

THE UNIVERSITY OF MELBOURNE

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COURSE NOTES: FIRST CLASS HONOURS

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# **BLAW10001 Principles of Business Law**

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# BLAW10001 Principles of Business Law

## BLAW10001 Principles of Business Law

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# 2 Sources of Law (Legislation)

## 2 Sources of Law (Legislation)

Outline of legislative process

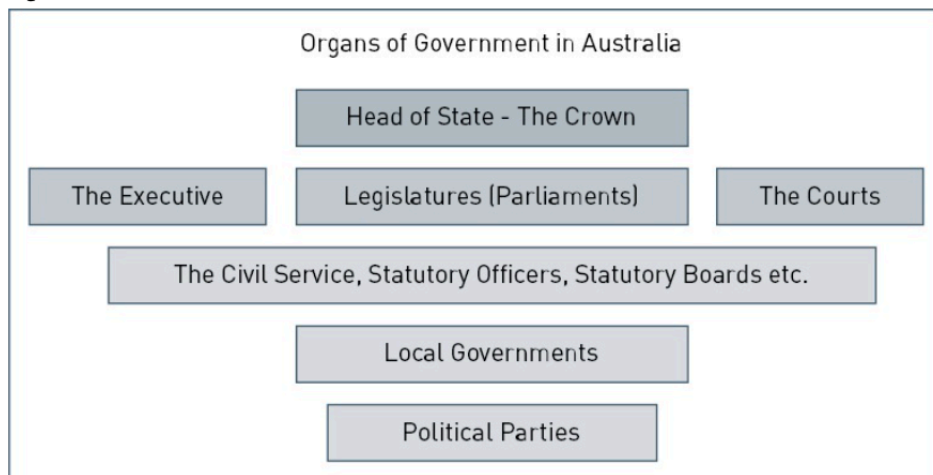
Structure of an Act

Commencement

Law making powers of Legislatures

**Conflict between the Commonwealth and State Legislation**

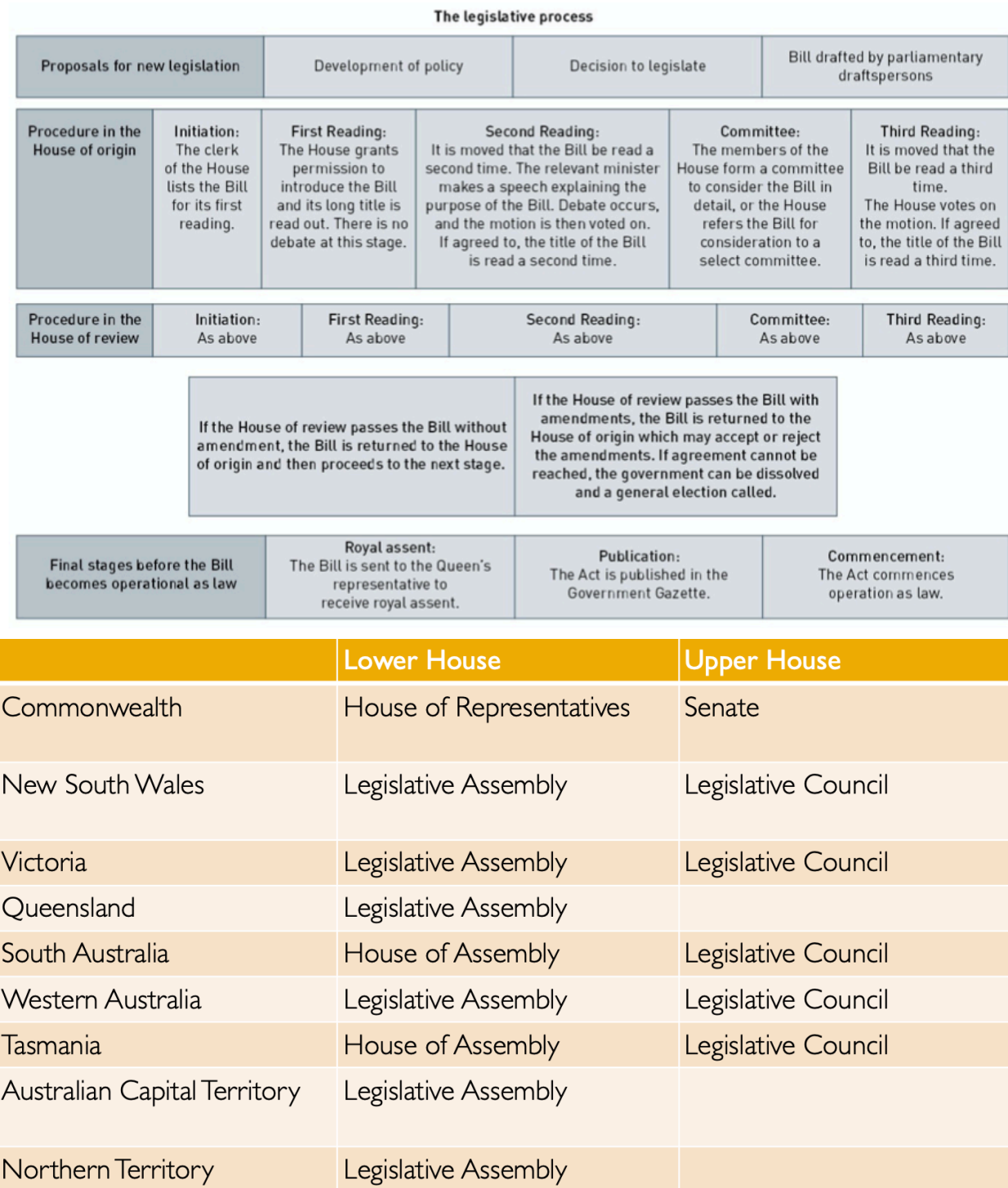
**Rules of interpretation (in order)**



## Outline of legislative process

1. Proposals for new legislation (identifying need for new law, politicians proceed, parliamentary draftspersons draft Bill)
2. Procedure in House of Origin
  - A. Initiation: Clerk of house lists Bill for first reading.
  - B. First reading: House grants permission to introduce Bill; and long title read out (no debate). Copies distributed to members
  - C. Second reading: Moved Bill read a second time; relevant Minister makes speech. Debate occurs and motion is voted on. *If* agreed to, the title of the Bill is read a second time
  - D. Committee: Members of house form Committee to consider Bill in detail, or House refers bill for consideration to select committee
  - E. Third Reading: Moved Bill read a third time. House votes, if agreed to, the title of Bill is read a Third time.
3. Procedure in House of Review
  - A. Initiation, First and Second Reading, Committee, Third Reading
  - B. Un-amended Bills: If HoR passes Bill without amendment, Bill is returned to House of Origin and proceeds to next stage
