

LAWS 108
COMMERCIAL LAW

(Lectures with Prof. Laurence Boulle)

D.B. Notes – Student's Lecture and Study Guide

**AUSTRALIAN CATHOLIC UNIVERSITY
THOMAS MORE SCHOOL OF LAW
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LAWS 108 – COMMERCIAL LAW
(Lectures with Prof Laurence Boulle)

**WEEK 1
COMMERCIAL LAW & THE CONCEPT OF PERSONAL PROPERTY**

COMMERCIAL LAW

Commercial law is that branch or law which is concerned with rights and duties arising from the supply of goods and services in the way of trade. Its scope is not clearly defined... There are, indeed, some who question whether commercial law is a subject at all, suggesting that the apparent monolith is in reality no more than an agglomeration of distinct subjects... [which] share little in common beyond the underlying foundations of the law of contract. (Professor Goode, Goode on Commercial Law Penguin 4th ed, p8-9.)

Goode argued that commercial law is “concerned primarily with dealings between merchants...as opposed to consumers” BUT Consumers may still benefit from commercial law protections. Although commercial law is about transactions involving business, in fact much of commercial law deals with the rights and obligations of consumers. Therefore it covers both business to business and business to consumer transactions. This is the two approaches to Commercial law: the transactional approach and the regulatory approach.

Commercial law deals with a whole range of various common law doctrines. Range of common law doctrines (e.g. law of finding, bailment) but increasingly becoming statute based: Competition and Consumer Act; Sale of Goods Act; Consumer Credit Code; Personal Property Securities Act.

TRENDS OR SHIFT IN COMMERCIAL LAW

1. Neoclassical contract theory = modified ‘classical contract theory’
 - Eg. Consumer protection legislation, Insurance Contracts Act 1984 (Cth) (“ICA 1984”) s13, duty of “utmost good faith”, Rise of Self-Regulating Codes of Practice: eg. Australian Bankers’ Associations Code of Banking Practice, and eg, Insurance Council of Australia’s General Insurance Code of Practice
2. Professor Goode Hamlyn Lecture in England 1997 discussed the ‘partnership between commercial law and equity’
 - ‘If contract lies at the heart of commercial law, it is equity that has provided the foundation for security interests in commercial assets and for the enhancement of the required standards of behaviour in the conduct of business life. Restitution is increasingly invoked as a remedy where there is no available claim in contract or where the benefits improperly received by the defendant exceed the amount of the plaintiff’s recoverable loss.’
3. Globalisation
 - Eg UN Convention on Contracts for the International Sale of Goods 1980 (Vienna Convention) Eg UN Commission on International Trade Law (UNCITRAL) 1996 Model Law on Electronic Commerce
4. Growing significance of Alternative Dispute Resolution
 - Membership of self-regulatory External Dispute Resolution (EDR) bodies is mandatory in some areas of commercial life, eg. provision of consumer credit and financial services.

RELATIONS TO CONTRACT LAW

- Commercial law is largely based on contracts.
- Issues on formation will arise:
 - o as to agreements – electronic agreements, agent’s capacity to bind principal.
 - o scope and content – privity in insurance contracts, implied terms in insurance, four corners rule in bailment, incorporation of terms and conditions in a click-through agreement in electronic transactions.

PROPERTY

- Property- "that which is capable of ownership... or "a right of ownership" (Osborne 1983)
- Property can refer to a thing, or to legal rights in respect of a thing
- The 'thing' may be tangible (e.g. goods) or intangible (e.g. copyright or patents)
- Even a legal right to sue someone else is an item of property in law (as a chose in action)

Note: commercial law focuses on personal property not real property and many of the concepts from 'real property' have no application when talking about personal property.

- When talking about property or property interests we are necessarily referring to an item of property in which we may have certain property rights.
- you may have more than one interest in an item of property, these interests may coexist.
- However this become problematic when you have competing claims to the same items of personal property. The personal property securities act provides with a piece of legislation the deals with resolving some of those conflicts.
- Property in terms of personal property also recognizes the right to sue as an item of personal property.

