Week 9

1. Introduction

Consumers entered into contracts for goods and services are often disadvantaged
Suppliers
are better organised
appropriate business and financial structures
Control availability of what consumers want
Know about laws
Sophisticated advertising and marketing techniques
Individual customers
Limited financial resources
Little knowledge of law
Lack detailed information about the goods and services they are obtaining
Consumers have little power to negotiate terms of their agreement & will normally agree to terms dictated by supplier

What consumer protection provisions existed in Australia before 2011?

Suppliers of goods on credit reserved their rights of ownership in goods until payment was made in full
Failure to make one payment may result in loss of all monies paid before the breach, had no rights in goods
State & territory hire purchase legislation regulated this type of situation
But suppliers responded by inventing a new transaction that hire purchase legislation did not cover
Supplier of goods engaged in unfair practices that encouraged weary customers to get goods that they would later regret
These were prohibited by trade practices & fair trading legislation
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Suppliers responded by inventing new practices that avoided specific legislation
Suppliers put terms into contracts to exclude legal liability for supplying inferior goods
Trade practices & fair trading legislation put implied terms into consumer contracts to guarantee basic quality
But could not be excluded in consumer contracts by agreement
These technical provisions were hard for consumers to understand
These are too narrow & technical to protect consumers

PBL Case Study Summaries

Taylor v Johnson (1983) 151 CLR 422:

Johnson offered in writing to sell 10 acres of land to Taylor for $15000, instead of at $15000 per acre. Taylor, knowing it was too good to be true, said nothing and quickly accepted the offer. Given the circumstances, the contract should be set aside.

Principle of equity and upholding good conscience: If a party enters a contract under a serious mistake in relation to a fundamental term, the contract will be made void is the other party was aware of circumstances that indicate the first party is mistaken, and deliberately sets out to ensure that the first party does not discover their error until it is too late.

Balfour v Balfour (1919) 2 KB 571:

Ms Balfour is sick and stays in England while Mr Balfour is employed overseas. Mr Balfour promises £30/month for Ms Balfour's maintenance. The couple were living in amity when the promise was made.

Cohen v Cohen (1929) 42 CLR 91:

Ms Cohen alleges that her husband was to pay her £100/year as a dress allowance before she married him. After separating, Ms Cohen claims for £278 owing in unpaid instalments.

Merritt v Merritt (1970) 1 WLR 1211:

Mr and Ms Merritt are in the process of separating. Ms Merritt agrees to finish paying off the loan to the house, and upon paying off the loan has made an agreement with Mr Merritt for him to transfer the house to her. Mr Merritt signed a letter to this effect.

Esso Petroleum Co Ltd v Commissioners of Customs and Excise (1976) 1 All ER 117:

Esso produces and provides a set of commemorative 'coins' as collector's items to motorists in order to promote sales of its petrol. It was found that Esso had intention to be legally bound in promising to provide the coins.

Price v Easton (1833) 4 B & Ad 433:

Privity. A builder owed money to Price. Easton agreed with the builder to pay Price the money owed, if the builder did some work for Easton. Easton did not pay Price after the work was done.

*****Coulls v Bagot's Executor & Trustee Co Ltd (1967) 119 CLR 460:**

Privity. Coulls gave O'Neil Construction the right to dig up and remove stones. In exchange O'Neil contracted to pay royalties to Coull's wife Doris. Coull dies, and because the contract did not involve services of a personal nature it was not terminated by Coull's death, and remained enforceable against the estate. Doris was not a party to the contract and therefore had no contractual right to the contract.

Placer Development Ltd v Cth (1969(121 CLR 353:

Illusory promise. The government promised that it would pay a subsidy "… of an amount or at a rate to be determined by the Commonwealth from time to time…" to importers of timber products.

Partridge v Crittenden (1968) 2 All ER 421:

Partridge advertises 'Bramblefinch cocks and hens 25/- each" in a magazine. However this isn't an offer in a legal sense as it is simply an invitation to treat.

Carlil v Carbolic Smoke Ball Co (1893) 1 QB 256:

Acceptance of an offer by conduct. Case involves Carlil buying a Carbolic Smoke Ball which claimed to prevent influenza, with a £100 reward if it failed to prevent influenza.