  - C. Amended Bills: If HoR passes Bill *with* amendment, Bill is returned which may accept or reject the amendments. If agreement is not reached, Government can be dissolved and general election called.
4. Royal Assent
5. Publication in Government Gazette
6. Commencement
7. Legislation can be introduced into either Upper or Lower House

**Figure 2.2 The legislative process**



## Structure of an Act

- statute/act/legislation are equivalent terms
- Citation** of an Act: **Name** of Act, **year** it was enacted (not commenced!) and the **legislature** that enacted it

## Commencement

If there is no specified commencement date in the act, its commencement is governed by either

- the government issuing a notice (in the *Government Gazette*)
- by the default commencement date (varying based on state)

### Henthorn v Fraser [1892] 2 Ch 27

- **Facts:** Day after receiving the offer, Henthorn posted a letter of acceptance to Fraser. After this letter of acceptance had been posted, but before it was received by Fraser, Fraser was offered a higher price for the houses by another buyer and he attempted to withdraw his offer to Henthorn. He relied on the principle that an offer may be withdrawn at any time before acceptance, arguing that acceptance by post had not been authorised and that Henthorn's acceptance was therefore not effective before it was delivered.
- **Decision/Ratio:** Acceptance of the offer was effective as soon as the letter of acceptance was posted by Henthorn, and this took place before Fraser's attempt to withdraw the offer.

**Caveat:** Only if the offeror states that acceptance is to occur *via post specifically*. Otherwise, only when the letter comes to attention of the recipient.

