**Laws1100 Notes**

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Lecture 1: Introduction to Business Law

**The Law needs people to believe in the law in order for it to work.**

* If people do not trust the law, then it has trouble being enforced and obeyed.
* Law has to be binding – it has to be followed, no exceptions or excuses.

**Law begins as rules, societal mores that form the unspoken law of basic human interaction. For example, holding the door for people.**

**Social rules have no system of enforcement or bindingness.**

**Laws have a system of enforcement and bindingness.**



**What is the purpose of Law?**

* Law provides consistent forms of resolving disputes.
* Law resolves disputes in a fair manner
* Maintains social order
* Preserves and enforces community values.
* Protects the disadvantaged
* Regulates the economy.
* Prevents the misuse of power

**The Rule of Law**

* The law is predictable
* It is passed by a proper authority in a proper manner
* Everyone (government included) is bound by the law
* The law is not arbitrary
* The law is not retrospective
* The law is enforceable
* Law is not retroactive, New laws do not affect crimes in the past.

**Why does law Change?**

* The law changes regularly because of:
* Political change
* The need to fix problems with the law
* Changing community values
* Pressure from lobby groups
  + Lobby groups are groups of people that petition parliament members to change the law to accurately represent the views of the people and conform to the modern society.
* And changing technology

**Law and Justice**

* Justice can be understood as fairness, such as fair compensation or punishment, a fair decision or a fair distribution of resources. The notion of fairness has influenced the development of business law in many ways.

**Law and Ethics**

* Ignorance of the law is not a defence
* A legal choice is one that complies with the law; an **ethical** choice is one that is recognised as ‘good’ and ‘right’
* Law and ethics generally correspond, but:
  + - A decision that is legal may not be ethical, and
    - A decision that is ethical may not be legal.

**Law and Politics**

* While the law is more than merely politics, the law is shaped and influenced by power and politics. Particular laws are usually the expression of a political ideology. Legislation is made by politicians to implement government policies and achieve political objectives.
* Parliamentary politics are democratic processes made by elected representatives.

**Business and the Law**

* Functions of commercial law
  + Facilitates law
  + Regulates business activity
  + Adjudicates law

Lecture 2: Sources of Law

**Federation**

The **Commonwealth of Australia** came into existence on 1 January 1901, A new federal or Commonwealth government was established, with its own constitution, parliament, executive government and court system.

* The Three Arms of government
* Legislature
  + Makes Law
* Executive
  + Administers Law
* Judiciary
  + Interprets Law

**THESE 3 ARMS, ARE COMPLETELY SEPARATE, THEY ARE NOT ALLOWED TO INTEFERE**

**WITH THE OTHERS PROCESSES.**

* + Constitution – One arm, cannot do what another can do.
    - If one arm could do all three, it would descend into a dictatorship.

**Sources of Law**

Australia has a Common Law system – divided into statute and common law. We are not a Civil Law System.

* Law of Equity = Fairness

**Statute Law:** the body of law enacted by the nine parliaments (one commonwealth, six state and two territory)

* + For Example:
    - State legislation such as the *Acts Interpretation Act 1954 (Qld)*
    - Statute/Legislation/Acts
      * Number
      * Title
      * Date of assent
      * Enacting words
      * Commencement
      * Sections, subsections and paragraphs
      * Object
      * Parts and divisions
      * Marginal Notes
      * Definitions sections
      * Schedules
      * Example
* Statute also includes laws made by other government bodies – delegated legislation – such as council or local government by-laws; orders; rules and regulations.
* Case law can be divided into Common Law and Equity – Common law (case law) is the law created by the reported decisions of judges.

**Common Law**: the body of unenacted laws that emanate from the courts at federal, state and territory levels

For Example:

* Decisions of the high court of Australia;
* Decisions of the state and territory Supreme Courts;
* Decisions of the federal and family courts of Australia
* Equity as a source of Law
* **Common Law V Equity**
  + Common Law – Case law developed by Kings Courts in England
  + Equity – ‘fairness’ – historically developed by the Lord Chancellor to supplement and redress the deficiency of common law – example;
  + Today there are no separate judicial systems that regulate common law and equity – a single court system which administers both has been established;
  + Common Law and equity still refers to two distinct sets of rules – for example in contract law, damages was a common law remedy and injunction and specific performance were equitable remedies;
  + In the event of a conflict between common law rules and equity rules – equity would prevail

**Law in a global context: The influence of international law**

* A further source of law arises from the globalisation of trade, markets and commercial and financial transactions.

**Statute – Law making by parliaments**

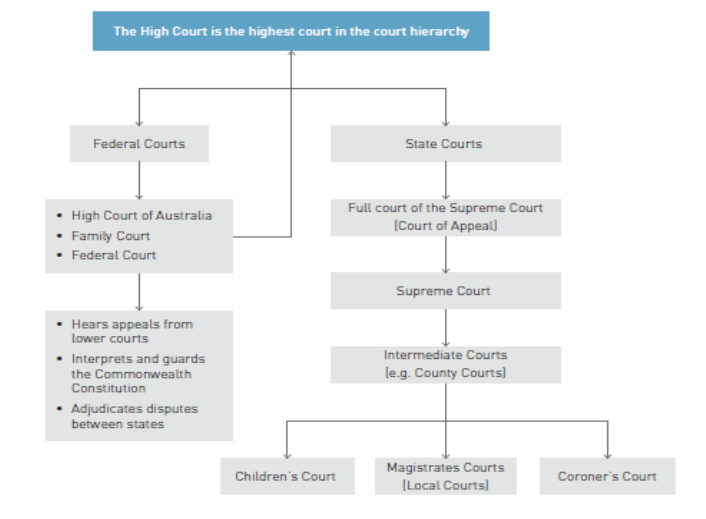
* There are nine parliaments (commonwealth, state and territory) engaged in the law – making process in Australia.
* Usually, each parliament in Australia compromises three elements
  + A lower house (That is, the House of Representatives in the federal parliaments and the Legislative assembly at state and territory level);
  + An upper house (That is, the senate in the federal parliament and the Legislative Council at state and territory level);
  + The Queen or her representative (That is, the Governor – General at federal level, The governor at state level and the Administrator at Territory Level)
    - **Don’t Get confused, State and Territory are the same thing with just different names, it’s because Northern Territory and ACT are fucking shit.**

**How do these parliaments make law?**

* Proposal for making/amending laws comes from government, pressure groups, media
* The draughtsmen draw up the Bill
* The Bill is initiated in the parliament (First reading; Second reading (Committee stage) and Third reading)
* **If passed by both houses, signed by the Governor or Governor-General it becomes ‘Law’**

**Hierachy of courts in Australia**

* Courts are vital to the operation of law as they dispense justice, resolve disputes, compensate the victims for their injuries and punish the wrongdoers.
* Hierachy refers to the ranking of courts according to their importance in the legal system.
* The High Court of Australia Sits at the peak of the Hierachy.
* The High Court has both original and appellate jurisdictions



**Roles of the High court of Australia**

* The High Court was established in 1903 and is the highest court in the land in both the state and federal judicial structures.
* Its jurisdiction falls into three main areas:

1. Hears appeals from the federal courts and the state court systems;
2. Hears disputes between states and disputes between the states and the Commonwealth;
3. Judicial power to interpret the Australian Constitution.

**State/Territory Supreme Courts**

**For Example – The Qld Supreme Court**

• Original jurisdiction - sits as a single Judge with an optional jury of six in civil matters and with a compulsory jury of twelve in contested criminal matters. Unlimited civil and criminal jurisdiction within the State or Territory.

• Appellate jurisdiction - sits as a Full Court or as a Court of Appeal usually with three Judges. Hears appeals from other State and Territory courts lower in the court hierarchy.

**State/Territory District and Magistrates Court**

**For Example – Qld District Court**

• Original jurisdiction - hears civil matters less than or equal to $750,000, and more than $150,000 - criminal matters involving indictable offences – but not serious crimes such as murder which are dealt with by the Supreme Court.

• Appellate jurisdiction - normally hears appeals form the Magistrates Court – however sometimes appeals from lower courts on questions of law can go directly to the Supreme Court.

* + **For Example: The Qld Magistrates Court** - hears civil matters up to $150,000 and criminal matters involving minor offences such as shoplifting and traffic offences - also deals with committal proceedings, hearings relating to serious crimes in which the Magistrate decides whether or not the accused person should go to trial.

**Tribunals**

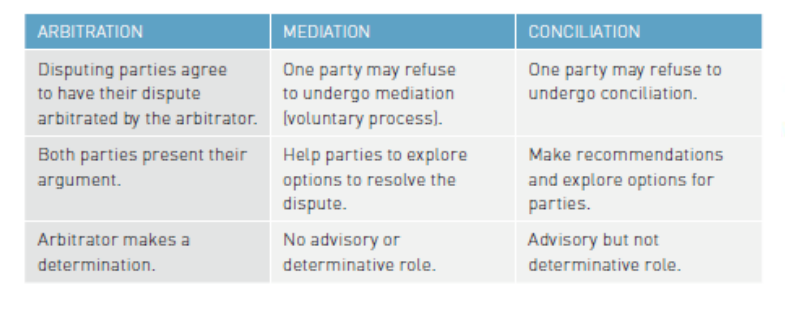
* Quasi – Judicial bodies, not courts.
* Tribunals are not part of the court hierarchy
* Not bound by strict rules of evidence
* Most tribunals review administrative decisions of State or Federal departments
* May be set up by either a state or territory, or the Federal Government
* **For Example: Qld Civil & Administrative Tribunal (QCAT) –** hears particular matters before tribunal member – not a justice – on certain matters up to 25,000 – for example Landlord and tenancy disputes, neighbour fence disputes etc… <http://www.qcat.qld.gov.au/>

**Alternative Dispute Resolution**

**Alternative Dispute Resolution –** before Court proceedings commence

1. Arbitration
   * + A process whereby parties to a dispute present their arguments and evidence to an arbitrator. After hearing both sides of the arguments, the arbitrator makes determination on the dispute.
2. Mediation
   * + A process whereby parties to a dispute attempt to resolve the dispute by negotiation with the help of a mediator.
3. Conciliation
   * + method of dispute resolution where an independent third person (conciliator) helps the parties to reach a mutual agreement between themselves, rather than making a decision in favour of one party. The process is considered to be more formal than mediation and less formal than arbitration or counselling.
4. Arbitration

* Generally cheaper, faster, more private and less stressful than court.
* In commercial situations less destructive to on-going business relations than litigation
* It relieves the pressure on, and therefore the costs of maintaining the court system.



**Law made by courts (common law)**

* **The role of the judiciary is to interpret and apply laws.**

1. By Precedents
2. 2. Statutory Interpretation

**The Doctrine of precedent**

* Precedent is the judgement of a court that establishes a point of law (like cases to be decided alike).
* Courts apply the doctrine when deciding cases based on common law principles.

**Advantages of the Precedent**

* Certainty, predictability and uniformity
* The doctrine of precedent has some flexibility

**Binding Precedent:** Precedent is binding on a lower court when set by a court higher on the same hierarchy and the facts are similar.

**Persuasive precedent**: where a court strongly considers a decision of another court in reaching a decision but is not bound by it.

**How are Precedents Set?**

Courts in arriving at a conclusion (decision) engage in a process of legal reasoning.

* + Important legal principles can be identified from the reasoning – reason for the decision or ratio decidendi (Who has the better case)
    - Ratio Decidendi - the rule of law on which a judicial decision is based.
  + These legal principles form the precedent
  + The Ratio decidendi or precedent is binding
  + Other comments made by judges which do not influence the decision of the court are not binding – referred to as ‘obiter dicta’ (comments by the way).
    - Obiter dicta - a judge's expression of opinion uttered in court or in a written judgement, but not essential to the decision and therefore not legally binding as a precedent.

**Can Precedent be overturned?**

Judges that hear you the first time, absolutely hate when the loser appeals to a higher court. The way the judge looks at it is, if he wins in the higher court then the Judge will look like he made a bad decision and essentially looks like a court. Therefore, if there is an established precedent, judges will usually not overturn it. The only one that will overturn an already established Precedent is the High court.

**Interpreting the Law – Statutory Interpretation**

* Judges interpret Common Law Case Law and Statute Law.
* Sometimes Statute Law is straightforward and easy to understand.
* However sometimes Statute Law is difficult to read, difficult to understand and is often criticised for being long, complex, repetitive and confusing. And one cannot draft a statute to cover every possibility.
* **Statutory Interpretation** – the interpretation by the courts of legislation when called upon to decide whether or not the legislation applies.
* Statutory rules exist regarding the reading and interpretation of statutes.
* For Commonwealth Legislation – the Commonwealth Acts Interpretation Act 1901(Cth AIA);
* For Queensland Legislation – the Queensland Acts Interpretation Act 1954,
* Sections 15AA and 15AB of the Cth AIA and sections 14A and 14B use the purposive approach – For example Cth AIA – Sections 15AA Interpretation best achieving Act’s purpose or object
  + In interpreting a provision of an Act, the interpretation **that would best achieve the purpose or object of the Act** (whether or not that purpose or object is expressly stated in the Act) **is to be preferred to each other interpretation.**
* In determining the purpose or object of the legislation, or resolving any ambiguity, the courts can resort to extrinsic materials - For Example Cth AIA – Section 15AB Use of extrinsic material in the interpretation of an Act:
* …if **any material not forming part** of the Act is capable of assisting in the ascertainment of the meaning of the provision, **consideration may be given to that material**…to **confirm** that the meaning of the provision **is the ordinary meaning** conveyed **by the text of the provision** taking into account its context in the Act and the purpose or object underlying the Act; or to determine the meaning of the provision when… **the provision is ambiguous or obscure**; or the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and **the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.**
* Section 15AB – lists the types of extrinsic material that may be considered …. in the interpretation of a provision of an Act – non-exhaustive - may include:
  + Explanatory memorandums/notes forming part of the legislation;
  + Relevant reports either made by parliament or a royal commission, law reform commission, similar body brought before parliament before the provision was enacted;
  + The speech made by the Minister who introduced the Bill into Parliament;
  + The records of parliamentary debates about the Act.

**Statutory Interpretation Case Studies (Section 15AB Explained)**

Section 15AB – ordinary meaning and a result that is manifestly absurd or is unreasonable:

* Fisher v Bell [1961] 1 QB 394
  + Policeman saw a flick knife with a price tag displayed in Bell’s shop window. He charged Bell under the Restriction of Offensive Weapons Act 1959 which stated: - “Any person who sells, lends or gives an offensive weapon [this included flick knives] to any other person commits an offence”
  + Bell’s lawyer successfully argued that his client had not sold, lent, or given the knife to anyone – he merely placed it in the window – Ordinary meaning in context of purpose or object? Absurd or unreasonable result?
* Smith v Hughes 1960 1 WLR 830
  + The Street Offences Act 1959 prohibited soliciting by prostitutes “in the street”. To try to get around the operation of the Act, the prostitutes began to try to attract business by standing at their windows or on their balconies and calling out to passers-by – Ordinary meaning in context of purpose or object? Absurd or unreasonable result? Absurd or unreasonable result?
  + The legislation covered windows or balconies because even though the prostitutes were technically not in the street, the purpose of the legislation was to prevent prostitutes soliciting customers in public.

Tutorial 1: Introduction

1. Most businesses conduct business by a certain set of behaviours or rules. Where do businesses obtain the rules by which they operate and conduct business? Is It only from the law or are their other sources of rules that businesses conduct business by?

* Ethics
* Uniform Codes (Workplace demeanour)
* Occupational work health and safety.

Lecture 3: The Australian Constitution

**The Constitution**

The Australian Constitution is a legal document that established a federation of the Australian colonies – which became states – The set of rules by which Australia is governed – the legal framework for running the country.

Chapter 1 – Federal Government – Consists of the Queen (Represented by the Governor – General (G-G), House of Representattives and Senate – Known as the Parliament of the Commonwealth

* + The Senate – numbers – election – 6 years;
  + House of Representatitives – numbers – qualifications – 3 years – unless dissolved earlier by G-G
  + S 52 – disagreement between House of Representatives and the Senate – G-G may dissolve the Senate and the House of Representatives simultaneously;
  + 1975 – Senate refused to pass HR Budget bills – government dismissed and Whitlam loses double dissolution election.

Chapter 2 – Executive – Queen, Governor – General and Executive Council;

* + Executive power vested in Queens and exercisable by G-G as Queen’s representative;
  + Federal Executive Council – advises G – G and Chosen by G-G;
  + Can appoint ministers of state to administer Cth Government Departments - must be members of house of representatives or senators.
    - Cth means Commonwealth of Australia, meaning the act is valid for the entire country

Chapter 3 – Creation of Federal Courts – and the High Court;

* + Original and appellate jurisdiction;
  + Judges – appointment and tenure- no-one ever 70 years of age

Chapter 4 – Financial and trade powers;

* + Consolidated revenue fund – for the payment and expenditure of the commonwealth

Chapter 5 and 6 – Relationship between Federal Government and the states and territories;

* + Saving of state constitutions, parliaments and laws
  + S109 – See Below

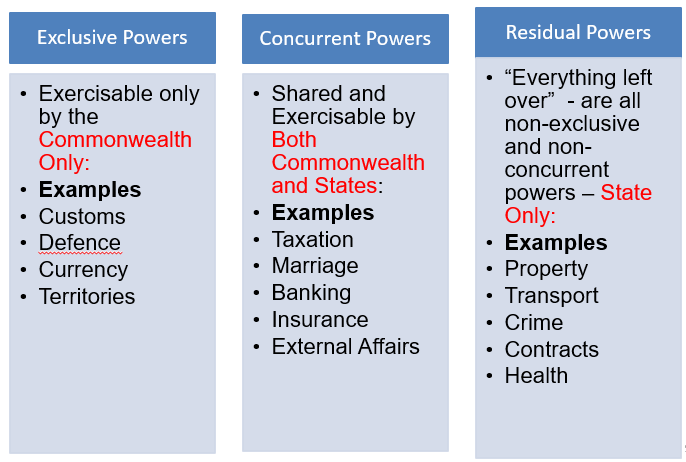
Chapter 7 – The Capital and powers of Governor – General;

Chapter 8 – Altering (Changing) the Constitution – See below

**Division of Powers to Make Laws**

* It was agreed/negotiated to give certain powers to the federal government, to share other powers with the states and for the states to retain all other powers (but delegated some to local (municipal) government).
* Section 9 of the Act creates the Constitution which sets out the division of power – the power to make laws - between the Federal and State governments in Australia and how the Federal government is to function.
* Exclusive powers to make laws about certain Issues (powers exclusive to the Commonwealth Parliament - ss. 90, 114, 121, 122);
* Concurrent powers to make laws about certain Issues (powers exercised both by the Commonwealth and the states - s. 51);
* Residual powers to make laws about certain issues (powers left over to states, i.e. bulk of state-based statute law)

**Balancing State & Commonwealth Power**



**What Happens when Powers Conflict?**

Think about Concurrent Powers – what type of problem could arise?