CHARACTERISTICS OF PROPERTY

'To talk about property is to talk not about objects but about relations between human beings or more accurately about relations between persons in relation to things...private property must at least involve the right of the owner to exclude others from doing something in respect of the object of ownership' Cohen, 'Dialogue on Private Property' (1954) 9 *Rutgers LR* 357

TYPES OF PROPERTY

1. Real Property:
 - Land (corporeal hereditaments)
 - Fixtures (things attached to land with an intention to remain fixed)
2. Personal Property: Property other than real property
 - Choses in possession (chattels-things)
 - Choses in action (rights enforceable by law)-IP, shares in a company, debts, negotiable instruments

Although not strictly correct an easy way to characterise the two is:

Real Property:

- Indestructible
- Immoveable
- Unique—contractual remedy specific performance rather than damages
- Appreciates - value

Personal Property:

- Impermanent
- Moveable
- Temporal – change over time
- Often depreciates in value – not always
- Common/not unique (related remedies damages unless unique e.g. work of art)

- The law classifies "objects" of ownership into real property (or "realty") and personal property (or "personalty"). Broadly speaking realty means land and those things fixed to it. Personalty means all other kinds of property. In the law property personal property (personalty) is divided into **chattels real** and **Chattels personal**.
- The category of chattels is divided into choses in possession and choses in action.
 - o **Chose in action** – A right or proceeding in a court of law to procure the payment of a sum of money or to recover damages for a wrong or non-performance of a contract and also an intellectual property rights. Choses in Action include a right to recover a debt or to sue for breach of contract, a tort, bonds, cheques, shares in companies, policies of insurance. • Also intellectual property rights, they are all chose in action
 - o **Chose in possession** – goods or tangible items of physical personal property. Physical goods: The term choses in possession, is perceived as synonymous with goods and chattels. A chose or thing in possession is something capable of being reduced to possession with remedies available to protect possession. Examples mobile phone, car, bottle of water, radio

PROPERTY RIGHTS

- Contrast property rights (*in rem*) v personal rights (*in personam*)
- Property rights enforceable against the world at large (*in rem*)
- Personal rights enforceable against other party in the contract or individual only (e.g. tort claim) (*in personam*)
- *In personam* are rights primarily available against specific persons, which the person can only exercise. Whereas rights *in rem*, are rights only available against the world at large, this is subject to qualification of someone having a better right than the person.

OWNERSHIP AND POSSESSION

Ownership

- Ownership relates to title, so you can have title to personal property but you need not necessarily have possession of personal property.
- One can have possession and not have title to personal property
- Ownership- “the right to exclusive enjoyment of a thing” (Austin)
- Ownership may include right to use, sell, give away, put into a trust, use as security for a loan, share with co-owners, leave in will, to do anything you can.

Possession

- Conversely someone who has possession over an item of personal property, note that possession is a lesser right than title, has exclusive control or dominion over an item and intention to exclude all others.
- Possession can give rise to legal rights in personal property.
- To “possess” property means to have exclusive control (or dominion) over the item and an intention to exclude all others.
- Possession is subject to the rights/or interests of the owner or person who holds title of an item of personal property.
- In the law, a person has possession of personal property, if they have control of it and intend to retain that control. Possession confers a right to retain control of an object against any other person except the person who has rights of ownership in the item of property.
- Ownership or title may or may not include the right to possess.
- The right to possess property does not mean the possessor is the owner. But property rights can arise merely from possession but subject to those rights held by person who holds title.

WEEK 2 SALE OF GOODS AND SERVICES

WHAT ARE GOODS?

- S 5 (1) of the Sale of Goods Act (NSW):
 - o ‘Goods’ include all chattels personal other than things in action and money. The term includes emblements and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Categories of goods

- Specific – existing
- Unascertained - Re Goldcorp
- Ascertained - Re Wait
- Future

The significance of classification

- Affects when title passes
- Requires ascertaining of unascertained goods before title passes
 - o Cannot overrule this fundamental principle of PP law by contract
- Passing of title dependent on parties’ intentions

Price – Sale of Goods Act NSW

Section 13 Ascertainment of price

- (1) Price in contract of sale may be fixed by contract, or be left to be fixed in manner, or may be determined by course of dealing between the parties.
- (2) Where price not determined in accordance with foregoing provisions, buyer must pay reasonable price. What is a reasonable price is question of fact dependent on circumstances of each case.

