

Final Exam Revision:

This section onwards will be all the knowledge required for the final exam. The previous chapters will not be on the final exam. I will also have the double sided single page that you can include in the final exam, which will be colour coded. You can see the colour codes at the heading of each chapter.

Final exam must use the ILAC style of writing.

- **Issue** - State the legal issue and situation
- **Law** - Find relevant law(s)
- **Application** - Apply the law to the facts
- **Conclusion** - Provide advice based on application

For the exam, all you need to do is:

1. Brief (1 sentence) outline of the issue
2. State the relevant law
3. Apply the law to the facts
4. Provide your advice = Conclusion

FOR EXAMPLE:

LAW:

Goldsborough Mort & Co Ltd v Quinn

APPLICATION:

Andrew, the offeror, has made the offer to sell his house to Rob, the offeree, and has promised to keep his offer open for 6 weeks. Rob has not paid any consideration for Andrew's offer to keep his offer open for 6 weeks. Therefore Andrew can revoke his offer before the 6 weeks is up.

CONCLUSION:

Andrew is entitled to revoke the offer.

If the question states: "Assume there is intention..." then any discussion on the intention is not necessary, because the intention is already defined.

If there is no mention of intention, then investigate the intention, and do not discuss any laws. This is because there is no formal contract yet, so there may not be any breach of contract.

E.g.

LAW:

Balfour v Balfour

Wakeling v Ripley

APPLICATION:

Because Johnny and Ash made a social agreement, the social assumption applies. Therefore it can be argued that there isn't an intention for the agreement to be legally enforceable.

However, Ash may be able to argue that given the financial investment and time spent off work, there is sufficient enough weighting for there to be a legally enforceable contract.

Johnny may be able to argue that due to the seriousness of the agreement, it is not of sufficient enough weighting to be a legally enforceable contract, as the premise of the agreement was a domestic agreement, rather than a legally enforceable contract.

CONCLUSION:

The stronger argument states that there was no intention to make the agreement a legally enforceable contract. Although it is possibly a significant financial investment for Ash, the intention of the agreement was domestic in nature.

Lastly, I would highly recommend completing the practice questions released each week a few days before the exam, just to get a good idea of each possible scenario for the questions asked. For example, if there is a question asked about negligence, you must elaborate on all four aspects of negligence; *Duty of care, Breach of Duty, Causation, and Defences.*

Good luck on your exam!

1 WEEK 7, 8 & 9 – CONTRACT LAW

1.1 WHAT IS A CONTRACT?

Businesses are underpinned by deals and negotiations, which means that contracts, and contract law, are part of day-to-day business transactions. A contract is a legally enforceable agreement between two or more parties. Not all contracts need to be written, they can come about through spoken words and actions. Some contracts are formed and performed simultaneously, while some are a promise that require an ongoing obligation.

The following process is the process of a contract (IACCCL):

- **Intention:** to create legal relations
- **Agreement:** (Acceptance of the offer)
- **Consideration:** (The 'price')
- **Capacity:** of the parties
- **Consent:** that is genuine
- **Legality:** of the objects

The first three are required to make a contract, and the second three are required to make the contract valid.

1.2 AGREEMENTS

1.2.1 What is an agreement?

An agreement exists when two or more people share an understanding and intention. Many agreements are preceded by negotiations.

An agreement can be finalised by the conduct of both parties, but sometimes it is less clear. If one party makes an offer, and another party accepts the offer, an agreement is formed.

1.2.2 Offer

A person has made an offer when one party expresses willingness to enter a contract with the recipient(s) of the offer. The person making the offer is the *offeror* and the person receiving the offer is the *offeree*. These offers can be in writing, verbally spoken, or enacted through conduct.

1.2.2.1 Termination

If the offer is accepted, there is a legally binding agreement between parties. If it is rejected, a counter offer can be made, terminating the original offer.

If the offer is not accepted or rejected, the offeror can revoke the offer. However, if the offeree has already accepted the offer, the offeror cannot revoke the offer.

If the offer is not accepted, rejected, or revoked, the offer will lapse. This means the offer ends. It is best to specify a lapse period, but if no date is set, the offer will be treated with the significance of the item.

1.2.2.2 Offer vs Request for Information

A request for information is seen when a potential offeree makes a request for information about the product/service. However, the response to this request does not result in an offer itself.

