	COMMERCIAL LAW NOTES----------
	Week 1
	"It is important to get some idea of the relationship between consumer law and commercial law. …the difference between the two seem …fundamental….Whereas… commercial law is based on the premise that businessmen are of roughly equal bargaining power, consumer law assumes that the consumer and business enterprises are roughly unequal. While commercial law is happy for businessmen to regulate their own affairs through mercantile usage, usage plays only a peripheral role in consumer transactions…..These fundamental differences mean that whereas commercial law is non-interventionist and essentially pragmatic in nature, consumer law intrudes into contracts made between consumer and business supplier and is essentially an instrument of social policy." (Sealy and Hooley, *Commercial Law, Text, Cases and Materials,* 4th ed, 2009, Oxford University Press, p16) -no uniform commercial code like there is in the us -diff between commercial and consumer law: eg: in comp/consumer act and its schedule – consumer law -continued change in emphasis from freedom of contract and laisse faire towards social responsibility and protection of economically weaker against conically stronger which are hallmarks of competition law -consumer law assumes that they are roughly unequal law- commercial law assumes they can regulate their own through usage -commercial law = largely non-interventionist and pragmatic., consumer law intrudes and is element of social policy
What is commercial law?	"The object of commerce is to deal in merchandise and, if we adopt this criterion, commercial law can be defined as the special rules which apply to contracts for the sale of goods and to such contracts as are ancillary thereto, namely, contracts for the carriage and insurance of goods and contracts the main purpose of which is to finance the carrying out of contracts of sale" (HC Gutteridge, *Contract and Commercial Law*, (1935) 51 LQR 117 "The totality of the law's response to mercantile disputes, encompassing all those principles, rules and statutory provisions, of whatever kind, from whatever source, which bear on the private law rights, and obligations, of parties to commercial transactions, whether between themselves, or in their relationship with others" (Royston Goode, *Commercial Law in the Next Millennium*, Sweet & Maxwell London, 1998)
The Nature of Commercial Law Royston Goode	Commercial law possesses four characteristics: • It is based on transactions(usually private parties sometimes govt) , not on institutions; • it is concerned primarily with dealings between merchants, in the broad sense of professionals as opposed to consumers; • it is centred on contract and on the usages of the market, and • It is concerned with a large mass of transaction in which each participant is a regular player, so that the transactions are typical and in large measure repetitive and lend themselves to a substantial measure of standardised treatment. (R Goode, *The Codification of Commercial Law,* (1988) 14 Mon LR 135, pp141
Commercial Law	• The US Uniform Commercial Code (UCC) • A negative definition – a commercial transaction is one of a mercantile character that does not involve a 'consumer' as defined in the legislation Some states, commercial code marks whether commercial transaction or not, other states- is the status of parties -in aus: broad range of legislation, commercial nature that doesn't apply to a consumer
The History of Commercial Law	Berman H,– Law and Revolution: *The Formation of the Western Legal Tradition,* Harvard University Press, Cambridge Mass, 1983 From 11th to 12th centuries: ○ An agricultural revolution which created surpluses to be traded and which also allowed the redistribution of a largely agrarian population into large cities; ○ The doubling of the population size of western Europe. ○ The introduction of a discrete merchant class; ○ Religious factors such as the Crusades and the programmes of Papal Revolution Most crucial state was during this period -increase in trade and rise of particular merchant class -trading transactions not by law of any country but by lex merchataria: governed sale, insurance, finance etc -existed outside common law: more flexible means of dispute resolution and didn't fit easily into English common law at the time

	-influences such as roman, Jewish, church law etc
	
	Religion and the Rise of Capitalism
	• "Money is the root of all evil"(1 Tim. 6:10)
	• Berman:
	"the Western Church of the late eleventh and twelfth centuries not only did not denounce money or riches as such, but indeed encouraged the pursuit of money or riches provided that such pursuit was carried on for certain ends and according to certain principles. The secular activities of those engaged in commercial enterprise were to be organised in ways that would redeem them from the sin of avarice. The merchants were to form guilds that would have religious functions and would maintain standards of morality in commercial transactions...Legitimate trade based on good faith was distinguished from illegitimate trade based on avarice"
	
	• Roman law: the texts of Justinian; the Sea Law of Rhodes (300BC)
	• The merchants
	  • the Amalfitan Table (1095)
	  • Court of Oléron (1100's)
	  • "piepowder courts" (pied poudre?)
	Merchants themselves developed it and implemented it in the tribunals, characteristic of the time that development left entirely to merchants themselves, organised international fairs/markets established mercantile offices etc
	some older compilations of law distributed internationally

