Concise Australian Commercial Law

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AN INTRODUCTION TO STUDYING LAW UNITS

How to approach assessment tasks

Approaching the hypothetical legal problem

One of the most common forms of assessment of law units is to ask students to unravel hypothetical legal problems. Generally speaking, you are given a story to read which ends badly (or less well) for one or more of the parties. Your task is (usually) to "advise" the parties or "discuss" their rights and obligations. Your advice (or the legal discussion) must be based on the law (cases or legislation). For this reason, from the start of the course, you are "invited" to read legal cases (or, more correctly, summaries of legal cases) and legislation. If you absorb the lessons of the first topic, you will appreciate the significance of case law in a common law legal system – in a nutshell, precedents matter!

Therefore, before you can unravel a legal hypothetical (for a tutorial or for a piece of assessment or to enable you to participate actively in lectures), you should be familiar with the cases. In this instance, "familiar" means you need to know what happened (the facts), what the outcome was (the decision) and the reason for that decision (the legal principle or *ratio decidendi*). Therefore, in practical terms, to "read" a case properly you should:

- identify the material (relevant) **facts**;
- identify the **legal issue**(s) that arise from those facts (is the question about the duty of care of occupiers or insolvent trading and directors' duties or remedies available for breach of the consumer guarantees?);
- make the **argument** that each side would have made (in every case, there is a reasonable argument to be made by each side (no-one goes to court (especially an appeal court) without a chance of success));
- note what **decision** the court reached; and
- note the **reasoning** of the court (the legal principle or "*ratio decidendi*").

Having studied the cases in this way, the next question is how to approach the hypothetical problem itself. First, you read the story carefully. Be clear about what has happened. Then identify the legal issue(s) raised in the story. Once you have isolated the issue(s) you need to discuss/explain the relevant law or legal principles referring, wherever possible, to the source (cases and/or legislation) of the law. Finally, and most importantly, you must apply that law to the facts and come to a conclusion about the rights and obligations of the parties.

Provided, in the course of your answer, you touch these bases (identifying the issues, discussing the law and applying the law to the facts), the precise path you follow and the writing style is a matter for you. You may choose to start at the beginning ("There are three relevant issues to discuss. The first is…"), or you may prefer to start with your conclusion and work backwards ("I believe that X is liable for breach of contract for the following reasons…") – the important thing is that your "advice" is clear, logical and well-supported.

2. Writing tips

Whilst we encourage you to find your own voice, the following tips will ensure you are not singing off-key:

1. *Plan your answer.* A well-planned, well-structured answer will always do better than one that "spontaneously arises" or is the product of a "stream of consciousness". If your answer lacks planning and structure, it is more likely to contain irrelevant or illogical material.
2. *Canvas all the relevant issues, not simply the major one.* Marks are allocated for each relevant issue so make sure you give proportionate time to each one. At the same time, you should resist the "shopping list" approach to answering questions – covering every aspect of the law on a particular point because of a fear you may leave something out. Be brave: stay relevant.
3. *Don't repeat or rewrite the question.* This is a waste of time for which no marks are given. Instead, a brief introduction setting the scene is a useful device – it gets you off to a good start and indicates to the examiner where you are heading. It need only be brief. For example, "I am asked to advise P whether he has any rights against the partnership. In order to do this it is necessary to (a) decide when the partnership began; (b) identify the partnership property; (c) decide when the partnership came to an end; and (d) decide whether appropriate notice of dissolution was given".
4. *Explain yourself.* Ensure that you support your propositional statements ("this action constitutes a breach of contract" or "there is a breach of the duty of care" or "this constitutes a breach of s 18") with evidence. To insert the conjunction "because..." is a useful strategy which ensures you explain your bold propositions.
5. *Don't include too much information.* In particular, when discussing relevant precedents do not include a summary of the facts of the cases. If there is a critical fact or two, state it concisely and move on to the argument or analysis. There is never a need for a case summary.
6. *Objective advice.* In most hypothetical problem questions, you are asked to "advise". This should be done "objectively"; you are not usually being asked to be an advocate for one party. Provide an answer that considers both sides and comes to a reasoned conclusion, even if it is not what your client would like to hear!
7. *Write good English.* Be clear and concise. Do not overwrite and do not use words just because you think they sound "lawyerly". Good lawyers (and, *a fortiori*, good, non-law undergraduate students) write and speak in plain English: they do not use words like "aforementioned", they do not use Latin and they know that only the Marx Bros say "the party of the first part alleges that the party of the second part....". Grammar and spelling are important so do the very best you can.

