This unit provides an overview of the legal regulation of business in Australia. It gives a basic introduction to the Australian legal system, the legal framework of business regulation and areas of substantive law relevant to commerce with particular reference to business contracts and torts, fair-trading (including misleading or deceptive conduct), unconscionability, and unfair practices.
Contact details

<table>
<thead>
<tr>
<th>Lecturer</th>
<th>Mr Peter Sinden, Dr Rasiah Gengatharen</th>
</tr>
</thead>
<tbody>
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<td><a href="mailto:psinden@law.uwa.edu.au">psinden@law.uwa.edu.au</a>;</td>
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<td>Office location:</td>
<td>Faculty of Law, Law Link Building, Rooms 2.40 &amp; 2.42</td>
</tr>
<tr>
<td>Consultation Hours:</td>
<td>We are available for consultation without any appointment on Tuesday 12.00 - 1.00 pm in person in our offices (or by phone or e-mail). And at other times by appointment</td>
</tr>
<tr>
<td>Lecture Times:</td>
<td>Mondays 6.00 - 9.00 pm</td>
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<tr>
<td>Lecture Venue:</td>
<td>Myers Case Study 1</td>
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<tr>
<td>Submission of Reports &amp; Assignments</td>
<td>In lectures</td>
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<tr>
<td>Reports &amp; Assignments Returned</td>
<td>In lectures</td>
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</tbody>
</table>

Your lecturers

**Mr Peter Sinden** BA LLB (Hons) Qld., LLM Lond.ASM. (Barrister & Solicitor Qld & WA)

Peter is the Unit Co-ordinator for this Unit. His research interests are in Competition Law and Intellectual Property. Within the UWA Law School he teaches the Industrial and Intellectual Property Law unit in the Master of Laws degree as well as undergraduate courses in Company Law and Marketing Law. He is a consultant to several Perth law firms and has been the consultant author of several reports by a Committee of the Legislative Assembly of the Parliament of Western Australia. Peter was admitted as a Barrister of the Supreme Court of Queensland in 1977 and as a Barrister and Solicitor of the Supreme Court of Western Australia and Barrister of the High Court of Australia in 1988.

**Dr Rasiah Gengatharen** BEc Mal., LLB Lond., LLM PhD W.Aust, AAIBF (Snr).

Genga's research interests are Finance and Banking Law. His current teaching commitments within the UWA Law school include undergraduate units in Introduction to Law, International Commercial Law, Finance Law, Banking Law and Business Law in Asia. His current research interests are in regulation of derivatives and law relating to bank payments.

Introduction

The course is designed to introduce MBA students to the main principles of commercial law, particularly the law of contract. The approach will be, as far as possible, to examine the law through the resolution of the sort of practical legal problems that are commonly encountered by business people.

The course will consist of 12 three-hour seminars. The seminars will be held weekly and will involve a mix of formal lecturing, group work and the consideration of a series of discussion questions. The purpose of spending class time on the discussion questions is to enable students to revise and contextualise the legal rules they have been learning.

The Seminar Programme is attached and you will see that it contains a Reading Guide. It will be assumed that students have read at least the stipulated passages from the textbook before the seminar concerned. However it is intended that all these materials, largely reported cases and journal articles, will be read for the appropriate seminar.

All the materials referred to in the Reading Guide are available on-line and can be accessed by going to the “Find Course Materials for Your Unit” button on CygNet On-Line at
References in the Seminar Programme and Reading Guide marked with an asterisk are considered to be particularly important. A further reference list is provided for those who wish to explore the subject in greater detail, and for use in preparation of assignments. Further references may be given in seminars.

Broad learning outcomes

This unit is set within a commercial context. It focuses on the rights and potential liabilities of businesspersons, professionals and consumers. On completion of this unit, you should be able to:

1. describe the key elements of the Australian legal system;
2. display a working knowledge of some important concepts of commercial law;
3. demonstrate logical reasoning, analysis and communication skills;
4. apply this knowledge and these skills in analysing and solving a series of legal case studies and hypothetical business problems.

Textbook(s)

Required text

Recommended

Recommended reference text for the contract law section of this unit

Recommended reference text on the legal system, legal materials and their use section of this unit

Key dates

Assignment No.1
You will be given a short problem question at Seminar 4. Your written solution to the problems posed in the question must be handed in at Seminar 5.

Assignment No.2
You will be given a longer problem question at Seminar 7. The answer will be due in Week 9.

Take Home Final Exam
The Exam paper will be handed out at Seminar 12. You will have one week to submit your answers. Your answer papers should be submitted electronically to Carol Brett at: cbrett@law.uwa.edu.au and copied to the Unit Co-ordinator, Mr. Peter Sinden at: psinden@law.uwa.edu.au

The maximum word length for your answers to each of the assignment questions and to the Final Exam will be notified to class members during the appropriate Seminars.
**Attendance**

Participation in class, whether it be listening to a lecture or getting involved in other activities, is an important part of the learning process. For this reason the GSM has decided not to move to on-line teaching. It is, therefore, important that you attend classes (and be on time).

More formally, the University regulations state that ‘to complete a course or unit a students shall attend prescribed classes, lectures, seminar and tutorials’. Students whose attendance at MBA units has been unsatisfactory will not be granted a pass grade. More than two missed classes without prior permission from the lecturer is classified as unsatisfactory. Students should not expect to obtain approval to miss more than two classes per unit, unless there are exceptional circumstances.

**Assessment**

Assessment will be based on two assignments and a (take home) Final Exam. The assignments and the exam are staggered through the duration of the course.

<table>
<thead>
<tr>
<th>Component</th>
<th>Weight</th>
<th>Due date</th>
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<tbody>
<tr>
<td>Assignment No.1</td>
<td>20%</td>
<td>Week 5</td>
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<tr>
<td>Assignment No.2</td>
<td>30%</td>
<td>Week 9</td>
</tr>
<tr>
<td>Final Exam</td>
<td>50%</td>
<td>The Exam paper will be handed out at Seminar 12. You will have one week to submit your answers.</td>
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</tbody>
</table>

The purpose of assessment

There are a number of reasons for having assessable tasks as part of an academic program. The assessable tasks are designed to encourage you to explore and understand the subject more fully. The fact that we grade your work then gives you an indication of how much you have achieved. Providing feedback on your work also serves as part of the learning process.

