

SAMPLE EXTRACT  
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# Foundations of Australian Law

SIXTH EDITION

CALLIE HARVEY

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## ABOUT THE BOOK

*Foundations of Australian Law* is pitched exactly at the right level – in terms of both content and language – for business students, for law students, and for international students. This sixth edition has been fully updated to include changes in the law.

This text consists of 12 chapters, divided into four parts. Part A looks at the Australian legal system. Part B addresses torts, and defamation, nuisance and trespass. Part C covers contract law, and is divided into three clear and logical chapters. Part D details consumer law, specifically the sale of goods and consumer protection. Part E contains a Glossary of key terms, Tables of Cases and Acts, and a comprehensive Index.

To support the learning process, each of the 12 chapters includes highlighted **Legal principles** and **Case studies**, plus new **Test your understanding** questions to encourage legal research. Each chapter concludes with **Terms & concepts review** questions, **Consolidation** questions, and **Discussion** questions or challenging **Problems**.

Now, in addition to being an accessible and affordable textbook for Business Law students studying law in Australia, but it is also the most up-to-date.



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# **ABOUT THE AUTHOR**



**Callie Harvey** has extensive experience in a wide range of senior education roles. She has particular expertise in program management in the areas of accounting and financial services. In her current role as a Program Manager in Legal and Financial Services, Callie has oversight of the following programs in a variety of vocational qualifications in legal and financial services.

She has gained considerable knowledge and expertise coordinating subject matter experts around contextualisation of course content, led the development of online course content, recruitment and management of teaching staff, and recruitment of students into business vocational education programs. Callie has over 10-years of experience engaging with industry, demonstrating a customer focused and solution driven approach, which ensures contextualised outcomes are delivered in a timely manner.

Callie is a VQF Internal Program Reviewer and ASQA delegate member for RMIT and has experience in both accrediting programs and sitting as a panel member to review proposals of new qualifications.

Callie has authored several textbooks in law. Her firm commitment to education is evident in her writing and ability to transfer knowledge effectively to the learner that sets her and her law textbooks apart. Her latest publication, *Foundations of Australian Law* Sixth Edition is prescribed across a number of institutions in Victoria, New South Wales, South Australia, Western Australia and overseas.

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# C O N T E N T S

|   |    |   |            |
|---|----|---|------------|
| About the author.....                                       | ix | Acts for Different Purposes .....                           | 71         |
| Foreword .....  | xi | Terms & Concepts Review .....                               | 75         |
| <b>Part I: The Australian Legal System</b>                  |    | Consolidation Questions .....                               | 82         |
| <b>Chapter 1: The basis of Australian law .....</b>         |    | Discussion Questions .....                                  | 83         |
| <b>3</b>  |    | <b>Chapter 3: The Hierarchy of Courts.....</b>              | <b>85</b>  |
| Introduction.....   | 4  | The Court Hierarchy.....                                    | 86         |
| Non-legal Rules .....                                       | 4  | The Need for the Court Hierarchy .....                      | 86         |
| Laws.....   | 5  | Types of Jurisdiction.....                                  | 87         |
| Statute and Common Law.....                                 | 8  | The Commonwealth Hierarchy of Australian Courts.....        | 89         |
| Criminal and Civil Law .....                                | 11 | The Hierarchy of Australian State and Territory Courts..... | 95         |
| Characteristics of Effective Laws.....                      | 20 | Cross Vesting .....   | 103        |
| Terms & Concepts Review .....                               | 22 | Strengths and Weaknesses of the Courts.....                 | 104        |
| Consolidation Questions .....                               | 25 | Alternative Dispute Resolution Process and Bodies.....      | 106        |
| Discussion Questions .....                                  | 26 | Legal Regulatory Bodies.....                                | 113        |
| <b>Chapter 2: The Australian parliamentary system .....</b> |    | Terms & Concepts Review .....                               | 115        |
| <b>27</b>   |    | Consolidation Questions .....                               | 116        |
| The History of Australian Federation.....                   | 28 | Discussion Questions .....                                  | 118        |
| The Structure of Parliament .....                           | 30 | <b>Chapter 4: How Courts Make Laws .....</b>                | <b>119</b> |
| Houses of Parliament .....                                  | 31 | Laws Made by Courts.....                                    | 120        |
| The Parliament of the Commonwealth of Australia .....       | 32 | Common Law .....  | 120        |
| The Parliaments of the States and Territories .....         | 43 | Doctrine of Precedent .....                                 | 120        |
| The Separation of Powers.....                               | 45 | Statutory Interpretation.....                               | 129        |
| Representative and Responsible Government .....             | 46 | Terms & Concepts Review .....                               | 138        |
| The Powers of Parliament .....                              | 49 | Consolidation Questions .....                               | 140        |
| Limitations on Commonwealth Power .....                     | 52 | Discussion Questions .....                                  | 141        |
| Limitations on State Powers.....                            | 53 | <b>Chapter 5: The Adversarial Trial Model .</b>             | <b>143</b> |
| Overcoming Constitutional Limitations.....                  | 54 | The Adversarial System .....                                | 144        |
| Delegated Legislation .....                                 | 61 | Roles and Rules in the Adversarial System ..                | 144        |
| Parliaments and Legislation.....                            | 65 | Criminal Law.....   | 151        |
| Private Members' Bills .....                                | 71 |   |            |

