TOPIC 1 - AGENCY

1.1 - INTRODUCTION TO COMMERCIAL TRANSACTIONS

Commercial transactions will be between legal entities that can organise themselves in any number of business structures:
→ **Sole trader, Partnership and Company**

EVALUATION OF BUSINESS STRUCTURES

Sole trader	
Advantages	**Disadvantages**
• Straightforward business structure • High degree of control by owner • Commercial privacy • No specific regulation • Retention of profits • Ownership of assets • Easy to terminate	• Unlimited legal liability (i.e. personal assets remain at risk) • Limited options in terms of offering security (e.g. not possible to grant a floating charge over business assets) • Transferability of business is problematic • Tax consequences – personal rate of income tax may be higher than the company rate
Partnership	
Advantages	**Disadvantages**
• Very easy to establish – can be based on an oral agreement • No registration requirements • Freedom to tailor the arrangement pursuant to the terms of an agreement • A clear common goal (to make a profit) • Limited liability partnerships available in certain circumstances • A legislative framework that will 'fill the gaps'	• No separate legal entity • Written partnership agreement recommended which will usually require legal advice and the input of all partners • Automatic dissolution in certain circumstances unless partnership agreement provides otherwise • Partners remain jointly and severally liable for defaults of other partners • Number of partners limited under s115 of the Corporations Act
Company	
Advantages	**Disadvantages**
• A separate legal entity created with the powers of a natural person and more • Simple registration process • A range of types to choose from (most types limit the liability of members) • Clear distinction between ownership and management (owners do not need to get involved) • Company tax rate applies • Range of security may be given by the company	• Expensive to register and maintain (compared to other forms of business structures) • Ongoing regulatory requirements (can be extensive) • Compliance with Act required by all companies (even small Pty Ltd companies) • Limited options for owners to get involved in management decisions (power to manage is vested in directors) • Restrictions on transfers of shares for some company types

<u>INTENDED CONTENT TO COVER IN THIS COURSE</u>

- Any one of those business structures (**businesses**) can operate through agents (**Agency**). All except partnerships are separate legal persons; therefore, there are specific legal risks arising from such structure (**Partnerships**).
- Any of these businesses can engage in the purchase or sale of goods, domestically or internationally (**Sale of goods**).
- In the process of buying or selling goods (**or other commercial transactions)** businesses or persons associated with them may act as sureties for the financial or contractual obligations of the business structures (**Guarantees**).
- In addition, to raise operating capital the businesses may borrow money on security of their personal property (**personal as opposed to real property**) (**Security interest over personal property**)
- Commercial prudence dictates that businesses insure against common risks (**Insurance**).
- Businesses owned by natural persons that fail financially face bankruptcy (**Bankruptcy**).

1.2 - WHAT IS AGENCY?

AGENCY

ACCC v Flight Centre Travel Group Ltd (2016) CLR 203

- This case involved an action by ACCC against Flight Centre for a breach of s 45 of the Trade Practices Act 1974 (Cth).
- Section 45 prohibited a person from proposing an arrangement, with a competitor, for the purpose of lessening competition (Price fixing).
- Flight Centre proposed, to several airlines, that they do not discount their direct sales.
- A key element of s 45 was that the parties be "in competition".
- French CJ described agency at [15], as follows:
    - *The word "agent" connotes in law a person who has the authority or capacity to create legal relations between a person who occupies the position of principal and third parties. The legal concept is encapsulated in the maxim quoted in Petersen v Moloney, "[q]ui facit per alium - he who does an act through another does it himself. [footnotes omitted]*
- The majority Kiefel and Gageler JJ described agency at [76], as follows:
    - *The term "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". An agent is "a person who is able, by virtue of authority conferred upon him, to create or affect legal rights and duties as between another person, who is called his principal, and third parties". [footnotes omitted]*

Petersen v Moloney (1951) 84 CLR 91

- Petersen v Moloney was one of the earlier cases referred to by the High Court in ACCC v Flight Centre.
- Petersen instructed an estate agent (Pulbrook) to find a purchaser for her house. Pulbrook found Moloney (the purchaser) who paid Pulbrook the full purchase price for the house and was issued a receipt by Pulbrook.
- Pulbrook did not pay the money to Petersen.
- Petersen sued both Moloney and Pulbrook. Pulbrook was bankrupt.
- Moloney's defence was that Pulbrook was Petersen's agent and that by paying the money to him, Moloney had discharged his obligation under the contract of sale.
- In finding that Pulbrook was not Petersen's agent and therefore Moloney had not discharged his obligation to pay the purchase price, Dixon, Fullagar and Kitto JJ stated as follows at page 94:
    - *In connection with sales and purchases of property the word "agent" is apt to be used in a misleading way. The legal conception of agency is expressed in the maxim "Qui facit per alium facit per se", and an "agent" is a person who is able, by virtue of authority conferred upon him, to create or affect legal rights and duties as between another person, who is called his principal, and third parties. When a person is employed to find a buyer of property, he is commonly said to be employed as an agent, and the term "estate agent" is a common description of a class of persons whose business is to find buyers for owners who wish to sell property. But the mere employment of such a person under the designation of agent does not, apart from the general rule that the employer will be responsible for misrepresentations made by him, necessarily create any authority to do anything which will affect the legal position of his employer. [emphasis added]*

- The court held that Maloney had failed to show that Pulbrook had either express or implied authority to receive money.
- Furthermore, Maloney had failed to show that the purchaser had ratified Pulbrook's actions; or that Pulbrook had any ostensible (apparent) authority.