### By email

- If the offeror specified an email address as a way in which to accept the offer, then receipt takes place **when the email reaches their system**
- If not (ie the offeror has an email address, but didn't actually specify that they wanted the offer to be accepted by email), the receipt takes place only when the email comes to the attention of the addressee (ie the offeror actually opens the email).

### Formal and informal agreements

- Agreements can be *formally* executed in a **deed**
- Courts treat informal agreements differently and apply the 'bargain theory' of contract.

### Doctrine of Consideration

An *exchange* of something of value. Consideration may be *anything* of value to the person receiving.

- even an exchange of ***promises*** to give or do something...

### Thomas v Thomas (1842) QB 851

- **Facts:** Before he died, Mr Thomas expressed the desire that, if his wife survived him, she should be allowed to live in his house until her death. After his death, Mr Thomas's executors took account of this wish and entered into a lease agreement with Ms Thomas, allowing her to occupy the house in return for her promising to pay £1 a year .
- **Decision/Ratio:** The promise to pay £1 each year and keep the house in good condition was not in any sense equivalent in value to the benefit that Ms Thomas received under the agreement with the executors. *However*, there is no requirement that consideration be of equivalent value: it is enough that it be of some value, even if relatively small. Ms Thomas's promise was therefore sufficient consideration for the promise to let her occupy the house for life.

### Past consideration

Consideration **cannot consist of something previously done** or promised (no 'past' consideration; has to be 'fresh'):

## Opinions

- Opinions are statements of **personal views or beliefs**. Even if wrong, the expression of an opinion does **not** create legal liability if honestly made.
- Generally prefaced by 'I think...', 'in my opinion'... - otherwise, it may become a term!

## Representations: statement of fact

- Such statements do **not** *become* terms of the contract **unless it can be inferred from the circumstances that *both* parties considered the statement was intended to be a binding promise.** This is so ***even if the statement induced the other party to enter into the contract.***

## Misrepresentations

- A *representation* that proves untrue is called a misrepresentation. Misrepresentations can be deliberate (fraudulent), careless (negligent) or simply the result of error (innocent). Misrepresentations (even fraudulent ones) are **NOT** terms of the contract and **do not give rise to an action for breach of contract**. However the law provides *other* relief, for example, in Tort law and under the Australian Consumer Law.

**Warning:** PBL *analyses* cases for representation from Oscar Chess v Williamdss, Handbury v Nolan and Van Den Escherff

## Factors to consider for representations

- the timing of the statement
- statement delivery e.g. was it in response to a direct question by the other party?
- the expertise of parties

## Classifying terms of a contract

- **Conditions:** Conditions are terms that are of fundamental importance in the agreement.
- **Warranties:** Warranties are terms that are of lesser importance than conditions.

Whether a term is a condition or warranty **depends on the intention of the parties**, as evidenced by the circumstances. Ask whether it can be inferred from the circumstances that the promise was so important that the person to whom it was made (the promisee) **would not have entered the contract without it, and this was apparent to the person making the promise** (the promisor).

- **Innominate terms** Sometimes the courts avoid classifying terms as 'conditions' or 'warranties' and leave them unnamed or '**innominate**'.

## Agreed and implied terms

Terms can become part of a contract either:

- by **agreement** (which can be **express or implied**); or
- because they are put into the contract **by law** (either the general law or legislation).

## Expressly agreed terms

- Terms are '**expressly agreed**' when they have **actually been declared or definitely stated, either in writing or orally.**
- Terms may be expressly agreed to in various ways: by being discussed; or included in a signed document; or referred to on a ticket or notice.

### Moorhead v Brennan [1991] 20 IPR 161

- **Facts:** Moorhead gives exclusive rights to Brennan to license or sub-license book. Overseas publisher offers to sub-license book from Brennan if foreword from Brennan is removed. Brennan declines, Moorhead loses out on potential royalties and Moorhead sues for breach of contract.
- **Issue:** Is there an implied term that Brennan would not obstruct the opportunity for Moorhead to obtain royalties?
- **Decision:** There is such an implied term *ad hoc*.
- **Ratio:** By the **Officious Bystander Test**, both parties would have agreed that the objective of the contract was to take reasonable opportunities to gain royalties.

