LAWS1100 Final Exam Notes

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**Notes 1 – Torts**

**Tort of Negligence**

A tort is a civil wrong that allows the aggrieved person to sue the wrongdoer for the recovery of damages for the wrong. The damages are awarded by way of compensation for the personal injury, property damage or economic loss.

Can be private or public liability. A person commits the tort of negligence if (3 requirements):

1. **Duty of Care**

Established categories - owe a duty of care.

* Motorists and road users (Cook v Cook)
* Doctors and patients (Rogers v Whitaker)
* Solicitors and clients (Hawkins v Clayton)
* Manufacturers and product users (Donoghue v Stevenson)
* Occupiers and people who come onto their premises (Australian Safeway Stores v Zaluzna)
* Employers and employees

The onus is on the plaintiff to establish the existence of the duty of care.

Established category – Occupier (most common)

* An occupier of a premises owes a duty of care to all persons entering the premises to ensure that the premises are safe (Australian Safeway Stores Pty Ltd v Zaluzna - The occupier owed a duty of care - must be something wrong with premise for the duty of care to be breached) (Hacksaw v Shaw - reasonable person would not fire two shots at a car, thus fails ‘Neighbour Principle’)

Occupier’s Liability – Public Authorities

* Is it a public authority? A public authority owes a duty of care to people who visit area under the control of the authority. Where danger is obvious, public authority is entitled to assume that most people will take reasonable care for their own safety
* Can include Government and Council bodies and organisations. Hidden Risks: Is there a hidden risk that requires warning or prevention? **(**Nagle v Rottnest Island Authority (1993) - rock pool swimming area with submerged rocks. There was a duty to warn due to the hidden risk) **(**Swain v Waverly - Submerged sandbar at patrolled beach. There was a duty to warn due to hidden risk) (Romeo v Conservation Commission (1998) - unfenced public space on cliff. There was a hidden risk but no breach of duty of care because no ‘reasonable person’ would do what she did)

The ‘Neighbourhood Principle’ – if there is a category

* The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, ‘Who is my neighbour?’ receives a restricted reply. **You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.** Who, then, in law is my neighbour? The answer seems to be – **persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation** as being so affected when I am directing my mind to the acts or omissions which are called in question (***Donoghue v Stevenson*).**

If **no** established categories, 2 tests must be then satisfied to establish the existence of a duty of care):

1. Was it reasonably foreseeable (would a reasonable person foresee) that the defendant’s act or omission could cause harm to someone in the plaintiff’s position (Donoghue v Stevenson)
2. The salient features of the case are consistent with the existence of a duty of care (relationship, control, experience, vulnerability, reliance and personal responsibility) (Sullivan v Moody)
3. **Breached Duty of Care**

**S9 Civil Liability Act 2003**

1. A person breaches a duty to take precautions against a risk of harm when –
2. The risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
3. The risk was not insignificant; and
4. In the circumstances, a reasonable person in the position of the person would have taken precautions.
5. In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things) –
6. The probability that the harm would occur if care were not taken (Bolton v Stone);
7. The likely seriousness of the harm (Paris v Stapney);
8. The burden of taking precautions to avoid the risk of harm (Latimer v AEC);
9. The social utility of the activity
10. **Breach Caused Harm**

Causation – S11 CLA

The defendant’s breach of duty caused the plaintiff to suffer reasonably foreseeable harm.

The court must consider:

* There was factual causation – but for the defendant’s actions/inaction, would the plaintiff have still suffered harm? (Yates v Jones);
* Scope of liability – was the actual harm a reasonable foreseeable consequence of the defendant’s breach? (Overseas Tankship v Morts Dock & Engineering)

**Defences:** S13-14 CLA **Voluntary assumption of risk** – if the plaintiff was fully aware of the risk then the defendant is relieved of all liability (Insurance Commissioner v Joyce); **Contributory negligence** – plaintiff contributed to own loss or injury, liability will be shared between the defendant and plaintiff (Ingram v Britten). **Vicarious Liability** – An employer may be liable for the acts or omission of their employees (Century v Northern Ireland).

**Other defences:** social utility - barristers, volunteers, emergency service providers, compliance with standard practices, and apology.

**Remedies:** Damages (ordinary - to compensate the plaintiff for the loss or injury suffered as a result of the defendant’s harm, nominal – damages awarded where no real loss, aggravated – compensate humiliation or emotional distress, exemplary – awarded where defendant deliberately or maliciously disregarded the plaintiff’s rights and interests), injunction

**Tort of Trespass**

‘*A defendant commits the tort of trespass if they intentionally or negligently interfere directly with the person or property of the plaintiff’*

The court will consider whether:

1. (specific tort)
2. The defendant’s interference is direct
3. The defendant’s interference is either intentional or negligent
4. There is no consent by the plaintiff or lawful justification for the interference

**Trespass to the Person:**

*‘Trespass to the person is direct and intentional or negligent interference with the person of the plaintiff without their consent’*

Batteryis committed if:

1. The defendant causes some sort of physical interference with the body of the plaintiff (Rixon v Star City Pty Ltd).

* Battery is intentional or negligent conduct that directly causes contact with the body of the plaintiff without their consent or lawful justification

Assault is committed if:

1. The defendant causes the plaintiff to develop a reasonable apprehension of imminent physical contact.

* Assault is a threat that causes the plaintiff to apprehend direct, imminent and harmful or offensive contact with their person

False imprisonment is committed if:

1. The defendant causes the plaintiff to be totally restrained.

* False imprisonment is the total deprivation of the plaintiff’s freedom of movement without consent or lawful justification

**The Tort of Defamation**

‘*Defamation is the publication by the defendant to a third party, in spoken or written form, of a statement about the plaintiff that would damage the reputation of the plaintiff’*

The court will consider whether:

1. The defendant’s statement about the plaintiff was defamatory. This means that the statement makes ordinary people think less of the plaintiff, causes people to shun or ridicule the plaintiff, or causes the plaintiff to be excluded from society (Bielke Peterson v Warburton).
2. The defendant’s statement identifies the plaintiff. This means the statement is one that can be **reasonably** identified as referring to the plaintiff.
3. The defendant’s statement was published to a third party (someone other than the plaintiff). The term publication is very broad and includes any communication in the form of speech, newspaper, book, magazine, email, text message, website, etc.

**Defence**: Fair comment – the defendant will not be liable if the statement was: An expression of opinion rather than a statement of fact; made in relation to a matter of public concern; based on material that is true.

**The Tort of Deceit**

*‘Deceit is the deliberate making of a false statement by a defendant during contractual negotiations to induce the plaintiff to enter into a contract’*

The court will consider whether (& all must be met):

1. The defendant makes a statement of fact to the plaintiff **knowing** that it is false (Bisset v Wilkinson).
2. The defendant makes the statement with the **intention** that it be relied upon by the plaintiff.
3. The plaintiff relies upon the statement.
4. The plaintiff suffers harm as a result of relying upon the statement.

**Remedies**

If in a civil action the court finds the defendant has committed a tort the plaintiff will be entitled to a range of possible remedies:

**Damages:**

Ordinary damages - awarded to compensate the plaintiff for the loss or injury suffered as a result of the defendants harm.

Nominal damages - damages awarded where the plaintiff has suffered no real loss.

Aggravated damages - compensate humiliation or emotional distress.

Exemplary damages - awarded where the defendant has deliberately and maliciously disregarded the plaintiffs rights and interest. Awarded to punish the defendant.

Injunction- ‘An injunction is a court order whereby a person is required to do or refrain from doing certain acts’. An injunction will be an appropriate remedy if they are committing a tort on an ongoing basis, such as nuisance, trespass or defamation.

Interim injection: provisional remedy granted to restrain activity (e.g. selling property or leaving the country) on a temporary basis until the court can make a final decision at trial.

Time limits: negligence, nuisance, trespass - 3 years, Defamation - 1 year, Other torts - 6 years

**Notes 2 – Contracts**

*‘A contract is a legally enforceable agreement’*

A contract will be formed if all of the following requirements are satisfied:

1. There is an agreement between the parties
2. Another person (the offeree) has accepted the offer
3. The offeree has communicated their acceptance to the offeror

**Agreement**

*‘An agreement exists when two or more people share understanding and intention’*

An agreement will be formed if all of the following requirements (3) are satisfied:

1. One person (the offeror) has made an offer

* Can be written, spoken or implied from the conduct of the offeror
* An intention to enter into a legally binding contract
* Offer must be firm, certain and communicated to the offeree.
* Offer can be revoked at any time prior to acceptance unless the offeree has paid consideration to keep the offer open.
* If an offer is not accepted, rejected or validly revoked, it will lapse after a reasonable amount of time.
* A request for information or response to a request is not considered an offer.
* Advertisements are generally deemed as invitations to treat rather than offers to the world at large.
* Advertisements, however, can be offers to the world at large if their wording makes it clear that the advertiser is willing to enter into a legally enforceable contract immediately upon acceptance of the advised offer (Carlill v Carbolic Smoke Ball Co)
* The display of a product in the window of a shop or on the shelves of a shop is also an invitation to treat rather than an offer (Pharmaceutical Society of Great Britain v Boots Cash Chemists)

1. Another person (the offeree) has accepted the offer communicated the offer

* Acceptance must be unqualified, otherwise it is a counter-offer; acceptance of the offer must be communicated through verbal, written or action; must be within in a reasonable period of time (Ramsgate v Montefiore)

1. The offeror has communicated their acceptance to the offeror

* If the offeror specifies the way that acceptance must be communicated, the acceptance is not valid unless it is communicated in this manner or in an alternative matter that is just as prompt and no less advantageous to the offeror
* An offeror can waive the requirement that acceptance be communicated, but cannot insist that a failure to respond is acceptance
* Exceptions: ongoing commercial relationship between the parties (Boyd v Holmes), unilateral contract – where the offeree’s acceptance and performance are achieved by the same act (Carlill v Carbolic Smoke Ball Co), postal rule
* Conditional agreements: conditional precedent – the parties have specified that the agreement will not be legally enforceable until the happening of a certain event.