Sale of Land Act 1962 (Vic)
Section 31(3)
A notice under subsection (2) must, within 3 clear business days after the purchaser has signed the contract—
(a) be given to one of the following persons-
(i) the vendor;
(ii) an agent of the vendor;
(iii) an estate agent engaged or appointed by the vendor to sell the land; or
(b) be left at one of the following addresses—
(i) the address for service of the vendor specified in the contract;
(ii) the address of the vendor's agent;
(iii) the address of the estate agent engaged or appointed by the vendor to sell the land.

Section 31(3)(a)(iii)
- This section was amended as a consequence of a matter that came before the Supreme Court and appealed to the Court of Appeal; Cheng Lo and Eng Kiat Tan v Thomas John Russell [2016] VSCA 323
- The trial judge and the Court of Appeal found that an agent of the vendor did not include the vendor's estate agent, and that it should be given its general law meaning (i.e. authorised agent who has either express or implied authority).

International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co (1958) 100 CLR 644
- International Harvester was another case referred to by the High Court in ACCC v Flight Centre.
- While at the Sydney Agricultural Show Carrigan, a farmer, was handed a pamphlet describing the benefits of a baler manufactured by International Harvester (IH).
- Carrigan bought a bayler from Hassan & Kensell Pty Ltd (HK). HK conducted a business under the description of machinery and general agents and also described itself as a dealer for the principal's products.
- The bayler was defective. HK had gone into liquidation. Carrigan sued IH.
- The question before the court was whether the HK was acting as an agent for IH or as an independent dealer.
- In finding that HK was not acting as agent for IH, and therefore IH had no liability for the defective bayler, the courts said as follows:
  - *Agency is a word 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. But in the business world its significance is by no means thus restricted. [emphasis added]…*
  - *No word is more commonly and constantly abused than the word ' agent '. A person may be spoken of as an ' agent ', and no doubt in the popular sense of the word may properly be said to be an' agent', although when it is attempted to suggest that he is an ' agent ' under such circumstances as create the legal obligations attaching to agency that use of the word is only misleading"*
- No one supposes that the "distributing agent " or "exclusive agent " in a particular territory " for a proprietary commodity or specific kind of article or machine is there to put a " consumer" into contractual relations with the manufacturer. …In the present case it appears clear enough that the transaction was carried through on the basis that [HL] sold the baler to the plaintiff company and that the defendant company was not the contracting party.

<u>WHAT DO WE LEARN FROM THESE LEGAL DECISIONS?</u>
- The legal definition of agency is well established and understood by lawyers.
- Other relationships, which are equally well established and understood, may be mistaken for agency.
- The commercial framework in which an agency may or may not arise.

Article 82 UNCISG

(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.
(2) The preceding paragraph does not apply—
    (a) If the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;
    (b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or
(3) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

4.2 - PRIVATE INTERNATIONAL LAW

The question will arise as to the law of which country and its courts is to be applied to the interpretation of the contract. This area of law is referred to as private international law or conflict of laws.

- **General rule**: An Australian court has jurisdiction in an action on a contract when the defendant has been served in the jurisdiction or, being out of the jurisdiction, has been served in accordance with the rules of the court and the legislative provisions relating to service out of the jurisdiction, or has submitted to the jurisdiction.
- **Proper law:** in interpreting a contract made in a foreign country, the law applicable is deemed to be the law which the parties intend should apply.
- If the parties have not made an express choice, the law infers that they intended that the "proper law" to be the system of law with which the transaction has the most real and substantial connection
- Normally, it is presumed that such law is the law of the place where the contract was made. However, circumstances may alter this.

Certain Australian laws provide that they are to apply irrespective of anything to the contrary in the contract. Such laws are referred to as "mandatory laws". An example of such a law is s 67 Australian Consumer Law

Section 67 ACL

Conflict of laws

If:

(a) the proper law of a contract for the supply of goods or services to a consumer would be the law of any part of Australia but for a term of the contract that provides otherwise; or
(b) a contract for the supply of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, the following provisions for all or any of the provisions of this Division:
    (i) the provisions of the law of a country other than Australia;
    (ii) the provisions of the law of a State or a Territory;

the provisions of this Division apply in relation to the supply under the contract despite that term.

TOPIC 5 - BILLS OF EXCHANGE (A TYPE OF NEGOTIABLE INSTRUMENT)

5.1 - FEATURES OF NEGOTIABLE INSTRUMENTS

TYPES OF NEGOTIABLE INSTRUMENTS

There are three main types of negotiable instruments:

1. bills of exchange (often used for international transactions)
2. cheques
3. promissory notes

Summary: Bills of exchange are an instrument or document drawn up by the **drawer** ordering the **drawee** to pay money either to the person drawing up the instrument (i.e. the **drawer**) or to some third person (the **payee**) (the **drawer** and **payee** can be the same person). Upon the **drawee** agreeing in writing on the bill to pay the specified sum, the **drawer** will transfer the bill to the payee, who in turn may negotiate the bill to some other person to whom they are indebted and the bill may continue to be further negotiated between subsequent parties. The person in possession of the bill (the **holder**) at its maturity (*its expiry date or the date on which it becomes due for payment*) will then present the bill to the **acceptor** for payment.