Is the Contract for Sale of Goods?

- If main purpose of contract is transfer of title to goods, contract is a contract for sale of goods
Toby Construction Products Pty Ltd v Computer Bar Sales Pty Ltd [1983]
- If main part of agreement relates to skill and experience of one of parties and use of materials is ancillary to main purpose, it is contract for work and materials: *Robinson v Graves* [1935]

Terms of Sale Contracts

- In sale of goods each party is negotiating on 'equal terms' and so caveat emptor applies
- Buyers have themselves to blame if fail to carefully inspections of goods before purchasing.
- Legislation takes into account disadvantaged buyer, as it implies a number of terms into such contracts as either conditions or warranties.
- Distinction between conditions and warranties under contract law is preserved by SOGA.

Exclusion of Implied Terms

- The implied conditions and warranties may be excluded by parties under sale of goods legislation.
- However, to strengthen position of consumers Commonwealth and most States have passed other legislation to prevent exclusion of the implied conditions.

Specific goods

- Where there is a contract for sale of specific goods property in goods is transferred to buyer at time agreed between parties.
- Goods are ascertained when identified as goods agreed on after contract has been made.
- Specific goods are goods identified at the time contract is made.

Reservation – Right of Disposal

- To preserve property (or ownership) rights of seller in goods they have sold until paid in full, sellers include a reservation of title clause in contract of sale of goods. This creates equitable interest or charge in favour of original seller. If buyer fails to pay for goods it was argued that seller could repossess them because they still had property and title in them. These are referred to as Romalpa clauses. (*General Motors Acceptance Corp Australia v Southbank Traders Pty Ltd* [2007])

Passing of Risk

- Where there is a sale of specific goods and without knowledge of seller they have been destroyed before or at time parties enter into the agreement, loss falls on the seller and contract is void.
- Unless otherwise agreed between parties if goods are lost, damaged, destroyed or have deteriorated risk prima facie passes with property.
- However: If property has not passed goods are at the seller's risk;
- but When property is transferred goods are at the buyer's risk, whether delivery has been made or not

Transfer of Title: Non-owner

- As general rule, when a person takes goods (buyer) they get only same rights to the goods as person from whom they took them (seller). Rightful owner of goods is entitled to recover them from those who have no title to them.
- Rule is known as nemo dat quod non habet — one cannot give what one does not possess. Seller cannot pass better title than that which they possess
- There are exceptions to the nemo dat quod non habet rule where good title may be given by nonowners

Exceptions

- o Sale of Goods Act 1923 (NSW) ss 26 and 27
 - o Estoppel
 - o Agency
 - o Power of Sale pursuant to court order
 - o Seller or buyer retains possession after contract of sale.
 - o Special powers of sale
 - o Market overt;
 - o Sale under a voidable title; and
 - o Factor or mercantile agent.
- Rules on when ownership passes to buyer remain part of the Sale of Goods Act and are not part of ACL.

Performance of Sale Contract

- To complete contract for sale of goods:
 - o Seller must be ready to deliver or give possession of goods; and
 - o Buyer must be ready to accept and pay for them in accordance with terms of contract.
- Delivery takes place when there is voluntary transfer of possession from seller to buyer.
- Need not be physical handing over; may be symbolic as in delivery warehouse key or handing over a document of title, such as bill of lading.

