MODULE TITLE: **COMMERCIAL LAW PRINCIPLES**

Nominal Duration: **25 - 30 hours**

Module Code: **NAP750**

Module Purpose: **Provide the participant with a knowledge of basic commercial law principles, applicable within an office environment.**

Prerequisites: **None**

Summary of Content:

I. Origins of Law, Legal Institutions
2. Civil Liability
3. Business Entities
4. Negotiable Instruments
5. Cash Transactions Reports Act

LEARNING OUTCOME 1

DESCRIBE THE HISTORICAL ORIGINS OF COMMERCIAL LAW AND THE LEGAL FRAMEWORK IN WHICH BUSINESS OPERATES.

CUSTOMISED FOR REAL ESTATE STUDENTS

INTRODUCTION

Legal systems respond to the various environments in which they operate. The different environments create a number of different perspectives or ways to view legal systems. These include:

1. *A Systematic Collection of Principles and Rules of Law:* These should be distinguished from principles and rules of morality, politics or physics. Under this paradigm an analysis of law would be an inquiry into legal rules to determine what is permitted and what is forbidden.

2. *An Independent System of the Government:* The legal system should be separate from the government which possesses 'ultimate law-making and governmental authority'. Under this perspective legal systems are viewed externally, from the outside. For the system to survive it requires a level of coherence necessary for viability in the international community, irrespective of whether the mode of government is democratic, autocratic or oligarchic.

3. *A Collection of Institutions within a Geographic Area*: The collection typically includes a *legislature* which makes laws, an *executive department* which implements the legislature's policy, *courts* which resolve disputes between persons subject to the laws, and a *police force* to enforce the law and to prevent breaches. The collection is bound together into one system by its common recognition of an ultimate source of authority (eg the crown).

THE AUSTRALIAN LEGAL SYSTEM

The Australian legal system has its base in the English legal system. The UK parliament had sovereign or unlimited power to make laws, and therefore, could legislate for colonies, and establish movements in colonies. The crown (the king or queen) had an inherent power to operate in colonies and therefore, could establish representatives (a Governor or Governor- General) and endow them with formidable executive powers called *prerogatives*. However, the power of the crown was inferior to, and subject to, that of parliament.

Under the Australian legal system all constitutional power is derived from the UK Parliament and Australian institutions of government are modeled on those of Britain (crown, parliaments, executive, courts). However, an important difference which is basic to Australian law is that, unlike Britain, which has a *unitary* form of government, Australia has a *federal* system of government (Commonwealth, State and Territory governments). Further, Australia has a

written constitution, which Britain does not have. A major similarity is that Australian law, like British law, consists of statutes, delegated legislation, and the common law (also known case law or judge-made law).

SOURCES OF AUSTRALIAN LAW

The source of law is grounded in cultural custom (for example, Roman civil law or Anglo-Saxon custom) which suggests that the idea of a particular rule of law may be traced to a point of development when taken into the legal system. That is, the substance of a rule may be traced to a material source as a matter of history. Therefore, such sources are referred to as *material sources* of law. The *material* content of Australian rules of law (for example, ideas, standards, principles and purposes) as distinct from their formal validity as enforceable law, has a variety of sources.

There has been little borrowing of other overseas law such as that in the USA over the years. This is despite the fact that some sections in the Australian Constitution are taken almost word perfect for some sections the Constitution of the United States of America and there are other examples. Source of law refers to a source in any particular legal system that has the authority to declare a rule to be a law. Such sources are known as *authoritative sources* to distinguish as opposed to *material sources.*

THREE SOURCES OF LAW

There are three sources of law:

1. **COMMON LAW: That part of the law of England formulated, developed and administrated by the old Common Law Courts. It was originally based on the common customs of the country but unwritten. The commonsense of the community, crystallized and formulated by forefathers.**

It is basically tribal custom. For example, for real estate, the tribe in question was the Norman conquerors of England, who imposed on England Norman ideas of land holdings, the *feudal system*. These medieval concepts still form the basis of Real Property Law in Australia.

The term Common Law; has 3 distinct meanings:

- **Common law rather than local law (its original meaning). That is, a law for ALL Australians.**
- **Common Law rather than the law under Equity (see later)**
- **Common Law rather than Statute Law.**

It would be fair to say that until recently case law was the main source of law, statutes being of a relatively minor importance. However, today the roles have been reversed. This is because in today's modern and complex society there is a greater need for government intervention. Statutes have become the dominant source of law, particularly inasmuch as statute law can amend or repeal the common law, and therefore, has priority over it. The main problem with the common law is that it has been too slow to meet the needs of today's society.

On the other hand, sometimes the common law leads society for example, in *Mabo*. When this happens it is called "positive law". Common law is still with us, but its luxuriant growth has been severely trimmed.

When faced with a contradictory statute, the common law must yield, but frequently statutes vest wide discretions in courts and a new common law develops as courts interpret and apply these discretions. As well, the common law stands in sharp contrast to statute law. Statutes emanate from parliament and are generally aimed at the future, for active intervention in our lives. Their terms are readily ascertainable from the statute. However, the common law, being judgemade law, operates *retrospectively* on the parties in a case. It is made in response to a dispute and because it is concerned with the particular facts of the subject case it is often difficult to translate to other or more general circumstances.

2. EQUITY: Equity is primarily concerned with "fairness" or *natural justice*. It is a comparatively new body or rules founded on distinct principles but claiming to superiority to the common law because of its superior sanctity inherent in those principles. It was originally the body of rules formulated and administered by the Court of Chancery to supplement and provide relief to the strict rules and procedures of the common law. It evolved out of church law and therefore, has taken the high moral ground.

The idea of a Court of Chancery was attractive to the King as it allowed the remedy of defects in the administration of justice through the established courts. Originally, it had a general mandate to provide justice in all cases, but over the centuries, the rules of Equity became fixed. It is sometimes important to distinguish between Equity and Common Law, but they are similar in being both; judgemade law.

3. STATUTE LAW: Statute Law includes both direct legislation passed by Parliament (Acts) and delegated legislation such as bylaws and regulations initiated by a government body. If there is a conflict between the three laws, statute law is the superior law.

After new legislation is passed there is a hiatus caused by the fact that the law has not been tested or sufficiently determined by the courts. This is the case with the Native Title Act. However, over a period of time the legislation is tested and interpreted in court cases and becomes more settled. When the legal system is reasonably assured of what the legislation means because of case law, then the law is "certain" or "settled".

EXAMPLE

The statutory definition of *site value* for property tax purposes rating values is certain or settled law because its meaning has been explored and determined by a long *line of cases*. Case law on interpretation of one section of an Act may converts a couple of lines (or even words) into a detailed explanation. For example, the *willing seller willing seller* theory of market value (*Spencer's* case).

AUSTRALIAN LAW

The law in Australia gradually became Australian law over time. The introduction of *Torrens Title* through the various Real Property Acts (RPAs), was quite revolutionary and overturned well established and old principles of law that applied to *old system* title. However, in the early days of implementation (late 19th century) some courts, particularly the Privy Council (a UK Court that was the highest court of appeal before 1975), could not believe that an Australian Parliament really meant what the legislation said. The consequences of this are still with use in terms of a confused property law still based on feudal notions. This is one reason that the law became vernacular (more Australian) particularly, after the abolition of appeals to the Privy Council in 1975 (Privy Council (Appeals from the High Court) Act, 1975).

One problem with statute law, is that a large amount of law is unclear, ambiguous or it means not what the legislators intended it to mean because of poor drafting. Some of the problems of understanding legislation have been addressed by a trend towards *plain English* statutes.

EXAMPLE

A good example of inherently unclear law is the question of what constitutes *fixtures* to land and thus pass with the sale of the land? Clearly, a car driven onto the land does not become part of the land. A pile of bricks on the land will most likely not become part of the land. However, what if the bricks are stacked in such a way that they support a substantial barbecue in a special barbecue area?

The definition of such simple words such as *fixtures* can only be determined by complex law including complex legislation. A typical answer is that it depends on the "circumstances of the case".

THE COURT SYSTEM

Australian courts are in a hierarchy, and as successive appeals are made against a lower court decision, a litigant moves up the hierarchy, and in the end may reach the highest court for Australian law; the *High Court of Australia.*

There are three main reasons for having a hierarchy of courts:

1. **ADMINISTRATIVE EFFICIENCY: The hierarchy system functions as a filter, with a large number of lower level courts dealing with the bulk of minor usually not contested cases. Therefore, only a small number of cases, those raising contentious public policy issues reach the higher courts. However, constitutional cases are heard from the outset by the High Court.**

2. **PRECEDENT: The more senior and hopefully more talented judges in the higher courts are better able to decide what principles should become binding precedents. If all the courts were of the same importance, there would be no certainty as to which principles of law should be followed. Inferior courts are bound by the decisions of a higher appeal court. The courts in ACT's legal system (and in other states and territories) are structured in order of seniority or importance. There is only one superior court in each state, the *Supreme Court*, where decisions and judgments made are noted and used as precedents (examples) for future cases. All other courts are known as *inferior courts*.**

   EXAMPLE

   Blackburn J, a judge of the Federal Court could not overturn the legal fiction of *terra nullius* (empty land) in *Millirpum* because he was bound by acceptance in a number of High Curt cases. It was not until *Mabo* (a High Court case) that the fiction was eventually overturned.

3. **APPEAL SYSTEM: If a party is dissatisfied with a result (arising from a wrong principle of law being applied or an extremely unreasonable finding of fact), then that party may appeal to have the case reconsidered by a higher court. If all courts were of equal standing, and a second court hearing a case on appeal gave a different verdict to the first instance court, there would be no basis to decide which decision is the superior one.**

The court system in Australia is divided between the Commonwealth and the States/Territories. To enable a more efficient and flexible system, cross-vesting is allowed (*Jurisdiction of Courts (Cross-Vesting) Act 1987).* This enables the major courts of each jurisdiction (Commonwealth, States and Territories) to deal with most Commonwealth matters.

Although the states' court system are broadly similar, and perform much the same functions they have different names. A number of courts, and tribunals operate independently from the Commonwealth legal system, even though because of the *cross vesting* legislation they may hear and decide some cases, (eg taxation) that comes under Commonwealth legislation. Most State courts have what is known as a *general jurisdiction* that means they will hear any case providing it involves some state law.

TRIBUNALS: Tribunals or boards are limited to a special jurisdiction and only hear matters involving a limited and usually specialist area of state/territory law. Tribunals are part of what is known as Alternative Dispute Resolution (ADR) which is the used of non "legal" bodies to try to resolve disputes because it gets into the court system.

AUSTRALIAN CAPITAL TERRITORY COURTS

The Courts in the ACT dealing with general law are:

- **Civil Registry**
- **Coroners Court**
- **Juvenile Court**
- **Magistrates Court**
- **Small Claims Court**
- **Supreme Court**
- **High Court**

Generally, the Supreme Courts in the various states and the ACT are only bound by decisions of the High Court. However, the Supreme Court of the ACT is not bound for example, by a High Court decision made on appeal from the Supreme Court of Queensland. This is because the law in the two states may be different. However, it would be most unusual for a Supreme Court not to follow a High court precedent, and it would do so only if there was a clear difference between the laws of the state and the ACT.

Single judges of the Supreme Court are bound by decisions of the Full Court and the High Court. The Full Court may overturn its own previous decision, but is bound by previous High Court decisions. The High Court is not bound by any precedents.

Although the High Court is not bound by the Supreme Court, it will usually follow Supreme Court precedents, unless it thinks they are wrong. Similarly, judges in the ACT will usually follow decisions of judges in Victoria or England or even Massachusetts if they are considered to be good and relevant law. The closer the legal systems and laws in the two jurisdictions, the more likely it is that a nonbinding (or persuasive) authority will be followed.

Courts are reluctant to overturn long established precedents, on the basis that people have been regulating their affairs on the basis of such decisions for a long time, and it would be unfair to change the rules in the middle of the game. However, no precedent is too venerable to be overturned if necessary. Again,

this is shown by *Mabo's* overturning of the concept of Terra Nullius as it applied to Australia.

LEGISLATION

Legislation is a generic term used to cover both parliamentary statutes or acts and can be classified into *delegated* or *subordinate* legislation. A statute will frequently authorize delegated legislation or executive instruments.

1. DELEGATED LEGISLATION: There are four types of statutes which apply in Australia: Commonwealth, State, Territory, and UK statutes. The first three categories are straight forward and the most important. South Australia expressly received the British common law on its foundation in 1836.