Section 8 Bills of Exchange Act 1909 (Cth)

Bill of exchange defined

(1) A bill of exchange is an **unconditional order in writing**, **addressed by one person to another, signed by the person giving it**, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a **sum certain in money** (to or to the order of a specified person, or to bearer).

(2) **An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money,** is **not** a bill of exchange.

(3) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with:

- (a) an indication of a particular fund out of which the drawee is to re - imburse himself or herself, or a particular account to be debited with the amount; or
- (b) a statement of the transaction which gives rise to the bill;

is unconditional.

(4) A bill is not invalid by reason *(that immaterial facts have been omitted from the bill):*

- (a) that it is not dated;
- (b) that it does not specify the value given, or that any value has been given therefor; or
- (c) that it does not specify the place where it is drawn, or the place where it is payable.

HOW DOES A BILL OF EXCHANGE WORK?

Bruce Brown is a seller of goods. Albert Anderson is the buyer of goods. There is a contract for the sale of goods for $50,000. The terms of the payment under the contract are that $50,000 be paid by **bill of exchange** as follows:

No 76 — Due 4/1/19

$50,000 — Sydney 4/10/18

Three months after date
pay C Cameron or order
the sum of Fifty Thousand
Dollars.

To: Albert Anderson

Bruce Brown

One scenario…

- Albert Anderson (**drawee** and **acceptor**) and Bruce Brown (**drawer**) sign the bill.
- The bill is given to C Cameron who is the **Payee** and Holder of the bill.
- On the due date of the bill, 4 January 2019, C Cameron presents the bill to Albert Anderson who must pay C Cameron the $50,000. Under section 43, as the holder C Cameron, can sue in their own name on the bill to enforce payment.
- If Albert Anderson fails or refuses to honour the bill (i.e. pay the $50,000), C Cameron can seek compensation from Bruce Brown (section 60(1)).

Alternative scenario…

- Before the due date of 4 January 2019 C Cameron (**indorser**) could indorse the bill over to another person, say Sandra Jones (new **holder** and **payee**). This is described as negotiating the bill, and C Cameron becomes the indorser.
- Sandra Jones becomes the **indorsee**, **payee** and **holder** of the bill. If C Cameron negotiates the bill in return for payment by Sandra Jones of an amount of less than $50,000, this is described as *negotiating the bill at a discount.* Upon becoming the **payee** and **holder** (as **indorsee**), Sandra Jones has all the attendant rights (described above) and on the 4 January 2019 she can present the bill to Albert who has a legal obligation to pay.

- As the **indorser**, C Cameron, becomes liable to compensate Sandra Jones if, when she presents the bill on 4 January 2019, Albert Anderson fails or refuses to pay the $50,000 (section 60(2)).

RELEVANT PARTIES

Party	Description	Liabilities/obligations
Drawer	This is the person who requires an identified other person to pay a specified sum at a specified time (sum payable). The drawer in usual circumstances is the creditor of the drawee. The bill of exchange is a means of paying that amount, as opposed to cash. *In our example Bruce Brown is the drawer, and is owed money, in the sum of $50,000, by Albert Anderson under the contract for the sale of goods.*	Section 60 Bills of Exchange Act 1909 (Cth) **Liability of drawer or indorser** (1) The drawer of a bill, by drawing it: (a) engages that on due presentment it will be accepted and paid according to its tenor, and that if it is dishonoured will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour are duly taken. (b) The drawer is precluded from denying to a holder in due course the existence of the payee and their then capacity to indorse.
Drawee	The identified other person who is required by the Drawer to pay the sum payable. If the Drawee agrees to pay the sum payable they become the **acceptor** (usually the debtor of the Drawer). The drawee is usually the **debtor** of the drawer. *In our example Albert Anderson is the drawee, and he owes Bruce Brown the sum of $50,000 as described above. When the drawee writes their acceptance on the bill, the drawee is called the acceptor.*	The drawee of a bill, after accepting it, is the person primarily liable on it. The drawer and indorsers are, in relation to the acceptor, guarantors to the holder in the event of the bill being dishonoured.
Acceptor	The drawee becomes the acceptor by signing it. *In our example Albert Anderson becomes the acceptor by signing the bill, and indicating the bank at which it is payable.*	The acceptor of a bill, by accepting it: • engages that they will pay it according to the tenor of their acceptance; and • is precluded from denying to a holder in due course the genuineness of the drawer's signature and the existence and capacity of the drawer and payee. The acceptor is not precluded from denying the validity of indorsements: s 59
Payee	This is the person to whom the drawee (acceptor) is required by the bill to pay the sum payable. The payee could be: • the drawer • a person, other than the drawer, named on Bill of Exchange • if the Bill of Exchange is marked "or order", the person to whom the Bill of Exchanges as been indorsed by the Payee • if the Bill of Exchange is marked "or Bearer", the person to whom the Bill of Exchanges is	