**Australian Constitution – Section 109**

* “When a Law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid”

**What Happens when Powers Conflict? Cont.**

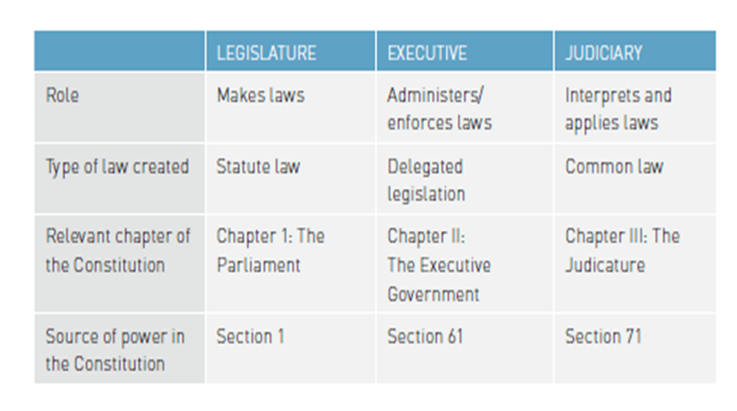
For Example

* For example - In the Tasmanian Dam case, Tasmanian legislation being the Gordon River Hydro-Electric Power Development Act 1982 (Tas) was declared invalid because of the existence of Commonwealth legislation being the World Heritage Properties Conservation Act 1983 (Cth).
* The venue for resolution of disputes regarding conflicts between Federal and state powers - the High Court of Australia.
* The venue for resolution of disputes regarding any interpretation of the Constitution?

**Can the Constitution Be Changed?**

* Section 128: An amendment – a change – to the Constitution must be passed by both Houses of Parliament; and by a majority of voters and by a majority of States. Specifically, the proposed amendment must be:
* Passed by over 50% (an absolute majority) of all elected members in both houses of Parliament;
* Put to a **referendum** of all Australian voters within 2 to 6 months after the absolute majority vote; q
* Approved by a majority of voters and by a majority of voters in a majority of states
* Given Royal Assent by the Governor – General on behalf of the Queen.
* Of the approximate 44 attempts to amend the Constitution which have been made since 1901, 36 have failed.
  + Why do you think that could be?
  + Examples
    - 1951 – Ban communist Party;
    - 1967 – Indigenous Australians to be counted among the populace;
    - 1999 – Australian Republic Referendum; Proposed referendum for constitutional recognition of Australia’s First Peoples.

**Doctrine of Separate Powers**



**LAWS1100 Business Law: How to do Well in this Subject**

1. Study Strategies:
   * Prepare Early and well for Tutorials;
   * Revision Day;
   * Summarise the Material – Guide time management and study tips – Benefits;
2. Mid – Semester Exam – Sat 3rd September – 4 Weeks Away – Closed book – 30 multiple choice questions – Complacency? Or not?
3. Topic 4 onwards – ILAC Style
   * Issue – What’s the biggest legal problem between the parties;
   * Law – What’s the most relevant law applicable to the facts here;
   * Application – the most important part – applying the law listed in your law section to the facts of the question;
   * Conclusion – who has the strongest argument?
   * Forthcoming to help you – Tutorial 3 Topic 4 class exercise, Guide to ILAC technique, Examples of “ok” ILAC answers and much better ILAC answers

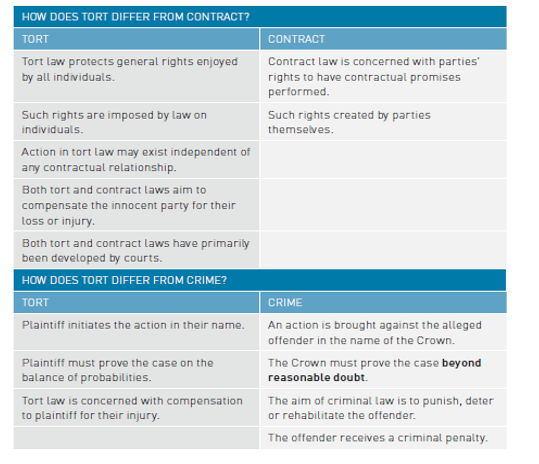
**ILAC – Issue, Rule, Analysis, Conclusion**

1. Identify the legal issue
2. Identify the relevant legal rules
3. Apply the rules to the facts
4. Reach a Conclusion

Lecture 4: Causing Harm – Tort Law

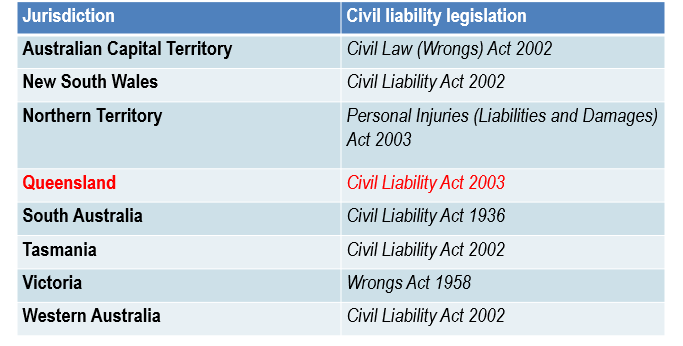
**What is a Tort?**

* Tort = French for a “wrong”
* The word ‘tort’ derives from the Latin *tortus* meaning twisted or crooked, and has become established in the English language as a general synonym for ‘wrong’.
* A civil or a criminal action?
* Why would a broad knowledge of torts law be useful for you?
* In very general terms, a tort is a civil wrong (as opposed to a criminal conduct) other than a breach of contract, which the law will redress by an award of damages.
* The object of the law of torts is to protect those general rights of every person which are conferred as a matter of law.
* Not intended – but doing something that a reasonable person would not do – being carless – failing to do something which a reasonable person would do.

**Liability in tort, contract and crime**

**Carelessly Causing Harm – Tort of Negligence**

* A person commits the tort of **negligence** if they carelessly cause harm to another person.
* Negligence is by far the most common tort: most acts that cause harm to other people are the result of carelessness rather than intent.

**Statutory Rules**

**Tort of Negligence**

3 stages/steps - a person commits the tort of negligence if:

1. They (Defendant) owe the other person (Plaintiff) a duty of care; and
2. They (Defendant) breach the duty of care - the standard expected is that of the ‘reasonable person’; and
3. The breach of duty causes the other person (Plaintiff) to suffer loss, damage or injury and the injury was caused by the breach. This means that the injury suffered by the plaintiff was reasonably foreseeable by the defendant and that the injury was not too remote.

**Requirement 1: Duty of Care**

First Case to really establish the Tort of Negligence – ‘Snail in a bottle’ – Donoghue V Stevenson

* Was it reasonably foreseeable that the defendant’s conduct could cause harm to someone in the plaintiff’s position?
* Are the salient features of the case being consistent with the existence of a duty of care?
  + Relationship, control, vulnerability, personal responsibility – a comparison of the facts of the case with other cases where a duty of care was found to exist.

That 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, 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. [Lord Atkin]

**Requirement 1: Duty of Care – Examples of Established Categories**

* Motorists owe a duty of care to other road users
* Doctors owe a duty of care to their patients
* Accountants owe a duty of care to their clients
* Bankers owe a duty of care to their clients
* Occupiers owe a duty of care to people who come onto their premises
* Employers owe a duty of care to their employees
* Employers can be vicariously liable for their actions of their employees
* Debatable whether schools owe a duty of care to students, contention that it is the parents responsibility and the students behaviour

An occupier is someone who has a control and power over what happens at the premises

**Requirement 1: Duty of Care – Occupier’s Liability**

* An **occupier** of premises owes a duty of care to all persons entering the premises to ensure that the premises are safe:
* Example - Australian Safeway Stores Pty Ltd v Zaluzna (1987) - Control;
  + **Note:** If an occupier’s duty of care exists, One still has to establish stages/steps 2 and 3 - breach of duty and if the harm was caused by the breach of duty - and consider any defences;
  + Question - Does an occupier also owe a duty of care to people who are on their premises without their permission? Example - Hackshaw v Shaw (1984)

**Requirement 2: Breach of Duty**

* Once it is established that a duty of care exists – the second step is working out if that duty of care was actually breached or not? Just because a duty of care is owed, this not does automatically mean that it was breached - it must be shown that the defendant failed to do what a reasonable person would have done or would not have done in the same circumstances
* Who is the reasonable person? – The reasonable person is someone of normal intelligence, credited with such perception of the surrounding circumstances and such knowledge of other pertinent matters as the relevant person would normally possess.
* S 9 Civil Liability Act 2009 (Qld) - Foreseeability
  + Was the risk reasonably forseeable? or not? – either knew or ought reasonably to have known
  + Was the risk not insignificant?
  + Would a reasonable person have taken precautions? Or not?
* S9 Civil Liability Act 2003 (Qld) – in order to work out what a reasonable person would have done or would not have done in the same circumstances- whether they would have taken precautions against a risk of harm or not - the court will take into account:
  + The probability of harm;
  + The likely seriousness of the harm;
  + The burden of taking precautions;
  + The social utility of the defendant’s activity.
* The probability of harm – a low or high chance of occurring? - Bolton v Stone (1951)
* The likely seriousness of the harm – minor or serious? - Paris v Stepney Borough Council (1951);
* The burden of taking precautions – time – consuming and expensive or relatively quick and inexpensive?
* The social utility of the defendant’s activity – is there any social utility? Or not?

**Requirement 3: Causation**

* Merely creating a risk of injury is not actionable
  + Injury must have become actual.
  + Injury must flow from the breach
  + Injury must not be remote
  + In other words, did the breach of duty actually cause the injury? Or Not?
* **What Kinds of Injury may be recognised by law?**
  + Physical Injury
  + Nervous shock/mental/psychiatric injury
  + Economic Loss
  + Damage to Property

**Requirement 3: Causation – Was the Harm caused by the breach of duty? Or Not?**

* S 11 Civil Liability Act 2003 (Qld) **Factual Causation -** Plaintiff must establish that the breach of duty was a necessary condition of the occurrence of the harm:
  + Alexander v Cambridge Credit Corp (1987) – the “But For” test – But for (or If not for) the defendants actions/inaction, would the plaintiff have still suffered harm?
  + Yates v Jones – “Break” in the “chain” of causation
* S 11 Civil Liability Act 2003 (Qld) **Scope of liability –** is it appropriate for the scope of the defendant's liability to extend to the harm actually suffered by the plaintiff? - the actual harm must have been a reasonably foreseeable consequence of the defendant’s breach
  + Donoghue v Stevenson;
  + Overseas Tankships v Morts [1961] – Remoteness

**Defences – Voluntary and Contributory**

* Even if the plaintiff has established all three elements of the tort of negligence, the defendant can still avoid liability, either completely or partially, if they can establish the existence of one or more defences.
* **Voluntary Assumption of Risk**
* If it can be established that the plaintiff was **fully informed/ware** of the risk at the time the harm was caused and that they **voluntarily assumed** the risk, the defendant **may** be relieved of **all** liability.
* **Contributory Negligence**
* If it can be established that the plaintiff **contributed** in some way to their own loss or injury, liability will be apportioned between the defendant and the plaintiff.
  + Examples: Cook v Hawkes; Ingram v Britten
* Other Defences include:
  + Barrister’s immunity; volunteer’s immunity; emergency service providers’ immunity; and compliance by professionals with standard practice.

**Remedies**

* An award of damages is the typical remedy for a tortious wrong.
* The primary purpose of tort liability is to compensate the person who is injured by making the person at fault pay for the damage they have caused. Notions of punishment generally have no place in an award of tortious damages.
* The objective of the award is to place the person injured in the position they would have been had the tort not been committed. In other words, the objective is to restore the injured person, so far as money can do so, to their original position.

**Consequences – Injunctions and Damages**

* **Injunction** - a court order whereby a person is required to do or refrain from doing certain acts – it will be an appropriate remedy if the person is committing a tort on an ongoing basis, such as nuisance, trespass or defamation – failure to comply with an injunction results in civil or criminal penalties.
* **Damages** - purpose - to compensate the plaintiff for the loss or injury suffered as a result of the defendant’s harmful conduct.
* **Assessed** ‘once and for all’ - Plaintiff cannot return to court again seeking more compensation – so it’s necessary to estimate future losses resulting from the harmful conduct.
* **Mitigation** - the plaintiff is under a duty to **mitigate** – take active steps to try to reduce/minimise - their loss as reasonable in the circumstances.

**Mid-Semester Exam 3rd September**

* Sat 3rd September – Time 4:30pm
* Check your room numbers/locations – perhaps in the week before the exam so you know where to go – your responsibility;
* Recommendation – arrive early – car-parking can be a problem on mid-sem exam days – walking in calm and focused – note late and panicked;
* **Closed -Book – Unmarked** bilingual dictionaries – (Written, not electronic\_
* 30% - 30 Multi Choice
* **Only Topics 1, 2 and 3**

Lecture 5: Causing Harm – Tort Law 2

**Occupier’s Liability – Public Authorities**

* **Public Authorities** – government/council bodies and organisations
* **Can often be occupiers** – have control over public spaces – such as parks, streets, roads – any others?  
  It’s questionable whether or not public authorities automatically owe a duty of care to care to people who are on areas under their control - depends on a range of factors - including whether or not there exists a duty of care to warn of **hidden risks.**
* What is a hidden risk? Is there a hidden risk that requires warning or prevention? Or is the risk so foreseeable or obvious to a reasonable person that no duty of care exists?
* Case Examples
  + Nagle v Rottnest Island Authority (1993) submerged rock at **designated** **swimming area** – Hidden - Not foreseeable/obvious – duty of care to warn;
  + Swain v Waverley (2005) submerged sandbag at a **patrolled surf beach** – Hidden - Not foreseeable/obvious – duty of care to warn;
  + Romeo v Conservation Commission (1998) unfenced **public space** cliff top - **?**;
  + Graham Barclay Oysters v Ryan (2002) poisoned oysters in **lake** - **?**;
  + Vairy v Wyong Shire Council (2005) **dived into the sea from a rock platform at a surfing beach - ?**
    - Check Lecture recording 10:05-10:12 Week 5 for further information

**Negligent Misstatement**

* What type of people give advice to others?
* When a person is **giving advice** to another, they might owe a duty of care **to the other person if:**

1. The advice is of a **business or serious nature;** and
2. They know or should know that the other person intends to **rely** on the advice – what does rely mean?
3. It is **reasonable** in the circumstances for the other person to rely on the advice.

* Example – Advice on the business vs Advice in a professional environment?
* The person giving advice may owe a duty of care even if they are not a professional adviser like as a lawyer or accountant – it depends whether the 3 elements are satisfied or not
* Examples
* Hedley Byrne & Co Ltd v Heller and Partners Ltd (1964) – letter from bank – is there a ‘special relationship’ or not?
* Shaddock & Associates v Parramatta City Council (1981) – Council Authority – Is the adviser the sole or only source of advice/information? Or not?
* What if the person harmed, is not the person who was directly advised;
* But a third party who hears/reads/receives the advice and also relies on the advice?
* A person giving advice will **ONLY** owe a duty of care to a third party if:

1. They give their client business or serious advice **knowing that the client will communicate that advice to the third party**; and
2. The advice is likely to lead the third party to enter into a **particular type of transaction**
3. It is likely that the third party will **suffer financial loss** if they enter into that transaction and the advice is **wrong**.

* **Note:** If a negligent misstatement duty of care exists, still have to establish steps 2 and 3 - breach of duty and if the harm was caused by the breach of duty - and consider any defences.
* Question – How would one reduce the possibility of third party liability?

**Liability of Auditors**

* An auditor owes a duty of care to their clients, and not usually to third parties who rely on the auditor’s report and suffer damage.
  + Caparo Industries -v- DIckman [1990] House of Lords
  + R. Lowe Lippmman Figdor & Frank -v- AGC (Adnances) [1992] Suprme C. Vic
  + Columbia Coffee -v- Churchill (1992) S.C. NSW
  + Esanda Finance Corporation Ltd -v- Peat Marwick Hungerfords (1998) Aust Torts Reports 81-420; (1997) 71 ALJR 448 (High Court)

**Esanda Finance Corporation Ltd -v- Peat Marwick Hungerford (1997)**

To be successful in negligence against an auditor, third party (C) must prove that:

* + Defendant auditor (A) knew (or ought reasonably to have known) that the information or advice given to B (A’s client) would be communicated to C (or a class of which C is a member), and
  + This advice would be very likely to lead C to enter into a transaction of the kind C usually enters into, and
  + It would be very likely that C would enter into such a transaction in reliance on the information or advice from A and thereby risk suffering economic loss.

**Trespass**

The tort of **trespass** – to commit an offence against - is committed when the Defendant interferes with the person or property of the Plaintiff - Three common forms of trespass: trespass to land, trespass to goods and trespass to the person.

**Trespass to Land –** Defendant unlawfully enters, remains on or puts something on Plaintiff’s land

* A person commits the tort of **trespass to land** if:
  1. They interfere with another person’s exclusive possession of land – a direct result of the Defendants action;
  2. The interference is either intentional; **OR**
  3. Even though trespass was not intended, it was a voluntary act by the Defendant to enter the Plaintiff’s land;
  4. There is no consent or lawful justification for the interference;

**Trespass to Goods**

* **Goods**

Trespass against goods is an interference by the Defendant with goods in the possession of the Plaintiff – such as taking or using goods without permission - a person commits the tort of trespass to goods if:

* 1. They interfere with another person’s possession of goods;
  2. The interference is intentional; OR
  3. The interference is negligent - unintentional;
  4. There is no consent or lawful justification for the interference.
  + **Two Other Types of Trespass to Goods**
    - **Conversion** - wrongfully dealing with the property of P in a way that is inconsistent with P’s ownership or rightful possession of the goods.
    - **Detinue** - wrongfully detaining the property of P.

**Trespass to the Person**

**As Little as a Touch – Battery**

A person commits the tort of **battery** – the actual application of physical force - if:

* 1. They cause some sort of physical interference – directly causing contact - with the body of another person;
  2. The act is either intentional; **OR**
  3. Negligent - unintentional; and
  4. There is no consent or lawful justification for the act.

**The Anticipation of Physical Force – Assault:**

A person commits the tort of **assault** – the “threat” of the actual application of physical force - if:

* 1. They cause another person to develop an apprehension of direct, imminent and harmful physical contact; and
  2. The act is intentional; **OR**
  3. Negligent - unintentional; and
  4. There is no consent or lawful justification for the act.

**No Reasonable Escape - False Imprisonment**

A person commits the tort of **false imprisonment** – the complete deprivation of someone’s freedom of movement - if:

* 1. They cause another person to be **totally** restrained;
  2. The act is intentional; **OR**
  3. Negligent - unintentional;
  4. There is no consent or lawful justification for the act.

**Tort of Nervous Shock** - a person who wilfully does something calculated to hurt another and causes nervous shock - Wilkinson v Downton[1897]

Reasonable means of escapable also have to be lawful means of escape s

**Tort of Nuisance – Private**

**Private Nuisance**

A person commits the tort of **private nuisance** if:

* 1. They interfere with another person’s use and enjoyment of **private land** – as an **indirect** result of the Defendant’s action (Not direct like trespass to land);
  2. The other person has an interest in that land (e.g. they are the owner or a tenant);
  3. The other person suffers actual harm or damage;
  4. The interference is either intentional; OR
  5. Reckless; and
  6. The interference is sustained and unreasonable.

**Tort of Nuisance - Public**

* A person commits the tort of **public nuisance** if:
  + They interfere with another person’s **use and enjoyment of public land** (e.g. a street or a park) - as an **indirect** result of the Defendant’s action (Not direct like trespass to land);
  + Tthe other person suffers actual harm or damage **over and above that suffered by members of the public generally**;
  + The interference is either intentional; OR
  + Reckless; and
  + The interference is sustained and unreasonable.

