

## 2. Agency

Agency is the legal relationship by which one person (the **agent**) has authority to create or affect legal rights and duties between the **principal** and **third parties**. The maxim is *qui facit per alium facit per se*. Commercially, a principal extends their reach through agents but bears legal exposure for the agent's authorised acts.

### RED FLAG -- Exam Triggers

Question says 'agent', 'broker', 'representative', or 'on behalf of' -- analyse whether true agency exists

Principal-agent dispute vs agent-third party dispute -- identify which relationship is at issue

Agent acts outside instructions -- check actual vs ostensible authority

Agent has personal interest or fails to disclose -- fiduciary duty breach

Unnamed or undisclosed principal -- election and merger rules apply

Agent bankrupts -- does liability remain with third party or pass to principal?

### 2.1 What is Agency?

**ACCC v Flight Centre Travel Group Ltd (2016) HCA:** 'Agency is used in the law to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties.' (Kiefel and Gageler JJ at [76]; French CJ at [15]).

**Petersen v Moloney (1951) 84 CLR 91 (Dixon, Fullagar and Kitto JJ):** The mere label 'agent' is not sufficient -- the legal substance of authority must be established. An estate agent who finds a buyer does not thereby have authority to receive the purchase price.

**Similar but different:** Agent (creates legal relations) differs from an employee; from a trustee (who acts on their own account); from an independent contractor.

### 2.2 How Agency is Created

Method	Key Rules
<b>Actual Express Authority</b>	Principal expressly authorises agent by oral or written instruction or deed. Agent must act within the exact terms.
<b>Actual Implied Authority</b>	Authority implied from circumstances, conduct, or position of the agent. Includes authority incidental or necessary to express authority, and authority usual to the agent's recognised position ( <i>Hely-Hutchinson v Brayhead Ltd [1968] 1 QB 549, Lord Denning MR at 583</i> ).

<b>Ostensible / Apparent Authority</b>	A third party is reasonably entitled to assume the agent has authority, based on a <b>representation made by the principal</b> (not the agent). Requires: (1) representation by principal; (2) that agent had authority; (3) reliance by third party; (4) alteration of third party's position in reliance ( <i>Freeman &amp; Locker v Buckhurst Properties Ltd [1964] 2 QB 480, Diplock LJ</i> ).
<b>Ratification</b>	Principal retrospectively adopts an unauthorised act. Requirements: principal existed and had capacity at time of act; agent purported to act as agent; principal adopts the whole act; ratification within a reasonable time.
<b>Agency by Necessity</b>	Rare. Emergency where agent cannot consult principal, acts reasonably in principal's interest, communication impossible.
<b>Agency by Estoppel</b>	Principal estopped from denying agency where third party has changed position in reliance on principal's conduct.

### SCRIPT: Identifying and Applying Authority

**Step 1: Is there actual express authority?:** Actual express authority arises from a direct and explicit grant by the principal (*Hely-Hutchinson v Brayhead Ltd [1968] 1 QB 549*).

- -> IF principal gave direct oral or written instructions: actual express authority is established. Identify scope -- agent must not exceed exact terms.
- -> IF agent exceeded the express terms: actual express authority does not extend to the excess. Move to implied or ostensible authority.
- -> **COUNTER-ARGUMENT:** [D] may argue the words of the grant should be construed narrowly. Respond by applying the ordinary meaning of the words and the commercial context.

**WRITE:** [Agent] [does / does not] have actual express authority to [act] because [the principal expressly authorised / did not expressly authorise] [act] by [oral instruction / written agreement / appointment letter dated X].

**Step 2: Is there actual implied authority?:** Implied authority arises from circumstances, conduct, or position of the agent. Includes authority incidental or necessary to the express authority, and authority usual to the type of agent (*Hely-Hutchinson v Brayhead Ltd at 583 per Lord Denning MR*).

- -> IF the agent holds a recognised commercial position (e.g., company director, estate agent, managing agent): that position carries usual implied authority for acts of that kind.
- -> IF the act is incidental and necessary to an expressly authorised purpose: implied authority likely extends to cover it.
- -> **COUNTER-ARGUMENT:** [D] may argue the act was not necessary or usual for that class of agent, citing *ANZ Bank Ltd v Ateliers de Constructions Electrique de Charleroi (1966) 39 ALJR 414*. Strongest where agent departed from usual practice.

