable and therefore enforceable.

a) Is the person prevented from earning a livelihood?
b) Is the person prevented from using their skills and knowledge in order to earn a livelihood? Is the person prevented from finding another job in that trade or profession?
c) Is the employer merely safeguarding trade secrets or asking for more than reasonable protection?
d) Is the restraint against the public interest?
e) Is the bargaining strength of the parties equal?
f) Is there consideration for agreeing to the restraint?

Schroeder Music Publishing Co Ltd v Macaulay (1974) 1 WLR 1308

Macaulay, an unknown 21 year old songwriter agreed to write exclusively for Schroeder Music for five years. The company had the right to extend the contract for another five years, or terminate it with one month’s notice. Macaulay however, had no rights of termination, and the company could transfer his contract without his consent and had no obligation to publish or promote his songs. He was only paid if the company chose to publish his songs. Eventually he tried to terminate his contract. It was held that the agreement was an unfair restraint of trade and therefore void, with the company having taken advantage of its superior bargaining position.

Arnotts Ltd v Bourke (1998) 41 IPR 172

A clause in the contract of the managing director of Arnott’s Ltd restrained him from working in any capacity ‘in the business of making and selling biscuits within Australia or New Zealand’ for three years after he left the company. Two years and four months after his resignation and receipt of $1.5 million dollars (3 years salary) he became the managing director of a rival company. It was held that the restraint clause was too wide to be enforced as; theoretically it even prevented him selling biscuits at a supermarket check out.

**TERMINATION OF THE EMPLOYMENT CONTRACT**

The law relating to the termination of the contract of the employment is based in common law; however the common law has been modified and supplemented by legislation and the provisions of awards and enterprise agreements.

- **Termination by death** – a contract of employment may cease as a result of the death of either the contracting parties, namely the employer (e.g. sole trader) or the employee. However the estate of the deceased employer or employee would have some rights to enforce some outstanding liabilities such as wages owed.

- **Termination by dissolution or the bankruptcy of the employer** – where the employer is a business structure and not a natural person, and the employer ceases to exist, the contract of employment also ceases to exist. For example the dissolution of a partnership or a new partnership being created by recomposition of the partnership. If the employer is a company, existing contracts of employment are terminated upon the winding up or liquidation of the company.
• There are specific laws that give an employee of a company that has ceased to exist priorities over other creditors for the payment of outstanding wages and other industrial entitlements. Where the employer is a natural person who is declared bankrupt, the bankruptcy will not automatically terminate contracts of employment with employees. The fact of the bankruptcy will usually give the employer grounds to terminate the employee’s contracts on the basis of redundancy.

• **Termination by sale of business of the employer** – pursuant to common law principles, an employer who has sold their business ceases to be the employer of workers engaged by the new proprietor of the business. All existing contracts between the former employer and the workers are terminated by sale of the business. Those workers who remain to work for the new business proprietor are engaged under a new contract of employment with their new employer.

These principles have been qualified by various decisions of industrial tribunals and awards and enterprise agreements to include specific provisions that ‘carry-over’ all service related entitlements for employees who continued working for the business after the transaction to a new proprietor.

The service-related entitlements which may be affected by these specific transmission provisions include:

- long service leave,
- annual leave,
- sick leave,
- wage classifications,
- severance pay,
- periods of notice before termination of employment,
- superannuation.

• **Termination by frustration of contract** – this will occur where some unforeseen event, the fault of neither party has occurred during the life of the contract which makes it impossible for the contract to be performed. E.g. – an employee suffers an ongoing illness or incapacity, making it impossible to perform their employment duties or an employer’s plant and equipment are destroyed by fire. It must be noted that specific statutory provisions may preclude termination of an employment contract where there is a work-related incapacity.

• **Termination by abandonment of contract** – a contract of employment is terminated where the employee demonstrates a clear intention, in all the circumstances, not to be bound by the contractual rights or obligations.
• **Termination by breach of contract** – if there is a breach of a fundamental term of the contract; the contract can be terminated at the option of the injured party, and may sue for damages. Courts will not usually order specific performance of employment contracts, although injunctive relief to protect the interests of the injured party may be granted. If the breach is of a warranty only, the only available remedy is damages.

• **Termination by Notice** – various rules apply to the giving of notice to terminate an employment contract;

  - Where a contract of employment is of indefinite duration, it may be terminated by either the employer or the employee giving ‘reasonable notice’. This rule is subject to any contractual provision to the contrary. What amounts to reasonable notice will vary depending upon the factual circumstances and application of any award or enterprise agreement provisions. The right of the employer to pay wages for the relevant notice period instead of requiring the employee to work is well recognised.

If an agreement or award does not include notice periods then generally the notice periods are:

<table>
<thead>
<tr>
<th>Years of Service</th>
<th>Minimum period of notice</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 1 year</td>
<td>1 week</td>
</tr>
<tr>
<td>1 to 3 years</td>
<td>2 weeks</td>
</tr>
<tr>
<td>3 to 5 years</td>
<td>3 weeks</td>
</tr>
<tr>
<td>Over 5 years</td>
<td>4 weeks</td>
</tr>
</tbody>
</table>

• A contract for a specified period of time automatically lapses when the specified period has passed.

• If the contract is for the performance of a particular task, the contract automatically terminates upon the completion of the task. Where a casual employment contract exists, the employment relationship is not a continuing one and the employment contract automatically ceases at the expiry of each engagement.

• Unless prescribed by the employment contract or by an industrial award or enterprise agreement, there are no particular formal requirements for the giving of notice, and thus notice may be verbal or written.

• **Termination by resignation** - The contract of employment or employment agreement will usually outline the duration of notice, which must be provided. As a general rule notice is linked to pay periods (e.g. monthly payment may require a months notice). In most cases the amount of notice requirement is two (2) weeks.

• **Termination without notice** - Termination of the employment contract by the employer or the employee may occur without notice if the other party commits a fundamental breach of the contract.
When this right is exercised by the employer it is referred to as the right of summary dismissal, and it is the most powerful of the employer’s remedies for breach of contract. The principal grounds for summary dismissal are in the cases of proven:

- misconduct,
- insubordination,
- dishonesty,
- incompetence,
- neglect of duty,
- failure to abide by lawful directions,
- offensive language,
- criminal activity,
- being under the influence of alcohol or drugs,
- breach of confidentiality.

Whether conduct of this type is sufficient to justify summary dismissal depends on the circumstances of each case. The conduct of the employee needs to be serious and wilful and to have struck at the heart of the employee’s fundamental obligations.
1. Simon was a lecturer for TAFESA. A clause in his employment contract stated that if and when he left TAFESA he would not be able to set up his own private Registered Training Organisation or additionally, work for a competitor of TAFE for 3 years. Simon subsequently resigned from TAFE and opened a Bed & Breakfast with his wife Sonya which they ran for two and half years. Unfortunately, due to an economic downturn, Simon was forced to sell the Bed & Breakfast and returned to lecture at a private Registered Training Organisation which was in competition with TAFESA. TAFESA is seeking to enforce the clause in his original employment contract, preventing Simon from working for the private RTO. Advise Simon

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

2. Before Harold became employed by ‘Rob’s Builders’ he agreed to only have 2 weeks annual leave. The owner explained that this was really all the business could afford despite the award covering Harold’s type of work specifying 4 weeks annual leave. Advise Harold. Would the situation differ if he was employed on a) permanent or b) casual basis. Why/why not?

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
3. Mark was due to start a new job as an entertainer aboard a cruise ship in two weeks time. The day before the ship was to leave port, he received the bad news that it had been gutted by fire the night before and would not be operational in the foreseeable future. What are Mark’s prospects for success should he choose to argue a breach of his employment contract?

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

4. Explain the options for an employer who wishes to terminate an employee with notice

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

5. Explain the options for an employer who wishes to terminate an employee without notice

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

___________
Learning Outcome | Learning Outcome 9  
---|---
  | Demonstrate an understanding of workplace relations law

Required Reading | Vickery and Pendleton 6th ed – Chapter 30  
---|---
  | Refer to Safework SA website

Activities | Activities in workbook

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
<th>In my own words....</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arbitration</td>
<td>A neutral third party is selected / appointed to hear and / or make a decision regarding a dispute.</td>
<td></td>
</tr>
<tr>
<td>Award</td>
<td>Minimum pay and conditions which may be set for particular employment / industries.</td>
<td></td>
</tr>
<tr>
<td>Certified Agreement</td>
<td>A form of collective employment agreement.</td>
<td></td>
</tr>
<tr>
<td>Conciliation</td>
<td>The process where parties to a dispute are assisted by a neutral third party in negotiating a resolution to the dispute.</td>
<td></td>
</tr>
<tr>
<td>Industrial action</td>
<td>Strikes, work bans or limitation of duties by employees (or unions).</td>
<td></td>
</tr>
<tr>
<td>Vicarious liability</td>
<td>The legal liability of an employer for the acts of an employee.</td>
<td></td>
</tr>
</tbody>
</table>

### Workplace Relations System

**Applicable Law**

- South Australia – Fair Work Act 1994:
- Federal – Fair Work Act 2009

Industrial Relations law is a state responsibility under the Constitution of Australia. The Federal government has powers to make laws in regards to industrial relations in regards to Federal employees, Corporations, Interstate disputes and in regards to International treaties (see section 51 of the Constitution). The State parliaments may refer (give away) their legislative powers to the Federal government. Victoria in 1997 referred the industrial relations power to the Federal government.

Although the Rudd government has made inroads to dismantling Work Choices, most of the important proposed changes will not come into force until January 2010.
Role of Industrial Relations Laws

The key roles of industrial relations laws include:

- To provide employees and employers with a set of rights and responsibilities which are not covered by the Common law
- To provide rights and responsibilities which are uniform across workplaces
- To support those with ‘weaker’ bargaining position in the workplace
- Increase living standards in Australia
- To provide a competitive workplace / economy
- To support workplaces in the resolution of industrial issues / concerns
- To provide employees with a safety net of minimum conditions of employment
- To provide dispute resolution mechanisms
- To assist employees and employers with the work / life balance
- To eliminate forms of discrimination in the workplace
- To give effect to international legal obligations Australia has agreed to adopt (International Labour Standards)
  - Freedom of association
  - Collective bargaining
  - Child labour
  - Wages
  - Working time
  - Equality of Opportunity and treatment
  - Occupational health and safety
  - Employment security

Awards

Awards set out minimum wages and conditions of employment for specified employees. Awards may be federal (Australian Industrial Relations Commission (AIRC) or State (Industrial Relations Commission).

Awards provide a ‘safety net’ of minimum standards / conditions, which may include:

- minimum rates of pay (wages / salary)
- allowances
- overtime, shift penalty and other penalty rates
- hours of work
- leave provisions
- paid paternity leave
- Redundancy
- Dispute settlement procedures

(Other conditions, such as occupational health and safety and workers compensation, are usually covered by state or territory laws)
Awards may include provisions about specific issues such as superannuation or long service leave. More than one award may apply to an employee but provide for different parts of the overall employment package.

Awards are a major source of law affecting the employment relationship and may be defined as: a legally binding order of an industrial tribunal relating to workplace matters including wages and conditions of employment. The wages and conditions contained therein are usually the minimum standard required to be met by an employer.

Minimum standards are set and apply to all employees, whether they are covered by an Enterprise agreement or contract. Awards can be varied by agreement. Many workplaces apply over award payments through employment contracts.

Although industrial awards apply in all state and federal workplace relations jurisdictions, the statutory objects of the award systems can differ. In some jurisdictions, such as the federal jurisdiction, they are intended only as a safety net of minimum standards with the emphasis on enterprise agreements. In other jurisdictions awards are intended to regulate minimum wages and employment conditions in a more extensive manner.

The Commonwealth has power under the Constitution to intervene in ‘interstate disputes’. Federal awards apply to employers named in the award or if the employer is a member of a federally registered employer organisation named (eg Australian Hotels Association).

There is therefore a link between disputes & awards - the AIRC can only set a national award through registration of a dispute by a union and employer eg Aust Hotels Assoc. The Union sets out a claim for pay and conditions known as a ‘log of claims’. The employer rejects the claim and makes a counteroffer. Once this process has occurred, there is a formally recognised dispute which is then registered by the employer and the union with the AIRC.

State Awards are usually 'common rule' Awards – that means that they apply to all workplaces in the industry covered by the Award that are not covered by Federal Awards.

**Award Modernisation**

Under the *Fair Work Act (Cth) 2009*, the Australian Industrial Relations Commission has been charged with undertaking an award modernisation process to create modern awards that commence on January 2010. Award modernisation aims to make a complete set of modern industry based federal Awards that:

- are simple and easy to understand;
- provide a minimum safety net of enforceable terms and conditions of employment;
- are economically sustainable; &
- promote collective bargaining, with no provision for individual statutory agreements.

Modern Awards may include terms relating to minimum wages, types of employment, when work is performed, overtime rates, penalty rates, annualised wages and salaries, allowances, leave and leave loadings, superannuation and procedures for consultation, representation and dispute settlement.
The Award modernisation process will lead to a reduction in the number of federal Awards and/or Notional Agreements Preserving State Awards (“NAPSA”) covering a given industry.

In the clerical industry, it is envisaged that there will be a single federal clerical Award covering the majority of clerical and administrative employees.

‘The process is complex and involves reducing some 4,000 instruments into a much smaller number of simpler modernised awards that are easier to understand.’ (WA Sports Federation 2009)

The modernisation process will establish industry sector awards which, together with the proposed National Employment Standards, create a new minimum set of conditions applicable to the majority of employers in Australia.’ (Consultation Timeframes

As of May 2008 the Full Bench of the Commission began determining a list of priority industries and occupations and an award modernisation timetable.

The Award modernisation process is to be completed by 2010. Unlike the past where unions and employers negotiated the content of an Award through conciliation and arbitration, the Commission will be responsible for drafting the content of and publishing the new modernised Awards. However, the Commission will be conducting a consultation process for each modernised Award including union representatives who will be given an opportunity to comment and have input into draft modernised Awards. (United Services Union 2009)

Enterprise Agreements

These agreements support the notion of an award free workplace where employment conditions are negotiated freely between employers and employees about terms and conditions of employment.

Enterprise agreements can be made at both the State and Federal level. Those employers deemed to be a ‘Constitutional Corporation’ (foreign, trading and financial corporations formed within Australia) need to make agreements under the Federal Fair Work Act 2009.

Why make an Enterprise Agreement? Awards cover a whole industry or occupation and only provide a safety net of minimum pay rates and employment conditions. Enterprise agreements can be tailored to meet the needs of particular enterprises. There are three types of agreements:

Single-enterprise agreements—involving a single employer or one or more employers (such as in a joint venture) co-operating in what is essentially a single enterprise (such employers are known as single interest employers).

Multi-enterprise agreements—involving two or more employers that are not all single interest employers.

Greenfields agreements—involving a genuinely new enterprise that one or more employers are establishing or propose to establish and who have not yet employed persons necessary for the normal conduct of the enterprise. Such agreements may be either a single-enterprise agreement or a multi-enterprise agreement.
Therefore, a Greenfields agreement is made between one or more employers and one or more relevant employee organisations (unions).

Unlike an award, the agreement applies specifically to a workplace or industry rather than an occupation. Employees usually agree to become more productive, efficient and flexible in return for improved pay and conditions. EBAs are about introducing change into the workplace.

Enterprise agreements can include a broad range of matters such as:

- rates of pay
- employment conditions e.g. hours of work, meal breaks, overtime
- consultative mechanisms
- dispute resolution procedures
- deductions from wages for any purpose authorised by an employee.

(Fair Work Australia 2009)

**State Agreements**

The South Australian Enterprise Agreement laws are contained in sections 73 to 89 of the Fair Work Act 1994. There are also regulations under the Act and Rules of the Industrial Relations Commission that relate to the making and approval of Enterprise Agreements. The following is a summary of the main features.

**NATURE OF ENTERPRISE AGREEMENTS (SECTION 74)**
An Enterprise Agreement may be made about remuneration and other industrial matters.

**PERSONS BOUND BY ENTERPRISE AGREEMENTS (SECTION 75)**
An Enterprise Agreement may be made between:

one or more employers (who are subject to the State system) and one of the following:-

- a group of employees at a workplace; or
- one or more Registered Employee Associations (Unions) entering into the Agreement on behalf of the entire group of employees (provided that Union or Association has been authorised in writing and/or by membership to make the Agreement by a majority of the group of employees).

**NEGOTIATION OF ENTERPRISE AGREEMENTS (SECTION 76)**
An employer must ensure that 14 days prior to the commencement of negotiations, all employees are aware of the intention to commence negotiation of the Agreement. The Commission, in limited circumstances, may waive this requirement.

The employer must inform the employees of their right to representation in the negotiation and proceedings for approval of the Agreement. Representation may take the form of a Registered Employee Association, the Employee Ombudsman, or an agent of the employee's choice.

If the employer is aware that an employee in the group is a member of a Trade Union (Registered Employee Association), the employer must take reasonable steps to inform the Association that the negotiations are to commence. The employer must ensure that the employees have access to an up to date copy of the relevant Award (if any) that governs employment at the workplace.
Employees or their Association may initiate the bargaining process, however the employer must still provide the notice and information as set out above.

There is an obligation upon the parties to apply ‘best endeavours bargaining’ principles (Section 76A) and these include:

- meeting at reasonable times and locations for the purposes of commencing and furthering negotiations;
- the parties explaining their respective positions;
- disclosure of relevant and necessary information (an employer cannot be required to disclose financial records);
- acting openly and honestly; and
- adhering to agreed procedures, timetables and outcomes.

COERCION AND/OR HARASSMENT (SECTIONS 79(1)(b) AND 225).

It is an offence for any person to harass an employer or employee to prevent or discourage them from entering into or supporting an Enterprise Agreement.

In addition, the Commission will not approve any Enterprise Agreement that has been entered into as a result of coercion.

FORM AND CONTENT OF ENTERPRISE AGREEMENTS (SECTION 77)

An Enterprise Agreement:

- must be in writing; and
- must specify the employers to be bound by the Agreement;
- must define the group of employees to be bound by the Agreement;
- must include provisions for preventing and settling industrial disputes between employer and employees bound by the Agreement;
- must address the provision for family care leave;
- must deal with the issue of future consultation regarding change at the workplace;
- must nominate a term which can be up to 3 years;
- must make provision for the renegotiation of the Agreement at the end of its term; and
- must be signed by the employer and the employees or by their authorised representatives.

APPROVAL OF THE ENTERPRISE AGREEMENT (SECTION 78 & 79)

An Enterprise Agreement has no force or effect unless approved by the Industrial Relations Commission.

Application should be made within 21 days after signing of the Agreement, and the parties must ensure that the employees concerned are aware of the terms of the Agreement, its relationship with any Award and the intention to seek to have the Agreement approved.

Where the Commission considers that the proposed Agreement does not comply with the Act, the parties are to be advised of the reasons, and given the opportunity to address the concerns identified by the Commission. In these circumstances, the Commission may accept a variation or a formal undertaking being inserted into the proposed Agreement.
EFFECT OF ENTERPRISE AGREEMENTS (SECTION 81)
An Enterprise Agreement prevails over a contract of employment to the extent that the Agreement is inconsistent with the contract.

An Enterprise Agreement operates to exclude the application of an Award only to the extent of inconsistency with the Award.

An Enterprise Agreement will also bind an employer who is the successor, transmitter or assignee to an employer who is an existing party.

DURATION OF ENTERPRISE AGREEMENTS (SECTION 83)
An Enterprise Agreement continues in force for a term specified in the Agreement (not exceeding three years) at which time it should be renegotiated.

The parties will be advised by the Commission as to the operation of the Act, near to the end of the Agreement's term. Where the Commission considers that a conference of the parties to encourage its renewal is appropriate, or is requested to call a conference by one of the parties, the Commission will conduct an informal conference.

In any event, an Agreement continues in force after its expiry date unless rescinded or replaced by the Commission following an application by one or both of the parties.

MINIMUM CONDITIONS OF EMPLOYMENT
The Fair Work Act 1994 establishes minimum conditions of employment that must be matched in any Enterprise Agreement (Section 66-72). This may be done by directly including provisions that are not inferior to the scheduled standards or allowing the existing Award provisions to continue as part of the Agreement. Only in cases of significant economic difficulties can the Full Industrial Relations Commission approve an Enterprise Agreement that is inferior to some of these conditions, or is inferior (as a package), to the safety net Award.

FEDERAL AGREEMENTS

Terminology

Before WorkChoices (2006) workplace agreements were called either:-
- Certified Agreements (between an employer and a group of employees); or
- AWAs (Australian Workplace Agreements – between an employer and an individual).

WorkChoices kept AWA terminology but changed Certified Agreements to ‘Collective Agreements’.

Under the Fair Work Act (2009) AWAs were abolished and replaced with ITEAs (Individual Transitional Employment Agreements) and collective agreements changed to ‘Enterprise Agreements’.
ENTERPRISE AGREEMENTS

Agreements at the Federal level can include:

- rates of pay
- employment conditions e.g. hours of work, meal breaks, overtime
- consultative mechanisms
- dispute resolution procedures
- deductions from wages for any purpose authorised by an employee.

They cannot, however, include unlawful content such as:

- a discriminatory term
- an objectionable term
- a term that confers an entitlement or remedy in relation to unfair dismissal before the employee has completed the minimum employment period
- a term that excludes, or modifies, the application of unfair dismissal provisions in a way that is detrimental to, or in relation to, a person
- a term that is inconsistent with the industrial action provisions
- a term that provides for an entitlement to right of entry
- a term that excludes the Australian Fair Pay and Conditions Standard or any part of it during the bridging period.

Pre-approval steps to be taken by employers

The employer must ensure that:

- the terms of the agreement, and the effect of those terms, are explained to the employees
- the explanation is provided in an appropriate manner (e.g. appropriate for young employees or employees from culturally diverse backgrounds).

Employees must endorse the agreement by voting for it. A vote must not occur until at least 21 days after the day on which employees were given notice of their representational rights.

During the 7 day period before voting for the agreement, the employer must ensure employees are given a copy of:

- the agreement
- any other material incorporated by reference in the agreement.

The employer must also notify employees of:

- the time and place at which the vote will occur
- the voting method that will be used.
Applying for Fair Work Australia approval

Fair Work Australia (FWA) is the national workplace relations tribunal. It is an independent body with power to carry out a range of functions including:

- providing a safety net of minimum conditions, including minimum wages, in awards
- facilitating good faith bargaining and the making of enterprise agreements
- granting remedies for unfair dismissal
- regulating the taking of industrial action
- resolving a range of collective and individual workplace disputes through conciliation, mediation and in some cases arbitration
- functions in connection with workplace determinations, equal remuneration, transfer of business, general workplace protections, right of entry and stand down.

Once an enterprise agreement is made, a bargaining representative for the agreement must apply to Fair Work Australia for approval of the agreement.

The application must be lodged with Fair Work Australia within 14 days of the agreement being made or within such further period as Fair Work Australia allows.

The application must be accompanied by:

- a signed copy of the agreement
- any declarations that are required by the FWA Rules or regulations to accompany the application.

What Fair Work Australia considers

To approve an enterprise agreement, Fair Work Australia must be satisfied that:

- the agreement has been made with the genuine agreement of those involved
- the agreement passes the no-disadvantage test and does not include any unlawful terms or designated outworker terms
- the group of employees covered by the agreement was fairly chosen
- the agreement specifies a date as its nominal expiry date (not more than four years after the date of FWA approval)
- the agreement provides a dispute settlement procedure
- the agreement includes a flexibility clause and a consultation clause.

No-disadvantage test

Before approving an enterprise agreement, Fair Work Australia must ensure the agreement or variation passes the no-disadvantage test.

This test ensures that the agreement does not, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employees who are covered by the agreement. The agreement is compared to the relevant general award or an award designated by Fair Work Australia as being the most appropriate award to cover the kind of work performed by the employees.
Approval of an enterprise agreement with undertakings

Fair Work Australia may approve an enterprise agreement that does not meet the requirements in the Fair Work Act 2009 if satisfied that a written undertaking meets the concern.

Fair Work Australia may only accept a written undertaking from an employer, after seeking the views of each bargaining representative and if satisfied that the effect of accepting the undertaking is not likely to:

- cause financial detriment to any employee
- result in substantial changes to the agreement.

(Fair Work Australia 2009)

Termination of the Agreement is either by the agreement of both parties or alternatively after the nominal expiry date.

**Australian Workplace Agreements**

Under Work Choices, an Australian Workplace Agreement could be made if the employer was one of the following:

- a Constitutional Corporation
- the Commonwealth
- The employer's primary place of business was a Territory
- The employer's place of business was in Victoria
- The employer's business was related to maritime or aviation activities involving interstate/overseas trade or commerce

AWA's could be used by employers to replace Enterprise Bargaining Agreements and had the ability to override Federal and State Awards. They were therefore individual contracts between and employer and employee for a fixed period of up to five years.

Under Section 83BB of the Workplace Relations Act 1996 (Cth) the Statutory Body authorised to approve Australian Workplace Agreements was the Workplace Authority. The "No Disadvantage" test was used to determine whether on balance (if the Agreement were to be approved) the employee would not be worse off as a whole in comparison with the relevant industrial Award.

Under the Fair Work Act (2009):

- Current AWA's continue to operate until terminated or replaced.

- Introduction of Individual Transitional Employment Agreements ('ITEAs') which will be able to be used by employers who had at least one employee engaged on an AWA as at 1 December 2007.

- ITEAs can still be made, and approved by the Workplace Authority, during the bridging period of 1 July 2009 to 31 December 2009
ITEAs must pass the no-disadvantage test (NDT) which is there to protect an employee's basic terms and conditions of employment in a workplace agreement.

