1. Judge-made law.

2. Judicial precedent.

3. The Queensland hierarchy of courts.

4. *Ratio decidendi* and *obiter dicta.*

5. *R v Kaporonovski* [1972] Qd R 465; *Kaporonovski v R* (1973) 133 CLR 209.

### STATUTE LAW

We have seen in **Chapter 2.4: The Australian Constitution** and in **Chapter 2.5: Parliaments: Sources Of Statute Law** that the Parliaments of the Commonwealth of Australia and of Queensland have the authority to make laws which apply to our lives, and that these laws override the common law to the extent that they are applicable. Again, it would be very useful for you to read these earlier chapters about statute law, and summarise the main aspects of them for future revision. This time, make up your own headings under which you make notes to describe and explain statute law, what it means, where it comes from, and how it is applied.

Ch 2.4
Ch 2.5

SAMPLE PAGES

#### WHAT DO YOU THINK?

The process by which the relationship between common law and statute law is maintained, involves interaction between parliaments as law-makers, courts as guardians and sources of the common law, and courts as interpreters of statutes. This is illustrated for you in Chapter 2.5, namely **Separation of Powers in the Australian Legal System**.

What do you think are the advantages and disadvantages of the separation of powers doctrine? Try to give actual examples in your answer of legal situations in which the doctrine is important. [C] [S] [A] [E]

## 14.3 DISTINGUISHING CIVIL LAW FROM CRIMINAL LAW

The development of the civil law involved separation of the criminal law from the civil law. The first modern paid police force was started in metropolitan London by Sir Robert Peel in 1829, when the *Municipal Corporations Act (1829)* was passed. Whatever crimes established by the common law and statute law in Britain, applied in Australia in accordance with the legal position set out above, until 1899.

A great Queensland lawyer, **Sir Samuel Griffith**, wrote the Criminal Code (1899)Qld, which codified into statute all of the common law relating to criminal offences. This was and still is a remarkable achievement, and the Code continues to be the **basis of the criminal law today** in Queensland, and also in Tasmania and Western Australia, where it was adopted.

Importantly, the civil law is very different from the criminal law, not only in Queensland, but everywhere in Australia. You can see this in the comparative table which follows.

| CIVIL LAW | CRIMINAL LAW |
| --- | --- |
| Under the civil law, the person who has suffered damage (the plaintiff) must bring a private claim (set) against the alleged wrongdoer (the defendant). Private legal disputes may arise between individuals, organisations and governments. | Criminal charges are made by the police. Court cases are commenced and argued by a prosecutor on behalf of the victim and the general public (the State) against the accused. Although rare, it is possible for a citizen to bring a private prosecution. |
| Under the civil law, the chief remedy usually sought is compensation (damages). Other remedies such as specific performance, injunctive relief, and declaratory relief, may be sought if appropriate, in both contract and in tort. | One of the main aims of criminal law is usually to punish the offender, and thus preserve the peace and good order of the society in which we live. Increasingly, victims seek the opportunity to have a voice in criminal proceedings and to seek restitution (compensation) from the offender or from the state under the *Criminal Offence Victims Act 1995* (Qld) and the *Victims of Crime Assistance Act 2009* (Qld). |
| Civil law is based mostly on common law (case law) although an increasing number of statutes have been passed that have altered both contract law and the law of torts. | The criminal law in Queensland, Tasmania, South Australia and Western Australia is all contained in Acts of Parliament, which owe their existence to Sir Samuel Griffiths codification of the criminal law in *Criminal Code 1899* (Qld). The basis of the criminal law in New South Wales and Victoria is the common law, but this has been significantly the subject of statute law in both states. |
| The standard of proof according to which the plaintiff must prove his or her case in a civil action is on the **balance of probabilities.** | A much higher standard of proof of **beyond reasonable doubt** is required for the prosecution to prove its case against an accused person in a criminal trial. |
| In civil trials, judges decide both questions of **fact** and questions of **law.** It is very unusual to have a jury trial in a civil matter, although it is not unheard of in defamation cases, particularly those involving high profile plaintiffs. | In criminal trials, it is nearly always the case, where a person is charged with a serious offence, that it will be heard before a judge and jury. The jury decides questions of fact, and a judge decides questions of law. |
| The cost of bringing a civil court action is usually paid by the loser in the case. This will include the cost of court fees, lawyer's fees, and other expenses relating to the claim. Quite often, these amount to thousands of dollars and make it difficult to bring a claim which is uncertain. There are ways of dealing with this issue which will be looked at in the context of the next two topics, but there is no substitute for good legal advice for a plaintiff. Legal aid is rarely granted in civil cases, the exception being family law cases involving children. | In criminal prosecutions, the State usually pays the cost of bringing the matter to court, and even where the accused is found not guilty, the accused pays his or her own costs, unless entitled to legal aid. |

SAMPLE PAGES

## HYPOTHETICAL

Facts: Tessa celebrates with her team mates after winning the netball grand final. She has too much to drink, and despite being told not to drive by friends, decides to drive home because it is a short distance. On the way she must pass through a Give Way sign, drives over the speed limit, and fails to give way to another vehicle travelling through the intersection from her right. There is a collision, with the other vehicle hitting the rear of her four-wheel-drive. The other driver's car is a write-off and he is badly injured, suffering a broken leg, cuts to his face, and concussion. The police attend the scene almost immediately. Tessa is breathalysed and records a reading of .09, over the legal limit.The police take statements and investigate the accident.

1. What criminal charges are the police likely to bring against Tessa? [C]
2. Could the driver of the other vehicle argue that Tessa was negligent and caused his injuries? [C]
3. Could the driver of the other vehicle recover damages for the loss of his vehicle against Tessa? [C]
4. How does this illustrate that the same fact situation can give rise to both a **criminal court action** and a **civil court action**? Explain your answer. [C] [A]

In some cases, a person's negligent action or omission is so extreme that he or she is charged with a criminal offence. This is known as **criminal negligence,** which means that the person has been so reckless to the point of almost knowingly causing harm to the victim of the accident in the eyes of the law. In other words, the jury is asked to consider whether the actions of the charged person was so grossly negligent that he or she must have known that someone else was likely to be injured.

## PRACTICAL APPLICATION

### DRINKING DAD CLEAR OF CHILD NEGLECT

SOURCE: AMANDA WATT, COURIER MAIL

An intoxicated Sunshine Coast man alleged to have dropped his baby daughter on a concrete path while carrying a schooner of beer was acquitted by a jury yesterday. The man, 52, who cannot be named under Queensland law, appeared in the Maroochydore District Court charged with committing a negligent act causing harm to his 18 month old child on May 14 last year. The baby suffered a fractured skull, bruising and swelling to her right eye and abrasions.

The court was told the man had been drinking at the Yandina Hotel with his de facto wife and three children, and was carrying his baby with one arm while holding a glass of beer in his other hand when he appeared to stumble on a ramp as he walked from the hotel.

Witnesses told the court the baby fell from his grasp and hit the path head-first while the schooner of beer remained in his hand. Kellie Davidson said she saw the man slowly place the beer down beside him before he went to pick up the child.

The court was told the man then put his daughter in his car, drove home and was later found by police drinking a stubby of beer while the injured girl lay on a bed in another part of the house. His blood alcohol reading was recorded at .096 per cent.

Investigating police arranged for the child to be taken to Nambour Hospital where her injuries were treated.

Crown Prosecutor Tricia Velthuizen told the jury that, while she was "not suggesting it was a deliberate dropping", the man's actions represent a "grave breach in his duty as a parent". She said there was an abundance of evidence that showed he was affected by alcohol at the time.

SAMPLE PAGES

## 15.1 WHAT IS A DISPUTE?

The potential for a dispute begins with a person **(the aggrieved party)** believing that he or she has been wronged in some way by another person **(the wrongdoer)**. This perception of being wronged could be one-sided (where a drunk driver mounted the footpath and hit an innocent pedestrian) or each party could have a conflicting claim against the other (where one driver was over the legal blood alcohol limit and the other was driving over the speed limit when they collided). The feeling of being wronged grows into a dispute once there is **communication of the perceived wrong/s** to the other party, either personally or through a third party (usually a mediator or a solicitor) and **disagreement or conflict results**.

Disputes can be resolved by unlawful as well as lawful means. Blood feuds, duels and taking violent revenge to settle differences were well-established means for settling disputes centuries ago. In modern Australian society, violent disputes can still occur when criminal organisations clash, such as outlawed bikie gangs. There are laws which limit the activities of such organisations and prohibit their illegal activities. The police in all states in Australia are actively involved in preventing violent criminal conduct. The focus in this chapter is on the lawful means of dispute resolution.

SAMPLE PAGE

## 15.2 DIFFERENT METHODS OF RESOLVING CIVIL DISPUTES

The following range of options for people in dispute exists in Australia to bring about a resolution to the dispute, beginning with doing nothing about the problem through to going to court for a binding decision to be imposed upon the disputing parties.

1. 'LUMPING' THE GRIEVANCE
2. EXIT AND AVOIDANCE
3. REDIRECTING
4. NAMING, BLAMING AND CLAIMING
5. NEGOTIATION
6. MEDIATION
7. EXPERT DETERMINATION/CASE APPRAISAL
8. ARBITRATION
9. ADJUDICATION BY A COURT OR TRIBUNAL

To explain how these options arise, we will consider two incidents at the local hairdresser's salon.

- **Incident One:** You arrive at the appointment time and are kept waiting for an hour, causing you to be late back to work and have your pay 'docked' (reduced by the hour that you were late to work).

### 1. 'LUMPING' THE GRIEVANCE

Most people will simply be annoyed and not even mention it to their hairdresser. The wait was irritating but you accept that this frequently happens so you 'lump the grievance'.

### 2. EXIT AND AVOIDANCE

However, you might decide that you will never go to that hairdresser again, which is a means of avoiding future conflict by exiting from it.

### 3. REDIRECTING

Alternatively, you may redirect the cause of the problem by deciding that it was not the fault of the hairdresser, but that of the person before you who was late for his or her appointment. By deciding to adopt any one of these responses, you have stopped the conflict escalating into a dispute.

- **Incident Two:** The hairdresser leaves the colour dye in your hair for too long on your wedding day and, instead of having subtle red foils running through it, your hair has turned bright purple. You complain and refuse to pay. He says you didn't explain clearly what you wanted and demands that you pay $150 for the service. You have to rush to another hairdresser, who charges a further $250 to take out the colour and give you the foils you wanted.

SAMPLE PAGES

### 4. NAMING, BLAMING AND CLAIMING

Here, you have decided against lumping the grievance and avoidance options. Instead, by speaking about it, you have **named the grievance**. You have **blamed** the hairdresser as the one responsible for the state of your hair and, by refusing to pay for the service, you have **claimed** a remedy or compensation of some sort. If the hairdresser denies she is to blame and insists on being paid, the two of you are clearly **in dispute**.

There is a range of options to deal with this dispute.

### 5. NEGOTIATION

To settle it, you may both decide to negotiate, which means you will discuss alternatives to come up with some **compromise solution**. The hairdresser may offer to recolour your hair at no extra cost. By accepting that compromise, the dispute has been resolved by negotiation.

### 6. MEDIATION

If you and the hairdresser are unable to agree on a compromise, then the assistance of a third person may be needed. **Mediation** is when **the third party tries to assist both of you to resolve the dispute without imposing a legally binding solution**. This means the mediator helps both parties to think of ways to settle the dispute and provides a neutral and helpful environment for discussion. The mediator helps to generate a range of possible solutions for you both – various combinations of recolouring, paying lesser amounts, paying it off over a period of time, or sums of money as compensation – but what you decide to do is totally up to you. The mediator cannot force a decision on either of you.

There can be an **informal mediation** where the parties just ask a person in the community whom both respect to assist them. Alternatively, you can decide to use a **professionally trained mediator**. Many community centres, professional bodies and associations, and also law firms, have trained mediators, for example, the Resolution Institute, formerly the Institute of Arbitrators and Mediators Australia (www.iama.org.au)

**Conciliation** is **a form of mediation that takes place under an Act of Parliament**. An example of

conciliation is found in the *Health Quality and Complaints Commission Act 2006* (Qld). Another example is the requirement to go to a concilation conference under the *Family Law Act 1975*(Cth) before the matter can go to trial. If conciliation settles the dispute, both parties appear before the Family Court, and the judge makes orders to give effect to the parties' agreement.'

### 7. EXPERT DETERMINATION /CASE APPRAISAL

Another alternative, often used to assist mediation, is to seek the opinion of an expert and have him or her advise you of the best possible outcome. If the reason why you did not accept the hairdresser's option of re-colouring your hair was because you were concerned it would make the matter worse, then an **expert determination** by a member of the Hairdressers' Association may be appropriate.

**Case appraisal** is a form of expert determination where the decision or solution is advisory or provisional, and is not binding on the parties. It is hoped that, when the parties hear what a neutral, independent expert has to say, it will assist in the resolution of the dispute. In Queensland the court can order that parties have case appraisal, as well as mediation. It differs from mediation because the case appraiser can provide a solution.

- If you and the hairdresser cannot reach a compromise, even with the assistance of a mediator or an expert, then you can choose to **have a third party impose a decision** on you. There are two avenues, described as follows.