Masters v Cameron (1954) 91 CLR 353:

Conditional agreement. Cameron agreed to sell her farm to Masters for £17500. A condition on the contract was that 'agreement is made subject to the preparation of a formal contract of sale' by Cameron's solicitors. Contract is created only if and when the condition is fulfilled within a reasonable time or otherwise.

Chapter 5 Making A Contract

Week 4

1. Introduction

What is a contract?

- Legally enforceable agreement between two or more parties to the contract
- Legally obliged to do what was promised, if fail to carry out promises, can be used and made to pay damages for the breach of obligations

Is every agreement a contract?

- Social agreements between friends / domestic agreement between family members are not legally binding

What makes a contract legally enforceable?

- Legal obligation - legally binding duty to give or do something
- Contract made - legally enforceable rights & duties = obligations

How are contractual duties discharged?

- Contract discharged = when all obligations created by the contract have been discharged

How is a contract enforced?

- Parties fail to carry out promises, becomes breach of contract! legal obligation remains undischarged
- Legal action to enforce the agreement
- Seek an appropriate remedy, I.e. Award of damages

Why are legally enforceable agreements important?

- Valuable for doing business with persons you may not know well enough to trust, & with whom you have no other relationship which could encourage them to do what they promised
- When agreements involve ongoing performance over time or future performance, e.g. Leasing business premises, hiring employees, acquiring goods & services to be delivered
at a later date

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How are contracts made?

- **Formation**: what particular requirements exist for the creation of a valid contract
- **Negotiation phase:** parties exchange information & explore the possibility to reach an agreement to which they are prepared to bind themselves

What are the essential requirements of contract formation?

- Three elements must be present for a contract to come into existence:

1. The parties intend to be legally bound.
2. **Either** formal execution of agreement in a deed, **or, as an alternative**, the exchange of "something of value" when the contract is made, called "consideration".
3. Sufficient degree of agreement on terms of contract.

DURESS:

- Physical harm to the person; or economic harm; or illegal actions over their goods
- directed at the party or their immediate family members
- can be set-aside within a reasonable time.
- as long as 'one' of the motivation reasons for entering into a contract is duress, other reasons don't matter, contract is void.

UNDUE INFLUENCE: (relationships)

- dominant party may influence the decisions of the weaker
- if undue influence is used, the contract can be declared void
- weaker party must act reasonably soon to have the contract set aside.
- *Presumptive Controlling Power:*
  - relationships that depends on trust.
  - contract between them are presumed to be the result of undue influence
- *General Controlling Power:*
  - weaker party may prove that stronger party had a general controlling influence.
- In both cases, stronger party has the onus of proving that no undue influence was exercised in the relation to the contract in question.

MISTAKE (ERROR): misapprehension of facts.

- Mutual Mistake: each party makes a different mistake
- Bilateral Mistake: both parties are mistaken.
  - Unless the mistaken term is a condition, contract cannot be voidable
  - error must not be the fault of the person relying on it.
- Unilateral mistake: one party is mistaken
  - misunderstood the terms
  - misunderstood the type of agreement being created
  - mistakes the identity of the other contracting party
- Valid in common law: unconditional agreement despite the unilateral error
- Voidable in equity: contrary to conscience for the other party to take advantage of the error.

UNCONSCIONABLE DEALING: (vulnerability)

- One party suffers from a disability or disadvantage and so enjoys no reasonable equality of bargaining power
- To establish unconscionable dealing:
  - Weaker party can't properly judge what is in their best interest
  - The disadvantage is evident to the stronger party
  - The stronger party takes unfair advantage of the circumstances

MISREPRESENTATION:

- Misrepresentation that are not terms of contract, have no action available for breach
- Deliberate or negligent misrepresentation justifies setting the contract as void. Also give rise to action in Tort.
- Neither deliberately nor carelessly are "innocent misrepresentation," do not justify setting aside as void, nor give rise to an action in Tort.

ILLEGALITY:

- Contrary to a general notion of "public policy."

Tort	Description
Trespass to land or chattels	Protection of property from interference.
Assault and Battery	Protection of the person from violence or threats of violence.
Private Nuisance	Protection of the right of quiet and peaceful enjoyment of one's property.
Deceit	Protection against being deliberately misled.
Defamation	Protection of personal reputation.
Negligence	Protection against many kinds of careless conduct causing harm.

