

Revision Questions and Answer Guides**Question 1**

In April 2016, the Federal Court of Australia found that the maker of *Nurofen*, Reckitt Benckiser, breached section 18 of the Australian Consumer Law “and another section of the ACL”. The Federal Court found *Nurofen*’s “specific pain” range misled consumers because they all contained the same active ingredient — ibuprofen lysine 342mg — and did the same thing. Nevertheless the “specific pain” range costs twice as much as the “non-specific” general *Nurofen* product. The products promised to relieve back pain, period pain, tension headache or migraine, even though it is not possible to specifically target pain relief in such a manner. It was admitted by the ACCC that if a consumer looked carefully he or she would have noticed small print on the packets that said that the active ingredient in each of the products was the same.

The ACCC is responsible for prosecuting the manufacturer in the Federal Court. What arguments do you believe the ACCC would have presented to the Court in relation to the breach of s18? Refer to relevant cases and statutes.

(10 marks)

Answer Guide

Main issue concerns ACL sections 18 and s29(1)(a)

The arguments that the ACCC would make in relation to s18 would be similar to those used in cases such as *ACCC v TPG*, *ACCC v Coles*, *ACCC v Turi*. Students should indicate:

(a) what misleading conduct means – lead into error; and

(b) discuss how misleading conduct is established – use TPG/Coles case – determine what the target audience is (reasonable and ordinary consumers – not necessary to have a pharmaceutical background) and then ask what is the “dominant message” to that audience (as in Coles and TPG). Small print won’t save RB if the dominant message is that it is better to pay a higher price for the specific kind of nurofen, bearing in mind we are talking about an item that normally is a quick purchase (like bread in *ACCC v Coles* or chips in *Apand v Kettle Chips*), one that the consumer would not examine carefully (unlike the lounge suite in *Parkdale v Puxu*)

Question 2

Ashraf Ghani completed a diploma in Cooking and Baking at William Anguish College. Immediately after graduating he set up his own bakery in Dandenong that he called "Kabul Breads". A few months later as things were going well, Ashraf decided to expand his business. Around that time he met an old Afghani friend, Shah Masood, who was an accountant and financial adviser. They discussed Ashraf's expansion plans and Shah quickly offered to review his financial situation and prepare a business plan. As Ashraf was financially ignorant and needed expert guidance, he accepted Shah's offer and gave him his financial records.

Shah prepared a financial report and advised Ashraf that he was in a sound financial position and could expand his business. He recommended that Ashraf borrow money in order to set up a new bakery on fashionable Lygon Street in Carlton. Ashraf trusted his friend and decided to act on the advice. He borrowed \$500,000 from "For You Only", a small credit union located in Springvale that provided loan and overdraft facilities. "For You Only" used the financial report prepared by Shah to offer a loan to Ashraf. Ashraf signed a five-year lease.

Soon after opening his new shop, Ashraf realised that people who visit the Lygon Street area generally only buy traditional Italian food and bread – there was no market for Afghani bread. Ashraf soon came under financial stress and blamed Shah for his situation. Shah admitted that he had not adequately factored in Ashraf's pre-existing debts and had underestimated the significant costs associated with setting up the new business. Shah advised Ashraf to terminate the lease and inform "For You Only" that he would be unable to repay the loan. "For You Only" is faced with significant losses.

Advise Ashraf and "For You Only" about their prospects of success in an action against Shah in the tort of negligence. Refer to relevant cases and statutes

(15 marks)

Answer Guide

Students should examine the duty of care question *vis-à-vis*

(A) Ashraf

(i) *Special Relationship*

Students are expected to distinguish the two-party situation (*Hedley Byrne/MLC v Evatt/Shaddock*) that affects the relationship between Shah- Ashraf – the "special relationship" and the criteria outlined by Barwick in *MLC v Evatt & Shaddock's case*.

Better students may discuss the indeterminacy issue (*Ultramares*) for the reason why *D v S* neighbour principle is not applicable

Here we look for a "special relationship"

- Serious matter

- Speaker realizes that he/she is trusted
- Reasonable reliance.