3. Worked examples

To help you appreciate that there is no great mystery to it, we provide answer guides to three legal hypotheticals.

Question 1

Best Guys Pty Ltd, an electrical goods retailer, advertised a range of specials in the newspaper including this one:

> "NEVER TO BE REPEATED OFFERS ON FAMOUS BRAND 65" 4K Ultra HD LED LCD Smart TV...ready to go from $3500"

On Wednesday September 19, Ben saw the advertisement and decided he would buy one. He immediately went down to the store near his home, walked over to Mary, the sales manager, and said that he accepted the store's offer, would pay now and take it home in the ute.

However, Mary told him to slow down. "Unfortunately, we are completely out of stock", she said. She then said, "The only similar television that I have left is the demonstration model, and you can have that for $2,000. Not a bad price as they usually sell for around $3,000".

Ben was very annoyed, believing that he already had made a contract with the store. Nevertheless, he said that he would think about her offer. Then Mary said, "Look, I'll hold it for you for two days. Here's my business card – just ring or email me with your decision before Friday at noon". Ben mumbled agreement and left the shop.

The next day (Thursday), Jessie walked into the store and fell in love with the same demonstration model. Mary said it was "on hold" but when Jessie offered to buy it for $3,000. Mary decided that it was better (for her) to get a certain sale and sold it to Jessie on the spot.

On Friday morning, at 10.00 am, Ben, who had stopped sulking, emailed Mary, advising her that he would buy the demonstration model. "I'll pay for it and pick it up after work", he wrote. When Mary saw the email, she immediately rang him and told him that it had been sold. Ben is now enraged and seeks your advice as to whether he had an enforceable agreement or an option contract with Best Guys Pty Ltd on the Wednesday or an enforceable agreement on the Friday.

Suggested answer guide

Introductory paragraph. For an enforceable agreement to occur, there must be an offer and an acceptance of that offer. The main issue in this question is whether Ben and Mary (as the agent of BG) have made an enforceable agreement either on Wednesday (when Ben visited the store) or on Friday (when he rang and "accepted" the offer). If Ben is to succeed, he must prove on the balance of probabilities that, either on Wednesday or on Friday, NP/Mary made an offer that he accepted.

The events of Wednesday. The issue here is whether an enforceable agreement was made on Wednesday and, if not, whether an option contract was made. For an agreement to have been made, it is necessary to characterize the advertisement that appeared in the brochure as an offer capable of acceptance and not an invitation to treat. To be an offer, there must be certainty as to the main terms and an indication, on the part of the offeror, that, if the person to whom the offer is directed (the offeree) accepts, an enforceable agreement will be made. An invitation to treat, on the other hand, is an indication that the party is open to negotiations, open to *receiving* an offer. The test is an objective one: in the light of all the circumstances, would a reasonable person regard this particular advertisement as an offer?

There are two considerations that may make it hard for Ben to argue that this is an "offer". First, although it is not impossible for an advertisement to be regarded as an offer – see, for example, *Carlill's* case – the common law (the courts) has generally regarded advertisements as invitations to treat only: see, for example, *Harvey v Facey*, *Partridge v Crittenden* and *Boots' case*. As the court said in *Boots*, it would be commercially inconvenient if an advertisement for the sale of goods or, as in *Boots*, the display of goods were to be regarded as an offer to sell to whomsoever "accepts". If this were to be the position here, there would be a contract at the moment Ben "accepted" the offer and, in theory at least, if BG could not able to deliver the goods at that time, it would be in breach.