IMPLIED GUARANTEES

Guarantee as to Title - Right to sell the goods

- There is consumer guarantee that seller has the right to sell goods in the case of a sale: (Rowland v Divall [1923]); or
- In case of an agreement to sell, the right to sell goods must exist when the time comes for property to pass.
- See ACL: s 51 guarantee as to title and

Guarantee to Undisturbed possession

- An implied guarantee that buyer will enjoy undisturbed possession of the goods: (Healing (Sales) Pty Ltd v Inglis Electric Pty Ltd (1968))
- ACL s 52 guarantee of undisturbed possession

Freedom from undisclosed securities

- An implied guarantee that goods will be free from any charges to a third party.
- ACL: s 52

Guarantee as to Description

- Goods shall correspond with description or sample and description: Varley v Whipp [1900] and Metal Roofing & Cladding Pty Ltd v Amcor Trading Pty Ltd (1999)
- If sale by sample and description, bulk of goods must correspond with both sample and description:
 - o The section is concerned with identity, not quality: Ashington Piggeries Ltd v Christopher Hill Ltd (1972)

- For description to apply:
 - Is contract for a sale of goods by description?
 - Have words of description been used?
 - Do goods comply with the description?

Fit for purpose Guarantee

- Implied guarantee seller will supply goods which are fit for their purpose.
- Buyer must expressly or by implication make known to seller particular purpose for which goods are required unless the goods really have only one purpose: *Grant v Australian Knitting Mills* [1936]
- ACL: s 55
- Four conditions:
 - 1. Has buyer made known to seller the particular purpose for which goods are required? (except if obvious)
 - 2. Has buyer relied on seller's skill and judgment?
 - 3. Are goods of a description which it is in course of seller's business to supply?
 - 4. Has buyer ordered goods under their patent or trade name?

Acceptable Quality Guarantee

- Implied guarantee seller will supply goods which are of acceptable quality.
- ACL s 54.
- Goods are of acceptable quality if:
 - Fit for all purposes for which goods of kind are commonly supplied
 - Acceptable in appearance and finish
 - Free from defects
 - Safe
 - Durable
- Four conditions must be satisfied:
 - 1. Has there been a sale by description?
 - 2. Have goods been bought from a seller who deals in goods of that description?
 - 3. Has buyer examined goods? (If not, then guarantee applies. If so, would a reasonable examination have revealed defects?)
 - 4. Do goods have one purpose or several?

Sale by Sample

- ACL s 57
- In sale by sample there is an implied condition that:
 - Bulk shall correspond with sample in quality;
 - Buyer shall have reasonable opportunity of comparing bulk with sample;
 - Goods must be free from any defect which would not be apparent on reasonable examination of sample: (*Drummond v Van Ingen* (1887))

Services

- ACL s60 provides that if a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.
- The remedy for a dissatisfied consumer for services is limited to a claim for a breach of an implied warranty.

Exclusion of Seller's Liability

- ACL s64 expressly prohibits buyer and seller from agreeing to exclude the operation of the consumer guarantees.
- Any such term of contract will be void.
- Under Ch 2, Part 2-3, of the ACL, unfair terms in consumer contracts are void.

REMEDIES:

- Seller's Remedies for Breach
 - o The unpaid seller – Is an agent or person who has not been paid the full price or has been paid with a cheque or bill of exchange that has been dishonoured, who may exercise certain rights against the goods even though property in the goods has already passed to the buyer.
 - o These rights may be preferable to the rights against the buyer where — for example, the buyer is insolvent.
 - o Unpaid sellers' rights depends on whether or not property and/or possession of goods has passed to buyer.
- Buyers' remedies against sellers
 - o depend on whether goods have been delivered or not
 - o includes: Damages for non-delivery (common law remedy);
 - o Specific performance (equitable remedy);
 - o Breach of warranty of quality; and
 - o Rescission.

Consumer Protection

- To assist consumers in dealings with traders, Commonwealth, state and territory governments introduced consumer protection legislation that inserts certain specified terms into □ contracts for sale of goods and, □ in some instances, contracts for services

To Whom Does the Law Apply?

Consumers

- Some portions of ACL and State acts apply only to consumers.
- Under ACL a person is a consumer:
 - o If price of goods or services purchased is under \$40,000 (whether acquired by a business or a regular person); OR
 - o Where price is over \$40,000, if goods or services are of a kind ordinarily acquired for 'personal, domestic or household use or consumption' OR are a commercial road vehicle.
 - o In addition in the case of goods they are not acquired for re-supply or for being used up or transformed in business.