**Tort of Defamation**

* A person commits the tort of **defamation** if they publish to a third party, in spoken or written form, a statement about another person that would damage the reputation of the other person.
* The other person must show that:
  1. The statement about them was defamatory; and
  2. The statement identified them; and
  3. The statement was published to a third party.

Defences to an action of defamation include: justification, absolute privilege, fair reporting, honest opinion, innocent dissemination etc

**Tort of Deceit**

A person commits the tort of **deceit** if:

* + They make a statement of fact to another person knowing that it is **false**; and
  + They make the statement with the intention that it be relied upon by the other person; and
  + The other person **relies** upon the statement; and
  + The other person suffers harm as a result of relying upon the statement.

**Passing off**

* D commits the tort of **passing off** if they misrepresent themselves or their product as having some kind of connection with P.
* In an action for **passing off** P must show:
  1. They make a misrepresentation (expressly or by implication) that their goods or services are connected with another person or have the other person’s endorsement or approval; and
  2. The misrepresentation is made in the course of a trade; and
  3. The misrepresentation is intended to deceive potential purchasers.

**Common Defences to Trespass**

* Defences to the tort of trespass include:
  + Consent;
  + Self-defence;
    - You can only self-defend to the level of which you are being attacked, (Ex. If someone grabs your arm, you try to get your arm out. Not kill them)
  + Protection of property;
    - Only the amount of force used to protect the property (If someone takes your water bottle on your property, you take the bottle back. Don’t fucking uppercut them)
  + Statutory authority; and
    - Emergency services have immunity or they’d be fucked
  + Abatement of a nuisance

Tutorial 3: The Australian Constitution and Tort 1

**Tutorial 3 Answer**

Section 109 of the constitution, if there is contention between state and commonwealth law, commonwealth overrules.

Section 51 of the Constitution, parliament shall have power to make laws in regards to taxation as long as there is no discrimination between states.

**Class Exercise**

Brian is the owner and operator of a cinema complex that screens movies and has 10 employees working for him. The complex has a candy bar that customers can buy food and drink from before sitting down to watch a movie. One Saturday evening at pm, a customer accidentally spills a big container of soft drink on the tiled floor in the crowded candy bar. Brian puts up a yellow “warning – Wet Floor” sign next to the puddle. He intends to do something else to clean the puddle up, but is then called away to deal with another problem in the complex.

The cinema and the candy bar gets more and more crowded as people start arriving at the movies for the 8pm movie session. Janice and Brad then arrive at the cinema, buy their movie tickets and decide to go to the candy bar. As they walk into the candy bar area, they are looking at the snacks on offer and the posters on the wall advertising movies and do not notice the warning sign or the puddle. Janice slips in the puddle, hits the floor and fractures her knee.

**Class Exercise Answer**

* A reasonable person would’ve cleaned up the spill as to make sure no injury came to their customers. Duty of care
* Occupier’s liability

(I)ssue- Has brian commited the tort of negligence against Janice? If so, can Brian rely on the deence of contributory negligence?

(L)aw - Owing a duty of care: an occu[pier of premises owes a duty of care to all persons entering the premises to ensure that the premises are sage: (Safeway v Zaluzna) (19870 (162 CLR 479).

* + The risk was foreseeable (that is, it is a risk that they knew about or ought reasonably to have known about),
  + The risk was not insignificant, and
  + In the circumstances a reasonable person in their position would have taken precautions.

[ Check this shit for the extended answer next week]

(A)pplication

* + The probability of harm occurring – High
  + The likely seriousness of the harm – High, we’re on tiles bitch
  + The burden of taking precautions - Not expensive to clean up, therefore easily avoidable.
  + The social utility of the defendant’s activity- Cinemas provide entertainment, and the legislation is only aiming to excuse businesses that provide a good/services for the greater good of society, therefore does not apply to this situation.

C(onclusion) – Causation – S11 CLA – The defendant is only reasonbile for the harm if:

* + S
* Contributory Negligence - if it can be established that the plaintiff contributed in some way to their own loss or injury, liability will be apportioned between te defendant and the plaintiff – Ingram v Britten – the standard of care is that of a reasonable person in the plaintiff’s position – court applies the same principles as those applied in determining the defendant’s liability -s23 CLA.

To identify the first element in the tort of negligence (Duty of care) you look at the case law (Basic summary of the issue)

To identify the second element in the trot of negligence (Breach of Duty) you look at statute (Civil Liability act 2003) in this case S9

The third element of the tort of Negligence is negligence (Causation) you late at statute (Still Civil liability act 2003) in this case s11

Contributory Negligence is statue law (Civil Liability act of Queensland 2003) Section 23

AN Occupier is someone that has possession and control (Not necessarily the owner or tenant) for example if you’re a construction company will all your equipment and labours as the company you have possession and control not necessarily the owner of that land or the tenant who Is leasing the building it is someone who is there and someone who sees what is going on and has the power to change it.

Lecture 6: Contracts 1

**What is a contract?**

* A contract is an agreement between two or more people which is legally enforceable.
* Contract = Agreement + Intention + Consideration

**Kind of Contracts**

Contracts can be classified as simple of formal

* + **Simple contract***:* can be made verbally or in writing, or implied by the conduct of the parties.
  + **Formal contract**: requires legal formalities and is valid only when it is made according to the form which is required by the law. There are two kinds of formal contracts: deed and contracts of record.

**Sources of Contract Law in Australia**

* Statue Law
  + Law made by parliaments of the states, territory and Commonwealth
  + Referred to as Acts of parliaments/legislation
* Common Law
  + Law developed by the courts in Australia
  + Referred to as common Law/case Law

**Elements of a Valid Contract**

* Offer and Acceptance
* Consideration
* Intention
* Certainty of terms
* Capacity of parties
* Free and voluntary consent
* Legality of the subject matter and legal

**Question**

* To form a simple contract, there must be:
  + 1. An Agreement.
    2. Consideration, agreement + Intention
    3. A written agreement that is signed by the parties in front of a witness/witnesses
    4. A written and signed agreement, consideration and intention
* If the essential elements of a contract are consideration, agreement and intention, what happens if one of those elements is missing?
  + Contract is broken!

**The essential elements of a valid contract**

1. Intention to enter into a legal relationship
2. Agreement: offer and acceptance
3. Consideration

**What is a contract Intention to enter into** 

**Intention to create legal relations**

* **Commercial agreements:** there is a presumption that parties have an intention to enter into legal relations.
* This presumption can be rebutted by presenting evidence to the contrary.
* In commercial agreements, parties can expressly intend not to be by the agreement i.e. ‘This agreement is not intended to be legally binding’; ‘This agreement is binding in *honour* only’; ‘it is a conditional agreement’; ‘This agreement is subject to a formal agreement’.

**Husband and Wife agreements**

Balfour -v- Balfour [1919] 2 KB 571

* Husband promises to pay wife, X amount. He breaks the promise, 1919 because she took him to court, because her agreement that her argument that there was a legal intention that both of us would be bound to a legal contract, and because he broke it I can take him to court. Court replied, because you are husband and wife this is a social/domestic agreement therefore the husband will not take the husband to court and not enforce him to pay the money. 1919 Different social views on promises between husband and wives

Merrit -v- Merrit- [1970] 2 ALL ER 760

* There’s a relative who lives in Australia, who does he/she miss, their relatives in England. If you live England and come and live in Australia. I’ll buy you a house and pay for your upkeep (costs) until you find work here. Distance between England and Australia is massive. They up and left England and went to Australia abandoning Friends, contacts, house, job etc… Problem arises where they have a fight in the family and the relative in Australia reneges on his deal of the promise, therefore no house. Lawyer said it was a social contract, therefore you cannot be sued. Oops stuck halfway across the world with jack shit. Although there was a presumption, things about presumptions is you can rebut. The counter argument was that even though something was made in a social/domestic agreement the court found that if there was **a serious or grave consequences as a result of the promise not being enforced, therefore the corut will rebut the presumption and find that the intention was legally binding.**

**Agreement ‘subject to contract’**

* ‘subject to finance approval’; ‘preliminary agreement’; ‘non-binding agreement’; ‘informal agreement’; ‘agreement to agree’;
  + Written ways of showing parties do not intend to enter a contract
  + Never sign a contract unless you’ve read it first
* Masters -v- Cameron (1954) 91 CLR 353
  + ‘this agreement is made subject to the preparation of a formal contract of sale which shall be acceptable to my solicitors…’
    - Basically meaning, there’s a second document supposed to come forward, presented by the solicitor. Therefore, the high court concluded that the bargain was not held until a formal final contract was brought forward by the lawyer.
  + The high Court held that in this case, the parties did not intend to be bound by that agreement as the bargain was not concluded until they executed a formal contract.

**What is an agreement?**

Agreement = Offer + Acceptance

**Offer:** a proposal made by one party to another to enter into a legally binding contract.

* Can be written or spoken or may be implied from the conduct of the offeror- an intention/willingness to enter into a legally binding contract.

**Elements of a valid offer**

* Offer must be firm
* Offer must be certain
* Offer must be communicated to the offered.

**Test to determine an offer**

* Whether a valid offer has been made by one party to the other will depend on the words used or the conduct engaged by the offeror.
* Courts use the objective test to determine whether an offer has been made.
* The objective test requires the court to ask whether a reasonable person standing in the shoes of the recipient would believe the statement/conduct to be a promise in the form of an offer (the reasonable person test).

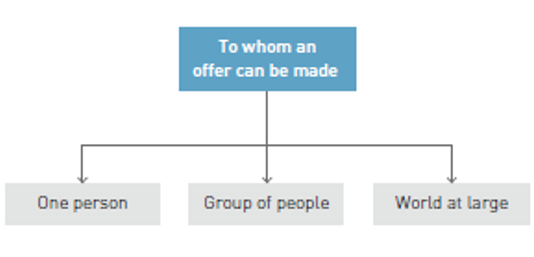
**Invitation to treat**

* AN invitation to treat is NOT an offer, it is something else, an invitation is an invite to think about something, try and persuade them to think about something. **An ITT is not an offer, its inviting them to make an offer to them.**
* Initial approach to others inviting them to deal or to instigate dealings on certain specified terms
* Inviting others to make an offer (i.e. auction sale)
  + *DO I hear $200 for this water bottle?* Adding a question, therefore not an offer because it’s not definitive. In contrast to an offer being “I will sell this water bottle for $200”.
* Fisher -v- Bell [1961] 1 QB 394

**Examples of Invitation to treat**

* Advertisement
  + Partridge -v- Crittenden [1968] 2 All ER 421
* Goods displayed in shops
  + Pharmaceutical society of Great Britain -v- Boots [1952] 2 QB 795
* Auction Sales
* Tenders, shares and debentures
* Price lists
* Transformation of an invitation to treat into an offer
* The transformation of an invitation to treat into an offer
  + Carlill v Carbolic Smoke Ball Company [1893- 1 QB 256.
* An offer to all the world – a willingness to immediately enter into a contract with a person to whom it is directed – conditions for performance.

**To whom can an offer be made?**



* For example, if I said “Sam” I will sell you my Car for $5000, and Michael pipes up and says I’ll buy it for $5000, you say no. because the was targeted at **Sam (One person)**
* But if I said I will sell my car to Sam, George and Michael for $5000 and Michael pipes up and says I’ll buy it for $5000 can buy the car because the offer was targeted. **(Group of people)**

**What can happen to a valid offer**

* Offer can be accepted [contract is model]
* Offer can be rejected [no contract]
* A counter offer can be made to the offeror like offeror accepts the counter offer- [contract will be made]

**Termination of an Offer**

* Revocation - The offeror is entitled to revoke their offer at any time before acceptance even if they have promised to keep the offer open for a particular period, provided that acceptance does not occur first. However, if the offeree has paid for a promise to keep the offer open, for example by paying a deposit, the offeror cannot revoke until the agreed offer period expires
  + Others: Rejection; Counter-offer; Lapse of time; Non-occurrence of an event; Death.

**Acceptance:** A *final and unqualified assent to all the terms of the offer.*

* Whether or not there has been an acceptance will be decided objectively by reference to the words or actions of the offeree, not by their thoughts.

**Rules of Acceptance**

* Offer must be in force before it may be accepted
* Acceptance is final and unqualified
* Acceptance must be communicated to the other party unless waved
* **Silence cannot constitute acceptance**
* **Acceptance must be made within a reasonable time**
* Acceptance must be in reliance upon the offer

**Acceptance can be made by**

* By Spoken Words
* By Written Words
* Performance of an Act
* By Conduct
* Acceptance must be communicated – written words – spoken words - by conduct - or by performance (Carlill v Carbolic)

**NO ACCEPTANCE: SILENCE = THE IGNORANCE OF AN OFFER**

**Example of how silence does not constitute acceptance**

* ‘If I do not hear from you to the contrary, I will take it you have accepted’ is no acceptance.
* Acceptance is a deliberate act and silence is not, therefore the offeror cannot impose silence as an acceptance.
  + *Felthouse -v- Bindley* (1862) 142 ER 1037

**Consideration:** the price paid by parties to buy each other’s promise. Generally, a person who sues another for a broken promise under a contract should prove that they paid the price and seek remedies from the other party through the court for the broken promise or breach of contract.

* Considerations is an essential element in every simple contract
* It applies to all contracts other than contracts under seal (deed).
* There must be an exchange of promises between the parties or a promise for performance at the time of forming the contract.
* The promise or performance given in exchange must have value.

Consideration can take the form of:

* The payment of money
* The provision of goods
* The provision of a service,
* The undertaking of an onerous obligation
* Refraining from doing something, such as agreeing not to sue,
* A promise to do any of these things

Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256

Consideration need not be adequate,

Consideration must be sufficient, and not:

* + A vague promise
  + Past consideration
  + Performance of a prior legal obligation.

**Kind of Consideration**

**Executed:** One party pays the price i.e. fulfils his/her obligations under the contract

**Executory:** Both parties still have to pay the price i.e. still have to fulfil their obligation

**Performance of an existing duty**

* Performing existing contractual obligations does not amount to good consideration to enforce a promise (*Stilk -v- Myrick* (1809) 2 Camp 317; 170 ER 1168).
* However, where the promisor receives *something extra* in exchange for his/her additional promise, that promise may be enforced (*Williams -v- Roffey Bros & Nicholls* [1991] 1 QB 1).

**Renegotiating Debts**

* Payment of a lesser sum in lieu of the full amount on the day it is due (due date) does not constitute satisfaction of the whole debt as the agreement to accept lesser sum is not supported by any consideration.
* This principle is known as Pinnel’s Rule

(Pinnels’ case (1602) 5 Co Rep 117a; 77 ER 237).

This rule was applied in the following case:

*Foakes -v- Beer* (1884) 9 App Cas 605.

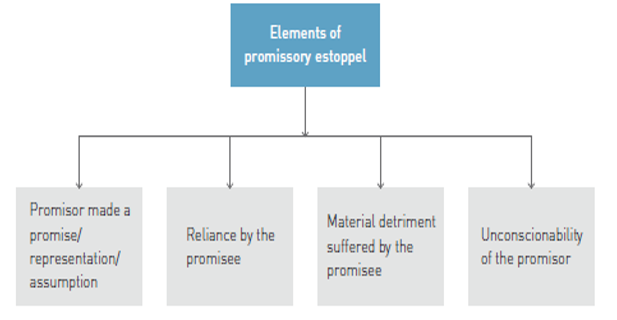
**Promises that do not need consideration**

* Contracts under seal
* The doctrine of promissory estoppel (equitable estoppel)
  + People can enforce promises, even where no consideration has been provided.

**A new approach to consideration: Promissory Estoppel**

‘…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* [1976] QB 225

* Promissory estoppel will allow a promise to be enforced even though the promise has not provided consideration for that promise.
* Example - Waltons Stores v Maher – Elements

**Elements of Promissory Estoppel**

**Privity**

* Although a contract between two or more parties may provide a benefit to a party that is not privy to the contract, that third party has no right to commence an action if the benefit fails to materialise.
* In other words, the doctrine of privity affects the right of a third party to enforce their expected benefit.

**Exceptions to the Privity rule**

* The courts have used the following exceptions to the *privity* rule:
  + Trusts;
  + Joint promises; and
  + Agency.

Tutorial 4: Torts 1 & 2

**Tutorial 4 Question & Answer**

Tute 4 Question - Joey is in the final year of his Business degree at UQ. The night before his final exam for Laws1100 Business Law, he goes to his favourite local restaurant/café called ‘The Hungry Student’ to order and eat dinner. The Hungry Student is a popular restaurant close to the University. It is often busy and full because it is frequented by many University students. The Hungry Student is owned and managed by Zebo who is also the chef in the restaurant kitchen.

When Joey enters the restaurant, he sees that every table and chair is already full with customers. Zebo tells Joey that because the restaurant is so busy that Joey will have to wait for at least an hour to get a table to sit at. Joey asks Zebo whether there is any possible way of getting somewhere to sit down and eat his dinner because he is hungry and cannot wait that long. After hearing this and because Joey is a regular customer, Zebo offers him a spare table and a chair in a room next to the kitchen that Zebo uses for storage. However, Zebo fails to tell Joey that the chair has not been used for two months. Although the chair isn't broken, the back legs of the chair have become rather loose over time. A customer had told Zebo about this problem with the chair two months ago, but although Zebo had been meaning to get the chair repaired, he has not managed to do so yet.

Joey sits at the table in the spare room and Zebo serves him his dinner. Half-way through eating his dinner, Joey slightly leans back on the chair and both back legs snap off, causing the chair to collapse and Joey falls hard to the ground. Zebo helps Joey up and asks him if he is alright. Joey is a bit dazed by the fall but thinks he is otherwise alright and says he is fine.

The next day Joey awakes with severe back and neck pain.  Joey decides to persevere and still sits his Business Law final exam that morning. However, because of the severe back and neck pain, his concentration and ability to do well in the final exam are severely compromised. He ends up failing the Business Law final exam and has to repeat the course the following semester. He also ends up incurring medical costs for treatment for what turns out to be muscle damage to his spine and neck, and he cannot work for two days.

Advise Joey if he can bring an action against Zebo for the tort of negligence? Or not? Will Joey be able to claim compensation for his failure of the final exam and having to repeat Business Law, his medical costs and wages for 2 days off work? Or not?

ISSUE – Is joey able to bring an action against Zebo for the trot of negligence?