The test makes sure the agreement doesn't, on balance, reduce an employee's overall terms and conditions of employment. This generally involves comparing the agreement with a reference instrument that would have covered the employee if they didn't have an agreement (eg. an award).

**Australian Fair Pay and Conditions Standard**

ITEAs must also meet the Australian Fair Pay and Conditions Standard - known as 'the Standard' - sets out 5 basic workplace conditions. They relate to:

1. basic rates of pay and casual loadings
2. hours of work
3. annual leave
4. personal / carer's and compassionate leave
5. unpaid parental leave

By law, the Standard applies, unless the workplace agreement or common law contract of employment offers an employee better conditions of employment.

The Standard will not apply after 31 December 2009. From 1 January 2010 the Standard will be replaced by the National Employment Standards - known as the NES.

**What are National Employment Standards?**

As part of the new Federal workplace relations laws, ten National Employment Standards (NES), together with Modern Awards, will form the new safety net of an employee’s minimum terms and conditions of employment.

Operative from 1 January 2010, the NES will apply to all employees in the Federal workplace relations system, regardless of whether they are covered by an award, and cannot be traded away by employment contracts or agreements.

As the NES and Modern Awards will complement each other, they will need to be read together in order to work out the minimum entitlements of an employee.

Businesses will be required to have a copy of the NES and the applicable Modern Award(s) in their workplace.

The NES will provide the following minimum entitlements:

> maximum weekly hours of work;
> the right to request flexible working arrangements;
> parental leave and related entitlements;
> annual leave;
> personal/carers’s leave and compassionate leave;
> community service leave;
> long service leave;
> public holidays;
> notice of termination and redundancy pay; and
> provision of a Fair Work Information Statement, which will detail the rights and entitlements of employees under the new system and how to seek advice and assistance. (Business SA 2009)

**Dispute Resolution**

**South Australian Industrial Relations Commission**
The key roles of the Commission are:
- to consider and approve enterprise agreements
- assist in the resolution of industrial relations disputes
- monitor the duration of enterprise agreements
- to review awards
- to register awards and enterprise agreements.

**Fair Work Australia**
Fair Work Australia (FWA) commenced on 1 July 2009 and is the new national workplace relations tribunal.

In general, Fair Work Australia assists in resolving disputes for:-

- any employer that is a constitutional corporation
- any employer in Victoria or the territories
- the Commonwealth (including any Commonwealth authority)
- any employee of one of the above types of employers
- a registered union or employer organisation.

The main types of disputes that can be referred to Fair Work Australia are:

- disputes under the terms of an award or a collective or enterprise agreement
- bargaining disputes, and
- disputes arising under the general protections provisions of the *Fair Work Act 2009*.

**The model dispute resolution procedure**

Enterprise agreements are required to contain a procedure for dealing with disputes.

Parties to an agreement can agree on a particular procedure or adopt the model term specified in the *Fair Work Regulations 2009*.

The model term applies if no other dispute resolution procedure has been specified in the agreement. It provides for a party to the dispute to refer the matter to Fair Work Australia if discussions at the workplace level do not achieve a resolution.
Australian Industrial Relations Commission

The Australian Industrial Relations Commission (AIRC) will continue to operate until 31 December 2009. During the transition period the AIRC will complete award modernisation and other matters relating to the period before 1 July 2009.
Activities

1. Briefly describe award modernisation under the **Fair Work Act (Cth) 2009**

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

2. What are the approval criteria for collective agreements under the federal workplace relations system, and who approves such agreements?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

3. Which body approves an EBA at State level? What is the duration of a South Australian EBA?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
4. Briefly describe the role of Fair Work Australia

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

5. Are Australian Workplace Agreements still allowable? If not, what have they been replaced with and what is the duration of these new agreements?

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

_________________________
Lecture 10

<table>
<thead>
<tr>
<th>Learning Outcome</th>
<th>Learning Outcome 10</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Recognise and describe the statutory provisions and principles relevant to the sale of goods which accountants are required to apply in the course of business.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Required Reading</th>
<th>Vickery and Pendleton 6th ed – Chapter 23</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Activities</th>
<th>Activities in workbook</th>
</tr>
</thead>
</table>

**Key Terms**

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agreements to sell</td>
<td>A contract is entered into for goods to be exchanged at a later date then the date of the contractual transaction.</td>
</tr>
<tr>
<td>Ascertained goods</td>
<td>Those goods identified and agreed upon at the time the contract is made.</td>
</tr>
<tr>
<td>Charge or Encumbrance</td>
<td>Money or payment owed to another party with the property interest used as security for money owed.</td>
</tr>
<tr>
<td>Fitness for Purpose</td>
<td>The goods must be reasonably fit for the particular purpose for which they were purchased. The consumer must make know the purpose as well as rely on the skill, judgement and expertise of the seller.</td>
</tr>
<tr>
<td>Future goods</td>
<td>Those goods to be made or obtained by the seller, after the making of the contract for sale.</td>
</tr>
<tr>
<td>Lien</td>
<td>The right to hold the property of another as security for the performance of an obligation or the payment of a debt.</td>
</tr>
<tr>
<td>Merchantable Quality</td>
<td>Goods are fit for the purpose or purposes for which the good of that kind are commonly bought. Of saleable quality with relevance given to price, and any description of the goods.</td>
</tr>
<tr>
<td>Quiet Possession</td>
<td>A right to undisturbed possession of property interest.</td>
</tr>
<tr>
<td>Title / property in goods</td>
<td>Ownership. The right to legally deal in the property / good (i.e. have the right to sell).</td>
</tr>
<tr>
<td>Unascertained goods</td>
<td>Those goods, which are described in the contract, in general terms but have yet to be identified specifically.</td>
</tr>
</tbody>
</table>
INTRODUCTION – PURPOSE AND DEVELOPMENT OF CONSUMER LAW

The development of modern consumer law in Australia has partly been in response to the changes and demands of its social and economic environment. These include:

- mass consumption,
- modern marketing practices,
- new technologies and information systems, and
- the development of new and complex products.

Historically, before the evolution of the consumer movement, the only protection for consumers who had suffered damage as a result of receiving faulty or incorrect goods lay in the limited common law actions of breach of contract or tort. The freedom of businesses from legal regulation was known as the "laissez-faire approach" (no restriction or control), which encapsulated the principle of non-interference by government with the action of individuals (especially in trade).

This approach was reflected in the case of Printing and Numerical Registering Co v Sampson (1875) LR 19 Eq 462 where Sir George Jessel MR made the comment that "it is paramount public policy that men shall have the utmost freedom of contracting". This represented the strong attitudes of the time that the free market was to be protected and that free competition would be sufficient to protect consumers.

The principle that was integral to the insistence on a free market was the principle of *Caveat emptor*. This is Latin for the well known principle of "let the buyer beware". This principle rests on the basis that buyers should take steps to protect themselves and that it is within their power to do so.

It may be argued that as long as sellers’ ethics stop them from undertaking conduct which is unfair or deceptive to consumers, the principles of *laissez-faire and caveat emptor* can and should operate so that sellers are free to be as creative and energetic as they can to sell to consumers.

But is it practical to rely on the ethics of sellers? A range of arguments and practical experience has instead resulted in an active consumer rights movement to which the Australian governments have increasingly responded. This response has taken the form of additional legislative protection and rights for consumers. Due to consumer protection legislation there has been an increase in regulation of the conduct of sellers. The various state *Fair Trading Acts*, consumer protection provisions of the federal *Trade Practices Act* (and their accompanying tribunals and courts) have been created to assist consumers and traders.

In addition to legislative protection for consumers, active and organised consumer groups have become well established, performing such functions as testing products, advising, informing and assisting the consumer.
SALE OF GOODS ACT OVERVIEW

Whether it is supported by cash or credit, by far the most important method of transferring ownership in goods from one person to another is by some form of contract of sale.

Our first major piece of consumer protection legislation was the Sale of Goods Act 1895 (SOGA). This is a state act, and each state has a similar, although not identical, act based on the English legislation of 1893 which simplified and codified English common law on trade and commerce.

(Note: When examining any legislation, remember that the language of the legislation must be taken from the viewpoint of its natural meaning.)

**Summary of the Sale of Goods Act**

1. Regulates sales and agreements to sell.
2. Defines and classifies what is meant by the legal term goods.
3. Sets out rules governing the transfer of property from seller to buyer.
5. Requires certain conditions namely implied conditions, be automatically part of the contract whether or not they are expressly stated.
6. Requires certain warranties (terms of lesser importance) be automatically part of the contract whether or not they are expressly stated.

**Implied Conditions**

(a) The goods must correspond with their description.
(b) The goods must be fit for sale, namely be of merchantable quality.
(c) The goods must be reasonably fit for the purpose specified by the buyer.
(d) Where the contract is for sale by sample of the goods the bulk of the goods must correspond with the sample.
(e) The seller must have the right to sell the goods.
Implied Warranties

(a) The goods must be free of any encumbrance or charge (that is a charge owing to another person and not disclosed to the buyer either previously or at the time of the contract).

(b) The buyer is entitled to quiet possession of the goods.

NOTE

It is very important to note that unlike all other later pieces of consumer protection legislation, the implied conditions and warranties contained in the Sale of Goods Act may be excluded by agreement. The Sale of Goods Act has parallel provisions in the Trade Practices Act and the Consumer Transactions Act SA (1972). If there is any conflict between state and federal law, the federal law applies.

TRANSACTIONS TO WHICH THE SALE OF GOODS ACT APPLIES

There is no mandatory limit on the application of the SOGA. Pursuant to s 1 of the SOGA it applies only to

"a contract whereby the seller transfers or agrees to transfer the property in goods for a money consideration called the price".

Contract

For the Act to apply there must be a valid contract with all required elements present. It is very important to note however, that the Act will apply only where the consideration is in the form of money, not barter.

Transfer or Agreements to Transfer

The SOGA will apply both to a sale, and an agreement to sell. In a sale, the seller transfers ownership at the time the contract is made, but in an agreement to sell, ownership does not pass until some future time or subject to some condition.

Property

Property means movement of ownership of title, not transfer of possession only. Ownership in the goods, and the risk to the buyer, passes at different times depending on whether the goods are specified, unascertained or future to be discussed further below.
Goods

The SOGA only applies to goods - tangible personal property. For example, books, clothes, furniture, cars, boats. Land, fixtures, and intangible property such as intellectual property, debts and partnership rights are excluded. Difficulty may arise in deciding whether a contract is one for goods, to which the SOGA will apply, or of service, to which it will not, if it involves both the provision of service and goods.

To resolve this issue, the contract is examined to ascertain its substance. For example, when you contract with a cabinet-maker to make a wall unit and to fix it upon your wall; if you can show that the main substance of the agreement is the transfer of ownership of goods and not the transfer of ownership of services then the contract is one for the sale of goods.

It follows therefore, that where the substance of the agreement is for the skill and experience displayed by one of the parties and the transfer of ownership of goods is only secondary or ancillary to these services, then the contract is for work and materials and not for the sale of goods.

Robinson v Graves (1935) 1 KB 579
An artist was commissioned to paint the portrait of a woman. It was necessary to decide if this was a contract for the sale of goods or a contract for the provision of labour. It was held that this was a contract for the supply of labour. The court distinguished between the "production of something to be sold", which would fall within the definition of a contract for sale of goods, and a contract whose main substance was skill or labour, with the transfer of materials being ancillary.

Aristoc Industries Pty Ltd v RA Wenham (Builders) PTY Ltd (1965) NSWR 581
The parties entered into a contract for the supply and installation of seats in a lecture theatre. It was held that the dominant element of the agreement related to the supply of work and materials and not goods.

Toby Constructions Products Pty Ltd v computer Bar Sales Pty Ltd (1983) 2 NSWLR 48
The defendant agreed to sell various items of computer hardware and software to the plaintiff. The agreement provided that the defendant would install the equipment, train the plaintiff’s staff and provide necessary after sales service. After the system was installed it failed to operate properly and the plaintiff argued that action was available for breach of the SOGA. It was held that the substance of the contract was a sale for a computer system which amounted to a contract for the sale of goods.
Price

Price is the money consideration and may be fixed by the contract itself, left to be determined in a manner agreed, or determined by the course of dealing between the parties.

TRANSFER OF OWNERSHIP BETWEEN BUYER AND SELLER

Pursuant to the SOGA, the buyer owns the goods only when:

- The buyer and seller have identified and agreed on the goods, namely when the goods have been ascertained;
- the buyer and owner intend the agreement to take place.

Classification of goods

- Specific or ascertained goods are those identified and agreed upon at the time the contract is made. The property in specific or ascertained goods is transferred to the buyer at such time as the parties intend it to be transferred. In determining this intention, the following must be considered:
  - the terms of the contract
  - the conduct and circumstances of the parties
  - the circumstances of the particular case.

- Unascertained goods are those which are described in the contract in general terms but have yet to be appropriated to the contract, namely clearly identified and separated to be the actual goods the subject of the contract. Ownership cannot pass until goods have been ascertained.

- Future goods are those goods to be made or obtained by the seller, after the making of the contract for sale.

Rules for determining intention as to when property in goods will pass

The following rules apply unless a clear intention or agreement exists to the contrary. If the goods perish it is important to know who the owner is because it is upon the owner of the goods that the loss falls.

(1) Goods in a deliverable state

In the case of an unconditional contract for the sale of specific goods in a deliverable state, the property passes to the buyer when the contract is made. This is regardless of whether the time of payment or time of delivery, or both has been postponed.
(2) Goods in a non deliverable state

In the case of a contract for the sale of specific goods in a non-deliverable state, namely where the seller is bound to do something to the goods to put them in a deliverable state, the property does not pass until that is done and the buyer has received notice that it has been done.

(3) Goods needing to be priced

In circumstances where the seller is bound to weigh, measure, test or do something else with the goods in order to determine the price, the property does not pass until that is done and the buyer has received notice.

(4) Goods ‘on approval’ or ‘sale or return’

In these circumstances, the property passes to the buyer when the buyer signifies approval or acceptance to the seller or acts in any other manner to adopt the transaction. If the buyer does not do this, but keeps the goods without notifying the seller of rejection, then ownership passes to the buyer after the goods were supposed to be returned, or after a reasonable time.

(5) Unascertained or future goods

In these circumstances the ownership passes when the seller unconditionally puts aside or appropriates the goods to the contract. The goods are deemed to be appropriated when delivered either to the buyer or to a carrier. The carrier must be an independent contractor and not merely an employee of the seller.

---

**Warder’s (Import and Export Co) v Norwood (1968) AER 602**

The seller had many cartons of kidneys held in cold storage. The buyer ordered 600 cartons of kidneys. The seller moved 600 cartons outside the cold storage area. When the carrier sent by the buyer arrived at about 8am he was given a delivery docket authorising him to pick up the cartons. This he did, and while he was loading the kidneys, he noticed at about 11am that a few of the cartons seemed to be dripping and, as a result, turned on his refrigeration. He continued to load his truck and set off for the buyer. Later, during the trip, at about 11pm, the refrigeration in his vehicle became effective.

Not surprisingly, the kidneys, upon arrival at the buyer’s premises, were found to be unfit for human consumption. The buyer sued the seller for breach of fitness for purpose and merchantable quality.
The buyer’s claim failed because it was held, that in a sale of unascertained goods, ownership passes when the goods become ascertained with the assent of the other party. This was considered to have taken place either when the goods were put outside the cold storage room, or at the latest, when the carrier with the delivery docket began to load the cartons. The damage occurred later, that is at about 11am at which time ownership and risk had already passed to the buyer.

**Risk prima facie passes with property**

Unless otherwise agreed, the goods remain at the seller’s risk until ownership has been transferred to the buyer. When this occurs, the goods are at the buyer’s risk, whether or not delivery has been made, except where delivery has been delayed through the fault of either the seller or the buyer. Then the goods are at the risk of the party at fault.

**Delivery of goods**

The SOGA sets out rules for delivery of goods. As with other terms contained in the SOGA, the following rights and obligations as to delivery may be altered or excluded by agreement between the parties.

1. **Rules as to Delivery of Goods**

   **Section 27**

   It is the duty of the seller to "deliver" the goods in accordance with the contract. (It is the duty of the buyer to accept the goods and pay for them).

   **Section 29**

   S 29(1) - The place of delivery is the seller's place of business or, if none, the seller's place of residence (if the sale is of specific goods at some other location, then the delivery place is where they are then located, unless there is some other intention).

   S 29(2) - Delivery within a reasonable time - when no time is set for delivery, the seller is bound to deliver the goods within a reasonable time (i.e. depending on the facts in each case).

   S 29(4) - Delivery must be at a reasonable hour (again this is a question of fact, for example, it would be reasonable for a milkman to expect the milk wholesaler to have milk for delivery at 3.00 am).

   S 29(5) - Delivery expenses are the cost of the seller - unless otherwise agreed. For example, if the seller is getting the goods in from interstate the cost would be the seller's.
(2) **Delivery of Wrong Quantities**

Section 30

S 30(1) - Buyer receives less than contract amount of goods:

- buyer can reject all the goods;
- if buyer accepts the goods, the buyer must pay for the goods at the rate set out in the contract.

S 30(2) - Buyer receives more than contract amount of goods:

- buyer can reject all the goods;
- if buyer accepts all the goods, they all must be paid for at the contract price, or
- buyer may accept the amount contracted for and reject the rest.

S 30(3) - buyer receives contract order mixed with unordered goods:

- buyer can reject all the goods;
- buyer may accept the contracted order and reject the rest.

(3) **Delivery to a Distant Place**

S 33 - Where the seller agrees to deliver goods at his own risk to a place other than from where the goods are sold, the buyer takes the risk that the goods may deteriorate in transit.

**TITLE OF TRANSFEE**

The basic rule is that when you sell goods to which you do not have good title, or for which you do not have authority to sell, the buyer cannot own the goods as they cannot receive good title to the goods. However, as always, there are exceptions.

**Estoppel**

Where the true owner allows the impression to be created that another person has the authority to sell their goods, when they do not in fact have that authority, the innocent buyer nevertheless receives good title. The true owner is estopped from denying the wrongful seller’s authority.
Sale by mercantile agent

Sale by mercantile agent refers to situations where a mercantile agent is entrusted with the possession of goods or the documents of title to any goods. Any sale or other disposition of the goods made by the agent when acting in the normal course of business is valid as if the agent were expressly authorised by the owner of the goods to make the arrangement. The buyer must be acting in good faith and must not have had notice at the time of the lack of authority to obtain good title.

**Folkes v King (1923) IKB 282**

Folkes delivered his car to Hudson, a mercantile agent and instructed Hudson sell it for no less than $575. The car was sold to King for $340. King purchased the car in good faith and with no knowledge of Hudson’s lack of authority to sell at that price. When Folkes tried to recover the car it was held that King had obtained good title, as Hudson was in possession of the car with the permission of Folkes.

Sale under voidable title

As a voidable contract has legal effect until it is avoided, the buyer in these circumstances receives a better title than the seller. For example, where the seller of goods has a voidable title through fraud, and the title has not been avoided at the time of sale, the buyer acquires a good title to the goods. This only applies if the buyer has bought in good faith without any knowledge of the defect in the seller’s title.

Sale by buyer or seller in possession after sale

Supposing S, having sold the goods to B, still holds on to those goods and then re-sells those goods to T. Under the SOGA, T will receive good title, provided she bought in good faith and without notice of the previous sale.

A similar provision applies where the buyer has obtained the goods – although under the contract of sale, ownership has not yet passed. A sale by a buyer in possession to another person, a third party, will give that person good title, provided that they have bought the goods in good faith and were not notified of the rights remaining to the seller.
Sale under statutory power

This is another exception to the rule that the buyer receives what ever title the seller has. Examples of sale under statutory power include:

- Sale of a judgement debtor’s goods by a sheriff or bailiff acting under a writ of execution.
- Sale by an unpaid seller who is exercising the remedies for non payment of the purchase price.
- Sale under the disposal of uncollected goods legislation which applies where a person has a lien (the right to hold and retain another’s property until a claim is satisfied) over goods being repaired until payment is made.

Sale in a market overt

This exception only applies in South Australia, Victoria, Western Australia and Tasmania.

Where goods are bought in an open public market, the buyer obtains a good title provided the goods were acquired in good faith. However if stolen goods are sold in a market overt, the true owner can recover the goods if the actual thief is actually convicted of theft.

CONSUMER PROTECTION WITHIN THE SALE OF GOODS ACT

You will recall the distinction between contractual terms which are conditions and those which are warranties:

- A condition is a term of fundamental importance, the breach of which entitles the injured party to terminate the contract and sue for damages.
- A warranty is a term of less importance, breach of which only entitles the injured party to sue for damages.

The SOGA implies various conditions and warranties into each contract for sale of goods to which it applies. S 35 of the SOGA says that a buyer has not accepted goods until the buyer has had a "reasonable time" to inspect them. Therefore, if the buyer receives goods and discovers a breach of implied conditions, acceptance has not taken place, and the goods can be rejected if the buyer wants to terminate the contract.

S 54 of the SOGA provides that if there is an express term in the contract which is inconsistent with the terms of the SOGA, the express terms will prevail. Thus, remember that unlike other consumer protection legislation, the terms of the SOGA can be excluded by agreement.
Implied Conditions

(1) Title - S12 Sale of Goods Act

In the case of a sale, the seller has the right to sell the goods. In the case of an agreement to sell, the seller will have a right to sell the goods at the time when the property is to pass. If this condition is breached, the buyer is entitled to reject the goods and claim a full refund. This right may be exercised even if the buyer may have received the goods and may have used them already.

Rowland v Divall (1923) 2 KB 500

Rowland bought a car from Divall and used it for four months before discovering it had been stolen. Rowland then had to return the car to its true owner. It was held that even though Rowland had had the use of the car for some time, he was entitled to recover the full purchase price as Divall had had no right to sell him the car in the first place.

(2) Correspondence with Description - S13 Sale of Goods Act

In the case of a contract for sale of goods by description, the goods must correspond with that description. This occurs when the buyer purchases goods on the basis of a description of goods by the seller, as with a catalogue sale. If the goods do not correspond with description the buyer is entitled to reject the goods and claim damages. If the sale is by sample as well as description, the goods must still correspond with description. Generally statements made regarding the quality of goods do not form part of the contractual description of the goods.

Ashington Piggeries Ltd v Christopher Hill Ltd (1971) 1 ALL ER 847

Here the contract was for the supply of a quantity of "Norwegian Herring Meal, fair to average quality of the season", to a breeder of minks. The food supplied was contaminated with DMNA, a toxic chemical which killed the minks. It was held that there was no breach of the implied condition of correspondence with description.

Moore & Co v Landaver & Co (1921) 2 KB 519

Goods were sold "30 tins to a case". In excess of half the cases supplied contained only 24 tins each, although the total quantity bought was present. It was held the condition was breached.
(3) **Merchantable Quality - S14 (2) Sale of Goods Act**

This condition means that the goods should be of such quality that a buyer fully acquainted with the quality of the goods, and therefore being aware of any hidden defects, would buy them without a reduction in price or any other special terms. The condition applies where goods are bought by description from a seller who deals in goods of such description, whether the seller is the manufacturer or not.

Dixon J in *Australian Knitting Mills v Grant* (1933) 50 CLR 387 at 418 said:

“The condition that goods are of merchantable quality requires that they should be in such an actual state that a buyer fully acquainted with the fact and, therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms”.

Therefore, to be of merchantable quality, goods must be saleable commercially by that description and be fit for the purpose usually used. Regard is had to the price and the circumstances of sale, and the goods do not have to be perfect to be of merchantable quality. The goods must be bought from a dealer in those goods.

**Note that the condition of merchantable quality will not be implied if the defect should have been revealed by reasonable inspection of the goods by the buyer.**

*David Jones Ltd v Willis* (1934) 52 CLR 110

Willis purchased a pair of shoes from David Jones after first explaining to the sales assistant that she wanted a comfortable pair of walking shoes to fit over her bunion. Willis purchased the pair of shoes recommended by the shop assistant after first trying them on. After wearing the shoes only three times, the heel came off and Willis fell and broke her leg.

It was held that as evidence showed that the heel had not been properly fastened and Willis could not have discovered this defect by trying on the shoes, the condition of merchantable quality had been breached.

(4) **Fitness for Purpose - S14(1) Sale of Goods Act**

This condition applies where the buyer expressly or by implication informs the seller of the purpose to which the goods are to be put. Therefore, the buyer is relying upon the seller's skill and judgement. Thus if this purpose is made known and the goods are of a kind that the seller's business supplies, there is an implied condition that the goods shall be reasonably fit for that purpose.
If the buyer relies on his/her own skill and judgement, then the condition will not apply. If the goods can be used for more than one purpose, this implied condition will only operate if the buyer communicates to the seller, both the particular use intended and the fact that the buyer is relying on the seller's judgement.

Thus, there are four elements to fitness for purpose which are easily inferred from the circumstances of sale;

- the buyer must actually or impliedly inform the seller of the purpose to which the goods will be put;
- the buyer must rely upon the seller's skill, diligence and advice as to the most suitable goods to purchase (this may be inferred readily);
- goods must be in the course of the seller's business to supply;
- goods must prove unfit for that purpose.

**Grant v Australian Knitting Mills** (1936) AC 85

You will recall this rash and irritating tragedy. This case not only dealt with tort, but also held that the underwear was not fit for their only proper purpose. Further, this case illustrates the point that the implied conditions impose strict liability on the seller of goods, as the retailer was held liable even though the defect in the goods was the fault of the manufacturer, against whom judgement was also obtained in negligence.