|   |     |  |     |
|---|-----|--|-----|
| Civil Law .....   | 159 | Consideration .....                          | 263 |
| Terms & Concepts Review .....                                 | 164 | Terms & Concepts Review .....                | 272 |
| Consolidation Questions .....                                 | 166 | Consolidation Questions .....                | 273 |
| Discussion questions .....                                    | 167 | Problems.....                                | 274 |
| <br><b>Part II Torts</b>                                      |     |  |     |
| <b>Chapter 6: Tort of Negligence .....</b>                    |     |  |     |
| Defining Tort .....   | 171 | <b>Chapter 9: Contracts II.....</b>          | 277 |
| Negligence.....   | 172 | Vitiating Elements .....                     | 278 |
| Elements of Negligence.....                                   | 175 | Capacity .....                               | 278 |
| Common Law Principles .....                                   | 176 | Mistake .....                                | 288 |
| Vicarious Liability .....                                     | 196 | Misrepresentation .....                      | 291 |
| Limitation Period .....                                       | 197 | Undue Influence.....                         | 293 |
| Statutory Provisions .....                                    | 199 | Duress.....                                  | 296 |
| Terms & Concepts Review .....                                 | 205 | Unconscionable Contracts.....                | 298 |
| Consolidation Questions .....                                 | 208 | Legality .....                               | 302 |
| Problems.....   | 209 | Contents of a Contract .....                 | 307 |
| <br><b>Chapter 7: Defamation, Nuisance and Trespass .....</b> |     |  |     |
| Defamation.....   | 211 | Exclusion Clauses .....                      | 311 |
| Internet Implications: Defamatory Material Posted Online..... | 212 | Conclusion.....                              | 312 |
| Nuisance .....  | 224 | Terms & Concepts Review .....                | 312 |
| Trespass.....   | 227 | Consolidation Questions .....                | 313 |
| Terms & Concepts Review .....                                 | 229 | Problems.....                                | 315 |
| Consolidation Questions .....                                 | 232 | <br><b>Chapter 10: Contracts III.....</b>    |     |
| Problems.....   | 232 | Termination or Discharge of a Contract ..... | 318 |
| <br><b>Part III Contract Law</b>                              |     |  |     |
| <b>Chapter 8: Contracts I .....</b>                           |     |  |     |
| What is a Contract?.....                                      | 237 | Frustration of Contract .....                | 323 |
| Classifications of Contracts .....                            | 238 | Breach of Contract.....                      | 325 |
| Invalid Contracts.....  | 239 | Remedies for Breach of Contract.....         | 326 |
| Valid Contracts.....  | 240 | Principle of Remoteness .....                | 330 |
| Intention to Create Legal Relations .....                     | 241 | Terms & Concepts Review .....                | 332 |
| Agreement – Offer and Acceptance .....                        | 244 | Consolidation Questions .....                | 333 |
| <br><b>Part IV Consumer Law</b>                               |     |  |     |
| <b>Chapter 11: Sale Of Goods .....</b>                        |     |  |     |
| Evolution of the <i>Sale of Goods Act</i> .....               |     |  |     |
| Contract of Sale of Goods.....                                |     |  |     |
| Capacity to Buy and Sell.....                                 |     |  |     |
| Sale and Agreement to Sell.....                               |     |  |     |