Prior to the *Australia Acts* 1986, if a State/Territory act came into conflict with an act of the United Kingdom parliament, still in force in Australia, then technically the State act gave way and was inoperative. However, since the *Statute of Westminster* 1931, an act of the Commonwealth parliament coming into conflict with an act of the UK parliament, no longer gives way. It is likely that the very few UK acts still in force in Australia will, in the wake of the *Australia Acts,* be progressively replaced by State or Commonwealth legislation, or simply be repealed.

Since Australia is a federal system, disputes will arise from time to time about whether or not particular acts are actually within the legal jurisdiction of the parliament which enacted them. Such jurisdictional disputes between the States and the Commonwealth are, in the last resort, resolved by the High Court. The process is called 'judicial review'.

2. SUBORDINATE LEGISLATION: Subordinate legislation is made under the authority of acts of parliament which delegate powers to a person or body of people to make laws in the form of regulations. Today, the volume of written laws made under such delegated legislative authority greatly exceeds those laws in acts of parliament. Parliaments being somewhat unwieldy bodies, tend to limit their own activities to that of determining broad matters of policy. Therefore, there is an ever burgeoning mass of legal rules embedded in regulations, by-laws, orders in council and so forth. At the same time:

The quality of subordinate legislation produces one of the gravest problems facing lawyers and citizens alike. The practical task of keeping up with new regulations is a difficult one. Further, legal issues arise when questions are raised whether or not regulations have been validly made within the ambit of the powers to legislate. Such questions often come before the courts for determination.

TYPES OF STATUTE

In Australian States/Territories, there are 4 types of statute that may be applicable (plus of course rules, regulations and by-laws which may be made under any of these):

1. STATUTES: State and territory statutes are made by State and Territory Parliament, while Federal statutes are made by the Commonwealth Parliament. As well there are two types of statute made by the United Kingdom Parliament may be relevant. These are known as Imperial Statute and English Municipal Acts.

When the British settled NSW in 1788 they brought their law and much of that law remains law today. The law applicable to a new colony are the common law of England, and such statutes that are appropriate to the circumstances and condition of the colony.

2. UNITED KINGDOM'S MUNICIPAL ACTS: It is generally assumed that all statutes in force in England in 1788 became part of NSW's law on settlement, except for those statutes that clearly do not apply to Australia. For example, The Wolf Control Act of 1716 because the new colony had no wolves. This includes English statutes made between 1066 and 1703 and United Kingdom statutes made between 1103 and 1788. Some very old English statutes still apply for example, the Statute of Frauds which applies to contracts over land.

3. IMPERIAL ACTS: Imperial Acts are also statutes passed by the UK Parliament but in its capacity as the Parliament of the Empire rather than Parliament of Britain.

COLONIAL LAWS VALIDITY ACT 1865: One of these, the Colonial Laws Validity Act of 1865, is closely connected with the Real Property Act. When the Real Property Act was first passed, it was bitterly opposed by the local profession, who persuaded the colonial judge, Mr Justice Boothby, to declare it invalid being inconsistent with English Law. He was promptly dismissed by the Governor on the address of the Legislative Council, and a new judge appointed. Boothby refused to go, and for several months, the two judges worked not quite side by side, since each held that the other had no authority. Eventually, the decision of the Colonial Office in London arrived - Boothby was no longer judge and Boothby left for England to appeal.

The Colonial Laws Validity Act was passed in 1865 to settle any doubts which may have existed that colonial parliaments throughout the Empire could indeed make laws, as everyone but Boothby knew anyway. Several Imperial Acts still apply. The most important is the Commonwealth of Australia Constitution Act, under which Australia's two Parliaments derive their authority. Some Imperial legislation including insurance, shipping and a few other topics remain in force.

STATUTE OF WESTMINSTER: In 1932, the Imperial Parliament passed a statute known as the Statute of Westminster, in which it declared that no Imperial Acts would apply to the Dominions without the consent of these dominions. In theory, the British Parliament could perhaps repeal that statute

at any time, and make new laws for Australia, but in practice it is unlikely. The status of pre 1932 Imperial legislation is debatable and unclear, but fortunately of little relevance to those concerned with commercial law.

4. FEDERAL AND STATE AND TERRITORY STATUTES: The distinction between Federal and State/Territory statutes is important but complex.

Typically under their Constitution a State Parliament has power to make laws for the "peace order and good government of the province" (South Australia). This has been held to mean any law that the State or Territory Parliament thinks fit to pass. The Commonwealth Parliament however has only those powers listed in the Federal Constitution under s51, and cannot make any laws except by reference to those powers. The High Court has authority to declare void any statute or law passed by the Federal Parliament, if that statute or law is not a valid exercise of the powers granted to under s51.

EXAMPLE

In 1955 for example, Prime Minister Menzies passed the Communist Party Dissolution Act, that would have enabled the government to declare any opponent a communist, and thereby disqualify him from holding any office and liable to summary imprisonment. It was held by the High Court, that this was not a valid exercise of the Commonwealth's defence power and therefore was void. A similar problem arose more recently with the Commonwealth's attempt to try "war criminals" (*Polyukhovich v Comm* (1991) 54 CLR 521).

However, if a Commonwealth Act is valid, it overrides any State Act which is inconsistent with it. Precisely what is meant by "inconsistent" is a question of enormous financial significance to the legal profession. The rule applies equally to Commonwealth Acts of Parliament and to Commonwealth delegated legislation. For example, regulations made under the Commonwealth Air Navigation Act would override inconsistent State legislation.

There are therefore a few problems with statute law in a federated collection of former colonies. Generally, these will not bother those involved in commercial law, but any person who works with laws should be aware that there are circumstances in which the apparent law is not the law. The decision of whether or not a law is valid is usually one for a legal expert.

TERRA NULLIUS AND THE SETTLED COLONIES THEORY

Today, the perspective and context has changed as the legal validity and significance of English settlement of Australia is under close scrutiny. This is shown particularly by the *Mabo* decision of the High Court. The historical problem which has largely been remedied by *Mabo* was the legal fiction that

when Australia was first colonised it was *terra nullius* (empty land), and therefore, was treated as a *settled colony,* as distinct from a *conquered* or *ceded territory.*

On the other hand in New Zealand the UK Parliament was obliged to sign a treaty with the Maoris. Terra Nullius was an entirely convenient doctrine to support white settlement in Australia, for on that basis the British could claim both sovereignty and ownership of the land. This, led to the dispossession of the original Aboriginal inhabitants of their land. Under *Mabo,* although Britain had "radical" title to Australia, it did not inherently have "beneficial" title over native lands and therefore native title remains intact where land was not alienated or used for a purpose contrary to native title.

The general principles for the introduction of British law into a 'settled', as distinct from a 'conquered', colony were articulated by Blackstone in 1765, and Blackburn J in *Milirrpum* described the distinction as follows:

> **There is a distinction between settled colonies, where the land being desert and uncultivated, is claimed by right of occupancy, and conquered a ceded colonies. The words 'desert and uncultivated' are Blackstone's own; they have always been taken to include territory in which live uncivilized inhabitants in a primitive state of society. The difference between the laws of the two kinds of colony is that in those of the former kind all the English laws which are applicable to the colony are immediately in force there upon its foundation. In those of the latter kind, the colony already having law of its own, the law remains in force until altered.**

This distinction had originally been confirmed by the British Privy Council in *Cooper v Stuart* (1889) 14 App 286 at 291 where it was pointed out that NSW had been regarded as a 'tract of territory, practically unoccupied, without settled inhabitants or settled land, at the time when it was peacefully annexed to the British dominions'. What this meant, of course, was that Aboriginal tribal law and land rights could be conveniently disregarded. Murphy J of the High Court had scant respect for the *settled colonies* theory:

> **Although the Privy Council referred in *Cooper v Stuart to* peaceful annexation, the Aborigines did not give up their lands peacefully; they were killed or removed forcibly from the lands by United Kingdom forces or the European colonists in what amounted to attempted (and in Tasmania almost complete) genocide. The statement by the Privy Council may be regarded as either having been made in ignorance or as a convenient falsehood to justify the taking of Aboriginal land *(Coe v Commonwealth (1979) 24* ALR 118 at 138).**

A related problem of early colonization was the question of Aborigines in relation to the law, and this question too, hinged on the *settled colony* theory. Since Australia was deemed to be 'uninhabited' (however bizarre this might seem) there could obviously be no prior existing Aboriginal law, so it was taken as axiomatic that British law came to Australia as part of the 'invisible

and inescapable cargo' of settlers. The context of law was mentioned above and the history of Aboriginal land rights claims in the courts well illustrates the gradually changing community attitudes towards these basic claims.

In its landmark 6-1 judgment in *Mabo v Queensland* (1992) 66 ALJR 408, the High Court finally put an end to the elaborate fiction of *terra nullius*. Mabo is now the law in Australia so that Aborigines did possess property rights prior to British settlement, and still have property rights as native title where their claims have not been overridden by subsequent government actions and land uses:

> **Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (eg authorities to prospect for minerals) *(Mabo v Queensland* (1992) 66 ALJR 408 at 422).**

THE AUSTRALIAN CONSTITUTION

When the Commonwealth of Australia came into existence in 1901 as a result of the *Commonwealth of Australia Constitution Act* (an act of the United Kingdom parliament passed in 1900), the six self-governing colonies became States within the Australian federation. The UK origin of the Act (an Imperial Act) is shown by its preamble and first 4 sections:

THE CONSTITUTION
(63 & 64 VICTORIA, CHAPTER 12)
An Act to constitute the Commonwealth of Australia.
[9th July 1900]

> **WHEREAS the people of New South Wales, Victoria, South Australia, Queensland; and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:**
>
> **And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:**
>
> **Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:--**
>
> > **1. This Act may be cited as the Commonwealth of Australia Constitution Act. (Short title).**

2. The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom.

3. It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. But the Queen may, at any time after the proclamation, appoint a Governor-General for the Commonwealth.

4. The Commonwealth shall be established, and the Constitution Commence of the Commonwealth shall take effect, on and after the day so appointed. But the Parliaments of the several colonies may at any time after the passing of this Act make any such laws, to come into operation on the day so appointed, as they might have made if the Constitution had taken effect at the passing of this Act.

As part of the agreement or compact between the colonies prior to the establishment of the federal system under the Constitution, the States agreed to surrender some of their law-making powers to the Commonwealth. Some powers surrendered by the States were to be exercised exclusively by the Commonwealth, while other powers, though given to the Commonwealth were not withdrawn from the states, but could be exercised by the States as well as the Commonwealth (joint powers). However, under the Constitution s109 is most important:

S109: When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

The Commonwealth can only make laws under the powers listed in the Constitution. S51 of the Constitution deals with most (though not all) of the legislative powers of the Commonwealth parliament:

PART V.--POWERS OF THE PARLIAMENT.

s51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the of Commonwealth with respect to:--

(i) Trade and commerce with other countries, and among the States:
(ii) Taxation; but so as not to discriminate between States or parts of States:
(iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth:
(iv) Borrowing money on the public credit of the Commonwealth:
(v) Postal, telegraphic, telephonic, and other like services:
(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:
(vii) Lighthouses, lightships, beacons and buoys:
(viii) Astronomical and meteorological observations:
(ix) Quarantine:
(x) Fisheries in Australian waters beyond territorial limits:
(xi) Census and statistics:
(xii) Currency, coinage, and legal tender
(xiii) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money:
(xiv) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned:
(xv) Weights and measures:
(xvi) Bills of exchange and promissory notes:
(xvii) Bankruptcy and insolvency:
(xviii) Copyrights, patents of inventions and designs, and trade marks:
(xix) Naturalization and aliens:
(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:
(xxi) Marriage:
(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:
(xxiii) Invalid and old-age pensions:
(xxiiiA) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances:
(xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States:
(xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States:
(xxvi) The people of any race for whom it is deemed necessary to make special laws:
(xxvii) Immigration and emigration:
(xxviii) The influx of criminals:
(xxix) External affairs:

(xxx) The relations of the Commonwealth with the islands of the Pacific:
(xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:
(xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth:
(xxxiii) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State:
(xxxiv) Railway construction and extension in any State with the consent of that State:
(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:
(xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides:
(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law:
(xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia:
(xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

ACTIVITY

Do not submit to your supervisor.

Examine the above powers in s51. What powers do you think would affect the property professional?