**WRITE:** [Agent] [does / does not] have actual implied authority to [act] because [the act was / was not] [incidental and necessary to the express grant / usual for an agent in the position of a [class -- e.g., managing director / insurance broker]].

**Step 3: Is there ostensible / apparent authority?:** Ostensible authority does not arise from agreement but from a **representation made by the principal** to the third party that the agent has authority (*Freeman & Locker v Buckhurst Properties Ltd [1964] 2 QB 480 per Diplock LJ*). Four requirements: (a) representation by the principal; (b) that agent had authority; (c) reliance by the third party; (d) alteration of third party's position in reliance.

- -> IF the principal made no representation (only the agent claimed authority): ostensible authority cannot arise -- the agent cannot create their own authority (*Crabtree Vickers Pty Ltd v Australian Direct Mail Advertising (1975) 133 CLR 72*).
- -> IF principal held agent out as having authority (e.g., placed agent in position carrying usual authority, or allowed agent to act with apparent authority previously): ostensible authority likely established.
- -> IF third party was aware the agent lacked authority, or failed to make reasonable inquiry: reliance element fails (*Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451*).
- -> **COUNTER-ARGUMENT:** [D] (principal) may argue no representation was made and any assumption by the third party was unreasonable. Strongest where there was no course of dealing and no placing of agent in a relevant position.

**WRITE:** [Agent] [does / does not] have ostensible authority to [act] because [the principal / a company officer with authority to bind the company] represented to [third party] that [agent] had authority to [act], and [third party] relied on that representation by [reliance act -- e.g., entering the contract / extending credit].

**Step 4: Has the principal ratified the act?:** Ratification is the retrospective adoption of an unauthorised act. The principal must have knowledge of all material facts; ratify the entire act; have existed and had capacity at time of the act; ratify within a reasonable time.

- -> IF the agent purported to act as agent (not in their own name): ratification is possible.
- -> IF the agent acted in their own name: the act cannot be ratified.
- -> **COUNTER-ARGUMENT:** [D] may argue the principal did not have knowledge of all material facts at the time of purported ratification. Without full knowledge, ratification is ineffective.

**WRITE:** The principal [has / has not] ratified the agent's act because [the principal, with knowledge of all material facts, adopted / failed to adopt] the [act] [within a reasonable time / outside a reasonable time], and the agent [did / did not] purport to act as agent at the time.

### 2.3 Duties of the Agent

Duty	Scope and Cases
<b>Duty to follow instructions</b>	Agent must follow principal's lawful instructions exactly. Departs from them at their peril and may be liable for any resulting loss ( <i>Mitor Investments Pty Ltd v General Accident Fire &amp; Life Assurance Corp [1984] WAR 365</i> ). Where instructions are unclear, agent must seek clarification.
<b>Duty to act in person</b>	Delegatus non potest delegare -- agent cannot sub-delegate unless authorised expressly or by implication.

<b>Duty to exercise reasonable care and skill</b>	Agent must exercise the degree of care and skill reasonable for that type of agent. A professional agent (solicitor, insurance broker) is held to the standard of a reasonably competent professional ( <i>Mitor Investments</i> ).
<b>Fiduciary duty: No conflict of interest</b>	Agent must not place themselves in a position where personal interests conflict with the principal's interests without full disclosure and consent ( <i>Lintrose Nominees Pty Ltd v King [1995] 1 VR 574 at 576</i> ).
<b>Fiduciary duty: No secret profit</b>	Agent must not make any unauthorised profit from the agency relationship. Secret profits must be accounted for to the principal even if the principal suffers no loss.
<b>Duty of disclosure</b>	Agent must disclose to the principal any personal interest in transactions they are conducting on the principal's behalf.

## 2.4 Rights of the Agent

Right	Scope and Cases
<b>Right to remuneration</b>	Agent is entitled to agreed remuneration. Right to commission depends on the contractual term -- agent must strictly comply with conditions precedent ( <i>L J Hooker Ltd v WJ Adams Estates Pty Ltd (1977) 138 CLR 52</i> ). An estate agent who introduces a buyer but does not complete the sale may not be entitled to commission.
<b>Right to indemnity</b>	Agent entitled to be indemnified by principal for all expenses and liabilities reasonably incurred within authority.
<b>Right to reimbursement</b>	Agent entitled to reimbursement for moneys properly paid on the principal's behalf.
<b>Lien</b>	Agent has a lien over principal's property in agent's possession to secure payment of commission and expenses.