In this question it would most likely satisfy the above test. Duty of care likely.

(ii) *Breach*

Having decided there was a duty of care, discuss whether the duty has been breached. Under common law or statute the question is whether the defendant has done what a reasonable person, equipped with the same skills and expertise expected of a person exercising a particular trade or profession, would do?: *Rogers v Whitaker*

Statutory defence – a brief discussion of the defence for professionals providing advice (ss 59-60) - defendant can have a defence (once breach has been established) that he or she acted in a manner widely accepted by peer professional opinion. It is unlikely that Shah would have satisfied the common law test or be able to plead the s 59 defence.

(ii) *Causation and Remoteness*

- (a) Causation – obvious - Ashraf borrowed the money and leased the shop and set up the web page on the strength of the advice given by Shah.
- (b) Remoteness - common law and the statute require that the loss not be too remote from the breach: *Wagon Mound*. The critical question that must be raised is whether the damage was “reasonably foreseeable” on *Wagon Mound* principles. It is likely that Ashraf’s losses referred to above satisfy the remoteness test.

(iii) *Defences*

- (a)** Contributory negligence – it is possible that Shah may argue that Ashraf contributed to his loss by failing to take reasonable precautions against a foreseeable risk. The statute provides that the same principles that apply to determine a breach of duty apply to determine whether there has been a failure to take reasonable care for one’s own safety. On the facts given there is not sufficient evidence to suggest Ashraf should have sought a second opinion.

(B) “For You Only”

Shah is not directly aware of the plaintiff “For You Only” and there is no “antecedent relationship” (*San Sebastian*). Focus on the principles of *Esanda v PMH* – D knew or ought to reasonably have known that the advice would be communicated to P (or a class to which P belongs) for a purpose that would be very likely to lead P to enter into a transaction of the kind that P does enter into, would act on it and suffer loss if the advice was careless

- No intention to induce action/reliance

- Mere knowledge is not enough.

On these facts, it is unlikely that a duty of care would arise.

Question 3

George and Jacob are partners in a superannuation advice practice known as “Super Men”. Bronwyn, an enthusiastic supporter of the alternative technology, sought advice about the financial benefits of investing some of her super funds in a wind farm project that was looking for investors. George advised that in his view the project was secure and she would receive a 20% per annum return. Bronwyn invested a significant amount of her super money in the project. It never returned 20% and eventually she lost most of it when the founders went missing. George should have known that the returns would not exceed 5% and he under-estimated the risk. Bronwyn seeks your advice about whether she should sue Jacob and George.

Is Jacob liable under the *Partnership Act* for George’s negligent advice to Bronwyn? Refer to relevant cases and statutes

(10 marks)

Issues: s14 all partners liable for wrongful act and omission committed by any partner- in the ordinary course of the business of the firm- being a financial planning practice then this could include structuring advice for B’s investment; or is done with the authority of the partners- this probably the case but no evidence of this in problem.

S16 Partnership Act - liability under s14 is joint and several meaning that B can sue J individually or together or pick one of them to sue. J cannot avoid liability.

Question 4

Ace Cleaning Ltd (AC) was established in 2010. It specialises in office cleaning in the CBDs of several states. It has two directors (Ellie and Abdul) and Ang Lee is the CEO. The company secretary is Renae. The company was very profitable for the first few years of operations and in February 2015 entered into a contract with Cleaning Systems Ltd (CS) to purchase a new vacuum and washing equipment system for \$5 million payable over three years.

In April 2016 AC was facing financial difficulties – indeed, it had the appearance of insolvency: it couldn’t pay its cleaning suppliers and the bank was dishonouring its cheques. Nevertheless, Ellie and Ang Lee committed to a \$300,000 advertising campaign, genuinely believing that it would help boost sales. Abdul was not involved in this decision as he decided to visit his dying father back in Malaysia. Unfortunately, the campaign did not produce the required results and AC has been put into liquidation.