LAW - Owing a duty of care – an occupier owes a duty of car to all persons entering the premises to ensure that the premises are safe “Safeway -v- Zaluzna”

APPLICATION –

* + Does Zebo owe Joey a duty of care? Or not? Because…
    - Zebo is the owner, manager and chef.
  + As the owner and manager, his is someone who has control over the premises and what occurs there. He has knowledge about what occurs on the premises including that a chair has loose legs. It is within his control and power to fix the chair or have it replaced. As the Occupier he owes a duty of care to entrants such as Joey.
    - If Zebo did owe Joey a duty of car, did Zebo breach that duty of care? Or not?
  + Was the risk foreseeable, being something Zebo knew about or ought reasonably to have known about? Or not? Because…
    - Yes, Zebo knew about the risk as a customer had told him about it two months prior.
    - A reasonable owner manager would know that dangers of letting someone sit on damaged furniture.
  + Was the risk not insignificant? Or Not? Because…
    - Collapsing furniture may result in serious injury/damage
* Would a reasonable person in Zebo’s position would have taken precautions> or not? Based on:
  + The probability of harm? Because…
    - Perhaps there was a low probability as the chair was in a spare room away from the main centre of operations of the restaurant, and not where customers would normally sit (The storage room). However, because the chair was moved it shows perhaps Zebo knew of the impending danger/ High probability of harm.
  + The likely seriousness of the harm? Because…
  + The burden of taking precautions? Because…
    - The burden is minor as it would not take much to repair the chair or have it replaced/dispose of it.
  + The social utility of the defendant’s activity? Because…
    - The restaurant is a recreational establishment and is only gives incredibly minor social utility which is outweighed by the danger of damaged equipment
    - There is no social utility for Zebo’s activity however Zebo would argue that by feeding people he is providing a benefit to society. Weighting this with the risk to society, it is clear that the risk outweighs the benefits. [This is the same thing as the answer above, just the class answer]
* Was Joeys failure of the final exam and repeat of the subject, caused by Zebo’s breach of duty? Or Not? Based on:
  + But for Zebo’s failure to ensure the chair was repaired, would Joey have suffered the failure of the final because?...
    - The injury suffered by Joey is not the only cause of his failure of the exams, many external factors may be included such as nerves, lack of study etc…
* Causation – were the medical costs/time off work suffered by Joey caused by Zebo’s breach of duty? Or Not
  + But for Zebo’s failure to ensure the chair was repaired, would Joey have suffered the medical costs/time off work? Because…
  + Was the risk of muscle damage to the spin e and neck/time off work something occurring to any customer who used the chair within Zebo’s scope of liability and reasonably foreseeable? Because…
    - A reasonable restaurant owner manger standing in Zebo’s shoes would foresee that not repairing a damaged chair would lead to someone being injured and therefore
  + Was the risk of failing a final exam occurring to any customer who used the chair within Zebo’s scope of liability and reasonably foreseeable? Because…
* Will Zebo have the defence of voluntary assumption of risk? Or not? Because…
* Will Zebo have the defence of contributory negligence? Or not? Because…
  + Claim that joey contributed to his own negligence by even though feeling unwell opted to sit the exam when he had the option to defer.

**Conclusion**

* On the balance of probability, a court would likely decide …?
  + Zebo will be liable in negligence to joey for his injury, medical costs and time off work, it is unlikely that zebo will be liable to Joey for him failing his Law exam and having to repeat the course next semester.

Lecture 7: Contracts 2

**Capacity to Contract**

* Certain individuals and entities are prohibited by law from entering into legal contracts.
* One reason for the existence of such laws is to protect vulnerable individuals from being exploited.
* The following individuals may not have the required legal capacity to contract:

–– minors;

–– drunkards; and

–– bankrupts.

**Valid contracts with Minors**

* General rule is that minors do not have the capacity to enter a contract.
* Minors are any persons below the age of 18 years.
* There are two types of valid contracts:
  + 1. contracts for necessaries; and
  + 2. contracts for beneficial services.
* Necessaries are defined as goods suitable to the condition in life of a minor and to the minor’s actual requirements at the time of sale and delivery.

**Drunkards**

* The law treats drunkards as being of unsound mind when entering into a contract with another. The person who has contracted with the drunkard will be deemed to have taken advantage of a person with insufficient legal capacity to contract.
* If drunkards wish to proceed with the contract, they can affirm the contract within reasonable time when they sober up.

**Bankrupts**

* Bankrupts do not have full legal capacity to enter into contracts (*Bankruptcy Act* 1966 (Cth).
* The contract may be voidable at the option of the bankrupt. However, bankrupts will have the opportunity to affirm the contract if they wish to do so.

**Mentally Incapacitated**

* Contract with mentally ill persons will be voidable if:
  + The person is incapable of understanding the nature of the contract; AND
  + the other party is aware of their condition.

**Legal Capacity of Other Entities**

* Corporations have full legal capacity
* Governments

**Privity**

* Although a contract between two or more parties may provide a benefit to a party that is not privy to the contract, that third party has no right to commence an action if the benefit fails to materialise.
* In other words, the doctrine of *privity* affects the right of a third party to enforce their expected benefit.

**Exceptions to the Privity rule**

* The courts have used the following exceptions to the *privity* rule:
  + trusts;
  + joint promises; and
  + agency.

**Common Law Contract Principles**

* Policy Underpinnings:
  + Freedom of contract
  + *Caveat Emptor* – let the buyer beware

**Vitiating Factors**

* Factors that affect genuine contractual consent are called ‘vitiating factors’. These factors ‘vitiate’ a contract and allow the innocent party to set it aside. The innocent party may set aside the contract and/or sue for damages or the courts may declare the contract void due to lack of genuine consent.
* Lack of free and voluntary consent may arise from:
  + Mistake
  + Misrepresentation
  + Duress
  + Undue influence
  + Unconscionability

**Void and Voidable Contracts**

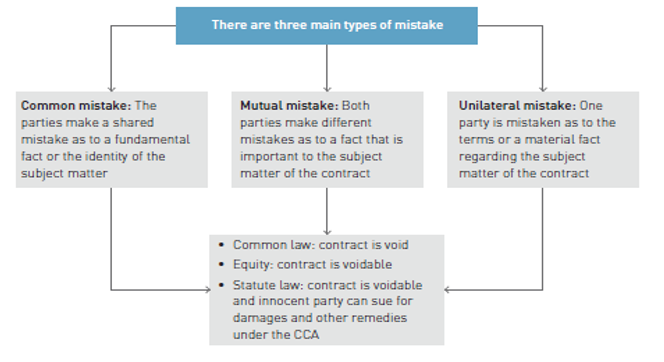
* A transaction is said to be void when it is of no contractual effect.
* A transaction is described as voidable when it is capable of being either set aside or confirmed at the option of one party to it (the innocent party).
* Until set aside or avoided, the transaction is a valid contract and is legally binding on the parties.

**Mistake**

* A mistake occurs when one or more of the parties to a contract misunderstand each other about a *fact*.
* Mistake prior to or at the time of the contract
* Mistake is fundamental
* Mistake, not misrepresentation
* *David Securities Pty Ltd –v- Commonwealth Bank Ltd* (1992) 175 CLR 353
* *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377

**Types of Mistake**

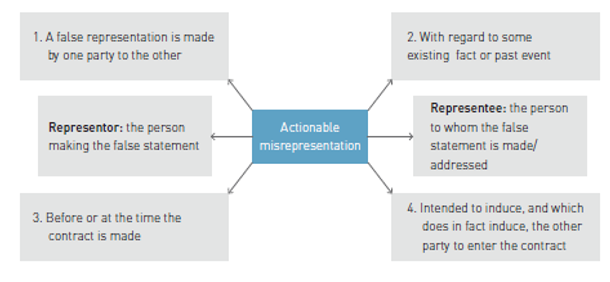
* **Common mistake:** shared mistake i.e. both parties make the same mistake as to a fundamental fact.
* **Mutual mistake:** both parties are mistaken though there appears to be an agreement between them. Both parties misunderstand each other and make different mistakes.
* **Unilateral mistake:** one party makes a mistake as to the terms or effect of the contract or to the identity of the other party. The other party knows or ought to be aware of the mistake made by the innocent party.



**Misrepresentation**

* A false statement of fact is made by one party (representor) to the other party (representee) before the contract is concluded.
* The statement leads the party to enter into the contract.
* Whether or not pre-contractual statements are promissory in nature, the court will judge the intention of the parties by using the ‘reasonable bystander test’

‘…whether the person making the statement is taken to have warranted its accuracy’.

**Elements of an actionable misrepresentation**

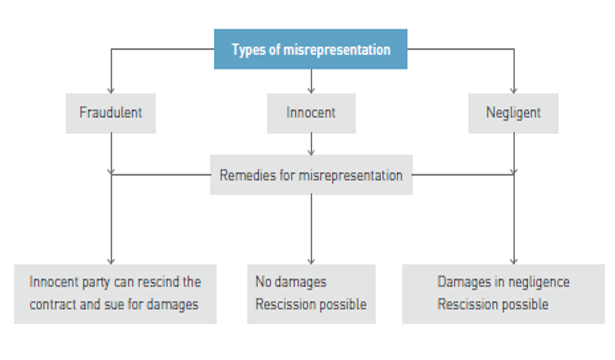
**What does not constitute misrepresentation?**

* The legal definition of a misrepresentation does not include the following:
  + honest statements of opinion
  + puffs or exaggerated statements
  + statements of future intention.
* The legal definition of a misrepresentation does not include the following:
  + mere silence, unless one or more of the following applies:
    - A statement, previously truthful, subsequently 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.

**Types of Misrepresentation**

* **Innocent misrepresentation:** when the representor does not intend to deceive anyone. The misrepresentation is made unintentionally.
* **Negligent misrepresentation:** the representor makes an honest but incorrect statement negligently and carelessly.
* **Fraudulent misrepresentation:** the representor knows or believes that the statement is untrue and presents it to be true or accurate. The aim of the representor is that the other party enters into the contract with the representor.

**Misrepresentation at Common Law**



**Fradulent Misrepresentaion**

* The elements of fraudulent misrepresentation are as follows:
  + A false statement of fact is made by one party to the other.
  + The statement is made with a lack of belief in its truth.
  + The statement induces the other party to enter into the contract.
  + The statement results in damage to the innocent party.
  + Parties affected by fraudulent misrepresentation may rescind the contract and sue for damages.

**Negligent Misrepresentation**

* The elements of negligent misrepresentation are as follows:
  + 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 loss
  + Example – Hedley v Heller; Shaddock v Parramatta

**Remedies for Misrepresentation**

* The following remedies for misrepresentation exist:
* **Rescission***:* This allows the innocent party to terminate the contract. Rescission is an equitable remedy.
* **Damages***:* These are available for fraudulent misrepresentation in the tort of deceit and for negligent misrepresentation in the tort of negligence. It should be noted that damages are not available at common law for innocent misrepresentation. The measure of damages in the case of fraudulent or negligent misrepresentation is designed to restore the innocent party to their original position.

**Undue Influence**

* ‘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 latter – the weaker party- to act for the former’s benefit – the person who has influence. As a result, there is a lack of genuine consent to the agreement.
* *Allcard -v- Skinner* (1887) 36 Ch D 145
* *Tate -v- Williamson* (1866) LR Ch 55

**Relationships of Trust and Confidence**

* **Special relationships -** In special relationships, there is a presumption that undue influence may occur:
* - Parent and child, guardian and ward, doctor and patient, solicitor and client, religious adviser and disciple
* *(Lyon -v- Home* (1868) LR 6 Eq 655)
* **Other relationships -** if there is no previously recognised special relationship between the parties, it is necessary for the party alleging undue influence to demonstrate that the other party exercised dominance over them such that they did not freely and voluntarily enter into the contract (*Johnson -v- Buttress* (1936) 56 CLR 113)

**Duress**

* Pressure exerted by one party to coerce another to contract on particular terms
* Physical, mental psychological duress to a person/relative to the person (duress to person)
* Duress to goods
* Economic duress
* *Barton v Armstrong* [1976] AC 104

**Unconscionable Conduct**

* Unconscionable conduct is a conduct that is unfair, unjust and against good conscience.
* At common law, mere harshness of a clause is not an adequate ground to set aside the contract.
* 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 equity stepped in to fill in the gap to remedy for harsh and oppressive contracts.
* Lord Denning, the chief proponent of this new development, held in one of his judgments that in unconscionable contracts ‘there runs a single thread. They rest on ‘inequality of bargaining power’.
* *Commercial Bank of Australia -v- Amadio* (1983) 151 CLR 447

**The requirements to frame a plea for ‘unconscionability’**

* The weaker party must have been under a special disability vis -a- vis the stronger party so that there was no real equality between them;
* The stronger party must have been aware of that special disability; and
* 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).

Lecture 8: Contracts 3

**Terms versus Representations**

* The question of whether a statement made by a party is a *Term* or mere *Representation* is important one because the statement’s classification has implications when determining the issues of breach and remedies.
* The Essential different between terms and representations is that terms contain a promise and therefore have promissory effect, whereas representations do not involve promises.

**How do the courts distinguish between a term and a representation?**

* The courts attempt to give effect to the parties’ intentions, and they do this using the objective test.
* The courts ask: ‘What would a reasonable person believe to be the parties’ intentions in relation to the contractual nature of the statement?’
* The courts look at the following factions
  + 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.

**Express versus implied terms**

* In a contract, terms can be expressly agreed by parties in words (verbally or in writing) or terms may be implied by law (common law or statute law).
* Once it is established that a particular statement is a term, courts determine the importance parties may have attached to them.
* Thus terms may be:
  + Conditions
  + Warranties; or
  + Innominate terms.

**Terms of the contract**

Express Terms + Terms Implied By Court + Statutory Terms = Terms of Contract

**Conditions, Warranties and innominate terms**

* Terms can be Conditions, Warranties or innominate
  + **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 and Pond (1876) 1 QBD 410*

* + **Warranties** - minor terms of the contract breach of which will entitle the parties to sue for damages

*Benttini -v- Gye* (1876) 1 QBD 183

* + **Innominate** - hybrid term that is capable of being a condition or a warranty

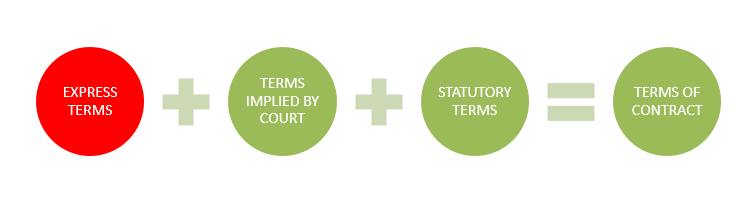
*Hong Kong Fir Shipping Co. -v- Kawasaki [1962] 2 QB 26*

**How do courts determine whether a term of a contract is a condition of 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.

*Tramways Advertising -v- Luna Park (1938) 38 SR (NSW) 632]*

**Terms of a Contract**



**Express Terms : Oral or written**

* The terms of a contract will be determined by the words (written or verbal) actually used by parties at the time of making, or immediately before making the contract.
* How would one know what was said (expressed) by parties to each other?
* This is a question of fact and will be determined by the courts by calling in the witnesses and the people present at the time of the formation of the contract.

**Written terms: Parol Evidence rule**

* When the contract is reduced in writing, it is presumed that writing contains all the terms of it. No other evidence may be admitted to vary or add the the terms of the contract.
* There are a number of exceptions to the parol evidence rule, for example:
  + Implied Terms;
  + Collateral Contracts.

**Implied Terms**

* Terms can be implied into a contract through the following ways
  + Common Law
  + Custom or trade usage;
  + Statute
* The following requirements should be present before a term will be implied by the courts:
  + The implied term must be reasonable and equitable.
  + It must be necessary to give business efficacy to the contract.
    - To make the contract work from a business point of view
  + It must be so obvious that it goes without saying.
  + It must be capable of clear expression.
  + It must not contradict any express term of the contract.

**Collateral Contracts**

Definition - A representation that forms a small pre-existing contract, which enables the big main contract to come into existence - If the representation is untrue, the innocent party can sue for breach of collateral contract.

* Example - De Lasalle v Guildford (1901) – drains.

Elements required for collateral contract:

* Oral statement – and main contract is written;
* Oral statement was intended as a promise – made to induce entry to the big main contract;
* The collateral contract is not inconsistent with the terms of the main contract;
* Consideration? – the entry into the big main contract is consideration for the collateral contract;
* Breach of the oral statement/promise entitles the innocent party to damages.

**Exclusion Clauses**

* An exclusion clause is a term of the contract that limits, excludes or restricts liability of one party against the other.
* The function of the exclusion clause is to limit or exclude liability for breach of an express or implied term, or to exclude liability for negligence in a contract.

**Exclusion Cause in a signed document**

* When the exclusion clause is included in a signed document, the person generally is bound by it.
  + *L’Estrange -v- Graucob* Ltd [1934] 2 KB 394
* *EXAMPLE OF CLAUSE*
  + This agreement contains all the terms and conditions under which I agree to purchase the machine specified above and any express or implied condition, statement or warranty, statutory or otherwise, not stated herein is hereby excluded.

**Exclusion Clauses in unsigned documents**

* With an unsigned document, an exclusion clause will be binding only if the clause was brought to the notice of the customer. This notice must be reasonable, and reasonableness is determined objectively by the courts.

**Exclusion Clauses in unsigned documents: Ticket Cases**

* Where the terms of the contract are contained, or referred to, on a ticket or another document. For example: 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.
* 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,

Party may not rely on that clause.

* The notice must be reasonable notice and is determined objectively by the courts (*Thornton -v- Shoe Lane Parking Ltd* [1971] 2 QB 163).
* EXAMPLE OF CLAUSE
  + [Shoe Lane Parking Ltd shall not be liable for] injury to the Customer… howsoever that loss, misdelivery, damage or injury shall be caused.

**Time of Notice**

* Notice of the exclusion clause may be express or implied (constructive).
* If the notice of the exclusion clause is given until after the contract has been completed, the exclusion clause will not be binding.
  + *Olley -v- Marlborough Court* [1949] 1 KB 532
  + *Sun Line Special Shipping Co -v- Fay* (1988) 165 CLR 197
* EXAMPLE OF CLASUE
  + The proprietors will not hold themselves responsible for articles lost or stolen, unless handed to the manageress for safe custody.

**Previous Course of Dealings**

* If the customer has had previous course of dealings with the defendant, the court will infer that the customer has the knowledge of the exclusion clause.
* In other words, if the customer knows about the exclusion clause through his/her previous dealings with the party, the customer will be bound by the exclusion clause.
  + *Balmain New Ferry Co -v- Robertson* (1906) 4 CLR 379
* EXAMPLE OF CLAUSE
  + A fare of one penny must be paid on entering or leaving the wharf. No exception shall be made to this rule whether the passenger has travelled by ferry or not.

**Effects of misrepresentation**

* If the person seeking to rely on the exclusion clause misrepresents the clause or its effect, the full protection of the clause will be lost.
* In other words, if the effect and scope of the exclusion clause has been misrepresented to the customer then the exclusion clause is not binding on him/her.
  + *Curtis -v- Chemical Cleaning & Dyeing* [1951] 1 KB 805

**Contra Proferentum Rule**

* The courts will interpret the exclusion clause against the person who is relying on the clause.
* Any ambiguities in the clause will be constructed against the person relying upon it.
  + *Elder Smith Goldsborough Mort Ltd -v McBride* [1976] 2 NSWLR 631
* If the clause is ambiguous, capable of more than one interpretation, could be the whole clause, could be one word, or a collection of words. If you look at the whole thing, one thing or the collection of words. And you think actually there are two ways this can be read. Then the court will choose the interpretation that goes against the person who drafted it and in favour of the person who it favours. English is capable of many interpretations of one word, it’s possible these scenarios can exist however if they don’t then the parties are bound by Contra Proferentum.

**Scope of Exclusion**

* The scope of the exclusion clause 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* (1965) 114 481
  + *Darlington Futures Ltd -v- Delco* (1986) 161 CLR 500

**Recession**

* Generally, the term means the rightful termination of a contract for breach of condition or the repudiation of a contract not performed.
* The term refers to the restoration of the parties to the positions they occupied before the transaction because of the presence of one of the vitiating factors.
* Rescission is an equitable remedy. It looks to the conduct of the party seeking the remedy.

**The right to rescind the contract is lost if:**

* substantial restitution of the rights/contract is impossible
* the contract is affirmed
* there is delay (lapse of time)
* there is intervention of third party rights
* the contract is executed/completed
* unconscientious conduct of party seeking relief.

These factors are the bars to rescission of contract.