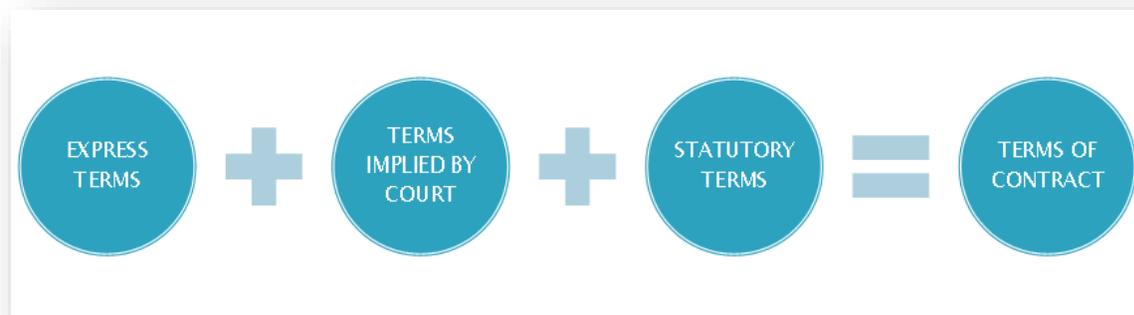
1.2.2.3 Offer vs Invitation to Treat

An invitation to treat is when one party invites another party to make an offer. This does not result in a valid offer.

1.3 TERMS OF A CONTRACT

After a contract is established (intention, agreement, and consideration), the parties must look at what they have agreed to include in the contract. These are the terms of a contract. There are two types of contractual terms. These are:

- **Express terms** - These terms are explicitly agreed upon, and can be written and/or verbally communicated. If the parties do not follow these terms, they have breached the contract. Determining the terms of the contract are best done by writing and signing to the terms.
 - **Representations:** These are terms of fact that are made by one party that are used to induce an offeree to enter the contract.
 - **Sales Puffs:** Terms that are not intended to be taken seriously, and are not actionable or express terms for the contract if they are inaccurate. (e.g. "Best value in town").
 - **Parol Evidence Rule:** If the contract is ENTIRELY in writing, it is difficult to include verbal statements into the contract that have not already been written. (He said she said) The court will favour the written contract as opposed to the verbal terms (Only if the written contract appears to be a complete record of the agreement).
- **Implied terms** - Terms implied by the court, and any relevant statutory terms



- There are also three criteria that determine whether a statement is a term or a representation. These criteria are:
 - **Time Lapse Between Statement and Final Agreement:** The longer a statement was made before the signing of the contract, the more likely it would be treated as a representation, and not a term.
 - **Importance the Parties' Attach to the Statement:** If the statement receiver treats the statement as very important to the contract, then the courts would be more willing to treat it as a term and not a representation.
 - **Special Knowledge:** If one of the parties has special knowledge that the other party does not possess, then it is more likely to be regarded as a term, rather than a statement.
- Collateral contracts are secondary contracts aside from the main contract, which is the consideration for entry into the main contract. If the collateral contract is breached, this is not cause to terminate the main contract. The other party cannot obtain damages for breach of the collateral contract.

1.4 DISCLAIMERS:

Disclaimers are statements in contracts that indicate no breach is made despite failing one or more of the contractual obligations. These are things such as "No liability for loss or injury". These are also known as;

2 CONSUMER PROTECTION LAW

The Australian Consumer Law (ACL) protects consumers from these 4 aspects of business purchases. The ACL is enforced by the Australian Competition and Consumer Commission (ACCC). This is a Statute law, not common law.

2.1 DEFINITION OF A CONSUMER:

An individual is only defined as a consumer if the following conditions post-purchase are met: (S3 ACL)

1. *Any types of good or services are of less than \$40,000 in value*
2. *Goods or services costing more than \$40,000 are goods or services frequently used in a personal, domestic, or household setting.*
3. *The goods or services are not purchased for the use of reselling*

2.2 MISLEADING OR DECEPTIVE CONDUCT

Misleading or deceptive conduct protects consumers from loss has been subject due to a business not adhering to S18.

S18: Section 18 states that a person must not sell a good or service that is misleading or deceptive, or is likely to mislead or deceive.

There are three main conditions that must be established before conduct is defined as having contravened S18. These are:

1. *The business has 'engaged in conduct'*
 - a. This term is very wide. Any time a business makes a statement, claim, or even remains silent, they have engaged in conduct: (*Henjo Investments v Collins Marrickville*)
2. *The business was 'in trade or commerce'*
 - a. The conduct must be in trading or commercial character.
3. *The conduct was 'misleading or deceptive conduct, or likely to mislead or deceive'*
 - a. The court will use an objective test to decide whether the action is misleading or deceptive.