**Intention**

*‘The parties intended to create legal relations’*

* The court will look at the conduct of the parties from the perspective of an objective observer and will consider whether the parties where behaving in a way that indicated that they intended the agreement to be legally enforceable. Presumptions of the objective test:
* Commercial agreements: There is a presumption that parties have an intention to enter into legal relations unless evidence is provided to the contrary.
* Domestic/social agreements: Not intended to be legally enforceable unless evidence is provided to the contrary (Balfour v Balfour)
* ‘Mere Puff’: Promises clearly not intended to be taken seriously – often found in advertising – Carlill v Carbolic (1983)

**Consideration**

*‘An agreement is not a contract unless both parties to the agreement have paid, or promised to pay, a price, for each other’s promise’*

Consideration can take the form of (Calill v Carbolic Smoke Ball):

* The payment of money
* The provision of goods
* The provision of a service
* The undertaking of an onerous obligation
* Refraining from doing something
* A promise to do any of these things.

If the promisee has not provided consideration, then the promise is merely a gift and as a general rule not legally enforceable.

Consideration need not to be fair or adequate, only a price of some legal value (Thomas v Thomas).

Consideration must be sufficient, and not either:

* A vague promise, that is uncertain or of no legal value (White v Bluett);
* Past consideration, that is the price paid for a promise that was paid before the promise was made (Roscorla v Thomas).
* Performance of a prior legal obligation – performing existing contractual obligations does not amount to good consideration to enforce a promise (Stilk v Myrick).

**Promissory Estoppel**

* The principle of estoppel may allow a promise to be enforced even though requirements are not satisfied.
* Consideration is not required if promissory estoppel is proven: “… when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.’ (Lord Denning in Moorgate Ltd v Twitchings)
* Promissory estoppel will allow a promise to be enforced even though the promisee has not provided consideration for that promise – provides equity as it would be unconscionable for the promisor to break their promise (Waltons Stores v Maher)

A promise will be legally enforceable under promissory estoppel if:

1. Some sort of legal relationship either exists or is anticipated between the parties;
2. Promisor makes a clear and unambiguous promise;
3. The promisee relies on the promise - by changing their circumstances;
4. The promisee will suffer a material detriment/disadvantage if the promisor does not keep their promise;
5. It would be unconscionable if the promisor did not keep their promise.

*Waltons Stores (Interstate) Ltd v Maher (1988)*

Facts: Maher agreed to build premises on the basis that Waltons would lease the premises. Waltons sent Maher an unsigned lease agreement, which Maher signed and returned. Maher commenced demolition after returning the agreement to Waltons. Waltons then decided not to continue with the lease after approximately 40% of building work was complete.

Result: The HC held that equitable estoppel (which includes promissory estoppel) will apply where: a plaintiff has assumed that a legal relationship existed or will exist; the defendant induced the plaintiff to adopt that assumption; the plaintiff acts in reliance on that assumption; the defendant knew of the acts of the plaintiff; the plaintiff's actions will cause detriment to the plaintiff if the assumption is not fulfilled; and the defendant has failed to act to avoid that detriment.

Silence will be sufficient to establish equitable estoppel where it was unconscionable (unjust) for the defendant to remain silent and the defendant knew that the plaintiff had assumed or expected something and acts on that assumption or expectation.

In those circumstances Waltons was under obligation to communicate with Maher within reasonable time and certainty when it heard of demolition. It did not and its inaction in the circumstances constituted clear encouragement or inducement for Maher to continue. As a result, Waltons was estopped from retreating from its implied promise to complete.

**Enforceability**

**Capacity to Contract**

*‘Certain persons or classes of persons who lack the capacity to enter into a contract are prohibited by law from entering into legal contracts’*

*…To protect vulnerable people from the possibility of exploitation*

A person will not have legal capacity to contract if they are: A **Minor** – any person under the age of 18 years.

The exceptions to this are:

* Contract for necessaries – defined as goods suitable to the condition in life to a minor and to the minor’s actual requirements at the time of sale and delivery. Courts will take into consideration the minor’s lifestyle, social background and social status in deciding what is ‘necessary’ for them (Bojczuk v Gregorcewicz).
* Contracts for beneficial services – where the minor is to provide a service and is beneficial to the minor, it will be enforceable against the minor (Hamilton v Lethbridge)
* … minors can enforce a contract but they cannot have a contract enforced against them.

Tutorial - **I:** Is Ned prohibited from entering into a contract with Billy due to his lack of capacity to contract… **L:** For a contract to exist, the parties must have contractual capacity … Certain persons or classes of persons, who lack the capacity to enter into a contract, are prohibited by law from entering into legal contracts. One class of persons who lack legal capacity are … persons below the age … However, there are two type of valid contracts with minors … contracts for … and contracts for … **A:** From the facts of the case, Ned is wishing to: be reimbursed $7,500 and seek an injunction to restrain Billy from working at the competitive business. 1st issue: Is a car necessary? Arguable – would need to look into factual circumstance where it can be determined that the car is not considered a necessary in the situation. It was for leisure (Scarborough v Sturzaker - A bicycle was a necessary because the minor had only one and used it to travel to work. Contract was thus enforceable and minor had to pay amount owing). In regard to the beneficial services, the restraints did not outweight the benefits and the terms were reasonable. Would be different if terms were ‘you could not work at any other mechanic until I retired etc). **C:** Due to Billy being capable of foring a contract and the car was not classified as a necessary, Ned would not be successful in claiming the payment $7,500. However, may be able to seek an injunction to …

A person will not have legal capacity to contract if they: **Lack Intellectual Capacity (Pg 282)**

* A person may lack intellectual capacity as a result of: Intellectual disability, insanity, mental illness or intoxication.
* The contract will be voidable if: The person is incapable of understanding the nature of the contact; and
* The other party is aware of their condition
* Contracts with persons suffering from mental illness or an intellectual disability will be voidable if: the person is incapable of understanding the nature of the contract; and the other party is aware of their condition. The party seeking to withdraw from the contract has the onus of proving both these requirements: that they were suffering from such a disability and as a result they are incapable of understanding the nature of the contract; and that the other party was (or ought to have been) aware of it (Gibbons v Wright)

A person will not have legal capacity to contract if they: are an **Intoxicated Persons**

* The law treats intoxicated persons as being of unsound mind (and in a sense taken advantage of) with insufficient legal capacity to contract.
* A contract is voidable at the option of a party who, as a result of intoxication, is unable to understand the nature of the contract being made – provided that the other party knew, or ought to have known, of that person’s disability.
* The person who has contracted with an intoxicated person will be deemed to have taken advantage of a person with insufficient legal capacity to contract
* If an intoxicated person wishes to proceed with the contract, they can affirm the contract within a reasonable time period after the intoxication period has ended (Blomley v Ryan)
* The party seeking to withdraw from the contract has the onus of proving 2 requirements:

1. That they were suffering from such a disability; and
2. That the other party was or ought to have been aware of it.

**Lack of Legality**

Contract will not satisfy the requirement of legality if: it contracts to commit a crime or tort; promotes corruption in public office; intended to evade the payment of tax; prevent or delay administration of justice.

**Distinguishing Between Terms and Representation**

Term attaches to a promise: A contractual term is any provision forming part of a contract"

Representation does not attach to a promise: A representation is a statement of fact which does not amount to a term of the contract but it is one that the maker of the statement does not guarantee its truth

The courts will look at the following factors when distinguishing whether term or representation:

* The language used by the parties
* The context in which the statement was made;
* The time the statement was made;
* The maker of the statement; and
* The importance of the statement

**Conditions and Warranties**

* **Conditions** - major terms of the contract breach of which will entitle the innocent party to rescind (terminate) the contract and sue for damages – (Poussard v Spiers)
* **Warranties** - minor terms of the contract breach of which will entitle the parties to sue for damages (Bettini v Gye)
* **Third Type - Intermediate** - hybrid term that is capable of being a condition or a warranty (Koompathoo v Sanpine)
* To determine if a term is a condition or a warranty, the courts apply the test of essentiality - whether the statement is of such importance to the innocent party that it would not have entered into the contract unless the promise by the defendant was made – Associated Newspapers v Bancks (1951)

**Disclaimers or Exclusion Clauses**

*‘A term of the contract that either limits, excludes or restricts the liability of one part against the other for either breach of contract or liability for negligence in a contract’*

Whether the disclaimer will effectively protect the party from liability for breach of contract will depend on:

1. Whether the disclaimer is in fact a term of the contract; and
2. Whether the disclaimer will be interpreted as applying to the particular breach in question

A disclaimer will only be a *term* of the contract if:

* When it is included in a **signed** written contract the person is usually bound by it (L’Estrange v Graucob);
* However, with an **unsigned document**, an exclusion clause will be binding only if the clause was brought to the other party’s attention by reasonable notice before the contract was entered into(Olley v Marlborough).
* It is implied into the contract as a result of **prior dealings** – If the customer has had a previous course of dealings with the defendant, the court will infer that the customer has the knowledge of the exclusion clause and be bound by the exclusion clause in the present contract (Balmain New Ferry v Robertson)
* Where the terms of the contract are contained, or referred to, on a ticket or another document such as airline, train, car park, dry cleaner’s tickets - the exclusion clause is **binding only if it was brought to the notice** of the customer at the time of entering into contract or prior to entering into contract (Thornton v Shoe Lane Parking):
* Is the ticket or other document of such a nature that one may **reasonably expect** it to contain contractual terms? IF NOT,
* Did the person relying on the terms **do what was reasonable to bring notice** of the existence of the terms to the attention of the other person? IF NOT, that person may not rely on that clause
* If the person seeking to rely on the exclusion clause misrepresents the clause or its effect, then the exclusion clause is not binding (Curtis v Chemical Cleaning).

