State/Territory Court Hierarchy

High Court
(Appellate Jurisdiction)

Court of Appeal/Full Court of the Supreme Court
(Appellate Jurisdiction)

Supreme Court
(Original Jurisdiction)

District/County Court
(Appellate Jurisdiction)

District/County Court
(Original Jurisdiction)

Magistrate/Local Court
(Original Jurisdiction)

Court Process

- Australian system of dispute resolution from *adversarial system* (each party hears case before a judge who then decides outcome)
- Rules of evidence and procedure
- Judge observes and checks whether these rules are applied fairly
- Adversarial contrasted with *inquisitorial system* (judge plays truth seeking role, code is law)
- *Starting point*
  - Civil: decision by plaintiff to litigate
  - Criminal: when accused is arrested
- *Commencement proceedings*
  - Civil: starts with statement of claim which sets out plaintiff's claim, defendant can also have a defence statement
  - Criminal: accused person is charged with offences
- *Pre-trial*
  - Each party knows about what the other is doing and can ask questions
  - Given copies of relevant documents
  - Once the parties have all the information they need they present a certificate of readiness which states that they are ready to move on with the trial
- *The trial*
  - Opening by lawyer from plaintiff
  - Calling of plaintiff's first witness
  - Questioning/examining of witness
  - Questioning of defendants witness
  - Opening statement done by defendant lawyer
  - Questioning of plaintiffs other witnesses
  - Closing address by lawyers
  - Summary by judge to jury
  - Judgement
  - Plaintiff must have burden of proof (sufficient evidence) to bring successful action against defendant
  - Must have standard of proof (amount of proof required to discharge burden of proof)
- *Evidence*
  - Testimony: verbal statement of witness
  - Real evidence: in form of objects to examine
  - Direct evidence: eyewitness account
  - Circumstantial evidence: not in direct fact of issue but the court may use it

- *Decision*
  - If before jury judge summarises
  - If no jury judge makes decision
  - If plaintiff is successful can get damages or an injunction etc.
  - In criminal trial if the victim is successful court can sentence defendant to jail or good behaviour bond etc.
- *Appeal*
  - If party is not satisfied can appeal
  - Heard by more than one judge

Doctrine of Precedent

- Says only legislature makes law
- *Stare decisis*: when deciding law question court must stand by decisions made previously through higher courts - provides consistency and predictability when deciding

Precedent

- *Binding precedent*
  - Earlier judicial decision that judge has to follow
- *Persuasive precedent*
  - Earlier decision that a judge does not have to follow but an if they want to
  - Depends on court status and case similarity
- *Distinguishing*
  - Emphasising difference between facts from current case and earlier case in order to justify why they haven't followed the precedent
- *Overruling/rejecting*
  - Court decision to not follow precedent
  - Can be due to disagreement with court of earlier precedent

Alternative Dispute Resolution

- Negotiation, mediation, conciliation and arbitration
- ADR is cheaper and faster than court, it's less stressful and more private and less destructive to business conflict

- Solution: third paragraph sets out solution to problem
- Warning: fourth paragraph warns if solution is unsuccessful
- Closing: closing line - prompt

Contract Drafting

- Contract is legally forceable agreement
- Good idea to have in writing for reference and evidence if something goes wrong in contract
- Step 1: prepare outline
- Step 2: draft the contract
- Step 3: test/revise contract
- Step 4: proofread contract
- Step 5: settle contract
- Step 6: sign the contract

CHAPTER 5: Making Deals

Contracts

- *Contract:* agreement between 2 or more parties
- *Party:* one of the people who have made an agreement with others
- For the agreement to become legally enforceable there must be 3 requirements that are met:
  - Must be an agreement between the parties
  - Parties must intend that the agreement they made is legally enforceable
  - Must pay price or make promise
- Does not have to be written
- Can be verbal

Requirement Number 1: Agreement

- *Agreement:* meeting of minds where parties share the understanding and intention of the contract
- Proceeded by negotiation
- If important aspects still being negotiated then there is no agreement
- Sometimes agreement can be seen from discussion of parties
- One party may say there has been agreement and other party may say no we are still negotiating
- In this case one party can offer to another party

Offer

- *Offer:* entering relationship with person who offer is directed at with expression of interest
- Offeror and offeree

Offeree

- Offer can be offered to one person or a group of people
- No limit on number of people offer can be made

Acceptance, Rejection or Revocation

- If offer accepted agreement or maybe even contract comes into play
- Offer may be rejected
- If offer has not been accepted or rejected offer can be revoked (withdrawn)
- Offeror can revoke offer even if promised to keep it open for certain amount of time
  - Exception: If offeree has expressed consideration for offer offeror cannot close until period of time is up
- If offeree has paid deposit the option (right to buy/sell something after/before certain date) comes into place

Requests for Information

- Offer is not made if someone asks for information about a certain item/service and the person who owns the good/service has given information