## Implied by operations of law

### Universal terms

(terms that are put into all contracts)

1. **Mutual benefit** - To **cooperate** and do what is reasonable so that both parties get the benefit of the contract;
2. To **act in accordance with good faith** – i.e. **use contractual powers honestly and reasonably**.

### Burger King Corp v Hungry Jack's Pty Ltd [2001] NSWCA 187

- **Facts:** HJ is franchisee of BK; dispute between BK and HJ and BK **uses its contractual powers** to make HJ's fulfilment of contractual obligations impossible. BK sues HJ for breach of contract.
- **Decision and Ratio:** HJ did not breach contract as there is a universal term inserted and BK **did not act in good faith**.

**Generic terms** (*Statutory* terms for certain kinds of contracts)

- Terms are put into different kinds of contract by both by the general law and by legislation

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## The Goods Act 1958 (Vic)

### Section 18

- **Circumstances:** Applies simply if the **goods sold are identified by description**. Goods are sold '**by description**' when they are described as belonging to a particular class or type of goods – e.g. 'shoes'.
- **Effect:** Section 18 **makes it a condition of the contract that the goods delivered must be those identified by the description**.
- **Warning:** There are **no implied guarantees** as to the **quality** of the goods under section 18 – the principle *caveat emptor* applies (let the buyer beware).

## Section 19 (a)

- **Circumstances:** This section applies if a **buyer makes known to a seller the purpose** for which goods are required; **AND** the **buyer shows reliance on the seller's skill or judgment** to provide goods suitable for that purpose; **AND** the goods are of a description that **it is in the course of the seller's business to supply** (even if the seller has not manufactured them).
- **Effect:** Under this section it becomes a condition of the contract that the seller **will supply goods reasonably fit for the buyer's purpose**. Otherwise the buyer may treat the contract as terminated and reject the goods.
- **Tradename exception:** There is **no** implied condition as to the fitness of the goods for any particular purpose **if specified articles are bought under a patent or trade name**. (Unless one asks for the product by tradename AND then asks for advice about suitability for purpose AND then relies on given advice). This rule applies **if**, when purchasing goods by reference to their trade name, *it is clear that the buyer is **not** relying on the seller's skill and judgment to supply suitable goods, or when it is clear that the seller is disclaiming any such liability.*

### Expo Aluminium (NSW) v WR Pateman [1990] ASC 55-978

"Section 19 (a)"

- **Facts:** Expo requires weatherproofed windows for a house 'nothing between it and South Pole'. Pateman delivers leaky windows and Expo sues.
- **Decision/Ratio:** Under Section 19 (a) the goods are not fit for the purpose which was intended and made known to the seller.

### Baldry v Marshall [1926] 1 KB 260

"Tradename exception"

- **Facts:** Marshall request an 8 cylinder Bugatti, specifies purposes of touring, Baldry assures Marshall that car is fit for purpose; car then proves to be defective for purpose.
- **Decision/Ratio:** Trade name exception does **not** apply as Marshall specifies the purpose which gave Baldry the opportunity to suggest otherwise; which he did not.

## Section 19 (b)

- **Circumstances:** This section applies if **goods are bought by description**; **AND** the **seller deals in goods of that description** (whether or not they manufactured them);
- **Effect:** it becomes a condition of the contract that the seller is **obliged to deliver goods that are at least of 'merchantable' quality**;
- **Exception:** **UNLESS** the buyer has examined the goods in a way that ought to have revealed the defects complained of.

**'Merchantable quality':** Goods are of 'merchantable quality' **if other buyers, knowing of any defects in the goods, would buy those goods under the same description and for about the same price as the original buyer.**

# 9 Australian Consumer Law

## 9 Australian Consumer Law

The ACL

'Consumers' and 'consumer transactions'

Consumer *contract*

Enforcement of the ACL

Section 18: Misleading or deceptive conduct

Section 20, 21, 22: Unconscionable dealing

Section 24: Standard form contracts (unfair terms)

Unfair business practices (s 29, 32, 33-34, 35, 36, 39, 40, 50, 44-45)

Statutory guarantees in consumer contracts

Remedies

'(Minor) failure'

'Major failure'

Unsolicited consumer agreements

Safety standards

## The ACL

- Enacted in 2010, came into power January 1, 2011
- ACL applies across the states and commonwealth uniformly (means case can be brought in state or federal courts)
- ACL includes some provisions (s 18) that are (almost identical) to old Trade Practises Act