	delivered by the Payee *In our example, the payee is Cameron. And should Cameron desire to transfer the bill, this could be done by means of simple delivery in the case of a bearer bill, and where drawn to order, by indorsement completed by delivery.*	
Indorser	The holder of an **order bill** may desire to negotiate it to some other person and this is done by means of an indorsement plus delivery. The person negotiating the bill is the **indorser** and the person to whom it is negotiated is the **indorsee**. The indorsee then becomes the new payee. The title passes by mere delivery or indorsement (depending on the type of bill): ● Order bill: Negotiation requires the endorsement (signature) over plus delivery (handing it over) ● Bearer bill: If it is a bearer bill, negotiation requires only delivery (handing it over) and need not be endorsed (see **bearer** below) Note: A bill of exchange may be made payable to the bearer or to order. A bearer bill does not require indorsement to be negotiated to another person, mere delivery being sufficient, whereas an order bill must be indorsed before being negotiated. An order bill becomes a bearer bill when indorsed in blank, that is, when no indorsee is named by the indorser who simply signs her or his name on the bill. As order bills require endorsement (signature) and delivery to transfer ownership to a specific party, **offering higher security**, while bearer bills transfer simply by delivery, making them riskier but easier to transfer.	Section 60 Bills of Exchange Act 1909 (Cth) **Liability of drawer or indorser** (1) Drawer… (2) The indorser of a bill, by indorsing it: (a) engages that on due presentment it will be accepted and paid according to its tenor, and that if it is dishonoured will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour are duly taken; and (b) is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements; and (c) is precluded from denying to their immediate or a subsequent indorsee the validity of the bill and their title to it. Section 37 Bills of Exchange Act 1909 (Cth) **Requisites of a valid indorsement** An indorsement, in order to operate as a negotiation, must comply with the following conditions, namely: (a) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient. An indorsement written on an allonge, or on a "copy" of a bill issued or negotiated in a country where "copies" are recognized, is deemed to be written on the bill itself. (b) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill. (c) Where a bill is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others. (d) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his or her name is mis - spelt, he or she may indorse the bill as therein described, adding, if he or she thinks fit, his or her proper signature. (e) Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved. (f) An indorsement may be made in blank or special. It may also contain terms making it restrictive.

TOPIC 7 - CONTRACTS OF INSURANCE

7.1 - INSURANCE

WHAT IS A CONTRACT OF INSURANCE?

- A **contract of insurance** is a contract by which one party, called the **insurer**, in consideration of a sum of money called the **premium**, undertakes to pay to another person called the **insured**, a sum of money, or its equivalent, on the **happening of a specified event** → Australian Commercial Law, Turner and Trone, 35 Ed at [1120]
- The central feature of insurance is the **sharing of "*risk*"**. The insured (plural) share a similar risk and pay premiums to the insurer, who pays out when the event (insured against) occurs. The level of premium paid by the insured reflects the risk.

TWO CLASSES OF INSURANCE

1. **Indemnity Insurance:** aims to return the insured to the position he or she was in before the loss.
    a. For example property insurance for cars and buildings (etc.) is indemnity insurance because it covers the cost of repair or replacement of the damaged property.
2. **Contingency Insurance:** is insurance where the insurer agrees to pay an agreed sum to the insured on the happening of an event. The payment is not necessarily related to the loss sustained by the insured.
    a. For example life insurance or superannuation insurance

HOW IS A CONTRACT OF INSURANCE FORMED?

- The normal rules regarding the formation of contracts apply to a contract of insurance.
- The offer is made by the person seeking to be insured, the proposer.
- The prosper makes the offer by means of a proposal form, which is a document (prepared by the insurer) containing questions to which a person (the **proposer**) is asked to give answers where the answers are intended to be used in connection with a proposed contract of insurance.
- If the proposal (as contained in the proposal form) is accepted, the insurer issues a policy document (policy), which contains the terms of the contract as agreed upon by the proposer (now the insured) and the insurer.
- An interim contract of insurance, includes a document of the kind usually known as a **cover note** prepared by the insurer.

FUNDAMENTAL CONCEPTS OF INSURANCE LAW

- The original source of the insurance law is the common law
- The common law has been affected by legislation
- The most significant legislation has been the Insurance Contracts Act 1984 (Cth)

INSURANCE CONTRACTS ACT 1984 (CTH)

APPLICATION

- The Insurance Contracts Act 1984 (Cth) is not intended to be a complete code of insurance law but rather deals with certain (albeit very important) aspects of it and is superimposed on the existing law.
- Accordingly, except to the extent that the Act either expressly or by implication limits their operation, the existing principles of common law and equity, as well as State and Commonwealth legislation, continue to apply to insurance contracts.

Section 7 Insurance Contracts Act 1984 (Cth)

Effect of Act on other laws

It is the intention of the Parliament that this Act is not, except in so far as this Act, either expressly or by necessary intendment, otherwise provides, to affect the operation of any other law of the Commonwealth, the operation of a law of a State or Territory or the operation of any principle or rule of the common law (including the law merchant) or of equity.

- The Marine Insurance Act 1909 (Cth) imposes a strict pre-contractual duty of disclosure and truth in representations. Failure to disclose every material circumstance, or making an untrue material representation, entitles the insurer to avoid the contract entirely (s 24(1)).

MATERIALITY

- Under the Marine Insurance Act 1909 (Cth), materiality is assessed by whether a circumstance or representation would influence the judgment of a prudent insurer in fixing the premium or taking the risk (s 24(2)).
- The Insurance Contracts Act 1984 (Cth) sets out its own statutory test of materiality and the consequences of breach (ss 21 and 26).