Advertising and Advertisements

- Advertisement is not expression of entering contract immediately despite the "offers" on TV
- *Invitation to treat:* invitations for people to make an offer
- Sometimes advertisements make clear that they want to enter into contract straight away legally and upon acceptance of offer
- Pricing lists and catalogues = invitations to treat
- Displays also invitation to treat

Auctions and Tenders

- Call for bids = invitation to treat
- *Collateral contract:* secondary contract which is entry into main one
- If auctioneer refuses to sell to highest bidder with no minimum price set = no contract
- Person who submits tender is making offer

Acceptance

- *Acceptance:* willingness to enter relationship with offeror via words or action

Offerree

- *Third party:* someone not in the agreement

Requirement 2: Conduct in trade or commerce

- Trade/commerce in ACL defined as:
  - Within Aus trade/commerce
  - Between Aus and outside of Aus including any professional business activity
- Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594
- Statements made in education/politics are not trade or commerce

Requirement 3: Misleading or deceptive conduct

- Court use an objective test to decide if conduct is misleading
  - First: pick section of public which the question of conduce falls to be tested
  - Second: once section established the issue is going to be considered by reference with everyone
- ACL does not define exactly what misleading conduct is
- Taco Company of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177
- Only need to show small % of target audience is going to be affected
- ACCC v powerballwin.com.au Pty Ltd [2010] FCA 378
- True statement can also be misleading: "organic"
- Henderson v Pioneer Homes Pty Ltd (No 2) (1980) ALR 597
- Statement of opinion can be misleading if:
  - No reasonable grounds to make opinion
  - Person making opinion does so without regards to future matter

Unconscionable Conduct

- Take advantage of another persons disadvantage
- Prohibited by ACL in Part 2-2
  - General unconscionable conduct
    - What ever the court has defined in case law as unconscionable is not allowed under ACL
  - Person who isn't listed as public company receiving/selling goods/services in unconscionable conduct
    - Protection limited to consumers/small businesses
- ACL has no definition of unconscionable
- List of matters under consideration when court decided that a business has contravened with Section 21:
  - Bargaining positions of customer and supplier strength
  - Customer required to comply with conditions that resulted in conduct because those conditions were not reasonably necessary
  - Whether customer could understand documents in relation to supply of goods/services
  - If there was unfair tactics used on customer

Contract Terms That Are Unfair

- Section 23 of ACL says:
  - Contract is void if it is unfair and if it is standard contract form, and if the contract binds the parties if it can operate without the unfairness

Requirement 1: Contract is consumer contract

- Consumer contract is one for goods supply and services and also land interest to someone who is going to use that for personal or domestic use

Requirement 2: Contract is Standard Form

- Contract which is pre-printed terms not negotiated
- "Take it or leave it"
- ACL says court must take into account these things before determining whether a contract is standard:
  - If one party has all of the bargaining power
  - If contract was made by one party before any transaction discussions between the other party
  - If other party needed to accept or reject the terms of the contract in which it was presented
  - If the other party was given an opportunity to negotiate terms

Requirement 3: Unfair term

- ACL section 24 3 requirements are satisfied when term is unfair:
  - Significant imbalance in parties obligations

  - *Trade Practises Commission:* replaced by ACCC, statutory authority

<u>Competition</u>

- CCA defines competition as:
  - Person who is not resident or owning business in Australia who renders goods and services imported which result in competition
- Trade Practises Tribunal defines competition as:
  - Rivalrous market behaviour
  - Prices be flexible (reflective of demand and supply forces)
  - Independent rivalry in all dimensions
  - Five elements of market structure that need to be scanned:
    - Distribution size and number of independent sellers; degree of concentration in market
    - Barrier height to entry
    - Extreme product differentiation and promotion of sales
    - Vertical relationships and integration with customers and suppliers
    - Nature of arrangements between firms
- "If the business raised its price - without altering anything else, such as quality or customer service - would it sell less?" (taken from textbook word for word)

<u>Substantially Lessening Competition</u>

- Determine relevant market
- Determine if it would be likely to have conduct lessening the competition in that market
- If there was was it substantial?
- If there wasn't what was the purpose of the conduct in lessening the competition?