Advise Ellie, Abdul and Ang Lee whether they can be made personally liable for the money owed for the advertising campaign. Refer to relevant cases and statutes.

(10 marks)

Personal liability of directors is rare. One instance is where the directors have breached the insolvent trading provisions of the CA: s.588G. Students to discuss all *relevant* provisions. Company appeared to be insolvent (couldn't pay suppliers, bank dishonouring its cheques etc). In regard to Ang Lee's liability and whether he can rely on the defences, need to ask whether his absence is a 'good reason' for the purposes of s.588H(4). If insolvent trading proved and defences not available, the liquidator of the company may, *inter alia*, seek compensation from the directors as a debt to the company.

Question 5

Nancy is in her final year at university. In order to graduate in November, she must submit her final folio of work to her supervisor by October. Nancy takes her work to Casey to be professionally bound. She explains to Casey the importance of having the work completed by 1 October, and Casey assures her that this can be done. The binding process is delayed due to technical issues and the bound folio is not delivered to Nancy until late October. As a result, she is unable to graduate until February. Her parents then have to cancel their flight from Perth to Melbourne and lose a deposit of \$500. Nancy telephones Casey and tells him that he has ruined her life and that he owes her parents \$500 for their lost deposit. Advise Casey of his liabilities. Refer to relevant cases.

(10 marks)

Students to discuss the right to seek damages for breach of contract – particularly in relation to the issue of *remoteness* (and the need of the court to limit the extent to which the defendant is responsible for what happens post-breach). The general principle underlying an award of damages is that damages for breach of contract are awarded to place the innocent party, as far as money can do so, in the same position as they would be in if the contract had been performed.

The party who is in breach of contract is liable in damages to the other contracting party for:

- (a) loss arising naturally from the breach, that is, loss occurring in the usual or normal course of things from the breach of contract; or
- (b) loss which is actually contemplated as a probable result of the breach, that is, loss occurring as a result of special or exceptional circumstances where such were made known to the party in breach so that they could have

reasonably contemplated the likelihood of exceptional loss if the contract was broken: *Hadley v Baxendale*

Performance is not exact. The time term as written may suggest a time is of the essence contract. If so, then the breach justifies full termination and damages. The probable consequences of breach are known since Nancy informed Casey of the importance of the due date for completion. Damages that flow naturally from this breach are recoverable by Nancy. Damages caused to her parents indirectly are likely too remote (applying *Hadley v Baxendale* and *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*).

Question 6

Olga migrated to Australia with her husband and two children from Russia one year ago. Her command of English is poor and she has little understanding of everyday business matters.

While home alone a sales representative of “Feel Good Gymnasium” knocked on her door with an offer for a two-year family deal at the gymnasium for \$5,000. The salesman explained that it was necessary in Australia for her children to be fit and in good shape at school, or else they were likely to be bullied. Olga, hearing this from the salesman signed the gymnasium membership contract immediately. She also made an initial advance payment of \$1,000.

Olga’s husband Peter returned home that evening and learned about the gymnasium expenditure and was very upset and angry. As the couple have recently migrated they have little money and Peter believes that the salesman made up the story about bullying at school.

Olga now wishes to get her money back and get out of the contract.

Advise Olga of any statutory rights she has under Australian Consumer Law against “Feel Good Gymnasium”. Use appropriate sections and cases to support your argument.

(5 marks)

Olga has potential rights under the *Australian Consumer Law*. In particular the unconscionability provisions. Discuss s20 (under the general law – *Amadio/Louth*) and s21 (goods and services)

Section 20(1) makes it clear that a person, in trade or commerce, must not engage in unconscionable conduct under the ‘unwritten law’ (common law – *Amadio/Louth*). Olga needs to prove an *Amadio* situation – special disadvantage, that D knew or should have known about but proceeded to enter the contract anyway. Olga appears to be under a ‘special disadvantage’ by virtue of her poor English, recent arrival, and lack of knowledge of everyday business matters. Her lack of English expertise and command of everyday matters must have been

obvious to the salesman. Whether the salesman took advantage of her position is unclear; there is no evidence on whether he explained the arrangements or was offering a reasonable deal or whether he suggested she discuss the matter with her husband. There is a real possibility that the requirements of *CBA v Amadio* are made out here.