The standard of assessment

The Graduate School must ensure that the processes of assessment are fair and are designed to maintain the standards of the School and its students. The School follows the University of Western Australia’s grading system

<table>
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<tr>
<th>Grade</th>
<th>Percentage</th>
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<tr>
<td>HD (Higher Distinction)</td>
<td>80-100%</td>
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<tr>
<td>D (Distinction)</td>
<td>70-79%</td>
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<tr>
<td>CR (Credit Pass)</td>
<td>60-69%</td>
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<tr>
<td>P (Pass)</td>
<td>50-59%</td>
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<tr>
<td>N+ (Fail)</td>
<td>45-49%</td>
</tr>
<tr>
<td>N (Fail)</td>
<td>0-44%</td>
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</tbody>
</table>

The School awards marks leading to these grades by using the following general criteria which are presented here as an indication of the School’s expectations. These general criteria may be supplemented by specific standards provided with regard to a particular assignment.

HD The student has a clear understanding of theory, concepts and issues relating to the subject and is able to adopt a critical perspective. The student is able to clearly identify the most critical aspects of the task and is able to offer a logically consistent and well articulated analysis within the analytic framework presented in the course. The student is able to draw widely from the academic literature and elsewhere but maintains relevance.
D The student has a clear understanding of theory, concepts and issues relating to the subject. The student is able to develop an analysis of an issue using the analytic framework presented in the course and is able to identify and evaluate the critical issues. The student is able to draw upon relevant academic and other material.

CR The student demonstrates an understanding of the analytic framework developed in the course and a partial understanding of concepts and issues. The student is able to identify some key issues and is able to present a logical discussion, but with some conceptual errors or gaps between analysis and conclusions. The student is able to draw upon an adequate range of references and other materials.

P The student generally takes a descriptive rather than analytic approach to the subject. The student is able to demonstrate some understanding of the issues involved but does not demonstrate the ability to apply the analytical framework which had been developed in the course. Draws primarily upon course materials for referencing.

N+ The student is unable to demonstrate that he or she understands the core elements of the subject matter. The student is able to provide some insight into issues but misapplies analytic framework developed in course, omitting key factors and, for example, drawing conclusions which are not related to the preceding discussion.

N The student is unable to demonstrate any understanding of the subject matter. Material presented for assessment is unrelated to course framework and shows no effort to identify or address critical aspects of the topic.

The scaling of marks to ensure comparability between classes in an acceptable academic practice. The GSM and Board of Examiners has the right to scale marks where it is considered necessary to maintain consistency and fairness.

Submission of assignments

Assignments should be submitted in class on the due date or if handed into the office; a standard cover sheet should be used and a receipt issued.

Late assignments will attract a penalty of 5% per day. This penalty will be waived by the lecturer only in exceptional circumstances. No marks will be awarded to assignments submitted after other students in the class have had their assignments returned.

Assignments will be returned in class.

It is the intention that the marked assignments will be returned within two weeks of submission.

Appeals against assessment marks

In the first instance, students are strongly advised to talk informally to the lecturer about the grade awarded.

The University provides the opportunity for students to lodge an appeal against any mark which he or she feels is unfair. Any student making an appeal is under an obligation to establish a prima facie case by providing particular and substantial reasons for the appeal.

There is a 10 day time limit for making any such appeal. An appeal against academic assessment may result, as appropriate, in an increase or decrease in the mark originally awarded. The University regulations relating to appeals and the form on which the appeal should be lodged can be found in the GSM website.
Acknowledgements and plagiarism

In the course of your individual and group work assignments, you will encounter ideas from many sources. These will include journal and newspaper articles, commentaries, books, web sites and other electronic sources, original case sources, lecture materials. All MBA assignments that you submit must acknowledge all the different sources you have used. Not to acknowledge your sources is plagiarism, a form of dishonesty. Plagiarism is the misappropriation of the work or ideas of others and presenting them as your own. This is reprehensible from both an ethical and legal viewpoint. Neither the School nor the University accepts ignorance or the fact that a student’s previous acts of plagiarism had been undetected as a defence.

In order to avoid engaging in plagiarism it is your responsibility to acknowledge all of your sources in any work submitted for assessment and it is essential that you reference the work of others correctly. Where you quote directly from a source, you must ensure that any direct quotations are placed in quotation marks and are fully referenced. Even when you do not quote directly and are just referring to or expanding on the work of others, you must still acknowledge the sources of your information and ideas. Close paraphrasing in which you change a few phrases around, leave a clause out of a long sentence or put the original sentences in a different order is still plagiarism. To mark words as a quotation the entire text that has been copied should be enclosed within quotation marks. If the copied text is four or more lines in length, it may be more appropriate to set it as a separate and indented paragraph. Each time that text is copied, the source must be acknowledged with a reference citation, including the page number.

Advice on proper referencing is given below. If you have any doubts concerning appropriate referencing formats or how to acknowledge the work of others correctly, you should seek the advise of your lecturer.

It is GSM policy that no student will profit from plagiarism. Generally, a mark of ‘Fail’ will be recorded for the assignment in which this has occurred, regardless of its other merits or qualities. Serious cases shall be referred to the University’s Board of Discipline. All students should note that cases of copying are automatically reported to the Sub-Dean and documentary evidence along with associated correspondence is placed on the student’s permanent record.

Taping of Lectures

The Graduate School does not provide tape recordings of lectures, however if you do wish to tape record a lecture then as a matter of courtesy, you should obtain the permission of the lecturer first.

Referencing

It is important that the referencing of any sources used in your written work is done properly, if only to substantiate the points you are making in your assignment or project. The Harvard style is the preferred and there are some notes for guidance which have been prepared by the library staff: ‘Citing your sources Harvard Style’

Endnote is a really good system for building up a database of references. Not everyone will want to invest the time in using this system but you should consider it if you intend to build up resource materials or plan to undertake extensive research in a particular area. The library staff have also developed a tutoring package: ‘A quick Guide to Using EndNote’ which provides the basics for using EndNote with an essay

This is linked to from the how to Use EndNote page
www.library.uwa.edu.au/guides/endnote/ which provides more comprehensive information.
SEMINAR PROGRAMME AND READING GUIDE

PART A: INTRODUCTION TO THE LEGAL SYSTEM, LAWYER’S REASONING, LEGAL MATERIALS AND THEIR USE

Seminar 1: Introduction to the Legal System

31 January
- The Court System
- Legislation and Precedent
- The Constitutional Framework of Business Law in Australia

Reading
Vermeesch: Chapters 1, 2 and 3


* Baltic Shipping Co v Dillon (1993) 111 ALR 289 (Mason CJ’s judgement only)

Seminar 2: The growth of the Tort of Negligence: an example of the common law at work

7 February
- Introduction to Torts
- Duty of care
- Standard of Care
- Remoteness of Damage

Reading
Vermeesch: Chapter 14

Seminar 3: Liability in Tort for Negligent Mistatement and Economic Loss

14 February
- Negligent Mistatement
- Economic Loss

Reading
Vermeesch: Chapter 14

* Shaddock v Parramatta City Council (1981) 55 ALJR 713 (Mason J’s judgment).