Characteristics of early *lex mercatoria*	○ "Speed in adjudication (a particular requirement for the foreign trader), a realistic attitude towards the proof of facts, a relative freedom from technical rules of evidence and procedure that plagued the common law courts and an acceptance of the fact that the customs of merchants generated rights which required international recognition and which, for the stability of the European markets, needed to be interpreted in a broadly uniform fashion, with an overriding requirement of good faith" (Roy Goode) • The "staples" towns and courts Speed was particular requirement for foreign trader • a clear distinction between the laws of real and personal property; • a balancing of the rights of two innocent parties, in particular, the innocent owner of goods and a good faith purchaser; • "recognition of the validity of informal oral agreements for the purchase and sale of movables" • the creation of a right of possession of moveables which was a source of rights independent of ownership. • the crucial development of the bill of exchange; • bankruptcy law aimed at prioritising creditors but also allowing the debtor to start again with a clean slate; • patents and trademarks • the development of the joint venture and other forms of business organisations • the development in the 14th and 15th centuries of marine insurance. -distinction: land had the function of status before statute of wills, was to eldest son, gave suffrage, lord of the manor had a seat in law making bodies- real property gave legal status -personal property- requirement of moving it rapidly between owners, law needed to be different to real property- different functions -balancing of rights of innocent owner against good faith owner- purchased from someone other than true owner -creation of right of possession of moveables- created a right of ownership- 2 types of ownership- documentary and possessory -bill of exchange- caused increase in security over personal property- distinctive innovation- security over personal property -bankruptcy law- still prioritised creditors – idea that bankrupt person should make clean start and be free of crippling financial obligations -marine insurance- don't have to spread risk of trading anymore
The Absorption of the Law Merchant into the common	• The lex mercatoria is originally a "language of interaction" • "thus, through a gradual process of absorption by creating governmentally backed institutional arrangements and laws which would be acceptable to the merchants, and by weakening the authority of the merchant courts, commercial law began to become part of common law.

law	(Bruce Benson, *The Spontaneous Evolution of Commercial Law*, (1989) 55 Southern Economic Journal, 644) • The lex mercatoria becomes: ○ less flexible, ○ more domesticated and concerned with domestic affairs to the benefit of the king. Not adjudicated in tribunal with international jurisdiction -governed virtually every transaction but not backed by some ultimate authority -much of law based on roman law- customary law -England contributed little- Italy did most of it -allowed alien merchants to be protected -was described as language of interaction: agreed rules as to how rules would be formalised -lack of coercive state that most effective was boycott if didn't abide by ruling, merchants themselves accepted its authority -lawyers not suitable judges because no speed or informality of merchants constantly moving and wanted them heard quickly -appeals previously unavailable because of commercial necessitude -common law took over-lord Edward Cooke The Law Merchant fared less well in England than in continental Europe, for pragmatic reasons. England had adopted neither the Romanist system of law nor the great commercial codes of continental Europe.(77) Post-medieval English judges also were reluctant to enshrine commercial practice in English Law.(78) Adopting a formulatory system of writs and precedents, English courts endorsed merchant customs only if they were 'certain' in nature, 'consistent with law,' and 'in existence since time immemorial.' (79) English judges also required that merchant custom be proven 'to the satisfaction of twelve reasonable and ignorant jurors "Many of the desirable characteristics of the Law Merchant in England had been lost by the nineteenth century, including its character, its flexibility and dynamic ability to grow, its informality and speed, and its reliance on commercial custom and practice" Common law's hijack of law merchant- became less flexible -needed evidence that truly ancient before admitted as law -more welcomed in civil law countries so still important role in international transactions
The Re-emergence of the Law Merchant	• Lord Mansfield: ○ drafts many commercial Acts ○ *R v Knowles, ex parte Somersett* (1772) 20 State Tr 1 – slavery is unlawful in England Goode (7) on Mansfield: "Proceeded to reduce the vast mass of case law on commercial disputes to an ordered structure, combining a mastery of the common law with a profound knowledge of foreign legal systems and a deep insight into the methods and usages of the mercantile world" • The rise of commercial arbitration as a dispute resolution process • Sir Mackenzie Chalmers responsible for drafting the *Bills of Exchange Act* 1882, the *Sale of Goods Act* 1893 and the *Marine Insurance Act* 1906 90% now through arbitration or other similar process -blacklisted merchants who didn't abide by it early- reputational sanctions, some continued -arbitration itself continued
Organic development of the *lex mercatoria*	Benson: "..the invisible hand guiding the development of the market's spontaneous order had to be supported by another invisible hand which guided the evolution of the commercial law. Neither of these evolutionary processes could have been achieved by intentional design". -Customary law continues to govern, since customary is based on voluntary recognition for mutual gain
The myth of the universal *lex mercatoria*?	• Emily Kadens, *"The Myth of the Customary Law Merchant":* the primary driving force behind early commercial trade were agreed rules of the law of contract …. customary law, or mercantile law, was employed only to augment contract law or to fill gaps in specific areas. Edwards and Ogilvie, ○ "The evidence shows that contract-enforcement at the fairs did not take the form of private-order or corporative mechanisms, but was provided by public institutions. More generally, the success and decline of the Champagne fairs depended, for good or ill, on the policies adopted by the public authorities" ○ *What lessons for economic development can we draw from the Champagne fairs*?, Explorations in

