

MACQUARIE UNIVERSITY
DEPARTMENT OF BUSINESS LAW
STUDY GUIDE

Year and Semester:	2008 Semester 1
Unit Code & Unit Name:	BUSL833 Business Property Law
Credit points:	4 credit points
Unit convenor:	Michael Quilter

Students in this unit should read this study guide carefully at the start of semester. It contains important information about the unit. If anything in it is unclear, please consult one of the teaching staff in the unit.

ABOUT THIS UNIT

Unit description

This unit reviews the law relating to property including real property and personal property. A particular focus of the course is the manner in which the law enables the protection, pursuance and composition or settlement of rights relating or incidental to property interests. In this context the law of tort, and particularly the means by which the law deals with insolvency, will be considered.

TEACHING STAFF

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CLASSES AND STUDY TIMES

Internal Students

Business Property Law is offered on an ongoing basis during first semester. The classes held will be conducted in seminar style. Classes will begin on 28th February 2008 in X5B 039. The manner in which the unit will be run and how students will be assessed will be outlined in the first class.

External Students

This unit is available to external students. The manner of participation and student requirements are to be organized with the convenor. Specific details of assessment will be advised at the commencement of the unit.

TEXTS

The unit deals with a range of topics covered in most general business law texts. Students should discuss the choice of text with the convenor before any purchase.

The text that has been prescribed in this unit previously is:
Gillies, *Business Law*, Federation Press

Other similar texts are also suitable and matters concerning texts will be discussed in the first class.

For that part of the unit concerning corporate insolvency company law texts will be most useful. For example:

Lipton & Herzberg, *Understanding Company Law*, Lawbook Co (*Chapters on Insolvency only*).

Examples for further reference:

Balkin and Davis, *Law of Torts*, Butterworths
Bevan, *Insolvent Trading*, Federation Press
Blakeney and McKeough, *Intellectual Property: Commentary and Materials*, Lawbook Co
Bugden, *Strata Title Management Practice in NSW*, CCH
Burton, *Australian Financial Transactions Law*, Butterworths
Butt, *Butterworths Statutes - Property Law NSW*, Butterworths
Butt, *Land Law*, Lawbook Co
Certoma, *The Law of Succession in NSW*, Lawbook Co
Chalmers, *Introduction to Trusts*, Lawbook Co
Carter, *Commercial Law & Personal Property in NSW*, Lawbook Co
Fleming, *The Law of Torts*, Lawbook Co
Ford and Austin, *Principles of Corporations Law*, Butterworths
Gardiner, *Outline of the Law of Torts*, Butterworths
Golvan, *An Introduction to Intellectual Property Law*, Federation Press
Insolvency Law Journal, Lawbook Co
Kelly, *Insurance Legislation Manual*, 3rd edn, Butterworths
Kelly and Ball, *Principles of Insurance Law in Australia and New Zealand*, Butterworths
Latimer, *Australian Business Law*, CCH
Mason Priddle & Fletcher, *Cases on Commercial Law*, Lawbook Co.
McKeough and Stewart, *Intellectual Property Law in Australia*, Butterworths
Neave et al, *Sackville and Neave Property Law - Cases and Materials*, Butterworths
Pentony et al, *Commercial Transactions - Cases & Materials*, Butterworths

Quilter, *The Company Law Notes*, Thomson Lawbook
Tarr et al, *Australian Insurance Law*, Lawbook Co
Teh and Dwyer, *Introduction to Property Law*, Butterworths
Townley and Pratt, *A Practical Guide to Insolvency*, Butterworths
Turner, *Australian Commercial Law*, Lawbook Co
Vermeesch and Lingren, *Business Law*, Butterworths

Statutes - following statutes (as amended) may usefully be referred to:

Conveyancing Act 1919 (NSW)
Copyright Act 1968 (Cth)
Corporations Act 2001
Designs Act 1906 (Cth)
Insurance Contracts Act 1984 (Cth)
Patents Act 1990 (Cth)
Real Property Act 1900 (NSW)
Trademarks Act 1994 (Cth)
Trade Practices Act 1974 (Cth)
Trustee Act, 1925 (NSW)

Statutes are at <http://www.austlii.edu.au>

UNIT WEB PAGE

There is no web page for this unit but study guides and information can be found at:
<http://www.law.mq.edu.au/html/postgraduate/studyguides.htm>

ASSESSMENT

To be advised at first session (externals will be advised by email at the commencement of the unit). The means of assessment will include assignments and may include a presentation. Note that the manner of submission of assignments will be advised by the convenor. If no specific instructions are given the following will apply: hard copies of assignments are required to be placed in the PG box outside room 341 W3A, or posted to the convenor, to arrive no later than any submission date, and an electronic copy emailed to the convenor. External students to post to COE in folder provided.