**Frost v Aylesbury Dairy Co Ltd** (1905) 1 KB 608

In this case milk was sold which contained typhoid fever germs. It was not necessary for the customer to inform the vendor that the milk was required for human consumption. The inference that the buyer is relying on the seller's skills and judgement will be readily drawn from the fact of the buyer going into the seller's shop to ask for the goods.

**Bristol Tramways Co v Fiat Motors Ltd** (1910) 2 KB 831

In this case the plaintiff wished to buy buses from Fiat Motors and told Fiat that the buses needed to be suitable for heavy passenger traffic. The plaintiff relied on Fiat's skill and judgement and bought buses that proved unsuitable for the purpose. It was held that the buses were not fit for the specified purpose and the plaintiff was awarded damages.

**McWilliams Wines Ltd v Liaweena Pty Ltd ASC 55-695**

The plaintiff purchased 500 000 from the defendant company, but subsequently discovered that a large number of the bottles they had sealed with the corks were contaminated and could not be sold. It was held that there had been a breach of fitness for purpose and merchantable quality, as the purpose for which the corks were required was well known.
(5) Sale by Sample - S15 Sale of Goods Act

This implied condition applies where a sample of the goods was shown to the buyer before she/he agreed to buy them. The three elements of the condition are:

- the quantity of the bulk of the goods should correspond with the sample;
- the buyer should have a reasonable opportunity to compare the bulk goods with the sample;
- the goods should be free from any defect making them unmerchantable which would not be apparent on reasonable inspection of the sample.

Each of these elements is independent of the other, thus if one condition is broken, the buyer is entitled to reject the goods and treat the contract at an end unless the buyer has accepted the goods.

Implied Warranties

(1) Quiet Possession - S12(II) Sale of Goods Act

The buyer shall have and enjoy quiet possession of the goods, such that the seller will not interfere with the buyer's right to enjoy the goods.

(2) Free From Charge or Encumbrance - S12(III) Sale of Goods Act

The goods shall be free from any charge or encumbrance in favour of any other party, not declared by the seller to the buyer at or before the time the contract was made.

Steinke v Edwards (1935) (unreported)

Following the sale of a car, it was discovered that it have been subject to a tax levied by the South Australian Government which meant the Government had a right to seize the vehicle to collect the tax. It was held that the tax, coupled with the right to seize, amounted to a charge or encumbrance and there had been a breach of the seller's implied warranty.
CONSUMER TRANSACTIONS ACT (SA) 1972

As previously stated the SOGA was the first piece of consumer protection legislation passed and as a consequence has its limitations, particularly in the manner in which the consumer protection provisions can be excluded and their non application to services. Many of these limitations have been dealt with in more recent legislation, including the Trade Practices Act, which we will discuss in much greater detail in the next section, and the South Australian Consumer Transactions Act (1972), the CTA.

This South Australian Act applies to consumer contracts under which goods or services are or are to be, delivered or rendered in South Australia. The (CTA) defines a consumer as a person other than a body corporate who enters into a consumer contract for goods and services. A consumer contract is defined as a contract or agreement;

(a) under which a person (other than a body corporate):
   (i) purchases goods or contracts for the performance of service, or
   (ii) takes goods on hire,
   (iii)acquires by other means the use or benefit of goods or services,

(b) under which the consideration to be paid or provided by or on behalf of the consumer in money or money's worth does not exceed $40,000.

A consumer contract does not include sale by auction, sale for resupply or sale of land.

Whilst the meaning of ‘goods’ under the act has a broad definition, ‘services’ has a more domestic orientation, and includes maintenance to dwellings, household goods, motor vehicles and clothes.

Implied Conditions as to Goods

The following conditions will be implied into a consumer contract with respect to goods;

- s 8(1)(a), seller's right to sell goods,
- s 8(3), correspondence with description,
- s 8(4), merchantable quality,
- s 8(6), fitness for purpose.

Implied Warranties as to Goods

The following warranties will be implied into a consumer contract with respect to goods;

- s 8(1)(b), free of encumbrance,
- s 8(2), quiet possession.
Implied Condition as to Services

The following condition will be implied into a consumer contract with respect to services;
- s 9(1), due skill and care, with materials reasonably fit for purpose.

This section is not applicable to a consumer contract concerning domestic building work.

Remedies Pursuant to Consumer Transactions Act

S 15 - a consumer is entitled, within a reasonable time (not exceeding 7 days) after the delivery of goods, under a consumer contract to rescind the contract on the grounds of the supplier's breach of condition.

Upon rescission, the property revests in the supplier, and the consumer may receive any consideration paid to the supplier. Damages are also available.

The Commissioner for Consumer Affairs is responsible for the administration of the CTA. The Civil (Consumer and Business) Division of the Magistrates Court has jurisdiction to resolve disputes concerning the CTA.

RIGHTS OF THE UNPAID SELLER

The SOGA also provides remedies for sellers who have not received payment from the buyers, which remedies fall into one of two categories – rights against the goods and rights against the buyer.

Rights against the goods

(1) **Lien, stoppage in transit and resale**

The SOGA provides that in some circumstances an unpaid seller may seek remedies even though the property in the goods may have passed to the buyer.

- **A lien** – a right to keep the goods until payment is received may exist even though ownership has passed.
- **A right to stop the goods in transit** after the seller has parted with the possession of them if the buyer is known to be insolvent.
- **A right of resale**

(2) **Withholding delivery**

Where the property in the goods has not passed to the buyer, the unpaid seller can refuse to deliver the goods (right of withholding delivery). This is similar to and exists beside the seller’s right of lien and stoppage in transit, where the property has passed to the buyer.
Rights against the Buyer

(1) Where ownership has been transferred

Where ownership of the goods has been passed to the buyer, and the buyer wrongfully refuses to pay for the goods according to the contract, the seller may sue the buyer for the price of the goods as a liquidated debt.

(2) Where ownership has not been transferred

Where the price is payable on a fixed day, irrespective of delivery, and the buyer wrongfully refuses to pay, the seller may sue for the price even though ownership of the goods has not passed and the goods have not been appropriated to the contract.

(3) Damages for non-acceptance

Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action for damages against the buyer for non-acceptance.

REMEDIES OF THE BUYER

(1) Damages for non-delivery

Damages for non-delivery applies when the seller wrongly neglects or refuses to deliver the goods to the buyer. If the buyer has prepaid the price and the seller defaults by non-delivery, the buyer may reclaim the payment as money paid for a consideration which has totally failed.

(2) Damages for breach of warranty

Where there is a breach of warranty by the seller, the buyer may not be entitled to reject the goods, but may;

- set up against the seller the breach of warranty in reduction or extinction of the price; or
- maintain an action against the seller for damages for breach of warranty.

(3) Specific performance

As per normal contractual principles, specific performance will not be granted if damages would be adequate compensation to the buyer. The remedy will not be granted unless the goods are of a unique or special kind.

(4) Repudiation

The buyer may be entitled to reject the goods for breach of condition and repudiate the contract.
Activities

1. Explain the difference between a sale and an agreement to sell. Why is this difference important?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

2. Buffy’s washing machine stopped working. She called Willow, a qualified repairer. Willow told Buffy that because the machine was more than 10 years old the correct spare part was no longer available, although she could use another part which should perform satisfactorily. Buffy agreed to her suggestion and the machine was repaired. Three days later the washing machine again broke down with the same problem. Buffy insisted that Willow mend the machine without further charge. Discuss Buffy’s rights under the Sale of Goods Act.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

3. Costanzza Fishmongers, located at Robe agreed to sell 20 boxes of crayfish to Seinfeld Fish Supplies in Adelaide. Costanzza Fishmongers sent a truckload of 200 boxes of crayfish to Adelaide and told the driver to deliver 20 of those boxes to Seinfeld Fish Supplies. The truck broke down 100 km from Adelaide and the crayfish began to deteriorate. By the time they were delivered they were in a decidedly unpleasant state. Seinfeld refused to pay for them. Discuss the position of both parties to the contract.

4. Darren bought an apparently sturdy toy car for his daughter Samantha’s fourth birthday. He did so after first receiving assurances from the toy salesperson that the car was safe for a child his daughter’s age and would stand up to rigorous use. While Samantha was playing with the toy car in the steep driveway of their home, the car overturned and the plastic windscreen shattered. Fragments of plastic pierced Samantha’s arm, leaving it badly scarred. Does Darren have any rights against the shop and/or the manufacturer pursuant to the Sale of Goods Act?
5. Riker had recently bought a house in the country. He was concerned about fire risks so he decided to buy a mower to keep the large area of grass near the house under control. He approached Picard, the proprietor of Enterprise Mowers and told him that he required a heavy duty mower which could operate for long periods over rough ground. Picard advised him to purchase a Mowemdown and Spitemout model of $750. Riker bought the mower as advised, but broke down after 5 weeks. A neighbour told him that he should have bought a mower with a much larger motor for the specific conditions. Does Riker have any rights against Enterprise Mowers?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

6. There are several situations in which, contrary to usual restrictions on transfer of title, a buyer may obtain better title than the seller. Explain four of these situations, giving examples.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

7. Discuss and explain the rules as to delivery of goods contained in the Sale of Goods Act.
8. Roger, in buying goods from Ginger, signed a contract which contained a clause as follows:

“All express or implied conditions or warranties, statutory or otherwise, not stated in this contract are hereby excluded”.

May the implied conditions and warranties set out in the Sale of Goods Act be excluded in this way? Explain the effect of such a clause, using examples.
Learning Outcome 11

Describe and explain the principles of consumer protection legislation as it applies to contract law and specifically the rights and duties in relation to contracts with “consumers”.

Required Reading

Vickery and Pendleton 6th ed – Chapter 24

Activities

Activities in workbook

Key Terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bait Advertising</td>
<td>To advertise a product or service at a lower than normal price, where the product is unavailable at that price, or available only in limited quantities. Where consumers are mislead.</td>
</tr>
<tr>
<td>Deceive</td>
<td>The most appropriate meaning for the word &quot;deceive&quot; is to cause to believe what is false.</td>
</tr>
<tr>
<td>Exclusive dealings</td>
<td>Conduct, which places restraints on sellers by manufacturers or wholesalers, with the intention to effect competition.</td>
</tr>
<tr>
<td>Lien</td>
<td>The right to hold the property of another as security for the performance of an obligation or the payment of a debt</td>
</tr>
<tr>
<td>Mislead</td>
<td>To lead astray in action or conduct; to lead into error.</td>
</tr>
<tr>
<td>Predatory pricing</td>
<td>Where a competitor (with market dominance) reduces prices or acts in a manner to discourage competition, therefore harming a new competitor entering the market.</td>
</tr>
<tr>
<td>Price fixing</td>
<td>Setting of prices of products in order to discourage competition in the marketplace (i.e. stop price wars).</td>
</tr>
<tr>
<td>Pyramid Selling</td>
<td>A trading scheme in which the promoter offers to sell a participant the right to sell a particular product or service, and the right to introduce others into the scheme in the same way.</td>
</tr>
<tr>
<td>Referral Selling</td>
<td>Commission or payment is received on the basis of a referral of another person to the product seller.</td>
</tr>
<tr>
<td>Resale Price Maintenance</td>
<td>Where a manufacturer or supplied places restrictions on sellers which are anti-competitive.</td>
</tr>
<tr>
<td>Unconscionable conduct</td>
<td>Unfair, unjust, unscrupulous, unreasonable, or excessive. Conduct, which goes against good conduct, or conduct of good conscience.</td>
</tr>
</tbody>
</table>
INTRODUCTION

The Trade Practices Act, 1974

The consumer protection and unfair trading provisions of the federal Trade Practices Act 1974 and the parallel provisions of the state Fair Trading Acts have a greater impact on business operators and consumers than any other common law or legislative area.

These acts set out clear codes of conduct for the Australian business community with the two prime objects being:

(1) To prevent conduct by corporations and other businesses that restricts competition and reduces efficiency in the Australian market place.

(2) To protect consumers from the unfair practices of businesses.

The Trade Practices Act and the Fair Trading Acts were introduced for a variety of reasons, including those already mentioned. Further reasons included:

- carefully worded exclusion clauses could remove consumers’ rights;
- great difficulty in proving unconscionable conduct and misrepresentation; limited remedies, for example businesses could not be fined for exploiting customers or dealing unfairly with other businesses;
- price fixing agreements and other uncompetitive practices were not illegal and indeed were a common part of business;
- there was no national investigative and enforcement body to act on behalf of consumer interests.

To complicate matters, the laws affecting businesses and consumers are both state and federal, reflecting the division of powers established in the Australian Constitution at the time of federation in 1901. The Australian Constitution does not grant clear power to the federal government to enact consumer protection law. Therefore the main piece of federal legislation protecting consumers and regulating business practices, the Trade Practices Act, 1974 (hereinafter the ‘TPA’), derives it existence and constitutional validity from several powers contained in s51 of the Constitution. One of the major foundations of the TPA is S51(20), or the corporations power, which gives power to the federal parliament to make laws for corporations on most issues, which means that all businesses operating as companies must comply with the TPA.

The TPA may also in some instances be extended to cover sole traders and partnerships by relying on several other powers contained in s51, including:

- external affairs;
- trade and commerce among states and with other countries;
- use of postal, telegraphic and other like services;
- trade or commerce within a territory; and
- trade or commerce related to the supply of goods or services to the Commonwealth Government or any of its authorities or instrumentalities.
S 6(4) has the effect of extending the operation of the consumer protection provisions - other than s 53A, 55 and 61 to apply to the promotional activities of professional persons. Consequently, proceedings may be instituted against doctors, dentists, architects, engineers, accountants, chemists, teachers, solicitors and other professional persons, who in trade or commerce in any of the territories engage in misleading or deceptive conduct in the course of promotional activities. In addition incorporated professional practices will be liable generally as they are corporations.

Therefore, the TPA applies to the following businesses;

- corporations;
- businesses that engage in interstate trade, trade within a territory or foreign trade;
- businesses that engage in business using the post, telephone, radio, television or other like services;
- businesses that supply goods or services to Commonwealth organisations;
- businesses that engage in misleading conduct related to intellectual property; and
- Professional businesses engaging in misleading conduct re promotional activity.

The TPA contains provisions intended to;

- create a competitive and efficient economy;
- limit the growth of monopolies;
- protect the consumer;
- regulate business and trade practices.

Due to the Constitutional limitations of the TPA, the state *Fair Trading Acts* repeat many of the consumer protection provisions of the TPA and apply those protections to those businesses not within the TPA’s jurisdiction. The states derive such power from their own constitutions.

**The Australian Competition and Consumer Commission (ACCC)**

The ACCC (formerly the Trade Practices Commission) is responsible for ensuring compliance with the TPA. The ACCC consists of a chairman, presently Graeme Samuel, a deputy chairman and several full time members who are experts from the business, economic and legal community. The ACCC is one of the most powerful bodies in Australian business, with very wide investigative powers. The prime duties of the ACCC include;

- take action against corporations and persons who breach the TPA;
- to authorise conduct that would be prohibited as a restrictive trade practice, but which is of benefit to the public;
- to hold hearings and/or order people to give evidence and supply relevant documents;
- to carry out research and to provide information to consumers and businesses.

(http://www.accc.gov.au/content/index.phtml/itemId/54165/fromItemId/3744 and http://www.accc.gov.au/content/index.phtml/itemId/54137/fromItemId/3744)
The Australian Competition Tribunal (ACT)

The ACT, (formerly the Trade Practices Tribunal), may review the decisions of the ACCC and has the power to confirm, vary or void those decisions. The ACT comprises a president, several deputy presidents who must be judges of the federal court and members appointed by the federal government who must be experienced business people.


The National Competition Council (NCC)

The NCC is an advisory body with responsibility for implementing the national competition provisions of the TPA.

(http://www.ncc.gov.au/)

The Federal Court

The Federal Court may hear appeals from the ACCC and the ACT, and has the power to interpret the TPA and punish breaches of its provisions.

(http://www.fedcourt.gov.au/)

CONSUMERS

A ‘consumer’ is defined in s4B of the TPA as a person who acquires, including through exchange, lease or hire;

- goods or services with a price of $40 000 or less; or
- goods or services with a price of more than $40 000 that are ordinarily acquired for personal, domestic or household consumption or use; or
- a commercial road vehicle of any value.

A person who acquires goods or services for the purpose of reselling or trade or commerce cannot qualify as a consumer.

UNCONSCIONABLE CONDUCT - S51AA, S51AB and S51AC TRADE PRACTICES ACT, S57 FAIR TRADING ACT

S51AA – general duty to treat consumers fairly

S51AA imposes a general duty on corporations to trade fairly in relation to consumers and provides that;

(1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.
This is a reference to the common law principles of unconscionable conduct and derives from statements of the High Court made in *Blomley v Ryan* (1956) 99 CLR 362.

“The court has the power to set aside a transaction… whenever one party to a transaction is at a special disadvantage in dealing with the other party because of illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affecting his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.”

It is not necessary for the party who has benefited from a transaction challenged as unconscionable to itself have created the special disadvantage which forms the basis of the unconscionability, claim, it is sufficient if that party knows, or ought to have known of the other person’s situation and takes unfair advantage of the opportunity presented.

*Gregg v Tasmanian Trustees Ltd* (1997) 73 FCR 91

The company was found to have taken advantage of the applicant when it accepted a mortgage over the family home from her as security for her husband’s business without explaining the effect of the mortgage to her. The wife was suffering from multiple sclerosis and the mortgage did not accord with the agreed terms.

**S51AB – prohibition against unconscionable conduct**

S 51AB provides that a corporation shall not in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.

Unconscionable conduct may be defined as, using a better bargaining position against someone with a special disability to enforce harsh conditions in a contract, which in good conscience a person (or corporation) would not do.

S 51AB(2) provides guidelines which the courts may use to determine whether a corporation has engaged in unconscionable conduct.

(a) The relative strengths of the bargaining positions of the corporation and the consumer.

(b) Whether the corporation's conduct required the consumer to comply with conditions that were not reasonably necessary to protect the corporation's legitimate interests.

(c) Whether the consumer was able to understand any relevant documents.

(d) Whether any undue influence or pressure was exerted upon the consumer by the corporation or any other unfair tactics used.

(e) The price of equivalent goods or services from a person other than the corporation.
It should be noted that s51AB(5) and (6) limit the operation of the section to unconscionable conduct in connection with the supply of goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption, not acquired for re-supply or manufacture.

It is not possible to describe all the situations in which the court will grant relief on the ground of unconscionable conduct (where, in accordance with the ordinary concepts of humanity it is seen to be against conscience). Commonly the circumstances could include poverty or need of any kind, sickness, age, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The party deriving the benefit must know of the special advantage for the wronged party to claim relief.

Commercial Bank of Australia v Amadio (1983) 151 CLR 447

Mr and Mrs Amadio gave a mortgage to the bank over an office block owned by their son. This was to secure a loan from the bank taken out by a company in which the son was involved. The parents agreed to pay the bank if the son’s company defaulted on the loan. At the time the contract was made, the parents had poor English skills; both were elderly and received no independent legal advice. The parents believed that the extent of their liability was far less than it actually was. The court held that the bank had acted unconscionably and stated the following:

"Relief on the ground of unconscionable conduct will be granted when unconscionable advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary”. “Unconscionable conduct exists in circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or ‘uncontentious’ that he procure, or accept, the weaker party’s assent to the impugned transaction in the circumstances in which he procured or accepted it.

Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable.”

Relief for unconscionable conduct

Proceedings for relief against unconscionable conduct by a person who has suffered as a result of a breach of a s51AA and s51AB are limited to s87 (ancillary orders) and s80 (injunctions). Proceedings for breach of s51AB must be brought within 2 years of the date on which the applicant has suffered, or is likely to suffer, loss or damage as a result of the unconscionable conduct. The Federal Court of Australia may grant relief including the following:

- declaring the whole or any part of a contract to be void
- varying the contract
- refusing to enforce any or all of the provisions of a contract
- directing the refund or money or the return of property ordering the repair of, or the provision of parts for, goods supplied or the supply of specified services.
S51AC – Unconscionable conduct against small business

S51AC is a recent amendment to the TPA and protects small businesses from unconscionable commercial conduct.

Following the findings of the Reid Committee’s report into Fair Trading in July 1997, that small businesses were particularly vulnerable to exploitation by larger businesses, s51AC and s51AD were introduced into the TPA. The purpose of s51AC is to protect small businesses against exploitative business by ‘dominant’ businesses behaving unconscionably and s51AD provides that a corporation must not in trade or commerce contravene an industry code of conduct.

S51AC lists the following matters to be considered by the court as to whether the bigger business has behaved unconscionably;

- the relative strengths of the bargaining positions of the parties involved;
- whether, as a result of conduct engaged in by the supplier or acquirer, the person claiming unconscionable conduct was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier or acquirer;
- whether the person complaining of unconscionable conduct was able to understand any documents relating to the supply or possible acquisition or supply of the goods or services;
- whether any undue influence or pressure was exerted or any unfair tactics used; the amount for which, and the circumstances under which, identical or equivalent goods or services could have been acquired from or supplied to someone else;
- the extent to which the conduct was consistent with conduct in similar transactions with other like customers;
- the requirement of any applicable industry code;
- the requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code;
- the extent to which the supplier unreasonably failed to disclose to the business consumer;
- any intended conduct of the supplier that might affect the interests of the business consumer; and
- any risks to the business consumer arising form the supplier’s intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer);
- the extent to which the supplier or acquirer was willing to negotiate the terms and conditions of any contract for supply of the goods and services;
- the extent to which the parties acted in good faith.

Establishment of a special disability is not required by the consumer business.
S52 TRADE PRACTICES ACT AND S56 FAIR TRADING ACT

Introduction to s52
Division 1 of Part V of the Trade Practices Act prohibits corporations engaging in certain unfair trade practices. The TPA first prohibits deceptive conduct generally and then identifies and prohibits specific unfair trade practices. Such prohibitions are mirrored in the Fair Trading Act (FTA) applicable to individuals. The very wide general prohibition against misleading and deceptive conduct is contained in s 52 of the TPA and s 56 of the FTA.

S 52 of the TPA states "a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive".

Note particularly that Section 52 intends to establish a "norm of conduct" exercised by corporations in relations with their consumers. This is the "catch all" provision. The words misleading and deceptive are not defined in the TPA. The court will in each case decide objectively whether the particular conduct was misleading or deceptive or likely to mislead or deceive. Generally, sellers are required to tell the truth or refrain from giving an untruthful impression. S52 is one of the most utilised provisions of the TPA for the following reasons:

The conduct does not actually have to mislead or deceive anyone, it is enough that it could mislead or deceive. Evidence that some or many people were actually misled or deceived can assist the court but is not essential to the findings. Section 52 covers a much wider range of conduct than other statutory provisions or common law.

Section 52 is relatively easy to prove as there is no ‘intention’ requirement, and defendants are liable even if they honestly believed they were speaking the truth.

The remedies are broad but do not allow the imposition of a fine.

Section 52 can be used by one business against another. Businesses and not consumers are the main applicants in such actions, supposedly improving the position for consumers whilst protecting their own interests.

Elements of Misleading and Deceptive Conduct
The five elements to misleading and deceptive conduct are;

A corporation (FTA includes "persons").

(1) In trade or commerce.

The conduct must be part of the corporation's trading or commercial activities, thus the Section does not apply to everything that a corporation does in its operations.
Essentially therefore, the definition of ‘trade and commerce’ is very broad and appears to extend to any business dealing that is involved with profit as its motive. As a consequence, the cases where the conduct has been held to be not in trade and commerce are rare.

(2) Engage in conduct.

S 4(2) of the TPA, and ss 46(2), (3) and (4) of the FTA define conduct.

Conduct includes:

- doing or refusing to do any act,
- giving effect to a provision of a contract or understanding,
- arriving at or giving effect to an understanding.

Thus conduct is very broad, and it can include silence where there is a duty to disclose.

(3) Misleading and deceptive.

The judicial meaning of the words deceive and mislead are:

Deceive - “The most appropriate meaning for the word "deceive" is to cause to believe what is false; to mislead as a matter of fact - to lead into error, to impose upon, delude, take in”. Weitmann v Katies Ltd (1979) FLR 455.

Mislead - “to lead astray in action or conduct; to lead into error; to cause to err”.

Whether conduct is misleading or deceptive must be determined from all the facts and circumstances of the case. Confusion is not enough, it must lead a person into the wrong idea.

The ACCC considers the following in determining whether conduct is misleading and deceptive;

- the type of person to whom the representation is addressed;
- the meaning of the words - do they have a specialised meaning to one group, but not to the public generally;
- whether the statement is ambiguous;
- whether false tests and surveys have been used as a basis of advertising;
- misleading packaging and labelling;
- special offers which do not eventuate and are not true;
- failure of advertisements to disclose hidden charges;
- inaccurate sizes and dimensions;
- country of origin of goods;
- age of the goods - for example, "antique" can be misleading.

Where deception of the public is alleged, the following principles derived from Taco Co of Australia Inc v Taco Bill Pty Ltd (1982) 42 ALR 177 will assist the court:

1. The relevant section of the public must be identified.
   The matter must be considered by reference to all people who come within that section of the public, including the astute and the gullible, the intelligent and not so intelligent, the well educated and the poorly educated.

   Is the conduct misleading or deceptive or capable of being misleading or deceptive? Evidence that some person has in fact formed an erroneous conclusion, while not conclusive, is persuasive.

   Did the defendant’s conduct cause the false beliefs held by the relevant section of the public? It is necessary to inquire why the misconception has arisen to ensure the error relates to the defendant’s conduct.