**How may a contract be discharged?**

* ‘Discharge’ refers to 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 in the following way:
  + By consent
  + By operation of law: frustration
  + By breach/repudiation
  + By performance
  + By lapse of time

**Discharge by operation of law: frustration**

* Examples of acts of frustration:
  + Fire
  + Illegality
  + Delay
  + Death or incapacity of either party.

*Taylor -v- Caldwell* (1863) 3 B & S 826

**Discharge by breach of conduct**

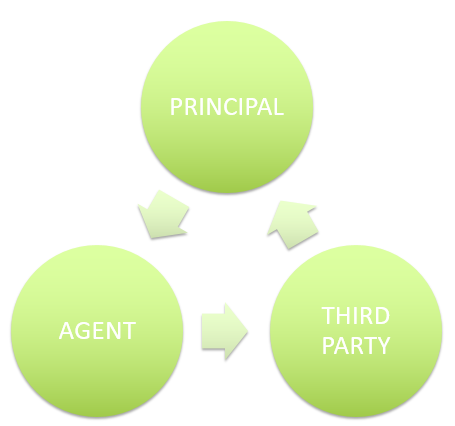
* There are two main types of breach of contract.
  + Where the other party to the contract breaches a condition (essential term), this entitles the innocent party to treat the contract as **terminated** and is termed ‘repudiation’ of the contract.
  + If one party breaches a warranty (non-essential term), then the innocent party is only entitled to claim **damages** for the breach.

**Discharge by 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.

Lecture 9: Agency + Principle

**Agency**



* An agent is responsible for making the contract between the principal and the third party, but the agent is not a party to this contract.
* An agent has a separate contract with the principal and this agreement is referred to as the contract of agency.
* The relationship of agent and principal gives rise to a number of obligations and duties on the part of both the principal and the agent. These duties and obligations are both contractual and fiduciary.

**Authority of an Agent**

* **Actual Authority**
  + Express
  + Implied

**Ostensible or apparent authority**

* + ‘If a (person) holds a license for an hotel, and leaves his name on the premises ... the occupier of the premises is the agent for the licensee, both for buying and selling, in the usual way of business’.

**Capacity to create Agency**

* An agent can be authorised to do anything that a principal may do, and a principal cannot authorise to do anything that he/she can’t do himself/herself.
* For example: If a principal has restricted capacity to enter into contracts (i.e. minor, mentally ill, bankrupt etc.), agent may have that restriction as well.

**Duties of an Agent**

* Follow principal’s instructions
* Exercise due care, skill and diligence
* Must act in person
* Must act in principal’s interests
* Must not to make secret profit or give or take bribe
* Duty to disclose conflict/s of interest to the principal
* Duty to keep and render correct and appropriate accounts

**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.

Tutorial 6: Contracts 2

Tommy DeVito is a businessman in the restaurant trade who is looking for new commercial premises in Brisbane to rent, so that he can open and run his new restaurant venture, being a seafood restaurant called ‘Tommy’s Seafood Palace’.

Jimmy Conway is a property developer who owns some commercial properties around Brisbane, including a restaurant premises in Tenerife, Brisbane. Tommy goes to visit Jimmy to see if he can negotiate a lease contract for the Tenerife premises.

During the negotiations, Jimmy gives Tommy a contract that Jimmy says is “My standard terms of lease with all my tenants”. Tommy reads the terms in the contract and notices that they say nothing about the state of the kitchens in Jimmy’s premises.

Tommy asks Jimmy “Do your premises have a working restaurant kitchen? Because if it does not, then maybe I’m going to have to look somewhere else” Jimmy says “Yes, everything in the kitchen is up to date with working ovens, fridges and all the necessary equipment you will need for a restaurant”.

As soon as Tommy hears this, Tommy says “Sounds good to me” and signs the contract without changing it or adding in anything Jimmy said about the kitchen.

However, when Tommy moves into the premises one week later he discovers that the kitchen is quite dilapidated, that only one out the three ovens work, that both fridges are broken and that the other equipment is more suited to a domestic kitchen than a restaurant kitchen. Tommy is upset, accuses Jimmy of lying to him and wants to terminate the contract and obtain damages because he will have to spend a considerable amount of money to fix these problems if he’s going to have a working kitchen for his restaurant in time for opening.

Jimmy says he had no idea at the time of entering into the contract that the kitchen was in such a bad state and blames the previous restaurant tenants for ruining the kitchen.

Assume that what Jimmy said is a term of the contract and advise Tommy whether he can make a claim for misrepresentation against Jimmy? Or not? (Use ILAC to answer this question)

**Issue** – Will Tommy be able to terminate the contract with Jimmy and obtain damages by arguing that Jimmy’s statement was a misrepresentation? Is o, will Tommy be able to argue fraudulent, innocent or negligent misrepresentation?

**Law**

4 Elements of Misrepresentation

* **Misrepresentation**: A false representation is made by one party to another; with regard to some existing fact or past event; before at the time that contract is made; and was intended to induce, and does induce, the other party to enter into the contract.
* **Fraudulent misrepresentation:** a false statement of fact is made by one party to the other; the statement is made with a lack of belief in in truth; the statement induces the other party to enter into the contract; the statement results in damage to the innocent party – parties affected by fraudulent misrepresentation may rescind the contract and sue for damages
* **Innocent Misrepresentation** - The person making the representation does not intend to deceive anyone – made unintentionally – parties may rescind the contract, but may not sue for damages.
* **Negligent Misrepresentation**: 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 of 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 Damages was suffered by the recipient, usually monetary loss – parties affected by negligent misrepresentation may rescind the contract and sue for damages (Hedley v Heller: Shaddock v Parramatta).

**Application**

* Was Jimmy Statement “Yes, everything in the kitchen up to date with working ovens, fridges and all the necessary equipment you will need for a restaurant” a misrepresentation? Or not? Because.
  + Was the representation by Jimmy a fraudulent misrepresentation? Or Not? Was it an innocent misrepresentation? Or Not? Because…
  + Is it possible that the representation by Jimmy was a negligent misrepresentation? Or not? Because…

**Conclusion**

* On the balance of probability, a court would likely decide…?

**Class Exercise**

Michelle and her partner Davo have lived for about 4 years with Michelle’s great grand-mother named Rachel, in Rachel’s large house. Rachel is very old, suffers from depression since the death of her husband one year ago and relies on Michelle and Davo to help her with tasks such as shopping, housework and taking her to the doctors. Rachel also regularly asks Michelle and Davo for advice about matters such as the paying of bills and filling in census forms.

In the last year, Michelle has persistently requested Rachel to agree to transfer title and property in the house as a gift under a deed to Michelle upon her death (which means that Michelle will not have to provide consideration in exchange for the promise) Rachel eventually agrees to do this and signs the deed on the condition that Michelle and Davo will take care of her during the rest of her lifetime.

However, after signing the deed Michelle and Davo start ill-treating Rachel and threaten to evict her.

Michelle’s brother John becomes concerned about this and wants to know if the deed can be cancelled for **undue influence**. Advise John.

**Issue**

* Can John cancel the transfer of Rachel’s house to Michelle under the deed due to undue influence?

**Law**

* Where there is a special relationship, undue influence may be presumed parents and child, guardian and ward, doctor and patient, solicitor and client, religious adviser and discipline (Lyon -v- Home);
* However, if there is no previously recognised special relationship between the aprties, it is necessary for the party alleging undue influence to demonstrate that the other party exercised dominance over them such that they did not freely and voluntarily enter into the contract (Allcard v Skinner; Johnson v Buttress).
* Undue Influence – a contract a voidable at the section of a weaker party when a stronger party, in a position of influence, improperly uses its power on the weaker arty in order to induce the latter to act for the former’s benefit. As a result, there is a lack of genuine consent to the agreement.

**Application**

* Is there a special relationship between Rachel and Michelle and Davo for the presumption of undue Influence? Or Not? Because…
* Did Michelle and Davo exercise dominance over Rachel, so that Rachel did not freely and voluntarily enter into the contract

COMPLETE FROM TUTE SLIES

Tutorial 8: Contracts 3

Grace is a professional ice skate designer and likes to go ice skating at the Spring Wood Ice Rink in Brisbane. She often invites her friend Josefina to go ice skating with her to the Spring Wood Ice Rink. They have gone together to the Spring Wood Ice Rink about 30 times in the last 12 months.

On 19 September 2016, they both go to the Spring Wood Ice Rink. Josephina tells the person at the front counter of the ice rink that they would like to go skating, the front counter person says “Sure” and they each pay $15 in exchange for each of them getting an all-day entry ticket. Grace brings her own skates and Josefina also hires a pair of ice-skates from the front counter for another $20.

They then go through a set of doors into the main area of the Ice Rink where the sitting benches and the ice skating rink are located. They sit down on the benches, put on their ice skates, walk out onto the rink and start skating.

About 20 minutes later, the blade of one of the hired ice skates that Josefina is wearing breaks off. This causes Josefina to fall quite badly and injure her ankle.  Grace inspects the broken ice skate and quickly ascertains that the blades on the hired skates are very old and have not been properly maintained for a long time.

Josefina later brings a claim against the Spring Wood Ice Rink seeking to recover damages for the ankle injury she has suffered.  However, the Spring Wood Ice Rink argues that it is not liable, because they have had four large signs that have been displayed at eye level on the walls in the main area of the Ice Rink for about 2 years, which state:

“The Spring Wood Ice Rink does not accept any responsibility whatsoever for any loss or damage suffered by customers while on the Spring Wood Ice Rink premises, however that loss or damage may arise or be caused.”

Is the sign a term of the contract between Spring Wood Ice Rink and Josefina, allowing Spring Wood to be protected from being liable to Josefina? Or not?

If the sign is a term of the contract between Spring Wood and Josefina, is there any way that the wording in the sign could be interpreted so that it goes against the interests of the party who drafted it, being Spring Wood?

**Issue**

Is the sign a disclaimer? Is it a term of the contract between Josefina nad Spring Wood Ice Rink? Or Not?

If the disclaimer is a term of the contract between Josefina nad Spring Wood Ice Rink, can Josefina use the Contra Proferentum rule to have it interpreted in such a way as to go against the interests of Spring Wood and in favour of her interest, so that she can make Spring Wood Liable for her injury? Or not?

**Law**

A disclaimer is only a term of the contract if: it is a term in a written and signed contract; or it is brought to the attention of the other party by reasonable notice before the contract is formed (Thornton v Shoe Lane); or is it implied into the contract as a result of prior dealing (Balmain v Robertson).

Contra Proferentum: 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 (Elder v McBride).

**Application**

Was there a contract entered into between Josefina nad Spring Wood? Where was it entrered into?

Was the disclaimer in the sign a term of the contract? Or Not? Because…

[**COMPLETE FROM TUTE SLIDES]**

**Class Exercise**

Christina Owns a house in St Lucia Brisbane and wants to sell it but has to go overseas for one month. Davo is a real estate agent with his own real estate agency business in St Lucia. Christina appoints Davo in writing to sell her house to a buyer for $1million to accept offers from potential buyers to buy this house for that amount whilst she is overseas for one month. Christina then goes overseas.

However one week later, a potential buyer named Patirzia approaches Davo and offers to buy the house for $750,00, Davo says to her “I am authorised by the owner to accept offers”, says nothing about Christina’s instruction to sell for $1million and accepts Patirizia’s offer of $750,000 on Christina’s Behalf

What duties did Davo owe to Christina? If he did, Did he breach them?

**Issue**

Has Davo breached any of his fiduciary obligations and/or contractual obligations he owed as an agent to his principal Christina by accepting Patrizia’s offer?

**Law**

* The relationship of agent and principal gives rise to a number of obligations and duties on the part of both the principal and the agent. These duties and obligations can be both contractual and fiduciary.
* Principals can provide agents with actual authority – either express or implied - Agents can also have ostensible/apparent authority.
* Examples of fiduciary obligations agents owes through the relationship of trust and confidence include: Duty to follow instructions from the principal and to act in the principal’s interests; Duty to act with due care, skill and diligence; Duty to avoid a conflict of interest and to disclose conflict of interests to a principal; Duty to account for any monies received on behalf of the principal; Duty not to make secret profit; Duty to act in person; Duty to keep and render correct and appropriate accounts.
* Duties could also be imposed as contractual duties under the terms of the agency agreement between the principal and the agent.

**Application**

* Is there a relationship of agent and principal between Christina and Davo? Or not? Because…
* Does Davo have actual authority? Or not? Because…
* Does Davo Have ostensible/apparent authority? Or not? Because…
* Did Davo breach his fiduciary and/or his contractual duties to Christina? Or not? Because…

**Conclusion**

* On the balance of probability, a court would likely decide ….?

Lecture 10: Intellectual Property

**Intellectual Propety**

* **Intellectual property** (IP) is a form of intangible creation such as the expression of an idea or a trade mark. It is a product of intellectual effort rather than a physical manufacturing process.
* **Intellectual property law** grants a business the right to prevent others from copying, using or exploiting its IP without its permission.

**Commercializing IP**

* IP is a valuable commercial asset. The value can be immense:
  + George Lucas’ Starwars – $20 billion
  + JK Rowling’s Harry Potter – $12 billion
  + polymerase chain reaction – $700 million
  + Microsoft trademark – $75 billion
* The owner of IP has the exclusive right to exploit the IP for a profit. This includes the right to **license** the IP: in return for a fee owner of the IP permits others to exercise their exclusive rights in relation to the IP.

**Types of IP Protection**

* Intellectual Property Law:
  + **Copyright law** protects text, images and other forms of expression
  + **Trade mark** law protects distinctive words, phrases and symbols
  + **Patent law** protects new technologies
  + **Design Law** protects the shape and appearance of products
  + **The tort of breach of confidence** protects commercial secrets.

**Multiple categories of IP rights**

* + Name/Logo - protected by trade mark law.
  + Inventions/Manufacturing processes/method - protected by patent law.
  + Information - protected as a commercial secret.
  + Appearance/packaging - protected by design law.
  + Writing - protected by copyright law.
* When intellectual property rights have expired - for example see slide on extent of copyright protection - the IP is said to have entered the public domain - the IP in question can be copied or exploited by others without penalty

**Rationale for protection**

* **Economic justifications**: Innovators are given protection by IP law and granted financially valuable legal rights because doing so motivates others to be innovative, and this is ultimately of economic benefit to the community.
* **Moral justifications**: Innovators are given protection by IP law because they are morally deserving in their own right as a consequence of their efforts, regardless of the value of their efforts to the community.

**Copyright – What is Copyright?**

* **Copyright** is the legal right to prevent unauthorised copying of the expression of an idea, e.g. a book, a song, a movie, or a photograph.
* The law of copyright does not protect the idea itself, only the expression of that idea.
* Copyright in Australia is regulated by the *Copyright Act 1968* (Cth) (“CA”)
* Copyright protection is automatic (no registration required)
* Ownership of copyright is a separate issue from ownership of the physical item - For example, someone may own a DVD movie but they do not necessarily own the copyright in the material on the DVD or in the movie.

**Requirements for Protection**

* **Requirement 1: The creation is a ‘work’ or ‘subject matter other than works’** – S32 CA - extends protection to ‘works’:
* Literary works – the expression of an idea in the form of text e.g. a book, an article, an email, written information, an advertisement, a manual, song lyrics - Note: Single words, titles, headlines, banners and business slogans are often too short/unoriginal to be protected as literary works by themselves- Fairfax v Reed (2010)- newspaper headlines are not literary works;
* Musical works – primarily the musical arrangement of a combination of notes and sounds;
* Dramatic works – such as a show, dance routine, film script;
* Artistic works – such as paintings, pictures, photographs, graphic designs, building or plans for a building, graphic designs, works of artistic craftsmanship - needing skill and appealing to aesthetic taste - not unskilled objects that not intended to appeal to aesthetic tastes
* **The CA also extends protection to ‘subject matter other than works’**
  + Sound recordings – the recordings of songs/music separately from lyrics (literary work) and musical arrangement (musical works)
  + S90 Recordings of films;
  + S91 Recordings of television and sound broadcasts - and
  + S92 Published editions – compilation of literary or artistic works – protected in its own right separately from copyright in the literary or artistic works of which it is compromised.
* A creation may not just fall into one category of works or subject matter other then works – each different component or element of a creation might have different copyright protection – for example:
* A song is a combination of literary works (music), musical works (musical arrangement) and sound recordings;
* A website is a combination of literary works (text written on the website including logos and business slogans), artistic works (pictures and graphic design of the website), Films (any videos or animated graphics on the website) and sound recordings (any background music on the website or accompanying any film).

Requirement 2

* **Requirement 2: The creation is original S32 CA**
* This does not mean that the creation must be different to other creations, only that it must be the result of the person’s own skill and effort rather than the result of copying from another source.
* A minimal degree of creativity is required - Desktop Marketing v Telstra (2002) – Telephone directory books by Telstra – even though the level of creativity was minimal – just listing peoples names addresses and telephone numbers - the layout and effort and expense in compiling the data made them an original literary work
* The requirement of originality only applies to works, not subject matter other then works because they are usually adaptions of works

Requirement 3

* **Requirement 3: The creation is expressed in a material form**
* 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 - someone may have a brilliant idea which is original, but if they tell the idea to second person who produces a work based on that idea, copyright belongs to the second person. The originator of the idea has no rights in the finished work.

**Extent of protection**

* S31 CA The copyright owner has exclusive rights:
  + to reproduce the work in a material form,
  + to publish the work,
  + to perform the work in public,
  + to communicate the work to the public, and
  + to make an adaptation of the work.
* If another person exercises any of these exclusive rights without the owner’s permission, they infringe the owner’s copyright.
* The copyright owner also has moral rights:
* of attribution of ownership, not to have ownership falsely attributed, and of integrity.
* The person who creates the original work will usually be the owner of the copyright in the original work.
* Where an original work is created by someone ‘in pursuance of the terms of his or her employment by another person’, then the employer is the copyright owner. Independent contractors usually own copyright in what they create.
* It is common practice for creators to assign copyright to publishers and employers.