### 8. ARBITRATION

The first is for you to agree who that person should be and agree to accept his or her decision and abide by it. For example, you may decide to go back to the person who was the mediator and ask to make a fair decision for you. This becomes an arbitration, which means that the third party has the **consent of the parties** to impose a **decision which will be binding** upon them. It is a more **formal process than mediation or conciliation** and is governed by relevant Arbitration Acts. Commercial contracts, often contain a clause that requires the parties to submit to arbitration.

### 9. ADJUDICATION BY A COURT OR TRIBUNAL

The second way to have a third person impose a decision is to take the matter to a **court or tribunal** for a formal **hearing and testing of the evidence**. An adjudication is then made, which means that **the judge will impose a decision on both parties who will usually be legally required to abide by that decision**.

It is unlikely that a dispute such as Incident Two, involving only $400 in damages, would ever go to court for resolution. Most disputes are resolved by the first four options ('lumping' through to a negotiated settlement).

SAMPLE PAGES

## WHAT DO YOU THINK?

*It is not possible to shake hands properly with a clenched fist.*

Think of three conflicts or disputes that you or a friend or a member of your family may have had. Look at the list in section 4.2 and write down which processes, if any, were, or could have been, used to resolve those disputes. [C] [A]

*(c) to provide a legislative framework allowing ADR processes to be conducted as quickly, and with as little formality and technicality, as possible; and*

*(d) to safeguard ADR processes–*

*(i) by extending the same protection to participants in an ADR process as they would have if the dispute were before a court; and*

*(ii) by ensuring that they remain confidential.*

## PRACTICAL APPLICATION

1. Describe and explain the differences between the objectives and processes of the Civil Dispute Resolution Act 2011 (Cth) and Part 6 of the *Civil Proceedings Act 2011* (Qld). [C] [A]
2. Describe the approach taken by QCAT when it deals with civil disputes. How is it different from the processes of the other courts, federal and state? [C] [A]

SAMPLE PAGES

## WHAT DO YOU THINK?

The public pays for the court system, the judge's salaries, the court buildings, and all the administrative staff.

Is it fair to require people to make a genuine attempt to resolve their disputes before they use this expensive court process at public expense? [E]

## 16.2 THE MEDIATION PROCESS

When a third person assists in resolving a dispute, but lacks the authority to impose a binding decision, it is called mediation. There are many forms of mediation found around the world and also many variations within Australia. The ADR movement has put forward certain characteristics that generally apply to mediations in this country.

**Usual characteristics of the mediation process are:**

- Participation in mediation is voluntary in many cases.
- Limited number of procedural rules.
- No rules of evidence.
- Informal discussion of the parties' concerns which allows for the venting of emotional issues.
- Mediator's power is restricted to control of the process.
- Parties decide the content of what is discussed.
- Parties decide on the outcome.

- The process is private and confidential.
- Flexibility of possible solutions.

## BENEFITS OF MEDIATION

- Mediation is considered **empowering** as it **gives control over the outcome of a dispute back to the parties** rather than having it controlled by the State, as occurs with an adjudication in the courts of law.

> *In law, nothing is certain but the expense.*
> SAMUEL BUTLER

- Mediation is considered **cheaper** than going to court. This is because there is less formality and paperwork involved, legal costs are lower, and settlement is likely to occur at an earlier time. The mediation process is thought to be **less stressful** for parties than going to court, partly because mediation is less formal and less adversarial.
- Mediation is **private and confidential** so no one else needs to know the details of the dispute or what was the agreement. Because mediation often involves a compromise by both parties, the emphasis is on finding common ground between the parties rather than finding a winner of the dispute. This differs from court cases where the process is adversarial, and generally results in a winner and a loser. This is why mediation is often referred to as providing a **'win/win' solution**. For this reason, you are more likely to stay friends or keep a workable relationship with the other party than occurs when people go to court.

## DISADVANTAGES OF MEDIATION

- As the mediator does not impose a solution both parties should be equally able to speak for themselves and promote their interests. However, if there is a significant **power imbalance** between the parties, mediation may not be recommended.
  For example, a wife who has been physically and emotionally abused by her husband should ot go to mediation to decide issues in dispute about children unless protected by independent representation.
- If a party has **a clear legal right**, it may be argued that a compromise in a mediation may cause him or her to receive less than if the matter went to court. Because mediations are private and confidential, no one knows how other similar disputes have been resolved. This means that there can be significant variations in settlements. As you saw in Chapters 2.6, 14.7 , consistency or 'treating like cases alike' has traditionally been considered fair and just. It also enables precedent to occur. Privately settled mediations **do not allow a clear and consistent history of decisions (precedent) to develop**.
- Lastly any decision given by a judge in a court of law will be **enforced by the State**.
  If the court orders a sum of money to be paid to one of the parties there are mechanisms to ensure this occurs, such as using a court-sanctioned bailiff to collect the money owed. As mediations are voluntary agreements, enforcement may be more difficult. If a party agrees to do something and then does not adhere to it, the matter may have to be taken to court.

### *WHO CAN MEDIATE?*

Mediations can occur informally without using professional mediators. However, there are many professional mediation services available where persons trained in mediation provide dispute resolution services. These range from highly expensive professional services to free mediation services provided through professional and government organisations.

SAMPLE PAGES

## HYPOTHETICAL CONTINUED...

Weigh up the evidence that you, as the magistrate, have accepted on the balance of probabilities and deliver judgment in favour of one of the parties. Write out your reasoning, including relevant calculations, clearly and concisely in the form of a judgment. [C] [S] [A] [E] [R]

1. Who are the stakeholders? [C]
2. Describe and explain the issue/dispute. [C] [S] [A]
3. What options are available to the stakeholders to resolve their dispute? [C] [A]
4. Describe each step taken in the litigation process and explain why each of them was necessary. [C] [S] [A]
5. Do you think it would be possible to make the litigation process simpler/less complex? Give your reasons. [A] [E]
6. Was there a fair balance in the litigation process between the interests of the plaintiff and the interests of the defendant? Did each of them receive procedural fairness? [A] [E]

SAMPLE PAGES

# 17.5 COURT - ORDERED ALTERNATIVE DISPUTE RESOLUTION

You saw in the previous example that SSID and Stephen Lister had an opportunity in a pre-trial conference to resolve their dispute. Almost always, in disputes of that kind, there is an opportunity for dispute resolution, ranging from a simple discussion between the parties, or their lawyers, or to formally arranged mediation of which the court would be aware. In some jurisdictions, for example under the *Family Law Act 1975* (Cth), it is compulsory for a conciliation conference before a court Registrar to occur, or for a private mediation ordered by the court to be held where the parties can afford it, before the court is prepared to set the matter down for trial. Conciliation conferences and mediations held between parties and their legal advisors in the Family Court jurisdiction, are very successful, and resolve many disputes about children and property.

## HYPOTHETICAL

Facts: Whitney and Coby were married for 15 years. They own their own home at Jimboomba which is now worth $550,000. They paid $300,000 for the home and still owe a mortgage debt of $50,000 Whitney does casual work at the local supermarket. Coby is a self-employed electrician. They have two children aged 10 and 8. They have been separated for three years. During that time Coby has lived with his parents at Jimboomba and Whitney has lived with the children in the home. They are not divorced.

Coby has been paying the mortgage repayments monthly, and helps Whitney financially with the children's expenses. Coby's electrician business earns him approximately $70,000 profit per year. Whitney earns approximately $28,000 per year from her part-time work. She also receives social security payments. Coby has not been able to put money into superannuation, and his superannuation balance is $30,000. Whitney has a superannuation balance of $19,000. Neither of them has any other significant assets and some time ago agreed to keep the furniture and contents which were in their possession respectively as their own.

After trying to negotiate an outcome for six months, Coby applies to the Federal Circuit Court (division of Family Court), seeking orders that the house be sold, and the net proceeds divided 50-50. He also sought an order that each of he and Whitney keep their respective superannuation entitlements and any other property in their possession. Whitney files a response to Coby's application, and seeks an order that she be entitled to retain the house until the youngest of the children is 18 or leaves school, whichever is the earlier. Alternatively, she seeks a greater share of the net proceeds of sale of the house (75-25 in her favour), and otherwise she agrees to the orders sought by Coby.

## HYPOTHETICAL CONTINUED...

### First hearing date/Directions hearing

On the first hearing date, Coby and Whitney and their lawyers attend court before a judge of the Federal Circuit Court. Coby's lawyer is invited by the judge to explain the matter and the issues in dispute. She outlines the pool of assets, and identifies the areas of dispute. She submits that the parties are not far apart and a conciliation conference should be ordered by the court before any trial. Whitney's lawyer agrees. The judge notes that Whitney wants to keep the house until the children leave school, but she says that she would not normally make such an order. She makes a direction that the parties attend mediation at their own expense. Whitney's lawyer objects because Whitney is unable to afford her share of the $4000 needed to pay the mediator. The judge points out that neither of them is unemployed or on Legal Aid, and the anticipated costs for trial for one day would be around $12,000 each. The court has scarce resources and children's matters have priority in the conciliation conference list. Coby instructs his lawyer that he will pay for the mediator. The judge makes the directions, including a direction that Coby's lawyer is to seek a further hearing date in due course if the matter does not settle.

### Mediation

Coby's lawyer organises a mediator and the date for the mediation. The parties attend at free rooms offered by the Queensland Law Society. The mediation proceeds. They agree to the following orders:

(a). The joint ownership of the home is to be severed and changed to tenants in common, 60% to Whitney, 40% to Coby.

(b). Coby is to be entitled to use the home to secure a loan to buy himself a new property, supported by up to 40% of the agreed value of $550,000. Whitney is to sign any documents needed for Coby to do this.

(c). Coby is to be responsible for payment of the balance of the mortgage of $50,000.

(d). Whitney is to keep the home in good condition until it is sold.

(e). Whitney and Coby are to sell the home at auction within 60 days of the date that the youngest child leaves school or turns 18, whichever is the later.

(f). Whitney and Coby are to be paid 60% and 40% respectively of the net proceeds of the sale of the home.

(g). Each of Whitney and Coby are otherwise be solely entitled to any asset they own or use in their possession respectively at the date of the orders.

Coby's lawyer organises a new hearing date, the parties attend with their lawyers, and the orders are made by consent. The judge congratulates them on reaching a compromise which saved them the considerable costs of a trial.

1. Who are the stakeholders? [C]
2. Describe and explain the issue in dispute? [C] [A]
3. Describe and explain the options available to the stakeholders to resolve this dispute? [C] [A]
4. Divide the class into groups of at least five students per group. There are five roles, and each student must be responsible for a role. Revise from Chapter 17.2 The Mediation Process, and then each of you prepare your respective roles, and conduct the mediation, attempting to reach the same outcome as Coby and Whitney. [C] [S] [A] [R]

SAMPLE PAGES

## WHAT DO YOU THINK?

1. Could any of the stakeholders in the four activities presented to you in this chapter, have resolved their dispute before commencing any litigation process? Describe what each of them could have done, and explain the process by which a resolution could have been achieved without court process. [C][S][A][E]

2. Could any of the stakeholders in the four activities presented to you in this chapter, have used a different litigation process other than that presented as chosen in the activity, to resolve the dispute? Explain your answer. [C][S][A][E]

## REVIEW

1. Describe the following: [C]

Office of the Queensland Ombudsman | Queensland Civil and Administrative Tribunal
Queensland Magistrates Court | Federal Circuit Court

2. Describe and explain the jurisdiction of each of the entities listed in question 1 above. [C] [A]

3. Make up a dispute scenario which needs to be resolved because it must go to formal dispute resolution (that is, to a court, tribunal, or ombudsman). Describe and explain to which entity it should go to be resolved. [C] [S] [A]

4. Compare and contrast the different jurisdictions used to present civil actions in this chapter. Ensure, among other things, you evaluate their characteristics using the criteria of procedural fairness. [C] [A] [E]

SAMPLE PAGES

## 18.2 CONSUMERS NEED STATUTORY PROTECTION

While the vast majority of individuals and businesses that interact commercially in the Australian economy are honest, there are enough examples of dishonest practices from which consumers need to be protected. *The Trade Practices Act 1974* (Cth) was passed by the Commonwealth Government to protect Australian consumers from **misleading and deceptive conduct** in the Australian economy. Improvements to this protection have continued since the Act was first passed, and are now found in the *Australian Consumer Law* (ACL), which is a part of the *Competition and Consumer Act 2010* (Cth).

### INQUIRY

*SHOULD THE AUSTRALIAN CONSUMER LAW (ACL) PROTECT AUSTRALIAN CONSUMERS FROM MISLEADING ADVERTISING, IN PARTICULAR, TICKET SCAMS AND MISLEADING RETAIL PRICING?*

SAMPLE PAGES

### PRACTICAL APPLICATION

#### 21 MARCH 2014
#### WAS/NOW PRICING CLAIMS UNDER SPOTLIGHT

South Australia's consumer watchdog is joining consumer protection agencies across the country to crackdown on misleading retail pricing claims.

Retailers who advertise discounted goods with 'was/now' pricing will be targeted by Consumer and Business Services (CBS) as part of a nationwide compliance operation.

Commissioner for Consumer Affairs Paul White said retailers will be called upon to substantiate their claims about discounts in was/now advertising.

"Was/now pricing, also known as 'strike through' or 'two-price' advertising, is where a business advertises that a product was a certain price but is now on sale for a discounted price," Mr White said.