* Esanda v Peat Marwick Hungerfords (1997) 188 CLR 241 (Brennan CJ’s judgement)

* Perre v Apand Pty Ltd (1999) 164 ALR 606 (headnote)
PART B: CONTRACT

Seminar 4: Formation of the Contract I.

21 February
- Invitations to Treat
- Offers
- Counter Offer
- Options
- Acceptance

Reading
Vermeesch: Chapter 4: [4.01]-4.47
Carter & Harland, Chapter 2.

* Masters v Cameron (1954) 91 CLR 353 (extract from Collinge p24-27).

Seminar 5: Formation of the Contract II

28 February
- Intention to Create Legal Relations
- Consideration
- Estoppel

Reading
Vermeesch: Chapter 4: [4.48] – [4.50], Chapter 5
Carter & Harland, Chapters 3 and 4

* Legione v Hately (1983) 57 ALR 292 (headnote only).


Seminar 6: Form Requirements; Construction of Contracts

7 March
- Formalities
- Existence (incorporation) of Terms
- Construction (interpretation) of Terms

Reading
Vermeesch, Chapters 7 and 9
Carter & Harland, Chapters 5, 6 and 7

Property Law Act 1969 (WA) "PLA" ss 9, 33, 34, 36

* Redden v Wilks [1979] WAR 161
* Sinclair v Preston [1970] WAR 186
* Snarski & Snarski v Barbarich [1969] WAR 46
* Cavanagh, SW. The Ultimate Exclusion Clause. (1985) 59 ALJ 67 noting Life Savers Case
* Liaweena (NSW) Pty Ltd v McWilliams Wines Pty Limited (1991) ASC 56-038
* Darlington Futures v Delco (1986) 59 ALJ 67
* Interfoto Picture Library v Stiletto Visual Programmes [1988] 1 All ER 348
**Seminar 7:** Contract: Vitiating Factors

14 March
- Contractual Capacity
- Misrepresentation
- Mistake
- Duress
- Undue Influence
- Unconscionability
- Illegality

**Reading**
Vermeesch: Chapters 8, 10, 11, 12 and 13
Carter & Harland - Chapters 8, 10, 12 - 17

* Property Law Act (WA) ss 124-125.

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**Seminar 8:** Third Parties in Contract

21 March
- Privity
- Contracts for benefit of third parties
- Assignment

**Reading**
Vermeesch: Chapter 6 (privity), paragraphs [13.33 – 13.38]
Carter & Harland, Chapter 9

* Property Law Act (WA), s11
* Tedeschi, Consideration, Privity and Exemption Clauses: Port Jackson Stevedoring Pty Ltd v Salmond and Spraggs (Australia) Pty Ltd (1981) 55 ALJ 876

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**Seminar 9:** Discharge of the Contract

4 April
- Performance
- Frustration
- Breach

**Reading**
Vermeesch: Chapter 13 paragraph’s [13.1 – 13.32]
Carter & Harland, Chapters 18, 19 and 20.

* Carter, Foran v Wright (1990) 3 JCL 70.
* Wright, Changed circumstances does the outcome remain the same.
Seminar 10: Remedies for Breach of Contract

11 April
- Termination
- Damages
- Specific Performance
- Injunction
- Other Remedies

Reading

Carter and Harland Chapters 21, 22, 23 and 24

* Butt, Note on Relief Against Forfeiture (1989) 63 ALJ 346.
* Victoria Laundry v Newman Industries [1949] 2 KB 528
* Baltic Shipping Co v Dillon (1993) 111 ALR 289 (see readings for seminar 1).
* Poseidon Ltd v Adelaide Petroleum NL (1994) 179 CLR 332 (headnote)

PART C: STATUTORY MODIFICATION OF THE COMMON LAW OF CONTRACT

Seminar 11 (a): Implied Terms, Exclusion Clauses and Remedies under Statute

18 April
- Sale of Goods Act 1895 (WA)
- Trade Practices Act 1974 (Cth)
- Fair Trading Act 1987 (WA)

Reading
Vermeesch: Chapter 22
* Trade Practices Act 1974 (Cth) ss 4B, 66-75A
* Sale of Goods Act, s11-15
* Fair Trading Act 1987 s6

Seminar 11 (b): Misleading, Deceptive and Unconscionable Conduct:
- Jurisdiction issues
- Meaning of "misleading or deceptive"
- "Unconscionable" conduct
- Remedies for Contravention

Reading
Vermeesch: [22.93] - [22.112]
Carter & Harland: Chapter 11

* Gates v CML (1986) 63 ALR 600.
* Demagogue v Ramensky (1992) 110 ALR 608.
PART D: BUSINESS RELATIONSHIPS

Seminar 12:

25 April
- The Fiduciary Relationship and Duties
- Forms of Business Association, including the
  - Sole Trader
  - Partnership and agency
  - Corporations
  - Joint Venture
  - Trust
  - The Nature and Constitution of Corporations

Reading
Vermeesch: Chapters 19 (agency), 20 (partnership), [29.33]-[29.71] (trust), Chapter 21 (corporations)

* Lehane, Fiduciaries in a Commercial Context

* Hospital Products Ltd v US Surgical Corporation 58 ALJR 587 (Headnote)

* Baxt, Bilakower and Morgan, Advantages and Disadvantages of Partnership, Extract from CCH Guidebook to Partnership Law, CCH (2nd Edition).

SEMINAR 1 OUTLINE

A. INTRODUCTION TO COMMERCIAL LAW

B. INTRODUCTION TO THE LEGAL SYSTEM

1. The Meaning of Law
2. Sources of Law
3. The Australian Constitution
4. Common Law and Equity
5. The Hierarchy of Courts
6. The Doctrine of Precedent
7. Interpretation of Statutes

C. LAW MAKING: PARLIAMENT & THE COURTS
(See: Handout attached as Annexure “A”)
SEMINAR 2 OUTLINE

A. INTRODUCTION TO TORTS
   1. The Definition of Tort
   2. The objectives of the law of tort
   3. The concepts of causation and fault
   4. Different levels of liability
      - strict liability
      - liability based on negligence
   5. Torts commonly encountered in business

B. NEGLIGENCE
   1. The elements of an action in negligence
      i. duty of care
         *(Donoghue v Stevenson)*
      ii. standard of care
         *(Bolton v Stone, Paris v Stepney Borough Council)*
      iii. damage
         *(The Wagon Mound)*
   2. Types of loss caused by a negligent act
DISCUSSION PAPER 1

Read the Case given to you during Seminar 1 and answer the following questions:

(a) Who are the Parties to the case?