Will they apply to the breach?

**Contra Proferentum Rule** - If the disclaimer is contained in a contract with another business, the courts will presume that the parties had equivalent bargaining power and will interpret the disclaimer neutrally and without favouring either party. If a disclaimer in a contract between a consumer and a business is uncertain or ambiguous, it will be interpreted contra proferentum, that is, against the interests of the party that included the disclaimer- (White v John Warwick – plaintiff hired faulty bike. Held that defendant was protected by disclaimer but did not exclude the responsibilities in negligence)

The scope of the exclusion clause (disclainmer) is limited to only acts performed within the scope of the contract - the exclusion clause will not exclude liability for acts occurring outside the contract.

The scope of the exclusion clause is a matter of interpretation by the court (Sydney City Council v West):

**Vitiating Factors**

Factors that impair the legal validity of a contract and allow the innocent party to set it aside/sue for damages due to lack of free and voluntary consent can arise from vitiating factors such as: misrepresentation, mistake, duress, undue influence or unconscionability

**Misrepresentation – need to establish the four elements of misrepresentation**

1. A false statement/representation of fact is made by the representor to the representee;
2. With regard to an existing fact or past event – not statements of future intention;
3. Before or at the time the contract is concluded;
4. Intended to induce the other party to enter into the contract

The legal definition of misrepresentation does not include:

* Honest statements of opinion; puffs or exaggerated statements; promises/statements of future intention; mere silence, unless one or more of the following applies:
  + A statement, previously true, then becomes untrue.
  + The representor does not correct a previous statement after discovering it is untrue.
  + A failure to disclose distorts a statement previously made so that it becomes a half-truth.
  + There is a legal obligation of full disclosure by parties during negotiations.
* **\*\*If it is misrepresentation make sure you cover ALL: fraudulent, innocent and negligent.**
* \*\*LOOK BELOW FOR TUTORIAL EXAMPLE

Tutorial:

Issue - The issue in question is whether or not Robert is able to make a claim for misrepresentation against Patrick and thus if the elements in the contract may constitute for it to be vitiated.

Law – A misrepresentation is a false statement of fact made by one person to induce another person to enter into the contract. It must be a statement of *fact*: promises are not ‘representations’ and hence cannot be misrepresented. Misrepresentation can be regarded as a factor that affects genuine contractual consent. These factors are regarded as ‘vitiating factors’ and give the innocent party the power to set aside the contract, with the court declaring the contract void due to lack of genuine consent and/or sue for damages. There are four elements which need to be established to prove misrepresentation (either fraudulent, negligence or innocent): 1), 2), 3), 4) Fraudulent Misrepresentation is where… state the 4 requirements for fraudulent misrepresentation… (Derry v Peek) Parties affected by fraudulent misrepresentation may…Innocent Misrepresentation occurs where:

state the 2 requirements for innocent misrepresentation… (Oscar Chess Ltd v Williams) Parties affected by innocent misrepresentation may…Negligent Misrepresentation is where: state the 5 requirements for negligent misrepresentation…(Hedley v Heller; Shaddock v Parramatta) Parties affected by negligent misrepresentation may…From this, some equitable remedies are available for the innocent party. Rescission (termination of contract) and damages (available for fraudulent and negligent).

Apply - To determine if Robert entered into an agreement with Patrick under false facts, it is necessary to establish the four elements under misrepresentation. Patrick claims he was unaware of the state the kitchen and how poor the condition was, however the information provided was still incorrect. It is a false representation because…It is about an existing fact because...It was made just before the contract was made because…It was intended to induce Robert into entering into the contract because…It is necessary to determine whether the misrepresentation was fraudulent, innocent or negligent. Fraudulent Misrepresentation:To prove fraudulent misrepresentation, Patrick’s statement needs to have a lack of belief in its truth or be made recklessly (In other words, Patrick didn’t care whether the statement was true or false). From the facts, we are told that ... ??? Therefore … ??? Innocent Misrepresentation: Applying the tests for innocent misrepresentation, according to the facts, Patrick did / did not intend to deceive Robert and Patrick’s misrepresentation was / was not made unintentionally. If the misrepresentation is proven to be an innocent misrepresentation, Robert will only be able to … ??? He will not be able to sue for … ??? Negligent Misrepresentation: Even though Patrick did not intend to deceive Robert and the misrepresentation was made unintentionally, was the statement negligently made? Patrick made an honest and incorrect statement negligently and carelessly, which can be determined through the four elements. 1) The relationship between Patrick and Robert clearly relied upon Patrick exercising a duty of care due to the private relationship the parties share in contractual terms ; 2) The subject matter was extremely important and detrimental to Robert’s business and opening of his restaurant; 3) Patrick was fully aware that Robert was relying upon the information he provided to be correct and specifically, the kitchen to be in satisfactory condition through the direct words of ‘if it doesn’t I will have to find somewhere else’; 4) It was reasonable for Robert to rely on this advice; and 5) Robert suffered monetary damages as he would undoubtedly need to renovate the kitchen and furthermore, may need to delay the opening of his business, constituting losses.

Conclusion- A court would likely decide that Patrick is unlikely to have committed a fraudulent misrepresentation. However, there is a strong argument in favour of negligent misrepresentation and, if proven, this would result in Robert claiming damages and possible recission.

**Fraudulent Misrepresentation**

The representor knows or believed that the statement is untrue and presents it to be true or accurate with the aim of making the other party enter into the contract.

The elements are as follows:

* A false statement of fact is made by one party to the other;
* The statement is made knowingly, with a lack of belief in its truth or recklessly;
* The statement induces the other party to enter into the contract;
* The statement results in damage to the innocent party (Derry v Peek)
* Parties may rescind the contract and sue for damages

**Innocent Misrepresentation**

When the representor does not intend to deceive anyone

The misrepresentation is made unintentionally (Oscar Chess Ltd v Williams)

Parties affected by innocent misrepresentation may rescind the contract, but cannot sue for damages

**Negligent Misrepresentation**

The representor makes an honest but incorrect statement negligently and carelessly

The elements are:

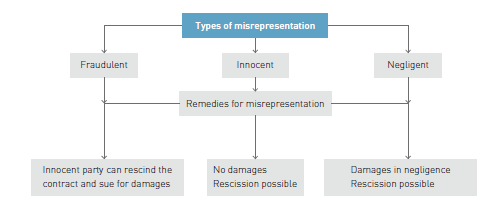
* A relationship/special position exists between parties such that the person providing the information or advice must exercise a duty of care;
* Subject matter is of a serious or business nature;
* Person providing the advice realises that the recipient intends to act upon that advice or information;
* It was reasonable for recipient to rely on the advice or information; and
* Damage was suffered by the recipient, usually monetary.

**Damages, Equitable and Statutory Remedies**

* **Damages:** The objective of the court in making an award of damages is to restore the other party to the position they would have been in if the breach or misrepresentation had not occurred, that is, if the contract has been performed properly. The other party is under an obligation to **mitigate** their loss.
* **Equitable Remedies:** If the other party can demonstrate to the court that an award of damages is not a satisfactory remedy, the court may decide to provide an equitable remedy, such as specific performance or injunction.
* **Statutory Remedies:** If the term breached is one of the terms implied into the contract by the ACL or the state sale of goods legislation, the legislation provides a range of remedies.

**Remedies for Misrepresentation**

* **Rescission:** This allows the innocent party to terminate the contract. Rescission is an equitable remedy.
* **Damages:** These are available for fraudulent misrepresentation and for negligent misrepresentation.
* It should be noted that damages are not available at common law for innocent misrepresentation
* If the other party was tricked or deceived into entering into a contract they can commence a legal action using the statutory provision in the ACL that prohibit misleading or deceptive conduct, false representations and other unfair practices



**Undue Influence**

Most commercial relationships with no business history and an equal bargaining position, should not have this situation arise.

‘Every case where influence is acquired and abused, where confidence is reposed and betrayed.’

Undue influence occurs where a person with influence and power dominates the will of another person.

A contract is voidable at the election of a weaker party:

* When a stronger party, in a position of influence;
* improperly uses its power on the weaker party;
* In order to induce the weaker party;
* To act for their benefit.
* As a result, there is a lack of genuine consent to the agreement.
* Where a special relationship of confidence exists, such as to raise a presumption of undue influence, the onus is on the person in the stronger position to establish that the transaction was the: ***“pure voluntary and well-understood act”*** of the person reposing the confidence and that their mind or intention was not subject to any undue influence

**Unconscionable Conduct**

* Unconscionable conduct is a conduct that is unfair, unjust and against good conscience.
* Unless the contract was induced by fraud, duress, undue influence, mistake, misrepresentation or illegality, the common law will be reluctant to give redress to the innocent party.
* The problem with the common law’s reluctant treatment of the harsh and oppressive clauses in contracts led to an attempt in the 1970s by courts to mount a new defence of ‘inequality of bargaining power’.
* The law of equity stepped in to fill in the gap to remedy for harsh and oppressive contracts.
* Lord Denning, held in one of his judgments that in unconscionable contracts: ‘… there runs a single thread. The inequality of bargaining power’ (Commercial Bank of Australia v Amadio)

**Requirements necessary to frame a plea for ‘unconscionability’**

* The weaker party must have been under a special disability/weakness/disadvantage vis-a-vis the stronger party so that there was no real equality between them;
* The stronger party knows or should have known about that special disability/weakness/disadvantage;
* It must have been unfair or “unconscientious” for the stronger party to procure agreement in the circumstances in which it was procured.
* 🡪 Statute Law in Australia has adopted the common law principles of ‘unconscionability’ (For example, see ss. 20-22 of the Australian Consumer Law provisions relating to Unconscionable conduct).