## 'Consumers' and 'consumer transactions'

How to assess if a person is a '*consumer*' (and thus able to use the consumer protections):

1. Consider the **purpose** of purchase. A person does not acquire goods as a consumer, whatever they pay for them, if the goods are acquired for the purposes of **re-supply** (i.e. re-sale) or to **use up in trade or commerce**, or in **production** or **manufacture**, or to **repair** or treat other goods or fixtures on land.
2. Then, consider the **price** of the goods purchased. Goods are acquired by a consumer when the price of goods is not more than \$40,000, regardless of what the goods are. If the price exceeds \$40,000, a person only acquires the goods as a consumer if they are goods of a kind that are normally acquired for personal or household use.
3. For policy reasons, the **acquisition of vehicles or trailers** acquired for use principally in the transport of goods on public roads is considered to be a consumer acquisition. (even for business purposes)

## Consumer *contract*

**consumer contracts:** defined in s 23 as contracts in standard form for the supply of goods or services, or for a sale or grant of an interest in land, to an individual who is acquiring them predominantly for their own personal, domestic or household use or consumption.

## Enforcement of the ACL

- **Private actions** brought against suppliers by consumers. For example, in appropriate circumstances, a consumer can ask for:
- an injunction;
  - an award of damages;
  - payment of compensation;
  - a declaration that a contract or arrangement is void in whole or in part;

- **Harassment or coercion (s 50).** The ACL prohibits the use of physical force, coercion or undue harassment in connection with the possible supply of goods or services, or interests in land.
- **Referral selling and pyramid schemes (s 44-45):**
  - Participation in **pyramid schemes** is completely prohibited, so that both participants and organisers of pyramid schemes may be liable. (Pyramid schemes are those in which a person joining the scheme must **provide a benefit to other participants, in the expectation that when new people join, they will receive a benefit.**)
  - **Referral selling** occurs when a supplier offers to provide goods/services for a discount, on the condition that the purchaser brings in new customers (ie the rebate/discount is conditional upon the purchaser carrying out certain actions *after* purchase).

## Statutory guarantees in consumer contracts

The ACL provides a number of important guarantees for consumers who enter into contracts for goods or services.

Unlike the *Goods Act* provisions, these ***cannot be 'contracted out of'***.

Section	Description
56	That when goods are <b>bought by description</b> , the goods supplied will accord with the description under which they were sold
54	That the goods are of ' <b>acceptable quality</b> '. Goods are not of acceptable quality if they are not fit for the purposes for which such goods are normally used; or if they are not durable; or <b>safe</b> ; or free from defects; or if they don't have an acceptable finish and appearance; <i>to the extent that a <b>reasonable</b> consumer who knows of their qualities would find them unacceptable</i>
55	That when the consumer has disclosed to the supplier the particular <b>purpose</b> for which they want the goods and indicated that they were <i>relying on the skill and judgment</i> of the supplier, a guarantee that the goods supplied are reasonably fit for the disclosed purpose
57	That, when goods are supplied by reference to a <b>sample</b> , a guarantee that the goods correspond with the sample in quality, state and condition; and that they are free of any defect that was not apparent from a reasonable examination of the sample, and which would make the goods of unacceptable quality
58	A guarantee that the manufacturer will take reasonable steps to ensure that <b>repair</b> facilities and <b>spare parts</b> are reasonably available for a reasonable period after the goods are supplied
59	A guarantee that the manufacturer and the supplier will <b>comply with any express warranties</b> they have given

## Remedies

### '(Minor) failure'

In the case of a failure to comply that **\*can** be remedied and is not a major failure\*, the consumer can ask the supplier to remedy the failure. If the supplier does not do what is required to remedy the failure, either at all, or within a reasonable time, the consumer can either:

- get the failure remedied by someone else, or by some other means, and then recover the costs of doing this from the supplier; or

- an order varying the terms of a contract or arrangement;
- the refund of monies paid; or
- an order for repairs or the supply of spare parts.
- The imposition of **pecuniary penalties** and **fines**. A court may order a supplier who has breached specified provisions of the ACL to pay a civil pecuniary penalty. The breach of specified provisions is also made an offence, for which a substantial fine can be imposed.