Second, the wording of the advertisement itself is couched in general terms (no mention of a particular brand and no firm price is mentioned) so it is unlikely to be regarded as certain enough to be regarded as an offer. The use of the word "offer" is not conclusive – it depends how a reasonable person would regard the advertisement as a whole: see, for example, *Schuler v Wickman Tools*. *Carlill* can be distinguished because the company went one step further than BG – it made a specific promise to reward anyone who contracted the flu after using the smoke ball as directed and it placed money in the Alliance Bank "to show its sincerity in the matter". For these reasons, the advertisement should be regarded as an invitation to treat.

Ben's "acceptance" is therefore, in fact, an "offer" (to purchase the television). In effect, he is offering to purchase the television on the terms he has outlined. At this point, Mary responds by offering to sell him a demo model for $2,000. How do we characterize this response? It is neither a rejection nor an acceptance of the offer – it is a counter-offer, defined and exemplified in cases such as *Harvey v Facey*, as an offer from the offeree in response to the original offer. The effect of the counter-offer is to "kill off" the original offer and leaves the ball in the court of the other party.

In this scenario, Mary, appreciating that Ben is undecided (about whether he already has a contract and whether he should buy the demo model), takes a very important step: she promises to keep her offer (to sell him the demo model) open until Friday at noon. The legal question is whether Mary's promise to keep this offer open is enforceable (as an "option") or is a gratuitous (and therefore unenforceable) promise? An option gives the option holder a right to purchase at a later time but, in order for it to be regarded as an option, Ben must have provided some value (i.e. "consideration") to Mary, in exchange for the promise to keep the offer open. This is the key to understanding the decision in *Goldsbrough Mort*. Unfortunately for Ben, as he has not provided any consideration to Mary for her promise, there is no enforceable agreement and no option contract concluded on the Wednesday.

The events of Friday. The question now is whether an agreement was made when Ben purported to accept Mary's offer on Friday at 10.00 am. The crucial issue is whether, after Mary sold the television to Jessie, the offer was still on the table. The rule is that an offer will lapse when any time limits have expired (in this case, noon on Friday) or when it is revoked. An offer can be revoked at any time before acceptance *but revocation is not effective until communicated to the offeree*: *Byrne v Van Tienhoven*. Therefore, until Mary informs Ben that she has sold the television to Jessie (ie has revoked her offer), he is in a position to accept her offer. And this he does when he emails his acceptance at 10.00 am (well before the noon deadline).

Conclusion. Although no agreement (or option contract) was concluded on Wednesday September 19, an agreement was concluded on Friday at 10.00 am. In not being able to deliver the television, BG has breached that contract. Ben is entitled to damages to compensate him for the losses (if any) he has suffered.

THE END

~~Question 2~~

~~Sally Bowles owns and operates a very successful song and dance club called the Kit Kat Klub. One evening, her sophisticated sound system breaks down. She contracts with a sound technician, Cliff Bradshaw, to repair it. The faulty parts of the system have to be taken to his workshop but he promises that he will return the next day and have the system up and running so that she will not have to close the club. Unfortunately, because of Cliff's carelessness, and lack of punctuality, the sound system is not returned for three days. Sally looks but is unable to find a substitute system so she has no choice but to close the club for those three nights. She now seeks compensation for the lost profits (approximately $6,500) for the first two nights she had to close the club. On the third night, she had contracted with Cosmo Brown, a famous American tap dancer, to perform and expected to earn an additional $15,000 profit from his appearance. Cliff was not aware that Cosmo was appearing at the Kit Kat Klub. Sally is also seeking damages to compensate her for~~