**Targetts Pty Ltd v Target Australia Pty Ltd (1993) ATPR 41**

The company, Targetts, had been a retailer in Launceston, Tasmania for many years. Target proposed to set up business in Launceston near the Targetts store. They had similar names and logos in shape and colour. Targetts claimed that Target would be engaging in misleading and deceptive conduct in contravention of s52. The respondent argued that there was public interest in promoting competition in retailing in Launceston.

The court held in part that it was likely that a significant number of the public would intend to deal with Targetts and by mistake deal at Target. Further, the court found that the public would be likely to associate the arrival of the new store as part of an arrangement with the established trader Targetts. It was also held that there was no public interest in promoting competition which contravened the law against misleading and deceptive conduct. Target was restrained from using its name and logo within 30 km of the Targetts store.

**Examples of Misleading and Deceptive Conduct**

(a) Advertising

While there is a clear distinction at common law between representations and ‘puffery’, s52 makes no such distinction. However, this does not mean that the courts will regard all puffery (exaggerated sales talk) as misleading conduct. It depends upon all the facts and circumstances.
Eighth SJR Pty Ltd v Merity, (1997) (unreported, NSW Supreme Court)

The court here held that general statements such as “Max living style with min maintenance” in a newspaper advertisement were introductory puffery. The court also found that similar statements made by the agent when introducing the buyer to the property were not representations which could be relied upon without further inquiry.

Union Carbide Australia Limited v Duracell Australia Pty Limited (1987) ASC 55-54

Union Carbide commenced an action against Duracell alleging misleading and deceptive conduct, in breach of the TPA. It was held that Duracell's advertisements were misleading and deceptive. The court stated that the ads had to be looked at in the way an ordinary consumer would look at them. The ordinary consumer would have understood the ads to refer to a wide range of uses, not just a continuous high-drain, discharge test.

Comparative advertising is dealt with very strictly as consumers will generally assume the comparisons are accurate.

(b) Business Names

A business name that is misleading (e.g. may be similar to another business) may be a breach of the Acts (even if it had been registered).

Taco Co of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177

“Taco Bell” is the name of a chain of restaurants in the US and Canada that deals in takeaway Mexican food. The parent company did not register its trademark in Australia. In about 1976 an Australian company began operating a Mexican takeaway restaurant called ‘Taco Bell’s Casa’ in Sydney. In 1981 the American company set up two ‘Taco Bell’ restaurants in Sydney. Both parties took legal action against each other for misleading or deceptive conduct under s52 and passing off.

It was held that the Australian company had not engaged in misleading and deceptive conduct as it had legally been in business for five years prior to the American company’s arrival. The American company could in fact mislead the patrons of the more established business and was restrained from operating under the ‘Taco Bell’ name in the Sydney area.

(c) Passing Off

Often an action in passing off will also raise misleading and deceptive conduct. Passing off occurs when one competitor trades on the reputation of another. It is a common law action. However, if misleading and deceptive conduct is involved, s52 may be breached.
**Kettle Chip Co Pty Ltd v Apand Pty Ltd** (1993) 46 FCR 152

The manufacturer of Australia’s largest selling brand of potato chips was found to have breached s 52 when it introduced a new line of chips in competition to the applicant’s brand. The respondent’s packaging was found to be deceptively similar to that of the applicant and the production method represented on the packaging was found to be inaccurate.

(d) **Failure to disclose all relevant information or silence**

Under s52, silence may constitute misleading or deceptive conduct where there is a duty to reveal relevant facts, or where in all the circumstances, silence has amounted to misleading or deceptive conduct. This does not mean that the courts are prepared to overturn the common law rule that there is no general duty of disclosure in commercial dealings. Instead, if a s52 breach is alleged, the courts, on a case by case basis, will assess failure to disclose information as a factor to be considered.

---

**Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd** (1988) 79 ALR 83

When Collins was negotiating to buy a restaurant from Henjo, it saw there was seating for 128 customers. Henjo did not disclose that the liquor licence limited the seating to 84 customers. Collins bought the premises without carrying out a proper search of the licence. The contract of sale contained the standard term that the purchaser had not relied on any warranty or representation made during negotiations. Collins sued for damages under s52.

It was held that Henjo’s conduct was misleading as it knew Collins had been given a false impression of the seating capacity of the restaurant and failed to disclose the true situation. Although Collins should have made proper enquires, this did not release Henjo from its duty of full disclosure.

---

**Penalties**

A breach of s52 does not result in a fine pursuant to s79. The ACCC or any other person may seek the issuing of an injunction pursuant to s80, a disclosure order may be made pursuant to s80A and remedial orders may be made pursuant to s87. In addition, any person suffering loss or damage as a result of the breach of s52 may also apply for damages pursuant to s82. Note that the applicant must prove loss or damage in reliance on the agreement to recover damages.
OTHER SPECIFIC BANNED UNFAIR CONDUCT

False or Misleading Representations - S53 Trade Practices Act, S57 Fair Trading Act

S 53 specifically prohibits false claims about:

s.53 (a) the standard, quality, grade, composition, style, model or history or particular previous use of goods;

Hartnell v Sharp Corporation of Australia Pty Ltd (1975) 5 ALR 49

Sharp advertised that "every Sharp microwave oven is tested and approved by the Standards Association of Australia". The statement was false. Sharp pleaded guilty to ten charges that it had falsely represented that the goods were of a particular standard in breach of s 53(a). Sharp had to pay fines totalling $100,000.

MacFarlane v John Martin & Co Ltd (1977) ATPR 40-034

Advertising shoes as "top quality" when they were seconds breached s 53(a).

ACCC v Nissan Motor Co Australia Pty Ltd (1998) ATPR 41-660

Nissan pleaded guilty to displaying the wrong model vehicle in advertisements and to advertising a vehicle at an end of year price where that price had been in the market for some time. Fines of $130,000 imposed.

s. 53 (aa) the standard, quality, value or grade of services (e.g. an insurance company, bank financial institution can be sued for falsely representing the standard of services provided);

ACCC v Optell Pty Ltd (1998) ATPR 41-640

The promoters of a purchasing guide distributed application forms which wrongly implied that their publication had a form of government affiliation – found in breach as their publication was not a ‘government service’ and was therefore not of the represented standard or quality.

s. 53 (b) whether goods are new (curious variety of meanings re cars) -

Annand & Thompson Pty Ltd v TPC (1979) 40 FLR 65

“New means "previously sold by retail, current and not superseded, has not suffered significant deterioration, of recent origin, has suffered some damage but this has been quite effectively repaired, or damaged par replaced, so vehicle is otherwise new in every respect".
s. 53 (bb) a particular person having agreed to acquire the goods; for example, someone recently deceased;

s. 53 (c) the sponsorship, approval, performance characteristics, accessories, uses or benefits of goods and services;

*Given v Snuffa Pty Ltd & Anor* (1978) ATPR 40-083

A company made fire extinguishers and falsely claimed that its product had been approved by the Yachting Association of Australia and complied with the Standards Association of Australia standards, which it did not;

s. 53 (d) the sponsorship, approval or affiliation of the corporation;

*Australian Home Loans Ltd (Trading as Aussie Home Loans) v Phillips* (1998) 40 IPR 392

The respondent used the name “Aussie Home Builders” in a logo similar to that of the applicant in what the court inferred was a deliberate attempt to suggest an association with the applicant;

s. 53 (e) the price of goods or services;

For example, that it is less than a competitor's price; advertisements stating "below cost" when the price is not below the net price paid to the supplier;

*TPC v Cue Design Pty Ltd* (1996) ATPR 41-475

A retailer who placed a dual price label on garments where the higher, strikethrough price was not a price at which the garments had ever been sold by it, was found to be in breach and a fine of $37 000 imposed.

s. 53 (ea) the availability of repair facilities or spare parts;

s. 53 (eb) the place of origin of goods;

*TPC v QDSV Holdings Pty Ltd* (1995) ATPR 41-371

A manufacturer of toy koalas who sold its products which were partly made in China and partly made in Australia under a label containing in large print "Aussie Born" and "Made in Australia with some imported components". The court held that the conduct was in breach of s 53(eb).
s. 53 (f) a buyer's need for goods or services;

**Keehn v Medibank Benefits Fund of Australia Ltd (1977) 14 ALR 77**

Following the introduction of Medibank, a medical benefits fund issued pamphlets suggesting it was necessary for contributors to contribute to a particular benefits scheme to be treated by their doctor of choice – it was not.

s. 53 (g) the existence, exclusion or effect of any condition, warranty, guarantee, right, or remedy;

**TPC v Radio World Pty Ltd (1989) ATPR 40-973**

Is it permissible to put a "no refund" sign up at a retail outlet? Radio World displayed a "no refund" sign at its premises which stated that requires.

The Trade Practices Commission (now the ACCC) alleged that Radio World, in displaying the sign, had engaged in misleading and deceptive conduct and had made a false and misleading representation in contravention of s 53 of the Act. The TPC claimed that the references to the Act in the sign did not remove the misleading character of the other statements in the sign which were absolute in their terms.

Radio World's solicitors disagreed with the TPC that the sign was being displayed in breach of the Act. The TPC sought an injunction to stop Radio World from displaying the sign. "There is no doubt that the sign creates a misleading impression that customers cannot obtain a refund" the TPC argued. "In this case, we have no indication that Radio World will uphold customer's rights".

The court held that the displaying of the "no refund" sign constituted misleading and deceptive conduct and a breach of s 53(g) of the Act. Inherent in that finding was a belief that consumers would not necessarily know their rights under the TPA.

---

**False or misleading conduct in relation to land - S53A Trade Practices Act, S59 Fair Trading Act**

A corporation shall not in trade or commerce, in connexion with the sale or grant, or the possible sale or grant, of an interest in land or in connexion with the promotion by any means of the sale or grant of an interest in land;

- represent that the corporation has a sponsorship, approval or affiliation it does not have;
make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put or the existence or availability of facilities associated with the land; or

- offer gifts, prizes or other free items with the intention of not providing them or of not providing them as offered.

A corporation shall not use physical force or undue harassment or coercion in connection with the sale or grant, or the possible sale or grant, of an interest in land or the payment for an interest in land.

Thus, s53A prohibits false or misleading representations regarding all types of dealings with land, including false advertising by real estate agents and developers. Intention to make a misleading representation does not have to be established – it is enough that the false or misleading representation was made.

**Misleading Conduct in Relation to Employment - s 53B Trade Practices Act, S 60 Fair Trading Act**

A corporation should not mislead people seeking employment about the availability, nature, terms or conditions of the employment, or any other matter to do with the employment.

In our particular economic climate such conduct can be particularly damaging and hurtful. It may include advertisements placed by employment agencies for positions which do not exist, and are placed in order to increase the agency's pool of available employees. It may also include using an employment advertisement to promote other enterprises such as photographic studies with little benefit to the job applicant.

---

**Dever v Creevey, Ex parte Creevey (1991) ATPR 46-079**

A real estate agent advertised in the paper under "Help Wanted", a number of jobs such as electricians and plumbers, to "start work on a big project". Several applicants found that the real nature of the employment was sales and marketing. It was held that this conduct breached Queensland's *Fair Trading Act* equivalent of s 53B.
Not Specifying the Full Cash Price - S53C Trade Practices Act, S61 Fair Trading Act

When advertising part of the price of goods or services (e.g. the deposit) a corporation is also required to specify the full cash price. The intention is to stop retailers offering goods and services on terms without disclosing full cash price. The difference in cost is usually the extra cost of time payment. Without knowing the cash price it would be difficult to work out this extra cost.

**TPC v Autoways Pty Ltd (1990) ATPR 41-051**

A car dealer advertised its used cars by stating the deposit and/or periodic repayments without stating the cash price. The dealer and principal pleaded guilty to 23 counts of breach of s 53C. As it was held there was no deliberate flouting of the law, the fines imposed were $3,200.

Falsely offering gifts or prizes - S54 Trade Practices Act, S62 Fair Trading Act

A corporation should not offer gifts, prizes or other free items to people buying its goods and services if it does not intend to provide them.

The ACCC has stated that such prohibited conduct includes;

- offers which don’t provide adequate information about the terms, conditions or limitations which apply (e.g. additional expenses),
- gifts or prizes which differ materially from those advertised, for example, prizes of "up to $10,000" when the prize is in fact a lottery ticket where the prize is $10,000.

**TPC v Caldenton Corporation Pty Ltd (1994) ATPR 41-306**

A retailer of stereo equipment pleaded guilty to breaches of s 54 in relation to a promotion which offered prizes, where the retailer extended the closing date and added fictitious names to the draw because the promotion had not been a financial success.

**ACCC v Nationwide News Pty Ltd (1996) ATPR 41-519**

An advertisement stated “Free mobile for every reader. Don’t miss Monday’s Telegraph Mirror.” Conditions applied which were not referred to in the advertisement but which were set out in the later edition. The ACCC argued that a breach of s54 had occurred because the respondent never intended to give every reader a phone without condition. The court held that the offer was to provide a free phone on terms set out in the later edition and that is what the respondent did.
Misleading Conduct to which the Industrial Property Convention Applies - S55 Trade Practices Act, S63 Fair Trading Act

A person shall not in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics the suitability for their purpose or the quantity of any goods.

Australia is a signatory nation to the 1967 Stockholm revision of the Paris Convention 1883 which is an international agreement for the protection of inventions, trademarks, patents, designs, trade names, appellation of origins and fair trading practices. In this agreement, Australia has agreed to protect the intellectual property of foreigners in the same way as it does its own, hence the purpose of s55.

The constitutional validity of this Section rests upon the power of the Federal Government to make and enforce international agreements under its external powers. Therefore it has a broad application because it applies to persons and not corporations who mislead the public.

Lennox v McGrey Pty Ltd (1986) ATPR 40-640

An importer of bicycle helmets sold helmets bearing the Standards Association of Australia label, but the goods had not been tested as stated on the label.

Temperley v Playground Supplies Pty Ltd (1980) 51 ALGR 362

A manufacturer of children's car booster seats pleaded guilty to breaches of s 55 in relation to ads for its car seats in which it stated that the seat complied with a particular Australian standard. Fines totalling $6,000 were imposed.


An importer of facial tissues which it advertised as 100% cotton, even after approaches from the TPC following tests which showed that representations to be untrue, was fined $7,000. This company was not a major importer and there was no evidence of loss or injury.

Misleading Conduct Regarding Services - S55A Trade Practices Act, S64 Fair Trading Act

A corporation shall not mislead the public as to the nature, characteristics, suitability for purpose, or quality of any services.

It must be noted that as in s 55, s 55A applies to conduct which is liable to mislead the public. This public element must be present for it to be covered by this Section or, s 52 may apply.
**ACCC v Optell Pty Ltd** (1998) ATPR – 640

The promoters of a purchasing guide who sent out the application forms and invoices which implied that their publication had some form of government affiliation were found to have breached s55A.

**Adams v Anthony Bryant & Co Pty Ltd** (1987) ATPR 40-784

An insurance agent who misrepresented the effect of investment plans offered by an insurer received penalties of $80,000.

**Doherty v Traveland Pty Ltd** (1982) 4 ATPR 40-323

A travel agent who kept on display in his agency a brochure advertising a 13 day trip to Bali and Singapore, after the trip had been shortened to 11 days, was held to have breached s 55A, the penalty was $11,000.

---

**Bait Advertising - S56 Trade Practices Act, S65 Fair Trading Act**

A corporation shall not in trade or commerce advertise goods at a specified price where it has reasonable grounds to expect that it will not be able to comply with the advertisement.

Basically, bait advertising is an alluring but insincere offer to sell a product which the advertiser has no real intention to sell. Typically this provision addresses the situation where a consumer is induced to a place of business by an advertisement, only to be told that the advertised product is not available. Usually the supplier will be able to supply the consumer with another product at a higher price.

S 56(2) imposed upon suppliers who advertise goods/services at a specified price a positive obligation to ensure that it has the goods/services available for a reasonable period and in reasonable quantities, having regard to the nature of the market and the advertisement.

What is "reasonable" depends upon the types of goods and services offered and the way they are normally marketed.

S 56(3) provides a defence to prosecution on the following grounds;

- that the corporation offered to provide the goods or services advertised within a reasonable time (raincheck policy) or
- that it offered to procure equivalent goods or services at the same price within a reasonable time.
**Reardon v Morley Ford Pty Ltd (1980) 49 FLR 401**

A car dealer advertised certain cars at a special price for a limited time period. A potential buyer approached the dealer's employees to purchase the car at the advertised price. No vehicles were available because there had only been one to start with which was sold "subject to finance". From circumstantial evidence it was established that the dealer did not intend to sell the vehicle at all. It was held that this conduct breached s 56.

**Referral Selling - S57 Trade Practices Act, S66 Fair Trading Act**

A corporation shall not in trade and commerce induce a consumer to buy goods or services by promising that after the consumer has paid he or she will receive a rebate, discount or some other benefit.

This concerns rebates, etc, **after** the consumer has paid for the goods or services. For example, "you will receive a 20% discount for every person you refer to us and who makes an application for one of our credit card accounts".

S 57 does not cover "spotter's fees", that is a commission for introducing a new business or the like, which is regarded as legal and good business practice. The offer of a spotter's fee comes **after** the contract is made and is not an inducement into the contract as with referral selling.

The following explanation is provided by the ACCC;

"The prohibited practice is confined to cases to which the benefit to the consumer is dependent upon subsequent sales or introductions and is not given at the time of the original sale. The prohibition in s 57 only applies to inducements to sign up for goods or services. If the contract is completed, (and there have been no prior representations that a rebate, commission or other benefit will apply) the supplier may without contravening s 57, offer a rebate to the original purchaser for others that sign up after inspecting his goods or services".

**Accepting Payment without Intention to Supply - S58 Trade Practices Act S 67 Fair Trading Act**

A corporation shall not accept payment or other consideration for the goods if at the time of acceptance it intends not to supply the goods or services or to supply goods and services materially different from the goods and services in respect of which the payment is made.

Further, a corporation can be considered to have contravened s 58 if there were reasonable grounds of which it was aware, or should have been aware, to suggest it would not be able to supply the goods when accepting payment.
Dawson v World Travel Headquarters Pty Ltd (1981) ATPR 40-240

World Travel sold tours as a retailer direct to the public and operated some tours itself. The tour in question, a "Swingaway Asia Group Holiday" was advertised in a brochure as a 16 day tour. In fact the tour only lasted 15 days.

The brochure had been prepared before the changes in the Qantas departure dates were made. However, when the departure dates changed, the information was not corrected on the brochure when it was reprinted. The brochure indicated a departure from Perth on a Tuesday, which allowed two full days' stay in Singapore. The plane, however, left Perth on a Wednesday. The people who bought tickets for the tour only became aware of the change after they had paid for their tickets and then made telephone inquiries about the change. The company was fined $3,200 for its breach of s 58(b).

Making False or Misleading Statements about Work-at-home Schemes S59Trade Practices Act, S68 Fair Trading Act

A corporation is prohibited from making false or misleading representations about the profits and practicability of home-operated businesses, a business activity requiring the performance of work at or from home, or a scheme requiring investment of money and associated work by the investor.

The ACCC have advised that advertisers have the following obligations in relation to s 59;

- claims concerning profitability should reflect what an average person would achieve in normal circumstances;
- estimates of profits should be based on reasonable predictions;
- reasonable risks should be disclosed;
- advertisements should disclose the minimum amount of capital investment, with details of expenditure, time involvement and market information.

Reardon v Aquajet Holdings Pty Ltd (1982) 4 ATPR 40-328

A manufacturer of carpet cleaning machines sold these machines to people who answered employment ads for cleaners. The ads stated that the position of cleaner offered a return of $400-$800 per week. The court held s 59 was breached as the people involved earned much less.
Harassment or Coercion - S60 Trade Practices Act, S69 Fair Trading Act

The Act prohibits the use of physical force, undue harassment or coercion by corporation (or its servants or agents) when it supplies goods or services to a consumer, or when it receives payment from a consumer for goods and services.

This Section exists beside the state door-to-door sales legislation. S 60 protection is aimed at very serious interference and not just high pressure tactics.

Pyramid Selling - Section 61 Trade Practices Act, Section 70 Fair Trading Act

 Corporations are prohibited from running trading schemes which concentrate upon accepting payments from participants who can expect payment in their turn when they recruit new salespersons into the trading scheme. Thus, pyramid selling occurs where the participants are offered the right to sell the product and then receive payment or consideration for every person they introduce into the scheme. It includes such schemes as chain letters with no product to sell but having benefits for those who recruit others into the scheme.

Essentially the founders of a pyramid selling scheme are at the top, and make their money from a slice of the profit made from each new sales recruit who pays to come into the scheme. As any market has limits or restraints to expansion, later recruits may find it difficult to persuade others to pay to join them in a saturated market, and may not profit from their contribution.

Multi-level marketing schemes that merely establish a distribution process or channel will generally not breach the Section.

ACCC v Golden Sphere International Inc (1998) ATPR 41-638

The ACCC successfully proceeded against a company incorporated in Vanuatu and its Australian agents for promoting a scheme involving a succession of people being invited to pay the company and others up the pyramid $50 each.

TPC v Parker (1990) ATPR 41-055

The defendant was found guilty of involvement in pyramid scheme in which people were induced to pay $125 each with the ultimate alleged result that if enough people were introduced into the scheme they would receive $1000.
Unsolicited Credit or Debit Cards, - Section 63A Trade Practices Act, Section 71 Fair Trading Act

A corporation shall not send an unsolicited credit or debit card, unless it has received a written request from the person, or sent a renewal or replacement card of the same kind as previously used and sent to that person.

Credit card means any article of a kind commonly known as a credit card of any similar article intended for use in obtaining cash.

Debit card means an article intended for use in obtaining access to an account held for the purpose of withdrawing or depositing cash or obtaining goods and services.

Unordered Goods or Services - Section 64 Trade Practices Act, Section 72 Fair Trading Act

Section 64 Trade Practices Act

A corporation must not assert a right to payment for unsolicited goods or services (unless it has reasonable cause to believe that it has a right to payment) or for an entry in a directory (unless the person authorised the entry in writing). Asserting payment includes sending an invoice, demanding payment, putting a person's name on a list of defaulters, etc. (s 64(5)).

S 64(6) sets out what is required for "authorising" an entry in a directory (including a written request) and s 64(10) defines a directory (it excludes newspapers).

S 64 was inserted to prevent the unscrupulous practice if "inertia selling" where Goods or services are provided without order and a right to payment is asserted. This particularly catches unsolicited deliveries of books and compact disks and the situation where tradespeople perform un-requested work, particularly on residences and then demand payment from the occupier.

Rizzo v Fitzgerald (1988) 19 FCR 175

A person, who sent invoices to a business for the publication of an advertisement which the business had not ordered, was found in breach of s 64.

Sections 72, 73 Fair Trading Act

Because the TPA generally only applies to corporations the state FTA mirror some of its provisions. When an offending party is not a corporation, the activity is still an offence under the FTA.

Ss 72 and 73 FTA mirror ss 64 and 65 TPA. It is an offence to contravene ss 72 and 73 (s 75) and the individuals are entitled to remedies (ss 83-86).
Liability of Recipient of Unsolicited Goods - Section 65 Trade Practices Act, Section 73 Fair Trading Act

Where a corporation sends unsolicited goods to a person, the person does not have to pay for them, and is not responsible for any loss or damage to them (except for intentional unlawful acts). The corporation loses all rights to the goods and the goods are the complete property of the person;

- three months after delivery,
- if the person gives written notice to the corporation in accordance with s 65(5), then the earlier of one month from the giving of notice, or three months from receiving the goods, unless the person before the time above;

- unreasonably refuses to let the owner/sender take possession or
- the sender/owner does take possession or
- the goods were received in circumstances where the person knew, or reasonably should have known that they were not intended for that person.

*Jacazlow Pty Ltd v Amleeny Autos Pty Ltd* (1992) *ATPR* 4-177

An automotive parts dealer received an unsolicited delivery of equipment from a manufacturer which it immediately drew to the manufacturer's attention and requested that the goods be collected. The manufacturer preferred to have the dealer keep the goods and try to sell them.

Subsequently the receiver and manufacturer sued for the invoiced price of the goods. The dealer was held to have a valid defence under s 65.

It is an offence to breach s 65 and penalties against the seller are to be found in s79. S 82 - damages is also available.

**Penalties**

A breach of the sections concerning specific banned conduct can result in a fine of up to $1,100,000 for a corporation and $220,000 for an individual pursuant to s 79. The ACCC or any other person may seek the issuing of an injunction pursuant to s80, a disclosure order may be made pursuant to s80A and remedial orders may be made pursuant to s 87. In addition, any person suffering loss or damage as a result of the breach of may also apply for damages pursuant to s82. Note that the applicant must prove loss or damage in reliance on the agreement to recover damages.
IMPLIED CONDITIONS AND WARRANTIES IN CONSUMER CONTRACTS

SUBJECT TO THE TRADE PRACTICES ACT

As previously stated when discussing the Sale of Goods Act and the Consumer Transactions Act, the TPA also addresses consumer protection by implying conditions and warranties into consumer contracts as well as addressing product safety. The TPA provides for;

(a) the setting of standards for product safety and product information;

(b) implied warranties, that is, terms relating to the quality of goods and services in contracts between consumers and corporations;

(c) implied conditions in contracts that goods or services comply with the description, are fit for the buyer's purpose, and correspond with any sample provided;

(d) places a liability on manufacturers and importers to compensate the consumer where implied conditions are breached.

Implied Conditions and Warranties

The TPA contains implied conditions and warranties to protect consumers falling within the jurisdiction of the Act. Transactions falling outside the TPA may fall within the jurisdiction of the CTA, FTA or SOGA.