## Section 18: Misleading or deceptive conduct

"A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

- This wording means that it is **not only consumers** that can claim a breach of s 18, but others (e.g. other businesses etc) as well
- The word 'persons' includes both natural persons and corporations.
- Conduct is misleading when it **lead the persons at whom it is directed into error**.

### McWilliam's Wines Pty Ltd v McDonald's System of Australia Pty Ltd (1980) 33 ALR 394.

- **Facts:** McWilliam's Wines sued for labelling wine 'Big Mac'.
- **Decision/Ratio:** Looks to be advertised to wine drinkers, we look at the average/reasonable person in the target audience (who would not be confused about the product). Thus, not misleading.

### ACCC v TPG Internet (2013) 250 CLR 640

- **Facts:** TPG does not make clear hidden fees and bundle costs in advertisement. Nothing *incorrect* - but still *misleading* to target audience - the general public. TPG argues that no one was actually misled (or will be)
- **Decision/Ratio:** Misleading conduct - *doesn't matter if no one is actually misled!*

- It is **not** relevant to prove that the conduct was either *intentional or negligent*.

### Yorke v Lucas (1985) 150 CLR 661

- **Facts:** Yorke purchases record shop, approaches shop's agent for the books. Books were wrong. Lucas (agent) claims he was simply handing over documents as middleman - didn't deliberately mislead.
- **Decision/Ratio:** Irrelevant whether middleman or no intention to deceive.

- Misleading conduct is prohibited only if it takes place 'in **trade or commerce**'.

### Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594.

- **Facts:** CC builds building, Nelson one of employees. Foreman on construction site misled about safety of grate, Nelson subsequently injures himself.
- **Decision/Ratio:** Not considered part of trade or commerce - occurred in course of business running, but not **actually** commercial activities. (We look at how business interacts with customers/others, not internally)

- A breach of s 18 can sometimes be avoided if a defendant gives a **disclaimer**, making it clear that they do not take responsibility for what is said

# 10 Tort Law

## 10 Tort Law

- Definition of Tort Law
  - Recognised types of torts
- Tort of Negligence
  - Categories of *conduct*
  - Categories of *harm*
- Essential elements of Negligence
  - Establishing Duty of Care
    - Recognised duty of care situations
    - Other situations
    - Purely Economic loss
    - Professional Advice
  - Breach of duty of care
- Causation
  - Non-recognised types of harm
- Remedies for Negligence

## Definition of Tort Law

Tort law is concerned with wrongful conduct by one person that causes harm to another.

- Tort law provides a **private right of action** for *compensation*; or for an *order to stop continuing or threatened harm*.
- Both natural persons and corporations are liable for wrongful conduct causing harm.

## Recognised types of torts

- Liability in tort must be limited to prevent the courts being overwhelmed and the economy damaged. Also, desirable activities must not be discouraged. Liability in tort therefore only exists in for particular recognised types of harm.

Tort	Description
Trespass to land or chattel	Protection of property from interference
Assault and Battery	Protection of the person for, violence or threat 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 conduct causing harm

## Tort of Negligence

The tort of negligence means a failure to take reasonable care to prevent loss or damage to others that was **foreseeable**, and should have been prevented. This is a very broad concept that potentially applies to a great number of situations.

## Categories of *conduct*

- A **positive** act
- A failure to act (**omission**):

## Case summary

### 4 Contract formation

#### Coulls v Bagot's Executor & Trustee Co Ltd [1967] 119 CLR 460

- Coulls' wife was a beneficiary of the contract and had signed the contract, **but she had not put up anything** (no consideration) and hence was **not** a party - she was just a *beneficiary*.

Note: If a couple has *joint* bank accounts, then the contracts entered by one spouse apply to the other

#### Price v Easton (1833) 110 ER 518

- **Facts:** A builder owed money to Price but did not have the money to pay what he owed. Easton agreed with the builder that if the builder did some work for Easton, Easton would pay Price the money that the builder owed to Price. The builder did the work, but Easton failed to pay Price. Price brought an action against Easton to enforce the promise that Easton had made to the builder that Easton would pay Price.
- **Decision/Ratio:** Price was not entitled to enforce the promise. Price was not a party to the agreement between Easton and the builder and, under the doctrine of privity of contract, Price did not acquire legally enforceable rights under that contract.