(b) How would you go about finding the case?

(c) Which party initiated this action and in which Court was it initiated?

(d) Describe the sequence of appeals in the case

(e) In your own words, make a summary of the facts of the case

(f) What would you consider to be the ratio decidendi of the case?

(g) What was the High Court's decision?

(h) Which jurisdiction does the case Addis v Gramophone Co Ltd [1909] AC 488 referred to by Mason CJ come from?

(i) What part did common law play in the Courts Decision?
A. NEGLIGENCE MISTATEMENT
   i. Policy Issues
   ii. Traditional Bar on Liability in tort
   iii. Hedley Byrne
   iv. MLC v Evatt
   v. Shaddock v Parramatta City Council
   vi. Esanda v Peat Marwick Hungerfords

B. ECONOMIC LOSS
   i. Policy Issues
   ii. Caltex v The Dredge Willemstad
   iii. Perre v Apand Pty Ltd
Jack had instructed his 18 year old daughter Jill to use a new welding machine. The second time she used it, she decided that one of the component parts needed cleaning. Jill used a cleaning chemical known as Tumbi. In the course of its use, some of the chemical was spilled on the garage floor from where it found its way into the drainage system. It caught fire when it came in contact with sparks from the acetylene torch in use at the panel beating workshop two doors down. The fire that resulted caused serious damages to five cars parked in the garage as well as the expensive equipment in use there. Neither Jack nor Jill knew that the chemical was flammable.

The garage owner, Sani, having become aware of the source of the fire now wants to claim damages against Jack and Jill for negligence. What would Sani need to prove?
FORMATION OF THE CONTRACT (I)

1. THE MEANING OF CONTRACT

2. THE ESSENTIAL ELEMENTS OF A CONTRACT
   
i. Agreement
   
ii. Intention
   
iii. Consideration

3. THE AGREEMENT
   
i. The Offer
      
      - Invitations to treat
      - Options
   
ii. Acceptance
      
      - form of acceptance
      - counter offers
      - requests for information
      - communication of acceptance
   
iii. Revocation of offer
   
iv. Rejection of Offer
   
v. Lapse of Offer
Question 1

Charles is a lecturer in Management Science in the Department of Management. After a staff meeting he speaks to Clyde, the Departmental tax expert. Clyde also practices as a Public Accountant and is a registered tax agent.

Charles asks for advice about a tax problem. Clyde does not wish to display his ignorance about what is a complicated and obscure point, and gives Charles some advice based on his knowledge of general principles of tax law. Charles subsequently acts upon this advice.

Clyde's advice proves to be completely wrong, and as a result, Charles is required to pay additional tax, as well as pay a substantial fine.

Charles now wants to bring an action against Clyde but first Charles wants you to answer the following questions?

(a) Is it likely that a Court would find that Clyde owed a duty of care to Charles not to give negligent advice?
(b) What standard of care must Clyde have exercised and is it likely that he has met that standard in this case?
(c) Can Charles' sue for any act of negligence in the circumstances of these facts?
(d) Can Charles be compensated for his loss and if so, how is the compensation to be measured?
(e) Support your answers with authorities.

Question 2

From his farm east of Perth, Wayne raises sheep, many of which he ultimately exports live to a number of Middle Eastern countries. Wayne's live sheep sales to Middle Eastern countries generated significant revenue during each of the last three years. Jose, who operates a farm approximately 100 kilometres from Wayne’s farm, also exports live sheep to Middle Eastern countries.

Last month, a particularly virulent disease was detected amongst the sheep on Jose’s farm. Following the revelation of the presence of the disease amongst Jose’s sheep, all Middle Eastern countries have impose a ban on live sheep imports from WA for a period of two years, following which the ban will be reviewed.

Wayne has already lost a number of live sheep sales to Middle Eastern customers and expects to generate very little revenue from live sheep sales to the Middle East over the next two years.

Assuming:

(a) the outbreak of the disease could have been prevented by Jose taking reasonable care of the sheep on his farm; and
(b) the disease has not spread to the sheep on Wayne’s farm and is unlikely to do so because of the distance between the two farms

Does Wayne have a claim against Jose in tort to recover his damage flowing from his loss of live sheep sales abroad?
SEMINAR 5 OUTLINE

FORMATION OF A CONTRACT (II)

4. The Intention to Create Legal Relations
   i. Presumption of intention
   ii. Rebutting the Presumption

5. The Doctrine of Consideration
   i. Meaning of consideration
   ii. Consideration must move from the promisee
         \((\text{Coults v Bagots Executors})\)
   iii. Consideration must be of value in the eyes of the law
         a. past consideration is no consideration
            \((\text{Roscorla v Thomas, Re Casey Patent})\)
         b. consideration need not be adequate
            \((\text{Thomas v Thomas})\)
         c. a promise to perform an existing legal duty is not consideration
            \((\text{Stilk v Myrick, Pinmel's Case, Foakes v Beer}), \text{ but see now Williams v Roffey Bros.})\)

6. Enforcement of Non-Contractual Promises
   i. Estoppel
      a. \text{Legione v Hately}
      b. \text{Walton Stores v Maher}
      c. \text{Commonwealth of Australia v Verwayen}
Question 1

Jim, a student, goes into the university refectory to eat lunch. As he passes along a counter an attendant gives him a plate of meat and vegetables which he puts on a tray. He then selects an apple from a glass case and also puts it on his tray. As he proceeds to the cashier he reflects on the examinations scheduled to take place in a week’s time. Suddenly he loses his appetite and tells the cashier that he wishes to return the food on his tray. The cashier insists that he pays for the food.

(a) Discuss the legal position of Jim.

(b) Would your answer be different if Jim takes a bite of the apple before he reaches the cashier?

Question 2

Liquor Store embarks on a marketing campaign to increase its sales in the northern suburbs. On 7 July, it mails a letter to Tom offering to sell two cartons of Margaret River wine at $250 per carton. There is no mention of the terms of payment. The letter reaches Tom on 10 July. On the following day, he sends Liquor Store the following fax:

‘Advise whether payment in two installments is acceptable, the first on delivery and the second a month later.’

Liquor Store does not respond to the fax when it discovers that the wrong price had been quoted. On 12 July Liquor Store sends a letter to Tom revoking its offer. On 14 July, Tom mails a letter to Liquor Store accepting its offer. On 15 July, Liquor Store’s letter of revocation reaches Tom. Tom’s letter of acceptance reaches Liquor Store on 16 July.

