



# Revision and Exam Prep

## Commercial Law

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## The exam

- The exam is a **3 hour open book exam with a 30 minute reading/noting period.**
- There are **4 compulsory questions** – each worth 1.5 marks. There are parts in each question. Allocate your time wisely
- Use the **reading/noting period**—make a *brief* plan for each question.
- **Write as clearly** as possible - your examiner has to read it!
- **Start each answer on a new page**

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- Adopt the method for answering that you have been using in tutorials and were demonstrated in the 5 scenarios we provided throughout the semester:
- Read the question carefully;
- Be clear about what you are being asked to do (especially study the final instruction...; eg advise A of his common law rights...or advise about rights under ACL );
- Identify the *specific/relevant* issues that the problem raises;
- Discuss the law on the issue (supported with cases/statutes) and apply it to the problem. Please make sure you have an adequate *discussion of the law*; and
- Brief conclusion

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## How to prepare

- **Complete your summaries**
  - Short clear summaries of principles and supporting cases/statutes. 1-2 pages at most.
  - Cases: knowledge of facts and decisions is very useful—can argue by analogy 'this aspect of the problem is like X case...or is different from X case'
  - Statutes: know the sections and their effect. Refer to relevant sections in your answer.
- **After revising/preparing attempt some answers to problem questions:**
  - Tutorial problems
  - Previous exam questions that have been uploaded

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## The examinable syllabus

### Topic 1. Contractual termination and remedies for breach

#### ■ The main ways in which a contract can be terminated

- Termination by performance
  - Exact and substantial performance
    - *Cutter v Powell; Hoenig v Isaacs; Bolton v Mahadeva*
  - Acceptance of partial performance
    - *Sumpter v Hedges*
- Entire and divisible contracts
- Time clauses
- Termination by breach
  - Repudiation and breach in performance
    - *Laurinda*
    - *Schuler*
- Termination by frustration
  - The concept
  - The rules and the cases – including *Codelfa*

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#### ■ Remedies

- **Termination** for breach of condition and repudiation
  - See earlier
- **Damages** for all breaches
  - Measure – expectation losses
    - *Robinson v Harman*
  - Causation
  - Remoteness
    - *Hadley v Baxendale*
      - Losses arising naturally
      - Within contemplation of the parties
  - Duty to mitigate
    - *Hadley v Baxendale*

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## Topic 2. Consumer Protection

### ■ 1. Prohibition of misleading or deceptive conduct: s18

#### ■ Elements – see fig 13.2

- Meaning of misleading conduct:
  - ACCC v Coles
- ACCC prosecutes for breach of s18 (and ss29/33 etc):
  - ACCC v TPG
- Competitor v competitor
  - McWilliams v McDonalds
  - Parkdale v Puxu
  - Apand v Kettle Chip
- Pre-contractual misreps
  - Metricon
  - Henjo
  - Demagogue

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#### ■ Silence/intention/fault/exclusion clauses

##### ■ **Butcher v Lachlan Realty**

- Reps about the future: s4(1)
- Remedies for breach of s18
  - Damages – s236
  - Range of other orders including rescission, variation of contract, injunction: s237, s243

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## ■ 2. Specific false reps: s29 - fig 13.6

### ■ Specific false reps (Other unfair practices – not examinable)

- s29(1)(a)-(n)
  - ACCC v Dell
  - Nationwide News v ACCC
  - Ascot Four v ACCC
  - ACCC v Gordon Superstore

### ■ Remedies

- Pecuniary penalties: s224 (\$1.1m for corp and \$220,000 for individual)
- Liability of those who aid and abet: s2(1) definition of "involved":
  - Except if just conduit – passing information on without verifying it: **Yorke v Lucas**

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## ■ 3. Prohibition of unconscionable conduct

- **s20** - 'unwritten law' – special disadvantage
  - Berbatis – explain why not special disadvantage
  - Samton – explain why not special disadvantage
- **ss21 – 22** – provision of goods and services
  - s21 – the offence
  - s22 – the factors
  - **ACCC v Lux** – why unconscionable? 'Societal values'