The External Affairs power? Yes. To find the reasons for this - read on!

The other important section concerned with the law making powers of the Commonwealth is s52:

> **s52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to--**
>
> > **(i) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes:**
> >
> > **(ii) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth:**
> >
> > **(iii) Other matters declared by this Constitution to be within the exclusive power of the Parliament.**

Therefore, the Commonwealth is empowered to make laws with respect to specified and limited subject matters and are only valid if *intra vires* the Constitution, that is, it must fall under one the above heads in s51. This apparent limitation on the power of the Commonwealth is not as restrictive as it may at first appear. For example, the use of the *external affairs* power which is the power that validates the Racial Discrimination Act 1975 (an act central to the *Mabo* debate). However, there is some concern in the High Court as to the extent that matters even tenuously related to external affairs, can be used to validate Commonwealth legislation.

The Constitution is Australia's fundamental law, but the various Constitutions of the states are also imperial legislation, which at least in theory, can still be amended by the UK parliament prior to the *Australia Acts* 1986. A state's constitution can be amended by state parliament (if in the correct form) but the Commonwealth's Constitution can only be amended by way of a referendum as laid down in the Constitution. It has proved very difficult to amend the Constitution as it requires consistent consensus throughout Australia.

THE DEVELOPING INDEPENDENCE OF THE AUSTRALIAN GOVERNMENT

The *Colonial Laws Validity Act* 1865 (CLVA) was applicable to all the colonies, and also to the Commonwealth parliament when it was established in 1901 (*Commonwealth of Australia Constitution Act* (1901)) passed by the UK Parliament. The CLVA granted limited forms of power to the state parliaments but always subject to the *paramount force* that is, the ultimate power of the UK parliament. This, produced the anomaly that while the Commonwealth could participate in the international community as an independent nation, at the same time it could still be subject to constitutional restrictions arising from Australia's original colonial status. However, the anomaly was removed in 1942 when the Commonwealth government passed the *Statute of Westminster Adoption Act* (Cth), which in turn adopted the *Statute of Westminster* 1931

(UK), and backdated the adoption to 3 September 1939 (the outbreak of World War II).

While the *Statute of Westminster* removed anomalies so far as the Commonwealth was concerned, it was not until the passing of the *Australia Acts* 1986 that the remaining anomalies relating to the States and Territories were removed. Although appeals from the High Court to the British Privy Council were abolished in 1975, it was only with the passing of the *Australia Acts* in 1986 that appeals from the State Supreme Courts to the Privy Council were also abolished.

Australia has a federal system of government whereby power is shared between the Commonwealth, States and Territories, and in which there is a *separation of powers* between the *legislature, executive,* and the *courts*. The major institutions of this system of government are:

- **The crown**
- **The parliament**
- **The executive**
- **The courts.**

Whilst the crown is undoubtedly an important element in Australian government, it is not of central concern to us, and it will not be considered in detail.

PARLIAMENT

The two basic functions of parliament are to *legislate* and to supervise the *executive.* Legislation comprises two forms: passing statutes, and overseeing the making of 'delegated legislation'.

1. **COMMONWEALTH PARLIAMENT: The legislative powers of the Commonwealth are defined in two broad ways:**

    - **By the *conferment of power***
      (what the Commonwealth is permitted to do).
    - **By the *imposition of prohibitions* (what the Commonwealth is forbidden to do).**

The power of the Commonwealth can be extended a number of ways. For example, the Constitution does not endow the Commonwealth with specific educational legislative power except for the 'Benefits of Students' provision in s51 (xxiiiA). However, despite the lack of specific constitutional powers, the Commonwealth has a considerable influence over educational policy making, especially by virtue of financial grants made by the Commonwealth for educational purposes of various kinds. The power of the "purse strings"!

The grants are designated for specific purposes, since the Commonwealth stipulates how the money shall be spent. In addition, s51(xxxix) (External

Affairs power) potentially endows the Commonwealth with the formidable power to legislate in a number of areas otherwise outside it's domain.

PROHIBITIONS: Are the reverse of powers, and serve to deprive the Commonwealth of power to legislate in certain areas. For example, s92 of the Constitution which ostensibly protects freedom of trade between the States. However, there are some *express* prohibitions in the Constitution which preclude certain sorts of legislation by the Commonwealth. For example:

> **s116: The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and not religious test shall be required as a qualification for any office or public trust under the Commonwealth.**

This section was crucial in the DOGS (Defence of Government Schools) case: *AG (Vic); ex re Black v Commonwealth* (1980) 33 ALR 321 which is the leading case in the history of the State aid to private schools debate.

2. STATE PARLIAMENTS: Whereas the majority of the powers of the Commonwealth parliament are conferred by the Constitution, most of the legislative powers of the States are in a single section. Commonwealth powers are *specific,* whereas those of the States are *general powers.* For example, s5 of the Constitution Act 1902 (NSW) is a 'power to make laws for the peace welfare and good government' of the State 'in all cases whatsoever'.

CONSTITUTIONAL DISPUTES OVER LEGISLATION

A common feature of the federal system is the challenge by the Commonwealth and State governments to the legislation of the other. Legislation which the High Court rules as invalid because it oversteps the constitutional reach of a particular parliament is described as being *ultra vires* ('beyond the power') as distinct from *intra vires* ('within the power'). A Commonwealth law can be challenged on 3 grounds:

1. **That the Commonwealth parliament has acted *ultra vires*. The doctrine of *ultra vires* (outside the powers) constitutes a useful corrective to administrative excesses and any regulations not within the scope of authority given by the parent act, or failing to meet all of the terms of that Act, may be found by a court to be *ultra vires* and therefore invalid.**

2. **That the statute, whilst otherwise authorised, is forbidden by one of the express or implied prohibitions.**

3. **That important procedural requirements involving the making of the statute have not been complied with.**

State/territory laws can be challenged on the following grounds:

1. That the statute falls outside the general State legislative powers. This is largely only a theoretically possible challenge, since the States generally possess power to make laws for the 'peace, welfare/order, good government', and although this appears as though it may be challenged, Australian courts have held that the question of peace, welfare/order, and good government is to be determined by the parliament in question, not the court.

2. That the statute trespasses into an area of legislative power which is exclusive to the Commonwealth.

3. That the statute is contrary to an expressed or implied prohibition in the Commonwealth Constitution.

4. That in the area of concurrent power, the State statute conflicts with a Commonwealth one, and is therefore invalid to the extent of inconsistency under sl09 of the Constitution.

5. That there has been a failure to comply with an important or special procedural requirement for making the statute.

THE EXECUTIVE

The executive consists of two bodies:

1. Cabinet
2. Executive council.

Both are composed of government ministers. Cabinet meetings are where the government deliberates and comes to agreement about its political decisions. Having reached such agreement, the cabinet ministers reconvene as the Executive Council where the Governor (or Governor-General in Commonwealth matters) is formally advised of the cabinet's decision.

The Governor then acts to implement this decision which necessitates the exercise of the Governor's statutory or prerogative powers. The administration of government is carried out by the government departments headed by a Minister as political head, and by a chief executive officer public servant (for example, the Director General of Education) as the permanent head.

STATUTES: Are the major source of executive power, and statutes confer authority on the crown, ministers, public servants, and other officers. Statutory powers are invariably cast in terms of a duty or a discretion. With regard to duties, or mandatory powers as they are also called, the Minister (or such other officer or group) is actually required to do something. Legislation will mandate that the Minister shall...'. On the other hand discretionary powers are indicated by an expression such as: 'The Director General may...'. However, discretionary powers should not be construed as an open invitation for an official to act arbitrarily. This is the province of Administrative Law.

WORK TO BE SUBMITTED FOR ASSESSMENT

Length: 1000 words

Consider the operations of a typical real estate agent set up as a company in an outer suburb of a large city. List 12 important laws that impinge on his/her day to day running of the business. Which of those laws are under Commonwealth legislation? For the Commonwealth laws determine from an examination of s51 of the Constitution, the powers on which they depend.

LEARNING OUTCOME 2

RECOGNISE THE RELEVANCE OF TORTIOUS LIABILITIES IN A BUSINESS ENVIRONMENT.

INTRODUCTION

"Tort" means "wrong". Originally it meant twisted and this meaning has survived in the word *tortuous,* which should not be confused with *tortious,* meaning 'wrongful' or 'injurious'. Tort law is broadly concerned with civil wrongs. Torts are:

- **"Wrongful" conduct or behaviour that;**
- **Infringes the rights or interests of an individual protected by the law**

- **against such wrongful conduct, and in turn;**

- **Gives a right to *damages* for loss suffered.**

A tort is different to a breach of contract or a breach of trust. The law redresses the civil wrong not by punishment (for example, the sending to jail of the guilty person) as in criminal cases but instead, by awarding damages. At the same time, there are torts such as *assault* and *battery* that are also punishable as crimes.

A tort may be *intentional* or *accidental:*

- **INTENTIONAL: Ignoring *self defence* or *necessity*, a person who intentionally harms another will be held responsible for the harm caused.**

- **ACCIDENTAL: A harm may result from negligence or without fault.**

There are 3 major bases of tortious liability:

- **Intention to interfere with the plaintiff's interests**
- ***Negligence***
- ***Strict liability* or *liability without fault*.**

INTENTIONAL TORTS

Intentional torts fall into 3 broad categories, all of which have some significance for those engaged in business:

- **Intentional torts to the person**
- **Intentional torts to chattels or goods**
- **Trespass to land.**

INTENTIONAL TORTS TO CHATTELS OR GOODS:

EXAMPLES

When a real estate agent fails to return a chattel found on premises recently vacated by a tenant, and refuses to return it when lawfully requested to do so. He/she could be faced with an action for *detinue* (that is the wrongful detention of a chattel for which a demand for its return has been made by the person with a right to immediate possession).

Similarly, a property manager foolish enough to use guard dogs when collecting rent money, could find him/herself in court should a dog injure a person. The Common Law and relevant legislation provides "strict liability" on the owners of dangerous dogs that are capable of injuring people.

INTENTIONAL TORTS TO PERSONS: There are 4 such torts:

- **Battery**
- **Assault**
- **Intentional infliction of nervous shock (this will not be considered)**
- **False imprisonment.**

BATTERY: This is a form of trespass to the person of any act of the defendant that directly and either intentionally or negligently causes some physical contact with the plaintiff and without the plaintiff's consent.

ASSAULT: "Assault is a trespass to the person, any act of the defendant that directly and either intentionally or negligently causes the plaintiff immediately to apprehend a contact with his person.

EXAMPLE

It is possible to have an assault without a battery (eg a mere threat of immediate violence) and a battery without an assault (for example, a teacher pushes a pupil from behind), but in most cases assault and battery are usually committed together, with battery generally following an assault..

Assault is also a criminal offence (*King v Nichols* (1936)).

FALSE IMPRISONMENT: False imprisonment can be defined as an act of the defendant that directly and intentionally or negligently causes the confinement of the plaintiff within an area delimited by the defendant.

EXAMPLE

If a property manager locks a tenant inside his/her premises. It is immaterial whether or not the tenant knows that he/she was locked in.

NEGLIGENCE

The usual basis for legal action arising from physical injury is the law of negligence. The rise of negligence as a separate tort broadly coincided with the progress of the *Industrial Revolution* when new sources of risk presented the law with new problems. However, in little more than 100 years the negligence concept completely transformed the basis of tort liability such that today the existence of negligence as a separate tort with a distinct set of principles is easily the most important tort of all.

DEFINITION: Circumstances vary so widely that it is virtually impossible to offer a satisfactory definition of negligence that covers all possible situations. However, it can be defined as conduct falling below the standard established for the protection of others against unreasonable risk of harm. However, it must be appreciated that a person suffering injury as a result of someone's

carelessness may not necessarily be able to sue for negligence. That is, careless acts do not necessarily constitute negligence.

The necessary ingredient for an action for negligence include the following:

- **That the defendant owed the plaintiff a DUTY OF CARE**

- **That the defendant's conduct fell below the standard of care expected and therefore, a BREACH OF DUTY OF CARE occurred. This is the taking of reasonable steps to protect the plaintiff against risks of injury which should reasonably have been foreseen.**

- **That as a result of the defendant's breach of duty of care, the PLAINTIFF SUFFERED INJURY (that is, the defendant's breach caused the injury). Without injury there can be no successful action in negligence. Compare with *Trespass* which is actionable *per se* (that is, without proof of damage),**

- **That the injury complained of must have been REASONABLY FORESEEABLE and hence, not too remote. In other words, there must be a reasonably *proximate connection* to the defendant's act.**

It follows that no claim for damages will be successful in respect of what can rightly be described as an accident that is, an event which cannot be prevented, or which could not reasonably have been foreseen.