(a) Advise Tom of his legal position.

(b) Would your advice be different if instead of sending a letter Tom had phoned his acceptance on 14 July but due to a failure in the telephone system the acceptance was not heard by Liquor Store?

Question 3

Discuss the doctrine of freedom of contract. Are there any restrictions placed on this freedom?
SEMINAR 6 OUTLINE

FORMALITIES IN CONTRACT LAW

1. Deeds

2. Contracts Required to be in Writing

3. The Statute of Frauds

4. Effect of Non-compliance with form

5. Interpretation of the Terms of the Contract

6. Effect of Oral Agreement on Written Contract

7. Exclusion and/or Limitation Clauses
Question 1

Mick borrows $10,000 from his friend Bob. Under the terms of the loan agreement, the whole sum is repayable in two months together with an extra $100 as interest on the loan. Advise Bob of the probability of success in each of the following scenarios:

(a) On the day repayment is due, Mick finds himself in a dire financial predicament. He offers to pay Bob $5,000 in full satisfaction of the debt. Bob is understanding of his friend’s difficulties, and accepts this amount in full satisfaction. However, a week later, Bob has second thoughts and decides to sue Mick for the remaining $5,000 plus $100 interest.

(b) After a month Mick pays Bob $10,000 plus $50 interest and Bob agrees to accept it as full satisfaction of the debt. Two months later, Bob commences proceedings against Mick for the remaining $50.

(c) On the day repayment is due, Mick offers Bob $9,000 and a ‘Bart Simpson’ skateboard as repayment for the loan. Bob initially accepts this as full satisfaction of the debt, but later sues Mick for the remaining $1,000 plus $100 interest less the present market value of the skateboard.

Question 2

On 14 March, Tropical Machinery offers to sell a tractor to Susan for $50,000 for delivery in April. The offer states that any order would only be accepted on the terms set out in Tropical Machinery’s quotation. One of the terms and conditions is a price variation clause. On 20 March, Susan submits her order. The order not only differs from Tropical Machinery’s quotation but is also on terms that do not make provision for any price variation. On 22 March, Tropical Machinery replies: ‘We accept your order on the terms thereon and will deliver the tractor on 25 April’. However, Susan is unable to accept delivery until 25 August. Tropical Machinery invokes the price variation clause and claims an additional $5,000 for increased costs. Susan refuses to pay.

(a) Advise Tropical Machinery.

(b) Assume that Tropical Machinery had replied: ‘We accept your order on the terms set out in our earlier quotation and will deliver the tractor on 25 April’ and Susan accepted delivery on 25 August. Would your advice to Tropical Machinery be different?

Question 3

What presumptions have developed to assist in determining whether parties to an agreement intend to create legal relation, and how can these presumptions be rebutted.
SEMINAR 7 OUTLINE

A. CONTRACTUAL CAPACITY

1. MINORS
   a. Contractual Capacity of Minors (Age of Majority Act 1972)
   b. The Nature of Contracts that can be Enforced against Minors
      i. Necessaries:
         - at Common Law
         - in Statute
      ii. Benefit of the Minor

2. MENTALLY IMPAIRED

3. INTOXICATED PERSONS

4. BANKRUPTS

5. CORPORATIONS

6. ALIENS

B. MATTERS THAT MAY VITIATE A CONTRACT

1. Misrepresentation:
   a. Innocent Misrepresentation on
   b. Fraudulent Misrepresentation

2. Mistake
   a. Non est factum
   b. Mutual Mistake
   c. Common Mistake
   d. Unilateral Mistake

3. Duress

4. Undue Influence and Unconscionable Conduct

5. Illegality
DISCUSSION PAPER 6

Question 1

Joy Rides Limited operates a leisure park for adults and children (provided they are accompanied by adults). The admission fee is $50 per person and it includes unlimited access to all rides, shows and attractions. Just inside the only entrance to the park is a large sign that states:

‘Nothing in the agreement for entry into this Park shall render its owners, managers or employees liable for any losses or injuries suffered by any persons whilst they are in the Park.’

David is injured while riding on one of the roller coasters due to the negligent act of the Park’s employee. Advice whether Joy Rides can exclude liability at common law for loss or damage to its customers. (You are not required to cover statutory intervention in this area.)

Question 2

Dick is interested in purchasing Carol’s house in Alexander Heights. He offers to pay $250,000 on condition that he is given vacant possession upon paying the 10 per cent deposit. After Carol has accepted his offer, Dick tells Carol, ‘Of course this agreement is subject to a formal contract being drawn up by my solicitor’. Dick writes a cheque for the 10 per cent deposit and gives it to Carol, who issues him with the following receipt, ‘I hereby acknowledge receipt of $25,000 as deposit from Dick for the purchase of 100 Cromwell Street, Alexander Heights, WA 6064 for $250,000 with early possession. Signed Carol.’ Dick takes possession of the property and spends $5,000 repairing the kitchen and bathrooms. No written contract is signed and a month later Carol changes her mind about selling the house.

Advise Carol whether the agreement is enforceable against her.

Question 3

In April 2002 Marg enters into a five-year lease of the ground floor of a building which she converts into a restaurant. Sometime in March 2003, a large vacant block of land adjacent to the building is designated a refuse tip by the council. This development has an adverse impact on her business. Turnover falls by more than 50 per cent and Marg suffers losses. She approaches the owners of the building for a reduction in rent. The owners agree to reduce the rent by 50 per cent from March 2003. As a result of intense lobbying by Marg and other occupants of the building, the tip is closed by the local council in July 2004. Marg’s restaurant business improves significantly and the owners of the building want Marg to pay the full rent from July 2003.

Advise Marg.
ENFORCEMENT OF THE CONTRACT BY THIRD PARTIES

1. The Doctrine of Privity
   i. The Contract of Insurance (Trident Insurance v McNeice Bros.)

2. Overcoming the Doctrine of Privity
   i. Exclusion Clauses
   ii. Agency
   iii. Trust of a Contractual Promise
   iv. Negotiable Instruments
   v. Assignment
   vi. Commercial Letters of Credit
   vii. Statutory Amendment
Question 1

Ima Rogue, disguised as the famous film star Jack Nicholson, enters Star Motors and examines a Porsche 911 motor car that has a list price of $165,000. He says to Sam, the owner of the car dealership, ‘You know who I am don’t you? I’ll take the car but only at a price of $140,000 to take account of all the free publicity you will get as I drive it around Hollywood and in my next movie with your “Star Motors” insignia left on it.’

