

**Curtin Law School**

**FINAL EXAMINATION**

End of Semester 2, 2022 Bentley and Mauritius

**BLAW1006 INTRODUCTION TO BUSINESS LAW**

**This is an OPEN BOOK examination**

**Examination Duration** 120 minutes + 15 minutes for technical support and set up

**Total Marks** 50

**Instructions to Students**

Answer ALL Questions

**ALL QUESTIONS ARE COMPULSORY - 50 MARKS IN TOTAL**

*1. Download this Microsoft Word Final Exam Document which contains the exam questions.*

*2. You must type your exam answers in the Microsoft Word Final Exam Document. Be sure to save your work as you go and refresh the Blackboard window every 1 hour.*

*3. At the end of the exam, upload your saved Microsoft Word Final Exam Document to the portal by selecting "Browse computer" and click "Save and Submit".*

*4. Submit the Exam Answers Document through the Turnitin portal.*

***This is an Invigilated Online Exam using IRIS (Invigilated Remote Intelligent System)***

**QUESTION ONE**

**Using the 4-step process discuss whether Cunnings Pty Ltd has breached *Section 18 of the Australian Consumer Law* (misleading and deceptive conduct) in the above scenario. What outcomes are likely to be ordered by the court as a result of this incident?**

**[15 Marks]**

**Area of law:**

The area of law associated with the question is the Australian Consumer Law (ACL).

**Legal principles:**

The Australian Consumer Law (ACL) is located within Schedule 2 Competition and Consumer Act 2010 (Cth). It is a law of the Commonwealth and applies in all states and territories and to all Australian Businesses. It is administered by the Australian Competition and Consumer Commission (ACCC) and state and territory consumer protection agencies. The ACL guarantees consumers remedies against misleading or deceptive conduct by suppliers and manufacturers. In *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191; (1982)ATPR 40-307 the courts affirmed that the ACL s 18 may be used not only by consumers but traders, corporations or other parties in the event they have experienced misleading of deceptive conduct.

What constitutes a ‘consumer’ is outlined in s 51a CCA 1010 (Cth) which states a ‘consumer, in relation to an industry, means a person to whom goods or services are or may be supplied by participant in the industry’. Section 3(10) ACL further elaborates a consumer as a person who acquires:

* Any type of goods that cost less than $40,000;
* Goods or services costing more than $40,000 IF those goods or services are ‘of a kind ordinarily acquired for personal, domestic or household consumption or
* A vehicle or trailer principally used to transport goods on public road.

Although, in *Seeley International Pty Ltd v Newtronics Pty Ltd* [2001] it was argued the purchaser was a consumer, however the defendant disagreed and in this case the onus is then on them to prove otherwise.

The former Trade Practices Act 1974 (Cth) (TPA) s 52 is now the Australian Consumer Law Act (Cth) s 18 and with relation to misleading and deceptive conduct it specifically states;

‘A person must not, in trade or commerce, engage in conduct, that is misleading or deceptive or likely to mislead or deceive.’[[1]](#footnote-1)

This statement comprises the elements to be satisfied when bringing a claim under s 18, the plaintiff must show that the defendant:

1. engaged in misleading or deceptive conduct; and
2. that conduct was done by the defendant ‘in trade or commerce’.

Conduct is classified as misleading or deceptive if it ‘leads into error’. It is illegal for a business to engage in false or misleading representations and there can be large pecuniary consequences. The Full Federal Court in *AstraZeneca Pty Ltd v GlaxoSmithKline Australia Pty Ltd* (2006) ATPR 42-106 formulated the following requirements

In order to determine whether there has been any contravention of s 52 (1) of the Act, it is necessary to determine whether or not the conduct complained of amounted to a representation which has or would be likely to lead to a misconception arising in the minds of that section of the public to whom the conduct has been directed….

The courts will assess if the conduct is in fact misleading or deceptive by objectively assessing the conduct and asking the question as to whether a ‘reasonable’ person in the position of the plaintiff would be likely to be mislead to deceived.

Recurring areas of conduct that are likely to mislead include but are not limited to false statements, statements of opinion, puffery, unfulfilled promises, disclaimers and passing off. *Taco Co of Australia v Taco Bell Pty Ltd* (1982) 42 ALR 177 is the leading case in distinguishing between conduct that ‘leads into error’ and that which is ambiguous, uncertain, or simply just confuses a plaintiff.