|   |            |   |            |
|---|------------|---|------------|
| Ownership of Property.....                                | 342        | Consumer Agreements.....  | 392        |
| Transfer of Title by a Non-Owner .....                    | 346        | Consumer Product Safety and Product-Related Services.....       | 398        |
| Performance of a Contract .....                           | 348        | Offences .....  | 401        |
| Implied Terms .....                                       | 349        | Enforcement and Remedies.....                                   | 402        |
| Remedies for Breach of a Contract of Sale for Goods.....  | 354        | The Australian Competition and Consumer Commission (ACCC) ..... | 402        |
| Vienna Sales Convention.....                              | 357        | Terms & Concepts Review .....                                   | 403        |
| Terms & Concepts Review .....                             | 358        | Consolidation Questions .....                                   | 405        |
| Consolidation Questions .....                             | 361        | Problems.....   | 406        |
| Problems.....   | 362        |   |            |
| <b>Chapter 12: Consumer Protection.....</b>               | <b>363</b> | <b>Part V Appendices</b>  |            |
| Consumer Protection Legislation.....                      | 364        | <b>Appendix .....</b>   | <b>411</b> |
| Primary Changes Introduced by the ACL.....                | 365        | Glossary .....  | 411        |
| Definitions and Provisions.....                           | 365        | <i>Index .....</i>  | <i>427</i> |
| Misleading and Deceptive Conduct.....                     | 366        |   |            |
| Unconscionable Conduct .....                              | 375        |   |            |
| Unfair Contract Terms .....                               | 380        |   |            |
| Specific False Representations for Goods or Services..... | 382        |   |            |

appropriate and overturns it. For example, a District Court can overrule the decision made by a state Magistrates' Court by setting a new precedent.

Overruling involves two separate cases. In the sample diagram below, the original precedent, called 'precedent 1' in our example, was determined in a case that appeared before the Supreme Court in 1979. In the ensuing ten years, the values, morals and attitudes of the community changed. Then, in 1989 the Court of Appeal changed the precedent by overruling it and setting a new precedent, called 'precedent 2' in our example.

This means that precedent 1 is no longer used and that the current precedent, precedent 2, is binding on lower courts and may be persuasive to higher courts and to courts in other court hierarchies. Precedent 1 is no longer binding or persuasive.

**Figure 4.3** Overruling

|  |
|--|
| <b>Precedent 2</b>   |
| Court of Appeal established the precedent 1989   |
| <b>Precedent 1</b>   |
| Supreme Court established the precedent in 1979  |
| <b>Characteristics</b>   |
| <ul style="list-style-type: none"> <li>▪ Two cases (with like facts and similar circumstances)</li> <li>▪ Change in values, morals and attitudes of the community since first case</li> <li>▪ Higher courts can overrule decisions made by lower courts</li> <li>▪ Courts of equal standing cannot overrule each other's past decisions</li> <li>▪ Lower courts cannot overrule decisions made by higher courts</li> </ul> |

*Reversing*

Reversing involves one case and is only used in appeals. An appeal is a review of an earlier judgment. For more information on appeals, see *Chapter 3 - The hierarchy of courts*.

The sanction in a criminal case, a remedy in a civil case or a question of law may be reviewed in a higher court if the party requesting the appeal has reasonable grounds. An application has to be lodged before an appeal can be granted. If a decision is appealed to a higher court, the higher court may set aside the precedent established in the earlier court, thus reversing the decision.

**Figure 4.4** Reversing

|   |
|---|
| <b>Characteristics</b>  |
| <ul style="list-style-type: none"> <li>▪ One case</li> <li>▪ Appeal court may change decision made by the original court that heard the case</li> </ul> |

If there are people whose names have not been called, they will be sent back to the jury pool room to await possible selection for another trial on the same day or the next day.

After this process, the remaining jurors who have not been challenged are asked to take an oath or affirmation.

*As an aside ... An affirmation is a form of oath used for people who state that they do not believe in God.*

In criminal trials, 27 cards are drawn from which 12 jurors are empanelled. In some exceptional cases, the number empanelled can expand from 13 to a maximum of 15. Regardless of the number empanelled, the number of jurors will be reduced to the prescribed number of 12 when it comes time to make verdict.

In civil trials, 17 cards are drawn from which a jury of six is empanelled.

In civil cases, the empanelling process varies slightly. The judge's associate draws cards from the ballot box at random. The associate makes a list of the names and occupations of jurors drawn (usually 12), and passes the list to the plaintiff's lawyer who may cross out three names. The list is then given to the defendant's lawyer who may cross off another three names. The remaining six jurors are then called to the jury box.