Cartel Conduct

- *Cartel:* contract that lessens competition by:
  - Price fixing
  - Output controlling
  - Bid rigging
  - Allocation of suppliers, territories or customers
- Section 44ZZRJ of CCA prohibits cartel making in businesses
- TPC v TNT Australia Pty Ltd (1995) ATPR 41-375
- Cartel conduct is also criminal offence
- To get out of cartel:
  - Conditions of immunity for cartel participants
  - Confidentiality
  - Benefits of having immunity

<u>Price Fixing</u>

- *Price fixing:* controlling the price or goods/services and/or discounts, rebates etc.
- Cannot join cartel and agree to charge same price
- Not necessary to prove that the fixing itself occurred, but that there was intention to do it
- ACCC v Alice Car and Truck Rentals Pty Ltd (1997) ATPR 41-582

Requirement 1: Contract/Arrangement/Understanding

- Necessary to show "meeting of minds"
- Must be conclusion between businesses
- *Parallel pricing:* one business sets price and others follow
- TPC v Email (1980) 43 FLR 383

Requirement 2: Purpose or likely effect of price fixing

- If provision included for substantial purpose of price fixing means it may be contravention of CCA
- Competitors do not HAVE to agree on price to contravene
- Examples:
  - Formula agreement to set prices
  - Relevant data exchange to set prices
  - Increasing pricing by restricting production

- Limited liability
- *General partners* – manage business and have unlimited personal liability
- *Limited partners* – don't participate management of business and whose liability is limited to an agreed amount

- Incorporated limited partnership
  - Intend to facilitate the investment of international venture capital in Australia
  - Separate legal entity able to own property, be a party litigation and enter into contracts in its own name rather than names of partners

Company

- Corporation is artificial legal person separate from its owners
  - Able to make contracts
  - Own property
  - Party to litigation in its own name
- A company is a type of corporation; incorporated under Corporations Act 2001 (Cth)
- *Body corporate* – corporation owned by the registered proprietors of the lots in community title or strata title property
- *Public company* – company that isn't proprietary company
- *Proprietary company* – privately owned company
- Less than 50 non-employee shareholders and p
- Can't sell shares to public
- Company must have:
  - At least one owner
  - At least one director responsible for managing business
  - Secretary to ensure compliance with Corporations Act
- Company created by registration of Australian Securities and Investments Commission
  - ASIC functions include:
    - Registering companies
    - Getting information about companies
    - Educating companies about new law
    - Enforcing the law
- Key features of corporate form:
  - Seperate legal entity
    - Insure debts in own name
    - Property holder
    - Plaintiff or defendant
    - Salomon v Salomon & Co Ltd
    - Court can lift corporate veil if they disregard seperate legal personality and instead identifies individuals
  - Corporate capacity
    - Legal capacity of corporation
  - Limited liability
    - Owners not liable for any debts or obligations

<u>Types of Companies</u>

- Company limited by shares
  - Members can contribute as share capital and in return are issued paid shares
- Unlimited company
  - Members have no limit placed on debt liability
- Company limited by guarantee
  - Member liability limited to amount members have guaranteed to contribute in event where company is wound up
- No liability
  - Company has no right to recover
- Proprietary companies are:
  - Privately owned
  - Must be either limited or unlimited
  - No more than 50 non-employee shareholders
  - Cannot fundraise activities that require prospectus issue

Buying and Owning Real Property

Types of Ownership
- *Estate*: interest in real property less than full ownership
  - *Freehold estate:* uncertain duration equated with real property ownership
    - *Fee simple:* holder of fee has unrestricted ownership of real property subject to right of Crown
    - Life state: owner of real property for lifetime after which property transfers to entitled person
  - *Leasehold:* holder is entitled to possession of real property for limits time and the property dos back to owner

Co-Ownership
- When there are 2 or more owners there are 2 possible arrangements
- *Joint tenancy:* equal and undivided interest in property
- Tenancy in common: for of co-ownership than isn't joint tenancy
  - Unity of possession, of interest, of title and of time
- Difference between 2 arrangements:
  - Tenancy in common characterised by unity of possession
  - Joint tenancy is characterised by right of survivorship

Strata Title and Community Title
- *Common property:* part of strata or community that is owned by body corporate
- *Strata title:* vertical subdivision of land
- *Community title:* subdivision of land into common property being shared

Buying Real Property
- First legal consequence is having interest in property
- *Settlement:* transferring ownership of real property
- Legal ownership doesn't pass until after settlement
- Vendor has to disclose defects
- Fixed data and evidence should be in writing
- Purchaser has right to investigate and be satisfied with purchase
- Special conditions:
  - Subject to sale of another property
  - Subject to plan of subdivision registration
  - Rezoning
- If there was a reliance on special condition to terminate contract they would have to show:
  - Finance actively sought
  - Finance was refused
  - No terms were specified

Steps for Buying Property
- Purchaser finds out borrowing capacity
- Purchaser decides on location and finds out about properties for sale in location
- Purchaser approaches seller for inspection
- Purchaser has property valued
- Purchaser should engage in solicitor to draft contract
- Purchaser makes offer on property
- Once price been established then purchaser receives contract from selling agent
  - Cooling off period: which person can change mind
- Purchaser ensures contract is right
- Purchaser signs contract
- Pays deposit
- Pest inspection
- Documents all arranged
- Move in

Title Registration
- *Old system title*: establishing chain of title under documents
- *Torrens system*: Registrar of Titles in each state maintains register which record details of land and persons holding interest in land
- Easements: right of way across real property