Tort Law: -Wrongful conduct by one person that causes harm to another.
-Provide a private right of action for compensation/order to stop continuing or threatened harm.

<u>Tort of negligence:</u> Failure to take reasonable care to prevent foreseeable harm on others

Essential Elements of Negligence: - Owed duty of care
- breached the duty of care
- As a result of the breach, suffered loss or injury (not remote)

<u>REMEDIES FOR TORT:</u>

1. *Damages:* Put injured party in the position they were previously
2. *Statutory Compensation Schemes*
3. *Injunctions:* to prevent threatened or continuing negligence

UNCONSCIONABLE CONDUCT:

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."

- Unconscionable dealing in the general law is also breach of S20.

SECTION 21: "A person must not, in trade or commerce, & in connection with the supply or acquisition of goods or services to or from a person, engage in conduct that is, in all circumstances, unconscionable."

- Does not distinguish between consumer & commercial transactions.
- Does not matter what goods/services supplied.

SECTION 22: Factors to take into account:

- Relative bargaining power
- Conditions not reasonably necessary
- Able to understand documents
- Any undue influence, pressure or any unfair tactics used by a party
- Could acquire identical/equivalent goods/services from another person
- Consistent in their conduct in similar transactions with other business consumers
- Requirement of any industry codes
- Willingness to negotiate terms and conditions
- Contractual right to vary terms and conditions
- Extent to act in good faith.

UNFAIR BUSINESS PRACTICES: ACL prohibit any unfair terms in standard contract. Void only unfair terms, other terms stay.

Terms are unfair if:

<u>*DUTY OF CARE:*</u>

1. Reasonably foreseeable harm
2. A member of a class of persons who it was foreseeable might suffer harm
3. Recognized 'duty situation or relationship' must exist

Breach of *Duty of Care:*

- Likeliness of the harm
- Greatness of the harm
- Difficulty to avoid harm
- Do the circumstances justify taking the risk of harm
- Do policy consideration s excuse the harm

<u>*Purely Economic Loss:*</u>

- ✓ Plaintiff vulnerable, dependent or powerless
- ✓ Defendant in control/power
- ✓ Wrong information (duty of care only exist if):
  - Speaker realized they are being relied on to provide correct info
  - Reasonable to act upon the info or advice provided

Causation: The harm must result directly from the defendant's conduct. "Would the harm have occurred but for the defendant's conduct?"
- If the other events intervene as proximate cause of the harm, defendant not liable.
- If plaintiff somehow contributed to their own harm, (contributory negligence) the losses must be apportioned between the parties.

AGENCY: - Authorizing third party to act in place of a party in legal transactions
- Agent has legal power to represent another, in the conduct of the legal transactions

Agent's authority arises in:

- <u>Express Authority:</u> explicitly granted via oral or written. General or specific.
- <u>Implied Authority:</u> Agent with express authority has additional implied authority.
- <u>Apparent Authority:</u> Not given actual authority, but do have something on behalf of their employers. When it appears to third party that they've authority to represent.
  - Same effect as actual authority.

RATIFICATION: process of giving retrospective authority; done within reasonable time; done expressly or impliedly.

- When agent is not given power to perform but did & principal can still choose to assent to the transaction.
- Unless ratified, principal is not bound & the agent is personally liable.

'<u>*UNDISCLOSED PRINCIPAL'*</u>: agent does not let the third party know that the agent is acting as a representative.

Duties of an AGENT:

- Required to carry out the instructions given by the principal
- Must carry out tasks with duty & care
- Act in accordance with good faith
- Make no secret profit or have conflict of interest
- Can appoint sub-agent unless personal discretion or performance is required
- Must keep proper accounts; not mix principal's monies with their own.

Duties of a PRINCIPAL:

- Must pay the agent agreed fee (unless required not to)
- Pay for agent's expenses and liabilities incurred
- If agent has any property from the principal, they have a lien over that property to secure until payment is due.

AGENT'S liabilities to THIRD PARTIES:

- Normally agent is not a party to the transaction unless an agent deals with a third