Multiple Remedies Where Goods/Services Defective or Otherwise Unsatisfactory

- Negligence
- Contract law
- Statute-based remedies – no need to prove elements of negligence, or in some cases that you had a contract
 - o State Sale of Goods Acts, State Fair Trading Acts, The Australian Consumer Law

International Sale of Goods

- UN Convention on Contracts for the International Sale of Goods 1980, known as Vienna Sales Convention, came into force internationally on 1 January 1988.
- Convention regulates contracts for sale of goods between signatory countries.
- The States passed uniform legislation between 1980 and 1987 called Sale of Goods (Vienna Convention) Acts enabling implementation and ratification of the Convention to take effect 1 April 1989.

WEEK 3 GUARANTEES

Guarantee

- Contract made by one person with another to answer for debt or obligation of a third person should latter default.
- Collateral contract to answer for the debt, default or miscarriage of another who is or is contemplated to become liable to the person to whom the guarantee is given (Mason J in Sunbird Plaza Pty Ltd v Maloney)
- Typically an undertaking to meet money liability of principal debtor arising from debtor's default. Guarantor could also assume secondary liability for performance of principal debtor's non-money obligations, eg construction contracts empower issuer of bond to take over the contract on default of contractor as alternative to payment of damages.
- The purpose is to secure the performance of the principal debtor's obligations to the creditor. The guarantee itself is not an assurance of the principal debtor's ability or intention to repay the debt or to fulfill other contractual obligations. Rather, the guarantor's promise is to be accountable to the creditor should the primary debtor default.

Indemnity

- Where a person is primarily liable whether or not the third party makes default.
- A promise by the promisor that he will keep the promise harmless against loss as a result of entering into a transaction with a third party.
- Promisor's liability is independent of the principal debtor. Promisor is primarily liable to the creditor irrespective of whether the principal debtor defaults and notwithstanding that the obligation of the principal debtor is unenforceable.

Insurance

- Akin to indemnity as the amount to be paid is to reimburse the insured to the extent of their loss, except life insurance.
- Insurance contracts involve primary obligations triggered by the happening of the event subject of the insurance.
- Requires utmost good faith, guarantee does not.

Parties in a Guarantee Agreement

1. Surety or Guarantor
 - o Person who gives guarantee ('surety' for performance of contractual obligation, 'guarantor' for a debt).
 - o Guarantors promise is to be accountable to creditor should primary debtor default.
 - o A guarantor is immediately liable to the full extent of the obligation on the default of the principal promisor, unless the guarantee provides otherwise (Moschi v Lep Air Services Ltd)
 - o May be more than one guarantor or surety. Liability of co-sureties and co-guarantors is joint and several.
 - o Guarantor has rights of recourse against principal debtor, for example under doctrine of subrogation.
2. Creditor or Guarantee
 - o Person to whom guarantee given.
 - o creditor can seek remedies against guarantor without first seeking remedies against principal debtor
 - o a right to demand will not be implied and needs to be expressly provided for if liability is not to arise before it is given (MS Fashions Ltd v Bank of Credit and Commerce Int'l SA)
3. Principal or Principal Debtor
 - o Person whose debt, default or miscarriage is foundation of guarantee.

Obligations and liabilities

Principal Obligation (Debtor – creditor)

- Primary obligation underlying the guarantee agreement is the obligation of the principal debtor to the creditor.
- Unless otherwise provided in the guarantee agreement, the creditor need not exhaust its remedies against the principal before proceeding against the guarantor. Upon default of the principal, creditor is generally free to enforce the guarantee before proceeding against the principal (*Sunbird Plaza Pty Ltd v Maloney*)
- If guarantor is compelled to satisfy the creditor, guarantor has rights of recourse against the principal and is entitled to be reimbursed (*Sunbird*)

Collateral Obligation (Guarantor – Creditor)