Whilst the implied terms are similar to those contained in the SOGA pursuant to s 68 of the TPA these implied terms and conditions cannot be excluded, restricted or modified in consumer contracts.

Implied Conditions Part V Division 2 Trade Practices Act

(a) As to title - S69(1)(a)

In every contract for the supply of goods by a corporation to a consumer, there is an implied condition that the seller has the right to sell the goods.

(b) Goods must correspond with their description - S70(1)

Where there is a contract for the supply of goods by a corporation to a consumer, there is an implied condition that the goods shall correspond with the description. Where there is reference to a sample as well a description, it is not sufficient if the bulk corresponds with the sample –goods must also match the description. This condition does not apply to goods sold at auction.
(c) **Merchantable Quality - S66(1)(a) and (2) and S71(1)**

Where there is a contract for the supply of goods by a corporation to a consumer (other than by auction) there is an implied condition that the goods must be of merchantable quality, that is, fit for the purpose for which they are commonly bought having regard to price and the circumstances of sale.

S 71(1)(a) and (b) provides that this condition will not apply if:

- any defects in the goods are brought to the attention of the consumer before the sale is made, or
- the consumer examines the goods before the contract is made and the defects ought to be revealed by such examination.

(d) **Fitness for Purpose - S71(2)**

Where the consumer makes known either to the corporation or to a person with whom negotiations are previously conducted any particular purpose for which the goods are bought, there is an implied condition that the goods must be fit for the purpose, whether or not that is the purpose for which the goods are commonly supplied.

The tests are similar to those for the SOGA, that if the consumer purchased the item on the basis of a brand name the condition may not apply, because this would infer that she or he did not rely on the supplier's skill and judgement.

It must be stressed that the implied conditions of merchantable quality and fitness for purpose apply only to the supply of goods and not services.

(e) **Supply by Sample - S72**

Where in a contract for the supply, (other than by auction) by a corporation in the course of business, of goods to a consumer, when these goods are supplied by reference to a sample;

- there is an implied condition that the goods will correspond to the bulk in quality;
- that there is an implied condition that the consumer will have a reasonable opportunity of comparing the bulk with the sample;
- that the bulk must be free from any defect rendering them unmerchantable that would not be apparent on reasonable examination of the sample.

S 72 applies where demonstration or shop models are used for display or practical demonstrations of the performance or suitability of goods.
Implied Warranties Part V Division 2 Trade Practices Act

In every contract for the supply of goods by a corporation to a consumer.

(a) **Quiet Possession - S69(1)(b)**

There is an implied warranty that the consumer will enjoy quiet possession of the goods.

(b) **Goods Free from Encumbrance or Charge - S69(1)(c)**

An implied warranty that the goods are free and will remain free until property passes from any charge or encumbrance not disclosed or known to the consumer before the contract was/is made.

(c) **Implied Warranties as to Services**

For s 74(1) and (2) only, the definition of services has been narrowed to exclude insurance services and the transportation and storage of commercial goods.

The implied warranties with respect to services are;

S74(1) - services will be rendered with due care and skill;

S74(2) - where the consumer makes known the particular purpose for the service, the services and any materials supplied must be reasonably fit for that purpose. This warranty is not implied where the consumer does not rely on the corporation's skill and judgement or that it would be unreasonable to do so.

**Remedies for Breach of Implied Terms**

(a) **where goods are supplied by a corporation to a consumer for personal, domestic or household consumption.**

Under s 75A of the Act a consumer may rescind the contract for breach of an implied condition either;

- by serving a notice in writing on the supplier signed by the consumer and giving particulars of the breach,
- by returning the goods to the supplier and giving the supplier either orally or in writing particulars of the breach.

The rescission must occur within a reasonable time after the consumer has had a reasonable opportunity to inspect the goods. The remedy of rescission will fail if;

- the goods were disposed of by the consumer, were lost, or destroyed other than by a defect in the goods themselves; or
- the consumer has made the goods un-merchantable by failing to take reasonable steps to prevent their deterioration; or
the goods are damaged by abnormal use while in the possession of the receiver of the goods.

Where the contract has been rescinded for breach of an implied condition, the property reverts to the supplier at the time the notice is served or the goods returned.

Remedies for breach of an implied term where goods are not ordinarily required for personal, domestic or household consumption or use

The corporation's liability is limited to;
- for the supply of goods - to the replacement or repair of the goods or that cost of that replacement or repair,
- for services - to re-supplying the services, or for the cost of re-supply.

This limitation of liability cannot be relied upon by the supplier if the consumer is able to establish that it was not fair or reasonable to do so.

(b) Civil remedies for breach of Part V

S 80 - injunctions to present an anticipated breach of the Act, and s 82, damages.

(c) Many of the provisions of Part V also give rise to criminal proceedings (not s52) with penalties up to $1,100,000 for a corporation and $220,000 for a natural person.

PRODUCT SAFETY AND INFORMATION – TRADE PRACTICES ACT PART V DIVISION 1A

This part contains provisions dealing with;
- publication of warning notices by the government in relation to goods under investigation as possibly dangerous (s 65B),
- banning of goods which do not comply with prescribed product safety standards (s 65C),
- banning of unsafe goods (s 65C),
- compliance with consumer product information standards (s 65D & E),
- compulsory recall of unsafe goods (s 65F),
- notification to the government of voluntary recall (s 65F) (see manufacturer's responsibilities)

MANUFACTURER'S LIABILITY

It is not only the seller of goods or services who has responsibility to ensure that their product is of a suitable standard. Manufacturers also have responsibilities which fall into the following categories:

(a) To adhere to product quality and composition legislation. Such legislation sets standards, procedures, enforcement, protects health and safety of consumers and includes state legislation and Part V and VA of the Trade Practices Act (TPA). These will be enforced by government departments and agencies (e.g. ACCC) and in the case of the TPA gives rights to consumers to take action if such standards are not met.
(b) To act upon rights based in contract between the consumer and the manufacturer (e.g. either on specified terms or implied conditions and warranties). These rights are created at common law and by statute (ie. SOGA, TPA, CTA). These rights may be exercised by the consumer.

(c) To act upon rights based in the tort of negligence. As you will recall, a tort action does not rely on a contract between the buyer and the manufacturer. It is a common law principle that makes individuals responsible for their negligent actions, regardless of whether a contractual relationship exists. Thus a tortious action may be taken by a consumer against a manufacturer.

(d) To honour statutory warranties that also exists independently of any contract.

To protect themselves against the gravity of the potential consequences of a breach of a consumer's rights most manufacturers/suppliers have product liability insurance.

The manufacturer's responsibilities may be broadly classified into seven areas. Whenever any product defect arises all seven areas must be considered. The seven areas are;

1. Contract
2. Tort
3. Product recalls
4. Product safety
5. **Manufacturer's Warranties Act 1974 (SA)**
7. **Trade Practices Act, Part VA**

**Contract law**

We dealt previously with sellers and what conditions and warranties are implied into contracts with sellers (principally, merchantable quality, fitness for purpose, sale by sample and description). The **same conditions and warranties** are implied into contracts with manufacturers.

However, for there to be a responsibility under one of the implied conditions or warranties at **common law**, there must be a contract. Usually the consumer's contract is with the retailer or seller, not with the manufacturer. Ordinarily, the consumer can exercise her/his rights against the seller, then the seller can pursue his/her own rights in contract against the manufacturer.

If the manufacturer is also the seller, then the consumer can exercise the rights granted by the **SOGA, CTA and TPA**.
Tort of negligence

Rights under the common law of torts exist independently of any contract, and the circumstances in which a manufacturer will be responsible for defective products have already been examined.

Product safety

(a) Food - Food Act 1985 (SA), Controlled Substances Act 1984 (SA) and Commonwealth Food Standards Legislation

There is extensive regulation of food, controlled by offences and penalties, for example;

- offences relation to preparing/packing any food that is not of adequate quality (e.g. damaged, not fit for human consumption, etc.);
- minimum standards are set for the quality of food in terms of purity, strength, composition, etc. (E.g. use by dates).
- some unsuitable processes are prohibited;
- standards for packaging and labelling are set;
- some substances are prohibited;
- there are extensive disclosure provisions regarding ingredients;
- minimum product quality standards exist for some foods such as flour, meat, fish, eggs, milk, etc (e.g. a "meat pie" must have a certain percentage of meat before it can be called a "meat pie");
- manufacturing processes are regulated in terms of cleanliness and hygiene.

(b) Product Safety - Trade Standards Act (1979) (SA) TPA Div 1A Part V

The Trade Standards Act 1979 (SA) enables regulation to be set for any goods with the purpose of preventing or reducing the risk of death, personal injury or disease (e.g. swimming pool fences, child seats in vehicles, etc). These regulations can set requirements for manufacture or for the inclusion of warnings/instructions.

Similar but more comprehensive provisions now exist under Div 1A, Part V TPA. This Division of the TPA deals with six matters;

- publication of warning notices by the government regarding goods under investigation as possibly dangerous;
- banning of goods which don't comply with prescribed product safety standards (i.e. regulations setting product safety standards are made);
- banning of unsafe goods (outright);
- compliance with prescribed product information standards (i.e. regulations setting product information standards are made);
- compulsory notification to government of voluntary recalls.
These pieces of legislation regulate the area with controls and offences/penalties.

The *TPA* also provides an action for consumers in damages where a standard is breached (i.e. so the consumer doesn't have to rely on contract or tort).

**Product recalls**

When a manufacturer becomes liable under one of the areas of responsibility the consequences can be extreme. To limit the harm to be done when a defect is found, often a product is recalled. This may be done voluntarily by the manufacturer in anticipation of their liability if the defective products continue to be supplied (s 65R *TPA* - the manufacturer has to fully disclose the problem to the Attorney-General within two days).

A product recall can be demanded by the Attorney-General. This provision exists by virtue of s 65F *TPA* (Part V Div 1A). This Section may apply when:

- the goods are likely to be used by consumers;
- Attorney-General considers that the goods may cause injury;
- goods do not comply with a consumer product safety standard (e.g. Part V Div 1A *TPA* or any state legislation) or an unsafe/banning order applies;
- the supplier hasn't already taken action to prevent the goods causing injury.

S 65F goes on to give the Attorney-General flexibility in dealing with the problem. The Attorney-General can:

- require actual recall;
- require the supplier to disclose (by advertisement or otherwise) what the defect is and/or procedures for the public to dispose of the goods;
- require the supplier to repair/replace the goods or refund the full price;
- use a general power to set out how these will be done.

S 65F says that where a recall order is made, the supplier must give notice to any overseas buyers and a copy of that notice to the Attorney-General within ten days.

Ss 65J, L and P provide that the Attorney-General must prepare a proposed notice and reasons for the publication, then there is an opportunity for the supplier to attend a conference on the matter with the ACCC. The Attorney-General then considers the ACCC's recommendations before proceeding. S 65L provides that where the risk of a serious injury/death/illness is immediate, then the Attorney-General does not have to comply with the notice and conference.

S 79 sets out the penalties in the case of any supplier that doesn't comply with the provisions. These requirements do **not** apply to food or drink.
Manufacturer’s Warranties Act SA 1974

The Manufacturer’s Warranties Act (MWA) provides "statutory" warranties. This means that the warranties are imposed by the statute itself; they do not have to be implied into a contract. The following statutory warranty is imposed; merchantable quality - the goods must be fit for the purpose normally used (s 4(2)).

Often manufacturers provide guarantees of service or warranties for a period after purchase. Under the MWA these can still be offered, but they must be honoured (s 3(1)).

The manufacturer is responsible for defects, but not defects that occurred through factors beyond its control after the goods left the factory.

The manufacturer must, for a reasonable period after manufacture, ensure that spare parts are available. Where the manufacturer is outside Australia, the importer is responsible, as if they are the manufacturer.

The terms of the MWA cannot be excluded. The responsibilities survive resale.

Trade Practices Act Part V Div 2A

The effect of TPA Part V Div 2A is to make manufacturers concurrently liable with the seller of goods to compensate a consumer for loss or damage, thus a person has a right to compensation from the manufacturer without having to prove negligence on the manufacturer’s part.

The following prerequisites for application apply:

The manufacturer must have supplied the goods "in the course of trade or commerce to a person who acquired them for "resupply" and the goods must then have been supplied to a consumer. If the manufacturer supplies goods directly to the consumer, the consumer cannot sue the manufacturer under this part of the TPA.

This protection works like the MWA in that the obligations are "statutory", they do not have to be implied into a contract.

It applies to "goods" ordinarily acquired for household use or consumption and not for resupply (ss 74A(2)(a) and (aa)).

The obligations are compulsory, they cannot be excluded by agreement (s 74K).

"Manufacturer" includes only corporations which are manufacturer, apparent manufacturer, or a corporation with its brand name on goods, a corporation which allows itself to be promoted as manufacturer, or an importer (where the manufacturer has no place of business in Australia) (s 74A).
The obligations are that the goods must:

- be fit for purpose (s 74B)
- correspond with description (s 74C)
- be of merchantable quality (s 74D)
- conform to sample (s 74E)
- be able to be repaired for a reasonable time (s 74F)
- comply with any express warranty given (s 74G)

Further the Act imposes an obligation upon manufacturers to provide repair facilities for consumers and to stock adequate spare parts so that repairs may be undertaken.

If a corporation breaches these provisions it is an offence under Part VI TPA and consumers are generally given a right to sue for loss or damage under Part V Div 2A itself.

There is a limit placed on the amount recoverable by a consumer against the manufacturer (s 74C). If the manufacturer is sued pursuant to Div 2A Part V, the manufacturer is obliged to indemnify the seller for any liability incurred to a consumer.

**Trade Practices Act Part VA**

The *TPA* Part VA (ss 75AA - 75AS) was added to the Act in 1992. This sets out the liability of manufacturers and importers for defective goods. It is a statutory code of defects. Strict liability is imposed upon the manufacturer. There is no need to prove negligence. Again this provides controls and standards on manufacturers and gives individuals who suffer loss as a result of a breach, a right to sue for damages.

The s 74AC definition of "defect" is very wide (i.e. goods have a defect if their safety is not such as persons generally are entitled to expect). Thus, when a court is determining the safety of the goods it will consider these matters set out in s 74AC(2);

- the manner in which and purpose for which, goods have been marketed,
- the packaging of the goods,
- the use of any mark in relation to the goods,
- any relevant instructions or warnings,
- what could reasonably have been expected to be done with the goods,
- the time at which the manufacturer supplied the goods.

S 75AK sets out the defences to an offence under the Part;

- the defect did not exist when the goods were supplied,
- the defect occurred because of mandatory compliance with a safety standard (then the Commonwealth is responsible),
- the defect could not have been discovered in light of scientific/technical knowledge available at the time of manufacture,
- the defect was due to the design of "worked on goods" (i.e. the goods were a non-faulty part of a faulty finished product, or markings, warnings, etc on the finished goods were adequate).
1. Gabrielle wished to buy a car and enquired about a bank loan. The credit manager told her that she would need a guarantor. She asked her parents, who were originally from Greece, to be guarantors. Being unfamiliar with some points of the English language, they did not understand what was involved, so Gabrielle asked the credit manager to explain it to them.

The credit manager told them that as their daughter was only 19, and did not earn enough money; the bank required that someone else’s name should appear upon the documents. Gabrielle’s parents agreed that their names could be used to obtain the loan for her.

After 10 months, Gabrielle stopped making repayments on the loan. The bank sent Gabrielle’s parents a letter 3 months later informing them that as the payments were overdue, despite repeated requests to Gabrielle, the bank required full payment of the outstanding $17,987 from them, without delay.

Gabrielle’s parents were shocked. They had not realised to what they had agreed. Advise them.
2. Priscilla bought a dining table advertised as solid mahogany. Three months after making the purchase, Priscilla notices that the top of the table is curling up at one edge, which she considered strange for a solid wood table. She showed the table to her husband Elvis, who was furious, saying that “this is only chipboard with a mahogany veneer”. Advise them.

___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________

3. A new cosmetics company “Deception Pty Ltd” advertised that its products were used on a daily basis by the soap opera cult figure, Aphrodite. When asked in an interview for a fan magazine which was her favourite Deception product, Aphrodite said that her beauty was natural, that she never wears makeup, and has never used any Deception products. Many fans who have purchased Deception products on the basis of the advertising campaign are devastated. Advise them.

___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
4. A manufacturer of dairy foods commences to market yoghurt called “Dairy Delite”. There is already existing yoghurt marketed by a competitor called “Dairy Delight”. Discuss.

___________________________________________________________________

___________________________________________________________________

___________________________________________________________________

___________________________________________________________________

___________________________________________________________________

___________________________________________________________________

5. An advertisement appeared in a local newspaper requesting interested people to ring a particular number to obtain information about a job “easily undertaken in the privacy and comfort of your own home, with weekly earnings up to $800.00 per week”. The job was making Christmas decorations and most people would need to work an average of 22 hours, 7 days a week to make that sort of return. Discuss.

___________________________________________________________________

___________________________________________________________________

___________________________________________________________________

___________________________________________________________________

___________________________________________________________________
6. A charity organisation sent decorated stationery to a number of households. In the parcel was an invoice stating the price of the cards. If no payment was received within a month, the organisation sent a further notice demanding payment within 14 days. George has received the stationary and does not know what to do. Advise him.

7. A clothing store advertised the latest fashion fluoro body shirt at a special price of $20. Customers who raced to the shop in a frenzy of delight to purchase the shirt were told they had all been sold, and were shown a similar stand of shirts selling for $45. Only 3 of the $20 shirts had actually been available. Discuss.
8. Bill went to purchase some birthday gifts for his young niece and nephew in England who were fascinated by Bill living in Australia “with the kangaroos, koalas and emus”. Bill carefully chose a selection of native animal soft toys from a range of toys displayed under a huge fake gum tree promoted as “Aussie blue, Fairdinkum and Australian Mate”. The ticket label described the goods as made in Australia with minimal imported components. When Bill is wrapping the toys ready to send, he notices a much smaller cloth label poking from the seam which says “Made in China”. Bill is furious, advise him.

________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________

9. Explain section 64 and 65 of the TPA

________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________

10. Elaine decides to purchase a new photocopier for her business. Having received an advertising brochure from Copyall Pty Ltd to supply her with a photocopier. The contract she signs refers only to the $25 per week payment. After only two weeks, the photocopier ceases to function. The repairer tells Elaine the copier is third hand and a superseded model which does not meet current Australian Standards. Advise Elaine.
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________

11. Explain the two ways a product may be recalled pursuant to the TPA.
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
12. In what way are consumers protected against overseas manufacturers under the TPA and the MWA?
Lecture 11

Learning Outcome 12
Describe the operation of the Trade Practices Act in relation to restrictive trade practices.

Required Reading
Vickery and Pendleton 6th ed – Chapter 25

Activities
Activities in workbook

Key Terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exclusive dealings</td>
<td>Conduct, which places restraints on sellers by manufacturers or wholesalers, with the intention to effect competition.</td>
</tr>
<tr>
<td>Predatory pricing</td>
<td>Where a competitor (with market dominance) reduces prices or acts in a manner to discourage competition, therefore harming a new competitor entering the market.</td>
</tr>
<tr>
<td>Price fixing</td>
<td>Setting of prices of products in order to discourage competition in the marketplace (i.e. stop price wars).</td>
</tr>
<tr>
<td>Resale Price Maintenance</td>
<td>Where a manufacturer or supplied places restrictions on sellers which are anti-competitive.</td>
</tr>
</tbody>
</table>

INTRODUCTION

Economic commentators and governments have identified that the best way to protect consumers and to encourage a buoyant economy is by the maintenance of competition. Thus one of the main purposes of the TPA is to prevent conduct by corporations and other businesses that restricts competition and reduces efficiency in the Australian marketplace.

RESTRICTIVE TRADE PRACTICES – APPLICABLE LAW

Part IV TPA 1974 - Restrictive Trade Practices

This Part of the TPA contains the relevant provisions regarding restrictive trade practices. The effect of these provisions has been considered in many cases. The essential object of Part IV TPA is to encourage, support and strengthen competition or rivalry in the marketplace.
There exist constitutional limitations to the operation of the TPA. However, many of these limitations have been removed by legislation. In response to the Hilmer Report which recommended major reforms to increase competition between Australian businesses, state and territory governments have acted to support the *Competition Policy Reform Act 1995*, and extend the application of Part IV. Consequently, the provisions now apply to most traders in Australia, including professionals such as lawyers, doctors and accountants.

ILLEGAL RESTRICTIVE TRADE PRACTICES

The provisions of Part IV *TPA* deal with market behaviour and market structure so that competition in the market is preserved.

---

The purpose of Part IV is clearly explained by Deane J. in *Refrig erated Express Lines (A/Asia) Pty Ltd v Australian Meat and Livestock Corporation* (1980) 44 FLR 455;

“The general purpose and scope of the Part can be described by saying that it contains provisions which proscribe and regulate agreements and conduct and which are aimed at procuring and maintaining competition in trade and commerce. Broadly speaking those provisions either control or proscribe the making of certain contracts or arrangements or the reaching of certain understandings, the giving or extracting of certain covenants in relation to land, the engaging in conduct involving a secondary boycott, engaging in the practices of monopolisation, exclusive dealing or resale price maintenance, engaging in predatory price discrimination, and the increasing of market share by means of takeover or merger. The primary constitutional heads of legislative power are the corporations power and the trade and commerce power and the relevant legislative controls and proscriptions contained in Part IV are largely directed to conduct or agreements, arrangements or understanding in trade and commerce involving a foreign trading or financial corporation”.

---

The following practices are prohibited by Part IV of the *TPA*;

1. contracts, arrangements or understandings restricting dealings or affecting competition (s 45),
2. misuse of market power (s 46),
3. exclusive dealing (s 47),
4. retail price maintenance (s 48),
5. certain mergers and acquisitions (s 50).

Some of the practices are prohibited outright. Most of the practices however, are only illegal if the purpose or effect of the practice is to **substantially lessen competition**. Both types of prohibition in some circumstances can be **authorised** on public benefit grounds, and in a few instances **notified**, meaning that in specific circumstances the ACCC will **approve** the usually prohibited conduct.
COMPETITION AND MARKET

Most of the prohibited practices under Part IV are only prohibited if the result or likely result is a substantial lessening of competition in a market. Also, in considering misuse of market power, whilst such conduct is automatically illegal, its illegality is by reference to a relevant "market".

Again, the broad aim of the whole of Part IV is to preserve competition. Competition can only be identified by reference to a defined market (e.g. operators can only be competitors if they operate in the same market).

The meanings of "competition" and "market" are fundamental to the operation of Part IV, yet neither are comprehensively defined in the TPA.

**Competition**

**Definition of Competition**

The courts have supported a concept of competition as workable or effective competition rather than an academic concept of perfect competition. That is, in basic terms there should be:

1. Several suppliers for comparable goods or services.
2. Complete freedom to select and change suppliers so that the influence of dominant suppliers can be influential but not restricting.
3. Accurate information freely available to all operators (i.e. consumers, competitors) so that informed decisions are possible.
4. No bar to entry into a market by other operators, monopoly power or other restrictive practices, while some barriers should still be allowable (e.g., protection of goodwill or confidential information by owners, and statutory marketing schemes).
5. Complete freedom for suppliers to trade however they wish without competitors restricting them.

One of the major precedents concerning restrictive trade practices is known as the QMCA Case, in full, Queensland *Cooperative Milling Association Ltd v Defiance Holding Pty Ltd* (1976) 25 *FLR* 169. This case explored the word "competition" and its interpretation has been widely adopted by the courts, etc. This case identified competition as a process rather than a situation.

Of course, whether firms compete is very much a matter of the structure of the markets in which they operate. A prime definition of competition is therefore, a **device for controlling the disposition of society's resources**. Thus in the QMCA Case, competition was described as “a mechanism … for firms discovering the kinds of goods and services the community wants and the manner in which these may be supplied in the cheapest possible way.”
The concept of competition can be further explained as follows:

(a) A mechanism for discovery of market information, the kinds of goods and services the community wants and the cheapest manner of supply. The forces of demand and supply will determine prices and profits.

(b) Competition enforces the control by the market, as competitors and market entrants will take the market shares of any non-performing operators.

(c) Competition is dynamic not passive; new technology, cost efficiency, superior service, etc. are rewarded in the market,

(d) There needs to be both price flexibility to respond to demand and supply forces and there must be free rivalry in price, product and service.

Most briefly "competition" may be defined as rivalry in the market place.

**Competition and Breach**

When the concept of competition must be addressed to see if a breach has occurred the relevant steps are as follows:

1. Define the nature and extent of the market.
2. Assess the probable nature and extent of competition which would exist but for the conduct in question.
3. Examine the existing state of competition in the market.
4. Establish the lessening of competition if any, by comparing point (2) above with point (3).

**Market**

A brief definition of market can be found at 4E of the TPA. It means a market in Australia and when used in relation to goods and services includes those or substitutable or competitive goods and services. It is no wonder that the courts have had to fully define the term 'market'.

This definition of "market" comes from *Queensland Cooperative Milling Association Ltd v Defiance Holding Ltd (1976) 25 FLR 169*, the QMCA Case:

"In determining the outer boundaries of the market, we ask a simple but fundamental question: if the firm were to "give less and charge more, would there be much of a reaction? And if so, from whom?" In the language of economics the language is this: from which products and which activities could we expect a relatively high demand or supply response to price change?".