## ■ 4. Unfair Contract terms: ss23-25

- **The definition – s23**
  - inc def "standard form" and "consumer" (predominantly for personal and domestic use, it is the only aspect of the consumer in this case).
- **Meaning of "unfair" – s24**
- **Examples of UCT – s25**

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## ■ 5. Consumer guarantees for goods and services

– see fig 13.7

### ■ Part 3-2 ss51-56, 60-61

#### ■ Key aspects:

- Supply: s2(1)
- Consumer: s3(1)(2)
- The guarantees
  - Acceptable quality: s54(2)(3)(4)
  - Fitness for Disclosed Purpose: s55(1)(2)(3)
- Limitation of liability: s64(1); s64A(1)(2)(3) and s139A
- Remedies for non-compliance
  - Major and minor failures: s259(1)(2), s260

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## Topic 3. The Tort of Negligence

### ■ General principles: duty, breach, damage and defences

- Note principles and cases

### ■ 1. Duty of care

- Liability for acts/omissions causing physical, psychological property damage: Donoghue v Stevenson
  - Reasonable foreseeability of harm and proximity
    - Donoghue v Stevenson (broad ratio – “who, in law, is my neighbour...” and narrow principle concerning a manufacturer’s duty to consumers)
    - Tame v NSW (psychological damage)
    - Jaensch v Coffee (psychological damage)
    - Roger v Whitaker (omissions)
  - Very often a duty of care has been established by precedent. For new/unusual situations where no precedent, need to consider salient features: Perre v Apand
    - Vulnerability of plaintiff?
    - Assumption of responsibility by D
    - Indeterminacy argument

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- **Liability for defective advice and information causing pure economic loss**

- **Two party situations**

- Broad principles laid down in Hedley Byrne, Shaddock, MLC v Evatt, San Sebastian
    - "Special relationship" (HB)
    - See *Barwick extract* from MLC v Evatt
  - Advice and information: Shaddock v City of Parramatta - study principles carefully
  - Volunteering Information: San Sebastian - study principles carefully

- **Three party situations: Esanda v PMH**

- Why narrower duty of care?
    - What needs to be proven in order for a duty of care to exist? See Esanda?

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- **2. Breach – Common law and Wrongs Act**

- **Overall standard of care – "reasonable person" test**

- **How to assess –**

- **Common law**

- Response to relevant ("not far-fetched or fanciful") risk by the a reasonable person
      - 4 Wyong factors (probability/gravity/difficulty/social utility)
        - Romeo v CC
        - Bolton v Stone
        - RTA v Dederer
        - Paris v SBC

- **Wrongs Act – two stage process**

- S48(1) – **risk** - *foreseeable* ("not insignificant") risk of harm
      - S48(2) – **response to risk** - how wd a reasonable person have responded? Same as Wyong factors (above)
      - S49(b) and (c) – effect of subsequent conduct
      - **Professionals defence** – peer professional opinion: Wrongs Act ss59-60. Mules v Ferguson

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### ■ 3. Damage

- There are two aspects:
  - **Causation:** the breach of duty must *cause* the loss
    - P must show that '**but for**' the breach, the loss or damage that would not have occurred- a "**common sense**" test is applied
    - Strong v Woolworths (CACL 14.508) - HCA 'the main question is...plaintiff's loss'.
  - **Remoteness:** the loss must not be too *remote* from the breach – ie must be reasonably foreseeable
    - At **common law and statute** (Wrongs Act s51(1)(b) a defendant should only be responsible for damage that is **reasonably foreseeable**
    - Wagon Mound (No 1) (CACL 14.520)

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### ■ 4. Defences

- **Contributory negligence** (CACL 14.560)
  - D's defence – P failed to take reasonable care of his/her own safety.
  - Damages that are assessed will be *reduced* to reflect the defendant's own contribution to the damage: Wrongs Act ss62-63
- **Volenti non fit injuria** (CACL 14.570)
  - A person cannot complain of damage which results from a risk which was accepted: Wrongs Act s54)
  - *Complete* defence

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## Topic 4. Bus Orgs: Partnerships/Agency