After the jurors have been determined, the judge asks them to elect a foreman or forewoman. The role of this person is to ensure that all members of the jury understand the proceedings. If there are any queries, the foreman will clarify these with the judge.

Individuals wishing to be excused from jury duty must submit an application together with a statutory declaration to the sheriff at least two days prior to the date of appearance specified in the summons.

### **Test your understanding**

1. What is the purpose of a challenge?
2. Draw a diagram to illustrate how a jury is empanelled.

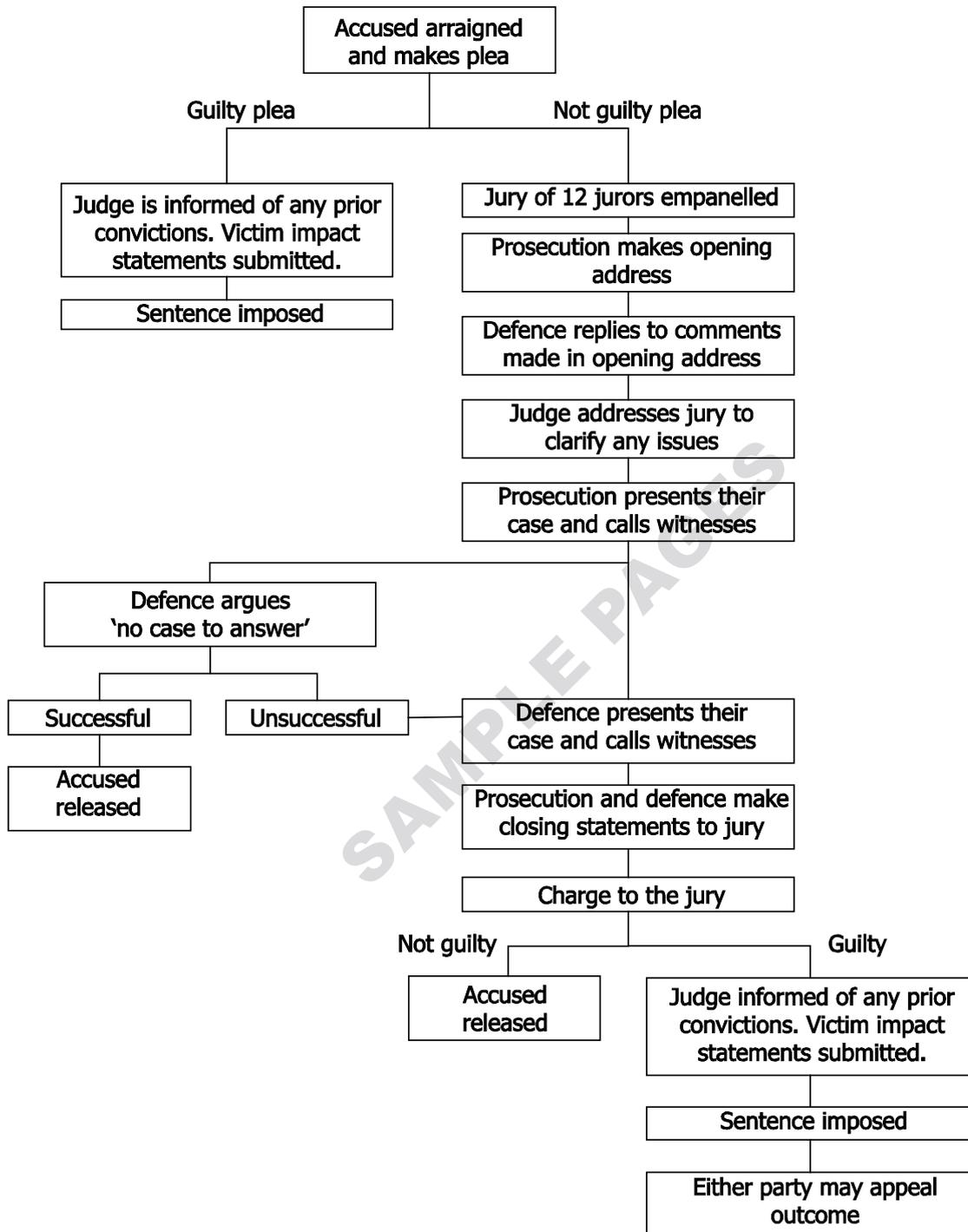
#### *The role of the jury in a trial*

Before the proceedings commence, the judge explains appropriate points of law to the jury and answers any questions they may have. This is referred to as charging the jury.