**Extent of copyright protection**

* Literary, dramatic, musical or artistic 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 edition: 25 years after first publication

**Infringement**

* Copyright is infringed when a person exercises the copyright owner’s exclusive rights in relation to the creation without their permission to do so, e.g. they copy the creation without permission.
* Copyright will be infringed if:
  + a substantial part of the creation is copied; and
  + there is objective similarity between the original and the copy; and
  + there is a causal connection between the original and the copy.
* **A substantial part of the creation is copied:**
  + No fixed rule about the precise portion that is copied;
  + The quality of the part copied will be considered - whether it was essential/distinctive or not?
  + it was insignificant material that was copied - if so, it may not be an infringement;
  + But if it was significant material that was copied – it may be an infringement:
    - Hawke v Paramount – the infringer only copied a few bars of a popular song – but it was infringement because they were a significant part of the song and very recognisable;
    - US – Blurred Lines and the Marvin Gaye Estate;
    - Not proven - but songs where questions have been raised - [http://www.buzzfeed.com/expresident/13-songs-that-sound-a-little-bit-too-much-like-oth#.nuXRaV5JN](http://www.buzzfeed.com/expresident/13-songs-that-sound-a-little-bit-too-much-like-oth)
* **Objective similarity between the original and the copy:**
  + If the copy is an exact copy of the original – the copy will be objectively similar;
  + But that is rare- often the copy will not be exactly the same – so the question is whether a reasonable person would view the copy as similar to the original or not?
    - Zeccola v Universal Studios (1982) – Universal owns the copyright for the book, script and film of Jaws (Shark Film). An Italian film is produced called Great White (I’UltimoSqualo) – although not an exact copy of Jaws- any reasonable person would detect that the Italian film is similar to Jaws – i.e. Great White Shark attacks and eats people and is destroyed by the hero. Look for the objective similarity yourself
    - Jaws - <https://www.youtube.com/watch?v=2I91DJZKRxs>
    - I’UltimoSqualo <https://www.youtube.com/watch?v=6Eo7Om2AfuE>
* There is a causal connection between the original and copy - It must be shown that the alleged copy of the original creation actually copied and not created independently;
  + To show this causal connection – it must be shown that the maker of the copy had access to the creation - intention does not matter - it does not matter if the copying was deliberate, accidental, conscious or subconscious
    - Bright Tunes v Harrissongs Music (1976) – In 1962 a band called the Chiffons record the song ‘He’s So Fine’. In 1970 George Harrison – one of the Beatles - records the song ‘My Sweet Lord’. Harrison substantially copied a part of “He’s So Fine” and admitted that he would have heard the song in 1962 but that such copying was accidental. Even though he subconsciously copied parts of the song, his access to the original amounted to a causal connection. Listen to them yourself –
    - <https://www.youtube.com/watch?v=rinz9Avvq6A>
    - <https://www.youtube.com/watch?v=0kNGnIKUdMI>

**Infringement – Remedies and Defences**

* Remedies for infringement include damages, an injunction, account of profits made from the infringement;
* A person accused of infringing copyright may seek to rely upon a range of possible defences, including:
  + insubstantial infringement – e.g. insignificant copying;
  + fair dealing – for a legitimate purpose and not for competing with the owner or depriving them of their rightful entitlements – such as for criticism or review; parody or satire; reporting the news; judicial proceedings or professional advice; research or study (See SS CA 40-43 and 103A-104)
  + Other statutory defences – such as reproducing text for collection in place of education, performances at home and incidental filming or televising of works.

**Trade Marks – What is a Trade Mark?**

* A trade mark is a distinctive word, a phrase, or a symbol used in commercial dealings to show a connection between a particular business and its product.
* A trade mark can be letters, a word, a name, a device, an aspect of packaging, a shape, a colour, a sound or a scent.
* In Australia trade marks are regulated by the Trade Marks Act 1995 (Cth).
* TM must be registered to gain protection under the Act.
* NAME AND LOGO are protected by **Trademark Law**

**Requirements for trade mark protection**

* A trade mark will only be registered if it:
* does not contain a proscribed sign,
* is able to be represented graphically,
* is distinctive, not common terms such as ‘Olympic’ or specific geographical indications such as ‘champagne’ or ‘cognac’
* is not scandalous or contrary to law,
* is not likely to deceive or cause confusion, and
* is not identical with or deceptively similar to another pending or registered trade mark.

**Registration Process**

* The following steps are required to register a trade mark.
* An applicant should first search the trade marks database at the IP Australia website (www.ipaustralia.gov.au) to see if the same or a similar trade mark has already been registered.
* Before lodging the application the applicant can request an assessment of the likelihood of the application being successful by using the ‘TM Headstart’ service accessible online at the IP Australia website.
* The application must be in relation to a particular class or classes of products. There is no limit on the number of classes in which a trade mark can be registered, as long as the trade mark is actually used or intended to be used in relation to products in that class.
* The application is examined by IP Australia. If the application meets the requirements for registration it will be accepted for registration.
* If accepted for registration, the application is advertised in the Official Journal of Trade Marks. Anyone who opposes the registration of the trade mark will have 3 months within which to register their opposition. In the event that the application is opposed the applicant will have to defend their application. Oppositions are administered by the Trade Marks Hearings section of IP Australia.
* If no opposition is filed, or if the opposition is unsuccessful, the trade mark will be registered. IP Australia will issue a Certificate of Registration and record the details of the trade mark in the Register of Trade Marks. The trade mark will be registered from the date the application was filed.

**Extent of trade mark protection**

* A trade mark owner only has the right to restrain others from using the registered trade mark in relation to the class of products for which the trade mark has been specifically registered.
* Classes of goods and services:
* <https://www.ipaustralia.gov.au/trade-marks/applying-for-a-trade-mark/classes-goods-and-services>
* The exception to this is if the trade mark is ‘well known in Australia’ in which case the trade mark owner would be able to prevent someone from using the trade mark in relation to unrelated goods or services.
* As long as they keep using the trade mark and continue paying the periodic renewal fees every 10 years, the trade mark owner can renew registration of their trade mark indefinitely.

**Infringement for trademark**

* If another business markets its products using a trademark that is substantially identical with or deceptively similar to the registered trade mark, it has infringed that trade mark.
* The other business may avoid liability if the trade mark:
  + is their own name, or place of business,
  + describes the kind, quality, quantity, intended purpose, value, geographical origin, or some other characteristic of their products,
  + was used in comparative advertising,
  + was used with the trade mark owner’s implied consent, or
  + has been used since a time before the trade mark owner registered or started using the trademark.

**The Tort of Passing Off**

* D commits the tort of **passing off** if they misrepresent themselves or their product as having some kind of connection with P – A common example of passing off – not always – but a common example occurs when someone copies the registered trademark of another:
* In an action for **passing off** P must show:
  + - 1. They make a misrepresentation (expressly or by implication) that their goods or services are connected with another person or have the other person’s endorsement or approval; and
      2. The misrepresentation is made in the course of a trade; and
      3. The misrepresentation is intended to deceive potential purchasers.

**Remedies**

* Under the Trade Marks Act the remedies available for infringement of a registered trade mark include:
* an injunction to prevent further infringement, and
* either damages or an account of profits.
* If a trade mark is unregistered the trade mark owner may still be able to prevent another from misusing it by bringing a legal action:
* in the tort of passing off, or
* under ACL s 18 – misleading and deceptive conduct.

**Patents - What is a patent?**

* A **patent** is a form of legal protection granting the creator of a new technology the exclusive right to use and exploit that new technology for a limited period. It is intended to encourage invention and innovation by rewarding the creator with a potentially valuable limited monopoly.
* Patent protection is not automatic; the patent must be registered with the Patents Office of IP Australia.
* Australian patents are regulated by the *Patents Act 1990* (Cth).
* MANUFACTURING PROCESS is protected by **Patent Law**

**Extent of patent protection**

* A new technology can only be patented if it is:
  + **a manner of manufacture;**
  + **new;**
  + **inventive or innovative; and**
  + **useful.**
  + **Eg: methods of doing business (Amazon ‘one click’)**

**Extent of protection**

* A standard patent grants protection for 20 years from the date of the patent; an innovation patent grants protection for 8 years.
* A patent owner has the exclusive right to exploit the new technology. They can also assign or license the patent to someone else in return for royalty payments.
* In return for being granted a monopoly over the use of the new technology for the duration of the patent, the patent owner must share their knowledge by providing a full description of how the new technology works; this information becomes public and can provide the basis for further research by others.

**Infringement for patent**

* A patent owner’s rights are infringed if the new technology protected by the patent is copied, used or exploited without their consent.
* A court may refuse to award damages or an account of profits if it is shown that at the time of the infringement the defendant was not aware that the new technology was protected by a patent.

**Designs – What is a design?**

* The design is the overall appearance of the product resulting from one or more visual features of the product.
* Design protection only protects the appearance of the product, not the way it works.
* The *Designs Act 2003* (Cth) protects the design of a product from unauthorised copying or exploitation.
* The design must be registered with IP Australia.
* A design will not be registered unless it is:
  + **new, and**
  + **distinctive.**

**Extent of protection for Design Law**

* The design owner has the exclusive right:
  + to make a product that embodies the design,
  + to import such a product into Australia for sale, or for use for the purposes of any trade or business,
  + to sell, hire or otherwise dispose of such a product,
  + to use such a product in any way for the purposes of any trade or business, and
  + to authorise another person to do any of these things.
* Design registration initially protects the design for five years; the design owner can renew the registration for a further five years, after which the design automatically enters the public domain.

**Infringement for Design Law**

* Another business will infringe the design owner’s rights if, without the design owner’s consent, they make, import, sell, hire, offer for sale or offer for hire a product that embodies a design that is identical to or substantially similar in ‘overall impression’ to the registered design.

**Confidential Information – Breach of Confidence**

* **Confidential Information -** information disclosed by one person to another a confidential basis (also known as ‘trade secret’) – often of a vitally important nature to a business – such as
  + Production formulae or methods.
  + Business accountants.
  + Future business strategies
  + Methods of sales.
  + Recipes.
  + Customer information and manuals.
* **Breach of confidence** is a tort that is committed when one person uses information disclosed to them on a confidential basis without the consent of the owner of the information.

**Breach of Confidence**

* **Breach of confidence** is a tort that is committed when one person uses information disclosed to them on a confidential basis without the consent of the owner of the information.
* To establish that this tort has been committed, the following requirements must be satisfied:
  + The information is of a confidential nature; trivial information and public knowledge are not protected.
  + The information was given in circumstances where the obligation of confidence was explicitly made known and accepted, or was implied from the context.
  + There has been an unauthorised use or threatened use of the information.
* In circumstances where confidential information is to be disclosed to another, it is wise to prepare and execute a **confidentiality agreement** to remove all uncertainty and ensure that all parties are aware of their obligation of confidence.

Lecture 11: Consumer and Competition Law 1

**Why Statutory reform?**

* The ACL overcomes many of the difficulties with the common law of misrepresentation and provides better remedies for ‘consumers’ whose contracts are induced by false statements or by misleading or deceptive conduct.

**Reasons for Statutory Reform**

* Traditional contract principles - *caveat emptor* and freedom of contract;
* Modern consumer-business relationship including standard form contracts and the information asymmetry between business and consumers; and
* The economic consequences of the information asymmetry between consumers and business.

**Misleading or 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’.

**Preconditions of liability under s.18 of the ACL**

* The defendant must be a person (corporated body or unincorporated business entity).
* The defendant’s conduct must occur in ‘trade or commerce’.
* The defendant must have ‘engaged in conduct’.
* The defendant’s conduct must have been ‘misleading or deceptive’.
* The defendant’s conduct is ‘likely to mislead or deceive’.

**‘Trade or commerce’**

* The terms ‘trade’ and ‘commerce’ are ordinary terms which describe all the mutual communing, the negotiations verbal and by correspondence, the bargain, the transport, and the delivery which comprised commercial arrangements (Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd (1978) 36 FLR 134 at 139).
* Unless the transaction has a commercial character or occurs as part of the business operation, s. 18 will not apply (Concrete Constructions (NSW) Pty Ltd -v- Nelson (1990) 169 CLR 594).

**‘Engaging in Conduct’**

* The term does not seem to have been defined under the ACL (except in the context of s. 4). However, s. 4 (2) of the TPA defines ‘engaging in conduct’ as ‘doing or refusing to do an act’.
* The definition included making a contract, making or giving effect to a provision of a contract.
* The term includes both actions (doing) or non-actions (refusing to do) of corporations or individuals (if the extended application of the TPA apply).
  + *Taco Co. of Australia Inc –v- Taco Bell Pty Ltd* (1982) 42 ALR 177; *Henjo Investments Pty Ltd –v- Collins Marrickville Pty Ltd* (1988) 79 ALR 83

**‘Mislead or deceive’**

* The terms misleading or deceptive had not been defined under the TPA. The Federal court in *Weitman -v- Katies* (1977) 2 TPC 329 defined the terms as follows:
* ‘**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.
* ‘**mislead**’- to lead astray in action or conduct; to lead into error; to cause to err.
* The conduct will be caught under section 18 if it has the likelihood of deceiving or misleading others.

***Taco Co of Australia -v- Taco Bell Pty Ltd* (1982) 42 ALR 177**

* The relevant section (target group) of the public must be identified - who are likely to be misled by this conduct? (INXS case 1986)
* 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 the not so intelligent, the well-educated and the poorly educated.
  + It has to be determined why the misconception has arisen:
  + Has the target group formed an erroneous belief ? Or
  + Has the target group been misled or deceived or capable of being so?
  + *McDonald’s System of Australia -v- McWilliam’s Wines Pty Ltd* (1980) ATPR 40–188

**Misleading or deceptive conduct**

* A statement that is not literally true is not necessarily misleading or deceptive \
* A statement that is literally true can still be misleading or deceptive

**The effect of section 18**

* The section is not limited to consumer transactions.
* The section is not limited to the supply or possible supply of goods or services.
* This section is not fault related. It imposes direct liability on corporations.
* An intention to mislead or deceive is not required.
* The proof that someone has been actually misled or deceived is not required.
* The section imposes a norm of behaviour in commercial transactions. It focuses on the conduct, rather than its effect.
* The breach of section 18 carries civil consequences/remedies.

**Contravention of Section 18**

* **Is the defendant a person?**
  + **IF NO**
    - The ACL will not apply
  + **IF YES**
    - Has the person engaged in conduct?
    - **IF YES**
      * Is the conduct in trade or commerce?
      * **IF YES**
        + Is the conduct misleading or deceptive or likely to mislead or deceive?
        + **IF YES**

The person has breached s18

* + - * + **IF NO**

The person has not breached s18

* + - * **IF NO**
        + The ACL does not apply
    - **IF NO**
      * The ACL will not apply

**Section 4 of the ACL – misleading representations with respect to future matters**

Section 4 states –

If:

* (a) a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and
* (b) the person does not have reasonable grounds for making the representation;
* The representation is taken, for the purposes of this Schedule, to be misleading.
* Note: Section 4 reverses the burden of proof (i.e. the person has to show that it had reasonable grounds for making the representation which turn out to be misleading).

**Enforcement and remedies**

* A contravention of the prohibition on misleading and deceptive conduct is subject to remedies including injunctions (s 232), damages (s 236) and compensatory orders (division 4), as set out in Chapter 5 of the ACL.
* Civil penalties and criminal sanctions do not apply to s 18, because of its breadth of the provision.
* s 18 of the ACL creates a norm of business conduct, and allows persons to seek remedies for harm caused by breaches of that norm, rather than giving rise to a contravention that attracts punitive sanctions.
* Note: Other prohibitions against specific forms of false or misleading conduct may also apply to instances of misleading conduct and have specific penalties and criminal sanctions.
* Also read Division 5 (ss. 246–250)

**Who may bring an action?**

* **Individuals** (i.e. consumers) who suffered or likely to suffer loss/damage due to the misleading or deceptive conduct of the other person who acts in trade or commerce.
* **Businesses** who suffered or likely to suffer loss/damage due to the misleading or deceptive conduct of the other (corporation).
* **Public interest groups** (anti-smoking lobby; environmental protection groups) who believe that the person’s conduct is misleading or likely to mislead even though the group’s members have not suffered any loss or damage.
* **The Australian Competition and Consumer Commission**.

**Regulator of the ACL**

* The Australian Competition and Consumer Commission (ACCC) oversees the operation of the ACL including the operation of s 18.
* The Australian Securities and Investment Commission (ASIC) oversees the misleading or deceptive conduct involving financial corporations.
* The action for breach of s 18 may be brought in the Federal Court of Australia by the relevant parties (plaintiffs).

**Implications of s18**

* Because of its broad scope and flexibility, s 18 provides a better remedy than an action for breach of contract.
* Because s 18 is not limited to consumers, the general public or other businesses can utilise the provision.
* Damages are available for plaintiffs for innocent misrepresentation.
* Courts generally will not enforce exclusion clauses in context of s 18 claims.

**Statutory unconscionability**

* There are main three sections prohibiting unconscionable conduct:
  + Section 20 : unconscionable conduct in general.
  + Section 21: unconscionable conduct in consumer transactions.
  + Section 22 : unconscionable conduct in business transactions.

**Unconscionable conduct**

* This provision imports into the Act the doctrine of unconscionability enunciated by the High Court in *Commercial Bank of Australia -v- Amadio* (1983) 151 CLR 447; *Blomley -v- Ryan* (1956) 99 CLR 362; *Louth* -v- *Diprose* (1992) 175 CLR 621.
* Section 20 does not apply where the conduct of the person falls within the specific sections 21 and 22.

**What is unconscionable?**

* ‘A transaction will be unconscientious within the meaning of the relevant equitable principles only if the party seeking to enforce the transaction has taken unfair advantage of his [her] own superior bargaining power, or of the position of disadvantage in which the other party was placed’.
* (Gibbs CJ in Amadio’s case at 459.)

**Prerequisites of statutory unconscionability under the ACL**

* The defendant must be a person (individual, partnerships or a body corporate)
* The transaction must be in ‘trade or commerce’ (i.e. the transaction must have commercial aspect to it)
* Each statutory provision specifies circumstances/situations where a particular provision may apply

**Section 20: unconscionable conduct within the meaning of the unwritten law**

* **Section 20:** 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.
* This section applies to ‘unconscionable conduct’ of a corporation that is recognised as part of the common law and equitable principles developed by of the courts of the states and territories.

**Section 20**

* This provision deals with unconscionable conduct which has been accepted as ‘unconscionable’ within the meaning of the state and territory laws.
* This section does not confer new rights for people, but codifies equitable doctrine of ‘unconscionability’ accepted by the Australian courts.

**Section 21: unconscionable conduct in connection with goods or services**

* **Section 21** deals with ‘unconscionable conduct’ of person in ‘trade or commerce’ in connection with supply or possible supply of goods or services to another ‘person’.
* **Section 22** Looks at matters to which the court may have regard for the purpose of determining whether a person has contravened section 21

**Statutory Unconscionability**

* Section 22 (1) and (2) takes into account both *procedural* and *substantive* unconscionability.
  + Relative strengths of the bargaining positions
  + As a result of the conduct engaged in by the person, the consumer was required to comply with a condition
  + Whether the consumer was able to understand any document
  + Whether any undue influence or pressure was exerted by the person (supplier) on the consumer
* **Note: Amadio’s equitable doctrine focuses on procedural unconscionability.**

**Examples of Procedural unconscionability**

* 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 body and mind or illiteracy
* Harsh or oppressive behaviour, unfair tactics used by the stronger party
* Section 22 (1) (a), (c) and (d) and (2) (a), (c) and (d) deal with procedural unconscionability

**Examples of 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 unduly one-sided from perspective of weaker party
* If for the same price the same goods/services or their equivalent could have been obtained elsewhere
* Section 22 (1) (b) & (e) and (2) (b) & (e) provide examples of substantive unconscionability

**Remedies for the breach of s21**

* A contravention of the prohibition on unconscionable conduct under s 21 subject to remedies, including rescission of contract, injunctions (s 232), damages (s236) and compensatory orders (division 4), as set out in Chapter 5 of the ACL.
* Civil penalties and criminal sanctions do apply to section 21. [Corporations $1.1 millions; Individuals: $220,000.]
* Damages , injunction other orders i.e. declaring a contract void in whole or part;
  + varying a contract or arrangement;
  + allowing the refund of money or return of property;
  + requiring the specified services be performed;
  + ACCC issuing infringement notice to the person (supplier).
  + Civil pecuniary penalties ($1.1 million for Companies; $220,000 for individuals)
* The court can declare a contract as void in whole or in part. It can also refuse to enforce any or all of the terms of the contract instead of setting the contract aside.
* Compensation for loss or damage
* The ACCC can issue infringement notice to the person:
  + - 1. 600 penalty units for a listed company
      2. 60 penalty units for body corporate (other than a publicly listed company)
      3. 12 penalty units for individuals
* The ACCC may take administrative or court action against a party who has engaged in unconscionable conduct in trade or commerce.
* *ACCC -v- Simply No-Knead (Franchising) Pty Ltd (200) 104 FCR 253*

Lecture 12: Consumer and Competition Law 2

**Unfair Terms**

* A term of contract will be **unfair** in contravention of ACL s 23 and therefore void if:

1. The contract is a consumer contract
2. The contract is a standard form contract; and
3. The term is unfair

* According to ACL s 24(1), a term of a consumer contract is ‘unfair’ if :

1. it causes a significant imbalance in the parties’ rights and obligations arising under the contract;
2. it is not reasonably necessary to protect the legitimate interests of the business; and
3. it would cause detriment to the consumer.

