

# Commercial Law

## Week 1: Introduction to key concepts

- Revision of contract law
- Estoppel
- Real and personal property

## Week 2: Agency

- What is agency
- Sources of agency
- Undisclosed principle
- Agency by law
- Duties of an agent
- Rights of an agent
- Liability of an agent
- Termination of agency

## Week 3: Government Tenders

- The tender process
- Contractual analysis of tenders
- Disclaimer clauses
- Potential basis of legal challenge
- Duty to act in good faith & act fairly

## Week 4: Sale of goods

- *Goods Act 1958* (Vic)
- *Competition & Consumer Act 2010* (Cth)
- Classification of goods
- Formation of a contract for the sale of goods
- Condition implied into contracts of sale
- Duties of seller and buyer
- Payment, delivery & acceptance
- Remedies

## Week 5: E-commerce Part 1-Online Presence

- Transmitting messages
- Domain name systems (DNS)

## Week 6: E-commerce Part 2- E-contracts

- What is e-commerce?
- Message integrity & confidentiality
- Formation of an e-contract
- Incorporation of terms

## Week 7: Credit Law

- National Consumer Credit Legislation
- General conduct obligations & credit licences
- Responsible lending obligations
- Application of the national credit code
- Entering into the credit contract
- Interest payments, fees & charges
- Changes to contractual obligations
- Notices
- Rights and Remedies
- Related contracts

## Week 8: Guarantees

- What is a guarantee?
- Requirements
- Discharging liability
- Vitiating factors
- Rights of the guarantor

## Week 9: Bailment

- What is bailment?
- Types of bailment
- Duties common to all bailment's
- Liability when delegating performance
- Termination of bailment
- Remedies

## Week 10: Insurance

- Legislative framework
- Nature of contracts of insurance
- Duties of disclosure
- Failure to perform duties
- Making a claim
- Subrogation
- Insurance complaint and codes of practice

## Week 11: Unjust enrichment

- Elements of unjust enrichment
- Unjust factors
- Subtractive unjust enrichment
- Restitution for wrongs
- Termination of contract

## Week 2: Agency

### Key points

- What is agency?
- Sources of agency
- Undisclosed principle
- Agency by law
- Duties of an agent
- Rights of agent
- Liability of an agent
- Termination of agency

### What is agency?

- A relationship involving the authority or capacity in one person (the agent) to create or affect legal relations between another person (the principal) and third parties
- '*Qui facit per alium, facit per se*' = 'he who acts through another is deemed in law to do it himself'
- Can be created by:
  - Contract
  - Ratification: assent is given either to an act done by someone who had no previous authority to act or to an act that exceeded the authority granted to an agent
  - Estoppel: a person allows another to act for him/her to such an extent that a third party reasonable believes that an agency relationship exists
  - Necessity: a person acts for another in an emergency situation without express authority to do so
- Classification of agents:
  - Special agents: act is not in ordinary course of business or profession
  - General agents: authority to act in all matters, or act in normal course of business
  - Universal agent: can do anything the principal can do, only limits are conferred by law **e.g** *power of attorney*
- Principal must have legal capacity to perform the act which they are performing through an agent
- An agent does not need contractual capacity to act as an agent
- Burden of proof is on person asserting agency relationship

### Sources of agency

- Actual express authority: requires consent of agent and principal, express or implied, can be conferred in writing or words, can be a term in a written or an oral contract (scope determined by terms of contract)
- Actual implied authority: consent inferred from relationship or conduct of parties and may arise in a number of ways including but not limited to incidental authority (incidental to expressly authorised acts), usual authority (usually employed to do) and customary authority (in accordance with reasonable business practice)
- Ostensible authority: involves the principal intentionally or negligently holding out, to a third party, another to be an authorised agent, when in fact the agent is not authorised.
- Where the third party acts to their own detriment in reliance upon the holding out, the principal will be bound notwithstanding the fact that the agent had no actual authority to perform the act (agency by estoppel)
- The principal can recover damages from agent for breach of duty to follow instructions
- 3 conditions of Ostensible authority:
  - *Representation*: Must be a representation by the principal to the third party. Consider manner in which representation was made and conduct relating to the representation.
  - *Reliance*: Must be a causal connectin between the representation to 3<sup>rd</sup> party & dealing between 3<sup>rd</sup> party & agent; must have relied upon representation
  - *Detriment*: Sufficient to show 3<sup>rd</sup> party entered into contract or altered their 3<sup>rd</sup> party position relying upon representation. (Note if misrepresentation comes to light before 3<sup>rd</sup> party acts in detriment = no breach)
- Ratification: retrospective authority, any act, irrespective of legality is capable of being ratified. A principal can only ratify if they have full knowledge of all material facts at time of ratification, and can only ratify the whole contract (cannot exclude certain provisions). Does not need to be communicated to 3<sup>rd</sup> party unless principal does not wish to ratify.
  - Exceptions to ratification include but are not limited to:
    - Must be done within a reasonable time
    - Must take place at a time when the ratifying party themselves done the act **e.g** *cannot ratify if principal lacks capacity*
    - Cannot create unfair prejudice towards a 3<sup>rd</sup> party
    - Cannot contradict other duties

### *Relevant cases*

*Hely-Hutchinson*: actual implied authority

*Crabtree-vickers*: ostensible authority

### Undisclosed principle

- 3<sup>rd</sup> party is not aware of the existence of or the identity of the principal
- Loss of indemnity = agent can sue and be sued
- 3<sup>rd</sup> party may elect to sue principal, once they become aware of principal, instead of agent (cannot sue both)

### Agency by law

- Law imposes agency irrespective of intention in case of emergency and purchase of necessities

### Duties of an agent

- An agent is in a fiduciary (a trust) relationship with their principal
- Duty to act in the bona fide interests of the principal
- Duty to avoid conflict with the agents own interests and the interests of a third party without disclosure
- Duty to perform their job with due care and skill
- Duty to follow the instructions of the principal
- Duty to act in person
- Duty not to make a secret profit (personal gain)
- Duty to preserve confidentiality
- Duty to keep accounts and have accounts ready for inspection on request

### *Relevant cases*

*Parker v McKenna* (1874) 10 Ch App 96 : secret profit

### Rights of agents

- Right to remuneration: The agent is entitled to receive an agreed remuneration or reasonable remuneration unless otherwise agreed upon.
- Right to indemnity and reimbursement
- Right of lien: An agent has the right to retain any movable or immovable property, papers or goods of the principal received by him, until the amount of commission due to him is received

### Liability of agent

- Personally liable where the agent does not disclose the existence of the principle at all
- Can be liable to the principal by disobeying instructions, the agent will be liable for loss resulted from breach
- Breach of warranty of authority: damages available to 3<sup>rd</sup> party
- Misrepresentations

### Termination

- Depends on terms of contract **e.g** *if agent was engaged for a particular time, terminated at expiration of time*
- Parties can agree to discharge
- Impossibility of performance
- Revocation
- Unilateral termination: one party gives notice to other of intention to withdraw from the agreement
- Termination by operation of law (includes by death, insanity, bankruptcy/insolvency)

### Agency exam question

- Define agency > identify principal and agent on the facts (their relationship, how does one know they have an agency relationship) > whether there is capacity to instruct > classify type of agent > identify source of authority (if ostensible authority *Cousens v Grayridge* criteria)