During the proceedings, jurors may be asked to leave the courtroom while the lawyers make any clarifications with the judge on legal points. Jurors may also be taken to view things or places that relate to the case at hand.

One of the most important processes that a jury has to undertake is deliberation. Often it is said that the jury has retired for deliberations. This means that the jury has been given time to

Figure 5.2 Traditional criminal trial procedure



**Test your understanding**

‘Suspended sentences are not a punishment.’ Discuss.

### **Legal principle**

The defendant is not liable and does not owe a duty of care to the plaintiff in respect of particular risk if the risk was subject to a risk warning or included in a term of a contract.

This means that, where the defendant warned the plaintiff about the risk, either in writing or orally, they will not be held liable for any injury or loss incurred. There are exceptions, of course, that apply to unattended minors or other parties restricted from entering into a contract (see *Chapter 9 – Contracts II*).

### **Professional negligence**

#### **Legal principle**

A professional party who acts in a manner that is widely accepted as common practice in Australia will avoid liability.

Thus, peer professional opinion is regarded as competent professional practice. In addition, some professional associations have set standards of professional conduct that is regarded as competent and are to be followed by all professionals in that industry. However, this peer professional opinion test does not apply to the duty to provide warning of possible risks and in situations where the opinion is irrational.

*For example ... A medical practitioner will not found to be negligent where his/her conduct in relation to treatment of a patient was considered to be in accordance with the opinion of a number of other practitioners from the same field, unless the opinion is irrational.*

### **Volunteers**

A volunteer is defined by some *Civil Liability and Wrongs Acts* as a person who undertakes community work or one who works for non-profit organisations on a voluntary basis.

However, a volunteer receives no protection where the conduct constitutes an offence. Furthermore, a volunteer may be found liable where he/she acted or omitted to act outside the scope of authority given by the community organisation or where the liability necessitates insurance.

#### **Legal principle**

A volunteer is immune from civil liability in respect to any act or omission to act that relates to community work done in good faith.<sup>32</sup>

<sup>32</sup> VIC, *Civil Liability and Wrongs Act*, ss 34-37; QLD s 39; WA *Volunteers (Protection from Liability) Act 2002*, ss 6-7; TAS ss 44-49; ACT Pt 2.2 ss 6-11; SA *Volunteers Protection Act 2001*; VIC *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002* Pt IX; NSW *Personal Injuries (Liability and Damages) Bill 2002* ss 60-66; CTH *Volunteers Protection Act 2003*.

14. What type of offer destroys the original offer by introducing a new alternative offer that can be accepted?
15. What standard of a contractual agreement usually means that the parties have agreed on the terms of the contract and are ready to implement and execute the contract?
16. When using instantaneous communication, at what time is an acceptance made?
17. What is the 'price' paid in exchange for another person's promise?
18. What type of consideration occurs when an act representing consideration is performed in return for a promise?
19. When a promise is made after an act has been performed, what type of consideration has taken place?
20. What type of duty is imposed by the law where a promise is made to attend a police station to give evidence regarding a crime?
21. Which remedy is used by judges to allow a promise to be enforced even though it was not supported by consideration?

## Problems

1. **Jack and Nick had been friends for a long time. In consultation with Nick, Jack organised for both of them to go on a fishing trip one weekend. Jack told Nick that he would drive both of them in his car if Nick paid the fees to go on a charter boat with his credit card prior to the trip. Nick took the day off from work in order to go on the trip. As arranged, Nick went to Jack's place at 5:00 am on the day of the trip. When Nick arrived, he found out from neighbours that Jack had already gone on the fishing trip with his girlfriend.**

Advise Nick whether he has any legal rights according to contract law.

2. **Simone entered into an agreement with her grandmother Judy to purchase a syndicate lotto every week with the aim of dividing any winnings equally between them. They always chose the same numbers. The two women took turns buying the lotto ticket. One day Judy went to check the lotto winning numbers at the newsagency and realised that they won \$1.1 million dollars. When Simone enquired about the ticket, her grandmother informed her that she had won the money and refused to give Simone her share of the winnings.**

Advise Simone whether she has any legal rights against Judy according to contract law.

3. **Clair asked her friend Sophie if she wanted to buy her car for \$15,000. Sophie replied that she was only willing to pay \$14,000. Clair refused to sell her car for that price. Sophie then agreed to pay \$15,000.**

Does a contract exist between Clair and Sophie? Give reasons for your answer.