	Economic History, Volume 49, issue 2, April 2012 State intuitional ordering and not private rules were basis of dispute resolution process -does rely on different sources of law
The Major Sources of Commercial Law	• **Contract (and exceptions to the doctrine of privity of contract)** • **Equity** • **Trade Usage or Mercantile Custom** • **International Bodies** ○ The International Chamber of Commerce (ICC), - codes of best practice in many areas ○ The United Nations Commission on International Trade Law (UNCITRAL) ○ The International Institute for the Unification of Private Law**, (**UNIDROIT)- produces best practice rules on int commercial contracts that have been adopted by many countries, eg: china ○ the European Commission (EU)**,** harmonisation of laws of Europe and great Britain ○ CISG advisory committee- contract of international sale of goods- group of eminent academics and commercial lawyers- issue opinions on Vienna convention • **Domestic legislation** • **"Soft Law"** **Contract:** forms basis of most relationships but many important commercial docs are exceptions to law of privity of contract, eg: bills of exchange) -where used: rules of contract are applied generally -law of contract may not be used by commercial parties or not suitable for transactions on the whole -may be ignored by parties or superseded by bill of exchange etc -many other terms not considered by parties, so many standard term contracts -sale of goods act and insurance contracts act will imply terms in -external influences on the law of contract **Equity:** -main tools: fiduciary obligation (trust confidence) and constructive trust (remedy and institution arises- when legal and equitable title is split) -personal property securities act shaped by things such as tracing -statutory unconscionability **Mercantile custom:** -usage in interpretation -usually taken that they intended to contract on the footing of particular trade/custom usage- can be incorporated as express or implied terms -debatable where used outside this- less important in common law unless express/implied term than civil countries **International bodies:** produces conventions: eg: Vienna convention on int sale of goods or produces model legislation -convention has no domestic application until its adopted -until a sovereign state ratifies/adopts legislation based on model rules then they have no application -adopt convention as it stands or use as model legislation adopted in full or in part **Domestic Legislation:** eg: Australian consumer law legislation aimed squarely at consumers dealings -commercial: more limited influence, still largely able to determine own terms and exclude legislation, eg: comp/consumer act doesn't apply- more than $40,000 or non consumer transactions -sale of goods act excludable by parties, same for Vienna convention **soft law** codes of conduct: may be compulsory: eg: adr schemes or arbitration schemes, penalty may include ostracism , loss of business or reputation
The American Uniform Commercial Code (UCC)	• A model statute completely adopted by all of the American States with the exception of Louisiana which maintains parts of its civil law origins • Its purpose of the code was to 'simplify, clarify and modernize the law governing commercial transactions" and also to make laws across the States uniform. • One of it principle drafters was Karl Llewellyn (nicknamed *Karl's code* and *lex Llewellyn*)