- **Intro to bus orgs**
- **Intro to partnerships**
  - Formation, number, capacity, firm name
- **Three sources of partnership law:**
  - Partnership Agreement
  - Common law – fiduciary relationship
  - Partnership Act: (gap-filler) s5 (def) and stat rules s6(1)-(3)
    - Smith v Anderson
    - Khan v Miah
    - Goudberg
    - Spicer v Mansell
    - Degiorgio v Dunn
    - Re Ruddock
    - Cribb v Korn
    - Cox v Hickman

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- **Liability of partners to each other: fig16.3**
  - *Note that each is a principal and an agent. A partner can bind the others if the partner has actual or ostensible authority*
  - Partnership Agreement (if there is one)
  - Partnership Act – rights and duties: ss28-29
  - Fiduciary obligations (equity and ss32-34)
    - Chan v Zacharia
    - Scotts and Momentum Productions Pty Ltd
  - Partnership property: s24
    - Harvey v Harvey –
      - why did the farm never become p'ship property?
    - Nature of a partner's interest?
    - Goodwill

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- **Liability of partners to TP**
  - Agency principles that affect p'ship law
  - Authority – Actual and Apparent Authority: see CACI 15.15.200-15.262
- **Liability for contractual debts and obligations:** ss9/13
  - Elements of s9
    - "within scope of the kind of business"
    - "carried out in the usual way"
    - without knowledge of TP or TP does not know him to be a partner
      - Mercantile Credit v Garrod
      - Goldberg v Jenkins
  - Liability is joint – each one is fully liable: s13
  - Liability of incoming partner: s21
  - Liability of retiring partner: s21
  - Liability for "holding out" as a partners: s18

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- **Liability for wrongful acts**
  - What are "wrongful acts"?
    - Torts, crimes, misleading conduct,
    - **not** breach of contract
  - **Elements:** "ordinary course of the business of the firm" or "authorised by the co-partners": s14.
  - **Liability is joint and several** (each partner is fully liable and can be sued individually): s16, 15
  - **Cases**
    - Walker v EE
    - National Commercial Banking Co v Batty
    - Polkinghorne v Holland
- **Dissolution of partnership**
- **Limited partnerships:** Part 3 of the PA

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## Topic 5. Corporations/agency

- **Features/powers of a corp**
  - Creation of separate legal person
  - Salomon/Lee & Corps Act s124
- **Types of corps**
  - Proprietary and Public

### Following is not examineable:

- **Registration and Constitution/replaceable rules: fig 17.1**
- **How does a corp enter into a contract?**
  - s126 (indirect authority by agent signing)
  - s127 (direct signature by co. with or without seal)
  - **statutory assumptions** that a TP is entitled to make when entering a contract: ss128-129
    - s128 – entitlement to make assumptions – note s128(4)
    - s129 – the assumptions
      - s129(1)-(6)
      - Holding out – apparent authority: Panorama Developments v FF

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- **General law and Statutory Obligations of Directors – see fig 17.3**
- **Duty of care skill and diligence (common law) and s180(1) and Business Judgment Rule (s180(2))**
  - ASIC v Healey
  - ASIC v Hellicar
  - Daniels v Anderson
- **Duty to act in good faith and for proper purpose: s181**
- **Duty not to misuse position to gain advantage or cause detriment to the corp: s182**
  - ASIC v Adler
  - Cummings v Claremont
- **Duty not to use position to obtain and use information improperly: s183**
  - ASIC v Vizard
- **Criminal offences – good faith, mis-use of position and mis-use of information: s184** (in other words ss181-183 but done with recklessness or intent)
  - Adler
- **Disclosure of interests: s191**

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- **General Penalties** - see **fig 17.4** – see CACL 17.1010

- **civil** (for ss180-183, 191)

- \$200,000
    - Management ban
    - \$1 million for the corporation

- **criminal** (for s184)

- \$340,000
    - Imprisonment for 5 years
    - Management ban
    - \$1 million for the corporation

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- **Director's duty to prevent insolvent trading: s588G**

- **Elements: s588H**

- **Consequences**

- Civil penalty (as above)
    - Directors to compensate creditors: s588J
    - Liquidators rights against directors: s588M

- **Defences-588H**

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