- A guarantee is a collateral obligation, ancillary to and premised upon some other present or future liability (*McDonald v Dennys Lascelles Ltd*)
- The guarantor's obligation is secondary and is dependent on the continued existence and enforceability of the principal debtor's obligation. (*McDonald* case – it was held that the guarantors were not liable under the guarantee as a legal consequence of the rescission of the contract.
- The liability of principal and guarantor must be co-extensive. Guarantor not liable if:
 - o principal is discharged, (*McDonald*)
 - o principal contract is significantly altered or otherwise determined (*McDonald*)
 - o if exceeds, replace, or terminate the liability of the principal debtor (*Direct Acceptance Finance v Cumberland Furnishings*)
 - o if liability differ in kind from the obligation of the principal debtor. (*Duncan Fox v North and South Wales Bank*)
 - XPT – if the parties agree otherwise (*Perry v National Provincial Bank of England*)
- Obligations of the guarantor will not be determined by the bankruptcy, winding up, placement into official management or entry into a scheme of arrangement by the principal debtor. (*Helou v Mulligan Pty Ltd*)
- (*Direct Acceptance Finance*) – 'recourse agreement' could not constitute a guarantee for the liability of the guarantor was not co-extensive with the liability of the principal debtor. Default was not needed for it to operate and could be held to pay amount in excess of what principal owed.

Continuing Guarantee

- A guarantee may extend beyond one particular obligation or transaction of the principal debtor and extend to securing the performance of the principal debtor's obligation in a course of dealing continuing through a series of future transactions (*Turner Manufacturing v Senes*)
- The language of the guarantee establishes whether the guarantee is continuing or limited, for example, the guarantee is continuing if:
 - o it is referred to as a "continuing security"; or
 - o It secures "any goods" supplied or "all moneys" advanced.
- "all moneys" clause – guarantor promise to pay all moneys...which may be owing or unpaid to the bank by the principal on any account whatsoever. This includes money stolen by the principal. Australia takes a confined approach tending to limit application to their context and commercial purpose. (*McVeigh v National Australia Bank*)
 - o If ambiguous, the all money clause would be construed against the arty seeking to rely on it, that is, resolved in favor of the guarantor. In NSW, it may be grounds for review of the contract as an unjust transaction in s 7 of the Contracts Review Act 1980 (NSW).

Requirements

- The general principles of contract law as to formation of contracts apply to contracts of guarantee, including the requirement that the agreement be supported by valuable consideration (*Barrell v Trussell*)

A. Consideration

- Guarantee is a contract and requires consideration (Barrell v Trussell)
 - o unless made by formal deed signed under seal (Rann v Hughes)
- Consideration must move from creditor, but need not move to the promisor (guarantor) (Morely v Boothby)
- Consideration must be of good value in the eyes of the law and must not be past (Roscarla v Thomas)
- Terms used on the face of the contract need to be carefully considered. If ambiguous, extrinsic evidence is admissible to demonstrate whether the guarantee was given in circumstances indicative of valuable consideration rather than past consideration.
- Examples of good consideration:
 - o Refrain from suing the principal debtor to enforce a debt (Rolt v Cozens)
 - o creditor advances funds to principal debtor; (White v Woodward)
 - o creditor supplies goods or services to principal debtor; (Johnston v Nicholls)
 - o Creditor enters into a lease with principal debtor. (Chan v Cresdon)
 - o Where consideration is contemporaneous (Coghlan v SH Lock)
- Example of no consideration:
 - o *Mackay v National Australia Bank Ltd* [1998] 1 VR 173: further guarantee was given in consideration of bank 'providing banking accommodation' – but no new financial accommodation provided to principal debtor.