DUTY OF CARE: Negligence does not entail liability unless the defendant owed the plaintiff a duty in the circumstances to observe care. For example, "a man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them" - *Le Lievre v Gould* [1893] 1 QB 491 at 497.

- **DUTY: "Duty" may be defined as an obligation, *recognised by law,* to avoid conduct fraught with unreasonable risk of damage to others.**

Duty of care limits the liability of the tort of negligence, keeping it within reasonable bounds. If someone is injured it does not mean that someone else owed the injured party a duty of care. Therefore, a crucial question that a court will ask is; "does a duty of care exist in this particular case?" If the answer is "no" then there is no case to answer. The classic presentation of a general formula for "duty" was Lord Atkin's "good neighbour" test in *Donoghue v Stevenson:*

> **There must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances...The rule that you are to love your neighbour becomes in law you must not injure your neighbour, and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be persons who are so closely and directly, affected by my act that I ought reasonably to have them in**

contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question *(Donoghue v Stevenson* [1932] AC 562 at 580).

In *Donoghue v Stevenson,* it was S's friend who actually purchased the contaminated drink, and the defendant's counsel argued that since the manufacturer had no contract with S, he was not liable and owed her no duty of care. However, the case established a vital precedent, and thereafter remedy could be sought for such an injury. Responsibility was established such that the manufacturer owes his/her "neighbour" (the consumer) a duty of care, and can be sued for negligence for failure to exercise foreseeable care required of the reasonable person. The importance of *Donoghue v Stevenson* is twofold:

- **It "firmly established a new category of duties, that of manufacturers of goods to eventual users, a category which has since developed far beyond the limits of the facts of that case".**

- **It finally set at rest any possible doubts whether the tort of negligence was capable of further expansion or was to be rigidly tied down by existing precedents.**

Further. Lord MacMillan stated that the "'categories of negligence are never closed" which means that in accordance with changing social standards new classes of persons legally bound or entitled to the exercise of care will from time to time emerge. This is a good example of the common law being flexible and able to adapt to changing social values and needs, that is, "positive law".

EXAMPLE

A good example of the emergence of a new notional duty of care is *O'Connor v State of South Australia* (1976) 14 SASR 187, where the court held the State vicariously liable for the negligence of a judge who injured someone by opening a door. There were no precedents to guide the court so the "court simply asked itself the question whether the judge should have foreseen harm in the circumstances of the case, and finding that he should, held that a duty of care existed" (Baker 1985, 82).

"DUTY IN THE AIR": English/Australian law does not recognise a "duty in the air", as it were. A defendant's negligence must not only constitute a breach of duty of care, but also the *duty must be owed directly to the plaintiff.* Consequently, the law has limited the range of liability to persons alone who were *foreseeably* imperilled. This is to reduce the burden of excessive liability.

There are numerous examples of the "duty" concept. For example, a person can owe a duty of care not to cause injury to an "unborn" plaintiff. For our purposes, however, among the various existing relationships where a duty of care is owed, the "business professional-client", "valuer-client", "builder-client", "architect-client" and "property manager-tenant" relationships are perhaps the most important.

OCCUPIERS LIABILITY: The law of occupiers' liability is concerned with the duty owed by occupiers of land or premises towards visitors, whether invited or uninvited whose presence is lawful or unlawful, who suffer injury during the course of their visit. Until 1987 a somewhat archaic categorization existed whereby occupiers had different and "special" duties, depending on the category of the entrant to the premises or land. The 4 major categories of "visitor" were contractual, invitees, licensees and trespassers.

AUSTRALIAN SAFEWAYS STORES CASE: The situation in Australia was much simplified by the landmark High Court decision in *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479, that ensured that, in Australia at least, the notion of *special* duties (and categories) will be relegated to the realm of legal history. The High Court held that in order to determine whether the plaintiff was owed a duty of care:

> **[A]ll that is necessary to determine whether, in all the relevant circumstances including the fate of the defendant's occupation of premises and the manner of the plaintiff's entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the plaintiff. A prerequisite of any such duty is that there be the necessary degree of proximity of relationship. The touchstone of its existence is that there be reasonable foreseeability of a real risk of injury to the visitor or to the class of person of which the visitor is a member *(Australian Safeway v Zaluzna* (1987) 162 CLR 479 at 488).**

The High Court also made it plain that the time had come to end the confusion by merging *special duty of care* and *general duty of care*:

> **It seems to us that the utility of the theory of concurrent duties could be accepted only if a situation could arise in which it was possible to establish a cause of action in reliance on *Indermaur v Dames* which could not be pursued by reference to the general duty of care postulated in *Donoghue v Stevenson.* And yet case after case affirms...that the special duties do not travel beyond the general law of negligence. They are no more than an expression of the general law in terms appropriate to the particular situation it was designed to address. [Consequently]...there remains neither warrant nor reason for continuing to search for fine distinctions between the so called special duty...and the general *duty...(Australian Safeway v Zaluzna* (1987)162 CLR 479 at 487).**

Further, the Court adopted the *Donoghue v Stevenson* general notion of duty of care for all entrants to premises and land. This shows how old but good cases survive in the common law. This does not mean that the High Court is also imposing on the occupier of property exactly the same obligations in relation to every entrant. A trespasser is still at a disadvantage in an action on occupier's liability compared to an invitee. Occupiers Liability is now codified in the various Wrongs Acts of the states and territories.

TRESPASS TO LAND

Trespass to land consists of:

- **Entering upon land in possession of the plaintiff - *Robson v Hallett* [1967] 2 QB 393 and *Amstad v Brisbane City Co* [1968] Qd R 334.**

- **Remaining upon such land after initial trespass or after permission to remain express or implied, has been withdrawn - *Cowell v Rosehill Racecourse* (1937) 56 CLR 605.**

- **Placing or throwing any material object upon it**

- **Thereafter leaving the material object upon the land and in each case without lawful justification. It is a continuing trespass to remain on land or leave objects there - *Konskier v Goodman* [1925] 1 KB 421.**

ENCROACHMENT OF BUILDINGS: The Court has the power to grant relief to an adjacent or encroaching owner in respect of the encroachment of buildings. This is governed by the states' and territories' Encroachment of Buildings Acts.

TRESPASS MUST BE A DIRECT INTERFERENCE WITH THE PLAINTIFF'S LAND:

EXAMPLE

Cases of damage caused indirectly such as by the growth of a neighbour's trees, comes under the tort of *nuisance* - *Smith v Giddy* [1904] 2 KB 448. However, the law is unclear concerning encroaching trees.

BELOW THE SURFACE OF THE LAND: The occupier is normally in possession of what is under or attached to the land and so has a title to sue for trespass even though he may not know of the existence of the object interfered with - *Corp of London v Applevard* [1963] 2 All ER 834.

AIRSPACE ABOVE THE LAND: It is a trespass to fix an object in the air space above land - *Kelsen v Imperial Tobacco Co* [1957] 2 Q8 334. An object passing through the air space above land and touching an object on the land renders the person responsible guilty of trespass to the land - *Oavies v Bennison* (1927) 22 Tas LR 52. The rights of an owner of land in the air space above the land is that necessary for the ordinary use and enjoyment of the land and the structures on it. Interference outside this area will not constitute a trespass - *Lord Bernstein v Skyviews* [1977/ 2] All ER 902.

THE MEASURE OF DAMAGES -TRESPASS TO LAND: The measure of damages is the diminution in the value of property caused by the trespass. The plaintiff may claim a reasonable remuneration for any use of his land by the defendant. Where chattels are severed from the land by an act of willful wrongdoing, the plaintiff may recover either the value of the chattel at the moment of severance

or the diminution in the value of the land, at his/her discretion. For other cases he/she is only entitled to the diminution in the value of the land or the cost of restoration provided that it is not disproportionate to the value of the land - *Evan v Balog* [1976] 1 NSWLR 36.

OTHER REMEDIES

INJUNCTION: The court orders the cessation of the trespass. This may be a remedy additional to damages.

CRIMINAL: Applies in certain cases.

EJECTMENT: Were a person is deprived of possession of his land by the act of another in wrongfully taking possession (trespass) or in holding over after the expiration of a lawful possession such at the expiration of a lease (not trespass) he/she may recover possession by an *action of ejectment*.

RE-ENTRY: The dispossessed person should re-enter peacefully. If he/she enters forcibly but peacefully, the party against whom the force is directed cannot bring an action in respect of the entry or of injuries caused to him/her by the use of that force. However he/she can recover for injuries caused by the use or excessive force - *Hemmings v Stoke Poges Golf Club* [1920] 1 K8 720. Although forcible entry by a person entitled in law to possession cannot result in a civil cause of action, a criminal offence under the relevant Crimes Act may be possible.

DAMAGE BY AIRCRAFT: The Civil Aviation (Damage by Aircraft) Act 1958 provides that the provisions of the Rome Convention of 1952 on damage by foreign aircraft to third parties on the surface applies in Australia (s8(1)). The Act drastically curtails common law rights in receiving and the amount of the award. See also Damage by Aircraft Act 1952.

TRESPASS TO LAND - MUST BE A DIRECT ACT, NOT CONSEQUENTIAL

This principle is illustrated by *Southport v Esso Petroleum* [1954] 2 All ER 561:

> **Denning LJ: "This is one of those cases, rare nowadays, where much depends on ascertaining the proper cause of action, particularly in regard to the burden of proof. The Southport Corporation alleges that the deposit of oil on their foreshore was either a trespass to land, or a nuisance, or that it was due to negligence. The judge seems to have thought that it did not matter much what was the proper cause of action; it all came back in the end to the universal tort of negligence.**

The action was, he said, "to be treated in the same way as any running down or collision case in which the plaintiff alleges negligence.

I do not share this view, and will give my reasons:

(1) Trespass to land. In order to support an action for trespass to the land the act done by the defendant must be a physical act done by him directly on to the plaintiff's land. That was decided in the year 1498 in the *Prior of Southwark's Case* (1498) Y8 13 Hen 7 which is conveniently set out in Fifoot's History and Sources of the Common Law at 87. The Prior complained because the defendant, who was a glover, had made a lime pit for calf-skins so close to a stream as to pollute it. It was held that if the glover had dug the lime pit in the prior's soil the action ought to be in *trespass*; but if it was made in the glover's soil it should be in case. The same distinction was taken in *Reynolds v Clarks* (1726) 1 Str 634, where the defendant put a rainspout on his house from which water poured on to the walls of the plaintiff's house and rotted them. The plaintiff brought an action for *trespass*, but failed because he should have brought an action upon the *case.* The reason was because the prejudice to the plaintiff was not immediate, but consequential. Quite recently, in *Read v Lyons* [1947] AC 156,166; 62 TLR 646; [1946] 2 All ER 471 Viscount Simon, LC affirmed the same distinction when he observed that "the circumstances in *Fletcher v Rylands* (1866) LR 1 Ex 265 did not constitute a case of trespass because the damage was consequential, not direct".

Applying this distinction, I am clearly of opinion that the Southport Corporation cannot here sue in trespass. This discharge of oil was not done directly on to their foreshore, but outside in the estuary. It was carried by the tide on to their land, but that was only consequential, not direct. Trespass, therefore does not lie...."

TRESPASS AB INITIO: Under this doctrine a defendant who enters upon land with authority but abuses his privilege by some positive act of wrongdoing against the plaintiff, is regarded as a trespasser not merely upon committing the act but from the moment of original entry - *Windeyer v Riddell* (1847). The rule has been criticised in *Chic Fashions v Jones* [1968] 2 Q8 299) but may not be obsolete.

TRESPASS THROUGH THE AIR SPACE:

AIRCRAFT: **There is no direct Australian authority on the problem of aircraft. The Civil Aviation (Damage by Aircraft) Act 1958 for example, allows for trespass.**

THE TRESPASS MUST BE A DIRECT ACT, NOT CONSEQUENTIAL

This rule is illustrated in *Gregory v Piper* (1829)109 ER 220 where the defendant directed his servant S to pile rubbish in such a way as to obstruct the entry to the stable yard of the plaintiff's inn. The rubbish did not at first

touch the wall of plaintiff's yard, but "being of a loose kind, as it became dry it naturally shingled down towards and ran against the wall". Plaintiff brought his suit in trespass. Because trespassory injury must be "direct", the law was that a master could only be liable for his servant's trespass if he had expressly ordered the act complained of or it was the inevitable consequence of his order.