"Businesses often advertise a specific saving on a product in comparison to its previous non-sale price, wholesale price, a competitor's price or recommended retail price (RRP).

"Consumers need to be able to trust an advertisement as a true representation of the savings on offer.

"For example, stating that a product 'Was $100 Now $50' or '$50' is likely to be misleading, and consequently unlawful, if that product had not been sold at $100 in a reasonable period immediately before the sale commenced.

"These types of advertisements can also be considered misleading if the 'was' price wasn't a true offer, for example, if only a limited amount of the product was on offer at the higher price immediately before the sale began.

"CBS will be visiting businesses around the state to educate them and make sure they are not misleading consumers with was/now pricing.

"We will be on the lookout for bait advertising, pricing which is misleading or deceptive, overcharging and instances where the original cost, RRP or saving amount has been inflated or wasn't a true offer.

"The maximum civil penalty for providing false or misleading information is $1.1 million for a corporation and $220,000 for an individual. Criminal penalties for the same amounts may also be imposed.

"Our aim is to make both businesses and consumers more aware of their rights and obligations under the Australian Consumer Law (ACL) regarding was/now pricing."

SOURCE: Attorney-General's Department, Government of South Australia (Consumer and Business Services):

## PRACTICAL APPLICATION CONTINUED...

1. Who are being targeted by CBS? [C]
2. Outline the behaviour being targeted by CBS. [C] [A]
3. In what circumstances would the target behaviour be misleading? [A]
4. Who is being protected by CBS? [C]
5. Are the laws which allow CBS to target misleading advertising in 'was/now' pricing justified? [A] [E]


## PRACTICAL APPLICATION

SAMPLE PAGES

### IT'S SHEER GREED, CALL FOR NATIONAL CRACKDOWN ON TICKET SCALPERS FLEECING FANS

SOURCE: DARRYL PASSMORE, COURIERMAIL.COM.AU, 18 MARCH 2018 (EXCERPTS ONLY)

Queensland is demanding urgent national action to crack down on shonky scalpers ripping off music and sports fans with overpriced or fake tickets to major events. It comes as the State's leading venue operator warns that hundreds of disappointed concertgoers could be denied entry to this week's two Ed Shearan shows in Brisbane because they have unknowingly bought invalid tickets.

The industry wants sweeping reforms to protect consumers, including outlawing the use of automated bots that scoop up huge numbers of newly released tickets, often for crime syndicates, using lists of stolen credit card numbers. Other measures sought include orders blocking the websites of overseas-based commercial operators such as Viagogo, which reap lucrative commissions--often 25% or more--from the resale of tickets at massive mark-ups from the original value. And resellers based in Australia may have to be licensed in future, with tough penalties for breaking rules on increasing prices for second-hand tickets.

Last year, The Federal Treasury developed an options paper on the issue, and a meeting with all state and territory consumer affairs ministers is planned, with a date yet to be set. A Palasczuk Government spokesman said the problems had to be tackled at a national level and had "been allowed to fester for far too long." The Queensland Office of Fair Trading has received 140 complaints about Swiss online ticket reseller Viagogo since January last year."Viagogo's conduct to date shows that they have little interest in resolving consumer complaints," a Palasczuk government spokesman said.

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Rex Davison got a shock as he pressed the "purchase" button for tickets to one of the Adele's Brisbane concerts last year on resale site Viagogo. A message popped up telling him he'd just spent $1040 on the four tickets--almost twice the $560 he thought he was paying. "I was horrified as I was unable to cancel the order and Viagogo did not have any e-mail or phone contacts on their website to speak to them," the Gold Coast man said.

Things got worse when Mr Davison and three friends, who had come from New Zealand, arrived at The Gabba for the show, as they were refused entry. The staff said, " Your tickets are a rip-off. They have been bought and resold. All those tickets have been cancelled." On his smart phone, Mr Davison bought more tickets from official seller Ticketmaster for $1247. His daughter later pointed him to a 'Victims of Viagogo' Facebook page, where there were complaints from hundreds of people in different countries.

He received a call a few days later from a Viagogo staff member in Ireland who promised him a refund and a credit as compensation. He received a refund of the $1040 he paid Viagogo, but no compensation.

# 19.2 ESSENTIAL ELEMENTS TO FORM A CONTRACT

A **valid contract** is defined as **an agreement made between two or more parties that creates legal rights and obligations which the law will enforce.** If **three essential** elements are present, a binding or valid contract will be created. These are:

1. INTENTION TO CREATE LEGAL RELATIONS
2. OFFER AND ACCEPTANCE
3. CONSIDERATION

Even though a legally binding agreement exists, it may be able to be challenged for other reasons. Generally, a contract can be set aside if one of the parties l**acks legal capacity**, there is not **genuine consent** to the agreement or the contract has an **illegal purpose, as in the case of *Everett v Williams*.** These matters are discussed later at Chapter 23.

## INTENTION TO CREATE LEGAL RELATIONS

In some cases people making agreements do not intend to be legally bound. Private and social arrangements are not usually intended to carry legal consequences. If they did, every private or social arrangement legally enforceable, life would be complicated, expensive and very difficult. The courts have, on many occasions, considered whether or not an arrangement is intended to have legal consequences. Two cases are set out below:

SAMPLE PAGES

### CASE STUDY

*Simpkins v Pays* (1955) 107 ALR 1, 66 ALJR 408

**Facts:** An elderly woman and her boarder frequently entered competitions in newspapers. The boarder drew up the form in the name of the woman and the entry fees were shared. The woman promised to share any winnings. However, when she won a prize of £750 in a competition, she refused to share it with her boarder.

**Legal Issue:** Was the arrangement with the boarder a binding contract?

**Decision:** It was the combined effort of the woman and the boarder and the sharing of expenses which led to the prize. The woman was obliged to share the prize. An intention to create legal relations was evident from the conduct of the parties and the promise of the woman.

### YOU BE THE JUDGE

In *Simpkins v Pays*, suppose that the elderly woman always drew up the form on her own and she always paid the entry fees herself.

Do you think that the Court would have made the same decision? [A] [E]

*THE PERSON ACCEPTING AN OFFER MUST KNOW THAT IT EXISTS. NO ONE CAN ACCEPT AN OFFER IF SHE OR HE DOES NOT KNOW THAT IT EXISTS.*

## CASE STUDY

*R v Clarke* (1927) 40 CLR 227

**Facts:** In 1927 a man was murdered. A reward of £1,000 was issued by the government for information leading to the arrest and conviction of the murderer. Clarke was charged with the murder. When interviewed he gave police information which led to the arrest and conviction of the murderers. He did not remember about the reward at the time of the interview. He later claimed the reward.

**Legal Issue:** Could Clarke accept the offer of a reward in exchange for information?

**Decision:** The High Court held that he was not entitled to the reward because at the time he gave information to the police it was in order to clear himself of the charge of murder, not in response to the offer of a reward. Therefore, there was no legal acceptance and therefore no contract.

SAMPLE PAGES

## INQUIRY

*HOW HAS CONTRACT LAW RESPONDED TO TECHNOLOGICAL CHANGE?*

As indicated above, the courts will look at the circumstances of each case, and if a precedent (one of the rules) applies, it will be followed. If not, the court attempts to apply the law fairly to the situation.

### THE POSTAL RULE

This exception to the principle that acceptance must actually be communicated was decided in the case of *Adams v Lindsell*.

## CASE STUDY

*Adams v Lindsell* (1818) 106 ER 250

**Facts:** A dealer wrote to a manufacturer on 2 September, offering him a quantity of wool at a certain price. The letter was delayed and didn't arrive until 5 September. The manufacturer accepted at once and wrote a letter saying so. Meanwhile the dealer grew uneasy, not knowing his letter had been delayed. So, having heard nothing from the manufacturer from whom he expected a reply on 7 September, he sold the wool to someone else on 8 September. Next day he received the manufacturer's letter of acceptance. The manufacturer sued for breach of contract.

**Legal Issue:**

1. Was there ever a contract between the dealer and the manufacturer?
2. If so, when was it formed?
3. When should contracts by post be complete – when the accepter posts the letter of acceptance or when the offeror receives it?

**Decision:** There is a binding contract which is formed when the letter of acceptance is posted. The dealer's offer, when made by post, repeats the offer every instant of time until it reaches its destination, unless withdrawn before it arrives.

When a universal system of publicly administered postal communication was introduced, the courts needed to decide what would happen where the parties used the post as the means of communicating to finalise a contract. A good statement of the rule is found in *Henthorn v Fraser* (1892) 2 Ch. 27 where it was said by Lord Herschell:

> *Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.*

The postal rule is that acceptance occurs when the letter of acceptance is posted, and the contract commences from that time.

## HYPOTHETICAL

You accept an offer by posting a letter at 9.00am on Wednesday. The offer was agreed to be accepted by post. At 12.00pm on Wednesday, you realised you could have made a much more advantageous agreement with someone else. Do you phone the person who made you the offer withdrawing the acceptance in the letter which has not yet been received? [A]

SAMPLE PAGES

## TELEPHONE, TELEX, FACSIMILE, EMAIL - INSTANTANEOUS COMMUNICATION

In *Entores LD v Miles Far East Corporation* (1955) 2QB page 330, Counsel for the plaintiffs stated:

> *When a contract is negotiated by telephone, telex or other form of instantaneous communication, the contract is not complete until the acceptance is actually received by the offeror, and further, the contract is made at the place where that acceptance is received and not at the place where it is spoken or, in the case of telex, typed.*

The decision in the *Entores* case will be set out later in this section.

How correct was the submission made on behalf of Counsel for the plaintiff? Since the Postal Rule, which was an exception to the rule that acceptance must be actually communicated, the Courts have had to deal with changes in technology, in particular:-


LETTER


TELEX


FACSIMILE


E-MAIL

It was not until electronic communications by e-mail, that laws were passed by Parliament dealing with the consequences of any of these changes. This, in Queensland occurred with the introduction of the *Electronic Transactions Act 1999* (Cth) and the *Electronic Transactions Act 2001* (Qld) (the *Electronic Acts*).

Before this, the common law addressed such issues by applying previous cases and developing the law to deal with the new circumstances. The *Entores* case was one of the first cases where there was a new medium of communication.

## CASE STUDY

*Entores Ltd v Miles Far East Corporation* [1955] 2QB 327

**Facts:** The plaintiff and the defendant were negotiating a contract. There was a series of communications by telex between the plaintiffs in London and the defendant (a Dutch company) in Holland. A counter offer was made by the plaintiffs on 8 September 1954, and an acceptance of that counter offer by the Dutch company was received by the plaintiffs in London by Telex on 10 September 1954.

**Legal Issue:** Where was the contract made?
That is, where did acceptance take place? Did it take place in Amsterdam from where the telex was sent or in London where it was received by the plaintiffs?

**Decision:** The court held that the contract was made in London where the acceptance was received. Birkett L. J. at page 335 said,

> *In my opinion, the cases governing the making of contracts by letters passing through the post have no application to the making of contracts by telex communications. The ordinary rule of law, to which the special considerations governing contracts by post are exceptions, is that the acceptance of an offer must be communicated to the offeror, and the place where the contract is made is the place where the offeror receives the notification of the acceptance by the offeree.*

SAMPLE PAGES

Where communication is instantaneous, for example by telephone, email or internet, or where the parties agree to a method of communication and how it should be applied, the courts do not appear to have had any problem in establishing when a contract has been validly formed or when acceptance has taken place.

The *Entores* case accepted that the **general rule applied to telex communications.** It therefore said that unlike the postal rule, which says that acceptance occurs when the letter is posted and not when it is received, acceptance by telex communications occurs when the **telex is received**. This also applies to email and internet communications Of course, as you know from the previous discussion regarding the postal rule, it must be in the contemplation of the parties at the time of entering the contract that acceptance by telex would occur.

## WHAT DO YOU THINK?

At this stage, perhaps we should pause to reflect and consider the question, What difference will communication by email make to persons who wish to use that method of communication to conclude contracts?" [A]

## EMAIL - THE *ELECTRONIC ACTS*

Existing law applies to electronic transactions. To prove a binding contract online, it is still necessary to prove that:

**a** There is an intention by all parties to create legal relations when entering the contract;

**b** A valid offer has been made by one party to another;

**c** The offer has been accepted by the other party or parties; and

**d** The promises made by the parties in the contract are for valuable consideration.

Nevertheless, both the Commonwealth and all State Governments decided that there was a need for legislation in an increasingly electronic environment.

The community needs to understand these differences and, therefore, the Commonwealth and the States passed various *Electronic Acts*.

## PURPOSE OF LEGISLATION

The purpose of the *Electronic Acts* is to provide a regulatory framework that:

a recognises the importance of the information economy to the future economy and social prosperity of Australia (Queensland);

b facilitates the use of electronic transactions;

c promotes business and community confidence in the use of electronic transactions; and

d enables business and community to use electronic communications in their dealings with Governments.

SAMPLE PAGES

### SIMPLIFIED OUTLINE OF THE ACT

The *Electronic Acts* say:

1. As a general rule, a transaction is not invalid simply because it took place through an electronic communication;

2. The Electronics Acts apply to all electronic communications, whether some or all of the parties are located within Australia or elsewhere.