*Commercial Bank of Australia v Amadio*

Facts: The Respondents [Amadio] signed a mortgage for the Appellant [Bank of Australia] to secure loans for their son. They were not well informed about the details of the mortgage, and clearly had no idea what's going on. They were both Italian and spoke very little English, being pretty much illiterate. When the Appellant attempted to seize the house, the Respondents attempted to challenge the validity of the of the mortgage. The Respondents allege that the mortgage was procured as a result of unconscionable dealing: the Respondents were in a disadvantageous position because of their lack of English skills and old age, and the Appellant used this in order to procure an unfair contract.

Held: The majority of the High Court of Australia held that the Amadio’s had suffered a special disadvantage thus finding that the conduct of the bank was unconscionable. Justice Mason stated that unconscionable conduct refers to a situation “in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage”. In coming to their decision, the Court took into consideration the special disadvantage suffered by the Amadio’s as a result of their minimal ability to speak English, lack of formal education and business experience, and old age. This special disadvantage suffered in conjunction with the failure of the bank to disclose the necessary facts that would allow the Amadio’s to make their own informed judgment about the transaction was held to amount to unconscionable conduct. Ultimately, the Amadio’s would not have signed the documents, had they been aware of the effect of the terms they were agreeing to.

**Duress**

* Quite a common vitiating factor
* Pressure exerted by one party to coerce or compel another to contract on particular terms

**Elements of Duress**

* One party expressly or impliedly threatens the other party with harm;
* The threat of harm contributed to the other party’s decision whether or not to enter into contract
* Types of Duress:
  + Physical, mental psychological duress to a person/relative or to their loved ones (duress to person) (Barton v Armstrong)
  + Duress to the safety of the other party’s good (Hawker Pacific v Helicopter)
  + Economic Duress – duress to the other party’s economic and financial well-being (North Ocean Shipping v Hyundai)

**Discharge**

A process whereby a valid and enforceable contract can be brought to an end, thereby releasing the contracting parties from all further obligations.

Contracts may be discharged by consent, by operation of law (such as by frustration), by breach/repudiation, by performance, by lapse of time.

**Discharge by Performance**: A contract may be discharged because both parties have completely performed their respective obligation under the contract. As a general rule, performance must be exact.

The doctrine of performance also applies when a lump sum contract has been substantially performed. Any remedial work that needs to be completed will be deducted from the contract price by way of a set off.

**Discharge by Breach**: There are two main types of breach of contract.

Where the other party to the contract breaches a condition (essential term), this entitles the innocent party to treat the contract as **terminated** and is termed ‘repudiation’ of the contract.

If one party breaches a warranty (non-essential term), then the innocent party is only entitled to claim **damages** for the breach.

**Discharge by Frustration**

Common examples: Natural disasters such as flood, fire etc, death or incapacity of one of the parties.

A contract will be terminated as a result of **frustration** if:

1. a supervening event has made performance of the contract either completely impossible or at least impossible to perform in the way originally envisaged,
2. neither party caused the supervening event,
3. the contract did not provide for the supervening event, either expressly or by implication, and
4. it would be unjust to compel either party to proceed with the contract (Taylor v Caldwell), (Krell v Henry), (Codelfa v State Rail)

**Notes 3 – Principal and Agents**

* An agency relationship is a fiduciary relationship, one in which the agent must always put the principal’s interests above their own and always act under the control and direction of the principal.
* Whether an agency relationship exists at law is a question of fact.
* A business owner will be legally bound by any statements, contracts or payments made (and possibly even torts/crimes committed) by an agent authorized to act on the business owner’s behalf.
* An agent is responsible for making the contract between the principal and the 3rd party, but the agent is not a party to this contract and is not liable under the contract – the principal is

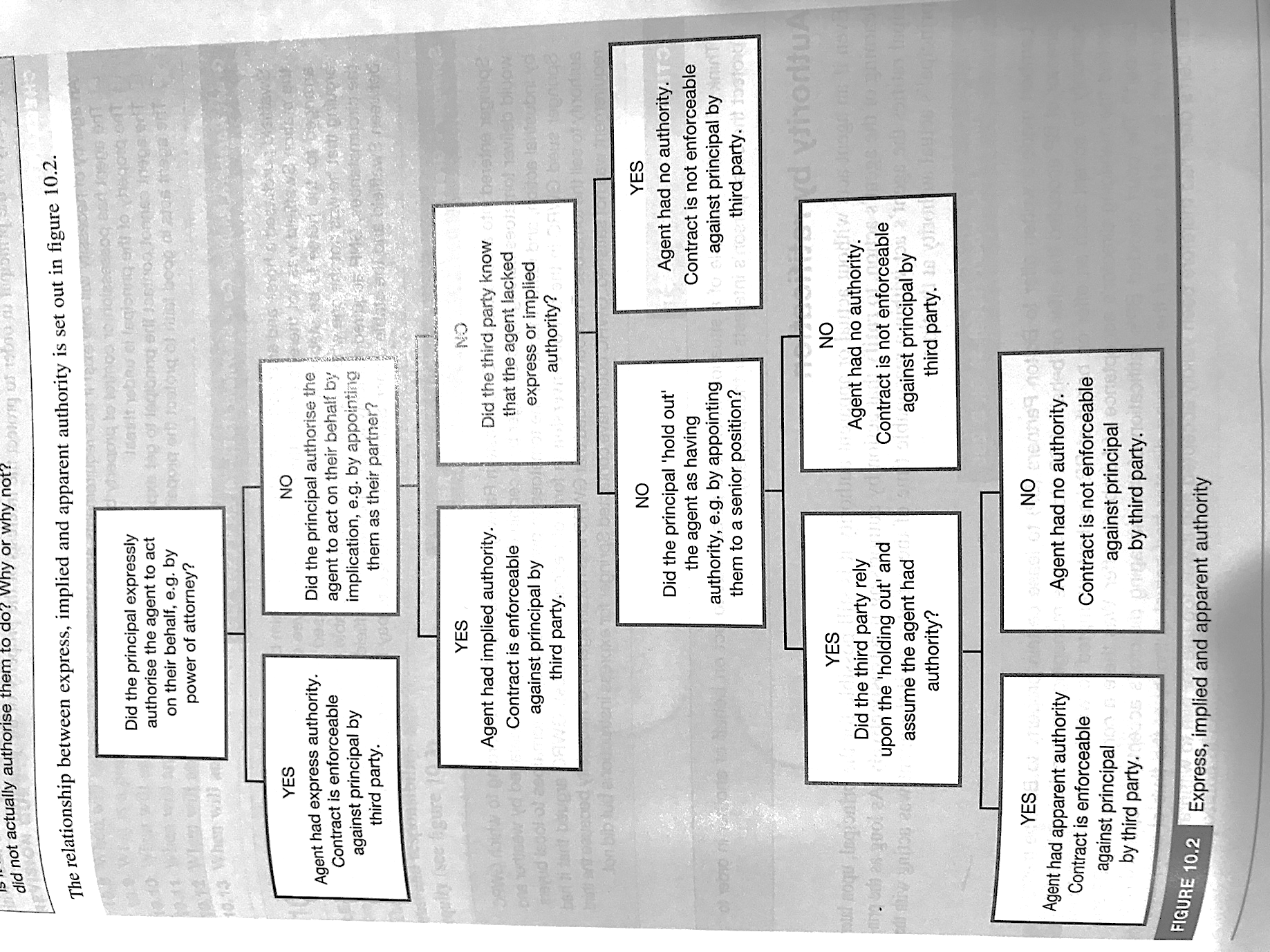
An agent can be authorized to act on behalf of a principle through (‘Formation’):

1. **Actual authority** - ‘A legal relationship between principal and agent created by a consensual agreement to which they alone are parties’ (Lord Diplock in Freeman & Lockyer v Buckhurst Park Properties Ltd).

* **Express actual authority** – Consent is the basis for express actual authority. This is the authority explicitly given to an agent, verbally or in writing, to act on the principal’s behalf
* **Implied actual authority** – Implied actual authority also rests upon the consent of the principal. However, in this instance the consent is to be implied from the circumstances of the case. Even without an express agreement, the principal and agent can conduct themselves in such a way so as to suggest that the relevant authority has been conferred on the agent. Authority is inferred from conduct.
* For example, by instructing the agent to carry out a particular task on the principal’s behalf or appointing them to a particular position in a way that makes it obvious that the agent will be required to enter into a contract with a third party on the principles behalf (Peterson v Moloney)
* Implied authority can be overridden by express instructions to the contrary or the partnership agreement – Construction v Hexyl (1985)

1. **Apparent authority** – an agent will have apparent authority if:
2. The third party did not know that the agent did not have express or implied actual authority
3. The principal ‘held out’ the agent as having authority to act on the principal’s behalf, e.g. by appointing the agent to a particular position, or by holding the agent out as having authority in the past; and
4. The third party relied upon that holding out, and assumed that the agent had actual authority (Panorama v Fidelis Furnishing Fabrics) (Tooth v Laws)
   * ‘Did not know’ case (Summers v Solomon – jewelry shop)
   * ‘Holding out’ case (Essington v Regency – secretary signed and made changes)

* If all three requirements are satisfied, the principal will be legally bound by the actions of the agent, even if the principal expressly told the agent that the agent was not to enter into such a contract or act in that manner on the principal’s behalf.