TRESPASS BY AN OVERHANGING ADVERTISING SIGN

Signs that encroach on the neighbour's property have been a fruitful cause of litigation. The legal principle is illustrated in *Kelson v Imperial Tobacco Co* [1957] 2 QB 334:

> **McNair J; "The report of *Gifford's* Case reads(ibid): "If he" - that is, the judge- "was right in the conclusion to which he had come that the plaintiffs were tenants of the forecourt and were accordingly tenants of the space above the forecourt *usque ad coelum*, it seemed to him that the projection was clearly a trespass upon the property of the plaintiffs. That decision, I think, has been recognized by the textbook writers, and in particular by the late Professor Winfield, as stating the true law. It is not without significance that the legislature in the Air Navigation Act, 1920, s9, found it necessary expressly to negative the action of trespass or nuisance arising from the mere fact of an aeroplane passing through the air above the land. It seems to me clearly to indicate that the legislature at least were not taking the same view of the matter as Lord Ellenborough in *Pickerina v Rudd* (4 Camp 219) but rather taking the view accepted in the later cases, such as the *Wandsworth District Case (*13 QBD 904), subsequently followed by Romer J. in *Gifford v Dent* [1926] WN 336. Accordingly, I reach the conclusion that a trespass and not a mere nuisance was created by the invasion of the plaintiff's air space by this sign".**

NEGLIGENT MISSTATEMENTS

The professional, any professional such as the valuer and real estate agent who hold themselves out against the world as an expert are subject to a duty of care in the information, reports and advice given to clients. This area of negligence is probably the most important area of tort affecting the real estate agent as it covers "economic loss".

ECONOMIC LOSS: Where a defendant, as a result of careless or negligent words, causes purely economic loss (financial loss) to the plaintiff, then the circumstances in which the defendant is liable to the plaintiff in negligence are much more closely circumscribed than if the plaintiff suffered economic loss arising from damage to the person or property. Where negligent

misstatements are concerned, questions such as whether or not the plaintiff relied on the defendant's statements or advice to his/her detriment, and whether a special close, or professional relationship existed between the plaintiff and defendant, take on crucial significance.

Traditionally, courts have been hesitant to impose liability for negligent misstatements, and there were several reasons for this, not least of which was the fear of *indeterminate liability* that is, liability to almost everybody who may suffer a loss because of a negligent misstatement made by the professional

EXAMPLE

Imagine a scenario of a real estate agent acting as an expert in housing finance, addresses a large hall of interested people on that matter. He/she was careless in some aspect of the advice given, and could have reasonably foreseen that the people would pass the advice to other people who may wish to buy a home (eg colleagues at work). Then, if *reasonable foreseeability* alone was the sole criterion of liability, the agent would be liable to all those who acted in the negligent advice to their cost no matter how remote they were from the agent. The adviser would be liable to an *indeterminate class* and as such could not estimate in advance the extent of liability.

An associated reason advanced for wishing to limit the liability for purely economic loss was that a negligent defendant could be exposed to claims that were out of all proportion to the extent to which the defendant's conduct fell below that of a reasonable person.

The landmark case that extended liability for pure economic loss was *Hedley Byrne.* However, *Hedley Byrne* suggested liability should attach only to those who were in a *special relationship* with the person(s) suffering loss as a result of negligent misstatement.

The present position is that liability is not limited to a particular class of persons, or a particular type of transaction. Rather, the defendant will be found to be under a duty to take care to prevent economic loss from his/her statements WHEN HE/SHE KNOWS, OR OUGHT TO KNOW, THAT HIS/HER WORDS ARE SUCH AS TO ENGENDER IN ANOTHER REASONABLE RELIANCE UPON THEM. Therefore, in the real estate agent acting as an expert adviser on housing finance scenario above, the question for the court to firstly decide is whether the agent could have reasonably foreseen that a workmate of a person attending the gathering would use the advice given.

This is why the agent must be careful about casual off the cuff statements even in informal social situations as the listener may be relying on the agent's words as the agent is holding himself/herself out as an expert on the matter. Of course the agent can qualify his/her statements so as to make it clear that the words ought not to be relied on and this is the best advice if statements and advice is given. In such a case, no liability will attach to the speaker.

PROXIMITY: The range of the defendant's liability is determined by the concept of *proximity,* and this is certainly *less* than that encompassed by the notion of *reasonable foreseeability*. In this regard, the High Court has decided that where purely economic loss results from the defendant's negligence sufficient control on liability is exercised by confining the ambit of the duty to the circumstances where the plaintiff individually is (or ought to be) within the defendant's contemplation.

Therefore, liability for negligent misstatements is sufficiently confined if the defendant can reasonably contemplate that an individual (though unspecified) might properly place reliance on the defendant's words, and suffer loss if his statement is misleading. Therefore, an agent would not be liable to economic loss suffered by somebody who finds his/her professional report and acts on that advice. The agent could not have reasonably contemplated that his/her report would be used by a finder. All that is necessary to find liability is that the statement be of such a character as to engender in the plaintiff reasonable reliance thereon.

CAUSAL LINK: Another relevant consideration is that a plaintiff would need to establish the necessary *causal link* between the defendant's statement and the plaintiff's loss. The loss cannot be too remote a consequence. It may be difficult to establish this causal link of showing that the alleged financial loss for which the plaintiff claims recompense, was in fact a reasonably foreseeable consequence of the defendant's alleged negligent misstatement. For example, if the negligent advice given at the housing finance gathering had been made *several years previously.*

The professional expert in business such as accountant, valuer, real estate agent, architect or builder, should be careful in any advice he/she gives with regard its accuracy and about the extent to which any person may claim to have acted in reliance on it. In many situations it may be best to refrain from gratuitous advice (offering an opinion when one is under no duty to do so) or to at least place the onus back on the recipient by making clear that the advice is only tentative and should be checked from other sources. In practice, particularly where written reports are used, it is common to issue a disclaimer limiting the purpose and/or the party for which and to whom the advice is given. However, the effect or efficiency of such disclaimers is not clear and will depend largely on the circumstances of the case.

BREACH OF DUTY OF CARE

A plaintiff must establish that a *duty of care* exists (that the defendant is under an obligation to the plaintiff) and that a breach of that duty has occurred. Any breach of duty must be judged against a *standard of care* being that of the reasonable person [reasonableness test], a legal standard). Should the defendant fail the "reasonable person" test, then he/she is said to be in breach of a duty of care.

However, as Baker (1985, 114) points out, the phrase *standard of care* used to illustrate the "standard of reasonable conduct by which the defendant's

conduct is measured", tends to be misleading insofar as it implies that a pre existing standard is available by which to gauge actions of defendants in negligence cases:

> **In fact, the court always reaches its decision by an *ex post facto* adjudication that on the actual facts of the case the defendant acted reasonably or unreasonably. Previous decisions on similar facts, though they show what in the past has been regarded as reasonable or unreasonable behaviour, are decisions of fact alone and do not bind the court in its decision in the instant case (Baker 1985, 114).**

The standard of care varies with the nature of the acts (for example, higher standards are required with more dangerous acts), and with regard to the type of person to whom care is owed. The standard of care expected of a person in charge of an adult group would be *less* than that demanded of a person in charge of say, infants. The issue is one of whether the harm from which the plaintiff suffers was reasonably foreseeable such that it results from a risk which a *reasonable person* would have taken reasonable precautions to prevent. Therefore, breach of duty is concerned with the question whether, granted that there was that foreseeable risk of harm, the defendant had taken reasonable care to prevent it from occurring.

THE COST OF AVOIDING HARM: In the main, courts do not respond sympathetically to arguments offered by defendants that expense and practicality mitigate against the provision of adequate precautions. However, the decision as to what is *reasonable* in this regard must obviously take account of the defendant's means and resources. For example, what sort of reasonable obligations should property owners make towards trespassers?

In some instances there is an interrelationship between the above factors that must be considered in regard to breach of duty. Where the degree of risk is insufficiently slight, the mere lawfulness of the activity in question, the absence of other deleterious consequences from it and the need for expensive measures to avert the slight risk it causes, are relevant factors in establishing that there is no breach of duty.

REASONABLE PERSON

The reasonable person test is a common test used in law. As can be seen by the comments above it is an important test in tort as well as contract. The person is a person of ordinary prudence, or a person using ordinary care and skill, Such a standard is necessary otherwise a defendant could only be judged by his/her own *subjective standards.* For example, "I did not think it was necessary for me to check that my recommended method of finance was in fact more expensive because of "hidden" costs than for the normal method of finance".

However, courts will take into account of such factors as youth, old age, physical/mental infirmities of a defendant, where they are considered relevant

GENERAL STANDARDS - PROFESSIONAL NEGLIGENCE

Property professionals are judged by the standards of generally accepted professional practice in the industry, and in the light of knowledge currently available to a reasonable practitioner at the time. Although not a legally enforceable set of rules, the various codes of ethics that professional institutes have would be evidence of acceptable standards. How would this test apply to property professionals, builders, valuers and architects?

PROOF OF NEGLIGENCE AND RES IPSA LOQUITUR

In actions for negligence the burden of proof is on the plaintiff to establish his/her case "on the balance of probabilities", and the plaintiff usually relies upon direct evidence to achieve this. But in some cases direct evidence may be lacking (for example, where injuries occur to young children), in which case *res ipsa loquitur* may come to aid of the plaintiff.

***Res ipsa loquitur* entitles the court to "infer the commission of negligence by the defendant on proof of certain facts. The facts themselves, therefore, speak of negligence *(res ipsa loquitur)* and the plaintiff need not give direct proof that the defendant was negligent). Mere proof of an occurrence causing injury itself constitutes prima facie evidence of negligence. However, certain conditions are necessary for the rule to apply.**

THERE MUST BE DAMAGE

Since *damage is* an integral element of liability of negligence no cause of action can accrue until damage occurs. Further, not only must there be damage (injury/harm of some legally acceptable form), but the damage must be caused by the defendant's fault, and as discussed above, the damage must be proximate and not too remote.

***Causation*, concerns the *factual* question of whether the relation between the defendant's breach of duty and the plaintiff's damage is one of *cause and effect. Remoteness* raises the question as to the extent to which the defendant should answer for the consequences which his/her conduct has helped to produce.**

DEFENCES TO NEGLIGENCE

The concepts of *duty of care* and *remoteness of damage* comprise two judicial techniques which circumscribe liability for negligence. In addition, there are two formal defences which need to be pleaded and proven by the defendant.

CONTRIBUTORY NEGLIGENCE: Arises from the plaintiffs failure to take reasonable care for his own safety and well being which contributes, at least in part, to his subsequent injury.

EXAMPLE

An example of contributory negligence is *Hasaganic v Minister of Education* (1973) 5 SASR 554 in which a teacher in a school for mentally retarded children tripped over a wire whilst attempting to prevent a child from climbing a tree in the school playground. As a result she was injured and the court held the school negligent. But the teacher was found guilty of contributory negligence for failing to see the wire in an environment with which she had some familiarity. Liability was apportioned 80% to the school and 20% to the teacher.

VOLUNTARY ASSUMPTION OF RISK

This defence is also called *volenti nonfit injuria* (ie to a willing person there is no injury), or *volenti* for short. *Volenti* is a complete defence in the sense that, should it prove successful, the defendant is completely exonerated from negligence. Hence, with *volenti* (unlike contributory negligence) blame and damages are not apportioned.

***Volenti* may be *deemed*' (inferred from the plaintiff's conduct) or based on express agreement, but the consent must be genuine and in no sense coerced or resulting from economic necessity. *Volenti* is sometimes invoked by employers where employees have been injured in dangerous environments, or by drug affected drivers, sued by injured passengers as a result of negligent driving. In order to establish the defence, the plaintiff must be shown not only to have perceived the existence of danger, for this alone would be insufficient, but also that he fully appreciated it and voluntarily accepted the risk.**

EXAMPLE

A property manager enters a premises to collect rent after being warned by the managing agent that there is a fierce dog in the yard and it is better to make an appointment with the tenant so that the dog can be controlled. The property manager ignores this advice and is bitten by the dog. In this situation the agent can plead the defence of *volenti* as the property manager entered the property at "his/her risk".