3. Invitations to treat
   Electronic communications

   (a) not addressed to one or more specific parties; and
   (b) generally accessible to parties making use of information systems

   are to be considered as an invitation to make offers, unless they clearly indicate the intention of the party making the proposal to be bound in case of acceptance.These requirements can generally be met in electronic form unless the law says otherwise.

4. The Electronic Acts, specifically provide for:

- The time of dispatch (sending) of an electronic communication
- The time of receipt of an electronic communication
- The place an electronic communication is sent

5. A person sending electronic communication is only bound by the communication if it was sent with that person's authority.

# 20.1 WHAT ARE THE TERMS OF THE CONTRACT?

Read the following Witness Statement relating to a contract dispute.

## HYPOTHETICAL

**The MPD Contract**
**Witness Statement**
**dated 30 November 2002**

1. My name is Owen Thomas. I live at 12 Perry Street, Brighton.

2. I know Max Patrick. I met him before August 2001. I also know his family and his wife Dell.

3. In August 2006, I was talking to Max about the possibility of constructing a house for investment. Max said, "I own a building construction company MPD Pty Ltd (MPD) which could build a house for you."
Dell said, "I am a director."
I said, "Perhaps we could build a house together as an investment?"
Dell said, "Max, I don't think we have enough money."

Negotiations not directly relevant

4. I said to Max and Dell, "I'll go ahead and get the land anyway and we'll see."

5. I bought the land and arranged for the building plans for the house to be approved by the council.

6. I negotiated a price of $300,000 with Dell for MPD to build the house. This price did not require Max to supervise the construction. A written contract for the construction of the house was signed by myself and by Dell as a Director of MPD to construct the house for a fixed price of $300,000 ("the building contract"). There was no discussion about sharing the profit if the house was sold and no term in the building contract to that effect.

7. Soon after I signed the building contract, Max asked me on behalf of MPD for $10,000 for initial expenses to clear the site and prepare it for building. I paid MPD this on 20 October 2006. I have a copy of this cheque here with me.

Documentary evidence

8. The day before the construction started, Max presented me with a written proposal. It said that I was to pay him a fee of $20,000 up-front for supervising the construction and to lend him a further $30,000 which he would pay back before 30 June 2007 together with 10% interest. He said, "I do not want to share the profits from the sale of the house with you. MPD will not build your house unless I supervise the construction." I agreed and said, "That's fine. Let's go ahead on that basis" ("the loan agreement").

Written offer

Terms of loan agreement

Oral acceptance

9. On 30 November 2006, I paid Max $20,000 up-front to supervise the construction and a second cheque for $30,000 as the loan.

10. Before the house was finished, Dell wanted something in writing about the arrangement. I wrote out a handwritten memo for Max to sign which said:
'I owe Owen Thomas $30,000 and will pay him interest at 10% per annum on any amount of the principal owing. I will pay it back before 30 June 2007.'

Documentary evidence

11. I have a copy of the written memo signed by Max.

12. The house was completed on time and I paid MPD the remainder of the price for building it.

13. Max is still refusing to pay me back the loan. He now says that I promised to share the profit from building the house with him. He also says that Dell is not a Director and had no authority to sign the building contract for MPD. I have paid MPD for the construction of the house and I have sold the house. After taking everything into account, I have actually made a loss.

Breach of loan agreement

14. Max is refusing to pay back the $30,000.

SAMPLE PAGES

## 20.3 WHEN CAN TERMS BE IMPLIED INTO A CONTRACT?

Express terms are specifically included in the contract. Implied terms are not included but they are assumed to be included.

Apart from the terms agreed by the parties which are written into the contract there are often terms **implied** into the contract by the **court, custom or trade usage, and/or statutes**.

A court will imply terms into the contract to give it business efficacy (that is, make it capable of being put into operation). It will also imply terms into certain types of contract which have been historically established. For example, where a worker carries out repairs, there is an implied term that reasonable care and skill will be exercised in the performance of the work and that the materials used will be reasonably fit for the purpose intended.

Where parties have contracted against the background of a particular trade, the customs or usages of that trade may be implied into the contract.

In some cases there are terms implied into the contract by statute. Some examples include the *Fair Trading Act 1989* (Qld) and the *Competition and Consumer Act 2010* (Cth).

SAMPLE PAGES

### PRACTICAL APPLICATION

1. Collect examples of contracts from local businesses or from other sources. Classify the contents of each under the following headings:
   - Object of contract
   - Main terms (conditions)
   - Minor terms (warranties)

   Are the contracts in 'standard form'? [C]
2. If possible, examine several contracts concerning the same activity, for example, the purchase of a mobile phone, a motor vehicle, or the contract for use of a credit card. Identify common clauses and also cases where clauses differ. Give reasons for the differences. [A]
3. Do you think any of the terms are unfair? [E]

## 20.4 DISTINGUISHING BETWEEN CONDITIONS AND WARRANTIES

Once it has been established that a statement is a term of a contract, it is then important to establish if it is a condition of the contract. Some terms of a contract are more important than others. The more **important terms are referred to as conditions** and the **less important terms** are **called warranties**. These words are used in a legal sense.

The distinction between a condition and a warranty is important when remedies for breach of contract are considered.

The court has certain tests that are applied when deciding whether a term of a contract is a condition or a warranty. A term will be a condition if:

- the term is an essential part of the contract; and
- the term is not carried out, it would make the performance of the rest of the contract totally different from what was agreed.

A warranty is a less important term of the contract and is regarded as subsidiary to the main purpose of the contract. The basic nature of a contract is not changed by a failure to perform a warranty term. Failure to do so is still a breach of contract, but, as will be seen later, the injured parties' remedies are different.

# 21.1 SETTING ASIDE CONTRACTS

Even after a contract has been validly entered into, it can be set aside on a number of well established grounds. These are, in general terms:

LACK OF LEGAL CAPACITY  LACK OF GENUINE CONSENT  LEGALITY OF OBJECT

The effect of being able to set the contract aside is that it may be found to be **void** or **voidable**. Void means that the contract never existed in the first place. Voidable means that the injured party (the innocent party) can decide if the contract is to continue.
This chapter is of **particular importance to children** (minors) because, as a general rule, all minors lack legal capacity.

## LACK OF LEGAL CAPACITY

Before a court will enforce an agreement it insists that the parties to the agreement have the power or ability to enter into that agreement. For example, bankrupts, criminals, persons with mental illness, and some intoxicated persons are said to lack capacity to contract.

There are also special rules which apply to many groups which must be satisfied before a valid contract can be created. For example, there are rules which apply to persons who are not Australian citizens and corporations (companies).

Many contracts are obviously made between parties who are not equals. Here the law asks the question, 'Is this agreement fair or has the stronger party driven too hard a bargain?' One category of contract which is not between equals should be of particular interest to you. These are contracts which are entered into by people below the age of majority – those whom the law (perhaps insultingly) calls infants.

## INFANTS

In Australia, an infant is defined as a person who has not reached the age of 18 years (prior to 1974 the age was 21 years in Queensland). All states in Australia have passed laws making the age of majority 18 years (see *Age of Majority Act* 1974 Qld). Each State determines the legal age at which an infant becomes an adult. Generally an infant lacks capacity to enter into contracts. There are **four main exceptions** to this general rule.

### *1. CONTRACTS FOR NECESSARIES*

An infant who contracts for necessaries is bound by that contract. 'Necessaries' are not confined to things which are needed to maintain life, but include things that are used to maintain the infant in question at the standard of living (eg food, clothing, shelter) which he or she enjoys. The infant's social position, age and occupation are all relevant factors that the court will take into consideration. For example, the court has held that an infant who bought a bicycle to ride 20 kilometres to work each day was obliged to pay for the bicycle. The court said that this was a necessary.

In *Sultman v Bond* (1956) St RQd 180 the Court held that a contract to build a house for an infant who was engaged to be married was a contract for 'necessaries'. The contract for the home building involved borrowing money to pay for it. Once it is determined the contract is one for necessaries, and in particular, price is mentioned in the contract, then *The Sale of Goods Act* 1896 (Qld) provides that where necessaries are sold and delivered to an infant he must pay a reasonable price for them.

An infant is also liable to pay for **services** which are 'necessaries.' This may include medical services, transportation, legal services or contracts for education.

SAMPLE PAGES

When a contract is ended by 'frustration', the parties do not lose all their rights under the contract. Any rights which the parties are entitled to up until the exact moment of frustration may be enforced each against the other. Similarly, any liabilities the parties have under the contract may be enforced up until the moment of frustration.

It must be stressed that just because a contract becomes tiresome or a burden does not amount to frustration. The performance of a contract must be no longer possible.

### E. DISCHARGE BY BREACH OF CONTRACT

To breach a contract means to break it. A party can breach a contract either by breaking a part of the contract , or by repudiating the whole of the contract. A repudiation occurs when one party renounces the contract completely. This can be done by simply saying, 'I do not wish to proceed with this contract' or by making it impossible to perform the contract. Repudiation can also occur by one party doing something totally inconsistent with his or her obligations under the contract.

A contract is not automatically terminated when one party repudiates it. The other party is entitled to reject the repudiation and treat the contract as still being on foot. When it is decided to treat the contract as being still in existence, the injured party can insist on performance. However, if the injured party accepts the repudiation, damages are then the only remedy available.

When one party is in breach by not fulfilling a term of the contract, the nature of the term which has been breached will decide whether or not the injured party can elect to end the contract. If the term breached is a condition, then the injured party can elect to discharge the contract and sue for damages. On the other hand, if the breached term is a warranty then the injured party cannot elect to terminate or discharge the contract but only has a remedy in damages.

SAMPLE PAGES

## PRACTICAL APPLICATION

### KING JOKER WINS PRICE OF BERNIE BANTER

SOURCE: WAYNE HOWELL, THE BULLETIN (GOLD COAST), 14 JUNE 2003 (EXCERPTS ONLY)

Celebrity chef, Bernard King, joked about big bums and unmarried mothers with ghastly hair after a District Court judge yesterday found his offensive comments did not warrant the termination of his contract.

King won $101,978 in damages after Judge Richard Rolfe found Brisbane-based cookware company Dine-Rite had unlawfully cancelled his ten-year contract four years early in 1998.

King said after the hearing he was funny, not offensive. King said mothers were the most delightful creatures who huddled together in little ghettos in special suburbs like Inala in Brisbane, Ultimo in Sydney and Footscray in Melbourne.

"They club together in a large group. You can't walk down Glebe Point Road in Sydney without being bashed over the head by an unmarried mother with ghastly hair and a kid in a pram," he said outside the NSW District Court.

But King conceded he might have "crossed the line a smidgin'" when he told a cooking demonstration audience 'if you don't brown it well enough it's going to come out like a stillborn baby'.

Dine-Rite claimed he breached his contract to promote its products by being banned from the Brisbane and Mackay shows, making offensive comments during cooking demonstrations, promoting rival products and refusing to appear at some shows.

Judge Rolfe rejected all the claims, but said the stillborn comment was in extremely bad taste. But he said the remarks did not warrant King's contract being terminated, especially after he agreed not to repeat them when he was chastised by Dine-Rite director, Paul Cunningham.

Judge Rolfe said Dine-Rite knew King was a flamboyant entertainer who could attract crowds by employing jokes, satire, humour and sending up audience members.

1. Who is the plaintiff? [C]

2. Who is the defendant? [C]

## PRACTICAL APPLICATION CONTINUED...

3. What allegation did King make against the company Dine-Rite? [C]

4. In whose favour did Judge Rolfe decide? [C]

5. Outline the reasons given by Judge Rolfe for his decision. [C] [A]

6. Do you think that the judge's decision was fair? [E]

7. Would it make any difference to the judge's decision if there was a term of the contract which said:

   'King shall not make comments which offend ordinary standards of decency and taste while conducting cooking demonstrations when he advertises Dine-Rite products'.

   Give your reasons in a letter of advice to Dine-Rite suggesting the inclusion of such a clause in future contracts. [E] [R]

8. This story was reported in 2003. Do you think that if these comments have been made in 2018, the judge sitting in the trial might have made a different decision? How could he/she have done this if there was no term of the contract like the one set out above in question 7? [C] [S] [A] [E]

## CASE STUDY

*Brien v Dwyer* (1978) 141 CLR 378

**Facts:** The parties entered a contract for the sale and purchase of land. It was a term of the contract that a deposit had to be paid within fourteen days of the date of the contract. The deposit was 10% of the purchase price. The buyer failed to pay the deposit in the time stipulated by the contract. The seller immediately gave notice terminating the contract on the basis that the buyer's failure to pay the deposit was a breach of a fundamental term of the contract. The seller alleged that the requirement to pay a deposit was a condition of the contract. As such, it was a fundamental term that goes to the root of the contract entitling the seller to immediately terminate and renounce further performance. The buyer disputed this.

**Legal Issue:** Was the requirement to pay the deposit within fourteen days of the date of the contract a condition of the contract which entitled the seller to terminate?

**Decision:** The court decided that the term relating to the deposit was an essential term (a condition) going to the very root of the contract. The breach of that term would immediately entitle the seller to terminate the contract.