TOPIC 8 - SECURITY INTERESTS IN PERSONAL PROPERTY (PPSR)

8.1 - THE PPSR

BRIEF INTRODUCTION TO THE PPSR

- The operation of Personal Property Securities Act 2009 (Cth) (PPSA), commenced on 30 January 2012 and transitioned into full operation on 30 January 2014.
- The PPSA is a culmination of a process of law reform that began with recommendations by the Law Council of Australia in its Report on Fair Consumer Credit Laws (1972), commonly referred to as the Molomby Committee Report).
- The basic concepts of the PPSA were developed (with some departures) from:
  - Article 9 of the Uniform Commercial Code of United States
  - the Personal Property Securities Act (1993) of Saskatchewan; and
  - the Personal Property Securities Act (1999) of New Zealand
- The PPSA replaces previous state, territorial and Cth statutes dealing with security over personal property.
- The PPSA is Commonwealth legislation based upon referrals of power by States, as provided for in s 51(xxxvii) of the Constitution: PPSA, Pt 7.3.
- All States have referred their powers over personal property securities to the Commonwealth, to the extent required for enactment of the PPSA.

THE PPSR

A central feature of the PPSA is the **Personal Property Securities Register (Register).**

- The register enables secured parties to give notice of actual or prospective security interests.
- The register is a single national register which is online and accessible 24 hours a day seven days per week with real-time operation. The ***Registrar*** is responsible for the Register.

1 – DETERMINING WHETHER THERE IS A SECURITY INTEREST FOR THE PURPOSES OF THE PPSA

KEY TERMS

PERSONAL PROPERTY

Section 10 PPSA 2009 (Cth)

Definitions

"personal property" means property (including a licence) other than:

(a) land; or

(b) a (statutory) right, entitlement or authority that is:

  (i) granted by or under a law of the Commonwealth, a State or a Territory; and

  (ii) declared by that law not to be personal property for the purposes of this Act.

Note: This Act does not apply to certain interests even if they are interests in personal property (see section 8).

Notes:

- The extension of the concept of personal property to licences means that at least in this respect, the statutory concept goes beyond the traditional idea of a proprietary interest (but note that a security interest does not include a licence).

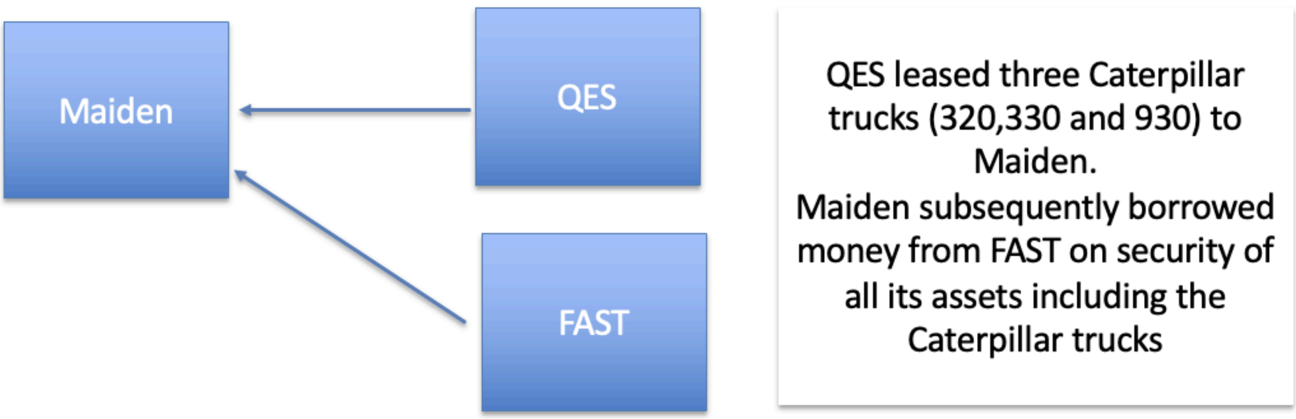
Note: A security interest in the proceeds of original collateral has the same default priority as the security interest in the original collateral (see subsection 32(5)).

Notes:

- In most cases, the "*priority time*" is the registration time, though the priority time might be earlier in those cases where the secured party can perfect the security interest by taking possession or control of the collateral, or in cases where the security interest is temporarily perfected or otherwise perfected by force of the legislation: s 55(5).
- A time is a priority time for a security interest only if, once the security interest is perfected, it remains continuously perfected: s 55(6); and as to how a security interest is continuously perfected, see s 56
- A security interest provided for by a security agreement has the same priority in respect of all advances (including future advances) and the performance of all obligations secured by the agreement: s 58

Secured party A (A) takes the security interest first in time, and A's security interest is…	**Secured party B(B) takes the security interest after Secured party A, and B's security interest is…**	**Priority position**
Perfected	Unperfected	A has priority because A has a perfected security interest; s 55(3)
Unperfected	Perfected	B has priority because B has a perfected security interests; s 55(3)
Perfected	Perfected	A has priority because A registered its security interest first; s 55(4)-(6) and 56
Unperfected	Unperfected	Priority will depend on the order of attachment of the security interest; s 55(2)

Re Maiden Civil (P&E) Pty Ltd [2013] NSWSC 852



- The Court determined that:
    - Maiden owned 320
    - QES owned 330 and 930
- Both QES and Fast had security interest in the Caterpillars, under section 12 of the PPSA:
    - QES's security interest arose from the lease. That lease was a PPS lease under s13(1)(b) and/or s13(1)(d); and section 13(1)(ii) and/or (iii) lease; therefore ultimately QES's interest as lessor was a security interest under s 12(3)(c).