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

- **Facts:** Carbolic marketed smoke balls as an effective means of preventing influenza. Company published an ad in a newspaper, offering to pay a reward of £100 to anyone who purchased the smoke balls, but who nevertheless caught influenza. Carlill saw the ad, she bought and used a smoke ball as directed, and caught the flu. Carbolic refused to pay her, denying that an enforceable contract with Carlill had been created in these circumstances.
- **Decision/Ratio:** There were sufficient circumstances to infer that the promise was intended to be contractually binding. The ad was unlike other advertisements. The fact that it stated that £1,000 had been deposited in a bank by the company expressly for the purpose of making the promised payments demonstrated that the promise was intended to be legally binding.

#### Balfour v Balfour [1919] 2 KB 571

- **Facts:** Mr Balfour promised to pay her £30 each month until she rejoined him. However, Mr and Ms Balfour later separated and divorced. Ms Balfour brought an action against Mr Balfour to enforce the promise to pay maintenance.
- **Decision/Ratio:** The agreement was not legally enforceable because, in the circumstances, it could not be inferred that it was intended to be legally enforceable. Spouses make many domestic agreements, but these agreements do not become legally enforceable, 'because the parties did not intend that they should be attended by legal consequences'.

#### Cohen v Cohen (1929) 42 CLR 91

- **Facts:** Ms Cohen alleged that, before she married the defendant in 1918, he had promised to pay her £100 a year as a dress allowance. The money was to be paid in quarterly instalments of £25. The money was paid until early 1920. In 1923 the parties separated. Ms Cohen then claimed that Mr Cohen owed her £278, being unpaid instalments of the promised dress allowance.
- **Decision:** Dixon J concluded that in the circumstances it could not be inferred that legally enforceable relations were intended.

#### Merritt v Merritt [1970] 2 All ER 760

- **Facts:** Mr and Ms Merritt borrowed money from a bank to build a house. Some time thereafter, Mr Merritt began an extramarital relationship with another woman and left his wife. Now separated, Ms Merritt agreed to finish paying off the loan on the house, and in return Mr Merritt promised that when the loan was completely repaid he would transfer the house to Ms Merritt's sole ownership. He signed a letter to this effect but, when the time came, he refused to transfer the house to Ms Merritt.
- **Decision/Ratio:** It could be inferred from the circumstances that the agreement was intended to be legally enforceable. Whether or not an agreement is intended to be legally enforceable is something that is decided **objectively**. The court asks what intention can reasonably be inferred from the circumstances at the time of the agreement. In the present case, the court decided that when the facts of a case show that the goodwill between married persons has broken down, it can be inferred that they no longer rely on honourable understandings, and that they intend their agreements to create legal obligations.

#### Ermogenous v Greek Orthodox Community of SA [2002]

- **Facts:** Ermogenous is head of the Greek Orthodox Church in Australia for 23 years. During this time he was paid a salary by the Community. At the end of his appointment, the Community refused to pay him for the accumulated leave that Ermogenous would have been entitled to under a legally binding contract of employment. The Community argued that their agreement with Ermogenous was not intended to be legally binding.
- **Decision/Ratio:** The agreement was intended to be legally binding and Ermogenous was entitled to payment for accumulated leave. The existence of an intention to be legally bound is judged on the basis of all relevant and available facts. The notion of 'presumptions' operating against such an intention in particular types of cases can easily distract from the true task of properly evaluating the particular circumstances.

#### Esso Petroleum Co Ltd v Commissioners of Customs and Excise [1976] 1 All ER 117

- **Facts:** Esso Petroleum produced a set of commemorative 'coins' as collectors' items. To promote sales of its petrol, Esso promised to give motorists a 'free' coin with every four gallons of Esso petrol purchased. The Commissioner of Customs and Excise argued that the 'free' coins were 'produced in quantity for general sale' and were therefore subject to a purchase tax.
- **Decision/Ratio:** It could be inferred from the commercial circumstances that it was a promise made with an intention to be legally bound.