SAMPLE PAGES

## REVIEW

1. Describe the following: [C]

   Void | voidable | necessaries | repudiation | ratification

2. Describe and explain the following: [C] [A]

   illegality of purpose | mistake of fact | misrepresentation | duress | undue influence | restraint of trade | unconscionability | breach of contract

3. Describe and explain when a consumer can declare all or part of the contract void (end it) under the CCA because of unfair terms. [A]

4. Describe and explain the test applied to determine if an event occurs which discharges a contract by frustration. [A] [E]

## 22.1 THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC)

In **Chapter 18.2: Consumers Need Statutory Protection** we set out examples which showed the importance of government intervention to protect consumers. In truth, it has been the case for many years that this has happened. When the *Trade Practices Act 1974* (Cth) was renamed the *Competition and Consumer Act 2010* (Cth) (the CCA), and the *Australian Consumer Law* (ACL) was incorporated into Schedule 2 of the CCA, it heralded a new era for consumer protection. The mandate of the ACCC is to protect consumer rights, business rights and obligations, perform industry regulation and price monitoring and prevent illegal anti-competitive behaviour.

Our society is dominated by large corporations using high-powered advertising and sales strategies. Consumers and these corporations are not in an equal bargaining position. In the past, trading corporations were able to rely on a long-standing legal saying, '**caveat emptor**' which means '**let the buyer beware**'. While the charter of the ACCC under the CCA is not intended to favour either the consumer or supplier/retailer, the ACCC has exercised its authority in a number of retail areas, for example:

- fining retailer Target for false advertising;
- fining Woolworths for anti-competitive liquor deals;
- reporting on the strategies used by Woolworths and Coles to prevent shopping centre managers from leasing space to other competing supermarkets; and
- in conjunction with state and territory offices of fair trading, developing and enforcing mandatory consumer product safety standards (e.g. in food products, motor vehicles, electrical goods, therapeutic goods and agricultural products such as pesticides).

SAMPLE PAGES

### RESEARCH

Go online to the website of the ACCC, at www.accc.gov.au/consumers.

1. Describe the range of topics set out on the relevant page on the ACCC website. [C]
2. Select one of the topics of interest to you (e.g. consumer rights and guarantees, consumer protection, misleading claims and advertising, sales and delivery, internet and phone). Investigate the aspects of the topic you have chosen which are set out on the website, then search for examples of them in the media. Prepare a report to present to your class and teacher. Describe and explain how the ACCC website addresses your chosen topic, and decide how useful the website would be to consumers. [C] [S] [A] [E] [R]

The role of the ACCC is to act both on behalf of **all consumers as a group** as well as **individual consumers** which are set out later in this chapter. A good recent example of its ability to provide policy-generating influence in the area of consumer protection is its report released on 10 July 2018 following its inquiry into electricity prices. This is the subject of the Practical Application which follows.

## PRACTICAL APPLICATION CONTINUED...

1. Is the ACCC report on electricity prices within its authority and expertise? [C]
2. List three suggestions made by the ACCC to bring about reduced electricity prices. [C]
3. Describe and explain how the ACCC proposes to make it possible to compare discounted prices? [C] [A]
4. Does the ACCC have the power to put into effect and enforce any of the proposals it has suggested? [C] [A] [E]
5. Name the stakeholders who react to the Prime Minister's announcement that the government would implement proposals by the ACCC. [C]
6. What policy did the government announce which did not adopt a proposal by the ACCC? [C] [S] [A]
7. Describe the reaction of each of the stakeholders to the policies announced by the Prime Minister. ]C] [S] [A] [E]
8. Describe and explain the role of the ACCC in this conversation between the government and the different stakeholders. Who represents the interests of consumers in this conversation? [A] [E] [R]

SAMPLE PAGES

# 22.2 STATUTORY PROTECTION AVAILABLE UNDER *AUSTRALIAN CONSUMER LAW* (ACL)

Each state in Australia has a government authority which administers the laws that affect consumers, and the businesses which provide goods and services to consumers. All of these authorities predate October 2010, which is the date on which the legislation containing the ACL was passed by the government and came into being on 1 January 2011. This legislation was subsequently adopted by each state in Australia. It overrides the state legislation if it addresses the same issue. This does not mean that all previous state acts have been replaced, but that when looking for the remedies which apply to consumers, it is important to go to the CCA (ACL) first and see if it applies. In this chapter we will not look at the previous state laws, and will only look at the ACL.

We have already seen in **Chapter 21.1: Setting Aside Contracts**, that all contracts can be set aside on the basis of **unconscionable conduct.** The ACL also contains provisions that contracts can be set aside for containing **unfair contract terms,** and for **misleading or deceptive conduct**. The remedies for misleading or deceptive conduct can be relied on by both businesses and consumers.

## CONSUMER GUARANTEES

We have seen that all contracts can be set aside on the basis of **unconscionable conduct,** and where there are **unfair contract terms**. The ACL also contains provisions that contracts can be set aside for **misleading or deceptive conduct**. These remedies can be relied on by both businesses and consumers.

## GUARANTEES RELATING TO THE SUPPLY OF GOODS

There are provisions in the ACL called **Consumer Guarantees** on which only consumers can rely. These are set out in s51 to s68 of the ACL. The ACL introduces a new approach to consumer contracts. Previously the Act contained a number of warranties and conditions which were implied into consumer contracts. These are now called consumer guarantees.

1. The supplier must have a right to sell (s51).
2. The buyer has a right to undisturbed possession of the goods (s52).

9. **The supplier and manufacturer must comply with any express warranty given or made by the manufacturer (s59).**

This section provides a statutory guarantee that goods supplied to a consumer, other than by auction, will comply with any express warranty given by the manufacturer or supplier. An express warranty is that given to the consumer in writing as part of the contract.

## UNFAIR CONTRACTS

It is now possible to set aside all or part of a contact because it contains unfair terms.
A court can declare a term of a contract to be unfair and therefore void. If the contract is not capable of operating without the unfair terms, the court will end the whole contract.

Schedule 2 to the *Competition and Consumer Act 2010* (CCA) entitled the *Australian Consumer Law* (ACL) came into effect on 1 July 2010. The provisions, with respect to unfair contract terms, are designed to protect consumers. They do not apply to business transactions.

A consumer contract is defined by the ACL as:

> *a contract for supply to an individual who acquires the relevant goods, services or interest in land wholly or predominantly for personal, domestic or household use or consumption.*

Previously, the *Fair Trading Act 1999 (Victoria)* 2003 had enacted, unfair contract terms provisions. These have now been taken over by the ACL which applies to all states of Australia.

Section 23 of the ACL applies to contracts entered into on or after commencement of the Act. It can also apply to a contract which is renewed on or after the commencement of the Act or varied on or after the commencement of the Act.

Section 23 of the ACL states:

**1. [void term]**
A term of a consumer contract is void if:
(a) the term is unfair; and
(b) the contract is a standard form contract:

**2. [effect of unfair term on a contract]**

The contract continues to bind the parties if it is capable of operating without the unfair term.
A term will only be regarded as "unfair" if it meets three tests:

- The term must cause a significant imbalance in the parties rights and obligations under the contract;
- The term must not be reasonably necessary to protect the legitimate interests of the party advantaged by the term;
- The term must cause financial or other detriment to a consumer if it were relied on.

There are exceptions to the application of the Act which are set out in sections 26(1) and 28(1) of the ACL. Section 23 does not apply to terms that:

- define the main subject matter of the contract;
- set the upfront price payable under the contract;
- are required, or expressly permitted, by a Commonwealth, State or Territory Law;

SAMPLE PAGES

## 23.1 INTRODUCTION

The approach taken to the subject matter of this chapter is to deal separately with the remedies for breach of contract, the remedy of unjust enrichment, and the remedies which are available for breach of the implied statutory conditions under the *Australian Consumer Law*.

The scope of 'remedies for breach of contract' has been interpreted to include the statutory remedies implied into all relevant contracts under the *Australian Consumer Law*. We have also included the remedy of unjust enrichment, an equitable remedy which does not arise from breach of contract. This last remedy illustrates the ability of the common law to adjust to unusual claims (that is, claims which arise outside the scope of the settled common law of contract) to provide a remedy which gives fairness to the parties in dispute.

## 23.2 COMMON LAW REMEDIES FOR BREACH OF CONTRACT

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To breach a contract means to break it. A party can breach a contract either by breaking a part of the contract , or by repudiating the whole of the contract. A repudiation occurs when one party renounces the contract completely. This can be done by simply saying, 'I do not wish to proceed with this contract' or by making it impossible to perform the contract. Repudiation can also occur by one party doing something totally inconsistent with his or her obligations under the contract.

A contract is not automatically terminated when one party repudiates it. The other party is entitled to reject the repudiation and treat the contract as still being effective. When it is decided to treat the contract as being still in existence, the injured party can insist on performance. However, if the injured party accepts the repudiation, damages are then the only remedy available.

When one party is in breach by not fulfilling a term of the contract, the nature of the term which has been breached will decide whether or not the injured party can elect to end the contract. If the term breached is a condition, then the injured party can elect to discharge the contract and sue for damages. On the other hand, if the breached term is a warranty then the injured party cannot elect to terminate or discharge the contract but only has a remedy in damages.

If the nature of the breach of contract **gives one party the right to end the contract**, he or she can either continue on with the contract or rescind. To rescind a contract simply means to tell the other party that you regard the contract as having been ended.

If one party decides to end the contract because of another's breach, he or she may:

- refuse to perform his or her part of the contract;
- resist any action brought by the defaulting party either for damages or specific performance;
- recover any money paid provided there has been a total failure of consideration;
- take action against the offending party for the damages sustained by the breach; or
- take action against the offending party for an amount equivalent to the value of labour performed or goods supplied.

If the nature of the breach **does not entitle one party to the contract to end the contract,** or if the innocent party decides not to elect to treat the contract as having being ended when entitled to do so, the innocent party may:

- in certain cases sue for specific performance;
- in certain cases sue for an injunction; or
- sue for damages.

## SPECIFIC PERFORMANCE

Specific performance is a remedy which involves making the defaulting party carry out the contract as originally agreed. It will only be granted by the court if damages are not an adequate remedy and the court can supervise the carrying out of the order for specific performance. There are other considerations the court looks at but the above two are the most important. Most orders for specific performance have been made where the contracts are for the sale of land or the subject matter of the contract is of a unique nature: for example, famous paintings or items of jewellery.

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### CASE STUDY

*JC Williamson Limited v Lukey and Mulholland* (1931) 45 CLR 282

**Facts:** The defendant company, J C Williamson Limited, gave the plaintiffs (Lukey and Mulholland) a lease of a shop for five years in a theatre in which drinks, lollies and ice-cream (confectionary) could be sold to the audience. The contract contained conditions about how the confectionary could be sold and about the arrangements for boys and girls to move around the theatre at certain times under the supervision of the theatre manager to sell the confectionary.

Before the term of the agreement expired, the defendant company said that no fixed period had been agreed upon and repudiated the contract. The plaintiffs sued the company. Instead of suing for damages which is a remedy for the breach of contract (caused by the repudiation) the plaintiffs asked the court to grant an injunction for specific performance.

That is, they asked the court to make an order that the defendant company must allow the plaintiffs to continue to operate the confectionary shop and to sell lollies, icecream and drinks in the theatre under the supervision of the manager.

**Legal Issue:** Would the court make an order for specific performance making the company perform the contract for the balance of the term so that the plaintiffs could continue to operate the shop in the theatre?

**Decision:** The court said that the performance of the contract on an ongoing basis would have required its supervision.

If it made an order compelling the defendant company to perform its obligations for the balance of the term, it could not guarantee that the company would fully carry out its obligations as contemplated by the agreement. In those circumstances, the court was not prepared to grant the order for specific performance.

## *INJUNCTION*

An injunction is an order of the court **restraining a person from doing a wrongful act.** For example, there may be a term in the contract which prevents the defaulting party from doing something during the term of the contract. If the defaulting party ignores the restricting term of the contract, the other party may apply for an injunction prohibiting the defaulting party from taking the action. A common example is the situation where someone has contracted to provide a personal service on the understanding that he or she would not provide that service to anyone else.

# 23.3 INQUIRY INTO COMMON LAW REMEDIES FOR UNJUST ENRICHMENT

## INQUIRY

*IN WHAT CIRCUMSTANCES HAS THE HIGH COURT MADE DECISIONS BASED ON THE IDEA OF UNJUST ENRICHMENT?*

## RESTITUTION

The term restitution is the legal word which is used to discuss a remedy based on the idea of unjust enrichment. Where a defendant would be unjustly enriched at a plaintiff's expense, the High Court has made decisions obliging a defendant to make restitution for a benefit derived at the plaintiff's expense.

Restitution will usually be awarded only where:

**a.** the defendant had received some form of benefit (that is, has been 'enriched');

**b.** the benefit or 'enrichment' was at the plaintiff's expense;

**c.** it would be 'unjust' to permit the defendant to retain the benefit; and

**d.** there are no defences available to the defendant, for example, change of position, estoppel, incapacity or illegality.

### *CIRCUMSTANCES WHERE RESTITUTION APPLIES*

There are two basic situations in which restitution may provide an appropriate remedy:

**1.** where the plaintiff is claiming **the return of money**, for example, because of a total failure of consideration, or it was paid under a mistake; and

**2.** when the plaintiff is claiming a **'reasonable remuneration' for work done** or services provided and there is no enforceable contract between the parties.