Alternatively, under s 21, Olga may be better served by bringing her action under s21(1). This section prohibits unconscionable conduct in relation to the provision of goods or services in trade or commerce. Section 22 lists the factors that a court may examine in determining whether the supplier (s22(1)) or acquirer (s22(2)) has engaged in unconscionable conduct. Of particular relevance here is s22(1)(c) and (d). Olga was unable to understand the documents she signed (given her poor English), and arguably making assertions about the gymnasium protecting her children from bullying might be characterized as 'unfair tactics'.

The facts of this case appear to offer close parallels with *ACCC v Lux*, where a door-to-door salesman took advantage of an illiterate and naïve woman at home alone to 'press' her into a terms contract for the purchase of a vacuum cleaner. The salesman used pressure tactics including conducting a bogus test comparing the ladies vacuum cleaner with a near-new demo model which unsurprisingly showed how poor the ladies' vacuum cleaner was. In *Lux*, the plaintiff was able to successfully avoid the contract and recover her money. If successful here, the ACL offers Olga remedies sufficient to set aside the contract and recover her \$1,000.

Students may also argue that an action under s18 is possible

Question 7

Sally Bowles owns and operates a very successful song and dance club called the Kit Kat Klub. One evening, her sophisticated sound system breaks down. She contracts with a sound technician, Cliff Bradshaw, to repair it. The faulty parts of the system have to be taken to his workshop but he promises that he will return the next day and have the system up and running so she will not have to close the club. Unfortunately, because of Cliff's carelessness, and lack of respect for punctuality, the sound system is not returned for three days. Sally looks but is unable to find a substitute system so she has no choice but to close the club for those three nights. She now seeks compensation for the lost profits (approximately \$6500) for the first two nights she had to close the club. On the third night she had contracted with Cosmo Brown, a famous American tap dancer, to perform and expected to earn an additional \$15,000 profit from his appearance. Cliff was not aware that Cosmo was appearing at the Kit Kat Klub. Sally is also seeking damages to compensate her for the embarrassment she has suffered as a result of having to cancel the contract with Cosmo and disappoint his many fans.

Please advise Sally whether you believe she would succeed in her claims for damages against Cliff

(15 marks)

Answer guide

The issue in this question concerns whether Sally is entitled to claim damages from Cliff.

1. First explain the objective of an award of damages for breach of contract - compensation for victim of breach not punishment for the guilty one. P should be put in position he or she would have been in if the contract had been performed as promised: *Robinson v Harman*.
2. What must Sally prove?
 - a. There is a causal link between the breach and the loss - “but for” the breach the loss would not have occurred.
 - b. The loss is not too remote from the breach – that is, the loss is a reasonably foreseeable result of the breach - two limbs of *Hadley v Baxendale*
 - i. first limb concerns losses that are reasonably foreseeable because they are losses that “arise naturally” or “in the ordinary course of things”: see *Victoria Laundry and Parsons*. The \$6500 loss of profit would come under this limb.
 - ii. The claim for \$15,000 (regarding losses arising from Cosmo not appearing) is not a “first limb” claim (a reasonable person would not expect such a famous person to be appearing on that night), so it would only be recoverable if it comes within the second limb that requires “actual notice” to be given. As Sally did not give Cliff notice, it is unlikely she would be able to recover the \$15000.
 - iii. Are the damages for her embarrassment/disappointment too remote? Damages are not usually recoverable for disappointment or embarrassment. The exception is when the contract itself is for entertainment or enjoyment (such as a cruise (*Dillon*) or a ski holiday (*Jarvis*) is the law likely to compensate a plaintiff in such circumstances. The contract between Cosmo and Sally was a strictly commercial deal (one that gave pleasure or enjoyment to others.)
3. A plaintiff must try to reduce or mitigate loss or the damages will be reduced: *Payzu*. Only need to do what is reasonable. Here, we are told that Sally did look for a substitute system. In this sense, she probably did enough. Her damages would not be reduced.