He then hands over a $140,000 cheque signed in the name of Jack Nicholson. Sam is rather apprehensive about the proposed deal. When Ima sees him hesitating, he produces an entry card to Paramount Studios (which later proves to be a forgery) with the object of proving his identity as Jack Nicholson. Sam then allows Ima to drive the car away. The following day, Ima sells the car to Olivia who pays him in cash which he takes with him to Majorca. One week later, the bank informs Sam that Ima’s cheque has been dishonoured. Sam traces the car to Olivia and demands that she hands over the car.

Advise Olivia whether she is obliged to surrender possession of the car. In your advice, be sure to explain to Olivia whether the contract between Star Motors and Ima is void or voidable, and why there is an important legal distinction in the circumstances.

Question 2

Fred Smith is prospective purchaser of a farming property near Margaret River. After being taken on an extensive tour of the farm, Fred asks the owner whether there are any problems with drainage on the property. The owner replies:

‘In twenty years on the farm I have never had any problems with drainage and I can assure you that you need not be concerned with that.’

Nothing is mentioned concerning drainage in the written contract of sale subsequently drawn up between Fred and the owner. The contract contains a clause ‘negating all prior assurances’. Fred buys the farm for $230,000. Six months after Fred enters into possession and after he has substantially reorganized the farm, he discovers that part of the farm is subject to persistent flooding during the winter months. Due to this problem the true market value of the farm had been only $150,000 at the time Fred made the purchase. The floods also ruined the crops that cost Fred $5,000 to plant (seeds and labour) and which Fred had reasonably expected to sell for $40,000.

Advise Fred of his legal position.

Question 3

Explain the doctrine of undue influence and examine its effects on the formation of contracts.
SEMINAR 9 OUTLINE

DISCHARGE OF CONTRACT

1. Performance
   i. The Requirement of Exact Performance,
   ii. Conditions, Innominate Terms, Warranties
   iii. Characteristics of Performance
      a. substantial performance
      b. acceptance of returnable performance (cf Sumpter v Hedges)
      c. divisible contracts
   d. prevention of performance
   iv. Time for Performance

2. Express Agreement

3. Operation of Law

4. The Doctrine of Frustration
   i. The Nature of the Doctrine
      (Codelfa Construction v State Rail Authority of NSW)
   ii. Application of the Doctrine
      a. illegality in Performance
         (Esposito v Bowden)
      b. impossibility of Performance
         (Taylor v Caldwell)
      c. frustration of purpose
         (Knell v Henry)
      d. self induced frustration
         (Maritime National Fish Pty Ltd v Ocean Trawlers)
   iii. Effect of Frustration on the Contract

5. Breach
   i. Anticipatory Breach (i.e. repudiation of the contract before performance is due)
      a. effect of anticipatory breach
         (Avery v Bowden)
      b. time for assessment of damages
   ii. Breach during Performance
   iii. Effect of Breach - discharge by breach does not affect the rights and obligations owed by the parties to one another, it only discharges one or both of the parties from their future obligations under the contract.

NOTE: wrongful termination (for breach) is also a breach of contract as it amounts to a refusal to perform
(DTR Nominees v Mona Homes, Woodar Investments Developments v Wimpey Construction)
Question 1

Jackson Enterprises and Simms Plastics enter into a five year contract whereby Jackson Enterprises is appointed the exclusive sales agent for a new reticulation system developed and manufactured by Simms Plastics. Under the contract, Simms Plastics is not permitted to sell the new system directly or through any agent other than Jackson Enterprises.

Simms Plastics originally wanted a provision in the contract that would require a minimum of five salespersons to make a minimum of thirty sales calls a week, but after a long and difficult negotiation Simms Plastics agrees to the following provision:

‘It is an express condition of this contract that Jackson Enterprises appoint a minimum of three salespersons each of whom should make calls at no less than twenty retail outlets a week in order to solicit orders for the system.’

Ten months later, Simms Plastics writes to Jackson Enterprises saying that there is a breach of a condition of the contract by Jackson Enterprises and for that reason the exclusive sales agency and the contract are being terminated. The reason given is that one of the three salespersons had been sick for two weeks and made no calls during that period (and no replacement was used during that two weeks) AND during three other weeks one of the salespersons had called on no more than 15 retailers.

Discuss the legal position, giving both sides of the argument.

Question 2

Max, a registered builder, enters into a written agreement to build a workshop for Stanley. Both parties agree that the workshop will be built in accordance with certain specifications which include the installation of electric light. The contract price is $2000, with payment due upon completion.

When the workshop is half finished, two of Max’s employees are seriously injured in a motor vehicle accident. Max elects to suspend work on Stanley’s garage to complete his other larger commitments, which carry heavy penalties for delays in completion.

Shortly afterwards, Stanley receives a bill for $1,000 for work done and materials supplied, together with a letter from Max stating that owing to the accident he will have to temporarily suspend work on the garage but will resume work as soon as the workers have recovered.

(a) Advise Stanley.

(b) Would your advice be different if, at the time of the accident, the workshop had been finished except for the installation of electric light?
Question 3

The Shire of Timbuktu allows the local soccer club to use its hall for the club’s annual dinner and dance. The charges for the hire of the hall are $2000 plus a percentage of all takings. The club pays a deposit of $500 when they confirm the booking of the hall. The club will charge its members $25 for entry, but they will have to purchase their own drinks. The main highlight of the dinner and dance is a raunchy floorshow by the famous Exotic Dance Company. There will be no advance sales and all tickets will be sold at the entrance on the day of the dinner and dance.

Advise the club of its legal position if:

(a) The hall is burnt down a couple of hours before the dinner and dance but after the full dress rehearsal by the Exotic Dance Company,

(b) The caterers are unable to supply food because their workers are on strike and the club cancels the dinner and dance.

(c) The members of the Exotic Dance Company meet with an accident and the club cancels the dinner and dance.
SEMINAR 10 OUTLINE

REMEDIES FOR BREACH OF CONTRACT

1. Damages
   i. This is the "usual" remedy, aims to place the plaintiff in the position of full performance
   ii. Rules for Assessment
      a. causation
      b. foreseeability (Hadley v Baxendale, Victoria Laundry)
      c. types of damages recoverable
      d. time for assessment
   iii. The Doctrine of Mitigation

2. Specific Performance
   i. The Nature of the Remedy
   ii. Factors the Court takes into account
      a. damages not an adequate remedy
      b. hardship to defendant
      c. difficulty of supervision
      d. personal obligation

3. Injunction

4. Miscellaneous Statutory Remedies (e.g. TPA s.75A)

5. Self Help Remedies
   i. Liquidated Damages Clauses
   ii. Electing to Treat Contract as Terminated by the Breach
   iii. Withholding Performance of the Contract
   iv. Rejection of Goods, or Refusing to Take Delivery
   v. Termination of Continuing Contractual Relationship
   vi. Forfeiture of Deposits
   vii. Refusal to Contract or Deal in Future
   viii. Repossession of Goods/Liens etc.
   ix. Repossession of Land
   x. Set-Off
Question 1

Max, a registered builder, enters into a written agreement to build a workshop for Stanley. It is agreed that the workshop will be built in accordance with certain specifications which include the installation of electric light. The contract price is $950, with payment due upon completion.