2.3 UNCONSCIONABLE CONDUCT

Unconscionable conduct protects consumers from unreasonable conduct that a business undertakes. There are two sections on unconscionable conduct in the ACL. These are:

S20: A person must not, in trade or commerce, engage in general unconscionable conduct, as defined in S22.

S21: Unconscionable conduct when making a purchase from a person other than a listed public company.

S22: *There are a number of guidelines that describe unconscionable conduct. These are:*

- Strengths of bargaining positions of the supplier and consumer
- Whether the customer understands documents relating to the supply of goods or services
- Whether undue influence or unfair tactics were used against the consumer by or on behalf of the supplier
- The extent to which the supplier's conduct toward the customer was similar to other transactions of similar nature

3 WEEK 11 & 12 – NEGLIGENCE & VICARIOUS LIABILITY

3.1 FORMS OF LEGAL LIABILITY

There are a number of forms of legal liability, that arise when a person's conduct causes harm to another person(s), and that conduct is not justified or excused by law. These forms of legal liability are:

- *Tortious liability* (tort law)
- *Contractual liability* (contract law)
- *Statutory liability* (consumer law)
- *Vicarious liability* (covered in week 12)

If a person breaches any of these forms of legal liability, they are able to have action brought against them.

3.2 THE LEGAL PRINCIPLES OF TORT NEGLIGENCE

There are four different sections of tort of negligence. These are:

3.2.1 Duty of care

a. This section focuses on the defendants owing of duty of care to the plaintiff. Whether there is an established duty of care is up to two categories. These categories describe that if the relationship between the parties falls within the established categories of duty of care, the plaintiff is owed a duty of care. If not, the plaintiff must ensure that:

- It was reasonably foreseeable that the defendant's conduct could cause harm to someone in the plaintiff's position.*
- Plaintiff must show the salient features of the case are consistent with the existence of duty of care. The following relevant salient features are:*
 - ***The control the defendant had over the situation***
 - ***The relative vulnerability of the plaintiff***
 - ***The need for people to take responsibility for their own actions***

If someone is to make a statement that causes economic loss, this is known as a negligent misstatement, which breaches duty of care. There are conditions that a defendant must adhere to when they owe a duty of care to the plaintiff. These are:

1. The advice was a business or serious nature
2. Defendant knew or should have known that the plaintiff were to rely on the advice
3. It was reasonable in the circumstances for the plaintiff to rely on the defendants advice

3.2.2 Breach of duty

The law for breach of duty of care is seen in S9 of the CLA. There is no breach of duty of care, UNLESS:

- The risk of harm was foreseeable; and*
- The risk was NOT insignificant; and*
- A reasonable person in the position of the defendant would have taken precautions against the risk of the harm, considering;*
 - Probability of harm occurring without precautions*
 - Likely seriousness of harm*
 - Burden of taking precautions*
 - Social utility of defendants activity*

BSB 111 FINAL EXAM PAGE:

CONTRACT LAW:

CONSIDERATION

Consideration does not need to be balanced (Thomas v Thomas)
 Consideration must be paid to the promisee, but not the promisor (Dunlop Pneumatic Tyre Co Ltd v Selfridge)
 If the consideration is stopping an act, or if too vague in nature, this is insufficient (White v Bluett)
 If the consideration is paid before the promise is made, it is insufficient (Roscorla v Thomas)
 If the consideration is an existing legal obligation, it is insufficient (Collins v Godefroy; Stilk v Myrick)

MISTAKE

Mistaken identity will only void contract if: One part is mistaken, identity is fundamental, other party knows of the mistake (Cundy v Lindsay)
 If a contract is performed face-to-face, mistaken identity cannot be relied upon to void a contract (Papas v Bianca Investments Pty Ltd)
 If a party signs a contract without reading it, they are still bound to it (L'Estrange v Groucob)
 Unless: The party had a fair reason for not reading (blindness), or the mistake is about the aspect of the contract they are signing (Petelin v Cullen)
 Contract can become void if: The agreement was made upon a belief of both parties, and that belief was incorrect (McRae v Commonwealth Disposals Commission)
 Implication of harm will void a contract (Barton v Armstrong)
 The threat may be to: (DURESS)

Personal Safety (Barton v Armstrong; Seear v Cohen)
 Safety of Goods (Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd)
 Economic wellbeing (North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd)

If a stronger party takes advantage of influence over a weaker party, the contract is void (UNDUE INFLUENCE) (Allcard v Skinner)
 Unconscionable conduct: (Commercial Bank of Australia Ltd v Amadio)
 Special disadvantage: Sickness, illiteracy, etc. (Blomley v Ryan)
 Misrepresentation: (Derry v Peek)