- The right to obtain that information is subject to any confidentiality agreement, but not if (among other things) the debtor is in default → s 275(6) and (7)
- The secured party must respond before the end of 10 business days (s 277) or apply to the court for exemption → s 278
- The person making the request may enforce it by application to the court under s 280
- The onus of proving matters of crucial importance under the PPSA, such as whether a security interest attaches to personal property or has been perfected by registration, lies with the person asserting those facts → s 296

VESTING OF CERTAIN UNPERFECTED SECURITY INTERESTS
- If the **grantor of an unperfected security interest goes into a formal external administration** (being a body corporate) or becomes bankrupt (being an individual), the **security interest vests in the grantor** under s 267
- This means that the secured party is deprived of the security interest and is left in the position of an **unsecured creditor**.
- The legislative intention appears to be that when the security interest vests in the grantor, the **collateral becomes available for distribution to unsecured creditors**, assuming there is no pre-existing perfected security interest over it.

TOPIC 9 - BANKRUPTCY (PERSONAL INSOLVENCY)

9.1 - BANKRUPTCY

POLICY AIMS OF BANKRUPTCY LAW
- The Bankruptcy Act 1966 (Cth) provides a comprehensive regime for dealing with individuals who are insolvent
  - that is, they are unable to pay their debts as and when they fall due
  - section 5 - a person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable; and a person who is not solvent is insolvent.
- The aim is not to punish the bankrupt
- The process is designed to release debtors from oppressive financial obligations
- The aim is to enable the bankrupt to start afresh
- To ensure creditors are treated fairly and equitably

Bankruptcy may be regarded as the method by which the normal rights of a creditor are withheld in the interests of the debtor and the creditors as a whole and by which the law of debt is modified to effect a compromise beneficial to all parties → *Turner & Trone, Australian Commercial Law 35 ed at page 719*

OVERVIEW OF THE ADMINISTRATION OF THE ACT
- When a person (natural person) becomes bankrupt their property vests in the registered trustee → section 156A(3)
- A registered trustee is a person (accountants or lawyers, registered under the Act to act in that capacity) who has consented to act.
- In the absence of a registered trustee the property of the bankrupts vest in the Official Trustee, a body corporate established under the Act.

APPLICATION OF THE ACT
- The Act applies to all debtors (including non-Australian citizens) except corporations, limited partnerships or associations registered under a law that provides for winding up → section 7

SCOPE OF THE ACT IN ADMINISTERING DEBTOR'S PROPERTY
The Act provides several ways for administering a debtor's property. They are:
- Bankruptcy of debtor on a creditor's petition → Part IV Division 2
- Bankruptcy of debtor on a the debtor's petition → Part IV Division 2A
- Bankruptcy proceeding as against the estate of a deceased debtor → Part XI
- Arrangements with creditors outside bankruptcy → Parts IX and X

BANKRUPTCY ON A CREDITOR'S PETITION

First question to ask before advising a client if they can bankrupt an individual who owes them money: has the jurisdiction been invoked under s 43 (i.e. are the requirements satisfied to pursue bankrupting someone).

Secondly, is the debt owed at least $10,000?

Section 43 Bankruptcy Act 1966 (Cth)

Jurisdiction to make sequestration orders

(1) Subject to this Act, where:

 (a) a debtor has committed an **act of bankruptcy**; and

 (b) at the time when the act of bankruptcy was committed, the **debtor**:

  (i) was personally present or ordinarily resident in Australia;

  (ii) had a dwelling - house or place of business in Australia;

  (iii) was carrying on business in Australia, either personally or by means of an agent or manager; or

  (iv) was a member of a firm or partnership carrying on business in Australia by means of a partner or partners or of an agent or manager;

 the Court may, on a petition presented by a creditor, make a **sequestration order** against the estate of the debtor.

(2) **Upon the making of a sequestration order against the estate of a debtor, the debtor becomes a bankrupt,** and continues to be a bankrupt until:

 (a) he or she is discharged by force of subsection 149(1); or

 (b) his or her bankruptcy is annulled by force of subsection 74(1) or 153A(1) or under section 153B.

<u>NOTES:</u>

- A debtor becomes bankrupt (i.e. a sequestration order is made against his or her estate) if he or she commits an act of bankruptcy.

Section 44 Bankruptcy Act 1966 (Cth)

Conditions on which creditor may petition

(1) A creditor's petition shall not be presented against a debtor unless:

 (a) there is owing by the debtor to the petitioning creditor a debt that amounts to the statutory minimum or 2 or more debts that amount in the aggregate to the statutory minimum, or, where 2 or more creditors join in the petition, there is owing by the debtor to the several petitioning creditors debts that amount in the aggregate to the statutory minimum;

 (b) that debt, or each of those debts, as the case may be:

  (i) is a liquidated sum due at law or in equity or partly at law and partly in equity; and

  (ii) is payable either immediately or at a certain future time; and

 (c) the act of bankruptcy on which the petition is founded was committed within 6 months before the presentation of the petition.