B. In Writing (Statute of Frauds)

- Statute of Frauds, requiring guarantees to be written, generally applied where there was 'special promise to answer for the debt, default or miscarriage of another'. (s 4 Statute of Frauds 1677 Ch 3 (Eng)) (*Actionstrength Ltd v International Glass Engineering*)
 - o what constitutes 'promise to answer for debt of another'?
 - o The guarantor may limit his liability by way of mortgage or charge over particular property as security for the performance of the principal's obligation. It includes one who pledge, mortgage, charge their property for the debt of another, even those who pledge personal credit.
 - o If guarantor merely offers property or proceeds as security (rather being personally liable to whole extent) then promise may not be 'a promise to answer for the debt of another' and Statute of Fraud may not apply (*Harvey v Edwards, Dunlop and Co Ltd*)
- Writing requirements in statute
 - o Property law
 - Writing must be signed by guarantor or agent.
 - Sufficiently identify the parties and set out all the material terms of the agreement
 - o National Consumer Credit Code (eg s55 of Code).
 - o Electronic Transactions Legislation: potential to satisfy writing requirements electronically.

Rules of construction

- Terms of the guarantee are construed *contra proferentem* with a strict regard to its terms (strictissimi juris). If the natural meaning of the terms is unclear, it is construed in favor of the surety (*Mason v Pritchard*)

Termination

- Guarantees are unenforceable (and guarantor not liable for obligations of debtor) if requirements of guarantees not met:
 - no consideration;
 - guarantee not written, where writing requirement; and
 - principal debtor's contract is unenforceable (because guarantor is secondarily liable to creditor).

- Revocation of the guarantee possible if:
 - Stipulated in contract.
 - If contract is silent, open for guarantor to revoke until consideration is furnished.
 - If continuing and with divisible consideration, can revoke at any time with respect to future liability.
 - Generally death of guarantor revokes the guarantee as to future liability, once creditor is notified. BUT death will not discharge liability of co-guarantors if joint and several.
- Circumstances that discharge guarantor's liability:
 1. When principal debtor pays.
 2. as stated in guarantee;
 3. by novation of principal debtor's obligation to new debtor;
 4. by material variation of obligation of principal debtor (unless for benefit of the guarantor)
 - this includes extension of time for repayment or performance of principal
 - increase in the interest rate upon default.
 5. Operation of law
 6. Principal validly terminates principal agreement.
 7. If creditor breaches essential term of guarantee, guarantor may elect to terminate.
 8. by death of guarantor (in certain circumstances).
- Note that guarantor still liable if principal debtor is bankrupt, wound up, placed into official management or entered a scheme of arrangement.

Rights of guarantor

- Creditor may call on guarantor to perform obligations of principal debtor.
- Where this occurs guarantor has rights under the following doctrines:
 1. Indemnity;
 2. Restitution;
 - Preconditions: payment to creditor, debtor requested or consented to have a guarantor, payment benefited debtor.
 - Claim from creditor if there is no consideration.
 3. subrogation;
 - a creature of equity and does not depend on contract (McColl's Wholesale)
 - right to be subrogated to the rights of the creditor in relation to all securities held by it for the principal obligation (Duncan v North and South Wales Bank)
 - effectively enforce rights by standing in the shoes of the creditor.
 4. assignment; and
 5. contribution
 - principal obligation is guaranteed by more than one guarantor, the creditor is generally free to proceed against any one of the guarantors upon default.
 - Guarantors may seek contribution from their co-guarantors to recoup any amount paid in excess of the guarantor's proportionate share of the common burden. (Albion Insurance v Government Insurance office of NSW)

Vitiating factors

- Guarantee may be set aside if:
 - unconscionable conduct on part of creditor;
 - guarantor can establish it was coerced to enter into guarantee by undue influence;
 - rule in *Yerkey v Jones* applies; or
 - creditor failed to disclose information to guarantor, to extent that there was a misrepresentation.
- Guarantees do not have same disclosure requirements as contract of insurance – but can be invalid due to: unconscionability, undue influence, misrepresentation or because of decision in *Yerkey v Jones* (1939) 63 CLR 649.
 - Unconscionability – (Amadio) – special disadvantage and an unfair or unconscientious advantage is then taken of the opportunity thereby created. Take account the combination of the conduct or circumstances (Karam)
 - Undue influence – (Johnson v Buttress)
 - This is where it may be necessary to consider the *Competition and Consumer Act* (2012) (Cth), s20 and ASIC Act, s12CA-12CC.