4. **Domenic used a vending machine to buy a Mars Bar. He checked the price of the bar on the machine and inserted the correct amount of coins in the machine. The machine accepted the payment and released the bar.**

Using the above information as a guide, answer the following:

- Is there an invitation to treat?
- Who made the offer?

- small businesses dealing with bigger businesses in relation to contract dealings that do not exceed \$3 million (s51AB).

State legislation has fair trading acts which prohibit persons or suppliers from engaging in unconscionable conduct, e.g. *The Fair Trading Act 1989* (Qld).

In addition, New South Wales has the *Contracts Review Act 1980* (NSW). This piece of legislation allows the Supreme Court of NSW to review unjust and unconscionable contracts and to: deny enforcement, pronounce the contract void, or alter the contract terms in whole or in part. The court would use this power in following situations (s9(1)):

- where the parties had unequal bargaining power;
- where either party was not given the opportunity to negotiate the terms of the contract;
- where either party received or should have received legal advice;
- where either party used complex legal or contractual terms without clarification;
- where either party's age, health or mental capacity interfered with their judgment to enter into the contract; or
- where either party's education, literacy or economic status played a role in their decision to enter into the contract.

In addition to the above legislation, New South Wales has the *Industrial Relations Act 1996* (NSW) which protects employers and employees from forming employment contracts that involve unconscionable conduct.

**Table 9.5** Comparison of duress, undue influence and unconscionability

|                 | <b>Duress</b>  | <b>Undue influence</b>   | <b>Unconscionability</b>  |
|-----------------|--|--|---|
| Definition      | The defendant has <i>threatened or used violence</i> towards the plaintiff (or his/her loved ones) to force them to enter into a contract. | The defendant used their influence ( <i>position of power</i> ) to force the plaintiff to enter into a contract.<br><br>Stronger party = defendant<br>Weaker party = plaintiff | The defendant took some undue advantage of the plaintiff's <i>disability</i> resulting in an agreement that was unjust, unfair and inequitable.<br><br>Stronger party = defendant<br>Weaker party = plaintiff |
| Burden of proof | Plaintiff  | Special relationships - defendant<br><br>Other relationships - plaintiff   | Plaintiff   |
| Effect          | Contract is voidable at the option of the plaintiff.   | Contract is voidable at the option of the plaintiff.   | Contract is voidable at the option of the plaintiff.<br><br><i>Competition and Consumer Act 2010</i> (Cwth)<br><br>Damages, an injunction, and allowing the plaintiff to avoid the contract.                  |

For this to occur, however, the parties and the subject must be the same as the original simple contract and the consideration must be of higher value.

## Frustration of Contract

Frustration of a contract refers to the parties experiencing ‘frustration’ due to unforeseeable circumstances making the contract impossible to perform. Lord Radcliffe in the case *Davis Contractors Ltd v Fareham*<sup>45</sup> defines frustration of contract as follows:

*Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract.*

The circumstances referred to by Lord Radcliff can be divided into five categories as shown in Table 10.1.

**Table 10.1** Frustration of contract categories

|                                       |   |
|---------------------------------------|---|
| Change in the law                     | Changes in the law may occur after the formation of a contract and render its performance illegal. In such circumstances, the parties become frustrated and the contract is discharged.   |
| Death or illness of the parties       | Parties may become frustrated in a situation where one of the parties was contracted to perform a service but, prior to completing that service, died or experienced a serious illness or disability thus making the contract impossible to complete and making discharge inevitable. |
| Destruction of subject matter         | A contract may be impossible to complete if its subject matter is destructed, i.e. damaged or destroyed, without the interference of either party. As a result, the contract is deemed frustrated.  |
| Common objective no longer attainable | Certain circumstances or events may occur that require parties to form a contract. If those events do not occur without it being the fault of either party, then the contract may be frustrated and the parties are discharged form their obligations.                                |
| Intervention by the Government        | A contract may be declared as frustrated in situations where government intervention is such that it causes the original terms of the contract to be radically changed.   |

### The effect of frustration

A frustrated contract is not void but comes to an end due to a supervening impossibility. Once one of the above circumstances eventuates or happens, the parties are discharged from their contractual obligations and the contract is discharged. If payment has taken place prior to the

<sup>45</sup> *Urban District Council* [1956] AC 696 at 729.

- vary the terms of the contract
- terminate, renew or not renew the contract
- determine whether a breach has occurred; or
- determine the meaning of the contract.