**Principal’s rights and obligations**

* The principal’s duties include the duty to remunerate, reimburse and indemnify the agent for expenses incurred in the proper course of the agency.
* Whether the principal will be liable for **any torts or crimes** committed by their agent depends on the extent of the control exercised by the principal over the agent: if the agent is an **independent contractor** and not subject to direct control by the principal, the principal is unlikely to be liable for the agent’s actions.
* If the agent is an employee of the principal, the principal is more likely to be held **vicariously liable** for the agent’s torts and crimes, provided they were committed by the agent while carrying out the principal’s instructions.

**Fiduciary obligations of an Agent**

The duties include the duty to:

* Follow the principal’s instructions; exercise due care, skill and diligence; to act in person; to act in the principal’s interest – not their own interests such as making a secret profile or taking a bribe; to disclose conflict/s of interest to the principal or the confidential information about the principal to others; to keep and render correct and appropriate accounts.

*To follow instructions:*

* An agent is obliged to obey the lawful instructions of the principal – failure to do so makes them personally liable to the principal as a result of the agent’s breach of duty – they will not be liable if they do not carry out instructions that are unlawful (*Bertram Armstrong v Godfray 1830)*

*To communicate information:*

* An agent owes a duty to the principal to communicate to the principal information relevant to the agency – anything they learn that a reasonable agent would consider relevant in the ordinary course of business such as anything about secret profits/commissions, bribes, or potential or actual conflict/s of interest (*John D Wood v Knatchbull 2002) (Hewson v Sydney 1968)*

*To act in person:*

* AN agent is not permitted to delegate the task to another person, or appoint a sub-agent, unless the principal gives them permission to do so. (*John McCann v Pow 1975 -* Agent appointed another agent to sell property. Held: Agent breached duty to act personally)

*To exercise due care, skill and diligence:*

* An agent owes the principal a duty to carry out the principal’s instructions with due care and skill.
* An agent who fails to do what a reasonable agent would have done in the same circumstance will be liable to the principal in the tort of negligence (*Provincial Insurance v Consolidated Wood)*

*To act in the principal’s interests:*

* An agent has a fiduciary obligation not to exercise their authority in a way contrary to the interests of the principal – not to put themselves in a position where the interests of the principal are in conflict with the agent’s own personal interests – or when they receive a secret commission from a 3rd party (*Hewson v Sydney 1968)*

*Confidentiality*

* An agent has an obligation to maintain the principal’s confidentiality.
* They should not disclose to others or use for their own benefit information about the principal or the principal’s affairs without the permission of the principal, or use for their own benefit information acquired during the course of the agency.

*To keep and render correct and appropriate accounts*

* The agent is obliged to keep proper records of any funds that are spent or received on behalf of the principal, and to produce these records when asked to do so by the principal
* The agent must also keep any money and property belonging to the principal in their possession separate from their own money and property
* Duties could also be imposed as contractual duties under the terms of the agency agreement between the principal and the agent.

**Partnerships (page 552)**

*A partnership is ‘the relation which subsist between persons carrying on a business in common with a view of profit’* Partnership Act 1891 s5(1)

**Mutual liability:** Each partner in a partnership is both the principal and agent of the other partners. This means that each partner is liable for the actions, contracts and debts of the other partners

**Formation**; There are no formal registration requirements for a partnership. The question is whether the following 4 requirements are present or not under s5(1) PA – which will then certify a partnership to be formed:

* 1. There are two or more persons involved. A person includes individuals and corporations
     + Each partner must have contractual capacity. A minor can be a partner but may not be personally liable to third parties (Whundo Copper Syndicate v Ferrari - Minor).
  2. Those persons are carrying on a business. A business is defined by s3 (PA) as including a ‘trade, occupation or profession’ (Evans v FCT – Business; system & organization)
     + Carrying on a business is taken to mean a ‘continuity or repetition of trading activities’. Single transaction/project is not usually a partnership. (Smith v Anderson – Single transaction)
     + If partners begin working together to prepare or establish an identifiable business, the partnership commences from the date they begin working together (Khan v Miah)
     + The key consideration falls onto the intention of the parties
  3. They are carrying on the business in common.
     + This means that each person is acting on behalf of the others as well as on their own behalf
     + An employer and employee are carrying on business together but are not partners (Degiorgio v Dunn – ACDC cover band)
     + Silent partners are legally responsible for the actions of the other partners
  4. They are carrying on the business with a view of profit.
     + Merely *seeking* to make a profit, not necessarily *making* a profit
     + If they expect to make a loss in the short term and/or they in fact make a loss, they will still be a partnership (Minter v Minter). If the person are carrying on a business together for a non-profit purpose they will have formed an unincorporated association rather than a partnership

**Partnership Agreement**

The relationship between partners is a contractual one. The terms of the contract are set out in the Partnership Agreement which may be:

* A formal written document;
* Partly in writing and party oral; or
* Wholly or partly implied from the conduct of the partners

A written partnership agreement is not required for the existence of a partnership

Mutual Liability: Joint and personal liability of partners for partnership debts (Kendall v Hamilton) – may be jointly and severally liable for torts and crimes committed by a fellow partner.

**Authority of Partners**

**Actual authority:**

* **Express** – expressly authorised by other partners;
* **Implied** – partners have implied authority to act on behalf of the other partners in doing all the things that would be **necessary to carry out their express authority and to carry on the business of the partnership**, for example buying and selling trading stock, hiring employees and incurring debts and paying debts on the behalf of the partnership. Implied authority can be overridden by express instructions to the contrary or the partnership agreement – Construction v Hexyl (1985)

**Apparent authority:**

* In addition, a partner may have **apparent authority** to act on behalf of the other partners. Where a partner acts without the actual authority of the firm, the other partners will still be liable for their actions if 4 requirements are satisfied:
  1. The partner was carrying on business of the kind carried on by the firm (Mercantile v Garrod); (Goldberg v Jenkins)
* In deciding whether or not a partner was engaged in the usual ‘kind of business’ of the partnership, the court will consider: what the usual business of the partnership actually is; and what transactions a partnership of that kind would usually engage in.
  1. That business was being carried on by the partner in a usual way
  2. The person with whom the partner was dealing knew or believed they were a partner;
  3. The person with whom the partner was dealing did not know or suspect that the partner had no actual authority (Crouch v IPG).
* \*\*LOOK BELOW FOR TUTORIAL EXAMPLE

**Fiduciary Duties:**

Partners owe fiduciary duties (to act in good faith for the common good of the partnership) to each-other, including:

* Not to profit personally from their position or from information gained as a result of that position (Chan v Zaccharia);
* Not to put themselves in a position where there will be a conflict of interest without keeping their partners informed;
* Not to compete with the partnership;
* To fully disclose to the other partners all matters likely to affect the partnership (Law v Law);
* To account for any private profits made without the consent of the other partners as a consequence of the above (Birtchnell v Equity);

Tutorial

\*\*\* Told in question the two parties are already in a Partnership

Issue - Was Enshen authorised to enter into this contract with CW? Can CW argue that the partnership will be bound to the contract?

Law - S5 (1) Partnership Act 1891 (Qld) – sets out the requirements for people being in a Partnership. Mutual Liability: Each partner in a partnership is the agent of the firm; they are the agent of the other partners. Each partner has express authority, implied authority and apparent authority to act on behalf of the other partners when dealing with 3rd parties such as financiers, suppliers and customers. Actual Authority: Express authority is... Implied authority is…Apparent Authority: In addition, partners may also have apparent authority. Requirements: 1), 2), 3), 4) (Case)

Application - Enshen is expressly authorised to… Attached to this, Enshen also has implied authority to… However, this express authority also means that for anything over $15 a kilogram, Enshen has to… Enshen did not have actual authority to enter into the contract with CW to buy the steak at $30 per kilogram because… Can CW argue that the partnership is bound because of apparent authority? Enshen was carrying on business of the kind carried on by the partnership because … The business was / was not being carried on by Enshen in the usual way because … CW did believe that Enshen was a partner because … CW did not know or suspect that Enshen had no actual authority to purchase the steaks because …

Conclusion - On the balance of probabilities, a court would most likely find that the stronger argument is that despite Enshen not having actual authority to enter into the contract on behalf of the partnership, the partnership will be liable under apparent authority to pay CW for the steak.

**Notes 4 – Intellectual Property**

‘*Intellectual property law grants a business the right to prevent others from copying, using or exploiting its IP without its permission’ … ‘Intellectual Property is a form of intangible creation such as the expression of an idea of a trademark; it is a product of intellectual effort rather than a physical manufacturing process’*

**Copyright**

Copyright law protects text, images and other forms of expression from unauthorised reproduction.