TERMS

If there is a written and signed contract, it is binding (L'Estrange v Groucob)
 A statement is tested as a term of a contract by: (Dick Bentley Productions Ltd v Harold Smith Motors Ltd)

Time lapse between statement and contract signing
 Importance attached to the statement

Whether a party had special knowledge or skills

Parol Evidence Rule: If it is presumed a contract is wholly written, then spoken terms will not be binding (Mercantile Bank of Sydney v Taylor)
 Unless: It is argued that it is not only written (Van den Eschert v Chappell)

A collateral contract is the consideration for the main contract. It is possible to obtain damages for breach of the collateral contract, but not void the main contract. (De Lasalle v Guildford)

DISCLAIMERS:

A disclaimer is only valid if:
 It is incorporated: (L'Estrange v Graucob Ltd)
 The disclaimer covers the breach: (Causser v Browne)
 The disclaimer is not misrepresented: (Curtis v Chemical Cleaning & Dyeing Co)
 The disclaimer does not exclude statute: **S64 ACL**

WARRANTIES

A breach of a condition gives the other party the right to; *recover damages*, and *terminate the contract* (Associated Newspapers Banks)
 If a warranty is breached, the only remedy is damages. (Bettini v Gye)

CONSUMER PROTECTION:

S3 ACL: A consumer is anyone who acquires goods or that cost less than \$40k, or cost more than \$40k, but are for regular household use.
S18 ACL: A person must not engage in deceptive or misleading conduct.
 The courts will use an objective test to see if something is misleading (Henderson v Pioneer Homes Pty Ltd)
S232 ACL: Requires business to stop conduct
S236 ACL: Damages to those suffering
S246 ACL: Establish compliance and educate employees
S20 ACL: A person must not engage in conduct that is unconscionable (not right) by law.
S21 ACL: A person must not; *supply goods or services*, or *buy goods or services*, that are unconscionable.
S22 ACL: Unconscionable conduct guidelines:
 - *Strengths of bargaining positions*
 - *Whether the customer understands relative documents*
 - *Whether undue influence was used*
 - *Whether the suppliers conduct was a factor*
S224 ACL: A business may incur financial penalties for unconscionable conduct
S243 ACL: A contract may be wholly or partly voided for unconscionable conduct

CONSUMER GUARANTEES:

S54 ACL: The goods are of acceptable quality
S55 ACL: The goods are fit for purpose
S56 ACL: The goods fit their description
S60 ACL: Services performed with due care
S61 ACL: Services, and products resulting, are

fit for any disclosed purpose.

S64 ACL: A business cannot exclude consumer guarantees

SAFETY DEFECTS:

S9 ACL: Goods only have a safety defect if their safety is not of assumed or marketed standard
 Compensation is owed to:
S138 ACL: The injured individual
S139 ACL: Anyone other than the injured individual who suffers as a result
S140 ACL: Anyone who used goods damaged by the defect
S141 ACL: Anyone who used land destroyed by the defect

NEGLIGENCE & VICARIOUS LIABILITY:

NEGLIGENCE:

For requirements for tort negligence:
 1. Defendant owed a DOC to the plaintiff
 2. The defendant breach DOC
 3. The breach caused harm to the plaintiff
 4. Defences may reduce liability to the plaintiff

1. OWED DUTY OF CARE

Established categories of duty of care (DOC):
 • Motorists owe DOC to other road users (Imbree v McNeilly)
 • Doctors owe DOC to patients (Rogers v Whitaker)
 • Manufacturers owe DOC to people who use their products (Donoghue v Stevenson)
 • Occupiers owe DOC to any on their premises (Australian Safeway Stores Pty Ltd v Zaluzna)

To establish a duty of care:

1. Reasonably foreseeable that harm was due to defendant's acts (Donoghue v Stevenson)
2. Plaintiff must show the features of the case fall under duty of care (Sullivan v Moody)
 - (i) *The control the defendant had in the situation*
 - (ii) *The relative vulnerability of the plaintiff*
 - (iii) *The need for taking responsibility of actions*

If the harm is not reasonably foreseeable, it is not a breach of DOC (Bourhill v Young)

Defendant owes DOC to the plaintiff if giving advice: (Hedley Byrne v Heller)

1. The advice was serious or of business nature
2. An assumption of relying on the advice exists
3. Relying on the advice was reasonable

A person giving advice owes DOC to a third party if: (Esanda Finance Corporation Ltd v Peat Marwick Hungerfords)

1. The advice is given with knowledge that it will be passed on to the third party
2. The advice is likely to cause the third party to enter a particular type of transaction
3. It is likely the third party will suffer financial loss as a result from entering in the transaction