A business can be found to be engaged in misleading or deceptive conduct if there is an overall creation of a false impression regarding the value, price or quality of an item. Disclaimers are often likely to mislead because they are not prominently displayed or have inadequate labelling as illustrated by the leading case *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982]. However, as determined in that case, the conduct of *Parkdale* did not breach s 18 as it is possible to escape liability where the disclaimer is worded effectively and is prominently. If the goods are labelled properly, as in that case, it is likely to prevent a misleading representation

It is important to note that intention is not a requirement for a person to have engaged in misleading conduct as illustrate in *Hornsby Building v Sydney Building* (1988).

Remedies available by the court under a breach of s 18 ACL are as follows:

* seeking undertakings;
* requiring claims to be sustained;
* public warning notices;
* issuing injunctions;
* seeking damages;
* issuing compensation orders;
* issuing adverse publicity orders;
* orders disqualifying a person from managing a company.

**Application of Principles:**

When applying *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] it is likely the courts will find the prerequisites of “misleading and deceptive conduct” to be satisfied in accordance with s 18 of the ACL.

Furthermore, illustrates *Taco Co of Australia v Taco Bell Pty Ltd* (1982) 42 ALR 177 that the small product label/disclaimer certainly ‘leads into error’ and in this case confused the consumer.

It is also important to note that with the application of *Hornsby Building v Sydney Building* (1988) to this case actual intent on behalf of Cunnings Australia is not a requirement to have engaged in misleading conduct.

**Conclusion:**

Marion is likely to succeed in a pursuit against Cunnings Australia. The courts will likely award Marian damages or some for of compensation order.

**QUESTION TWO**

**Using the 4-step process discuss whether Michala has a valid contract with her brother in this situation. In particular, *intention to be legally bound* should be examined.**

**[15 Marks]**

**Area of Law:** The common law of Contract – formation of contracts.

**Legal Principles:**

A contract is a legally binding agreement, which can take many forms including but not limited to verbal, written and implied. It important to note that an agreement per sae is not necessarily a ‘contract’. For a contract to be established there must be a ‘meeting of the minds’ whereby the parties to the agreement **intend on being legally bound** by the terms of the agreement. In *Australian Woollen Mills Ltd Pty v Commonwealth* (1954) the high court held there was no binding agreement as it was not a contractual offer, based on an objective assessment and the offeror did not intend on being bound in contract by the statement.

Contracts are pervasive not only in business, but also to our personal lives and are often utilised to allocate risks. Contracts do not operate in isolation and can be impacted by multiple laws. There are three sources of the law of contract. Firstly, the Common Law of contract, whereby judges recorded decisions and court records are utilised for judicial decisions and applied to similar future cases. Secondly, Equity law which provides principles and remedies which are more flexible than the common law. And lastly, statutory law is the highest and most authoritative form of law established by parliament and must be differentiated from the common law.

There are two types of contracts: formal and simple. Each type must be distinguished from each other and have elements which must be satisfied. Formal contracts are generally contracts of record or under seal such as deeds or gratuitous promises.

There are certain elements which constitute a contractual agreement.

There must be two parties, an offer and acceptance along with consideration, intention, capacity and privity. The leading case *Carlill v Carbolic* [1893] differentiates the meaning of an offer from puffery and defines an offer as serious and promissory in nature. There are many statements or actions which do not fulfil the characteristics of an offer such as invitations to treat which was determined in *Pharmaceutical Society of GB v Boots* [1953]. Tenders are generally invitations to treat as governed by the leading case *Spencer v Harding* [1870]. There may also be requests for further information, which do not satisfy the elements of a contract a in *Stevenson Jacques v McLean* (1880).

A valid acceptance of a contractual offer must correspond directly with unqualified assent in accordance with the terms of the offer as determined in *Boulton v Jones* (1857). Furthermore, acceptance must be communicated, as demonstrated in *R v Clarke* (1927) where the plaintiff was unaware of the offer. In some cases, such as *Stevenson, Jaques & co v McLean* (1880), there may be a request for further information in order to decide whether to accept. The method of communicating acceptance may be stated in the terms of the offer, however silence does not constitute acceptant as resulted in *Felthouse v Bindley* (1982). The law of contract has a rule to facility commerce by allowing acceptance of a contract to be undertaken by post. This is known the postal acceptance rule which stipulates that where an offer allows for acceptance by post the timing of acceptance is when the letter is posted as established in the leading case *Adams v Lindsell* (1818).