(2) Subject to subsection (3), a secured creditor shall, for the purposes of paragraph (1)(a), be deemed to be a creditor only to the extent, if any, by which the amount of the debt owing to him or her exceeds the value of his or her security.

(3) A secured creditor may present, or join in presenting, a creditor's petition as if he or she were an unsecured creditor if he or she includes in the petition a statement that he or she is willing to surrender his or her security for the benefit of creditors generally in the event of a sequestration order being made against the debtor.

(4) Where a petitioning creditor is a secured creditor, he or she shall set out in the petition particulars of his or her security.

(5) Where a secured creditor has presented, or joined in presenting, a creditor's petition as if he or she were an unsecured creditor, he or she shall, upon request in writing by the trustee within 3 months after the making of a sequestration order, surrender his or her security to the trustee for the benefit of the creditors generally.

(6) A secured creditor to whom subsection (5) applies who fails to surrender his or her security when requested to do so by the trustee in accordance with that subsection is guilty of contempt of court.

NOTES:

- Note section 44 provides that before a creditor's petition can be presented:
  - there is owing by the debtor to the petitioning creditor a debt that amounts to the ***statutory minimum*** or **2 or more debts that amount in the aggregate** to the statutory minimum or, where 2 or more creditors join in the petition, there is owing by the debtor to the several petitioning creditors debts that amount in the statutory minimum;
  - that debt, or each of those debts, as the case may be:
    - is a liquidated sum due at law or in equity or partly at law and partly in equity; and
    - is payable either immediately or at a certain future time; and
  - the act of bankruptcy on which the petition is founded was committed within 6 months before the presentation of the petition

STATUTORY MINIMUM

Section 5 Bankruptcy Act 1966 (Cth)

Interpretation

"Statutory minimum" means:

(a) if an amount greater than $5,000 is prescribed--the prescribed amount; or
(b) otherwise--$5,000.

BUT SEE → BANKRUPTCY REGULATIONS 2021 - **REG 10A**

Prescribed statutory minimum: for the purposes of paragraph (a) of the definition of ***statutory minimum*** in subsection 5(1) of the Act, the amount prescribed is **$10,000**

ACTS OF BANKRUPTCY

This section sets out what constitutes an act of bankruptcy by the debtor. The most commonly used act of bankruptcy is a bankruptcy notice (s 40(1)(g)).

Section 40 Bankruptcy Act 1966 (Cth)

Acts of bankruptcy

(1) A debtor commits an act of bankruptcy in each of the following cases:
   (a) if in Australia or elsewhere he or she makes a conveyance or assignment of his or her property for the benefit of his or her creditors generally;
   (b) if in Australia or elsewhere:
      (i) he or she makes a conveyance, transfer, settlement or other disposition of his or her property or of any part of his or her property;
      (ii) he or she creates a charge on his or her property or on any part of his or her property;
      (iii) he or she makes a payment; or
      (iv) he or she incurs an obligation;
   that would, if he or she became a bankrupt, be void as against the trustee;
   (c) if, with intent to defeat or delay his or her creditors:
      (i) he or she departs or remains out of Australia;
      (ii) he or she departs from his or her dwelling - house or usual place of business;
      (iii) he or she otherwise absents himself or herself; or
      (iv) he or she begins to keep house;
   (d) If:
      (i) execution has been issued against him or her under process of a court and any of his or her property has, in consequence, either been sold by the sheriff or held by the sheriff for 21 days; or
      (ii) execution has been issued against him or her under process of a court and has been returned unsatisfied;
   (daa) if the debtor presents a debtor's petition under this Act;
   (da) if the debtor presents to the Official Receiver a declaration under section 54A;
   (e) if, at a meeting of any of his or her creditors:
      (i) he or she consents to present a debtor's petition under this Act and does not, within 7 days from

COMMERCIAL TRANSACTIONS EXAM SCRIPT	
TOPIC 1: AGENCY	
DEFINITION AND IDENTIFICATION	**Step 1: Define the Relationship** Agency is a legal concept where one person (the agent) has the authority or capacity to create legal relations between another person (the principal) and third parties ● The core principle is encapsulated in the maxim qui facit per alium facit per se—he who does an act through another does it himself **Step 2: Distinguish Popular from Legal Usage** The word "*agent*" is often used loosely in business (e.g., *"estate agents" or "exclusive agents"*) but this label does not necessarily create the legal obligations of agency ● **The Test**: Does the person have the authority to put the principal into a contractual relationship with a third party? ● **Dealers vs. Agents**: An independent dealer selling products is generally not an agent of the manufacturer, as they do not create legal rights between the manufacturer and the consumer
METHODS OF CREATING AUTHORITY	Determine which form of authority was present at the time of the transaction. **Step 1: Actual Express Authority** This arises where the principal explicitly appoints the agent, often via an employment contract or a Power of Attorney. It can be oral or in writing. **Step 2: Actual Implied Authority** This is inferred from the conduct of the parties and the circumstances of the case ● **Incidental Authority**: Authority necessarily incidental to carrying out express duties ● **Usual Authority**: Authority attached to a specific position (e.g., *a Managing Director usually has authority for ordinary trading transactions*) ● **Acquiescence**: If the board of directors allows a person to act in a role without formal appointment, they may have actual implied authority through the board's acquiescence **Step 3: Apparent or Ostensible Authority** This arises when a principal's "*holding out*" or representation makes it appear to a third party that the agent has authority, even if they do not. Apply the Freeman & Lockyer test: ● **Representation**: A representation was made (by words or conduct) that the agent had authority ● **Actual Authority of Representor**: The representation was made by someone who had actual authority to manage the business or make such representations ○ **Note**: A person with only ostensible authority cannot usually "*cloak*" another with authority (Crabtree Vickers) ● **Inducement/Reliance**: The third party was induced by the representation to enter the contract ● **Title/Status**: Equipage with a certain title, facilities, or blank order forms can constitute a representation (Pacific Carriers)