Under s32 of the Copyright Act 1968, a creation will only be **(1)** **protected** by copyright if all of the following 3 elements are satisfied:

1. The creation is a ‘work’ or ‘subject matter other than works’ (Mirror Newspapers v Queensland Newspapers);

* Literary works: expression of an idea in the form of tect
* Musical works: a particular combination of notes and sounds
* Dramatic works: a choreographic show, dance or film script
* Artistic works: a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not
* Subject matter other than works: sound recordings, films, TV and sound broadcasts, published editions
* NOTE: single words, names, titles, slogans and headlines are too short and/or unoriginal to be protected as literary works (Fairfax Media v Reed International Books – newspaper copying headline)

1. The creation is original (Desktop Marketing Systems v Telstra);

* The creation must be the result of the creator’s own skill and effort rather than the result of copying from another source. A minimal degree of creativity is required (Desktop Marketing Systems v Telstra – telephone directories copied).
* If two creators express the same idea and their respective creations are created independently without copying, both will be protected by copyright

1. The creation is expressed in a material form (John Fairfax and Sons v Australian Consolidated Press)

* Facts, information methods and systems are not protected by copyright unless they are expressed in material form.
* It is not the originator of an idea who owns the copyright but the person who first expresses the idea in material form (Donoghue v Allied Newspapers – jockey gave ideas to journalist who published)

Duration:

* Any work: 70 years after the creator’s death or first publication
* Film or sound recording: 70 years after first publication
* Television or sound broadcast: 50 years after first publication
* Published editions: 25 years after first publication

Where copyright is created by someone ‘in pursuance of the terms of his or her employment by another person’ then that other person (i.e. the employer) is the copyright owner CA s35 (6)

**Copyright (2) infringement**

*‘Copyright is directly infringed when a person exercises the copyright owner’s exclusive rights in relation to the creation without their permission to do so’*

The 3 requirements to establish **direct infringement** of copyright are as follows:

1. A substantial part has been copied;

* There is no fixed quantity, it is the quality of the part that has been copies that will be taken into consideration (Hawke & Sons v Paramount – substantial bars copied)

1. There is objective similarity between the original and the copy;

* The test applied whether a reasonable person would view the copy as similar to the original (Zeccola v Universal – Italian Jaws)

1. There is a causal connection between the original and the copy;

* To establish, it must be shown that the maker of the copy had access to the original

**Indirect infringement**:

* Importing products knowing that if they had veen manufactured in Australia they would be a direct infringement of copyright
* Selling or renting products known to be unauthorized copies
* Permitting a place of public entertainment to be used for public performance which is known to be unauthorised
* \*\*LOOK BELOW FOR TUTORIAL EXAMPLE

Tutorial

Issue 1 - Is the slogan ‘Country Meets City: Teaching Business the Australian Way’ protected by copyright law? Is OWC’s information package protected by copyright law?

Law - Copyright law protects text, images and other forms of expression from unauthorised reproduction. A creation will only be protected by copyright if all of the following 3 elements are satisfied: 1), 2), 3) (Cases). Copyright is directly infringed when a person exercises the exclusive rights of the copyright owner in relation to the creation without the owner’s permission to do so. The 3 requirements to establish infringement of copyright are: 1) 2) 3) (Cases)

Application - Is OWC’s slogan “Country Meets City: Teaching Business the Australian Way” protected by copyright? What is the exception for business slogans? If OWC’s slogan is not capable of copyright protection – what about OWC’s information package? To answer this, 3 elements for copyright protection must be addressed: 1) OWC’s information package is a ‘work’ or ‘subject matter other than works’? Or not? Because…2) OWC’s information package is original? Or not? Because …3) OWC’s information package is expressed in a material form? Or not? Because… Has AIC’s information package infringed OWC’s copyright in the OWC information package? To answer this, 3 elements for copyright infringement must be addressed: 1), 2), 3). If a breach of copyright claim is successful, what remedies would OWC be able to rely upon…

Conclusion - On the balance of probability, a court would likely decide…

A person may rely upon the following **defences:**

**Fair dealing** – a creation does not constitute an infringement of copyright if it is for the purpose of:

* Criticism or review (CA ss41, 103A)
* Parody or satire (CA ss41A, 103AA)
* Reporting news (CA ss42, 103B)
* Judicial proceedings or professional advice (CA ss43, 104)
* Research or study (CA ss40, 103C)

**For research and study** (the following will be considered fair dealing):

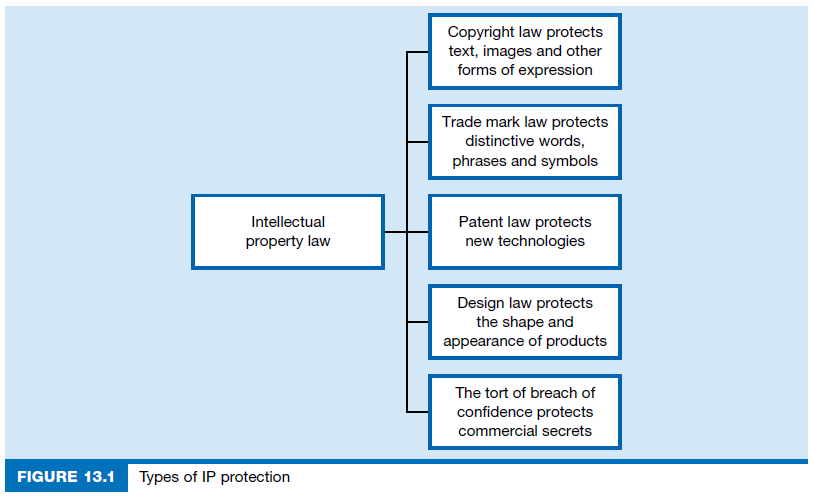
* The whole of a journal article
* 10% of the pages or one chapter of an electronic publication.
* 10% of the words or one chapter of an electronic publication.

**Other defences:**

* Reproducing text for private use
* Reproducing text for a collection in a place of education
* Public readings and recitations

In the event of **infringement** (not trademark), the following **remedies** are possible:

* **Damages** to compensate the copyright holder for any loss suffered as a result of infringement.
* **Additional damages** if the infringement was deliberate and the court wishes to deter others.
* **Injunction** to stop infringement and prevent future infringement
* **An account of profits** – the defendant **pays the owner any profits** made as a result of infringement.
* An order that the defendant **transfer** to the owner any **infringing products**.



**IP** – page 467, **Copyright** – page 469, **Trademarks** – page 486, **Patents –** page 496, **Designs** – page 504, **Confidential Information** – page 507 (could link to Torts or Contractual Issues)

**Notes 5 – Australian Consumer Law**

The **Australian Consumer Law** (ACL) is a Schedule to the *Competition and Consumer Act 2010* (Cth).

The ACL protects consumers by prohibiting misleading or deceptive conduct generally, unconscionable conduct, unfair terms and various specific forms of prohibited conduct.

The ACL is enforced by the ACCC and by various State and Territory consumer protection agencies.

S3 ACL states that a person is a **consumer** if they have acquired goods or services:

* Of a kind ordinarily acquired for personal, domestic or household use or consumption, and
* That have not been acquired for the purpose of re-supply or for use in a manufacturing process.

**S18 – Misleading and Deceptive Conduct**

Section 18 (1) of the ACL states: ‘a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive’.

* Under s18, intention or fault is irrelevant and liability cannot be avoided by use of a disclaimer (ACCC v Telstra)
* S18 is not limited to consumer transactions or the supply or possible supply of goods or services – the words of s18 do not restrict who can bring a s18 action - S18 can be relied upon not only by consumers but also by members of the public, lobby and public interest groups, other businesses and competitors (Gillette v Energiser)
* ACCC v C.I & Co (Egg case)

A business will have contravened ACL S18 if all of the following 4 requirements are satisfied:

1. ‘A person must not’

* Either a person, incorporated or an unincorporated business entity

1. ‘Trade or Commerce’

* Conduct involves or is associated with commercial activity (Concrete Constructions Pty Ltd v Nelson) – non-commercial context does not apply

1. ‘Engaging in Conduct’

* Not defined under the ACL, however s4 (2) of the TPA defined ‘engaging in conduct’ as ‘doing or refusing to do an act’
* A person will ‘engage in conduct’ if they make a statement, claim or promise, perform and action or refuse to do any of these things
* In certain circumstances, even silence can be conduct (Henjo Investments v Collins)

1. ‘Misleading or Deceptive’

* Weitmann v Katies Ltd defined the terms as following: ‘mislead’: to lead astray in action or conduct; to lead into error; to cause error
* ‘Deceive’: to cause to believe what is false; to mislead as to a matter of fact; to lead into error; to impose upon, delude, take in.

In deciding whether conduct is misleading or deceptive the court will use an objective test which derives from the case of **Taco Company of Australia Inc v Taco Bell Pty Ltd**.

1. It is first necessary to identify relevant sections of consumers to whom conduct is aimed at – identify the relevant section (or sections) of the public (which may be the public at large) by reference to whom the question of whether the conduct is, or is likely to be, misleading or deceptive falls to be tested;
2. Is it misleading and deceptive to those consumers or not? - once the relevant section of the public is established, the matter is to be considered by reference to all who come within it, including the astute and the gullible, the intelligent and the not so intelligent, the well-educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations.

To establish further contravention of ACL s18, it need only be shown that a small percentage of the target audience is likely to be misled or deceived. However, a certain amount of intelligence on the part of the target audience can be assumed:

* **Annand & Thompson Pty Ltd v TPC**: It is fair to say that the question is to be tested by the effect on a person, not particularly intelligent or well-informed, but perhaps of somewhat less than average intelligence and background knowledge, although the test is not the effect on a person who is, for example, quite unusually stupid. The question is not whether the purchaser was deceived but whether the conduct was misleading or deceptive (ACCC v Powerballwin.com).
* Sales puff or exaggeration may be misleading and deceptive (Given v Pryor) – but to determine such, apply the two tests from Taco.
* A statement that is literally true can still be misleading or deceptive - but to determine such, apply the two tests from Taco.
* S4 – Misleading Representations with respect to Future Matters
* S18 may apply to future promises (s4) if:
* A person makes a representation with respect to any future matter; and
* The person does not have reasonable grounds for making the representation
* The representation is taken, for the purposes of this schedule, to be misleading
* \*\*LOOK BELOW FOR TUTORIAL EXAMPLE

Tutorial

Issue - Can Sandra bring an action against Charles under the ACL?