#### Placer Development Ltd v Commonwealth (1969) 121 CLR 353

- **Facts:** The Commonwealth government said that it would pay a subsidy to companies that imported timber products into Australia. The subsidy was to be 'of an amount or at a rate to be determined by the Commonwealth from time to time'. The government made some initial payments to importers, but then stopped.
- **Decision/Ratio:** The court held that what the government had said was not a legally enforceable promise. What was said may have appeared to be a promise, but on proper analysis it was not actually a promise at all as unspecified amount.

#### Partridge v Crittenden [1968] 2 All ER 421

- **Facts:** advertisement for hens at certain price, but the hens were no longer available)
- **Decision/Ratio:** Not legally enforceable ad, as ads are **not** contracts, they are **invitations to treat**

#### Masters v Cameron (1954) 91 CLR 353

- **Facts:** Cameron agreed to sell her farm to Masters for £17,500. Both parties signed a written agreement which described the property and set out other details of the agreement. One of the provisions in the document was that "This agreement is made subject to the preparation of a formal contract of sale..."
- **Decision/Ratio:** In the circumstances, it was clear that Cameron had intended not to be bound until a formal contract was prepared and signed.

#### Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft [1983] 2 AC 34; [1982] 1 All ER 293

- **Facts:** A dispute between the parties arose and, for procedural reasons, it became important to determine whether the contract acceptance posted had been made in England or in Austria.
- **Decision:** The acceptance took effect when the telex was received by Stahag in Vienna. The contract was therefore made in Vienna.

#### Henthorn v Fraser [1992] 2 Ch 27

- **Facts:** Day after receiving the offer, Henthorn posted a letter of acceptance to Fraser. After this letter of acceptance had been posted, but before it was received by Fraser, Fraser was offered a higher price for the houses by another buyer and he attempted to withdraw his offer to Henthorn. He relied on the principle that an offer may be withdrawn at any time before acceptance, arguing that acceptance by post had not been authorised and that Henthorn's acceptance was therefore not effective before it was delivered.
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- **Decision/Ratio:** The promise to pay £1 each year and keep the house in good condition was not in any sense equivalent in value to the benefit that Ms Thomas received under the agreement with the executors. However, there is no requirement that consideration be of equivalent value: it is enough that it be of some value, even if relatively small. Ms Thomas's promise was therefore sufficient consideration for the promise to let her occupy the house for life.

#### Stylk v Myrick (1809) 170 ER 1168

- **Facts:** While on a voyage in the Baltic, two seamen deserted from their ship. The captain made a promise to the remaining crew that they would share the deserters' pay if they worked extra hard to get the ship safely back home. When the ship got back to England, the shipowner refused to honour the captain's promise. The crew wished to enforce the promise, saying there was an enforceable contract for the extra pay.
- **Decision/Ratio:** The crew had given nothing of value in exchange for the captain's promise. Accordingly, no binding contract for extra pay was created. When they had originally signed on for the voyage, the crew had made a promise to do whatever was necessary in case of any emergencies to bring the ship home safely. The desertion of two crew members was an emergency, and the crew was therefore already bound to do the extra work that was needed. When the captain promised extra pay, the crew promised nothing in return beyond what they were already legally bound to do.

#### Musumeci v Winadell Pty Ltd (1994) 34 NSWLR 723

- **Facts:** Musumeci leased a shop in a mall from Winadell. Some time later, Winadell leased another shop in the mall to a competing retailer and Musumeci's business declined. Musumeci told Winadell that his shop was no longer viable and asked Winadell to reduce the rent. Rather than lose Musumeci as a tenant, Winadell agreed to a reduction of rent.
- **Decision/Ratio:** The promise to reduce the rent was properly supported by consideration and therefore legally binding. The consideration obtained by Winadell was the **practical benefit** of keeping Musumeci as a tenant and the mall full of operating shops.

## 5 Terms of a contract

#### Causar v Brown [1952] VLR 1

- **Facts:** Ruined clothes at dry-cleaners, receipt includes a liability waiver
- **Decision:** Liability waiver is not an included term
- **Ratio:** As terms are not expected to be included in a docket, and attention was not drawn to the terms, the term cannot be considered to be included in the contract.

**Warning:** To include additional terms, if they are not prominent, you need to make them prominent or draw attention to customer.