* *Director of Consumer Affairs Victoria v AAPT Limited* [2006] VCAT 1493

**Specific Prohibitions**

* A Business must not make a false representation:
  + That its good are of a particular standard, quality value, grade, composition, style or model or have had a particular history or particular previous use,
  + That its goods are new
  + That is has a sponsorship, approval or affiliation it does not have,
  + With respect to the price of its goods or services.
  + concerning the availability of facilities for the repair of its goods or of spare parts for its goods,
  + concerning the place of origin of its goods, or
  + concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy: s 29.
* A business must not engage in **bait advertising**: s 35.
* A business engages in bait advertising when it advertises a product at a price that is likely to attract buyers to its premises when it knows or should know that it is likely to run out of stock very quickly.
* A business must not accept payment from a buyer when it either does not intend to supply the product or it knows or should know that it will be unable to provide the product within the specific time or a reasonable time: s 36.
* **Inertia selling** is sending an unsolicited product to a person and then pressuring the person to pay for that product.
* A business must not claim a right to payment unless it reasonably believes that it in fact has a right to payment: s 40.
* If a business has sent an unsolicited product to a person, the person:
  + does not have to pay for it, and
  + is not liable for the loss of or damage to the product unless the loss or damage results from a wilful and unlawful act.
* After the expiry of a certain period, the product becomes the property of the person, **free of charge**.

**Consumer Guarantees**

* The ACL implies into contracts for the sale of goods to consumers guarantees that:
  + the seller has title: ACL s 51;
  + the consumer will have undisturbed possession: ACL s 52;
  + there are no undisclosed securities: ACL s 53;
  + the goods are of acceptable quality: s 54;
  + the goods are fit for any disclosed purpose: s 55;
  + the goods correspond with their description: s 56;
  + the goods correspond with any sample or demonstration model in quality, state or condition: s 57;
  + the manufacturer will ensure that repair facilities and spare parts are reasonably available: s 58; and
  + the manufacturer will comply with any express warranties given in relation to the goods: s 59.
* The ACL implies into contracts for the supply of services to consumers guarantees that:
  + the services will be rendered with due care and skill: s 60;
  + the services, and any product resulting from the services, will be fit for any disclosed purpose: s 61; and
  + the services will be supplied to the consumer within a reasonable time: s 62.
* Unlike the terms implied by the SGA, these guarantees cannot be excluded.

**Example**

* ACL s 54 - In every contract for the supply of **goods** to a consumer in trade or commerce (other than a sale by auction), there is a guarantee that the goods will be of **acceptable quality** – being:
  + **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**;
  + 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
* ACL S 55 - In every contract for the supply of goods to a consumer in trade or commerce, there is a guarantee that the goods will be **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;
  + the consumer makes known, expressly or by implication, to the supplier, a person by whom any prior negotiations or arrangements in relation to the acquisition of the goods were conducted or made (for example an agent) or the manufacturer of the goods;
  + 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/agent/manufacturer.

**Consequences**

* Remedies that can be granted by a court for contravention of the ACL include:
  + pecuniary penalties;
  + injunctions;
  + an order that the business pay damages to any person who has suffered loss because of the contravention:
  + a compensation order for injured persons;
  + an order declaring a contract void, varying a contract, refusing to enforce a contract, ordering a refund, ordering compensation, ordering repair of the goods, or ordering the provision of services;
  + non-punitive orders including orders directing the business to perform a community service or to establish compliance and education programs for its employees;
  + an adverse publicity order; and
  + an order disqualifying a person from managing a corporation.

**Statutory implied terms: states and territories**

* Sellers of goods or services may have alternative rights and remedies under the *Sale of Goods Acts* of the states and territories, which may include damages, interest, right to terminate and equitable lien.

**Overview of competition law in Australia**

* Australia’s competition laws are primarily contained in Part IV of the Competition and Consumer Act 2010 (Cth) (CCA).
* The objective of Part IV is to promote competition in Australian industry by prohibiting conduct that would otherwise amount to anticompetitive behaviour.
* The CCA is enforced by the Australian Competition and Commission (ACCC).
* Breaches of the CCA can be prosecuted by the ACCC.

**Competition Law and Policy**

* Part IV regulates:
  + conduct that restricts competition between competitors (horizontal restraints);
  + conduct that restricts the ability of suppliers or customers to engage in lawful trade (vertical restraints);
  + misuse of market power; and
  + mergers and acquisitions that have the potential of undermining competition and give rise to anticompetitive behaviour.

**Prohibited conduct under Part IV**

* Broadly speaking, Part IV prohibits the following anticompetitive trade practices:
  + anticompetitive agreements and exclusionary provisions, including primary or secondary
  + boycotts: s 45;
  + misuse of market power: s 46;
  + exclusive dealing/third line forcing: s 47;
  + resale price maintenance: ss 48, 96–100;
  + mergers that would have the effect or likely effect of substantially lessening competition in a substantial market: ss 504, 50A.

**Exceptions**

* Arrangements specifically authorised or approved by a Commonwealth or state or territory act;
* Industrial agreements in relation to conditions 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; and
* Protection of intellectual property.

**Authorisation**

* The ACCC can authorise:
  + agreements that will lessen competition,
  + price fixing,
  + boycotts,
  + exclusive dealing,
  + resale price maintenance, and
  + prohibited mergers
* if it is of the view that the benefits to the public outweigh the detriment to the public caused by the conduct.
* The ACCC cannot authorise a misuse of market power.

**Anticompetitive agreements and exclusionary provisions: s45**

* Sections 45–45EA deal with a variety of anticompetitive agreements, including:
  + agreements that involve market sharing of goods; or
  + agreements that restrict the supply of goods (s 45(2));
  + agreements that contain an exclusionary provision (s 45(2));
  + price fixing agreements (s 45C); and
  + secondary boycotts (ss 45D–45EA).

**Agreements that lessen competition**

* A business cannot make a deal with one or more of its competitors that is intended to or is likely to reduce competition in the particular market: ss 45, 45B.
* *ACCC v Visy Industries Holdings Pty Ltd* [2007] FCA 1617
* 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’.

**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: s 45A.
* E.g. petrol price fixing
* 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* [1980] FCA 86

**Primary Boycotts**

* A **boycott** is an action by an individual or group that prevents or is intended to prevent another individual or group from buying or selling products in a market.
* A business is not permitted to agree with its competitors that they will collectively refuse to deal with a particular competitor, supplier or customer: s 45.

**Secondary Boycotts**

* 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.

**Misuse of Market Power**

* If a business has a substantial degree of power in a market, it cannot take advantage of that power to eliminate or substantially damage a competitor, or prevent the entry of a person into that or any other market: s 45.
* E.g. Warner Music & Universal Music
* An example of misuse of market power is **predatory pricing**: charging an unrealistically low price for a product to force a competitor out of the market.
* E.g. Boral Besser Masonry

**Exclusive Dealing**

* CCA s 47 prohibits two types of exclusive dealing: full-line forcing and third-line forcing. A business will engage in **full-line forcing** when 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, or
  + not to resupply its product to a particular place.
* *TPC v Massey Ferguson (Australia) Pty Ltd* [1983] FCA 124
* **Third-line forcing** occurs when a business makes the supply of its product to a customer conditional upon the customer also purchasing the product of another business.
  + E.g. travel insurance

**Resale price maintenance**

* A business will engage in **resale price maintenance** in breach of CCA s 48 if it:
  + imposes a minimum price upon resellers of its product,
  + sets a price that retailers are likely to understand is a minimum price,
  + agrees with retailers that they will not advertise its product below a specified price,
  + induces a retailer not to discount its product, or
  + threatens to refuse supply to a retailer to force them to comply with any of the above.
  + *TPC v Sony (Australia) Pty Ltd* (1990) ATPR 41-031

**Mergers and Acquisitions: ss50 and 50A**

* Section 50 generally prohibits mergers or acquisitions that would have the effect or likely effect of substantially lessening competition in a substantial market for goods or services.
* Section 50A deals with certain acquisitions occurring outside Australia that would substantially lessen competition in a market within Australia.

**Statutory exemptions to Part IV: s51**

* Statutory exemptions from certain prohibitions are available under the CCA for acts that would otherwise constitute a breach of Part IV.

**Penalties and remedies for Part IV breaches**

* monetary penalties of up to $10 million for companies and up to $500 000 for individuals: s 76;
* injunctions: s 80;
* damages: s 82;
* divestiture of shares or assets that have been acquired in the case of an unauthorised merger: s 81;
* other orders made by court application to an aggrieved party, including specific performance, rescission of a contract and variation: s 87;
* probation orders, community service orders and corrective advertising orders: s 86C;
* adverse publicity orders: s 86D; and
* compensation orders to a victim: s 79B.

Tutorial 8: Topic 10 Intellectual Property

**Homework Question**

In 2005, Bazza was hired in the “research” department of *The* *College of Australian Business Law (CAB)*. The College has 1 campus in Brisbane and multiple campuses in outback Australia. CAB runs a 3 year course, teaching students about Australian Business and Corporate Law. In 2010, Bazza was handed a promotion and became their “Chief Marketing Officer”. As part of his employment, he was asked to produce an “Introduction Package” that would welcome potential, new students to the University.  The College sent Bazza an email, with the following instructions: “As part of our vision to increase student numbers, particularly in our rural campuses, you are required to undertake the task of creating an information/promotional package that will best represent our Institution to potential Foreign and Domestic students. We are all about the Country meeting the City and giving students a great legal education, whilst also experiencing Australian culture in the outback. We leave the layout and design up to you.”

After two weeks, Bazza still had no new idea on how to approach the task and so he decided to see what other Colleges had done in similar situations. Using a false name, Bazza applied as a potential student to each of the leading Universities/Colleges within Australia, so that he could be sent their promotional material.

After reading all of the material on offer, he then designed his own promotional package which included a brochure, a covering letter and an accompanying CD. The package was designed in a bright yellow, orange and red colour scheme. The brochure provided information about the history of Australia and the history of the College. The CD was separated into 2 sections: the first containing information about CAB’s unique Business Law curriculum and the second outlining one of CAB’s new trial programs – extra-curricular, “cultural” activities that were to be offered at their regional campuses. These activities included boomerang throwing and crocodile wresting. Bazza used the songs “I Still Call Australia Home” and “I came from the Dreamtime” as background music for the CD. He also devised a new slogan “*City to Country: Learning Law with an Aussie Twist*’’ which was used throughout the promotional package. All writing in the brochure, letter and CD was in a unique font called “Old Australian”.

Bazza has now been contacted by Macca, the CEO of a famous Business College in Mt Isa (“The College of the Outback” (TCO)). TCO runs a 3 year course, focusing on business practices and the requirements of running a business in regional and rural Australia. One of the College’s main priorities is on students understanding Australia’s diverse culture and its unique ancestry. Macca claims that Bazza has copied TCO’s promotional package which includes a covering letter and CV and which has remained largely the same for 10 years. Macca says that TCO’s package has an orange and red colour scheme and that all information has always been printed in the “Old Australian” font.

Macca describes how TCO’s cover letter sets out the history of Australia and outlines why the University feels that this is important when understanding and teaching how “Business” operates in Australia. He alleges that TCO has always promoted “regional Australia” and that this is evidenced by the many cultural activities that their College offers, such as learning to play thedidgeridoo, raising a baby crocodile and baking damper (traditional Australian bread). All of these activities are featured on TCO’s promotional CD. Macca states that “I Still Call Australia Home” is featured as the background music on their CD and that it is well known that the College uses this song as their “Inspirational Anthem” for their students. Finally, he also claims that CAB has copied their slogan, being “*Country Meets City: Teaching Business the Australian Way*”.

Bazza insists that he did not intentionally copy TCO’s promotional package. However, he will not say whether or not he had access to it.

Is TCO’s package, including their slogan, protected by copyright law?

If so, has Bazza infringed their copyright?

**Issue**

* Is TCO’s package, including their slogan, protected by copyright?
* Has Bazza infringed their copyright?

**Law**

* Copyright law protects text, images and other forms of expression from unauthorized reproduction.
* A creation will only be protected by copyright if all of the following3 elements are satisfied:

1. The creation is a ‘work’ of ‘subject matter other than works’;
2. The creation is original;
3. The creation is expressed in material form.

* 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. One of those rights is the right to copy the creation.
* The 3 requirements to establish infringement of copyright are as follows:

1. A substantial part has been copied;
2. There is objective similarity between the original and the copy;
3. There is a casual connection between the original and the copy.

**Application**

* iIs TCO’s slogan ‘Country meets City: Teaching Business the Australian Way” protected by copyright? To answer this, 3 elements for copyright protection msut be addressed:

1. TCO’s slogan is a ‘work’ or ‘subject matter other than works’? Or not? Because…
2. TCO’s slogan is original? Or not? because…
3. TCO’s slogan is expressed in a material form? Or not? Because…

* Is the information package protected by copyright? TO answer this, 3 elements for copyright protection must be addressed:

1. TCO’s information package is a ‘work’ or ‘subject matter other than works’? Or not? Because…
2. TCO’s information package is Original? Or not? Because…
3. TCO’s ifnroamtion package is expressed in a material form? Or not? Because…

* Has CAB’s information package infringed TCO’s copyright? To answer this. 3 eleemtns for copyright infringement must be addressed:

1. A substantial part of the TCO information package has been copied? Or not? Because…
2. There is an objective similarity between TCO’s package and CAB’s Package? Or not? Because…
3. There is a casual connection between TCO’s package and CAB’s package? Or not? Because…

* If a breach of copyright claim is successful, what remedies would TCO be able to rely upon?...

**Conclusion**

* On the balance of probability, a court would likely decide…?

**Class Exercise**

Timbo is a student at The College of the Outback (TCO). In week 3 of lectures, he attends class and 5 minutes before class starts, receives a text message from his school friend, Lozza. Lozza’s message says: ‘Mate, my car is broken down. As a favour, can you secretly record the lecture for me and I’ll buy you lunch as a thank you.” Timbo’s normal lecturer, Professor Lawman, arrives at class and delivers his 2-hour lecture. Professor Lawman always has comprehensive notes that he reads from. The notes are written by him, in order to aid him in his teaching, Professor Lawman also invited a guest speaker, Dr Doolittle, to talk about one particular aspect of the weekly readings. Dr Doolittle prepared his own notes and power-point presentation. The lecturers are not recorded by the University.

Without permission to do so, Timbo records the lecture and posts the recording to Lozza’s Facebook page. Timbo and Lozza then meet for lunch and think it is a good idea to sell the recording for $10 to some of their other friends who could not make it to class.

The college finds out about this and wants to know whether the lecture is protected by copyright and, if so, who owns the copyright? TImbo and Lozza also wish to know whether they could rely upon the defence of fair dealing.

(Short Answer Question – No need for ILAC)

**Class Answer**

* Under copyright law, the recording belongs to the college as Professor Lawman works for the university and subsequently Timbo and Lozza are students. College ToS would relinquish all claims to Intellectual property to the university.

1. Comprehensive note taking (falls under literary works) definitely meets criteria to be claimed under copyright law
2. The creation is a ‘work’ or ‘subject matter other than works?’:
3. The creation is original?
4. The creation is expressed in a material form

* When an original work 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.
* For this exception to apply, two elements must be satisfied.

1. The creator must be an employee rather than an independent contractor; and
2. The original work must have been created as part of the duties of employment.

* Independent contractors usually own copyright in what they create.
* ‘Fair dealing’ is usually interpreted to mean that the use of the protected creation is primarily for the legitimate purpose and not for the purpose of competing with the owner or primarily for the legitimate purpose and not for the purpose of competing with the owner or depriving them of their rightful entitlements. A ‘fair dealing’ with a literary work for the purpose of research or study does not constitute an infringement of the copyright in the creation.

Lecture 13: Business Structures 1& 2

**Factors to be considered for the choice of a business structure**

* The purpose of the business
* The duration of the venture
* The availability of finance
* The types of assets to be acquired
* The taxation implications of each type
* The degree of control by those investing capital

**Choice of Business Structure**

The main grounds relevant to selecting an appropriate business structure are related to the following factors:

* the purpose, nature and objectives of the business;
* capital and credit requirements (financing);
* management and control;
* taxation;
* extent of liability;
* privacy and confidentiality;
* formalities and cost; and
* transferability of interest.

**Sole trader: Advantages**

* No outside interference
  + No one can tell you what to do, no badgering from partners.
* Low-cost and no formality
* Confidential
* Personal and high degree of control

**Sole trader: Disadvantages**

* Unlimited liability
  + No differentiation between business and personal, therefore personal assets can be claimed for business failures/expenses (Damages).
* Isolated working and business environment
* Limited lifespan, no continuity
  + When you die, the business is over. (you may retire, and sell it on to another but this can only be done when you’re alive.)
* Business closure or limited trading capacity due to holidays, illness or incapacity
  + No holidays, no employer insurance protection scheme, everything is on you
* Limited access to finances

**Partners and Partnership**

* Partnership: Two or more persons carrying on a business in common with
* Section 5 of the partnership act QLD, actually spells out this test. The elements are (from the section 5)

1. You can’t have a partnership with yourself, 2 or more people.
2. It has to be persons (Humans, not dolphins etc… or bodies given the state of a human by law (like companies)).
3. A repetition over a period of time with a business or commercial angle. But when several people work together for a one off project but never work together again this is a different phenomenon, these are called joint ventures. Not partnership because it lacks the repetition
4. You work together to advance the goas of the partnership, not both of you work on different projects for different goals.
5. Rare to have a partnership where everyone has the same skill, different people are specialised in different fields but are still committed to the overall goal which is the expansion and good of the partnership business
6. Partners work together with a view to make a profit, if they do not make a profit or the first year or first couple, the test is still satisfied at the test is was **there an intention** to make a profit. SO long as the goal is to make a profit, as long as the intent to get the margin above the final cost then the test is satisfied

* Mutual liability: Each partner in a partnership has express authority, implied authority and apparent authority to act on behalf of the other partners.
  + Same type of test as Agents and Principles. If the partnership business deals with a customer and the partner sues the business and sues the business each partner has **unlimited personal liability**, how it works is so forth, If there are 3 partners. You sell a product, its defective and unusable, the customer then sues the partnership business. The customer can sue the partners individually when they cannot claim from the partnership business any longer. For example, someone sues a business for $100, they take $50 from the partnership business and the remaining $50 must be claimed from the partner’s personal assets, if the partner only has $25 then the remaining $25 is taken from liquid assets such as houses, cars…
* Each partner has unlimited personal liability for the debts and obligations of the business.
* The relationship between partners can be contractual – partnership agreement, regulated by legislation (e.g. *Partnership Act 1891* (Qld)), governed by laws of agency and fiduciary duties.
* Sole traders often combine to become partnerships combining strengths and eliminating weaknesses.
* Partnership Agreement, lawyers draft them. If you have concerns about your partner then you can have them contractually agree to doing certain activities, and relinquish certain profits of the profit
* Each partner is usually an agent of the partnership - Actual authority:
  + Express- authorised by other partners;
  + Implied – only extends to transactions in the usual course of the partnership business.
* Dealings with Third Parties - S8 Partnership Act 1891 (Qld) provides that:
* 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 of which the partner is a member bind the firm and his or her partners, unless— (a) the partner so acting has in fact no authority to act for the firm in the particular matter; and (b) the person with whom the partner is dealing either knows that the partner has no authority, or does not know or believe the partner to be a partner.
* In addition, partners may also have apparent authority - determined on the same tests as for principal and agent (page 378 textbook).
  + The principal – partnership - has represented that the agent – partner- has authority to contract on their behalf;
  + The third party was induced by that representation to enter the contract;
  + The third party relied on the representation in good faith and without notice of the agent’s – partners- lack of authority.
* In addition, because the relationship between partners is also a fiduciary one, partners will owe fiduciary duties to each-other, such as:
  + A partner must not profit personally from their position or from information gained as a result of that position.
  + They must not put themselves in a position where there will be a conflict of interest without keeping their partners informed.
  + Each partner must fully disclose to the other partners all matters likely to affect the partnership.
  + They must account for any private profits made without the consent of the other partners as a consequence of the above;
  + They must not compete with the partnership.