	-based on principles rather than rules
Principles of the UCC	1. favored open-ended standards over firm rules; 2. avoided formalities; 3. required and facilitated the "purposive interpretation" of its provisions; 4. did not attempt to provide an exclusive statement of the law, but instead directed courts to supplement its rules with general legal and equitable principles; and 5. provided a range of remedies that principally served to make injured parties whole. Different approach to our law of contract: firmly embedded rules
The Basic Requirements of Commercial Law	Sealy and Hooley: the needs of commercial parties: • They demand that their agreements be upheld. • They require the decisions of the courts on commercial issues to be predictable so that they know where they stand. • They need to the law to be flexible enough to take account of their latest business practices. • They want their disputes resolved quickly, inexpensively and effectively. (Sealy and Hooley, *Commercial Law, Text, Cases and Materials,* 4th ed, 2009, Oxford University Press, p10 – 14) Eg: need to plan into the future so want to know where they stand, that agreement will be upheld and have consistent approach to resolution -needs to be flexible enough to take account of developing practices -upholding bargains, courts have pretty much left contract law alone -assumed that they have equal bargaining power -commercial contracts- less of a nanny state approach -argued that courts favour predictability over fairness etc -need for flexibility: can be met by judicial recognition of mercantile usage and taking it into account- limits to this such as conflict with parole evidence rule, but if shown custom/usage is universally recognised it will be implied as implied term , some relationships are entirely based on trade custom -equity division on commercial list -aim of rules: just, quick cheap but still tendency to be bogged down in discovery etc
Berman	"Time limits were narrow: in the fair courts justice was to be done while the merchants' feet were still dusty, in the maritime courts it was to be done "from tide to tide", in guild and town courts "from day to day"
Principles in a Code	• Part autonomy • Predictability • flexibility • Good Faith • The Encouragement of Self help • The facilitation of security interests • the protection of vested rights • The protection of innocent third parties Make up philosophy of commercial law and should make up the code of commercial law -sir oysten?? Said these principles are essential -autonomy: business people largely free to make their own law- contract is a contract- enforced and should be entitled to benefit and strict performance of contact, only when oppressive or offends public interest should courts intervene – reasons= freedom under the law and certain enforcement helps to promote security and predictability -predictability= essential -good faith: us ucc and most civil jurisdiction apply the requirement of good faith, not common in English law: resisted until recently – similarly in aus -nsw: implied into at least some commercial contracts -self help- common law already encourages self help remedies- common ones such as rights to repossession for non payment, rights of set off and appointment of receivers without judicial approval- to be encouraged -encourages facilitation of security interest- allow them to be taken over any kind of asset- present/future, tangible/intangible -third parties vs vested rights- conflict,

	-nemo dat principle: doesn't have title so cannot transfer, but sale of goofs provides exceptions to this- directed at balancing rights of true owner and innocent third party Reciprocity of rights – Berman "This is turn has two aspects, one procedural, the other substantive. Procedurally, the exchange must be entered into fairly, that is, without duress or fraud or other abuse of the will or knowledge of either party. Substantively, even an exchange which is entered into willingly and knowingly must not impose on either side costs that are excessively disadvantageous to third parties or to society generally". Equality of burden= fairness -procedurally: must be entered fairly: no duress/fraud etc substantially: even when entered willingly known- no costs disadvantaging third parties or society generally
The Australian Perspective	• Land not nearly as important as in England • Early legal issues caused by lack of currency and reliance on the promissory note. • An amateur judiciary: ○ Richard Atkins was an insolvent drunk who allegedly never let any bottle be taken from his table until it was emptied. Neither his alcoholism nor his chronic financial problems were uncommon in early New South Wales, although they did leave him vulnerable to his political enemies. They claimed that he was a person "Who lies, cheats, drinks, forbears no Lewd Delights, A hateful Fiend by Day – a monster thro' the Night. Governor Bligh thought Atkins was a "disgrace to human jurisprudence". Kercher said commercial conditions always different to other countries: more land in uk: uninhabited and not as heavily populated -so much less important -problems initially due to lack of currency so promissory note more important and treated differently -judiciary at time often untrained in the law
Two views of contract - Kercher	• A laissez faire attitude aimed at protecting freedom of contract. This was based on "laissez-faire ideological assumptions of the amoral neutrality of contract law and equality of bargaining power" • A model based on conscience, and morality. Based on a fair price for goods and services already provided rather than on enforcing agreed prices regardless of subsequent changes of circumstances. Issue with function of law expectation damages issue: harsh consequences resulting from uk model of contract: laissez faire attitude in country particularly susceptible to disasters, eg: flood -where remains executory had harsh consequences for those affected by disaster by supplying the product and would be liable for expectation damages -dispute was between conscience/morality and assumption that entry in had shifted the risk of price changes Conscience/morality for goods/services already produced- regardless of circumstances -where applied- went further than modern day equity. Statutes- equitable remedy where events subsequent meant one side would suffer hardship -rather than laissez faire- didn't agree prices in advance, based on fair price for goods and ascertained what they could provide rather than relying on changes etc
Justice Heydon	• *Some Developments in Commercial law in the lifetime of the Australian Law Journal* 'In a federation like Australia, commercial law has been shaped by considerations of national power versus imperial power and central power versus State power' • Wide Federal powers; involvement by the State as participants • The growth of regulatory bodies such as ACCC, ASIC, APRA, • Gradual drift from reliance on English law • Increase in consumer law • Search for "individualized justice" through statute and development of equitable doctrines such as unconscionability -adoption of status of west mister -uk entry into eu and closer ties with Europe- severing of ties with aus, laws of countries diverged to greater extent -central power vs state powers: engineers case: hinted at wider federal powers to come, referral from states to coth in number of areas eg: consumer laws