DEFAMATION

The final tort to be considered here is that of defamation which covers the twin torts of libel and slander:

LIBEL: In common law libel refers to anything committed in a form of a *permanent* character and *visible* to the eye. For example, an article that defames a person is libel.

A defamatory statement may be defined, in general terms at common law as one that is of a kind likely to lead ordinary decent folk to think less of a person about whom it is made. Further, it need not impute any moral blame to the plaintiff. It is enough that the plaintiff is 'dishonoured'. Hence, to call someone 'insane' can constitute defamation. We should also appreciate that defamation protects a person's *professional standing* as well as *social standing.* At common law, a defamatory claim may be committed by an attack on the skill or competence of an architect, real estate agent or a valuer.

SLANDER: Slander refers to anything *temporary* and merely *audible.* A property manager that is overheard defaming a tenant is committing slander.

There are 3 defences against defamation: justification; privilege; fair comment. At common law it is a complete defence against an action for defamation using *justification*. This is showing that the statement complained of is true, (though *knowing* something to be true and *proving* it are two different things).

Given the costs of litigation, prudence dictates that the property professional scrupulously takes care about what one says and writes.

WORK TO BE FORWARDED

Length: 1000 words

You have established a new real estate agency in the outer suburbs of a large city. Briefly list and describe the torts (as covered) above that may apply to the day to day operation of your agency.

As part of your agency practice you are providing potential sellers with a "free appraisal" of their home. Further, you advertised yourself as the "appraisal expert in (this suburb)". What are the dangers under tort in this area of your professional activities?

LEARNING OUTCOME 3

DESCRIBE AND EXPLAIN THE DIFFERENT TYPES OF ENTITIES UNDER WHICH A BUSINESS MAY BE FORMED AND OPERATED AND THE PROCESS FOR REGISTRATION OF BUSINESS NAMES.

SETTING UP THE AGENCY : BUSINESS NAMES AND ASSOCIATIONS

This is a guide for potential agents who wish to register a business name. The legislation referred to in this section is for the ACT but each state has similar legislation. The agent will need to register business names and to know of their obligations under the Business Names Act 1963 (the Act). The principal object of the Act is to place business names and ownership details of businesses operating in the ACT on a public record. Registration does not protect or confer proprietors rights to a name. The purpose of the register is to place the name on a public register in order to identify persons who conduct business under registered business names. An agent is required under s5 of the Act to register a business name if it is not your personal name.

ACCEPTABILITY OF BUSINESS NAMES

The Registrar General's Office policy on acceptability of business names for registration is rather detailed. For the purposes of this module the following reasons for non registration will give the applicant an idea of the type of names that are not acceptable:

- **Names that are either identical or similar to a registered ACT business name or a corporation under the Corporations Law.**
- **Names that in the opinion of the Registrar General are likely to be offensive.**
- **Names or words that by the direction of the Registrar General or the National Companies and Securities Commission have been deemed to be undesirable. For example, National, Trust, Institute, Club.**
- **Names that may suggest a connection to a Government body**
- **Names that in the opinion of the Registrar General are misleading.**

REGISTRATION OF A BUSINESS NAME

Registration is effected by completing an approved "Application to Register a Business Name" form. A non refundable lodgement fee is payable. Alternate business names should be listed on the application in order of preference as the preferred name may be disallowed.

Upon registration a certificate will be issued to the lodging party at the address listed. The certificate of registration of the business name shall at all times be exhibited in a conspicuous position at the place where business is carried on in the ACT under the name or, if there is more than one such place, at the principal place where business is so carried on in the ACT.

CHANGE OF PARTICULARS OF A REGISTERED BUSINESS NAME

Under s12 of the Act the following changes must be advised:

- **Nature of business**
- **Principal or other placers of business particulars/appointment of resident agent name or place of residence of registered proprietor change of proprietor/s.**

These changes should be advised by completing an approved "Notice of Change of Particulars" form.

RENEWAL OF REGISTRATION OF A BUSINESS NAME

Under s11 of the Act, registration of a business name remains in force for 3 years. Renewal should be effected by completing an approved "Renewal of Registration of Business Name" form. This form may lodged at any time within the period of one month before or after the date of expiry of the registration. Upon renewal the business name is registered for a period of a further three years. A new certificate does not automatically issue and is available for a fee.

CESSATION OF BUSINESS UNDER A REGISTERED BUSINESS NAME

Under s12(3) of the Act where a person ceases to carry on business under a registered business name an approved "Notice of Cessation of Business Name" should be lodged within 14 days of the cessation. The Registrar General may extend this period. No fee is payable.

SETTING UP THE AGENCY: WHICH BUSINESS ORGANISATION SHOULD AN AGENCY USE?

There are 3 main methods of business organisation that agents use:

- **Sole trader**
- **Partnership**
- **Company.**

The best method is a function of the scale or size of your business, income factors, exposure to risk, how much control you require over the business and the type of business.

SOLE TRADER

A popular method is sole trader where the agent uses his/her name and is the one and only owner of the business.

ADVANTAGES:

- **Complete control**
- **Free and easy to set up**
- **Goodwill potential in the use of one's name**
- **May attract clients who wish to deal with a person rather than a corporation.**

DISADVANTAGES:

- **The sole trader is completely liable for debts and liabilities incurred**
- **Attracts the highest income tax rate**
- **May hamper growth - a sole trader is only possible for a small business.**

PARTNERSHIP

The partnership system is more popular amongst professionals than the sole trader. A partnership is defined as:

> **"The relationship that exists between persons carrying on a business in common with a view to profit."**

It is a contract between two or more parties to enter into a legally binding relationship. There are 3 essential elements of a partnership are:

1. **The carrying on of a business**
2. **In common**
3. **With a view to profit.**

All three are necessary for a partnership to be established. The Partnership Act allows a partner to bind the firm and the other partners when two elements are satisfied:

- **When the partners acts are within the type of business carried on by the firm.**
- **When the partners' actions are carried out in the usual way.**

If the partner does not however have any authority and the third party knows this, the partnership is not bound. Partners in a partnership are subject to several and joint liability

SEVERAL LIABILITY: *Several liability* is separate liability.

EXAMPLE

Under sole trader arrangements agent A borrows $1 000 from B and agent C borrows $ 10 000 from B. Each party has a separate or several liability. If A fails to repay $1 000 to B, that is of no concern to C. C has no liability for A's debt. Similarly, if agent C fails to repay $10 000 to B, that is of no concern to A. A has no liability for C's debt.

JOINT LIABILITY: *Joint liability* means that all the parties have a joint obligation to repay irrespective of any personal arrangements between them.

EXAMPLE

Agents A and C jointly borrow $10 000 from B on the understanding between A and C that A will be responsible for repayment of $6 000 and C be responsible for repayment of $4 000. This is of no concern to B who only looks to the joint promise of A and C to repay the debt.

If A goes bankrupt and cannot repay any part of the debt, B can look to C for repayment of the full amount. However, B, once obtaining judgment against one party, cannot then sue the. other party, even if the judgment has not been satisfied.

JOINT AND SEVERAL LIABILITY: Agents as partners are jointly and severally liable for a debt to a third party.

EXAMPLE

Agents A and C are jointly and severally liable to pay $10 000 to B. This means that B can sue A for the whole of the debt, or B can sue C for the whole of the debt, or B can sue them both. As between themselves, A and C are responsible for the debt in the proportions that they agreed.

DISSOLUTION OF PARTNERSHIP

An agency partnership is dissolved:

- **By the expiration of a fixed term**
- **If entered into for a single undertaking, by the termination of such undertaking.**
- **If entered into for an undefined time, by any partner giving notice**
- **Death of a partner**
- **Bankruptcy of a partner**
- **If it becomes unlawful.**

DISSOLUTION BY THE COURT: The court may dissolve the partnership on any of the following grounds:

- **Where a partner has been declared to be of unsound mind**
- **Permanent incapacity of a partner**
- **Where a partner is guilty of conduct which, in the opinion of the court, is calculated to prejudicially affect the business.**
- **Willful or persistent breach of the partnership agreement**
- **When the business can only be carried on at a loss**
- **Whenever circumstances have arisen that render it just and equitable that the partnership be dissolved.**

The author has carried out a survey on a number of small businesses and the reasons advanced why they formed a partnership. Overwhelmingly, the main reason was the reduction in tax liability as the rate is split between the two partners. This was a particularly, strong reason for husband/wife partnerships.

DRAFTING A PARTNERSHIP AGREEMENT

When drafting a partnership agreement, the following matters will need to be considered. These are, of course, only the barest essentials, and depend very much on circumstances. Partnership agreements will also contain provisions covering other matters that are not covered in these general comments. Therefore, this guide should not be used as a substitute for legal advice.

LEGAL QUESTIONS TO BE ANSWERED

- **Is a formal partnership agreement necessary?**

- **When will the partnership commence? What will be the duration of the partnership? This data should be included in the agreement, particularly if the partnership is for a set period only.**

- **How will partnership land be held? If the land is already owned by one of the partners, will the land be transferred to all the partners or held in trust for the partnership? Or will a lease be granted to the partnership? Normally an agreement would be drawn up to allow the partnership to lease the land and buildings from the partner owner.**

- **If the place where the partnership business will be carried on is already leased by one of the partners, will the lease be assigned to all partners? Usually the lease is rewritten or assigned to the new partnership as lessee.**

- **Will a firm of accountants be appointed to draw up the partnership accounts? It is advisable to engage an accountant to attend to the**

affairs of the partnership who is NOT the accountant used by any partner for their private affairs.

- **Will there be any prohibition on partners assigning or changing their interest in the partnership? It is essential to have these points clearly defined in the partnership agreement.**

FINANCIAL QUESTIONS TO BE ANSWERED

- **In what proportions will profits and losses (including capital and losses) be shared? Will any partner be entitled to draw sums on account of profits? The usual practice is for all partners to work equal hours and profits and losses to be distributed equally. Partners would normally take equal drawings per month Against profits.**

- **Who will be the firm's bankers? What will be the cheque signing arrangements? Partnership cheques are normally signed by any two partners.**

- **If one partner decides to sell his/her interest, how is the business valued? Do other partners get the *right of first refusal*? Partnership agreements should detail the method of valuing the business and whether right of first refusal to other partners either singularly or collectively will be applicable.**

PERSONAL QUESTIONS TO BE ANSWERED

- **In what proportions will capital be contributed and belong to the partners? Will capital carry interest? In the great majority of partnerships, all members contribute an equal amount of capital which does not carry interest.**

- **If a loan from a partner is contemplated, what will be the terms of the loan? This could be covered in the partnership agreement, usually stated as at current bank lending rate for business loans.**

- **Is it understood that all partners are jointly and severally liable to the full extent of their private assets for debts of the partnership? In this regard, a partner who has more private assets than the other partner(s) has more at risk. All partners should check their individual liability in relation to the partnership agreement.**

- **Will majority decisions of partners govern all matters? This could apply, however in large partnerships, to maintain harmony, a consensus of all partners may be appropriate for major decisions.**

- **What happens if there are two partners and they disagree? Generally in this situation the *status quo* would remain.**

- **Are partners required to insure each other for the protection of the remaining partner(s) in the event of the death of a partner? Worth considering. This is one method used to finance the purchase of a deceased partner's equity.**

THE AGENCY AS A CORPORATION - CORPORATIONS LAW

The third method of operation is as a corporation. Advantages of incorporation include:

- **Limited liability**
- **Flexibility**
- **Perpetual succession**
- **The company's shares can be transferred**
- **Imputation of taxation**
- **The company has power to acquire, hold and dispose of property**
- **The company is capable of suing and being sued**
- **Separate legal entity: upon incorporation the company**
- **Becomes a new and independent legal entity.**

Disadvantages of incorporation include:

- **Procedural difficulties for shareholders to bring a court action on their own behalf and on behalf of their company.**
- **Limited role that shareholders have in management (that is, loss of control)**
- **The ever-increasing penalty provisions applying to the defaulting officer and director.**
- **Fees associated with complying with the Corporations Law. For example, filling of the Annual Return, annual accounts.**
- **The paperwork associated with special resolutions and Annual General Meetings.**
- **The need for auditors - or at least, accountants.**

The duties of the directors of an agency company are more onerous than the other two forms of ownership. However, most agents will be a Small Proprietary Company only (see later) and under the new company law, the

duties and responsibilites are not as nearly as onerous as for large and public companies. To give you an idea of the extra cost and responsibilities that a corporatised agent incurs and has, the following is a brief description of the duties and responsibilites under the Act:

DIRECTORS DUTIES

Common law:

- **To act in good faith**
- **To act honestly in the company's best interest**
- **To exercise care, diligence and skill**
- **To avoid conflicts of interest**
- **Not to make secret profits and make full disclosure**
- **To act in the interest of creditors**
- **To act in the interest of beneficiaries when the company is a trustee.**

THE AUSTRALIAN SECURITIES COMMISSION (ASC)

The Australian Securities Commission (ASC) is an independent government body that ensures fair play in business, reduces corporate crime, helps to protect investors and Australia's business reputation abroad. Further, it aims to protect the interests of companies and investors by providing information about companies. The Corporations Law (the Law) and the Corporations Regulations impose various obligations on companies and their officers. Failure to comply may render the company or its officers liable to certain penalties or prosecution.