Question 8

Joanna's boyfriend is into rock-climbing and he asks Joanna to come with him on a rock-climbing expedition run by Rock and Roll Safaris to the Arapiles in the Grampians in the West of Victoria. The cost is \$500 for 5 nights. As Joanna does not have appropriate shoes, she goes to Boots 4 U. After explaining her intention to climb in the Arapiles, the sales assistant recommends a pair of "Matterhorn" boots for the expedition. Joanna takes note of the advice, examines the boots, sees that on the box they are called the "Matterhorn – the best Swiss rock-grippers", and buys a pair for \$300. However, unfortunately for Joanna, the boots do not grip well on the granite rocks of the Arapiles and she is forced to abandon the rock climbing. She spends her time on the ground reading a book. Advise Joanna of any remedies she may have against Boots 4 U under Part 3-2 of the Australian Consumer Law

(15 marks)

Answer guide

The issue is whether remedies under Part 3-2 (consumer guarantees) of the ACL are available to Joanna.

This involves a discussion of the relevant criteria (as there is no "issue" that the boots are "goods", that have been "supplied" in "trade or commerce" and that Joanna is a "consumer" under s3(1) students are not expected to discuss these definitions).

1. Under the ACL, if a person supplies goods to a consumer in trade or commerce the goods must satisfy a number of consumer guarantees. Three of these guarantees are of most relevance:
 - a. the goods be of "acceptable quality" (s54(1)). Discuss meaning of "acceptable quality": s54(2). On the facts, it is unlikely that the boots are "fit for all the purposes for which goods of that kind are commonly supplied" (first criteria) - the goods are not of acceptable quality particularly having regard to the statements made about the goods on any packaging or label (s54(3))
 - b. the goods must be "reasonably fit" for (i) a purpose which the supplier represents they are for; or (ii) a purpose the consumer makes known to the supplier that they will use the goods (s 55(1)). The meaning of a disclosed purpose is discussed in s55(2) but it is clear that there has been a breach of this consumer guarantee in respect of (i) and (ii) above: the boots are not fit for the purpose represented by the supplier and for the purpose disclosed by Joanna.

2. Having established that one or more of the guarantees have been breached consider any remedies that may be available to Joanna. The remedies depend on whether the breach is considered to be a major or minor failure.
 - a. A major failure is defined in s260 as a situation where the goods would not have been acquired by a reasonable consumer who was fully acquainted with the nature and extent of the failure, or where the goods differ in significant respects from their description or are substantially unfit for a common purpose and cannot easily be remedied or where goods are not fit for a disclosed purpose. Joanna would successfully argue that there has been a major failure on each of these counts. Therefore, she may reject the goods or recover compensation for any reduction in the value of the goods below the price paid: s 259(3).
3. Joanna may also recover damages for any reasonably foreseeable loss or damage caused by the failure to comply with the guarantee: s 259(4). It is likely she could claim (from Boots 4 U) at least part of the \$500 cost of the expedition as compensation for her inability to climb.

Question 9

Giorgio experiences a heart murmur, so he consults with his GP, Dr Kee. Dr Kee tells Giorgio not to worry and decides not to send Giorgio for further tests. Shortly thereafter, Giorgio suffers a cardiac arrest and as a result is brain damaged. Giorgio now intends to claim damages for negligence, arguing that Dr Kee should have taken a possible cardiac problem into account when the heart murmur was detected and arranged an ECG and referral to a cardiologist. Dr Kee admits he owes Giorgio a duty of care. Please advise Giorgio whether his claim is likely to succeed.

(5 marks)

Answer guide

The issue whether there has been a breach of a duty of care (you have been told that a duty of care exists).