Law - Although located in a Schedule of the Competition and Consumer Act titled ‘Consumer protection’, an action under s18 does not have to be brought by a consumer. It can also be brought by… (Case) ACL s18 provides that: … A business will have contravened s18 if the following are satisfied: The business has ‘engaged in conduct’; The conduct was ‘in trade or commerce’; The conduct was ‘misleading or deceptive or likely to mislead or deceive’. A business engages in conduct if…Trade or commence is defined as…Whether particular conduct is ‘misleading or deceptive or is likely to mislead or deceive’ is an … test. In Taco v Taco Bell the Court explained the test for determining whether particular conduct is misleading or deceptive:1), 2) In Annand & Thompson Pty Ltd v TPC the test was further examined: Broadly speaking, it is fair to say that the question is to be tested by the effect on a person… Although, the question is not to be tested by the effect on a person who is, for example…To establish a contravention of s18, it need only be shown that a small / large percentage of the target audience is likely to be misled or deceived. Sales puff may / may not be misleading and deceptive – to determine this consider the tests from Taco v Taco Bell. A statement that is literally true can still be misleading or deceptive (Henderson v Pioneer Homes).

Application - As a competitor Sandra can bring an action under s18 against Charles. Applying the 3 elements: Charles has engaged in conduct because…The conduct was in trade or commerce because…The important question is whether Charles’s conduct is misleading or deceptive or likely to mislead or deceive. It is debateable whether or not anyone has actually been misled or deceived at this point. However, s18 can be used to prohibit such behaviour if it is likely to mislead or deceive, even though no-one has actually suffered any loss or damage yet. So, using the two tests from Taco Bell: Identify the relevant section of the public. This could include people who … Then, with reference to the 2nd test in Taco Bell, consider all who may fall within this section of the public and, applying the test in Annand, ask yourself: QUESTION 1: How would people who like to eat at French restaurants in Brisbane, and are of below average intelligence or background knowledge, interpret the words, ‘… made with all fresh ingredients’? Does it make a difference that the statement is literally true: “fresh from the tin”?... ANSWER: … QUESTION 2: How would people who like to eat at French restaurants in Brisbane, and are of below average intelligence or background knowledge, interpret the words, ‘The best French food in Brisbane…’? ANSWER:…

Conclusion - A Court would most likely find that Sandra could bring a s18 claim against Charles. Sandra would be entitled to a range of remedies, including …

**S20 – Unconscionable conduct within the meaning of unwritten law (s20,21,22)**

* ‘A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time’

**S21 – Unconscionable conduct in connection with goods or services**

\*\* Unconscionable and unfair terms are likely to be together. Question the *terms*.

ACL s21 states:

A person must not, in trade or commerce, in connection with:

1. The supply or possible supply of goods or services to a person (other than a listed public company); or
2. The acquisition or possible acquisition of goods or services from a person (other than a listed public company);

… engage in conduct that is, in all the circumstance, unconscionable

A business will have contravened ACL s21 is all of the following requirements are satisfied:

1. The business has engaged in conduct
2. The conduct was in trade or commerce
3. The conduct was in connection with the supply of goods or services to, or acquisition of goods or services from, another person
4. The other person was not a listed public company
5. The conduct was unconscionable

**S22 - Looks at a range of matters that a Court may consider to determine whether a person has contravened section 21.**

Section 22 (1) and (2) takes into account both procedural and substantive unconscionability, to determine a breach of s21, including:

* Relative strengths of the bargaining positions;
* Imbalance in the terms (favours stronger party);
* Whether the consumer was able to understand any document; and
* Whether any undue influence or pressure was exerted by the person (supplier) on the consumer

Procedural Unconscionability:

* v Complex and incomprehensible language and terms hidden away in the document (contract);
* Inequality of bargaining power between parties due to factors like age, infirmity of mind or illiteracy;
* Harsh or oppressive behaviour; unfair tactics used by the stronger party.
* (Cth v Amadio)

Substantive Unconscionability:

* Imbalance in the terms (leaning towards the stronger party);
* Harsh, oppressive or unreasonable terms;
* Exclusion clauses or excessive payment clauses advantaging the stronger party;
* Overall terms of the contract operate to benefit the stronger party and are unduly one-sided from perspective of weaker party;

**S23 – Unfair contract terms (s23, 24, 25, 26)**

A term of a contract will be unfair in contravention of ACL s23 and therefore void if:

1. The contract is a consumer contract. This means the contract is for the supply of goods, services or an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominately for personal, domestic or household use or consumption: ACL s. 23(3)
2. The contract is a standard form contract
3. The term is unfair

* According to ACL s. 24(1), a term of a contract is 'unfair' if three requirements are satisfied:

1. It causes a significant imbalance in the parties' rights and obligations arising under the contact.

* *On the balance of probabilities:*

1. It is not reasonably necessary to protect the legitimate interests of the business
2. It would cause detriment to the consumer. 'Detriment' includes financial detriment, inconvenience, delay or distress

* ACL s24(2) states that when considering whether a term is unfair under ACL s24(1) it must also take into account:

1. The extent to which the term is transparent;
2. The contract as a whole

* ACL s24 (3) states that to be transparent a term must be:

1. Expresses in reasonably plain language; and
2. Legible; and
3. Presented clearly; and
4. Readily available to any party affected by the term

**S25 – Examples of Unfair Terms**

* A term that permits the business (but not the consumer) to avoid or limit performance of the contract
* A term that permits the business (but not the consumer) to terminate the contract
* A term that penalises the consumer (but not the business) for a breach or termination of contract
* A term that permits the business (but not the consumer) to vary the terms of the contract
* A term that permits the business (but not the consumer) to renew or not renew the contract
* A term that permits the business to vary the upfront price payable under the contact without the right of consumer to terminate the contract
* A term that permits the business the unilaterally vary the characteristics of the goods, services or interest in land being supplied
* A term that permits the business to unilaterally determine whether the contact has been breached or to interpret its meaning.
* A term that limits the vicarious liability of the business for its agents
* A term that permits the business to assign the contract to the detriment of the consumer without the consumers consent
* A term that limits the consumer's right to sue the business
* A term that limits the evidence the consumer can present in proceedings relating to the contract
* A term that imposes the evidential burden on the consumer in proceedings relating to the contract

**S26 – Exceptions**

* Terms that define the main subject matter of the consumer contract
* Terms that set the ‘upfront price’ payable under the contract, or
* Terms that are required, or permitted, by a law of the Commonwealth or a State or Territory

**S29 – False or Misleading Representations**

S29 stimulates that a business must not, in trade or commerce, in relation to the supply of goods and services, make false or misleading misrepresentations about those goods or services, including:

* That the goods or service are of a particular standard, quality, value, grade, composition, style or model, or have had a particular history or particular previous use (ACCC v C.I & Co– Eggs. Also links to misleading and deceptive conduct)
* That the goods are new
* That it has a sponsorship, approval or affiliation it does not have (Hartnell v Sharp)
* With respect to the price of the goods or services
* Concerning the availability of facilities for the repairs of its goods or of spare parts for its goods
* Concerning the place of origin of its goods
* Concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy

**Consumer guarantees**

The ACL implies into contracts for the sale of goods to consumer guarantees that:

* The seller has title: ACL s51
* The consumer will have undisturbed possession: ACL s.  52
* There are no undisclosed securities: ACL s. 53
* The goods are of acceptable quality: ACL s. 54
* The goods are fit for any disclosed purpose: ACL s. 55
* The goods correspond with their description: ACL s. 56
* The goods correspond with any sample or demonstration model, in quality, state or condition: ACL s. 57
* The manufacturer will ensure that repair facilities and spare parts are reasonably available: ACL s. 58
* The manufacturer will comply with any express warranties given in relation to the goods: ACL s. 59

**S54 - Acceptable Quality**

In every contract for the supply of goods to a consumer in trade or commerce (other than a scale by auction), there is a guarantee that the goods will be of acceptable quality – being (S2):

* Fit for all the purposes for which goods of that kind are commonly supplied; and
* Acceptable in appearance and finish; and
* Free from defects; and
* Safe; and
* Durable;

Do not need to prove all elements, just some. As much as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable (this falls under an ‘implied term’ as mentioned earlier in the semester) (Licciardo v Plush Think Sofas Pty Ltd) (Mitchell v Oz Design Furniture Pty Ltd)

**S55 - Fit for Purpose**

If a person supplies, in trade or commerce, goods to a consumer … there is a guarantee that the goods are reasonably fit for any disclosed purpose and for any purpose for which the supplier represents that they are reasonably fit.

* A disclosed purpose is a particular purpose (whether or not that purpose is a purpose for which the goods are commonly supplied) for which the goods are being acquired by the consumer and the consumer makes known, expressly or by implication to the a) supplier or a person by whom any prior negotiations or arrangements in relation to the acquisition of the goods were conducted or made, or b) the manufacturer
* This section does not apply if the circumstances show that the consumer did not rely on, or that it was unreasonable for the consumer to rely on, the skill or judgment of the supplier, manufacturer etc. (ACCC v C.I & Co Pty Ltd - free range and caged egg)

**The ACL implies into contracts for the supply of services to consumers guarantees that:**

* The services will be rendered with due care and skill: ACL s60
* The services and any product resulting from the services, will be fit for any disclosed purpose: ACL s. 61
* The services will be supplied to the consumer within a reasonable time: ACL s. 62  The guarantees cannot be excluded or overridden by the business. ACL s. 64 automatically voids any terms that seek to do so.