This modules covers the routine requirements of the Law and Regulations that a corporatised agency must follow but it is not an exhaustive statement.

REGISTERED OFFICE

Every company must have a registered office within Australia to which all communications and notices may be addressed. Where the company has given the ASC notice of office hours under s218(2), the office must be open to the public for at least three hours between 9am and 5pm on each business

day. If no s218(2) notice is lodged with the ASC, the office must be open for at least five hours between 10am and 4pm on each business day [s2l7, s218, s240(5)].

If the agent changes the place of his/her registered office, he/she must notify the ASC within seven days on Form 203 'Notification of change of office hours or address of one or more corporations' [s2l8]. No fee will be payable if the agent lodges the new details within this time. If the corporatised agent does not occupy the address specified as the registered office, the actual occupant of the premises must give consent in writing to the agent to use of the address as the address of the registered office.

COMPANY NAME

The corporatised agent must display the company name on the outside of every office or place in which he/she carries on the agency business. If it is the 'registered office' those words must also appear [s2l9(8)].

AUSTRALIAN COMPANY NUMBER

When it is registered, every Australian company receives a unique nine digit identifying number known as the Australian Company Number (ACN). The corporatised agent's name, in legible characters, followed by the words 'Australian Company Number' (or a permitted abbreviation) and the number itself must appear on:

- **The common seal and every other seal of the company**
- **Every public document issued, signed or published by, or on behalf of, the company.**
- **Every eligible negotiable instrument issued or signed by, or on behalf of, the company.**
- **All documents intended or required to be lodged with the ASC under the Law [s219].**

LODGMENT OF DOCUMENTS

When the corporatised agent lodges a document, he/she must clearly identify:

- **The name of the company to which the document relates and its Australian Company Number.**
- **The title of the document**

- **The name, address and telephone number of the lodging party.**

If the document is an ASC printed form, space for these details are provided on the form. Requirements relating to annexures are listed on most ASC printed forms and in regulation 1.06 of the Corporations Regulations.

WHERE TO LODGE DOCUMENTS

Urgent documents, such as applications for incorporation applications for change of company name charge documents notices of registered office notices of external administrators should be lodged over the counter at any ASC Business Centre or with a Local ASC Representative.

Documents such as:

- **Prospectuses**
- **Takeover documents trust deeds**
- **Applications for securities industry licences**

- should be lodged in person at an ASC Regional Office or by mail to Australian Securities Commission GPO Box 9827 in the capital city of your State or Territory.

FEES TO BE PAID

The corporatised agent may be required to pay a prescribed fee to lodge and register his/her documents. If the agent does not pay the fee at the time you lodge the document, processing will be delayed until the fee is received.

PREPARATION OF ACCOUNTS

Unless exempted by an ASC class order, public companies and large proprietary companies must prepare a profit and loss account and a balance sheet for each financial year that gives a true and fair view of the company's profit and loss and state of affairs at the end of the relevant accounting period [s292, s293].

These accounts must be prepared within the prescribed deadline (see definition of 'deadline' in section 9 of the Corporations Law), must comply with prescribed requirements and must be prepared in accordance with applicable accounting standards.

SMALL PROPRIETARY COMPANIES

The agent will most likely be a *small proprietary company*. A *small proprietary company* will not have to prepare financial statements unless:

- **Required to do so by the ASC**
- **Required to do so by members holding 5% of the company's shares**
- **It is controlled by foreign companies and is not covered by consolidated accounts lodged with the ASC [s283C(2) and s283B].**

Most agencies will come under the definition of a *small proprietary company*. Such a company is subject to much less rigorous rules and regulations compared to that for a large proprietary company.

A *small proprietary company* is one that has satisfied at least two of the following tests:

- **Gross operating revenue for the financial year of the company and the entities it controls (if any) is less than $10 million;**

- **Gross assets at the end of the financial year of the company and the entities it controls (if any) are less than $5 million;**

- **The company and the entities it controls (if any) have fewer than 50 employees at the end of the financial year [45A(2)].**

A company that cannot satisfy at least two of the above criteria is classified as a *large proprietary company* [s45A(3)].

APPOINTMENT OF AN AUDITOR

Unless the company is a *small proprietary company,* it must appoint an auditor within one month after the date of incorporation [s325, s3270)]. The initial appointment of an auditor can be made by the directors or by resolution at a general meeting of the company [s327].

This auditor will hold office until the first Annual General Meeting when the company will make an appointment. The auditor then appointed will hold that office until death or removal or resignation or until the person is no longer deemed by the Law to be qualified to hold office [s327(4), s324].

A *small proprietary company* will not have to appoint an auditor unless:

- **Required to do so by the ASC**
- **Required to do so by members holding 5% of the company's shares;**
- **It is controlled by foreign companies and is not covered by consolidated accounts lodged with the ASC [s3251.**

ANNUAL GENERAL MEETING (AGM)

A *proprietary company* is not required to hold an Annual General Meeting. A *public company* must hold an Annual General Meeting at least once in every calendar year, and within five months of the end of the financial year [s245(l)]. A public company is required to hold its first Annual General Meeting within 18 months after its incorporation or within five months after the end of its first financial year, whichever comes first [s245(2)].

ANNUAL RETURN

A company must lodge an annual return for each year. This annual return must be in the prescribed Form 316 'Annual Return of a company'. Form 316 and an instruction Guide on how to complete the annual return are sent by the ASC to every registered company each year in due time for the company to complete the form and lodge it. Details already supplied to the ASC by the company will be shown on the form. A proprietary company must lodge with the ASC an annual return for each calendar year before 31 January in the next calendar year [s335(1A)].

LODGMENT OF ANNUAL ACCOUNTS

The Corporations Law requires all companies to keep records that would enable annual accounts to be prepared and audited if required.

PROPRIETARY COMPANIES

Some companies that were non exempt proprietary companies prior to the commencement of the First Corporate Law Simplification Act must attach accounts to the annual return they are required to lodge by 31 January 1996. That is the last annual return to which proprietary companies will be required to attach accounts. Thereafter, if a proprietary company is required to lodge accounts (for example, because it is large), those accounts will be lodged separately.

***Small proprietary companies*, that are foreign controlled and not covered by consolidated accounts lodged with the ASC by their parent company, are required to lodge company accounts and reports with the ASC. These proprietary companies must prepare and lodge audited accounts with the ASC within four months after the end of the financial year [s317(2), s283D(4)].**

***Large proprietary companies*, except disclosing entities, must lodge accounts within four months after the end of the financial year [s317B(2), s283D(3)].**

SPECIAL RESOLUTIONS

Certain changes relating to a company need to be authorised by way of a *special resolution.* The term *special resolution* is defined in s253. The

company must detail any such resolution on Form 205 'Notification of resolution' and lodge it with the ASC within the prescribed time.

BOOKS AND REGISTERS

A company is required to keep the following Books and Registers.

- **Register of members [s216B]**
- **Register of option holders, if any [s216C]**
- **Minutes of all proceedings of general meetings and of meetings of its directors. [s258]**
- **Register of charges [s271]**
- **Such accounting and other records as will correctly explain the transactions and financial position of the company and enable true and fair accounts to be prepared. [s2891**
- **Register of debenture holders, if any [s2l6D]**
- **Register of holders of prescribed interests, if any [s1070]**

DUTIES OF COMPANY DIRECTORS

Every company must have directors. At least one is needed for a proprietary company and three for a public company. The company must supply the names and other personal details of directors to the ASC for inclusion on the public database, at the time the company is first registered and when there are changes of directors.

Directors are needed to ensure that specific individuals take responsibility for the management and direction of companies, and for such matters as seeing that books of account are properly maintained. It is common for the Articles of Association of a company (that is the company's rules) to give control of many aspects of the company's business to its directors. The tasks of directors are usually very different in the case of a smaller (usually proprietary) company than in the case of a larger (usually public) company.

In a proprietary company, directors are often involved in all aspects of the running of the company's business, including:

- **Buying or leasing trading premises**
- **Arranging for bank or other finance to enable the company's business to be carried on.**
- **Ordering goods and services**
- **Operating retail outlets**
- **Making sure the company's accounts are prepared property**

- **Paying suppliers.**
- **Seeing to the preparation of tax returns.**

In a larger company, expert employees carry out many of the tasks which the directors of a proprietary company may handle. Directors of larger companies, some of whom may be appointed from outside the company, are more involved with matters such as:

- **The appointment of executives**
- **Maintaining good industrial relations with the company's workers long-term business and financial planning.**
- **Looking at the overall performance of the company and its different divisions.**
- **Deciding whether the company should be moving into different types of business undertakings.**
- **Determining what part of the company's profits should be distributed to shareholders in the form of dividends.**

WHO CAN BECOME A COMPANY DIRECTOR?

Only persons 18 years of age or older can be appointed company directors. In a public company, unless certain steps are taken by the company, a person cannot act as a director after reaching the age of 72. The following people must not manage a company (which includes acting as a director) unless they have the consent of the Federal Court or the Supreme Court of a State or Territory:

- **Insolvents under administration (those who have either been declared bankrupt or have entered into an arrangement under Part X of the *Bankruptcy Act*).**

- **Those who have been convicted of an offence against any law in connection with the promotion, formation or management of a company or other body corporate serious fraud (punishable by imprisonment for at least three months).**

- **An offence against certain provisions of the Law, including breaches of duties of directors and other officers [s232] and insolvent trading [s588G].**

Those convicted must not manage a corporation within 5 years of conviction or, if imprisoned for one of these offences, within 5 years after release from prison. The Court can also order a person not to manage any company, for such period as the Court thinks fit, if the person:

- **Has repeatedly breached taws relating to the running of companies**
- **Was a director or other officer of a company that repeatedly breached these laws and the person failed to take reasonable steps to prevent the company breaching these laws.**

A COMPANY IS A SEPARATE LEGAL PERSON TO WHICH DUTIES ARE OWED

A very important rule of company law, too often overlooked, is that a company is a separate legal "person" to which duties are owed by its directors and other officers, regardless of the personal taxation or business reasons for its establishment. In relation to some matters, such as the use of money and other property of a company, the law takes a very strict approach. The duties owed by directors and other officers are viewed as virtually the same as the duties owed by a trustee of the estate of a deceased person.

While the test applied by the Law in other situations, for instance in deciding the correctness of the day to day business decisions of a company, may not appear to be as strict, it must be remembered that in every situation directors and other officers are expected to have regard to the best interests of their company rather than to their own personal interest or advancement.

THE DUTIES OF DIRECTORS TO THEIR COMPANY

The general duties of company directors, and other company officers, are to act honestly, exercise care and diligence, not use inside information and not make improper use of information or their positions [s232]. A director shall at all times act honestly in the exercise of their powers and the discharge of the duties of their office [s232(2)]. The duty to act honestly is an aspect of the principle that directors, as *fiduciaries*, must act with the utmost good faith towards the companies with which they are associated.

The clearest cases of breach of the duty of honesty are those involving theft or other misuse of a company's property, actions that are viewed very seriously by the Law. The reason for this strict view of directors' duties arises from the privilege of *limited liability* that is given to company shareholders. If a company fails, leaving debts owing to outsiders, the only property available to meet those debts in most circumstances are the company's assets plus any money that remains unpaid on the company's shares. Usually, this is the limit on the liability of the company's shareholders.

The amount of any company property wrongfully taken or used by directors reduces the property available to meet the claims of creditors if the company fails. Therefore, the Law protects creditors by requiring company directors to observe strict standards of behaviour. Breach of duty to act honestly covers more than outright dishonesty, such as theft of property belonging to a company or fraud. Directors who, without any intent to defraud, take a decision knowing that it cannot be in the overall best interests of a company would not act honestly.