### Test your understanding

Visit the website link [www.accc.gov.au/publications/unfair-terms-in-small-business-contracts](http://www.accc.gov.au/publications/unfair-terms-in-small-business-contracts) and download a copy of the “*Unfair terms in small business contract: a review of selected industries*” and select an industry listed. Draft a checklist for that industry that can be used when constructing a contract to avoid unfair terms.

## Specific False Representations for Goods or Services

Chapter 3 of the ACL provides protection from specific false representation for goods or services through specific prohibitions.

Part 3.2, section 29, of the Act focuses primarily on protecting consumers from false representations in connection with the supply, possible supply or promotion of goods or services.

A number of the provisions in the Act against specific false representations are summarised in Table 12.2.

### Legal principle

A person must not make false or misleading representations in association with the supply or possible supply of goods or services, or in association with the promotion, by any means, of the supply or use of goods or services.

**Table 12.2 Specific false representations**

| Section   | Provision   | Case reference  |
|-----------|---|---|
| 29 (1)(a) | Prohibits the false representation of goods in regard to standard, quality, value or grade, composition, style, model, history or previous use. | <i>Sharp Corp of Australia Pty Ltd v Hartnell</i> <sup>125</sup><br><br><i>MacFarlane v John Martin &amp; Co Ltd</i> <sup>126</sup> |
| 29 (1)(b) | Prohibits the false or misleading representation of services in regard to the standard, value or grade or quality.                              | <i>Kiley v Lysfar Pty Ltd</i> [1985] ATPR 40 614  |
| 29 (1)(c) | Prohibits false or misleading representation in relation to the newness of goods.   | <i>TPC v Annand &amp; Thompson Pty Ltd</i> [1978]   |

125 [1975] ATPR 40-003.

126 [1977] ATPR 40-034.



**Constructive trust** – the result of the operation of the law rather than the intention of the parties to hold property with the purpose its use or benefit of another. **Consumer credit** - refers to the situation where a person advances money for non-commercial purposes to another person with the expectation or repayment at a later date.

**Consumer Credit Code** – was enacted to legislate situations where credit is offered by spelling out in user friendly way the obligations and liabilities of credit providers.

**Contract** – a situation where two or more parties make a promise or agreement to an act or thing that creates rights and responsibilities that are legally enforceable.

**Contract for service** – one where a person agrees to perform work for another person but is not considered an employee, e.g. an independent contractor.

**Contract of sale of goods** – a contract as defined in the *Sale of Goods Act* where the seller transfers or agrees to transfer goods to the buyer for money, i.e. consideration.

**Contract of service** – occurs when an offer of employment which includes rate of pay and other employment conditions are made by the employer and accepted by the employee.

**Contributory negligence** – a type of defence pleaded by a defendant who claims the plaintiff contributed or participated in some way to the loss or injury he/she suffered.

**Copyright** – a right given to an author to prevent unauthorised people from reproducing their work.

**Counter offer** – destroys the original offer by introducing a new alternative offer that can in itself be accepted.

**Cover note** – a form of temporary insurance that may be revoked by the insurer.

**Criminal jurisdiction** – empowers the courts to hear cases that are of a criminal nature.

**Criminal law** – concerned with issues that affect or threaten the whole society.

**Crown** – the Queen's powers under the Constitution are exercised by the Governor-General (at Commonwealth level) and the General (at State level) and both are referred to as the Crown or the Head of State.