1. Breach of duty depends on whether the defendant met the standard of care required by the law of negligence. The standard expected is that of the "reasonable person". The reasonable person is equipped with the same skills and expertise expected of a person exercising a particular trade or profession. For example, in an action against a doctor for professional negligence, the relevant standard is that of an ordinary,

competent doctor exercising ordinary professional skill: *Rogers v Whitaker*

2. Where the plaintiff proves that the defendant professional has not exercised reasonable care in the discharge of their professional duties, the defendant is liable unless it can be shown by way of defence that the defendant acted in a manner that satisfies the test in s 59 of the *Wrongs Act* – this depends on D providing evidence in court (from his peers) that he acted in a manner that was ‘widely accepted in Australia by a significant number of respected practitioners in the field as competent professional practice in the circumstances’. This is not easy to establish and, even where peers do provide that evidence a court may disregard it if it believes the opinion is ‘irrational’: s59(2) and *Mules v Ferguson*. Thus, the question is whether Dr Kee acted in a reasonable way. If the heart condition would have been revealed had Dr Kee referred Giorgio for an ECG or to a cardiologist, Dr Kee may be found to have breached the duty of care and may then attempt to rely on s59 defence

Question 10

Jacob Farook’s company, JF Solar Panels Pty Ltd., has been running a solar panel business for many years. Jacob is the sole director and the sole shareholder. In July 2016, Jacob ordered glass panels to the value of \$1m from Glass Makers Pty Ltd, a glass wholesaler, as he had done on many occasions. At around the time the order was placed, the company was experiencing serious cash-flow problems and was unable to pay its debts. Jacob, who was so immersed in the research and development side of the business, did not pay sufficient attention to the company’s accounts and only realised it was in serious trouble a month later. When the glass was delivered in September, the company could not pay the account and it has remained unpaid. The manufacturer is now suing both the company and Jacob. Advise Jacob of the extent (if any) of his liability.

(10 marks)

Answer guide

The issue here is whether Jacob is liable for the debts of the company.

1. The first question concerns Jacob’s possible liability as a director of the company – this involves an understanding of the nature of a corporation as a separate legal entity, the concept of the “corporate veil” and the circumstances when it may be lifted. Since the company was registered as a company, it exists as a separate legal entity capable of entering into contracts does and it can sue or be sued on those contracts: *Salomon v Salomon & Co Ltd* and recognised by s124(1) *Corporations Act*, which gives every registered company the full legal capacity of natural person.

For Jacob, this means that the company had the legal capacity to form the contract with the manufacturer, and it is the company that is legally responsible to perform the contract or pay damages for breach. Jacob may be the sole director and sole owner of the shares in the company, but, in the eyes of the law, the company is a separate legal person and Jacob is not responsible for its debts.

2. As a director of the company, Jacob is also not personally liable for the debts of the company. An exception under the *Corporations Act* is where the corporation has been trading whilst insolvent. Section 588G prohibits company directors from allowing the company to incur new debts at a time when the company is unable to pay existing debts as they fall due (this is the statutory definition of insolvency: see s95A), or if incurring such new debt(s) would make the company insolvent. On the facts, we are told that the company was experiencing difficulty paying its debts when it placed the order. It is, therefore, likely that it was insolvent according to the definition in s95A. If so, Jacob would be personally liable for the debt under s588J, K and M and *ASIC v Plymin, Elliott & Harrison* unless his ignorance is an excuse.
3. Is ignorance of the cash-flow position a defence to the offence in s588G? Jacob would have to establish that he had reasonable grounds to expect, and did expect, that the company was solvent. The defences to s588G are set out in s588H. As Jacob appears to be running the business himself and not relying on a “competent and reliable person” (s588H(3)), the only relevant defence is s588H(2). Under this sub-section it is a defence if it is proved that the defendant had reasonable grounds to expect, and did expect, that the company was solvent and would remain solvent even if it incurred that debt. In *ASIC v Plyman*, the Court said that in order to escape liability using s588(2), directors must show they made sufficient enquiries and sought external advice to allow them to reasonably conclude the company was not insolvent. On the facts, it is unlikely that this would be the case. Jacob was simply unaware of the state of the company. Ignorance is not enough, so it is likely that he would be liable for a breach of s588G.