	-role of cth/state govts as direct participants in commerce: eg: in banking etc -rise of regulatory bodies such as ACCC, ASIC etc- regulation of corporate and financial sectors
Individualised Justice	"[F]or a number of reasons, some to do with the work of legislatures, some to do with judicial law making, and some to do with the temper and spirit of the times, we can no longer say that, in all but exceptional cases, the rights and liabilities of parties to a written contract can be discovered by reading the contract." - the Hon. Mr. Justice AM Gleeson AC, *'Individualised Justice – The Holy Grail'* (1995) 69 Australian Law Journal 421, 428. 1. Statutes which tend to weaken security of transactions and to increase the breadth, complexity and detail of factual inquiries in litigation. Examples include Trade Practices Act which introduced a wide range of remedies which would nullify contracts for conduct, including silence, which was misleading or deceptive. State legislation such as the *Contracts Review Act* 1980 (NSW) had a similar effect. 2. Judge made law eg Amadio (unconscionable conduct) and the development of the constructive trust, various forms of estoppel including *Commonwealth v Verwayen* which, in an attempt to consolidate the rules relating to estoppel extended its boundaries to a large number of factual situations. Has a number of sources/influences- from statutes weakening security, increasing complexity of factual inquiries in litigation, tpa now cc act- actions by parties can nullify the contract -contract review act has similar effect -judge made law: armadio: unconscionable, constructive trust, estoppel and cth v verwayen: overarching law of estoppel but heydon said in consolidating law of estoppel extended its boundaries further "These statutory changes, together with the fashionable growth of related equitable doctrines, and new techniques of contractual analysis must have undesirable effects on some legitimate forms of commerce. They lend themselves to gross abuses of process. It must be tempting for defendants to litigate at length about their bargains rather than to perform them, in the hope that out of a mixture of allegations relating to s 52, estoppel, implied terms, unconscionable behaviour, and contractual construction against an extensive oral background, something useful will turn up which can be used to obtain one of a wide range of discretionary remedies available under the Trade Practices Act and related State legislation." –Heydon Extended discretionary role of the court, far more ready to imply terms into a contract -s 52= now s 18 of ACL
The Federal Court	• low numbers everywhere except Sydney and Melbourne; • judges to hear a particular case are chosen not by expertise but by their own workload • there is no specialised court of appeal – appeals are to a full bench of judges chosen from the same pool. Decreases reliance on doctrine of *stare decisis*. • Encourages forum shopping Original purpose: grown in size and jurisdiction leading to 2 parallel systems of law in commercial - now exclusive jurisdiction in tax, ip and bankruptcy and forum shopping real possibility in other areas -size means low numbers everywhere except Sydney or Melbourne -problem with no specialised court of appeal stacked with senior jurists- judges chosen from the same pool in appeal to full court -some judges feel their view of the law is better than would be reached by relying on stare decisis – not good when legislation is similar to original uk and rich history of precedent to rely on – which is what they should be doing
	Week 2
Jonathon Swift: Gulliver's Travels	"I said that those who made profession of this science [law] were exceedingly multiplied, being almost equal to the caterpillars in number… The numerousness of those that dedicated themselves to this profession were such that the fair and justifiable advantage and income of the profession was not sufficient…Hence it come to pass that it was found needful to supply that by artifice and cunning, which could not be procured by just and honest methods: the better to bring which about, very many men among us were bred up from their youth in the art of proving by words, multiplied for the purpose that white is black, and black is white, according as they are paid." -Many happy with own interaction with lawyers but general public impression- seen as negative influence and people want to stay away There is a perception that "lawyerification" detrimentally affects business competitiveness and economic growth through the misdirecting of both human and financial resources. • "All of the economic studies purporting to show a negative economic effect of lawyers contain a simplifying presumption – lawyers engage in non-productive, redistributive, rent-seeking behaviour".