**D | Damages** – a monetary payment made by the defendant to the plaintiff in a civil case.

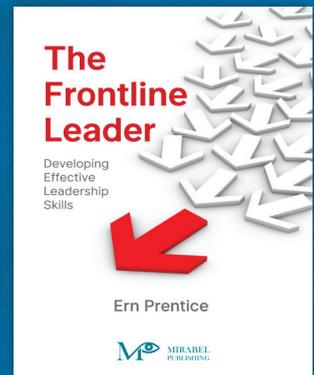
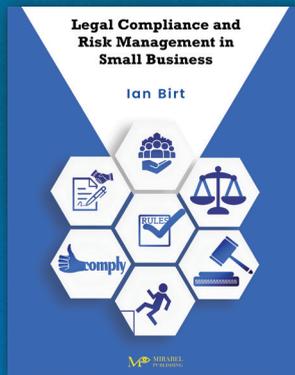
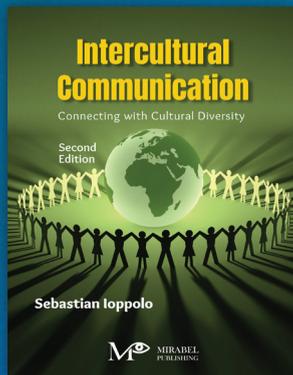
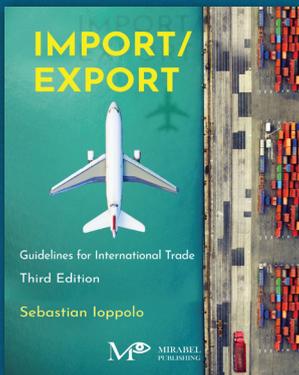
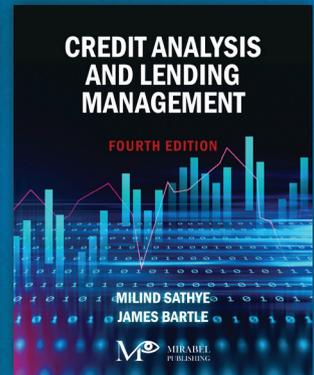
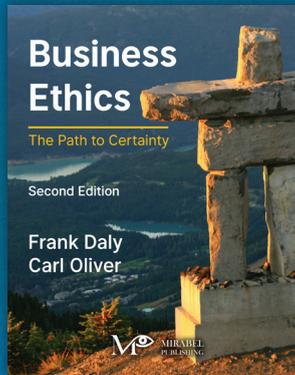
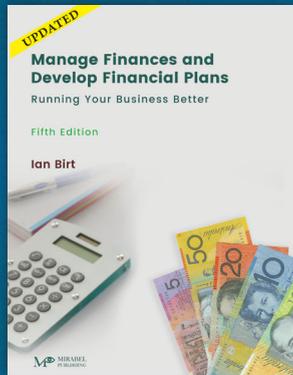
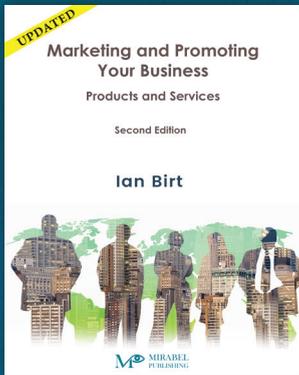
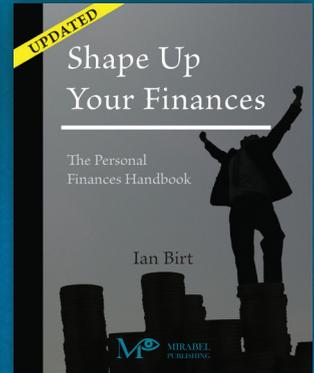
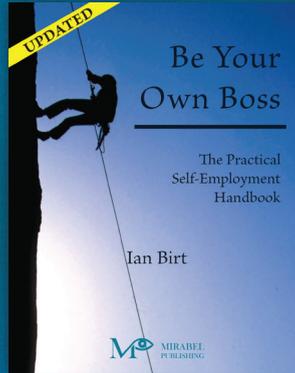
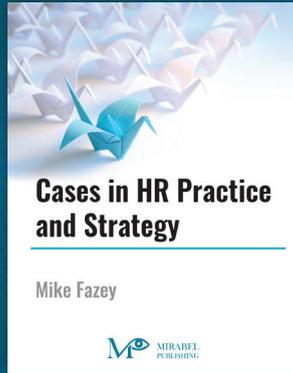
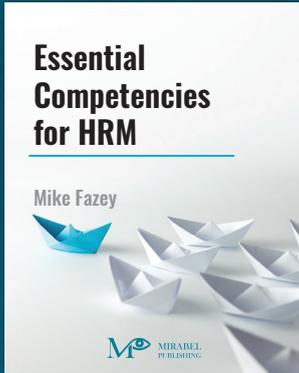
**Dangerous goods** – substances which are capable of posing risk to a person's wellbeing, health, safety or to property when exposed to air - such as flammable liquids and explosive substances.

**Debt agreement** – occurs when the debtor provides the Official Trustee with a written proposal together with a copy of his/her statement of affairs that satisfies the requirements as set out in s6A in order to enter into an agreement with the creditor and avoid bankruptcy.

**Debtor's petition** – occurs when debtors cannot repay their debts and choose to become voluntarily bankrupt by presenting a petition.

**Declaratory Acts** – if there is some doubt as to the law on a certain matter, parliament can pass an Act declaring what the law is.

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