When the workshop is half finished, Max is seriously injured in a major vehicle accident.

Shortly afterwards Stanley receives a bill for $420 for work done and materials supplied, together with a letter which states that owing to the serious injuries he has received, Max is unable to continue work on the garage.

a. Advise Stanley.

b. Would your advice be different if, at the time of the accident the workshop had been finished except for the installation of electric light.

Question 2

Northern Mining Ltd (NML) owns and operates a nickel mine at Leinster, Western Australia. It is currently engaged in building a powerhouse to enable it to supply power to its mine, and is under contract to meet the power supply needs of the operators of three nearby mines by 30th September, 2004.

On 1st February, Bob, Site Project Manager for NML at Leinster, contracted with ABC, a Perth based equipment operator to carry out certain excavation work relating to the powerhouse. Bob made known to ABC at the time of contracting the fact that the excavator was required urgently and was the only one available in Western Australia of a size suitable to the job required by NML. (The nearest suitable excavator is in South Australia and it would take ten days and cost $20,000 to bring it to Western Australia.) ABC agreed to transport their excavator to Leinster by road and to commence work on 5th February. The contract price was $10,000 of which $2,000 was paid in advance by NML on 3rd February.

ABC's employee, Alf, left Perth for Leinster on 4th February. That day, just north of Leonora, Alf's truck broke down. He returned to Leonora with a passing motorist for replacement parts, but on the morning of 5th February a flash flood struck that stretch of the road where Alf's truck was stranded, causing irreparable damage to the truck and the excavator.

NML estimates that it is costing them $2,000 for every day that excavating work does not proceed. In addition, if NML does not provide power for the three nearby mine operators from 30th September it will be liable to liquidated damages of $10,000 per day.

Advise NML and ABC of their rights and liabilities in respect to the contract of the 1st February.
Question 3

Why do the courts make a distinction between conditions and warranties? What is the remedy available to a person who has suffered from a breach of a condition or warranty? What test was used by Blackburn J in Bettini v Gye to distinguish between a condition and a warranty?

Question 4

A vessel was chartered from Sydney to London. The contract of charter contained a clause that the vessel was to be available on or before 10th July. In fact, the ship did not arrive in Sydney until 13th July.

i. Advise the charterers.

ii. Would your answer be different if the ship had arrived early on the morning of 11th July.
SEMINAR 11 OUTLINE

(a) STATUTORY REFORM OF CONTRACTS FOR THE SALE OF GOODS AND SUPPLY OF SERVICES

1. Implied Conditions in Contracts for the Sale of Goods
   i. Sale of Goods Act (WA) 1895
      a. Section 12 title
      b. Section 13 sale by description
         (Grant v Australian Knitting Mills)
      c. Section 14(1) merchantable quality
         (Brown v Craiks)
      d. Section 14(2) fitness for purpose
         (Ashington Piggeries v Christopher Hill)
      e. Section 15 sale by sample
      f. Section 11 effect of breach
      g. Section 54 exclusion of conditions
   ii. Trade Practices Act/Fair Trading Act
      a. Section 4B definition of "consumer"
      b. Section 6(2) definition of "merchantable quality"
      c. Section 69 title
      d. Section 70 sale by description
      e. Section 71 quality and fitness
      f. Breach of a statutory implied condition is a breach of contract, not a contravention of the TPA/FTA. Consequently, usual common law remedies are applicable.
      g. Section 75A. Rescission. An additional statutory remedy where there has been a breach of the implied conditions.
      h. Exclusion of Conditions
         - Section 68 applies to sale of goods "of a kind ordinarily acquired for personal, domestic or household " use.
         - Section 68A allows limitations of liability in respect of sales of goods not "of a kind ordinarily acquired for personal, domestic or household use.

2. Implied Conditions in Contracts for the Supply of Services
   See: Trade Practices Act/Fair Trading Act
   a. definition of supply of "services"
   b. section 74 warranties
(b) MISLEADING, DECEPTIVE AND UNCONSCIONABLE CONDUCT

3. The Scope of s.52 TPA and s.10 FTA

4. Misleading or Deceptive "Conduct"
   i. Conduct and Representations - s.4(2) TPA; FTA
      *(Taco Co Australia v Taco Bell, Henjo Investments v Collins Marrickville, Demagogue Pty Ltd v Ramensky)*
   ii. Predictions, Promises - s.51A TPA; FTA
   iii. Examples
      - pre-contractual statements
      - passing off
      - defamation of character/goods

5. "In Trade or Commerce"

6. Meaning of "Misleading or Deceptive"
   i. Knowledge, Intention to Misled not Necessary *(Parkdale Furniture v Puxu)*
   ii. Must "Lead into Error" *(Hornsby Building Information Centre v Sydney BIC)*
   iii. Confusion and Erroneous Assumptions Distinguished from Misleading, Deceiving *(Nike v Campomar; cf Williams Wines v MacDonalds)*

7. Who must be mislead?
   i. "Reasonable" member of relevant class *(Parkdale Furniture v Puxu)*
   ii. Causation must be established

8. "Unconscionable" Conduct

9. Liability of Person Involved in Misleading or Deceptive Conduct (s.75B)

10. Remedies
    i. Damages (s.82) - *Gates v CML*
    ii. Injunctions (s.80)
    iii. Other orders (s.87)

11. Disclaimers of Liability
    i. in contract
    ii. generally

12. Relationship with Contractual Claims
DISCUSSION PAPER 10

Question 1
What remedies would you seek in the following situations when Jones agrees to buy an antique business from Robinson for $85,000:

i. It is a term of the contract that Robinson shall not open any antique business within a radius of 5 kilometres for the following two years. Robinson opens an antique business 4.5 kilometres away some 22 months later.

ii. It is a term of the contract that Robinson shall remain as manager for three months. Robinson works two weeks and then falls ill. He recover after six weeks but says he is too depressed to work for the remainder of the three month period.