**Partnership: Advantages**

* Informal and relatively low-cost
* Confidential
* Combine skill, expertise and resources of a number of persons
* Flexible

**Partnership: Disadvantages**

* Unlimited personal liability of partners for partnership debts
* Upper limit on numbers (usually 20, except in the case of certain professional partnerships)
* Transfer of partnership interest may not be easy; compare with companies, particularly publicly listed companies, where there is a liquid market for the valuation and transfer of shares

**Joint Venture**

* The term ‘**Joint venture’** does not have a specific definition in Australian Law.
* Generally, joint ventures are contractual arrangements relating to a commercial or financial undertaking entered into by commercial actors for their individual gain and for a finite time.

**Join Venture: Advantages**

Similar to those of partnership

* + Participants in a joint venture enjoy more autonomy than partners
  + Join ventures do not usually have a relationship of trust and good faith
  + Joint venturers can dispose of their interest at any time.

**Joint Venture: Disadvantages**

* There are a number of transaction costs. Because a joint venture is a contractual collaboration, a detailed document setting out the parties’ agreement is a practical necessity. The transaction costs of customising a contract (in terms of legal costs, time, resources etc.) are extremely high, which explains why the joint venture business structure is appropriate for large-scale, complex projects.

**Trusts**

* A **trust** can be defined as obligation binding a person (called trustee) to deal with property over which he/she has control (the trust property) for the benefits of person or persons (called beneficiaries).
* The basic elements of an expressly created trust are:
  + Settlor
  + Trustee
  + Beneficiary
  + Trust property
* Trust obligation is enforceable in equity.
* A trust may be created *inter vivos* (between the living) or by the will of a deceased person.
* There are numerous categories of trust, for example:

–– **express**: declared and communicated by the settlor;

the

–– **implied**: arising as a matter of law;

–– **private**: to benefit specified people;

–– **public**: for public benefit via charitable

institutions.

**Trusts: Advantages**

* Fewer formalities than those required to form a company
* Privacy: there is no need for trusts to publish or disclose financial information
* Flexibility and simplicity
* Tax advantages (such as an income-splitting device for tax purposes)
* Protection of assets from creditors
* Facilitates passing on wealth in families

**Trusts: Disadvantages**

* Personal liability of trustees for trust debts, as the trust is not a separate legal entity; but note that such liability may be mitigated, for example, liability may be excluded by express disclaimer, or it may be deflected by the use of an incorporated company as trustee.
* Setting-up and ongoing administration costs.

**Companies**

* A **company** is a corporation incorporated/ registered under the *Corporations Act* 2001 (Cth). Once incorporated, a company becomes a separate legal entity in the eyes of the law.
* Company is a distinct legal entity, separate from its shareholders and members who form the company. Its assets and property belong to it, not to its members (Salomon -v- Salomon & Co Ltd [1897] AC 22
* **What are the features of a company?**
  + Limited liability
  + Permanent existence
  + Members may transfer their interest in the company
  + Company can make contracts, sue and may be sued in its own name

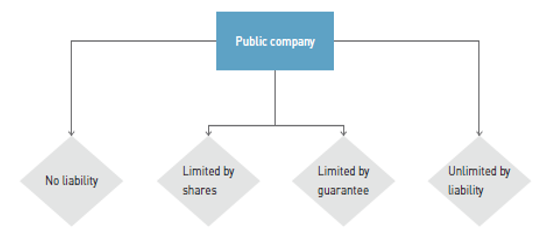
**Formation of a Company**

* To register a company, a person must lodge an application to register with ASIC2 containing the following information:
  + the type of company that will be registered;
  + the company’s proposed name;
  + the names and addresses of each shareholder (a company must have at least one shareholder: s 114);
  + the names, addresses and birth dates of each director;
  + the address of the company’s registered office;
  + the address of the company’s principal place of business;
  + the company’s capital structure.

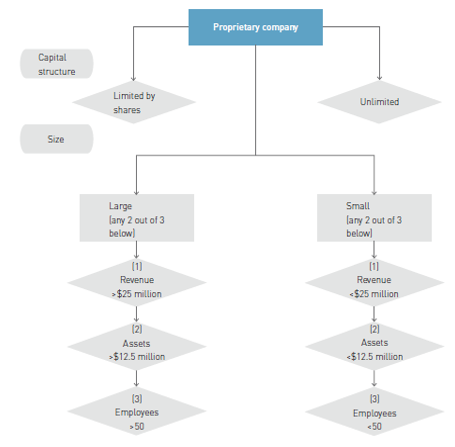
**Types of Companies**

* There are four types of public company and two types of proprietary company that can be registered and incorporated under the *Corporations Act 2001 (Cth)*, depending on the type of capital structure required.
* A **public company** can be limited by shares, limited by guarantee, no liability or unlimited.
  + A public company is where shares are traded on the stock exchange, the prospectus is the advertising tool (the promotion) to perspective shareholders as to why you should buy shares in the company, once shares are made public anyone may buy stocks or sell on the stock exchange, you may buy stocks yourself or use a stock broker (who charges a fee)
* A **proprietary company** can be limited by shares or unlimited.
  + You have 50 non-employee shareholders, to get those shareholders you did not go onto the share market, you contact them through private means. Potential investors invest in the company buy shares. Private companies have acquired shares through contacts, networking and private investors
* Companies need shareholders, it’s a form of revenue, (not everything can be gained from the bank). These revenues are used for business expansion, if the company does well they issue dividends to shareholders which are a portion of the profits.

**Types of Public Companies**



* No liability companies, as a shareholder are not responsible for the debts of 3rd parties, these are common In the mining industry.
* Limited by shares: this is the most popular, if the company goes into liquidation you only lose the value of your shares/dividends, not as bad as being personally liable for the business failure.
* Limited by guarantee: in the event of liquidation, [complete from recording] 11:15am Lecture 12 17/10/2016
* Unlimited by Liability: if the company cannot pay for the debt, then all the shareholders become liable for the debt, not a very desirable prospect and extremely risky. Liability should be limited

**Proprietary Companies**

**Separated Legal Entity Principle**

The landmark decision in *Salomon v Salomon* established the fundamental principle that a company is a separate legal entity that can sue and be sued, and that a company must be treated as a separate entity from its directors, members or shareholders. The company is independent of its owners because it lives in its own right.

**Separation of Management from Control**

Shareholders do not own the company’s assets. The company owns its assets. The shareholders own shares in the company which carry a bundle of so-called ‘rights’ (these are not, however, absolute rights) such as the right to vote and to receive dividends.

**Appointment and Removal of directors**

Part 2D.3 of the *Corporations Act* provides rules for the appointment and removal of directors, as well as for their remuneration.

**Financial records and reports**

* Financial records and reports are part of the disclosure obligations of companies
* Chapter 2M of the *Corporations Act* requires companies to keep financial records and to prepare annual financial reports and directors’ reports

**Company’s Internal Rules**

* A company is internally regulated or governed according to its constitution.
* However, under s 134, a company may choose not to:
* adopt a constitution and instead choose to be governed solely by the replaceable rules under the *Corporations Act; or*
* a combination of both the rules and a constitution.

**Directors and Shareholders**

* *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninghame* [1906] 2 Ch 34
* The directors have the power to generally manage the business of the company, and the shareholders are only entitled to vote on limited matters.

**Directors**

* **Proprietary companies** must have at least 1 director, and **public companies** must have at least 3 directors.
* A director of a company must:
  + be an individual and not a company,
  + be at least 18-years-old, and
  + not be disqualified.
* **Executive directors** are involved in the full-time management of the company and are employees of the company, e.g. the CEO, the CFO.
* **Non-executive directors** are not employees of the company.
* When the board acts collectively its decision are the decisions of the company.
* A director found to have breached one or more of their statutory duties may be:
  + disqualified from being a director,
  + fined,
  + ordered to compensate the company for any loss, and/or
  + ordered to pay to the company profits made as a result of the breach.
* If the breach was deliberate and fraudulent they may be subjected to criminal penalties, including in some circumstances a jail term.



**Shareholders**

* Each shareholder is part-owner of the company.
* Shareholders have:
  + voting rights,
  + distribution rights, and
  + rights to receive information.
* Decision-making power is exercised by shareholders at general meetings.
* Public companies are required to hold an **annual general meeting** at least once in every calendar year. Companies may also hold **extraordinary general meetings**.
* The types of decisions on which shareholders are usually entitled to vote include:
  + decisions relating to the structure or constitution of the company,
  + decisions relating to the composition of the board of directors,
  + decisionsto veto certain transactions, including **related party transactions** by public companies, and
  + the decision to initiate a shareholders’ voluntary **winding up.**
* A shareholder who is dissatisfied with the way the company is being managed may be entitled to:
  + commence a legal action against the company if they can establish **oppressive conduct,**
  + seek an **injunction** to stop a director, shareholder or other person breaching the *Corporations Act,* and/or
  + bring a **statutory derivative action** in the event of a breach of duty by a director.

**Franchises**

* A **franchise** is a contractual arrangement between the franchiser and the franchisee in which the franchiser allows the franchisee to use the franchiser’s products, trademark, method of operation and business name. In return the franchisee pays the franchiser a fee or a percentage of its income/profits.
* Examples: McDonalds, Pizza Hut, Hungry Jacks, 7-Eleven stores, KFC.

**Regulations of a Franchise**

* Franchising Code of Conduct: a mandatory industry code. Part IVB of the Competition and Consumer Act (CCA) gives legal validity to the Industry codes of conduct.
* The Australian Competition and Consumer Commission may administer and enforce the industry codes of conduct.
* Code of conduct may be enforced by individuals under the common law good-faith principles.

**Franchises: Advantages**

* The franchisee does not have to undertake the marketing of their business.
* The franchisee is guaranteed an exclusive geographic area in which to market, sell and distribute their goods or services.
* Set-up costs can be minimal relative to other business structures.
* Economies of scale exist for purchases and supplies.
* A reputable brand provides considerable market clout.
* The franchiser provides equipment and training.
* The franchisee receives professional and/or business advice.
* The franchisee’s business risks are reduced.
* The franchisee takes advantage of the franchiser’s goodwill in the marketplace.
* The communication flow between the franchiser and franchisee can provide additional ideas on how to grow the business.
* The franchisee takes advantage of the franchiser’s investment in research and development.

**Franchises: Disadvantages**

* The franchise agreement may place excessive controls and restrictions on the franchisee.
* Ongoing franchise payments need to be made by the franchisee.
* The franchiser may not invest in the brand, or may market the brand in an ineffective manner.
* The franchiser–franchisee relationship may break down.
* Excessive penalties may exist if the franchisee decides to sell or quit the business.
* The franchiser may make mistakes that adversely affect the franchisee’s business.
* The franchiser’s plans may differ from the franchisee’s expectations.
* The franchiser may exert excessive control over the franchisee or third parties, such as suppliers.

Lecture 14: Revision

Precedents:

**Topics 4 + 5 Torts 1 + 2 Precedents**

* First case to really establish the Tort of Negligence - ‘Snail in a bottle’ – Donoghue V Stevenson (Topic 4 + 5)
* Requirement 1: Duty of Care - Occupier’s Liability (Topic 4 + 5)
  + An **occupier** of premises owes a duty of care to all persons entering the premises to ensure that the premises are safe:
    - Duty of Care: Occupiers Liability - Australian Safeway Stores Pty Ltd v Zaluzna (1987) - Control;
  + Does an occupier also owe a duty of care to people who are on their premises without their permission?
    - Example - Hackshaw v Shaw (1984)
* Requirement 2 for Tort of Negligence: Breach of Duty (Topic 4 + 5)
  + The probability of harm – a low or high chance of occurring?
    - - Bolton v Stone (1951)
  + The likely seriousness of the harm – minor or serious?
    - - Paris v Stepney Borough Council (1951);
* Requirement 3 for Tort of Negligence : Causation (Topic 4 + 5)
  + Alexander v Cambridge Credit Corp (1987) – the “But For” test – But for (or If not for ) the defendants actions/inaction, would the plaintiff have still suffered harm?
  + Yates v Jones – “Break” in the “chain” of causation
* S 11 Civil Liability Act 2003 (Qld) **Scope of liability** (Topic 4 + 5)
  + Donoghue v Stevenson;
  + Overseas Tankships v Morts [1961] - Remoteness
* Voluntary Assumption of Risk (Topic 4 + 5)
  + If it can be established that the plaintiff was **fully informed/aware** of the risk at the time the harm was caused and that they **voluntarily assumed** the risk, the defendant **may** be relieved of **all** liability.
    - Avran v Gusaroski (2006)
* Occupiers Liability – Public Authorities (Topic 4 + 5)
  + submerged rock at **designated** **swimming area** – Hidden - Not foreseeable/obvious – duty of care to warn;
    - Nagle v Rottnest Island Authority (1993)
  + submerged sandbag at a **patrolled surf beach** – Hidden - Not foreseeable/obvious – duty of care to warn;
    - Swain v Waverley (2005)
  + unfenced **public space** cliff top - **?**;
    - Romeo v Conservation Commission (1998)
  + poisoned oysters in **lake** - **?**;
    - Graham Barclay Oysters v Ryan (2002)
  + dived into the sea from a rock platform at a surfing beach - ?
    - Vairy v Wyong Shire Council (2005)
* Negligent Mistatement (Topic 4 + 5)
  + The person giving advice may owe a duty of care even if they are not a professional adviser like as a lawyer or accountant – it depends whether the 3 elements are satisfied or not; EXAMPLES BELOW
    - Hedley Byrne & Co Ltd v Heller and Partners Ltd (1964) – letter from bank – is there a ‘special relationship’ or not?;
    - Shaddock & Associates v Parramatta City Council (1981) – Council Authority – Is the adviser the sole or only source of advice/information? Or not?
* Liability of Auditors (Topic 4 + 5)
  + An auditor owes a duty of care to their clients, and not usually to third parties who rely on the auditor’s report and suffer damage. EXAMPLES BELOW
    - Caparo Industries -v- Dickman [1990] House of Lords
    - R. Lowe Lippman Figdor & Frank -v- AGC (Adnances) [1992] Supreme C. Vic
    - Columbia Coffee -v- Churchill (1992) S.C. NSW
    - Esanda Finance Corporation Ltd -v- Peat Marwick Hungerfords (1997) Aust Torts Reports 81-420; (1997) 71 ALJR 448 (High Court)
      1. Precedent set by Esanda Finance Corporation Ltd -v- Peat Marwick Hungerfords (1997) states that To be successful in negligence against an auditor, third party (C) must prove that:
      2. Defendant auditor (A) knew (or ought reasonably to have known) that the information or advice given to B (A’s client) would be communicated to C (or a class of which C is a member), and
      3. This advice would be very likely to lead C to enter into a transaction of the kind C usually enters into, and
      4. It would be very likely that C would enter into such a transaction in reliance on the information or advice from A and thereby risk suffering economic loss.
* Tort of Nervous Shock (Topic 4 + 5)
  + a person who wilfully does something calculated to hurt another and causes nervous shock
    - Wilkinson v Downton[1897]

**Topic 6 Contracts 1 Precedents**

* Husband and Wife Agreements
  + *Balfour -v- Balfour* [1919] 2 KB 571
  + *Merritt -v- Merritt* [1970] 2 All ER 760
* Agreements ‘Subject to contract’
  + *Masters –v- Cameron* (1954) 91 CLR 353
    - The High Court held that in this case, the parties did not intend to be bound by that agreement as the bargain was not concluded until they executed a formal contract.
      1. Basically stop dicking around and just sign the fucking contract
* Invitation to treat
  + *Fisher -v- Bell* [1961] 1 QB 394
* Examples of Invitation to treat: Advertisement
  + *Partridge -v- Crittenden[1968*] 2 All ER 421
* Examples of Invitation to treat: Goods displayed in shops
  + *Pharmaceutical Society of Great Britain -v- Boots [1952] 2 QB 795*
* The transformation of an invitation into an offer
  + *Carlill v Carbolic Smoke Ball Company [1893] 1 QB 256.*
* Example of how silence does not constitute acceptance
  + *Felthouse -v- Bindley* (1862) 142 ER 1037
* Consideration
  + *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256
* Performance of an existing duty
  + Performing existing contractual obligations does not amount to good consideration to enforce a promise
    - (*Stilk -v- Myrick* (1809) 2 Camp 317; 170 ER 1168).
  + However, where the promisor receives *something extra* in exchange for his/her additional promise, that promise may be enforced
    - (*Williams -v- Roffey Bros & Nicholls* [1991] 1 QB 1).
* Renegotiating debts
  + *Foakes -v- Beer* (1884) 9 App Cas 605.
* Promissory Estoppel
  + Lord Denning in *Moorgate Ltd -v- Twitchings* [1976] QB 225
  + Waltons Stores v Maher

Civil Liability Act QLD 2003 (Pertinent to Torts 1+2)

***Civil Liability Act 2003* (Qld)**

**Part 1--Breach of duty**

**Division 1--General standard of care**

**9 General principles**

(1) A person does not breach a duty to take precautions against a risk of harm unless—

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and

(b) the risk was not insignificant; and

(c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.

(2) 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)—

(a) the probability that the harm would occur if care were not taken;

(b) the likely seriousness of the harm;

(c) the burden of taking precautions to avoid the risk of harm;

(d) the social utility of the activity that creates the risk of harm.

**Division 2--Causation**

**11 General principles**

(1) A decision that a breach of duty caused particular harm comprises the following elements—

(a) the breach of duty was a necessary condition of the occurrence of the harm (factual causation);

(b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (scope of liability).

(2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying subsection (1)(a)—should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.

(3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of the duty had not been so in breach—

(a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty.

**Division 6--Contributory negligence**

**23 Standard of care in relation to contributory negligence**

(1) The principles that are applicable in deciding whether a person has breached a duty also apply in deciding whether the person who suffered harm has been guilty of contributory negligence in failing to take precautions against the risk of that harm.

(2) For that purpose—

(a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person; and

(b) the matter is to be decided on the basis of what that person knew or ought reasonably to have known at the time.

**24 Contributory negligence can defeat claim**

In deciding the extent of a reduction in damages by reason of contributory negligence, a court may decide a reduction of 100% if the court considers it just and equitable to do so, with the result that the claim for damages is defeated.

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