In the exercise of their powers and the discharge of their duties, a director or other officer of a company must exercise the degree of care and diligence that a *reasonable person* in a similar position in a company would exercise in similar circumstances [s232(4)].

It is difficult to lay down a precise test as to what sort of care and diligence is expected from every director, as much will depend on the size of the company, the nature of its business operations, the types of persons who make up the board of directors, etc. However, in one recent case the Court said directors had to take reasonable steps to be in a position to monitor the company's management, to gain at least a general understanding of the business of the company, and how this might be affected by changing economic circumstances.

IN EVERY CASE A DIRECTOR SHOULD

- **Obtain ongoing information about their**
- **company's operations.**
- **Take an active part in Board meetings**
- **Question the impact on their company's business performance of any proposal (particularly one involving a substantial financial commitment).**
- **Seek outside professional advice when they do not have sufficient information to properly allow them to make an informed decision about any matter that comes before the board of directors for decision.**

Directors cannot simply agree to proposals put forward by other directors without obtaining some information about the effect of these proposals on the company's business. Nor can they allow themselves to remain uninformed about the state of their company's business. They cannot satisfy themselves that any decision is truly in the overall best interests of their company if they are just "rubber-stamps" for various proposals - *Morley's* case. The Courts

can look at the special skills or education of a particular director when deciding whether that director has met the required level of care and diligence.

DUTIES RELATING TO THE USE OF INFORMATION OR POSITION

A director must not make improper use of information gained through their position to gain, directly or indirectly, an advantage for themselves or for any other person, or to cause detriment to the company [s232(5)]. The Courts have held that this information need not be confidential. It is a question of how the information is used. A director must not make improper use of his or her position to gain, directly or indirectly, an advantage for themselves or for any other person, or to cause detriment to the company [s232(6)].

Where directors have personal interests that might give rise to conflicts of interest with their duties as directors, the nature of these interests must be disclosed at a directors' meeting [s231].

KEEPING PROPER BOOKS AND RECORDS

The Law sets out many requirements for the setting up and maintenance of registers and other company records. One obligation [s289] important for directors is the requirement that a company "keep such accounting records as correctly record and explain its transactions (including any transactions as trustee) and financial position". These records must be kept so that

- **"True and fair" accounts of the company can be prepared from time to time (at least annually).**
- **The accounts can be conveniently and properly audited in accordance with the provisions of the Law.**

FALSE OR MISLEADING STATEMENTS OR INFORMATION

Any person who makes or authorizes a statement which to their knowledge is false or materially misleading in a document required to be lodged with the ASC, is guilty of an offence. The offence includes making a document materially misleading by leaving something out [s1308]. It is also an offence not to take reasonable steps to ensure that the contents of a document lodged with the ASC are not in fact misleading [s1308]. A director or officer of a company who knowingly provides false or misleading information about the company's affairs to a director, auditor or shareholder of the company, is guilty of an offence [s1309].

The Company will also be liable under the Trade Practices Act (Part IV) and the local Fair Trade Act for any misleading or false advertising.

WORK TO BE FORWARDED TO YOUR SUPERVISOR

About 500 words

Following on from the previous "works to be forwarded"; considering the agency you intend to establish how would you answer the following questions?

1. **Determine the relevant body in your state or territory that registers business names. Fill out the appropriate form for the name you intend to use.**

2. **Determine the relevant licensing body in your state or territory. What rules and regulations apply to registration of the business name and its display?**

3. **What type of business organisation will you use? Briefly state the reasons why.**

LEARNING OUTCOME 4

DEMONSTRATE AN UNDERSTANDING OF THE USE OF NEGOTIABLE INSTRUMENTS AS A MEANS OF EXCHANGE.

NEGOTIABLE INSTRUMENTS

A negotiable instrument is a document that carries a legal right to receive payment in the future. It is legal right that is transferable by delivery or by delivery and indorsement (or endorsement). Examples are cheques and bills of exchange.

Negotiable instruments are mainly governed by state statutory law and this i generally, the common law. Drafts (cheques) and notes (eg bills of exchange) are the two categories of instruments:

1. **A draft is an instrument that orders a payment to be made. For example, cheques.**

2. **A note is an instrument that promises that a payment will be made. For example, certificates of deposit (CD's) are notes.**

Cheques are the negotiable instrument most commonly used in business transactions to finance the movement of goods and to secure and distribute loans. Negotiable instruments do not include money and certain payment orders.

DERIVATIVE TITLE: The rule of *derivative title*, which is applicable in most areas of the law, does not allow a property owner to transfer rights in a piece of property greater than his/her own. However, if an instrument is negotiable this rule is suspended. A purchaser in good faith (who has no knowledge of a defect in the title or claims against it) takes title to the instrument free of any defects or claims.

CHEQUES ?

A cheque is a draft, other than a documentary draft, payable on demand and drawn on a bank.

"Draft" is defined as an "order," which is a "written instruction to pay money signed by the person giving the instruction." A cheque, therefore, contains an order rather than a promise to pay money. In most cases, a cheque is a negotiable instrument. A preprinted form of a cheque invariably satisfies both the essentials of a draft and the requirements for negotiability.

BILLS OF EXCHANGE

Bills of exchange have fallen into disfavour with the rise of banks and cheques drawn on a bank account. They come under the Bills of Exchange Act 1909 (Cth). A bill of exchange is:

- **An unconditional order in writing**
- **Signed by the person giving the bill**
- **Requiring the addressee to pay on demand or at a fixed or determinable future time.**
- **A certain sum of money to or to the order of a specified person or to the bearer.**

Because property professional are mainly concerned with cheques, this module will concentrate on this particular negotiable instrument.

REQUIREMENTS OF NEGOTIABILITY:

Negotiable instruments must have the attribute of negotiability. This attribute has three elements. The negotiable instrument must be:

1. **In writing signed by maker or drawer**

2. **A promise or order. In an ordinary draft, this requirement is usually satisfied by inserting the drawee's name immediately following the word "To" on the printed form in the lower left hand corner of the instrument. A cheque usually meets the requirement because the drawee's bank's name is printed and encoded on the face of the instrument.**

3. **Must be unconditional. Generally, a promise or order is unconditional unless the writing states an express condition of payment, that the promise or order is subject to or governed by another writing, or that rights or obligations with respect to the promise or order are stated in another writing. In other words, if the writing contains none of these provisions, the order or promise is unconditional.**

4. **An order to pay money must be a fixed amount on demand or at a definite time.**

5. **Most instruments that are payable on demand, including virtually all cheques, are so payable for the last reason: they make no express provision for time of payment.**

6. **Payable to order or to bearer. Payable to bearer or order at time it first comes into possession of a holder.**

7. **No other undertaking or instruction. Beyond the maker's order or promise money, the instrument itself must not contain "any other undertaking or instruction" by the maker or drawer "to do any act in addition to the payment of money,"**

8. **Negotiability (or Not) By Declaration. The opposite issue is whether or not the parties can use a form that is a negotiable instrument and avoid negotiability by declaring, on the instrument, that it is not negotiable. The answer is yes, except for a cheque.**

A statement on a cheque that it is not negotiable (eg, "nonnegotiable") is ineffective to destroy negotiability, if the cheque is otherwise negotiable.

CHEQUE NOTATIONS

Cheques are commonly noted or endorsed in some way. These are messages to parties who may come into contact with the cheque. The following is a summary of typical endorsements:

PAYABLE TO BEARER: This endorsement authorises the paying bank to pay the cheque to the bearer at the time. The bank does not have to confirm that the bearer is the owner of the cheque. A bearer cheque also informs intending holders of the cheque that it is negotiable by delivery.

PAYABLE TO ORDER: This endorsement is an instruction to the bank to only pay the cheque to the drawee or an indorsee. The cheque is only negotiable by delivery and endorsement. The bank should must take care to collect the cheque only on behalf of the payee or a lawful indorsee. However, there are a number of defences available to the bank under the relevant legislation.

CROSSING A CHEQUE: Instructs the bank to only pay the cheque into a bank account or to another bank. That is, the bank must not pay cash. The crossing must be two parallel transverse lines.

NOT NEGOTIABLE CROSSING: If the words “not negotiable” are added to a crossed cheque, it is no longer a negotiable instrument. It warns all parties who deal with the cheque that they cannot get a better title than the transferor and therefore, they take the cheque subject to all defects in title. A cheque cannot be "not negotiable" unless it is crossed.

ACCOUNT PAYEE ONLY: Does not impose any contractual duty on the bank because there is no contract between the drawer and the bank. However a

bank that ignores the endorsement may be guilty of negligence toward the true owner of the cheque.

LEARNING OUTCOME 5

DEMONSTRATE AN UNDERSTANDING OF THE OPERATION OF THE FINANCIAL TRANSACTIONS REPORTS ACT 1988 (CTH)

THE FINANCIAL TRANSACTIONS REPORTS ACT (the ACT) 1988

Both Commonwealth and some State legislation requires the reporting of specified financial transactions. The legislation aims to restrict tax avoidance and to assist in the detection of crime and by preventing the laundering of money.

***The Financial Transactions Reports Act* 1988 (Cth) (the ACT) requires suspect transactions to be reported to the Australian Transaction Reports and Analysis Centre (AUSTRAC). AUSTRAC passes on these reports to taxation and law enforcement authorities and also analyses the data. The Australian Taxation Office Australian, Customs Service, Federal Police and the Australian Securities Commission have access to all the information held by AUSTRAC.**

The Act defines the types of transactions that are to be reported, the people who are to report them and the details of the transaction to be reported.
A cash dealer is required to report certain transactions. The Act defines a cash dealer to include:

- **Financial institutions**
- **A body corporate that is, or would be if incorporated in Australia, a financial corporation.**
- **Insurers or their intermediaries**
- **Dealers in securities**
- **Futures brokers**
- **Share registrars**
- **Trustees or managers of a unit trust**
- **Persons carrying on the business of selling travelers' cheques**
- **Bullion dealers**
- **Persons carrying on any business that includes collecting currency, preparing payrolls, delivering money.**
- **Operators of gambling houses, bookmakers and operators of totalisator betting services.**

CASH TRANSACTIONS

A cash transaction is a transaction involving the physical transfer of currency from one person to another. Currency is the coin or paper money of Australia or another country. A significant cash transaction is a cash transaction involving the transfer of currency of the value of $10,000 or more.

A cash dealer must report to AUSTRAC any significant cash transactions with its Australian customers. A cash dealer must also report any suspect transactions whether in cash or otherwise where there are reasonable grounds to suspect that there is tax evasion or criminal activity involved or that the transaction may be the proceeds of crime. The details of international telegraphic transfers of significant cash transactions to and from Australia must also be provided. In addition, cash dealers are required to verify the identify of signatories to accounts in accordance with the Act and regulations.

NEGOTIABLE INSTRUMENTS AND ASSOCIATED

The Act excludes the reporting by some financial institutions, such as banks, of routine cash transactions and these include payroll transfers, routine transactions with established retail customers and public authorities and transactions between financial institutions. The institution must however keep a register of these exempt transactions.

The Act also imposes reporting obligations on members of the public. Proper identification must be provided when opening an account with a cash dealer. In addition the public is required to report the taking or sending of $5,000 (in Australian currency or equivalent) into or out of Australia. The report can be made directly to AUSTRAC or to the Australian Customs Service who will forward it to AUSTRAC.

There is state/territory legislation that mirrors or is similar to the Commonwealth legislation. For example, in New South Wales, the *Financial Transaction Reports Act* 1992 (NSW) provides for the giving of further information in relation to suspect transactions reported under the Commonwealth Act. The Act also covers reports on suspect transactions which may not be reported under the Commonwealth Act but which may be relevant to the administration of the *Independent Commission Against Corruption Act* 1988 (NSW) or enforcement of other Acts such as the *Confiscation of Proceeds of Crime Act* 1989 (NSW).

WORK TO BE FORWARDED TO YOUR SUPERVISOR

Length: 500 words

Following on from your previous "work to be submitted" scenarios, your proposed real estate agency is involved in a number of transactions where the amount is payable by cheque or cash. For example, deposit paid on the purchase of a house and/or rent money paid by tenants. How are these transactions affected by the law applicable to negotiable instruments covered in Learning Outcome 4?

Describe how your agency would be affected by the Financial Transactions Reports Act 1988 (Cth).

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