The high courts decision in the *Ermogenous v Greek Orthodox Community of SA Inc* [2002] is now the leading authority on assessing contractual intention. In this case, two categories of agreements were established business/commercial and social/domestic. In this case it was established that the parties intended the agreement to be legally enforceable as a contract. The courts will consider the relationship between the parties and traditionally social/domestic agreements will not be considered a formal legally binding agreement. Intention will mostly be express, although in some instances there may be confusion between a ‘letter of comfort’ which avoids the giving of a formal contract as in *Australian Woolen Mills v Commonwealth* (1954) and also *Gate Gourmet Australia Pty Ltd (in liquidation) v Gate Gourmet Holding AG* [2004].

The mechanism the law uses to justify enforcing a contractual agreement is consideration. Consideration must be provided by the promisee in order to enforce the contractual promise made by the promisor. Essentially, this means that sometime of value be given up by the promisee in support of the agreement of what was promised by the promisor. Consideration must move from the promise and there are three elements which demonstrate this;

1. Valuable consideration whereby the consideration has some legal value;
2. The promisee must give something up in exchange such as a right, interest, profit or benefit; and
3. Some forbearance, detriment or loss; such as a right they can exercise.

Furthermore, consideration must be sufficient. There are some instances which do not establish sufficient consideration such as a pre-existing duty between the promisor and promise as the courts ruled in *Stylk v Myrick* (1809), performing existing legal duties and promises to pay lessor amounts, which was the case in *Foakes v Beer* (1884). Contracts without sufficient consideration are not enforceable.

Lastly, legal capacity to contract must present. In a court of law there is a presumption that the person entering a contract has the capacity to do so. Contracts can not only be made by natural persons but also by legal persons such as companies, trusts and partnerships. Minors (which are those under 18 years) do have the capacity to enter contract. Those found to be mentally incapacitated will find their contracts voidable as was the court’s decision in *Gibbons v Wright* (1954).

**Application of Principles:**

When applying *Australian Woollen Mills Ltd Pty v Commonwealth* (1954) an agreement has been reached whereby both parties intend on being legally bound by the offer. Bob’s email proposal equates to the offer in this case. An offer of employment, living arrangements and leaving his possessions to Michala in his will.

With the application of *Carlill v Carbolic* [1893] the courts can decipher that the offer by Bob was serious and promissory in nature.

Furthermore, there was valid acceptance of the offer by Michala and when comparing with *R v Clarke* (1927) the acceptance was communicated.

Application of the leading authority *Ermogenous* demonstrates that both parties intended the agreement to be legally enforceable by the contract. Although, there is a domestic relationship, the wording of the proposal specifically speaks of employment contracts and legal will. It is likely the courts will see that there was intent on both Bob and Michala’s part to be legally bound by the proposal.

Lastly, Michala has provided valid/valuable consideration by moving countries. She has given up her employment and home. The promise by Bob is likely to be enforced by the courts.

**Conclusion:**

The courts will likely award Michala damages in accordance with the contract.

**QUESTION THREE**

Explain two (2) of the following key terms in insurance law:

***Subrogation: This applies to all indemnity contracts. It allows the insurer to the right to sue any third parties for losses incurred and prevents in insured from making profits by further suing third parties.***

***Indemnity: Aims to put the person or business in the same position prior to when the incident or loss occurred.***

**[10 Marks]**

**QUESTION FOUR**

Define white collar crime and discuss the role the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) and *Financial Transaction Reports Act 1988* (Cth) plays in mitigating white collar crime. Also, comment on recent developments in this area.

**[10 Marks]**

White collar crimes are committed by individuals within the corporate realm of business or government. It is often difficult to identify and prostitute and the victims are often unaware. Some examples are embezzlement, bribery, and insider trading.

*Anti-Money Laundering and Counter Terrorism Financing Act 2006 (Cth)* and *Financial Transaction Reports Act 1988 (Cth)* aim to mitigate these types of white collar crimes by managing money laundering and terrorism financing activities. The Australian Transaction Reports and Analysis Centre is responsible for compliance with the above legislations.

Parliament implemented the *Anti-Money Laundering and Counter Terrorism Financing Act 2006 (Cth)* enhance reporting and inter government sharing such as stricter controls on banking and increased information sharing.

Under the *Anti-Money Laundering and Counter Terrorism Act* individuals can be identified through disclosure of personal information, however business operators subject to this legislation are obliged to comply with the Privacy Act 1988 when accessing personal information.

**END OF EXAMINATION**

1. *Australian Consumer Law Act* (Cth) s 18. [↑](#footnote-ref-1)