**Consequences**

If a business breaches a general prohibition it may be the subject of civil action but not criminal penalties. If a business breaches a specific prohibition it may be subject of both a civil action and a criminal penalty such as a fine (up to $1.1 million for companies and $220,000 for individuals)

**General prohibitions** include: misleading or deceptive conduct, unconscionable conduct, unfair terms in consumer contracts. Specific prohibitions include: pyramid schemes, inertial selling, wrongly accepting payments, bait advertising.

**Remedies for contravention of the ACL include:**

State: ACL gives much broader range of remedies in comparison to contract law

* Pecuniary (monetary) penalties (ACL ss224-331)
* Injunctions (ACL ss232-235)
* An order that the business pay damages to any person who has suffered loss because of the contravention (ACL s236)
* A compensation order for injured persons (ACL ss237-241)
* An order declaring the contract void, varying a contract refusing to enforce a contract, ordering compensation, ordering repair of goods, ordering the provision of services, or ordering execution of an instrument relating to land (ACL s243)
* Non-punitive orders including orders directing the business to perform community service or undertake an educational program (ACL s246)
* An adverse publicity order (ACL s247)
* An order disqualifying a person from managing a corporation (ACL s248)
* …The ACCC may take investigative, administrative or court actions against parties in breach of the ACL and the CCA

**Remedies for consumer guarantees:**

ACL Part 5-4 sets out the remedies available to a consumer when a product does not comply with the consumer guarantees in ACL Part 3-2 (those relating to title, fitness for purpose, etc)

**Action against supplier of goods or services (page 420)**

**Action against manufacturer (page 420)**

**Notes 6 – Dealing with Competitors**

**ACL Competitors**

Part IV of the CCA promotes competition by prohibiting certain trade practise that have the effect of substantially lessening competition in the market in order to promote competition in the market.

**Defences**

* Arrangements specifically authorised or approved by a Commonwealth or State or Territory Act;
* Industrial agreements in relation to condition of employment
* Provisions for the sale of a business
* Compliance with Australian standards
* Partnership agreements between individuals
* Export agreements (if full particulars are notified to the ACCC)
* Consumer boycotts
* Protection of intellectual property

**Authorisation (The ACCC can authorise) (page 452)**

* Agreements that will lessen competition
* Price fixing
* Boycotts
* Exclusive dealings
* Resale price maintenance
* Prohibited mergers
* … IF it is of the view that the benefits to the public outweigh the detriment to the public caused by the conduct. However, ACCC cannot authorise a misuse of market power. The party needs to apply to the ACCC to get authorisation.

**Withdrawal of Authorisation**

A business can notify the ACCC of proposed exclusive dealing conduct and gain automatic immunity from legal proceedings (CCA s93). However, the ACCC can withdraw the immunity if it forms the view that the subsequent conduct will:

1. Substantially lessen competition; and
2. Is not out-weighed by a public benefit; and
3. The immunity ceases 30 days after the ACCC’s decision to withdraw it

**Cartel Conduct**

A business cannot make a contract or arrangement, or arrive at an understanding that lessens competitionby, for example, fixing prices, controlling outputs, rigging bids or allocating customers by using a cartel provision (CCA ss44ZZRJ; 44ZZRK)

* S44ZZRD: A provision in a contract, arrangement or understanding between two or more businesses that are or should be in competition with each other which:
  1. Fixes prices;
  2. Controls the output of goods to inflate prices
  3. Rigs bids or tenders
  4. Allocate customers, suppliers and territories
* (TPC v TNT – allocation of cxs); (ACCC v Visy – discrimination of cxs ($))

**Price Fixing**

A business cannot make a deal with its competitors that they will all charge the same price for particular products, or that they will all raise, lower or maintain their prices (CCA s44ZZRD; ACCC v Alice). A business will have engaged in price fixing if:

1. The business has a contract, arrangement or understanding with one or more other businesses with which it is in competition. This means that there was a ‘meeting of minds’ between the competitors.
2. The contract, arrangement or understanding contains a provision that has the purpose or likely effect of fixing, controlling or maintaining prices (E.g. petrol price pixing)

* Note: just because two parties act in parallel does not necessarily mean that they are in collusion; a common example of parallel conduct is price leadership (TPC v Email)

**Misuse of market power**

Misuse of market power only applies to a business if it has a substantial degree of power within a market.

A business will engage in misuse of market power in breach of CCA s. 46 if it uses its substantial degree of power within a market to:

* Eliminate or substantially damage a competitor.
* Prevent the entry of a person into a market.
* Deter or prevent a person from engaging in competitive conduct in that or any other market.

The court will consider whether the businesses conduct:

* Adversely affects the competitive process in a market,
* Adversely affects consumers in terms of price, quality, availability, choice or convenience,
* Raises the costs of entry to a market,
* Can be explained in terms of efficiency or a desire to engage in genuine competitive rivalry.

**Predatory Pricing**

An example of misuse of market power is predatory pricing which occurs when it charges an unrealistically low price for its product to force a competitor out of the market.

Other examples of conduct that contribute misuse of market power include:

* Refusing to supply products to a competitor to exclude them from a market (QLD Wire v Broken Hill Proprietary)
* A major retailer refusing to sell products that are on special at nearby independent stores (ACCC v Australian Safeway Stores)

**Resale Price Maintenance (page 449)**

Supplier/manufacturer tells retailer how to sell their product. This is in breach of s48 CCA. A business will engage in resale price maintenance if:

1. Imposes a minimum price upon resellers of its product; or
2. Sets a price that retailers are likely to understand is a minimum price; or
3. Agrees with retailers that they won’t advertise its product below a specified price; or
4. Induces a retailer not to discount the product; or
5. Threatens to refuse supply to a retailer to force them to comply with any of the above

* (TPC v Sony) (ACCC v Chaste) (ACCC v Dermalogica)

**Primary Boycotts (page 450)**

A business is not permitted to agree with one or more other businesses that they will collectively refuse to deal with a particular competitor, supplier or customer.

A **primary** boycott is where two or more businesses **directly** boycott the products of the target.

CCA s45 prevents a business to make a contract or arrangement, or arrive at an understanding that contains an exclusionary provision (TPC v JW Bryant)

An exclusionary provision is a provision in an agreement between competitors intended to prevent, restrict or limit the supply or acquisition of products from, a particular person or class of persons.

**Secondary Boycotts (page 450)**

A **secondary** boycott occurs if two or more businesses put pressure **on another business** with whom they have no dispute to discourage **them** from dealing with the target of the boycott.

**Exclusive Dealing (page 452)**

‘*Exclusive dealing occurs when a business imposes restrictions on another’s freedom to choose with whom, in what amount, or where they buy products’*

CCA s47 prohibits two types of exclusive dealing: full-line forcing and third-line forcing.

A business will engage in **full-line** forcing if it refuses to supply its product unless the buyer agrees:

* Not to buy products from a competitor
* Not to resupply products acquired from a competitor
* Not to resupply its product to a particular place

A business will enagage in **third-line** forcing if a business makes a supply of its products to a customer conditional upon the customer **also purchasing the product of another business** (CCA s47 (6)).A business will have engaged in **third line** forcing if:

* There is one product that the purchaser desires and another product is being forced upon them
* The business ‘forces’ the product of a third party onto the purchaser
* The purchaser will not gain the desired product without also being required to obtain the product of the third party

Legitimate reason to not deal with consumer means no contravention of the CCA.

**Mergers/Acquisition (page 454)**

*‘A merger occurs when two or moe organisations combine to form a single organisation’*

*‘An acquisition occurs when one organisation acquires ownership or purchases the assets of another organisation’*

A business is not permitted to merge with or acquire ownership of another business if by doing so it will have the effect of substantially lessening competition in the market: CCA s50

In considering if competition has been lessened … page 454

**Agreements that lessen competition (455)**

A business is not permitted to make a contract or arrangement or arrive at an understanding, that has the purpose or effect of substantially lessening competition (CCA s45)

In establishing a breach of these provisions it does not need to be shown that the competitors have finalised a formal agreement. It is sufficient to show that they have reached an ‘arrangement or understanding’ (ACCC v Visy Industry Holdings)

**Penalties and Remedies**

If a breach of Part IV is established, the Federal court can grant a number of possible remedies, including:

If the business is not a corporation the maximum fine is $500,000

If the business is a corporation, the maximum fine will usually be the greatest of (CCA s76):

* + $10 million;
  + If the Court can determine the value of the benefit that the business has obtained directly or indirectly as a result of the breach; 3 times the value of that benefit;
  + If the court cannot determine the value of that benefit: 10% of its annual turnover

Additionally:

* Injunctions (CCA s80);
* Damages (CCA s82);
* Compensation orders to a victim (s79B)
* Divestiture of shares or assets that have been acquired in the case of an unauthorised merger: (s81);
* Other orders made by court application by an aggrieved party, including specific performance, rescission of a contract and variation (s87);
* Probation orders, community service orders and corrective advertising orders (s86C);
* Enforcement of a written undertaking given to the ACCC and/or a declaration;
* Statutory exemptions from certain prohibitions are available under the CCA for acts that would otherwise constitute a breach of Part IV.
* Apply: Dot points & precedents
* End of Law Section: Potential remedies are …, Potential defences are …
* Conclusion: Thus, Tim may be able to rely upon contributory negligence but Bob will be able to claim damages as Tim is liable for the tort of negligence.