SAMPLE PAGES

## 24.1 RESOLVING CONTRACT DISPUTES

The importance of knowing and understanding the nature of your contract, and being able to identify how any dispute affects your rights and obligations, cannot be overstated. It obviously affects your bargaining position. If you have strong legal advice which supports your position, you are more likely to want to enforce your rights. If the matter is important to you, there is no substitute for **good legal advice.**

You can then approach resolving the dispute with confidence. The mechanisms and avenues of dispute resolution are already set out **Chapter 15: Dispute Resolution in the Civil Law.** There are also in **Chapter 17: Resolving Civil Issues resolved in action** a number of case studies giving practical examples where disputes of different kinds have been taken to different jurisdictions.

## 24.2 A RESIDENTIAL TENANCY DISPUTE

A person who rents a home is called a tenant. A person who owns a home and provides it for rent is called a lessor. Whenever a tenant rents a home there will be an agreement between the tenant and the lessor as to the terms and conditions upon which the tenant occupies the property. In Queensland, residential tenancies are subject to the *Residential Tenancies and Room Accommodation Act 2008* (Qld) ('the Act'). Where the Act applies to a residential tenancy a standard tenancy agreement must be used, and s54 says that the parties to a residential tenancy are not allowed to make an agreement inconsistent with the standard tenancy agreement or the Act.

### HOLDING DEPOSITS

The Act allows a lessor to require a prospective **tenant** to pay a holding deposit for a tenancy of the premises. If this happens, s160 of the Act requires that the **lessor** must give the prospective tenant a **receipt** for the holding deposit which is to be signed by the prospective tenant. If the prospective tenant does not enter into the tenancy agreement, or does not notify the lessor that he or she does not intend to enter the tenancy agreement, then the holding deposit is **forfeited**. Otherwise, the lessor must return the holding deposit.

### HYPOTHETICAL

Facts: Kim and Christina planned to leave New South Wales to live in Brisbane. Kim travelled to Brisbane to look at homes to buy. They could not make up their minds which one to buy so they decided to rent for three months. They agreed to put a holding deposit on a home in an area they liked. They paid $800 for the holding deposit and the agent provided them with a receipt setting out all the information required by the Act which they signed. The receipt stated that Kim and Christina had to take up the option to sign a tenancy agreement by 1 November 2018. After a month, Kim and Christina found a home and entered a contract with a settlement date which allowed them to take up occupation on 31 October 2018.

In the excitement of buying a new home, they forgot to inform the agent that they did not wish to exercise the option. It was not until 4 November 2018 that they contacted the agent.

Legal issues:

1. Are Kim and Christina entitled to the return of their holding deposit? [C]

2. What reasons can you give for the Act entitling a lessor to keep the holding deposit of a prospective tenant? [C] [A]

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## HYPOTHETICAL CONTINUED...

3. Suppose the agent does not provide Kim and Christina with the receipt setting out all of the information required by the Act, although he sends them an e-mail saying they must take up the option by 1 November 2018 or he will find another tenant. Do you think Kim and Christina are entitled to the return of the holding deposit? [C] [A]

4. Suppose that in the circumstances set out in question 3, the agent refuses to return Kim and Christina's holding deposit. They ask you, as their lawyer, to prepare a plan of approach to resolve the dispute including, if necessary, going to litigation. Set out the steps you propose and the jurisdiction to which you will apply, if litigation is required. Provide them with advice about how to get ready for the litigation. [C] [S] [A] [E] [R]

## RESEARCH

1. Go to www.rta.qld.gov.au (the website of the Residential Tenancy Authority) and click on 'disputes'. If you scroll down you will see a set of headings which are links to Dispute resolution, Helping to resolve tenancy issues, Applying for dispute resolution and Applying to QCAT. Investigate each of these headings/topics online and select information which would be useful in providing advice to Kim and Christina. Make notes of your investigations. [C] [S]

2. Describe and explain how the information on the website would be useful to anyone experiencing a dispute about a residential tenancy agreement. [C] [A] [E]

SAMPLE PAGES

## 24.3 SPORTING CONTRACTS, RIGHTS AND OBLIGATIONS

There are many stakeholders with an interest in modern professional sport. Typically, they all enter contracts to protect their interests. Sponsors enter agreements with national sporting organisations which they expect to be reflected in agreements with the players and clubs involved in the sport. Sponsors do not like being identified with violence, racism, criminal acts and other behaviours which reflect poorly on the sport they sponsor. This means they usually want the right to withdraw from a sponsorship agreement if the behaviour of players and clubs does not reflect the values they want associated with their products. A practical application follows which gives you the opportunity to make your own judgments about an effective contract meeting the needs of all stakeholders.

## 25.1 WHAT ELEMENTS MUST THE PLAINTIFF PROVE?

Negligence is the **breach of a person's duty** to another person **to take reasonable care** in the circumstances where such breach of duty **causes damage** to another person. For the defendant to be negligent, the plaintiff must prove to the judge, **on the balance of probabilities**, the existence of the following **three elements**:

1. The defendant must owe a **duty of care** to the plaintiff.
2. The defendant must **breach** this duty by failing to meet the required standard of care.
3. **Damage** to the plaintiff must be **caused** by the breach of the duty of care.

Before turning to each of these elements that need to be proved, it will be helpful to look at some specific instances of negligence that you will recognise.

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### CASE STUDY

*State of Victoria v Bryar* [1970] 44 ALJR 174

**Facts:** Bryar was a student in the Heidelberg Technical School in Victoria. While in class, supervised by the teacher, Mr Keyte, he suffered an injury to his right eye from a blow from a pellet. This blow eventually caused a total loss of sight of the eye. The paper pellet was fired by another student using a rubber band. A large number of the class were firing paper pellets over a substantial part of the lesson. Mr Keyte's evidence was that he was unaware of the firing of the pellets but that, if he had have been aware, he could have, without difficulty, restored order. The jury at the trial took the view that the teacher did see the majority of his students engaged in a concentrated exchange of paper pellets and had done nothing about it. At the trial the student was successful. The appeal to the Full Court of the Supreme Court of Victoria was dismissed. The defendant appealed to the High Court.

**Legal Issues:**

1. Did the school teacher owe a duty to the student to take reasonable care for his safety?
2. Was the failure of the teacher to prevent the exchange of pellets a breach of this duty?
3. Was the damage to the student's eye caused by the breach of the duty?

**Decision:** The High Court held that the school teacher did owe a duty to the student to take reasonable care for his safety. The teacher's failure to discipline the class was a breach of this duty. He didn't act reasonably in the circumstances. A reasonable teacher would have disciplined the class. Further, given that the teacher himself said that he could have brought the class to order, it was his failure to do so that caused the damage to the student.

1. What duty of care did the teacher owe to the studentl? [C]
2. What steps do you think the teacher should have taken so it could be said he had acted reasonably? [A]
3. What other events could be regarded as having caused the harm to the student? Do you think it is fair for the teacher to shoulder the whole of the legal burden? [A] [E]

## YOU BE THE JUDGE

Assuming the facts in *Bryar's* case were the same, other than the changes in the situations referred to below, say whether you think Mr Keyte would have been negligent in each of the following situations.

1. Imagine that the injury was caused by a pellet (being the only pellet fired throughout the lesson) which was fired without any warning. [A]
2. What if the pellet that harmed the student was fired from outside the room by a student walking by? [A]
3. Imagine that the students were adults, instead of being teenagers, attending a conference at which Mr Keyte was a lecturer delivering a paper. [A]

PROOF PAGES

The Court found that the teacher in *Bryar's* case did not act reasonably in the circumstances. To establish that the teacher has breached his or her duty of care it must be shown that a teacher failed to act as an '… **ordinary reasonable teacher**…' (Kitto, J. in *Ramsay v Larson* (1964) 111 CLR 16 at 27). In determining the standard of care required of a teacher in a negligence action, courts today generally use the test of what steps a reasonable teacher, with similar skills, experience and qualifications possessed by the defendant teacher, would have taken in a similar situation.

Because *Bryar's* case was heard in the High Court, this means that the decision and its legal principles are **binding on every court in Australia**. If another case with **similar facts** were to come before a court, then the same decision as *Bryar's* case must be **applied** to the later case, unless it can proved to the court that the facts of the later case are materially (significantly) different from the facts in the High Court authority of *Bryar*. If there are **materially different facts** in the later case, then its facts will be **distinguished** from the facts of the case authority (precedent) and the decision in the earlier case will not be followed.

That is what happened in the following South Australian Supreme Court case of *Johns v Minister of Education, Chinner and Beck,* which also involved a classroom teacher with unruly students who were firing objects at each other. It sounds very familiar but did the later case have any facts that were **materially (significantly) different** from the facts in *Bryar's* case?

**Material facts** are those which are **significant or important to proving the main legal elements of the case**. In *Johns'* case, as in *Bryar's* case, the main legal element in dispute was whether the teacher had breached the duty of care owed to the students in the classroom. Clearly, the different sex of the teacher was not a material fact and neither would have been the fact that a different subject was being taught.

**To apply or distinguish the facts of *Bryar's* case?**

… that was a key question for the South Australian judge in:

## RESEARCH

1. Survey a number of teachers in your school about their knowledge and attitudes in relation to the legal principle of vicarious liability, especially as it relates to situations where teachers are negligent, but the Education Department or the School Board is likely to have to pay whatever compensation is granted by the courts. [C] [S] [E] [R]
2. Invite a representative of the Education Department or the Queensland Teachers' Union to present its policy on the question: "Should the Education Department be vicariously liable for the negligence of its employee teachers?" [R]
3. Write a report which summarises the results of your survey and the views of the Education Department or the Queensland Teachers' Union. [C] [A] [R]
4. Based on your research, what is your opinion of the legal principle of vicarious liability – is it fair for the employer to be held legally responsible for an employee's negligence? [A] [E] [R]

# 25.2 WHAT IS A DUTY OF CARE?

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For a plaintiff to be successful the court must decide that the plaintiff is owed a **duty of care** by the defendant. To understand how a court decides whether a person is owed a duty of care or not we must look briefly at the historical development of the duty of care.

## *DEVELOPMENT OF THE DUTY OF CARE*

**The starting point** and the cornerstone of determining whether a duty of care exists is the famous case of *Donoghue v Stevenson*, which was decided by the House of Lords (the highest court in England) in 1932. Prior to 1932, no legal relationship was recognised as existing between the manufacturer of a product and a person (the consumer) who used the product, unless there was a legally binding contract made between them. As you can suppose, there was not a contract in most cases because a consumer very rarely bought directly from a manufacturer. Most consumers bought from retailers. This case, however, changed the law.

## CASE STUDY

*Donoghue v Stevenson* [1932] AC 562

**Facts:** The plaintiff and her friend were in a cafe when her friend bought her a bottle of ginger beer in a bottle made of dark glass through which the contents could not be seen. The owner of the cafe poured some of the ginger beer from the bottle into a glass. Once the plaintiff had drunk some of the ginger beer from the glass, the plaintiff's friend poured the remainder of the ginger beer into the glass, at which point the decomposed remains of a snail fell from the bottle. The plaintiff suffered shock at the sight of the snail and severe gastro-enteritis (stomach upset).

**Legal Issue:** Did the defendant owe the plaintiff a duty of care? Because the plaintiff did not buy the ginger beer, she had no contractual relationship with the cafe owner (seller). She therefore couldn't sue the café owner for breach of contract and sued the manufacturer of the bottle of ginger beer, claiming that the manufacturer had a duty of care to her. Thus, the basis of the plaintiff's claim was that her shock and illness had been caused by the defendant's failure to take reasonable care in making and bottling the ginger beer.

**Decision:** A majority of the House of Lords (3-2) decided that the defendant owed a duty of care to the plaintiff and had breached that duty in manufacturing the product in question. Significantly, the court held that the fact there was no contractual relationship between the plaintiff and the defendant did not stop the plaintiff from suing someone for a tort.

## CASE STUDY CONTINUED...

As a result of this case, a very important new principle, which became known as **the 'neighbour principle'**, was established by Lord Atkin, one of the majority judges in *Donoghue v Stevenson*.

This obligation to take reasonable care of your neighbour became a legal duty. As happened in *Donoghue v Stevenson*, it is very important to understand that this legal duty can arise independently of any contract between the people involved. In practice, however, it is sometimes the case that there is both a contract and a duty of care in tort arising out of the same situation. For example, imagine that you purchased a meal from a restaurant and the food used in the preparation of the meal was so old and so far beyond its use by date that it was poisonous to your system, and you suffered damage. In that situation there would be both a breach of contract between you as the consumer and the restaurant owner and also a breach of a duty of care to you which the owner of the restaurant owed you as a customer. In those circumstances, you could sue for both a breach of contract and in negligence.

Although Lord Atkin stated that he was merely summarising the existing law of negligence, his above words actually **brought about a fundamental change in the scope of the tort of negligence**. The duty to take care could now arise where there was a risk of injury, damage or loss being suffered, even though no duty of care had previously been imposed by the courts in that type of case.

1. Who was the plaintiff? [C]
2. Who was the defendant? [C]
3. Before the case of *Donoghue v Stevenson* was decided, why didn't consumers have the right to sue manufacturers if there was no contract made between them? [C]
4. Why is the neighbour principle so important to consumers? [C]
5. What fact meant that the plaintiff could not prove that the owner of the cafe who sold the bottle of ginger beer had been negligent? [A]
6. In your opinion, was this a wise decision? In answering this question, consider the long-term effects the decision has had on the way manufacturers, suppliers, retailers and consumers do business in our modern world. [A] [E]

SAMPLE PAGES

The **neighbour principle** provides the **starting point** for testing whether a duty of care is owed by one person to another.