"Market is the area of close competition between firms, i.e. the field of rivalry. The vital characteristic is substitution, that is, of product or supplier. The market is who would respond to a price change (i.e. responses would be from competitors on the supply side and buyers on the demand side)".
Market and Competition

Market structure needs to be first examined to determine if corporations are competing with each other in the same market, (i.e. the QCMA case) and the following elements should be considered:

1. Number, size and distribution of independent sellers and in particular the degree of market concentration.

2. How difficult it is to enter the market, i.e. the heights of barriers to entry, that is the ease with which new firms may enter and secure available market share.

3. The influence of promotion, and extreme difference in products.

4. The character of vertical relationships with customers and with suppliers, and the extent of vertical integration.

5. The nature of any formal, stable arrangements between suppliers which restrict their ability to function as independent entities.

Of all these elements of market structure, the most important must be said to be element (2), the condition to entry, for it is the ease with which firms may enter which establishes the possibilities of market concentration over time; and it is the threat of the entry of a new firm into a market which operates as the ultimate regulator of competitive conduct.

SPECIFIC RESTRICTIVE TRADE PRACTICES

CONTRACTS, ARRANGEMENTS OR UNDERSTANDINGS RESTRICTING DEALINGS OR AFFECTING COMPETITION (SECTION 45)

Meaning of S45

Section 45 prohibits corporations from entering into any contract, understanding or arrangement which has the purpose of, or is likely to have the effect of substantially lessening competition. It is a general prohibition against anti-competitive agreements.

S 45(2) is the main operative provision re anti-competitive conduct. The section may be analysed as follows:

(a) contract - includes all enforceable formal and simple contracts, those contracts not strictly enforceable according to the principles of contract law and contracts for commercial lease or licences of land;

(b) arrangement - extends the Section to include an agreement between parties about what is to be done; it must be more than just a hope that something will happen, and individually held beliefs are not sufficient unless there is also a consensus or meeting of minds;
“Although it may not be easy to put it into words, everyone knows what is meant by arrangement by two or more parties. If the arrangement is intended to be enforceable by legal proceedings, as in the case where it is made for good consideration, it may no doubt properly be described as an agreement. But the statute clearly contemplates that there may be arrangements which are not enforceable by legal proceedings, but which create only moral obligations or obligations binding in honour . . . For, when each of two or more parties intentionally arouse in the others an expectation that he will act in a certain way, it seems to me that he incurs at least a moral obligation to do so. An arrangement so defined is therefore something “whereby the parties to it accept mutual rights and obligations”.

(c) understanding - this has been interpreted by the courts as an alternative to "arrangement";

(d) substantial - it has been held that "substantial" must be interpreted in a relative sense, according to its context;

"One needs to know something of the business carried on in the relevant market and the nature and extent of the market before one can say that any particular lessening of competition is substantial".

See Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd (1982)62 FLR 437

(e) lessening - includes preventing or hindering.

**Prohibited Practices**

Prohibited practices pursuant to s 45 include:

(a) **Agreements to share markets with other traders by dividing up customers, territories or markets between them for any goods or services.**

**ACCC v Jaycee Rectification & Building Services Pty Ltd (1996) ATPR 41-539**

The respondents carried on small businesses in competition providing waterproofing services to businesses. Over a period of four years they ensured that neither would solicit a customer from the other. Total penalties were $25,000.

(b) **Agreements to regulate the supply of goods to a market to keep demand price high.**
ACCC v J McPhee & Son (Aust) (1998) ATPR 46-183

The respondent made an arrangement with a competitor to ensure that when asked for a quote for cartage by a particular customer the competitor would not quote a rate less than that quoted by the respondent. Fines totalling $4 million were

(c) **Exclusionary provisions or primary boycotts.**

This is an agreement between two or more traders which limits dealings with a particular class of customer or supplier. Primary boycotts are specifically forbidden by S45(2), and are forbidden whether or not they reduce competition. The methods of primary boycotting include inducing customers not to purchase goods or services from competitors in the market or inducing suppliers not to supply goods or services to competitors. Note that authorisation is available.

*McCarthy & Ors v Australian Rough Riders Association Incorporation & Anor*(1988) 
*ATPR*-40-836

Rough Riders, as members of the Australian Rough Riders Association were prevented from competing in rodeos organised by other rodeo associations. The applicants were fined $3,000 by the Association under its rules for competing in such rodeos and were excluded from Association rodeos. The court held that the Association's rule involved a contravention of s 45(2) as it included an exclusionary provision and an injunction was granted.

*Gallagher v Pioneer Concrete (NSW) Pty Ltd* (1993) 46 IR 304

One hundred and forty five lorry owner/drivers in the concrete cartage industry were found to be parties to an exclusionary provision in breach of s 45(2) in agreeing amongst themselves to restrict the number of trucks which could enter the business and rostering trucks to give effect to an equalisation scheme.

**Penalties**

Pursuant to s76, breaches may result in fines of up to $10 million for corporations and $500,000 for individuals. Additionally, the civil remedies of damages and injunction may also be available under s80 and s82, and remedial orders under s87.
PRICE FIXING - SECTION 45A

Meaning of s45A

S 45A provides that without limiting the generality of s 45, a provision of an actual or proposed contract, agreement or understanding which is likely to fix, control or maintain prices for goods or services acquired or supplied by the parties to the agreement is prohibited. Thus price fixing is deemed illegal under s 45A, the competition test necessary to prove breach in s 45, does not apply. S 45A prohibits horizontal price fixing, agreements which are made between competing businesses who are at the same level of commercial activity for example, between a retailer and retailer. Whether such an agreement is a price fixing agreement, is a question of substance and not form.

Collective agreements and covenants fixing, controlling or maintaining prices are prohibited outright, (e.g., price fixing). Therefore it is not necessary to show that such agreements are likely to lessen competition, they are deemed to do so.

Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd (1983) 68

The word `fixing' in s 45A takes colour from its general context and from. The words used with it - `controlling or maintaining' - and not every determination of a price, following discussion between competitors, will amount to a price `fixing'. There must, we believe, be an element of intention or likelihood to affect price competition before price fixing' can be established. This will often be a matter of inference, requiring no direct evidence for it to be established.

Parallel pricing is not a breach of s 45A because there is no coming together or meeting of minds to pre-determine a uniform pricing policy. The similarity in market behaviour is merely a result of prevailing market forces.

TPC v Email Ltd (1980) 6 TPC 121

Email and Warburton Frankie were the only Australian manufacturers and suppliers of a certain kilowatt-hour electric meter. Email was the market leader, having about 65% of the market, with the balance largely held by Warburton Frankie, there being only a small amount of competition from imports. The pricing structures of the two Australian manufacturers were identical. The evidence indicated that pricing lists were established by Email and then followed by the other manufacturer.

It was established by Warburton Frankie that it had decided independently to follow Email's pricing and marketing strategies because it knew it would be unlikely to survive a price-cutting war with the market leader. It was held that as there was no evidence of collusion, there was no price fixing. Independently held beliefs or the mere hope as to what might happen will not be sufficient to establish an arrangement.
**Examples**

*TPC v TNT Australia Pty Ltd* (1995) ATPR 41-375

A number of large transport companies admitted agreeing not to poach parcel express customers from each other and charging uniform prices for air express satchels. Penalties totalling $11,760,000 plus costs were imposed by agreement.

*TPC v JJ & YK Russel Pty Ltd* (1991) ATPR 41-132

Two service station proprietors and their principals pleaded guilty to having attended a meeting at which they agreed to increase the retail price of petrol and to having done so for a short period. A third proprietor who had convened the meeting but not taken part in the pricing discussion was found not to have breached the *TPA* even though he also increased his price to the price discussed at the meeting.

*TPC v Nicholas Enterprises Pty Ltd (no 2)* (1979) 40

At a luncheon attended by a number of Adelaide hoteliers, regret was expressed as to the good old "pre-beer war" days. Some of the hoteliers eventually arrived at an understanding to reduce the "15 to the dozen" discount on beer to "14 to the dozen".

**Exceptions**

There are basically three categories of exception to the price fixing rule;

- joint venture pricing,
- certain recommended price agreements
- collective buying.

Only price fixing arrangements in relation to services could previously be authorised by the TPC, subject to a public benefit test. Now, authorisation by the ACCC is also available to price fixing arrangements concerning goods (ss 45A, 45C).

**Penalties**

Pursuant to s76, breaches may result in fines of up to $10 million for corporations and $500,000 for individuals. Additionally, the civil remedies of damages and injunction may also be available under s80 and s82, and remedial orders under s87.
SECONDARY BOYCOTTS - SECTIONS 45D AND 45E

Meaning of S45D and S45E

S 45D and E prohibit secondary boycotts which occur where persons or corporations act together with one another to hinder or prevent another person from:

- supplying goods or services to a business,
- acquiring goods or services from a business, or
- trading interstate or overseas.

The term "person" includes corporations, and may include unions and government departments. However, as regards trade unions s 45D(2) in effect exempts union activity.

Essentially s 45D applies where a "person" engages in conduct with another person which hinders goods or services being supplied by a corporation (being a third party) to or from an individual or a corporation (the fourth party). A breach of the secondary boycott provisions will apply;

(a) if the fourth party is an individual, if the conduct has the effect of causing substantial loss or damage to the corporation or of causing a substantial lessening of competition in any market in which the corporation supplies or acquires goods or services,

(b) if the fourth party effected is a corporation, if the conduct has the purpose or effect of causing substantial loss or damage to the business of the corporation or substantial lessening of competition in any market in which the corporation supplies or acquires goods or services.

Thus, in a secondary boycott, two persons collude to damage a fourth party by exerting pressure on a third party to prevent or hinder the supply of goods or services to the fourth party.

Note that s 45D will not be breached unless those involved in the conduct act "in concert". This means knowing the effect of conduct which results from communication between those concerned, and not simply simultaneous actions occurring spontaneously. It also involves "contemporaneity and community of purpose". S45D conduct may be authorised on public interest grounds.

Jewel Food Stores Pty Ltd v Amalgamated Milk Vendors Association Incorporated (1987) 24

In this case, the court had to determine whether a ban by milk vendors on the supply of milk to the applicant's supermarkets in NSW because it brought milk in from Victoria came within s 45D. The court said:

"Conduct falling within s 45D ... will rarely be adopted out of disinterested malice. Ordinarily, the purpose of inflicting damage upon the business of a person is to cause that person to modify its [sic] behaviour in some way for the advantage of the person occasioning the damage, or its members."
In other words, the purpose of the milk vendors was to protect their own business, another purpose which they had was to damage or injure the appellant's business. That was the means by which they intended to achieve their primary purpose”.
It was held that infringement had occurred.

Transport Workers’ Union of Australian v Leon Laidley Pty Ltd (1980) 28

Laidley was an independent distributor of bulk fuel which he purchased from Amoco and distributed to approximately 400 customers using his own drivers and vehicles. Amoco's drivers, who were concerned that Laidley may ultimately threaten their long-term employment, asked the Transport Workers’ Union to encourage Amoco not to supply Laidley with petroleum products. Laidley was granted an injunction by the Federal Court restraining the Union from engaging in conduct hindering the supply of petrol from Amoco to Laidley because s 45D had been contravened by the Union.

Secondary Boycotts and Industrial Action

“A secondary boycott is not prohibited if its dominant purpose relates to employment matters, environmental protection or consumer protection. ‘Industrial action’ however is prohibited. Employees will not breach s45D if their dominant purpose is to advance conditions of employment, such as pay rates or working hours (s45DD(1) – (3)). The difference between ‘employment matters’ and ‘industrial action’ is not clear.” (Vickery and Pendleton, 2003, p. 514)

Actions based on alleged secondary boycotts are dealt with by the Federal Court, and industrial disputes arising from boycotts may be heard by the Australian Industrial Relations Commission. The courts have ruled that the employment defence does not extend to disputes over union membership or the use of independent contractors; therefore it was not available in the Mudginberri Case set out below.

The Australian Meat Industry Employees’ Union and Organisation v Mudginberri Station Pty Ltd (1986) ATPR 40-715

Mudginberri was a northern abattoir and meat processing works with a large overseas meat market. An industrial dispute arose because Mudginberri was employing non-union workers under contract rates based on the amount of meat produced rather than on the tally system the Union preferred. Under the tally system, workers were paid bonuses for the number of beasts killed over and above the daily tally. The Australian Meat Industries Employees' Union (AMIEU) set up a picket line which disrupted the movement of freight into and out of the abattoir, and prevented the meat inspectors from entering and inspecting the meat before it could be exported. The inspectors were acting on the instruction of the Union in failing to cross the picket. Mudginberri sought an injunction against the Union to prevent the continuation of the substantial losses it was suffering. The injunction was granted on the basis that the AMIEU had engaged in a secondary boycott.
Ultimately Mudginberri was awarded damages of $1,759,444 to compensate for losses sustained as a result of the picket line and the Union was also fined $2,000 a day for maintaining the picket line after the granting of the injunction by the Federal Court.

**Penalties**

If s45D is breached, fines of up to $750,000 may be imposed, although the court must take into account the matters set out in s87AA which include any actions available before an industrial authority. As persons who have been found to engage without defence in the prohibited conduct may be liable for any loss or damage that results, the civil remedies of damages and injunction may also be available under s80 and s82, and remedial orders under s87.

**MISUSE OF MARKET POWER - SECTION 46**

**Meaning of S46**

S 46 prohibits a corporation with a substantial degree of power in a market from taking advantage of its power for the purpose of;

- eliminating or damaging a competitor in that market,
- preventing a competitor from entering that or any other market, or
- deterring someone from being competitive in that or any other market.

The object of s 46 was well described by the HC in the major precedent case on this section *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) CLR 177 in the following terms;

"The object of s 46 is to protect the interests of consumers, the operation of the Section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to "injure" each other in this way. This competition has never been a tort ... and these injuries are an inevitable consequence of the competition s 46 is designed to foster”.

It is **not necessary to prove that misuse of market power has substantially reduced competition**, it is presumed that this is the consequence of misuse. **No authorisation is available for this conduct.**
Meaning of ‘substantial degree of market power’

What is “substantial power” is determined by the nature of the market. Therefore s46 applies not only to large corporations such as Telstra, which has exercised a monopoly control over telecommunications: it applies equally to medium and small corporations which can substantially influence the supply of goods or services in a specific market. If the market is so big that the competitor’s conduct could not substantially lessen competition, there is no misuse of market power.

Whether the corporation's market power is substantial, will be a question of fact - in the case of *Mark Lyons Pty Ltd v Bursill Sportsgear Pty Ltd* (1987) 75 ALR 581 (ABL 496), the question was asked "was the corporation's power real and of substance rather than trivial or minimal?".

In *Williams v Papersave Pty Ltd* (1987) 16 FLR 69, it was held that a company with a 60% market share had a substantial degree of power in the market within the meaning of s 46.

When considering the term "market power" and its existence in a given fact situation, the following factors must be considered:

- the ability of a firm to raise prices above the supply cost (minimum cost of producing goods or services) without rivals attracting customers in due time;
- the extent to which the firm’s conduct in the market is constrained by that of competitors or potential competitors;
- the market share of the firm;
- the existence of vertical integration;
- the extent to which it is rational or possible for new entrants to enter the market (i.e. barriers to entry).

Conduct in Breach of Section 46

To prove conduct breaching s 46 of the *TPA*, the plaintiff must prove;

- the plaintiff and defendant are suppliers of goods in the market for those goods or services,
- the defendant has a substantial degree of power in the market,
- the plaintiff is a competitor of the defendant in that or in any other market,
- the defendant has taken advantage of that power for the purpose of preventing the plaintiff from entering that or any other market or deterring or preventing the plaintiff from being a competitor in that or any other market.
The guidelines of the ACCC list the following as conduct that is generally restrictive of competition and breaches s 46:

- predatory pricing,
- exclusive dealing arrangements and requirement contracts,
- withdrawal of supply to customers who deal with competitors or who fail to follow price guidelines,
- inducing price discrimination and loyalty rebates,
- tie-ins and similar practices.

Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd (1987) 16 FLR 50

BHP was the sole Australian manufacturer of "star picket posts". These posts were used in rural fencing. The posts were made from Y-bar steel manufactured solely by BHP. Queensland Wire Industries (QWI) wished to manufacture these star picket posts, but BHP refused to supply the necessary Y-steel except at a very high price. This high price meant that QWI could not manufacture the posts at a competitive price. It was held that BHP has infringed s 46. It was held that BHP's purpose was to prevent entry of other competitors into the fencing market. By refusing to supply QWI with the Y-steel, BHP had taken advantage of its substantial market power to prevent QWI from competing with it as a manufacturer and a wholesaler of star picket posts.

OKeefe Nominees Pty Ltd v BP Australia Ltd (1990) ATPR 41-057

An independent petrol reseller succeeded in obtaining an injunction against a major oil company when the reseller was refused refinery access to petrol and the product sold to it was at a different price charged to the other major oil companies.

Australian Performing Rights Association Ltd v Ceridale Pty Ltd (1991) ATPR 41-074

The Australian Performing Rights Association (APRA) was found not to have breached s 46 when it refused a licence to a nightclub because a disputed debt had not been paid. Although there was little doubt that APRA had the requisite market power and that it was using that power, it was merely exercising a right - not using the power for a proscribed purpose.

TPC v CSR Ltd (1991) ATPR 41-076

A major Western Australian building supply company refused to supply plasterboard to a Western Australian distributor. This was because the distributor decided to obtain most of its supplies of plasterboard from a competitor. Fined $220,000.

Victorian Egg Marketing Board v Parkwood Eggs Pty Ltd (1978) 33

Parkwood Eggs Pty Ltd supplied 85% of the ACT egg market. They sought an injunction to restrain the Victorian Egg Marketing Board (VEMB) from selling eggs in the ACT at a price lower than Parkwood's price. The VEMB had a virtual monopoly in Victoria and they negotiated with two retailers that held 25% approximately of the ACT market to supply those retailers with eggs at a price lower than that of the ACT suppliers. The injunction was granted as an abuse of market power.
Penalties

Pursuant to s76, breaches may result in fines of up to $10 million for corporations and $500,000 for individuals. Additionally, the civil remedies of damages and injunction may also be available under s80 and s82, and remedial orders under s87.

S46 (1AA)
The intent of this section is to specifically target predatory pricing by introducing a prohibition on below cost pricing. According to Freehills 2007, s46 (1AA) ‘prohibits a corporation which has substantial market share from suppling goods or services for a sustained period at a price less than the cost to the corporation of supplying such goods or services for the purposes of:

- Eliminating or substantially damaging a competitor;
- Preventing the entry of a person into a market, or
- Deterring or preventing a person from engaging in competitive conduct in a market.

This amendment has proven to be somewhat controversial with small business proponents claiming a ‘victory’ whilst according to Minter Ellison 2008, “Woolworths CEO, Michael Luscombe, said that Woolworths would now ‘need an army of lawyers to work out whether we can mark down the bread at the end of the day.’”

EXCLUSIVE DEALING - SECTION 47

Meaning of S47

S47 prohibits exclusive dealing which occurs when a supplier places conditions on its customers with the threat of ceasing further supplies which has the purpose or effect of substantially lessening competition. Thus s47 may be breached where a supplier imposes restrictions on the freedom of its customers to deal with others, or similar limitations are imposed on a supplier by a customer. This section is primarily concerned with vertical restraints within the marketplace, with those engaged in different levels of commercial activity, e.g. wholesaler and retailer. The conditions which breach this conduct usually require the customers to limit their trade with competitors of the supplier or to limit the re-supply of the goods or services to particular persons or geographic areas.

Thus, exclusive dealing involves the supply of goods or services on the condition that the purchasers not take goods or services from a competitor or not re-supply goods or services to a particular person or class of person.

S 47 also prohibits third line forcing, which is supplying goods or services on condition that the purchaser will or will not acquire other goods or services from an unrelated supplier or third party. Unlike other conduct in breach of s47, third line forcing is absolutely prohibited and does not require the establishment of reduction of competition test.
Note the prohibition extends to the re-supply to of services as well as goods. As exclusive dealing other than third line forcing is not illegal unless the purpose or effect of the dealing is to substantially lessen competition, the question must again be asked: What is the market involved and how much influence over it is exerted by the corporation?

**Authorisation and Notification**

Authorisation is available for general exclusionary conduct and third line forcing. Conduct other than third line forcing can be notified to the ACCC the effect of which is to protect the conduct from litigation from the time the notification is lodged until the ACCC withdraws that protection.

Third line forcing may be notified but is subject to a different notification than applies to other forms of exclusive dealing. Protection is not accorded from the time of notification, but operates at the end of a period of time which will be specified in regulations unless the ACCC forms the view within or after the specified period that the likely benefit to the public from the conduct will not outweigh the likely detriment to the public from the conduct. If the ACCC forms this view it is to give notice to the business within the specified time period and the TPA provides then for various consultative and review processes.

**Conduct in Breach of s47**

*Cool & Sons Pty Ltd v O'Brien Glass Industries Ltd* (1981) 35

A manufacturer was found in breach of s 47 where they offered discounts on the condition that retailers purchase the majority of their windscreens from them.

*TPC v Legion Cabs Co-op Society Ltd* (1978) 35 FLR 372

The Legion Cabs Co-op maintained a central radio booking service for its members. Shell provided the Co-op with a commission on petrol sold to its members. The Co-op required members to limit their petrol purchases from non-Shell outlets so that they met a set quota. Penalty payments to the radio service were levied on members who failed to limit their purchases from non-Shell outlets to the quota level. The Co-op was held to have breached s 47.

*TPC v British Building Society* (1988) ATPR 40-880

A building society introduced a lending scheme which involved a requirement that the borrower take life insurance with a nominated insurance company. The society incurred penalties totalling $54,000.
Penalties

Pursuant to s76, breaches may result in fines of up to $10 million for corporations and $500,000 for individuals. Additionally, the civil remedies of damages and injunction may also be available under s80 and s82, and remedial orders under s87.

RESALE PRICE MAINTENANCE - SECTIONS 45a, 48, 96(3), 96(7) AND 98(1)

Meaning of s48, 97 and s98

S 48 prohibits corporations or other persons from engaging in the practice of resale price maintenance that is, specifying a minimum price below which specific goods or services cannot be sold to a customer. This is a prohibition against vertical price fixing regardless of its effect upon competition. A supplier can recommend a resale price if it is clear that it is only a recommendation, and provided the supplier does not influence the seller not to sell the goods or services below that price.

It is an offence against the TPA for a supplier to;

- set a minimum price at which the reseller should advertise, display or offer their goods or services for sale;
- induce sellers not to discount;
- take or threaten to take action against a reseller to force the reseller to sell the goods or services at or above the minimum price by refusing to supply to them;
- indicate a price that is taken by the reseller to be a price below which the seller should not resell;
- withhold supplies of goods or services to a reseller because a third person who has obtained (or wishes to obtain) goods or services from the reseller had not agreed not to sell below a specified price; or
- use a statement which is likely to be understood as requiring a specified resale price.

Collective and individual resale price maintenance are unlawful as they

- eliminate price competition among resellers;
- stop efficient sellers passing on lower costs;
- protect inefficient sellers;
- result in fixed prices regardless of location, service, etc. (eg discount stores offer lower standards of service and lower prices).

Indirect resale price maintenance is also illegal (eg, refusing to deal with or discriminating against a reseller if they don't comply). s 98(1)
There are three situations that are generally not unlawful, i.e.:

(1) recommended prices (s 97);
(2) where a reseller refuses to sell at a particular price, if the supplier does not want to deal with that reseller then it will be allowable if there are other bona fide commercial reasons for the refusal to deal. (If the price issue is the only or substantial reason, then the conduct will be unlawful.);
(3) where the supplier refuses to deal with a reseller, as the reseller is using the supplier's goods as a loss leader (98(2)).

**Conduct in Breach of S48**

**TPC v Sony (Australia) Pty Ltd** *(1990)* **ATPR 41-031**

A Japanese electronics firm was found guilty of breaching the resale price maintenance provisions after its Queensland manager attempted to stop two of its retailers discounting. The manufacturer was fined $250,000 and the two executives $37,000.

**Ron Hodgeson (Holdings) Pty Ltd v Westco Motor (Distributors) Pty Ltd** *(1980)* **29 ALR 307**

The plaintiff was a dealer in new and second-hand cars, and held a franchise as a dealer in Mazda vehicles and parts. The defendant was the Mazda distributor and had complained to the plaintiff about the fact that Mazda vehicles were being advertised for sale by the plaintiff at discount prices. Shortly afterwards the plaintiff’s franchise was cancelled.

The plaintiff applied to the Federal Court and was granted an injunction on the grounds that, in withholding the supply of Mazda vehicles and parts, the defendant was involved in resale price maintenance in contravention of s48 of the TPA.

The plaintiff succeeded as one substantial cause of the franchise being terminated was the plaintiff had in the past, and was likely in the future, to sell vehicles at less than a price specified by the distributor.

**TPC v Commodore Business Machines Pty Ltd** *(1989)* **ATPR 40-976**

An importer of personal computers which included in its dealership agreement a provision prohibiting dealers advertising the computers other than at the recommended retail price was found to have breached s 48.

**ACCC v Hugo Boss Australia Pty Ltd** *(1996)* **ATPR 41-536**

Following an investigation by the ACCC, the respondent, one of the largest wholesale clothing suppliers in Australia, admitted in July 1996, that for a three year period it had refused to supply retailers who sold its men’s suits at more than 10% below its recommended retail price. As this conduct was clearly in breach of s48, the company and the managing director agreed to pay fines of $515,000 and $75,000 respectively.
Penalties

Pursuant to s76, breaches may result in fines of up to $10 million for corporations and $500,000 for individuals. Additionally, the civil remedies of damages and injunction may also be available under s80 and s82, and remedial orders under s87.

**Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd (1978) 2 ATPR 40-091**

Smithers J said:

“the penalty should constitute a real punishment proportionate to the deliberation with which the defendant contravened the provisions of the Act. It should be sufficiently high to have a deterrent quality, and it should be kept in mind that the Act operates in a commercial environment where deterrents of those minded to contravene its provisions is not likely to be achieved by penalties which are not realistic. It should reflect the will of Parliament that the commercial standards laid down by the Act must be observed, but not so high as to be oppressive.”

**MERGERS - SECTION 50**

**Meaning of s 50**

S 50 of the TPA prohibits persons or corporations from acquiring shares and personal assets if the acquisition is likely to have the effect of substantially lessening competition in a market. Authorisation for the conduct is available under s 88.

Under its current guidelines the ACCC automatically investigates merger negotiations that could create a company with;

(i) a market share of more than 40%, or 
(ii) where the market share is more than 15% and the remaining 85% share is held by less than four competitors.

The ACCC guidelines also list the following factors to be considered in determining whether a merger substantially lessens competition;

- the actual and potential level of import competition in the market;
- the height of barriers to entry into the market, that is, the ease with which new participants enter the market;
- the level of concentration of market power in the market;
- other opposing power in the market;
- the merged firm's ability to increase price or profit margins significantly without being inhibited by other market participants;
- the extent to which acceptable substitutes are available in the market;
- the dynamic characteristics of the market including growth, innovation and product differentiation;
- the likelihood that the merger would result in the removal of a vigorous and effective competitor;
- the nature and extent of vertical integration; and
- any other relevant factor.
Conduct in breach of S50

**Arnotts Ltd v TPC (1990) ATPR 41-061**

Arnotts had 65% of the Australian biscuit market and wished to acquire Nabisco with about 8% of the market. It was held that Arnotts was in a dominant position and further acquisition would be likely to substantially strengthen Arnotts' power to dominate the market. The proposed acquisition was held to breach s 50 and was not allowed.

This was considered a controversial decision when Arnotts was later bought out by an overseas company which strengthened its market power in the Australian food market.

**TPC v Bowral Brickworks Pty Ltd (1984) 2 FCR 552**

The court refused to grant an injunction against an alleged breach of s 50 where it held that a company which undertook a takeover was not in a position to control or dominate the market; and the two companies which owned the offeror company, which together could control or dominate the market, were not acquiring anything within the meaning of s 50.

**TPC v Australian Meat Holdings Pty Ltd (1988) ATPR 40-876**

A company with interest in the meat industry in Queensland was held to be in breach of s 50 of the TPA after it acquired an English company which also had interests in that industry in Queensland. The court found that the acquisition would lead to dominance in the North Queensland fat cattle market.

**ACCC v Pioneer International Ltd (Unreported, Fed Ct, 20 December 1996)**

Penalties totalling $4.8 million were imposed in relation to acquisitions in the south east Queensland market for the production and supply of concrete masonry blocks which had the effect of removing the third largest producer from the market and a respondent increasing prices significantly.

**Acquisitions outside Australia – s50A**

S50A provides for regulatory procedures where mergers resulting from activity outside Australia, may have an effect upon competition within Australia. If a merger or acquisition outside Australia results in the acquisition of a controlling interest in a corporation within Australia, the Australian Competition Tribunal can review the situation. If the ACT decides that the acquisition would have public benefit, it can disregard the prohibition, also the ACT has power to declare an acquisition exempt from these provisions.
Penalties

Breach of s50 can give rise to the following penalties;

- application by the Minister or the Commission for pecuniary penalties against the corporation and its officers under s76 of up to $10 million for corporations or $500,000 for individuals;
- application by the Minister or the Commission for a divestiture order under s81;
- application by the Minister or the Commission for an injunction under s80; or
- application by any person suffering loss or damage for damages under s82.

STATUTORY EXCEPTIONS TO RESTRICTIVE TRADE PRACTICES

S51 provides that the restrictive trade practices provisions will not apply in several circumstances, which include the following;

- conduct specifically authorised by the TPA;
- restraint of trade clauses, particularly in employment contracts;
- contracts requiring compliance with standards, such as those set by the Standards Association of Australia;
- agreements between professionals, such as partnership agreements;
- contracts for the sale of businesses that protect ‘goodwill’;
- boycotts by consumers against suppliers and retailers; and
- agreements over intellectual property rights regarding copyright, patent, design or trademarks. (This last is currently under review and could be limited in the future. Presently, licences for the use of these rights remain subject to s46 and s48.)

AUTHORISATIONS

Corporations can apply to the ACCC for authorisation to engage in prohibited restrictive trade practices. Authorisations may be granted pursuant to Part VII Division 1 TPA sections 88-91 for all restrictive trade practices except s46, misuse of market power.

The ACCC must apply one of two tests in considering an application for authorisation dependent upon the relevant conduct:

1. **The public benefit versus competition test, (s90 (6)-(7)).** Does the public benefit exceed the reduction in competition that will result? This test applies to anti-competitive arrangements, price fixing and exclusive dealing.

2. **The public benefit test, (s90(8)).** Does the benefit to the public that will result justify the practice? The anti-competitive impact of the practice is not considered in this test, which applies to primary and secondary boycotts, third line forcing, resale price maintenance and mergers. The ACCC must be satisfied that the conduct results in a benefit to the public such that it should be allowed to occur.
Except for mergers, the ACCC must publish a draft determination and provide the opportunity for a conference of interested parties before making a final decision whether to grant authorisation. The immunity conferred operates only from the time the ACCC grants final authorisation. Appeals from an authorisation made by the ACCC may be heard by the ACT (s 101).

The QCMA case found "benefit to the public" to mean "anything of value to the community generally, any contribution to the aims pursued by society including as one of the principle elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress".

The case went on to say that even if the conduct only benefited the employees of the two corporations it served some form of public benefit.

Benefits and detriments must be weighed. The assessment of any public benefit and lessening of competition can only be made on the overall context of the function performed by the applicant, of the relevant industry and the markets which would be affected by the conduct.

**NOTIFICATION - SECTIONS 93 AND 93A**

Exclusive dealing conduct (except third line forcing) gains immediate and automatic immunity from legal proceedings under the TPA where notification of it is given to the ACCC. Immunity for third line forcing comes into force at the end of the prescribed period from the time the ACCC receives notice. The immunity remains unless revoked by the ACCC. It cannot be revoked unless;

- the conduct (other than third line forcing) substantially lessens competition within the meaning of s 47 and any public benefit flowing from the conduct is outweighed by the lessening of competition,

- in the case of third line forcing, immunity cannot be revoked unless the ACCC finds that the public benefit from the conduct does not outweigh the public detriment from the conduct.

**ENFORCEMENT AND REMEDIES**

The main remedies available through the Federal Court for breaches of the restrictive trade practices provisions are;

(a) **Pecuniary penalties** - pursuant to s76 fines to a maximum of $10million for corporations and $500 000 for natural persons may be imposed for breaches of all sections except s45D and s45E the maximum for which is $750 000 for a corporation.
The practice has developed whereby the respondent and the ACCC agree on an appropriate penalty to be imposed which is usually endorsed by the court. Application for fines must be made within 6 years of the date of the breach and are paid to the Commonwealth.

(b) **Injunctions** - pursuant to s80 the court may grant an injunction restraining a person from engaging in conduct in contravention of the TPA. An application for an injunction may be made by the relevant Minister, the ACCC or ‘any other person’. In regard to sections 50 and 50A, only the Minister and the ACCC may apply for an injunction.

(c) **Damages** - pursuant to s82, action for damages can be commenced for up to 3 years from when the loss occurred or was discovered. The amount of damages payable should place the applicant in the position they would have been in had the breach not occurred.

(d) **Divestiture orders** - s81 allows an order for divestiture in certain circumstances, for example, an order can be made for a company to dispose of any shares or assets acquired in breach of s50.

(e) **Ancillary orders** - pursuant to s87 the court has power to make ancillary orders if it deems them appropriate – such orders may include declaring a contract void, varying the terms of a contract or directing the refund of money or property by a party.

(f) **Compliance programmes** – guilty corporations are frequently ordered to carry out such programmes which ensure they will obey the law in the future. Compliance programmes can involve years of training and auditing obligations.
Activities

1. What are the purposes of the Trade Practices Act 1974 (Cth)?

___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________

2. Explain the meaning of ‘restrictive trade practices’ and why they are regulated under the Trade Practices Act.

___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________

___________________________________________________________________
3. Elaine is a marketing consultant happily growing her incorporated business in the eastern suburbs. The area is well serviced with other incorporated marketing consultants and Elaine is on friendly, if competitive terms with most of them. At a professional development seminar for marketing consultants, Elaine meets ten of her colleagues, all of whom are concerned about an aggressive new marketing firm from Queensland, Petermans Pty Ltd (hereafter ‘Petermans’), which is about to open for business two doors from Elaine’s office. Elaine and her colleagues decide to go to lunch and discuss any action they may take to protect themselves against the commercial threat posed by Petermans entry into their market.

Elaine suggests that the existing consultants could act together in threatening to withdraw their newspaper advertising from the local newspaper if it accepts advertisements placed by Petermans. Elaine also suggests that one of Petermans tactics upon entry into a certain market is to offer services at half the cost of that offered by the existing consultants, forcing the existing agents to discount their fees until they can no longer remain in business. With all competition removed, Petermans then raises their prices. Elaine and her 10 colleagues decide that they will resist this tactic by agreeing to charge no less than a specific hourly rate for their services.

Discuss the proposed conduct of Elaine, her colleagues and Petermans in relation to the regulation of restrictive trade practices.

___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________

___________________________________________________________________

___________________________________________________________________

___________________________________________________________________

___________________________________________________________________

___________________________________________________________________

___________________________________________________________________

___________________________________________________________________

___________________________________________________________________

___________________________________________________________________
4. Elaine uses various promotional tools in her business. One of her most successful tools is a book which is a comprehensive seller’s guide to selling almost anything, obtained from the publishing house Larson Pty Ltd. Larson Pty Ltd has provided a recommended retail price for the book of $18.95. For various marketing reasons, Elaine sells the guide to her clients at the price of $14.95. She has now received notification from the publisher that unless she sells the guide for the recommended retail price, the publisher will cease to supply her with the book. Elaine is furious. Advise her.

5. Plaingreedy Pty Ltd has 55% of the real estate brochure printing business in Adelaide. Their competitor Cantgetenough Pty Ltd has 32% of the same business. Both companies wish to merge. Can they? What matters will be considered in reaching such a decision and by whom will these matters be considered.
6. What is the meaning of the terms ‘authorisation’ and ‘notification’ and what is their importance to the regulation of restrictive trade practices.

___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________

7. Discuss the remedies and penalties available for breaches of the various restrictive trade practices provisions.

___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
Lecture 12

Learning Outcome 13
Explain the types of legal protection available for intellectual property.

Required Reading
Vickery and Pendleton 6th ed - Chapter 28

Activities
Activities in workbook

Key Terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Account of Profits</td>
<td>An assessment of the monies made by the infringer used to calculate damages due to the copyright owner.</td>
</tr>
<tr>
<td>Anton Pillar order</td>
<td>An order by the court allowing the plaintiff to ‘swoop’ on the alleged infringer and search for and seize incriminating evidence.</td>
</tr>
<tr>
<td>Confidential Information</td>
<td>Facts or knowledge that is not intended for public information. As such this information is to be maintained in a secret context.</td>
</tr>
<tr>
<td>Copyright</td>
<td>The right to copy or reproduce a form of expression of an idea or information.</td>
</tr>
<tr>
<td>Design protection</td>
<td>Protection of the visual form of articles that can be produced.</td>
</tr>
<tr>
<td>Infringement</td>
<td>Where a person has used, copied, reproduced or in any other way utilised another’s intellectual property right without permission.</td>
</tr>
<tr>
<td>Mareva injunction</td>
<td>An order by the court requiring an alleged infringer not to dispose of specific material, which is relevant to forthcoming legal proceedings.</td>
</tr>
<tr>
<td>Patent</td>
<td>A registered patent grants to the owner of the patent the exclusive right to exploit an invention, provided that the invention is a manner of manufacture, is new, is not obvious and is useful.</td>
</tr>
<tr>
<td>Passing off</td>
<td>An action to prevent financial loss arising from the defendant’s representations that his or her goods or services are those of the plaintiff more successful or well know producer / supplier.</td>
</tr>
<tr>
<td>Trademark</td>
<td>A sign used or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by any other person.</td>
</tr>
</tbody>
</table>
INTRODUCTION

Intellectual and industrial property law is the protection of the creative and material interests resulting from a creation by an individual, or the monopoly rights which a person acquires over the use of a “product” which has been generated by original creative effort.

The terms “intellectual” and “industrial” to some extent overlap and can be interchanged. Broadly however:

- **Industrial property** protection protects industry and commerce including agriculture, natural products, extractive industries etc. Protection is provided in the form of patents, industrial designs, licenses and trademarks.

- **Intellectual property** protection was originally about the protection of literary and artistic creations. It now also embraces sound recordings, broadcasts, cinematography, performances and photography. It can also be extended to include some industrial property such as scientific works, commercial names and computer programs.

Both industrial and intellectual property rights may be described very loosely as a generic term for the various rights, or bundles of rights which the law accords for the protection of creative effort –or more specifically for the protection of economic investment in creative effort.

Intellectual property rights (which are our emphasis) are protected primarily through federal statutes as the power to make laws with respect to ‘copyrights, patents or inventions and designs, and trademarks’ is to be found in s51(xviii) of the Constitution. The power to effectively protect intellectual property depends upon there being uniform application of the law throughout Australia, and also international recognition of intellectual property protection rights achieved through Australia’s involvement in various international treaties and conventions.

At first glance such laws may seem against competition policy but the justification for such government legislation includes;

- if such protection was absent, creative people would be less likely to produce the advances and innovations which help to develop and enrich our society and its economy;
- it is unfair to deny creative people control over the fruits of their effort;
- the public interest is served by having ready access to new knowledge and innovative developments.
The intellectual property legislation generally provides exclusive rights over the commercial exploitation and reproduction of that property to its creator or owner for a limited period of time, after which, protection lapses and the creation enters the public domain. Essentially, all of the legislative protections are negative in character – the owner is empowered merely to prevent others from engaging in unauthorised activities in relation to the property.

The four basic forms of legislative protection are copyright, design, patent and trademark. Copyright is the most common form of intellectual property protection sought. We will also examine the common law intellectual property actions of breach of confidential information and passing off.

COPYRIGHT

Copyright is the right to copy or reproduce a form of expression of an idea or information and the right to prevent others from copying or reproducing a form of expression without the owner’s authority. Copyright does not give rights of ownership over ideas or information – only over the physical form in which they are expressed, for example, novels, poetry, musical compositions, sculpture, industrial designs etc. Copyright is the primary protection sought for artistic works and is historically the oldest form of intellectual property available. Copyright owners may exercise their rights personally or may give permission to other people to do so – this is referred to as the grant of a licence. Licence may be granted subject to certain conditions, such as the payment of a fee or royalty, or limit of the exercise of the licence as to time, place or purpose.

Applicable law

The applicable law is the Copyright Act 1968 (Cth.) and the relevant international conventions to which Australia is a party. (E.g. The Berne Convention, the UNESCO Convention, the Universal Copyright Convention, World Trade Organisation Agreement on Trade Related Aspects of Intellectual Property Rights.)

How is it protected?

In Australia there is no requirement for registration – copyright protection arises automatically from the time an original work is made in a material form.

Recognition of copyright is by marking the publication with the symbol ©, date and owner’s name. Although copyright protection in Australia is not dependent upon formal notice, it is advisable for copyright owners to place a copyright notice in a prominent place on their work, such as the following example:

“This work is copyright. Apart from any use permitted in the Copyright Act, no part may be reproduced by any process or any other exclusive right exercised, without the permission of (name and address of copyright owner and the year in which the work was made).”

(Extract from “Attorney General’s Department, Copyright Law in Australia, A Short Guide – January 2000)
Copyright owners should regard their copyright as an item of property and thus deal with it in a businesslike fashion – always keeping dated copies of their work and copies of any letters submitting their works to others.

International copyright protection is achieved under the conventions by the principle of ‘national treatment’. Broadly speaking, each convention member country gives the same rights to the nationals of other convention countries as it gives to its own nationals under its own law.

**What does copyright protect? - Part III of the Copyright Act**

**(a) Meaning of ‘works’ and copyright protection**

Part III of the Copyright Act protects the traditional areas of *original* literary, dramatic, musical and artistic “works”. Essentially the protection that is given provides the owner with exclusive rights to exploit the work, for example to adapt, reproduce, publish, perform, broadcast and transmit the work. **Originality** in the work is required to attract copyright protection but it is enough that the person exercises originality in the sense of some minimal degree of skill and effort in creating a work. The work does not itself have to possess aesthetic qualities – everything from obituary notices to paintings may be protected if it can be demonstrated that its creator used some skill and judgment.

The Copyright Act distinguishes between:

- **Published works** – works protected if they were first published in Australia, or if the author is an Australian citizen or was living in Australia at the time of the first publication or immediately before death; and

- **Unpublished works** – works protected under copyright if the author is a qualified person that is an Australian citizen living in Australia at the time of making the work.

The Act states that there is no claim for copyright where the literary, dramatic or musical work has not been reduced to writing or some material form, whether visible or not, at the time of the claim. For example, a tape recording of the work for a novel or play or work typed into a computer are works expressed in a material form. Writing something down is not the same as publishing the work because the Act requires ‘publishing’ to include availability or reproduction of the work to the public.

**(b) Categories of “works”**

- **Literary works** – need not be works of literature, they need no elegance or style but specifically include a written table or compilation and a computer program or compilation thereof. The fundamental criterion seems to be that the work conveys information or perhaps instruction and pleasure in the form of literary enjoyment. The expression includes catalogues, examination papers, original advertisements, instructions and labelling. However, single words, slogans and titles are not usually protected as literary works.
In *Mirror Newspapers Ltd v Queensland Newspapers P/L* (1982) ACLD 230 it was held that a list of numbers drawn from a device called a “bingo blower” was a literary work due to the skill and ingenuity involved in producing the list.

Computer programs are now specifically included in literary works due to a 1984 amendment to the Act – “a table or complication expressed in words, figures or symbols, whether or not in visible form and a computer program or compilation of computer programs”. The area of protection of computer programs is of course expanding.

- **Dramatic works** – the categories of works may overlap so that a play for example may be a literary as well as a dramatic work. The Copyright Act does not define ‘dramatic work’ but s10(1) states that it includes;
  
  (a) a choreographic show (as to choreography, it will be protected if it is recorded in some material form, be it in writing, film or video), and;

  (b) a scenario or script for a cinematograph film, but does not include a cinematograph film as distinct from the scenario or script for a cinematograph film.

- **Musical works** – the term musical refers to the method of production and, as with other works, no aesthetic or artistic element is required. The score of a song is a musical work, whether it is an advertising jingle or an operatic aria. The words could be a literary work. These may be owned by two separate people as they are two distinct copyrights. If the song is recorded, then a distinct copyright in the sound recording exists, separate from the music and words.

- **Artistic works** – this is one area of the Copyright Act which contains a definition and includes a painting, sculpture, drawing, engraving, photo-graph, blueprints, plans, maps and buildings or models of buildings whether the foregoing have artistic quality or not. The definition also refers to work of ‘artistic craftsmanship’ which works do need to exhibit some aesthetic qualities – this may include items such as hand-woven tapestry, handmade jewellery or hand crafted furniture.

(c) **Originality**

Only the expression of the idea and not the idea itself must be original and so the idea itself is not protected. The degree of originality required is not high, provided that some skill and judgment is involved.
John Fairfax & Sons P/L v Consolidated Press Ltd (1960) SR (NSW) 413

The Herald newspaper copied the Telegraph newspaper’s early edition birth and death notices, and were restrained. However, when the Herald continued to use the Telegraph’s information but changed the abbreviations used, it was held that their work was now original – the Telegraph could not protect the ideas in their work, only its form.

Donoghue v Allied Newspapers Ltd (1938) Ch 106

The plaintiff, a jockey, related a number of his riding experiences to a writer in a number of interviews. The writer wrote up the stories which were published in a newspaper. The plaintiff made suggestions as to the final form of the stories, but these suggestions were not always followed. Five years later the writer wanted to use the same material in a different publication. Donoghue sought an injunction to restrain the writer from doing so on the basis that Donoghue owned the copyright in the stories.

Donoghue failed. It was held that the copyright belonged to the newspaper who first published the stories – that if a person had an idea and they communicate that idea to an author, then the production which is the result of the idea belongs to the author, and not to the person who had the ideal initially. Copyright does not protect an idea, but only the physical expression of an idea.

To identify whether an infringement has taken place the question to ask is – has there been a substantial reproduction of copyright work? The courts have ruled that substantial reproduction is a question of quality rather than quantity. An unauthorized person who copies a vital or essential part of a work will usually breach copyright. If it is clear that work has been copied, the following questions will be asked to decide with infringement has taken place.

- How much of the work was used?
- What was the defendant’s purpose? If it was to save time, money or effort, it is probable that infringement has occurred.
- How much did the defendant’s work compete with that of the owner? The greater the degree of competition, the greater the chance of breach.

Milpurru v Indofurn Pty Ltd (1995) 130 ALR

The director of the defendant company copied paintings of living Aboriginal artists from the Western Desert region in Western Australia and ordered 246 carpets to be woven in Vietnam using the exact designs or those adapted from the paintings. The company was sued by the artists who were able to establish that the works were protected by copyright and that they would not have approved their use for commercial purposes.
Thus, an infringement of the protections provided in Part III if the Act occurs when a party exercises the owner’s copyright without authorisation, for example reproducing or publicly performing a work without license. There is no infringement for those uses falling within the classification of ‘fair dealing’ which include reasonable use for research or study, reasonable extract used with acknowledgement and use for critique or review.

(d) Owner of the copyright

Usually the creator of a literary, dramatic musical or artistic work is the first owner of the copyright in it, although there are some exceptions. Probably the most important exception is that copyright in works made in the course of employment are owned by the employer and not the employee. All copyright ownership rules may be varied by agreement, and copyright can be assigned or bought as a property right.

In the case of certain artistic works, such as engravings and portraits which are made under commission, the person commissioning the work is the first copyright owner. However, if the person commissioning the work informs the artist of the purpose for which the work is required then the artist may restrain the use of the work for any other purpose.

Where photographs are commissioned, the photographer is the copyright owner, except for commissioned photographs of a private or domestic nature, where the commissioning owner has ownership of the copyright.

(e) Duration of the copyright if Part III works

The duration of protection for copyright works that have been published generally lasts for the life of the author plus 70 years. Copyright subsists indefinitely in literary, dramatic or musical work that has not been published, performed in public, broadcast or sold as a recording during the life of the author. If the work is posthumously published, the duration of the copyright protection is at the end of 70 years after publication.

What does copyright protect – Part IV of the Copyright Act

(a) Subject matter under Part IV

Part IV of the Copyright Act protects sound recordings, films, broadcasts and published editions by giving the owner exclusive rights to exploit the above creations. The owner of copyright in a film or sound recording has the exclusive rights to:

- copy it
- to cause it to be heard or seen in public
- to broadcast it
- in the case of a film, to transmit it to subscribers to a diffusion service and
- in the case of a sound recording, to commercially rent it.
The owner of copyright in a radio or television broadcast has the exclusive right to make a sound recording or film of it and to rebroadcast it.

**b) Owner of the copyright**

The owner of any copyright in a sound recording or a film is normally the maker of it. The ‘maker’ of a film is the person who undertook the arrangements necessary for the making of the film. However, copyright in commissioned sound recordings and films is normally owned by the commissioning party.

**e) Duration of copyright**

Duration of copyright protection for sound recordings and films is generally 70 years from the end of the year of first publication. If the film or sound recording is unpublished, the period is indefinite until it is published. The duration of copyright in radio and television broadcasts is 70 years from the making of the broadcast.

**Performer’s Rights**

Part XIA of the Copyright Act was introduced in 1989 to protect performers’ rights because live dramatic and musical performers do not attract customary copyright as their performance is not in a fixed material form. The rights which apply to live performers by virtue of Part XIA are more limited, merely allowing performers to restrain or take action against any unauthorised broadcast or recording of their performance. There now exists civil and criminal liability for unauthorized recording or performing of defined performances.

**Infringement of Part III and Part IV of the Copyright Act**

An infringement occurs when a party exercises the owner’s copyright without authorization (e.g. license) by reproducing, publishing, publicly performing, broadcasting, transmitting or adapting the work. Infringement also includes importing for sale, hire, exhibition or distribution.

Infringement may also include 3D reproduction of 2D works, and vice versa, (e.g. a cartoon based on a copyrighted doll or a toy depicting a cartoon character). This may result in protection of the use of copyrighted plans.

To balance the rights of copyright owners with the needs of the general public to have access to copyright materials, the Copyright Act provides a number of exceptions to the general rules regarding infringement of copyright.

**i) Fair dealing** – a fair dealing with a copyright work, sound recording, film or broadcast will not amount to an infringement of copyright if done for the purposes of

- research or study,
- criticism or review
- the reporting or news, or
- professional legal advice.
- Parody or satire (*Copyright Amendment Act December 2006*)
What amounts to a fair dealing is a question of fact in each circumstance. For example, in the case of copying for fair dealing for research or study, the factors include:

- the purpose and character of the use;
- the nature of the work or other subject matter;
- the amount and substantiality of the portion copied;
- the possibility of obtaining the work within a reasonable time at an ordinary commercial price; and
- the effect of the value of the work or other subject matter.