	Step 4: Ratification If an agent acts without authority, the principal may retrospectively adopt the contract ● **Requirements**: The agent must have purported to act for the principal, and the principal must have been in existence and had capacity at the time of the contract ● **Knowledge**: Ratification requires *"full knowledge"* or an unqualified adoption of the whole contract
DUTIES AND RIGHTS OF THE AGENT	**Step 1: Identify Breaches of Duty** ● **Follow Instructions**: The primary duty is to obey the principal's lawful instructions; departure is at the agent's peril ● **Act in Person**: Agents generally cannot delegate duties to a sub-agent unless the business nature requires it ● **Full Disclosure**: Must disclose all material circumstances that might influence the principal ● **No Secret Profits**: Any gain made using their position without the principal's assent must be accounted for ● **Reasonable Care and Skill**: An agent must exercise the skill usual for their profession (e.g., *an insurance broker failing to get specific flood cover*) ● **Fiduciary Duties:** The agent must act in the interest of the principal to the exclusion of their own interests **Step 2: Identify Agent Rights** ● **Remuneration**: The agent must be the "*effective cause*" of the transaction to claim commission (Luxor v Cooper) ● **Indemnity**: Right to be reimbursed for expenses and indemnified against losses lawfully incurred ● **Lien**: Right to retain the principal's property until debts/remuneration are paid
LIABILITY AND TERMINATION	**Step 1: Contractual Liability to Third Parties** ● **Named Principal**: Generally, the agent is not liable ● **Undisclosed Principal**: Either the agent or the principal can be sued, but the third party must eventually elect which one to hold liable ● **Breach of Warranty of Authority**: If an agent falsely represents they have authority, the third party can sue the agent for the loss sustained **Step 2: Tortious Liability** ● Principal is liable for any tort committed by the agent while acting within the scope of their actual or apparent authority ● Principal is not liable for wrongful acts outside that authority **Step 3: Termination** Agency is terminated by: ● **Performance**: The specific act or period is completed ● **Revocation/Renunciation**: Either party gives notice, though the agent may be liable for the principal's loss ● **Death/Insanity**: Generally ends agency automatically, even if agent is unaware ● **Bankruptcy**: Usually terminates authority, especially if principal becomes bankrupt

TOPIC 2: PARTNERSHIPS → *Partnership Act 1958* (Vic)

FORMATION

Step 1: Define the Relationship

A partnership is defined under s 5(1) as the "*relation which subsists between persons carrying on a business in common with a view of profit*"

- It is essentially contractual in nature, involving mutual consent, and its existence is a mixed question of fact and law determined by the parties' objective intentions

Step 2: Consider the Relevant Elements of a Partnership

Element 1 – "Carrying on a Business"

The term "***business***" includes every trade, occupation, or profession (s 3), but excludes non-profit clubs

- **The Fact-Based Tes**t: Determining if an activity is a "*business*" depends on questions of fact and degree, considering indicia such as profit motive, scale of activity, commercial principles, repetition, continuity, and system (Evan v FCT)
- **Single Ventures**: While "*carrying on*" typically implies a repetition of acts (Smith v Anderson), modern courts have found partnerships in single ventures or "*single adventures*" if they are commercial enterprises entered into with the requisite intent (Canny Gabriel; United Dominions)
- **Continuity is relevant but not determinative:** While the phrase "*carrying on a business*" typically implies a degree of continuity, repetition, and system, it is not an absolute requirement for a partnership to exist
  - **Indicia, not a rule**: Continuity is just one of several indicia (alongside profit motive, scale of activity, and commercial principles) to be considered as a whole; the absence of any one factor does not necessarily mean a business is not being carried on (Evan v FCT)
  - **Single Ventures**: As above, a partnership can be found in a "*single adventure*" or isolated commercial transaction if it is entered into with the requisite intent (Canny Gabriel)
  - **Low Emphasis:** Modern courts place less weight on the element of repetition, provided the enterprise has an operation "*sufficiently extended*" to amount to carrying on a business (United Dominions
- **Labels are Not Conclusive**: The court will look past the label parties give their relationship (e.g., "joint venture") to the substance of the arrangement (Canny Gabriel)

Element 2 – "In Common"

This requires some participation in a common business, meaning parties are engaged in the same business

- **Mutual Agency**: The business must be carried on by, or on behalf of, the partners, often described as a mutuality of rights and obligations (Lang v James Morrison; Re Ruddock)
- **Active Management Not Required**: "*In common*" does not mean every partner must take an active role in daily management

Element 3 – "With a View of Profit"

- **Ultimate Profit**: A view to ultimate profit is essential, though it need not be a motive in the short term (Minter v Minter)