The High Court has pointed out that the cases which have been decided over the years have **clearly established situations in which duties of care are owed**. However there is a difficulty associated with determining whether a duty of care exists or not in new cases arising out of new situations. Nevertheless, we can say that, **for a duty of care to exist, the plaintiff must show at least two things. These are:**

1. that the plaintiff is **a reasonably foreseeable person** who would suffer harm as a result of the negligence on the part of the defendant; and

# 26.4 REMEDIES AVAILABLE FOR A SUCCESSFUL CLAIM IN NEGLIGENCE

If the plaintiff is successful in proving that the defendant has been negligent, the judge will usually award the plaintiff one or both of the following major remedies:

1. DAMAGES 2. INJUNCTION

## 1. DAMAGES

### TYPES OF DAMAGES

It was partly because of the level of damages that the courts were awarding that prompted the reforms in the law of torts in 2002-2003. In Queensland these reforms resulted in the passing of the *Civil Liability Act*.

Section 52 of that Act now provides that a court cannot award **exemplary, punitive, or aggravated** damages in a claim for personal injuries unless the action which gave rise to the claim was:

1. **an unlawful, intentional act done with intent to cause personal injury; or**
2. **an unlawful sexual assault or other unlawful sexual misconduct.**

This means that in negligence cases resulting in personal injury the damages that will be awarded will be compensatory damages. These include;

**1. General damages**

**2. Special damages**

**3. Future economic loss.**

### GENERAL DAMAGES

General damages include pain and suffering, loss of amenities of life, loss of expectation of life, and disfigurement. The most common claims in this category are for pain and suffering and loss of amenities of life. Loss of amenities of life include no longer having the ability to play sport or engage in other recreational activities that the plaintiff used to enjoy.

To assess how much overall a court will award to a plaintiff for general damages restraints have been placed upon the judge by s61 and s62 of the *Civil Liability Act*. The judge is required to consider how severe a particular plaintiff's general damages are, ranking them on a scale of 1:100, with 100 being the most severe general damages a plaintiff could suffer and 1 being the least severe. This is referred to as the **scale value**. A mathematical formula then is applied to this **scale value**, provided by the judge. For the full

SAMPLE PAGES

mathematical formula look at s62 of the *Civil Liability Act*. One example given is given in s62(f):

- If the scale value of the injury is assessed at 30 or less but more than 25, add $35,000 to an amount calculated by multiplying the number by which the scale value exceeds 25 by $2,000.
- For example, a scale injury of 30 would give general damages of $45,000. This is calculated by adding $35,000 to ($2,000 multiplied by 5).

When one looks at the highest limit of the scale, the maximum amount of general damages that can be awarded in Queensland is $250,000. Very many litigants and practising lawyers regard this figure as being too low, and, being overly protective of defendants, especially insurance companies which indemnify the defendants. Prior to the *Civil Liability Act* judges had a very wide discretion in assessing **general damages**. Now they do not.

### SPECIAL DAMAGES

These include monetary compensation for expenditure capable of being given a precise value. Examples are doctor and hospital bills, physiotherapy charges, and even the cost of taxis to and from healthcare professionals.

### FUTURE ECONOMIC LOSS

Future economic loss is most commonly seen in loss of future earnings. This is to compensate the plaintiff for the fact that the injury arising from the negligence prevents the plaintiff from returning to work for a time or, perhaps, at all. It has been calculated in the past by looking at the plaintiff's net pay each week and then multiplying that by the time the plaintiff was expected to be out of work (based usually on expert medical opinion), discounted by expenses that the plaintiff wouldn't need to have because he or she wasn't actually going to work.

A limit has been placed on the award of future economic loss by s54 of the *Civil Liability Act*. The Act now provides that the maximum amount that can be claimed is "the present value of **three times the average weekly earnings** per week for each week of the period of loss of earnings."

SAMPLE PAGES

### WHAT DO YOU THINK?

Many plaintiffs earn much more than three times the average weekly earnings in Queensland. For example, a doctor who is injured can now only recover as a loss of earnings a figure which represents three times the average weekly earnings in Queensland. Before the *Civil Liability Act* that doctor would have been compensated by the defendant for the loss of earnings which he himself would have experienced.

Do you think that this restriction means that the defendant, who would ordinarily be responsible for damages that have actually been done, now escapes some of his liability? Is this fair? [A] [E] [R]

# 27.1 THE CHANGING LANDSCAPE OF NEGLIGENCE

The basic proposition that has been presented to you about negligence is that the courts must find that the victim is owed a duty of care before being able to award compensation to the victim. The categories of negligence are never closed. It is always possible that a new set of factual circumstances will give rise to a new duty of care. To combat this ever-growing octopus of negligence, with its variety of claims, Australian governments have tried to limit the rights of individuals to claim by both limiting the scope of the duty of care, and by putting ceilings on the amount of compensation that can be claimed. We will look at two different areas which illustrate how negligence has developed. On the one hand, we will look at an example where the Queensland government introduced a **ceiling to claims for compensation**, but then reversed that when there was a change of government. On the other hand, we will look at examples of how persons with similar claims have joined together in what are called **class actions**.

## CLASS ACTIONS

An area which is of great interest is increased use by lawyers of **class actions** to make claims. This is where large numbers of people pursue the same or a sufficiently similar claim for the court to allow them to join a class action. Our legal system does not have the same court rules as the United States, where such actions are common. Nevertheless, in recent times there have been class actions taken or threatened in the following areas:

- negligent financial advice
- overcharging by banks
- asbestos related illness
- institutional child sex abuse
- faulty breast implants
- product liability
- failure of government owned infrastructure

It is however not so much the change in law but the change in the way cases are brought to court which represents one of the most significant current legal issues in the tort of negligence. It is the use of class actions in the courts to bring proceedings in negligence, which is now a significant current legal issue.

The purpose of a class action is to allow plaintiffs who have the same interest in a legal case to obtain a court order in one action rather than in separate actions. This assists the administration of justice by reducing the number of cases the court may need to deal with, reducing the costs of litigation, and speeding up the court process for the litigants.

On 1 March 2017 Queensland adopted the class action regime used in the Federal Court and in Victoria and New South Wales courts. Previous to that, group litigation was referred to as a **representative action.** For a class action to proceed there must be at least seven members of the class, the claims of each of the class members must arise out of similar circumstances and raise a substantial common issue of law and fact. In short, a court will only allow one plaintiff to represent other plaintiffs if each of the plaintiffs have the same sort of interest in the court action.

SAMPLE PAGES

## CASE STUDY

*Kinsella v Gold Coast City Council* (2014) QSC 65

**Facts:** The plaintiffs own a house in Arundel Hills on the Gold Coast near a council dump (Suntown Landfill Facility). The plaintiffs claim that the council's operation of the dump resulted in the escape of noxious materials from its site causing damage to the plaintiffs by reducing the value of the plaintiffs land. They claim that the council was aware of the risks of the noxious materials escaping and were negligent in allowing the area in which their property is located to be developed as a residential subdivision. The plaintiffs sued as representatives of other persons who are owners of houses within Stage 3 of the estate. Approximately 80 lots were owned by those whom the plaintiffs were purporting to represent. The properties were spread along 4 streets and parts of another 4 streets. Some lots adjoined the dump. Some were up to 400 metres from it. The plaintiffs property was about 150 metres from the dump. It was pleaded by the plaintiffs that the council was negligent in that the noxious materials could have been reasonably controlled and managed by steps which were not taken by the council. It was further pleaded that each lot was worth 15 to 20% less than it would have been had the council not been negligent. The plaintiffs sought a declaration therefore that the council owed a duty of care to the plaintiffs and each of the representative lot owners and a declaration that the council had breached its duty.

**Legal Issue:** Could the plaintiffs sue as representatives of the other lot owners

**Decision:** The court looked at the interpretation of Rule 75 (Court Rules) which required all the representative parties along with the plaintiffs to have the same interest in the proceedings. The court decided that they had the same interest. The plaintiffs and the representative parties had the same interest in the answer to the declaration sought by the plaintiffs, that is, that a duty of care was owed to the lot owners and that the council had failed to perform its duty of care. This was so notwithstanding the amount of damages might be different for each lot owner and notwithstanding each lot owner was in a slightly different position with respect to the dump. The lot owners had the same interest in the declarations and the issue of damages to be assessed for each lot owner could be dealt with in later proceedings. The case therefore proceeded with the plaintiffs acting in a representative capacity.

SAMPLE PAGES

## EXAMPLES OF CLASS ACTIONS

You will see from the above case study that this case was commenced in Queensland. Most class actions in Australia however are commenced under the Federal Court of Australia's representative action rules. Regardless of where the class action is commenced there has been an increase in the number of high profile class actions and ones in which large amounts of money are at stake. 2017 was the 25th anniversary of class actions in Australia. In 2017 the 500th class action in Australia was filed. The majority of such class actions are supported by litigation funding. Typically litigation funding is provided by companies in meeting the litigant's legal costs and disbursements and typically the litigation funder agrees to pay any adverse costs orders should the litigation fail. For those services the litigation Funder is paid substantial fees out of the settlement if successful.

The traditional area for class actions was in product liability cases, that is, cases usually directed at manufacturers for the negligent manufacture of products which have caused damage to consumers. The types of negligence cases in which class actions are now used however has broadened. These include actions for negligent financial advice, overcharging by banks, asbestos related illness, institutional child and sexual abuse, and faulty breast implants. Some further examples follow:

### (A) QUEENSLAND FLOOD CLASS ACTION

Maurice Blackburn Solicitors have filed a class action in the Supreme Court of New South Wales on 8 July 2014 in what is referred to as the Queensland Flood Class Action. Damages are being sought for losses caused by the negligent operation of Wivenhoe and Somerset dams during the 2011 flood in southeast Queensland. There are approximately 5,000 represented by the plaintiff in that case, all suffering damage from water released from the Wivenhoe dam at the peak of the floods. This case has continued for years and it is not yet resolved. Evidence is still being given at the time of writing this book in July 2018. The cost of mounting such a class action is considerable. There are costs of investigations, costs of having expert reports produced and considerable legal costs as the case proceeds. The costs of this action are being paid by a litigation funder, Bentham IMF.

### (B) CENTRO CLASS ACTION

In May 2008 a class action was commenced in the Federal Court against two public companies Centro Properties Ltd and Centro Retail Ltd. This class action was brought on behalf of those who purchased an interest in either of the public companies between 9 August 2007 and 15th February 2008 (for Centro Properties) and between 7 August 2007 and 15 February 2008 (for Centro Retail). It was alleged that both companies engaged in misleading and deceptive conduct by failing to adequately disclose to the stock exchange and to their security holders the full extent of their maturing debt obligations, and the risk that they may not be able to refinance maturing debts, and further that there was a risk that there was no longer a reasonable basis for their profit forecasts. When the companies revealed the extent of their debt obligations that had become payable, their share prices fell dramatically and as a result losses were incurred by a class of persons buying shares (or taking security over the companies). **On 19 June 2012 a settlement of $200 million was agreed to by all the parties to the class action. This settlement represents the largest shareholder class action settlement in Australia to date. The action was supported by a litigation funder.**

### (C) SHAREHOLDERS ACTION AGAINST ARISTOCRAT LEISURE LTD

Shareholders of the Aristocrat Leisure Ltd brought a class action against the company alleging that the way the financial accounts of the company were done overstated the revenue of the company. Such overstating was not in accordance with ordinary accounting standards and was misleading and deceptive. The case settled in August 2008 after trial but before judgment was delivered for $136 million plus $8.5 million in costs. This was the second largest shareholder class action settlement in Australia.

### (D) CRANBOURNE GAS LEAKS

There was a series of methane gas leaks from a landfill site in outer Melbourne. The properties of 750 owners were affected adversely by this methane gas leak. There was a negotiated settlement of $23.5 million paid by the Environmental Protection Agency and the local council, to the home owners in compensation for the fallen value of their properties, along with the loss of enjoyment of the use of their homes.

### (E) BLACK SATURDAY BUSHFIRES

The 2009 Black Saturday bushfires in Victoria resulted in the deaths of 173 people, personal injury to others and the loss of homes and property. More than a thousand homes were destroyed. The class action was brought against SP AusNet (whose ageing power lines were found to have caused the bushfire), the Utility Services Corporation and Victorian State Government Instrumentalities. The case settled when SP AusNet agreed to pay $378.6 million, Utility Services Corporation Ltd agreed to pay $12.5 million and the Victorian State Government agreed to pay $103.6 million. This settlement of almost $500 million is the highest class action settlement in Australia to date.

### (F) NUROFEN CLASS ACTION

A class action was taken against the owners of Nurofen alleging contraventions of the misleading or deceptive conduct provisions of the ACL. These were denied by Nurofen. The class action settled in July 2017 for $3.5 million of which 20% was to go to the litigation funder.