The Copyright Act specifically provides that it is a fair dealing to make a single copy of a journal article or one chapter or 10% of a book of ten or more pages for the purpose of study or research.

**Hubbard v Vosper (1972) 1 All ER 1023**

Vosper wrote a book called ‘The Mind Benders’ which was heavily critical of the Church of Scientology and its founder, Ron L Hubbard. Vosper quoted extensively from books written by Hubbard, who sued for infringement of copyright. Lord Denning held that extracts used by Vosper were substantial and considerable, but they were allowable under the defence of fair dealing, which was always a question of fact in the circumstances.

**Parody or Satire**

You can use copyright material for the purposes of parody and satire without permission, provided your use is fair.

According to Copyright Australia 2008

A **parody** is an imitation of a work that may include parts of the original. In some cases, a parody may not be effective unless parts of the original are included. It seems that the purpose of a true parody is to make some comment on the imitated work or on its creator.

A parody is not necessarily humorous: for example, in a US case, a book called *The Wind Done Gone*, which told the story of *Gone With the Wind* from the point of view of one of the slave characters, was held to be a parody and was entitled to rely on an exception under US law.

The purpose of **satire**, on the other hand, is to draw attention to characteristics or actions – such as vice or folly – by using certain forms of expression – such as irony, sarcasm and ridicule. It seems that both elements are required: the object to which attention is drawn (vice or folly etc) and the manner in which it is done (irony, ridicule etc). It is not clear, for example, that a cartoon which uses irony or ridicule about characteristics or actions other than something like vice or folly would be satirical.
(ii) Other exceptions include –

- the owner of a copy of a computer program making a copy of the program for backup purposes;
- the public performance of a literary, dramatic or musical work at guest houses or premises where people reside or sleep;
- the reproduction for broadcasting purposes and filming or recording for private domestic uses (but only so far as the broadcaster’s copyright is concerned);
- educational compilations (conditions apply);

Moral Rights
The Copyright Amendment (Moral Rights) Act 2000 enables creators of Part III works created after 1 December 2000 to have control over the ‘moral ‘use of these works in regard to:-

- the right to be identified as the creator where this is reasonable; and
- the right to object to distortions and other modifications that unreasonably harm their honour or reputation.

Remedies for infringement of Parts III and IV of the Copyright Act

Remedies for infringement of the Copyright Act must be sought within six years of the infringement and include the following.

(a) Injunction – this is an order by the court preventing particular conduct, namely an order restraining an infringement of copyright occurring or continuing.

(b) Mareva injunction – an order by the court requiring an alleged infringer not to dispose of specific material which is relevant to forthcoming legal proceedings.

(c) Anton Pillar order – this is an order by the court allowing the plaintiff to ‘swoop’ on the alleged infringer and search for and seize incriminating evidence. Is granted only rarely, when a particularly strong interlocutory case has been made out – where there is strong evidence of infringement, incriminating material on the premises, and a strong likelihood that the alleged infringer will destroy the incriminating evidence.

(d) Damages - monetary compensation. A person whose copyright is infringed is entitled to damages as compensation for that infringement. In the case of blatant infringement, or where some particular benefit has accrued to the defendant, punitive damages may also be awarded to the copyright owner. Alternatively, the court may order the infringer to pay to the owner of the copyright any profit they have made as a result of the infringement.

Where the infringement was deliberate, the Copyright Act also provides for the owner of the copyright to be placed in substantially the same position as if they owned the infringing copies of the material. This is known as conversion damages. At the court’s discretion, there is a provision for a copyright owner to have any infringing copies of the material in the hands of the infringer delivered to the copyright owner, and the money value of any copies already sold to be handed over.
(e) **Account of Profits** – an assessment of the monies made by the infringer used to calculate damages due to the copyright owner.

(f) **Delivery of copies** – for example the handing over of plates etc. used to breach the copyright.

**DESIGN**

**Design** deals with protection of the visual form of articles that can be produced. This area is governed by the *Designs Act 2003 (Cth)* which establishes a system of registration of new or original designs for the visual presentation of commercial products. The registered owner acquires the exclusive rights to apply the design to a manufactured article and to authorise on licence such an application. The main aim of the *Designs Act* is to give monopoly rights for a limited period to a designer who creates an original visual form which is used on a line of mass-produced goods.

**Applicable law**

The Commonwealth *Designs Act 2003*, which protects the copyright in a design which is to be applied industrially – for example wallpaper, crockery patterns, the visual form of articles that can be produced.

**How is it protected?**

Design is defined in the Act as “features of shape, configuration, pattern or ornamentation applicable to an article, being features that, in the finished article, can be judged by the eye, but does not include a method or principle of construction.” The design must be new or original, and the system does not protect designs with common features or immaterial changes from an existing design.

The design is protected by a system of registration administered by IP Australia through the Designs Office. The owner of a design applies for registration by lodging an application and presenting a representation of the design which could be in the form of drawings, photographs and specifications. It is likely that the Registrar of Designs will also require a “statement of novelty” (specifying those features of the design claimed to be novel) and a “statement of monopoly” (which specifies those unique features over which the owner is claiming exclusive rights). If the statutory requirements are not met, registration may be refused. Protection exists for a maximum time period of 10 years.

**What is protected?**

The registered owner acquires the exclusive rights to apply the design to a manufactured article and to authorize on licence such an application. The main aim of the Act is to give monopoly rights for a limited period to a designer who creates an original visual form which is used on a line of mass produced goods. The duration of protection is 10 years.
Infringement and remedies
Infringement occurs if a person without the authority of the registered designer –
- copies the design, or makes an obvious imitation or fraudulent imitation – one with intentional slight changes; or
- commercially deals with the design; or
- imports the design.

The remedies are very similar to those for copyright.

Overlap with copyright

Where copyrighted art is applied to 3D articles industrially, meaning more than 50 articles are reproduced, then no copyright subsists in the designs. The idea is that industrial articles should have the shorter period of protection, not the extended periods afforded by copyright.

Note however that many designs which are eligible for design registration are also eligible for protection under the Copyright Act.

PATENT

A registered patent grants to the owner of the patent the exclusive right to exploit an invention, such as an improved product or device, substance or method or industrial process, provided that the invention is a manner of manufacture, is new, is not obvious and is useful. In return, the patent owner must publish details of the invention. A standard patent lasts 20. To be patentable, an invention must be a “manner of new manufacture”, namely a product which has some useful commercial application. Further, it must be ‘new’ in the sense that its creation has not been anticipated by others, and inventive, in the sense that it is not merely an obvious advance in regard to existing technology.

Applicable law

Patents are governed by the Commonwealth Patents Act (1990), and also by many international treaties and conventions such as the Patents Cooperation Treaty. A patent is a temporary monopoly granted to the owner in return for disclosure of the invention to the public.

How is a patent protected?

Patents are protected by a system of regulation operated by Intellectual Property Australia through the Patent Office. The subject of the application must be novel and inventive for sealing as a standard patent. The Act also allows for petty patents and patents of addition. To provide international protection it is possible to file a single application called a PCT under the Patents Cooperation Treaty.
What is protected?

An invention, a new manner of manufacture or an old one with an inventive step. It must be useful and vendible in this new form. It must be novel – meaning publicly unknown.

(i) Manner of manufacture

the invention must relate to a tangible article in the commercial sense discoveries, theories, principles or information are not patentable both the article and the process of making it must be new.

National Research and Development Corporation v The Commissioner of Patents (1959) CLR 252

A method of eradicating weeds by spraying crops with a selective weed killer was held to be patentable – it had economic value and was saleable.

Joss v The Commissioner of Patents (1972) 126 CLR 13

A process for the cosmetic treatment of human hair on the head was held to be patentable.

(ii) Novelty

- invention must be new in the sense that it is not already known
- will not be regarded as new if it has been disclosed to the public in any form – for example, prior use of a drilling tool in a local factory would destroy claim.

Longworth v Emerton (1951) 83 CLR 539

Prior public use of the invention by the inventor or others who had previously created the same device will defeat a claim for novelty.

(iii) Inventive step

- the step must be inventive when compared to existing knowledge of skilful people in the industry at the time of the application

(iv) Usefulness

- it must actually work – it is not a question of whether the invention is likely to sell or not, but it must do what it is said it will do
The sealing of a patent gives the patent owner exclusive rights to exploit the invention – to make, sell, import, assign the patent, or provide licence for its manufacture or otherwise dispose of the invention.

There are legislative restrictions on granting patents in the following areas:

- nuclear technology
- national security
- illegal purposes
- admixtures of known substances for use as food or chemicals
- human beings and processes for their generation
- plant varieties and non-human life varieties – The *Plant Variety Rights Act 1987* specifically allows rights for breeders of new plant varieties, separate from patent applications – although in some cases, patents are available as well.

**Duration**

**Innovative patent** – 8 years  
**Standard patent** – 20 years

**Infringement**

Infringement is not specifically defined in the Act but it is simply acting contrary to the owner’s exclusive right to exploit.

An inventor must be very careful in defining the claim because the registered patent is a legal document as well as the compilation of technical data. If it is too wide it may be rejected, but if it is too narrow, it may not provide adequate protection – a slight variation by another could be patentable, or a copy effected without infringement.

**Rodi & Weinenberger AG v Henri Showell Ltd** (1960) RP C367

The patented invention was an expandable metal watch band with “U – shaped links”. The defendant manufactured a similar expandable metal watch band with “C – shaped links”. The court would only protect what was claimed. There are of course cases which take a more liberal view than this.

**Remedies**

Remedies include injunctions, damages and account of profits. Note however, that section 122 of the Patent Act states that these remedies will not be available if the breach is innocent, but a breaching party can be deemed aware that they were breaching another’s rights.
TRADEMARKS

A Trademark is defined in section 17 of the Trademarks Act (1995) as “a sign used or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by any other person”. Thus, a trademark is a sign which indicates that goods or services originate from a particular trader.

Applicable law

The applicable law is the Trademarks Act 1995 (Cth.) which defines “sign” to include any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent. To obtain protection, the owner must register the trademark and is then entitled to restrain the use of unregistered marks which are substantially identical or deceptively similar to their own.

How is it protected?

Trademarks are protected by a system of registration administered by IP Australia through the Commonwealth Trademarks Office. Pursuant to s19 of the Act, a trademark may be registered in respect of goods, services or both goods and services. An application for a trademark must include a representation of the trademark and specify in accordance with the regulations, the goods and or services in respect of which the trademark is sought. There are 34 classes of goods and 8 classes of services including advertising, business, insurance, telecommunications, provision of entertainment and education, providing of food and drink, transport and miscellaneous. A separate fee is charged for each class in which the trademark is registered.

An application will be rejected if it:

- contains a sign prohibited by regulation
- cannot be represented graphically
- does not distinguish the applicant’s goods or services
- consists of scandalous or illegal matter
- contains matter likely to deceive or cause confusion
- is substantially identical or deceptively similar to a trademark registered by another person.

Rights of the owner

Section 20(1) of the Act provides that “if a trademark is registered, the registered owner of the trademark has, subject to this Part, exclusive rights to:

(a) use the trademark, and
(b) to authorize other persons to use the trademark in relation to the goods and/or services in respect of which the trademark is registered.
The registered owner of a trademark also has the right to obtain relief under this Act if the trademark has been infringed.”

**Eastman Photographic Materials Co Ltd v Griffiths Cycle Corporation (1968) 15 PPC 105**

The plaintiff was successful in restraining the defendant from using the mark “Kodak” in respect of bicycles, as the mark was only registered to be used in respect of cameras.

### Duration

Registration may last for ten years with an unrestricted right of renewal, however to maintain registration the mark must normally be used in such a way that it becomes and remains distinctive of the owner’s business. Also, if within 12 months after the date upon which registration expires, a request for renewal is made in accordance with section 72(2) of the Act, it will be granted.

### Infringement

Infringement occurs if the trademark is used in its registered form without authorization, or in a form that is likely to mislead or deceive. (e.g. Steineker / Heinecken, Solaroid / Polaroid)

The trademark is only protected in relation to its use in connection with the supplier – there is no infringement if it is used comparatively.

There is no infringement where a person uses their own name or business predecessor’s name or honestly describes qualities of the product or service.

A trademark can be cancelled if it is not exercised for 3 years.

A trademark can be cancelled if the term becomes generic – such as cola, escalator, pyrex, lino etc

### Remedies for infringement

- Prosecution of offences under the Act
- Injunction
- Damages
- Account of profits
PASSING OFF

Passing off is a common law action whose purpose is to protect the goodwill of a business from exploitation by a competitor or someone who wishes to harm the business. It occurs where the defendant represents for trading purposes that their goods or services or business, is that of another, by direct statements or using names, marks/colours by which the owner’s goods are known, in connection of goods or services of the same kind.

That is, the defendant seeks to pass their own goods or services off as the product or service of a more successful competitor. The remedies are civil – injunctions and damages.

The following elements are required for the tort to be established;
- misrepresentation – falsely leading customers to believe the goods or services are those of another business;
- made by a trader in the course of trade;
- to prospective or ultimate consumers;
- calculated to injure the business or goodwill of another trader – that it is reasonably foreseeable that this will be the effect;
- causes actual damage or will probably do so.

_Cadbury Schweppes Pty Ltd v Pub Squash Co Pty Ltd_ (1980) 32 ALR 387

The plaintiff produced a lemon squash soft drink called ‘Solo’. In 1977 the defendant produced a similar product called ‘Pub Squash’. In 1973, the plaintiff had run an advertising campaign that contained themes of ‘manliness and nostalgia’. The Solo cans were a distinctive colour and had a medallion style label. The Pub Squash drink also advertised its product by evoking themes of masculinity and nostalgia. The cans were of a similar appearance. The plaintiff sued the defendant for passing off in 1977.

It was held that the passing off had not occurred. That the tort is not simply reliant on trademarks and names, but includes other material such as visual images and slogans. This was the case, provided the material had become part of the goodwill of the product. The court held that consumers were not confused or misled by a marketing program similar in theme.

_Hogan v Koala Dundee Pty Ltd_ (1988) 83 ALR 187

Paul Hogan, one of the characters of the movie Crocodile Dundee, sued the defendant for passing off and for breaching s52 of the Trade Practices Act. The company promoted its products by using a cartoon koala dressed in a Crocodile Dundee outfit. The court held that the tort of passing off had been committed as the use of the Koala Dundee cartoon and other motifs was likely to have misled members of the public in regard to Paul Hogan’s association. The s52 claim was not heard.
BREACH OF CONFIDENTIAL INFORMATION

This is another common law action, and the duty of confidence may be founded in common law, contractual obligation or an implied condition of a contract. It may be owed by a present or past employee to an employer, by a vendor of a business to a purchaser of a business or by a professional advisor to a client. An action for common law breach of confidence is based on the legal principle that people have a right to hold certain commercial or personal matters secret.

The three rules establishing “breach of confidence” were clarified in *Coco v AN Clark Engineers Ltd (1969) RCP 41* and are as follows:

The information itself must have the necessary quality of confidence about it – not publicly known although it does not have to be top secret.

- The information must have been imparted in circumstances importing an obligation of confidence, which may be assumed from the situation e.g. where there exists a fiduciary relationship.
- There must be an unauthorized use of the information to the detriment of the party communicating it – that the unauthorized communication of the information to the third party harms the person who wished to keep the information confidential.

There are two groups of confidential information namely **commercial information** and **personal or government information**. Commercial information has not been defined but includes any product of the human mind such as drawings, plans, techniques, processes, recipes, formulae, survey results, chart lists, lectures, plays, works, concepts.

Breach of confidential information does not protect every mention of an idea. It must be clearly identifiable, original, potentially commercially attractive and capable of being realized. Trade secrets, techniques of production, business information such as accounting information, data bases, sales profiles, lists of customers, negotiation costing information, research data, product tests etc may all be relevant in this action.

The disclosing of confidential information may result in the plaintiff claiming the following remedies:

- Action for breach of contract and consequent remedies
- Damages
- Injunction
- Account of profits
- Anton Pillar order.
1. What action would you take to protect a tender and business plan that you were sending to a potential client?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

2. What does copyright protect? How is copyright protection obtained, and how long does it last?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

3. Explain the relationship between copyright and design protection.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
4. Describe the remedies for breach of intellectual property rights.

__________________________________________________________________________________________
__________________________________________________________________________________________
__________________________________________________________________________________________
__________________________________________________________________________________________
__________________________________________________________________________________________
__________________________________________________________________________________________

5. Under what circumstances would you apply for a patent?

__________________________________________________________________________________________
__________________________________________________________________________________________
__________________________________________________________________________________________
__________________________________________________________________________________________
__________________________________________________________________________________________
__________________________________________________________________________________________

6. What is the purpose of a trademark? How is it obtained, and what does it protect?

__________________________________________________________________________________________
__________________________________________________________________________________________
__________________________________________________________________________________________
__________________________________________________________________________________________
__________________________________________________________________________________________
__________________________________________________________________________________________
7. What are the elements in establishing breach of confidence?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

8. Give an example of a passing off action.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

9. McDonald’s, aware that Hungry Jacks are streaking ahead in sales, start advertising their new products, McWhopper and McYumbo. You are a sales executive at Hungry Jacks – what advice will you give your management about this situation?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
10. You have invented a beach umbrella created of a revolutionary, transparent, rainbow hued plastic that repels 100% of harmful UV rays. You have trialled it at the local swimming pool for the last 3 months, and are now keen to seek intellectual property protection rights for your invention. What can you do to protect your invention?
E-COMMERCE LAW

INTRODUCTION

E-commerce (or electronic commerce) is the term that covers the growing practice of carrying out business transactions using the Internet and other electronic networks. Different types of e business include consumer based retail sites, auction sites and music sites.

Over the past five years, e commerce has rapidly expanded and is continuing to do so; of concern is its regulation.

Business to consumer (B2C) electronic commerce

There are substantial benefits offered to consumers such as increased competition on goods and services. Additionally, Australian businesses are afforded the opportunity to develop new markets and create deeper relationships with their customers.

The way in which information is made available to consumers, security of payments and privacy of personal information differs electronically to that of a traditional retail environment. Consequently, the Australian Guidelines for Electronic Commerce focus on these issues and provide guidance to businesses on dealing with consumers when engaged in electronic commerce. Accordingly, these guidelines seek to enhance consumer confidence.

The Guidelines

The Guidelines have been developed for businesses located in Australia dealing with consumers both within Australia and overseas. Those traders outside of Australia who deal with Australian consumers are encouraged to follow the Guidelines which deal with the following:-

- Fair business practices;
- Accessibility and disability access;
- Advertising and marketing;
- Engaging with minors;
- Disclosure of a business’s identity and location;
- Disclosure of a contract’s terms and conditions;
- The implementation of mechanisms for concluding contracts;
- Adopting privacy principles;
- Using and disclosing information about payment, security and authentication mechanisms;
- The establishment of fair and effective procedures for handling complaints and resolving disputes; and
- The law and forum for the resolution of contractual disputes.

The Guidelines can be viewed via the Australian Government Treasury website:

CONTRACTUAL NEGOTIATIONS

Genuine e-commerce contracts are ones negotiated and formed through electronic communication, such as the purchase of an item from an internet site through use of the consumer’s credit card. Essentially the rules of common law contract still apply, but note that where acceptance of the offer takes place is very important, because the contract usually comes into existence in the place that acceptance takes place, and consequently, that provides the jurisdiction in which any disputes will be resolved.

Of particular interest is the case of Smythe v Thomas (2007) NSWSC 844 (the eBay Warplane auction), the major Australian precedent on Internet auctions. Rein, J held that the listing of the plane on eBay with a reserve price for a specific auction period constituted an offer. Acceptance occurred at the time the bidder agreed, before the auction closed, to pay the reserve price or the highest price above the reserve.

The outcome of the case was that there was in fact a valid contract due to the acceptance of the $150,000.00 bid.

Most reputable e-commerce operators place processes in their web-sites which require consumers to scroll through and agree to the contractual terms by clicking on an “I accept” icon. The website must disclose all relevant terms and conditions in relation to the proposed transaction, such as method of payment, delivery terms and remedies for defective goods. Any misleading and deceptive conduct may place them in breach of the Trade Practices Act.

DEFAMATION

There have been several successful defamation actions against people who have ‘published’ defamatory material on websites, chat lines and the like. Employers are vicariously liable for conduct by employees that arises out of the usual course of their employment duties.

INTELLECTUAL PROPERTY PROTECTION

Material that is protected by copyright is usually protected in regard to Internet use. Web users have the right to look at copyright works placed on a web site but they will breach national and international copyright laws if they make any unauthorized use of the material.

Domain names are the internet addresses of computer sites, and a registered domain name with worldwide recognition can be obtained by successfully applying to Internet Names Australia, the sole accredited authority in Australia. Registration is a guarantee that no one else in Australia or countries that recognize the international domain system can register or use your domain name.
However, since trademarks are registered by IPAustralia, domain name owners could still be liable for infringing intellectual property rights if their name is deceptively similar to a registered or well established trade mark. Thus intending domain owners should search to ensure they will not make such a breach.

**ELECTRONIC TRANSACTIONS ACT**

This Act recognizes that electronic communications may satisfy existing legal requirements for writing, signatures, document production and retention of documents, providing they satisfy minimum conditions. The Act is technology neutral, meaning that it recognizes all forms of electronic technologies.
Lecture 13

<table>
<thead>
<tr>
<th>Learning Outcome</th>
<th>Learning Outcome 14</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Explain effective methods of debt collection</td>
</tr>
<tr>
<td></td>
<td>Learning Outcome 15</td>
</tr>
<tr>
<td></td>
<td>Explain the effect of bankruptcy</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Required Reading</th>
<th>Vickery and Pendleton 6th ed – Chapter 22</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Activities</th>
<th>Activities in workbook</th>
</tr>
</thead>
</table>

Debt Collection

Debt collection is a normal day-to-day business activity. Debt management is an important part of business operations. Debt management consists of a business / individuals understanding of revenue and expenditures. If expenditures exceed revenue, or the revenue and expenditures are not monitored a business or individuals can find themselves in financial difficulty.
Activities

1. What do you understand by the concept creditor’s petition?

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

2. Discuss whether an act of bankruptcy has been committed in each of the following instances:

   a) Sam owns a café in a shopping mall, and is competing for business with five other café’s. On the advice of her psychologist Sam boards a ship for an eight-month cruise to get away from the tough competition and the demands of her suppliers.

      __________________________________________________________________________
      __________________________________________________________________________
      __________________________________________________________________________
      __________________________________________________________________________

   b) Chris, a director of many companies, is informed by his accountant that some of his companies are experiencing financial difficulties. A television current affairs reporter later discovers that Chris is living in a bungalow on a tropical island in the South Pacific. Chris informs his friends that he cannot return to Australia because he has developed a medical condition which can only be treated by the islanders.

      __________________________________________________________________________
      __________________________________________________________________________
      __________________________________________________________________________
      __________________________________________________________________________
c) Andy is a builder. He telephones his creditors (suppliers of building materials) informing them that he is experiencing financial difficulties and that he wishes to suspend payment.

d) Jeff has received a bankruptcy notice. He has failed to respond to it within the time limit indicated.

3. Pat, a former business entrepreneur, is currently an undischarged bankrupt. Discuss the legal effect of the following transactions entered into by Pat.

   a) Pat approaches the Friendly Bank for a $7,500 loan for the purchase of a used car and does not volunteer any information to the bank.

   b) Pat is approached by a company, Telco Pty Ltd to serve as a director. Pat gladly accepts and is now serving on the board of directors.
c) Pat and his friend, Chris, establish a partnership to open a sporting goods store. Pat manages the books of the business and trades with various suppliers.

4. How are secured and unsecured creditors affected by a debtor becoming a bankrupt?

5. What various types of property are available to the trustee for payment of the debtor’s debts?

6. Discuss whether the following transactions by Alex Con, a debtor declared bankrupt on 1 April 2004 are recoverable by Alex’s trustee:
   a) An unconditional gift of $150,000 to her son Craig, made during December 2002.
   b) A sale of her Mercedes to her father-in-law, on 1 February 2005, with an agreement to lease the car back.
c) One month before the closure of the business, Alex paid a management trainee (her daughter) $16,000 on her dismissal form employment. The daughter deposited the money into her bank account on her mother’s instructions and then withdrew the entire amount (proving Alex with a loan of $16,000).

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

7. Construct a list of the advantages and disadvantages of bankruptcy from the perspective of the creditors and the debtor.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________
Lecture 14

<table>
<thead>
<tr>
<th>Learning Outcome</th>
<th>Learning Outcome 16</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Formulate procedures to ensure compliance with applicable business law and to continually review legislative requirements.</td>
</tr>
</tbody>
</table>

Having considered the various legal issues and laws which may apply in business, in this session, we will be discussing and workshopping the various methods by which compliance with these laws may be achieved.

Basically, to achieve compliance, it is necessary for a business to be able to;

- identify the various laws that apply to their business;
- identify the procedures that must be undertaken to ensure that those various laws are being met, which involves:
  - identification of conduct which fulfils compliance
  - distributing information regarding conduct which fulfils compliance
  - ensuring that information is understood and put into practice
- gathering evidence to prove that compliance has in fact taken place.

Some issues you may like to consider are:

1. How is identification of the various laws applicable achieved?
2. What sources exist to inform a business as to the applicable law?
3. How is conduct to effect compliance identified?
4. What is the most effective means to formulate and distribute information re conduct that will fulfil compliance requirements? How should this be assessed and updated? Should such information be part of a job description? What of training and induction?
5. How is compliance in fact measured and proved? By productivity? Lack of breach? Lack of prosecution?