## 2.5 Liability to Third Parties

Situation	Outcome
<b>Principal named and disclosed</b>	Agent generally not personally liable. Contract is between principal and third party.
<b>Existence disclosed but name not given</b>	Third party may sue either the unnamed principal (once identified) or the agent. Election: once one is pursued, the other is discharged.
<b>Undisclosed principal</b>	Principal may intervene and sue or be sued on the contract, subject to: third party can set off defences available against agent; contract did not exclude undisclosed principal.

<b>Breach of warranty of authority</b>	If agent purports to have authority they do not have and this causes loss, the agent is personally liable in tort for breach of warranty of authority.
<b>Agent personally liable</b>	Agent becomes personally liable where: agent signs as principal; custom makes agent personally liable; agent uses 'I' rather than 'for and on behalf of.'

## 2.6 Liability of Principal for Wrongful Acts

**Principal's liability for agent's torts:** A principal is generally liable for torts of an agent committed within the scope of the agent's actual or ostensible authority. Analogous to employer/employee vicarious liability.

**Agent always personally liable for own torts:** Regardless of whether the principal is also liable.

**Fraud:** A principal is NOT liable for the agent's fraud where the agent is acting for their own benefit and outside their authority, even if the agent used the principal's name.

**Frolic of own:** If the agent departs substantially from authorised functions, the principal bears no liability. Applied by analogy to partnership liability (*National Commercial Banking Corporation of Australia Ltd v Batty (1986)* 160 CLR 251).

## 2.7 Termination of Agency

Method	Notes
Performance / completion	Agency ends when the purpose for which it was created is fulfilled.
Agreement	Principal and agent agree to terminate by mutual consent or by exercise of a contractual right.
Revocation by principal	Principal may revoke at any time unless the agency is coupled with an interest. Wrongful revocation gives agent a damages claim.
Renunciation by agent	Agent may renounce. Wrongful renunciation gives principal a damages claim.
Death	Death of either principal or agent terminates the agency.
Insanity	Insanity of either party terminates the agency (subject to Powers of Attorney legislation).
Bankruptcy	Bankruptcy of the principal terminates the agency.
Impossibility	If the purpose becomes impossible to perform, the agency is terminated.

## Key Cases -- Agency

Case	Principle / Ratio	Watch Out / Application
ACCC v Flight Centre (2016) HCA	Authority = capacity to create legal relations between P and TP. An agent and principal may be 'in competition' for price-fixing purposes.	Check: true agency or merely commercial intermediary buying/selling for own account?
Petersen v Moloney (1951) 84 CLR 91	Label 'agent' does not confer authority to receive money. Must show express or implied authority (Dixon, Fullagar and Kitto JJ at 94).	Estate agents and brokers: finding-only authority does not include authority to receive purchase price.
Hely-Hutchinson v Brayhead Ltd [1968] 1 QB 549	Implied actual authority of a de facto managing director to guarantee company debts. Distinguishes usual authority of position from express grant.	Company director scenarios: check what authority their position usually carries.
Freeman & Locker v Buckhurst Properties Ltd [1964] 2 QB 480	Ostensible authority: representation must come from principal (not agent); four requirements. (Diplock LJ).	The agent cannot represent their own authority. Representation must come from the principal.
Crabtree Vickers Pty Ltd v ADMA (1975) 133 CLR 72	Agent cannot create ostensible authority by their own representations -- must come from the principal.	If only the agent said they had authority: ostensible authority fails entirely.
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451	Ostensible authority: third party must act reasonably in relying on the representation. Bank officer had ostensible authority for letters of indemnity.	Check if third party made reasonable inquiry or whether custom of trade established the representation.
L J Hooker Ltd v WJ Adams Estates Pty Ltd (1977) 138 CLR 52	Commission clause construed strictly. Agent entitled to commission only if conditions precedent met. Finding a buyer who did not complete did not satisfy the clause (Stephen J).	'Effective cause' vs 'introduction and completion' are different standards. Read commission agreement carefully.
Mitor Investments Pty Ltd v General Accident [1984] WAR 365	Insurance broker failed to follow instructions. Broker held liable for resulting loss. Professional standard of care applies.	Professional agents (brokers, solicitors) held to higher standard of care than lay agents.
Lintrose Nominees Pty Ltd v King [1995] 1 VR 574	Fiduciary duty -- agent must fully disclose personal interests. Acting without disclosure may void the transaction.	Undisclosed conflict of interest: principal can rescind or recover any profit.