SAMPLE PAGES

# 27.7 NEGLIGENCE IN SPORT

## INQUIRY

*IN WHAT CIRCUMSTANCES DO PARTICIPANTS IN SPORTING ACTIVITIES OWE A DUTY OF CARE, AND TO WHOM?*

Participants in sport include players, coaches, organisers, spectators, and board members. Accidents in sporting activities often raise the issue of whether or not a participant can seek compensation from some other person by establishing that they are owed a duty of care. In some cases the circumstances in which an injury occurs may mean that compensation may even be sought from state.

## THE STATE EDUCATION DEPARTMENT

### CASE STUDY

*Watson v Haines* (1987) Aust Torts R 80-094

**Facts:** The plaintiff, Watson, was a 15 year-old schoolboy, who was playing hooker for his school's first grade rugby league team against another school's team in the competition. As a result of a scrum collapsing, he suffered a fractured spine and became a quadriplegic. He sued the State, through its Education Department, on the grounds that he should not have been allowed to play in the first or second row because he had a long thin neck. There was evidence that the Minister of Education had been advised of the risk of spinal injuries through a kit, entitled 'Don't Stick your Neck Out'. Copies of the kit were sent to schools, but there was no check by the Department as to whether teachers had seen the kits and knew of the risks involved.

**Legal Issue 1:** Did the State owe a duty of care to Watson? For a negligence claim it must first be established whether there was a duty of care owed by the defendant to the person injured.

Whether this duty exists or not is a question of law, and will depend on the individual circumstances of each case and the nature of the relationship between the parties. Recent decisions by the High Court indicate that the court takes into account a range of factors such as foreseeability, proximity and policy considerations of fairness and justice. To decide if there was a duty owed the court will determine whether the damage suffered by the plaintiff was a reasonably foreseeable consequence of the defendant's actions.

**Decision:** The State, through its staff, owed a duty to take reasonable care for the safety of school children including the safety of boys like Watson. Football was a school activity and as such it was the duty to take reasonable care for all safety aspects of sport played. As members of the State's Education Department knew that injuries of this type could occur, it was the State's duty to make sure teachers were informed of this.

**Legal Issue 2:** Did the State breach its duty of care to Watson? There must be a breach of the duty of care owed - standard of care owed by the defendant.

Here it has to be shown that the duty of care was breached by falling below the standard required by law. This is a question of fact to be answered after a duty of care has been established. The standard is that of a reasonable person, so that a duty will be breached if the conduct of the defendant falls below that of a reasonable person with knowledge of that sport. Children playing sport are required to do what a child of similar age and knowledge of the sport would reasonably be expected to do in the circumstances.

**Decision:** The State failed to ensure reasonable care was taken for the safety of boys with long thin necks, who play football. By letting him play, Watson was exposed to unnecessary risk of injury. Hence the State breached its duty.

SAMPLE PAGES

## CASE STUDY CONTINUED...

**Obiter:** The duty would also have been breached if a boy with a long thin neck had merely been warned of the risk. The duty required a person in authority to prevent a player with that physique from playing hooker or any position in the first or second row.

**Legal Issue 3:** Did the State cause the injury?
Causation of damage
A negligence action will only succeed if the victim plaintiff suffered damage and the defendant caused the damage.

**Decision:** The injury to his spine was caused by the fact that the school allowed him to play as hooker. There was nothing unusual about the scrum and there was no other explanation for the injury apart from his long thin neck.

Defences to negligence

There are two defences that are relevant to negligence in the context of sport. These can be argued by the defendant to reduce liability for the injury. They are (a) voluntary assumption of risk, and (b) contributory negligence. Both were raised in the case of Watson v Haines.

**Legal Issue 4 (a)** Had Watson by agreeing to play as hooker voluntarily assumed the risk of serious injury?

a. Voluntary Assumption of Risk

Because sport involves inherent risk and players know that injuries occur frequently, it can be said that playing a sport voluntarily means the player is agreeing to assume those risks. If the player has freely decided to play that sport, knowing the nature and likelihood of the risks involved, then the defence of voluntary assumption of risk is relevant.

**Decision:** Although he played the sport voluntarily, he was never warned of the risk involved. The duty, however, was to stop schoolboys with long thin necks from playing in these positions and a mere warning would have been insufficient in the context of school sport.

**Obiter:** 'If after leaving school, men with thin necks choose to go into first or second row in adult competition that is their own concern'. In such cases this defence of 'voluntarily assuming risk' may apply.

**Legal Issue 4(b):** Had Watson failed to take reasonable care for his own safety.

b. Contributory negligence

To successfully plead this defence, a defendant has to show that the plaintiff's own actions were also negligent and contributed to the injuries or damage suffered. The court in working out the damages for the plaintiff will reduce the amount by what it decides is the plaintiff's share of responsibility for the damage.

**Decision:** There was 'not a scintilla of evidence' on the facts for contributory negligence.

What different facts can you think of that may have given rise to the defence of contributory negligence? [C] [A] [E]

SAMPLE PAGES

## CHILDREN PLAYING SPORT

Children are required to do what a child of similar age and knowledge would reasonably be expected to do in the circumstances.

## CASE STUDY

*McHale v Watson* (1966) 115 CLR 199

**Facts:** A twelve year old boy threw a dart at a dartboard, which missed, hitting instead the nine-year plaintiff old in the eye.

**Legal Issue:** Did the twelve year old breach his duty to take reasonable care when throwing darts, which would make him liable in negligence?

**Decision:** No. Although an adult would have been negligent in those circumstances, the child did not have to meet the adult standard. The standard here was the degree of care one would expect from a twelve year old with the same level of experience in dart throwing.

# ESSENTIAL LEGAL STUDIES SKILLS

# CHAPTER 28

*FOCUS SUBJECT MATTER*



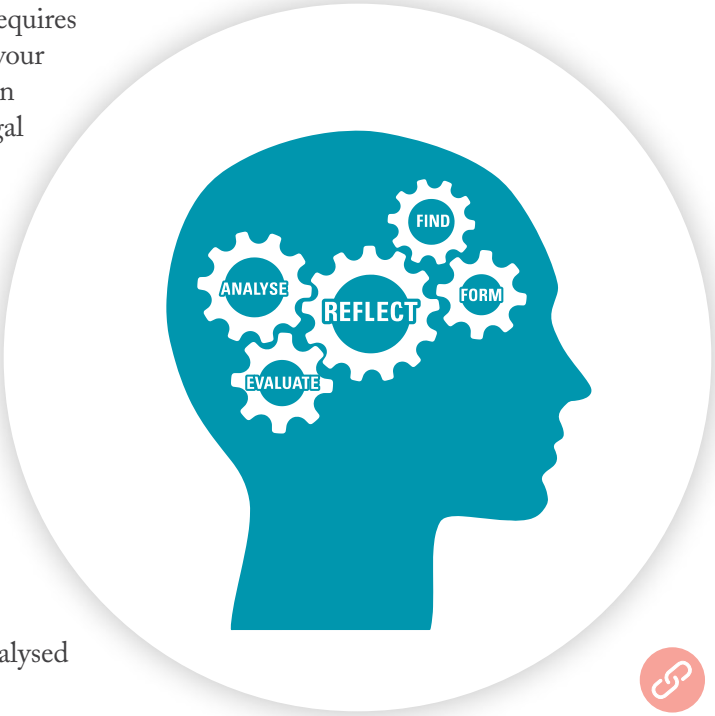
SAMPLE PAGES

*TO UNDERSTAND AND APPRECIATE:*

- essential skills needed to demonstrate a mastery of the objectives set out in the Queensland Legal Studies 2019 General Senior Syllabus.

## 28.1 FOCUS ON INQUIRY-BASED LEARNING

Legal Studies is a dynamic, real-world subject that requires you to learn how to develop an inquiry approach to your learning, which is illustrated in 'Figure 3: Stages of an inquiry approach' on page 10 of the Queensland Legal Studies 2019 Syllabus (referred to as 'the Syllabus').




'Inquiry Focus' activities are a regular, distinctive and thought-provoking feature of this textbook. They are designed to help you to hone your skills of 'Forming', 'Finding', 'Analysing', 'Evaluating' and 'Reflecting' in relation to a wide range of topical and controversial legal issues as you undertake the Syllabus-mandated inquiry approach to learning in Legal Studies. For example, an Inquiry activity in Chapter 3.2: 'Inquiries into Criminal Legal Issues' delves into the effectiveness and fairness of Queensland's new 'One Punch Kill' laws, beginning with the following 'Forming' of a central question to be investigated, analysed and evaluated:

Ch 3.2

SAMPLE PAGES

### INQUIRY FOCUS

*DO QUEENSLAND'S NEW 'ONE PUNCH KILL' LAWS ACHIEVE THE PURPOSES FOR WHICH THEY WERE CREATED AND FAIRLY BALANCE THE RIGHTS AND RESPONSIBILITIES OF THE DIFFERENT PARTIES AND OTHER STAKEHOLDERS AFFECTED BY THEM?*

A number of topical sources of information are provided in this Inquiry Focus activity in Chapter 3.2 in relation to this emotion-charged, media-driven issue, followed by the following reproduced INQUIRY FOCUS questions:

## INQUIRY FOCUS CONTINUED

1. State in your own words the issues which each of these sources raise. Outline the facts used by each author that supports his/her point of view about the particular issue. Are the facts relevant and persuasive? Give your reasons. [C] [A]
2. Conduct research and select relevant and up-to-date sources which provide opposing viewpoints in relation to this contemporary legal issue. For example, as a starting point, research the viewpoints of the following stakeholders: Bill Potts (Queensland criminal defence lawyer), Tina Good (Queensland homicide victims' support group) and Simon Turner (Director of the 'Just Let it Go' Foundation) [S]
3. Examine the opposing viewpoints and consequences which are presented in these sources and in sources which you have selected during your research, referring to evidence which supports these opposing perspectives and outcomes. [A]
4. Based on your weighing up of the competing arguments and substantiating evidence, make a decision as to what is the most persuasive viewpoint in relation to this issue. [E]
5. Present the alternatives available to respond to this issue which, in your opinion, are just and equitable. Provide recommendations for law reform which you believe will result in just and equitable outcomes for the community. Set out the facts and principles which support your views. [E] [R]

SAMPLE PAGES

At the end of the INQUIRY FOCUS questions are square brackets, each with a capital letter in them, which allow you, as a student of Legal Studies, to know which Syllabus objectives you are addressing as you answer each question. These are explained as follows so that you know what is expected of you by the Syllabus.

### COMPREHEND [C] LEGAL CONCEPTS, PRINCIPLES AND PROCESSES AND SELECT [S] LEGAL INFORMATION FROM SOURCES

Legal Studies is an excellent subject for you to **develop an inquiring mind,** which, of course, involves **asking probing questions** to find out the **what, when, where, who** and **how** of each law under investigation before **asking the big questions: Why does this law exist?** In other words, you could ask, 'What is its **purpose**?' or '**What is it intended to achieve**?'

Whether you are given, or you have to locate for yourself, sources of legal information, it is important to **dig below the surface of a controversial legal issue** that is being debated in our media-driven society (for example, the effectiveness and fairness of Queensland's new 'One Punch Kill' criminal laws) **to the first layer of your inquiry process in order to identify the purposes of any new or proposed laws** which are **current (up-to-date)** and **relevant** to the specific area of law which you are investigating.

These fundamental processes of the inquiry-based learning process are described on page 4 of the Syllabus as the following Legal Studies objectives:

### 1. COMPREHEND LEGAL CONCEPTS, PRINCIPLES AND PROCESSES:

*When students comprehend legal concepts, principles and processes, they identify features and examples to demonstrate understanding. Comprehending includes describing, explaining, translating knowledge into symbolic representations, constructing diagrams, and using legal terminology.*

### 2. SELECT LEGAL INFORMATION FROM SOURCES:

*When students select legal information from sources, they choose legal information from primary and/or secondary sources, for example, case law, legal databases, legislation, government and other institutional websites, published reports, media and expert commentaries, and lobbyist statements. Students make these choices based on currency and relevance, and use a recognised system of referencing to document and acknowledge sources.*

SAMPLE ONLY

## ANALYSE [A] LEGAL ISSUES AND COMPREHEND [C] LEGAL SITUATIONS

You will then be given many opportunities in the subject of Legal Studies to dig **deeper into the legal and social issues arising from the application of the law affecting specific scenarios (cases/situations/circumstances) based on the perspectives of various stakeholders** in our society. A '**stakeholder**', according to the Syllabus Glossary (p. 68), is a '… person, group or organisation that is affected by, can affect, or is concerned with an issue.' The Glossary then defines '**stakeholder perspectives**' (p. 68) as '… viewpoints, opinions and beliefs in regards to the presented situation.'

Once you have found out what are the laws and what they are intended to achieve (i.e. their purposes), it is essential to dig more deeply into the effectiveness and fairness of the laws by analysing [A] and evaluating [E] the legal issues arising from the specific cases or scenarios to which the relevant laws are applied.

These higher order processes of inquiry are described on pages 4 and 5 of the Syllabus as the following Legal Studies objectives:

### 3. ANALYSE LEGAL ISSUES:

*When students analyse legal issues, they apply legal concepts, principles and processes to determine the nature and scope of the issue and to examine viewpoints and consequences.*

### 4. EVALUATE LEGAL SITUATIONS

*When students evaluate legal situations, they use knowledge from their analysis to present legal alternatives, and then make a decision or propose recommendation/s to resolve the situation. Students synthesise information to justify the decision or recommendation/s using **legal criteria** and discuss their implications.*