iii. It is a term of the contract that Robinson shall collect and pay over all outstanding debts totalling $5,000. Robinson collects and pays in $500 only. He says he is unable to recover any more as the remaining debtors have disappeared or gone bankrupt.

iv. It is a term of the contract that payment is to be made by give equal instalments on the first day of each month commencing 1st January. Two instalments are made. Jones then defaults.

v. It is a term of the contract that Jones shall employ Robinson's daughter as a trainee assistant for $300 per week for six months. Robinson's daughter proves unsatisfactory and she is dismissed after one week.

vi. Robinson represented value of stock as $35,000. An inventory after sale reveals it was $20,000.

vii. Jones agrees to settle on 30th June. The value of the business at the date of entering the contract was $87,000. On 30th May Jones notifies of his intention not to go ahead. The value of the business on 30th May was $85,000, and on 30th June was $83,000.

viii. After the sale is concluded, twenty items labelled as genuine antiques are found not to be.

ix. The agreed settlement date is 30th May. Jones requires a delay in settlement until 30th June. Robinson had planned to use the proceeds of sale to settle on a home unit on 1st June, but agrees to the delay to ensure the sale proceeds. Robinson has to pay $2,000 interest on bridging finance.

Question 2
When is a liquidated damages clause a penalty? If such a clause is found to be a penalty, can the party not in breach recover any damages?

Question 3
Fred Hayseed runs a wheat farm at Pingelly. He carries on his business in partnership with his wife Nancy.

On 1st April Fred planted his wheat but he soon discovers that the wheat seed he planted in two of his paddocks was defective and although the stalks grew to maturity, they did not bear any seeds, so the crop is worthless.
Fred had already pre-sold the crop from those two paddocks to a buyer for $16,000. The seed was purchased from JS Seeds Co Pty Ltd for $2,500. When Fred looks at the sale note for the wheat seed he sees the following clause:

JS Seeds Co Pty Ltd do not warrant the quality of this seed, and in the event of any claims for any breach of condition or warranty, our sole liability shall be to refund the price of the seed. We shall not be liable for any consequential loss.

On 2nd April Nancy Hayseed bought a new pair of overalls at the Pingelly branch of Western Jeans Pty Ltd who were having a sale. Nancy wears the overalls for a week during harvesting and at the end of the week finds the stitching in the seams is giving way.

She takes them back to the shop and demands her money back but the salesman shakes his head and points to a sign which says "NO REFUNDS ON SALE GOODS".

Discuss the issues and advise:

i. Fred as to his position in relation to JS Seeds Co Pty Ltd; and

ii. Nancy as to her remedies (if any) against Western Jeans Pty Ltd
SEMESTER 12 OUTLINE

1. Forms of Business Organization
   i. Sole Trader
   ii. Partnership
   iii. Joint Ventures (see Vann and Laughton article)
   iv. Trading Trusts
   v. Corporations

2. The Fiduciary Relationship
   i. Who is a fiduciary? (See Lehane article)
   ii. Duties of a Fiduciary
   iii. Remedies for Breach (Hospital Products v US Surgical Corporation)

3. The Trust
   i. Origins and the Nature of the Trust, and its Traditional Use
   ii. Duties of a Trustee and the Remedies of a Beneficiary for Breach
   iii. Rights of a Trustee
   iv. Types of Trusts
      - Express Trusts
        (Testamentary or Inter Vivos)
        - Fixed Trust
        - Discretionary Trust
      - Implied Trusts
        - Resulting Trust
        - Constructive Trust
   v. Commercial Use of Trusts
      - The Trading Trust
      - The Unit Trust

4. Agency
   i. Definition
   ii. Types of Agency
   iii. Actual and Apparent Authority
   iv. Rights and Obligations of Principal and Agent.
5. Partnership

a. Definition and Nature of a Partnership (s7 Partnership Act)
   i. "Carrying on a business"
   ii. "In common" - agency an important feature
   iii. "with a view to profit"
   iv. statutory rules - section 8
   v. parties intentions (Canny Cabriel v Volume Sales)

b. Form of the Agreement

c. Legal Restraints

d. Relations of Partners to Outsiders dealing with the Firm
   i. Section 26 - ability of a partner to bind the firm
   ii. Individual liability of partners in:
      a. contract (s16, s19)
      b. tort (s17, s19)
      c. criminal (National Commercial Banking Corp. v Batty)
   iii. Partnership by estoppel
      a. section 21
      b. section 17

e. Relations of Partners to One Another
   i. Variation by agreement (s29)
   ii. Partnership property (s30)
   iii. Management of the partnership (s34)
   iv. Fiduciary duties (see Chan v Zacharia)
      a. s39 rendering accounts and information
      b. s40 accounting for profits
      c. s41 competing with the firm
   v. Composition of the partnership
      a. s35 expulsion of a partner
      b. s36, s37 retirement of a partner
      c. incoming, outgoing partners

f. Dissolution of the Partnership
   i. Methods - s43, s44, s46
   ii. Consequences - s51, s52, s57
   a. The Nature of Incorporation
   b. Types of Incorporation
   c. Legal Personality at Incorporation
      (a) The Doctrine of Lifting the Veil
      (b) Personal Liability of Directors and Officers
      (c) Contractual duties (express and implied) owed to the company
      (d) Duties of good faith (fiduciary) owed to the company
   d. The Constitution and Management of the Company
      (a) Memorandum of Association
      (b) Articles of Association
   e. Shares
   f. Legislative Control of Incorporated Companies
DISCUSSION PAPER NO. 11

Question 1

The facts in *McWilliams Wines Pty Ltd v McDonald's System of Australia Pty Ltd* 33 ALR 394 were as follows:

McDonalds used the expression "BIG MAC" to describe one of its products, a particular type of hamburger, and used the name "McDonalds" as a trade name for itself.

McWilliams caused to be published a number of newspaper advertisements which contained the words "BIG MAC", used in reference to one of the brands of wine.

McDonalds complained that the use of these words by McWilliams contravened section 52, section 53(c) in representing the wine had a sponsorship on approval that it did not have, and that the advertisements constituted a contraventions of section 53(d) in representing that McWilliams had a sponsorship approval or affiliation which it did not have.

The Full Court of the Federal Court found against McDonalds in relations to each complaint.

a. Identify what McDonalds needed to prove to succeed in its actions.

b. Why did McDonalds action fail?

c. What is the main distinguishing feature between an action under section 52 and an action under section 53?

Question 2

a. In what way does s52 TPA alter the law relating to pre-contractual statements?

b. Why was Mr Gates in *Gates v CML* unable to recover damages at common law?

c. How did the High Court in *Gates v CML* calculate the damages recoverable for the breach of s52?