PLAGIARISM

The University defines plagiarism in its rules: **“Plagiarism involves using the work of another person and presenting it as one’s own.”** Plagiarism is a serious breach of the University’s rules and carries significant penalties. You must read the University’s policies and procedures on plagiarism. These can be found in the *Handbook of Undergraduate Studies* or on the web at: <http://www.student.mq.edu.au/plagiarism/>. Penalties may include a deduction of marks, failure in the unit, and/or referral to the University Discipline Committee.

YOU WILL BE GUILTY OF PLAGIARISM

If you take and use the work of another person without clearly stating or acknowledging your source, you are falsely claiming that material as your own work and committing an act of *PLAGIARISM*. This is a very serious violation of good practice and an offence for which you will be penalised. If you do any of the following in an assignment, or in any piece of work which is to be assessed, ***without clearly acknowledging your source(s) for each quotation or piece of borrowed material*** you are **guilty of PLAGIARISM**:

- (a) Copy out part(s) of any document , including computer and web-based material;
- (b) Use or extract someone else's concepts or experimental results or conclusions, even if you put them in your own words;
- (c) Copy out or take ideas or summarise from the work of another student, even if you put the borrowed material in your own words;
- (d) Submit substantially the same final version of any material as a fellow student.

On occasions, you may be encouraged to prepare your work with someone else, but the final form of the assignment you hand in must be your own independent endeavour.

There is nothing wrong in using the work of others as a basis for your own work, nor is it evidence of inadequacy on your part, ***provided you do not attempt to pass off someone else's work as your own.***

LIBRARY SUPPORT SERVICES

Macquarie University Library offers a wide range of services and resources to postgraduate students. Go to the Library website: <http://www.lib.mq.edu.au>.

Services include information on borrowing periods, services to distance students, links to IT Help (the Library's IT support service), and links to training information and training course notes.

Postgraduate students are eligible for a number of additional services. Information about these is available from the **Postgraduates** link, listed under **Additional Services** on the Library homepage.

Additional services for Macquarie postgraduate students include the liaison librarians. There is a liaison librarian appointed to each Division of the University.

Liaison Librarian for Law: Belinda Law

Phone: (02) 9850 7528

Email: belinda.law@library.mq.edu.au

Services offered by your liaison librarian include:

Providing further information on the library services.

Providing individual and group library resource sessions for postgraduate students.
Advising on new database trials being held in the Library.
Advising on appropriate contacts for specific services, such requesting items not held at the Library from the Document Supply Service.
Preparation of resource guides in print and on the web.
Reference advice (face-to-face, phone and email)

UNIVERSITY POLICY ON GRADING

The University requires all Divisions to adhere to a policy relating to the distribution of grades across high distinction, distinction, credit and pass grades. This means a student's raw mark for a unit (ie, the total of their marks for each assessment item) may not be the same as that which they receive on their transcript. This is because the total raw mark may be scaled up or down so that the grades of all students in each unit sit within the distribution bands set down by the University. The policy does not require that any number of students are to be failed in any unit.

SCHEDULE OF TOPICS

PRECIS OF AREAS

Note that the following areas indicate the general scope of the unit. They are not necessarily of equal weight in the overall structure and certain areas will provide a focus for discussion.

AREA 1 Real property and, and personal property

AREA 2 Intellectual property

AREA 3 Torts

AREA 4 Trusts, succession and bailment

AREA 5 Insurance Law

AREA 6 Insolvency (personal and corporate)

Students may wish to consider the following:

AREA 1

Property

- ✚ notion of property
- ✚ legal and equitable interests
- ✚ personal property
- ✚ real property
- ✚ systems of title to land
- ✚ assignment of property
- ✚ priorities among claimants

Securing Property Interests

- ✚ mortgages over real property
- ✚ company debentures and charges

Consider the Following:

- (1)
 - concepts of property, ownership and possessory title
 - nature of real property; necessity to distinguish, for legal purposes, real property and personal property
 - role of land registration systems
 - categories of personal property; tangible personal property (choses in possession); intangible personal property (choses in action)
 - fixtures
 - assignment of property – why are the rules important?
- (2) A business enterprise trades as Happy Pets. It wishes to dispose of the business completely. The assets consist of:
 - (i) Land (with shop premises) under the Real Property Act, together with shop fittings, fixtures and equipment.
 - (ii) Stock in trade consisting of assorted cats, dogs and goldfish, pet foods, accessories and general paraphernalia.
 - (iii) A registered Business Name under which the business is carried on, several patents on pet accessories, a Trademark (“Happibites”), a number of trade debts, goodwill (valued by them at \$20,000), a claim against a lorry driver for running into the shop and causing \$10,000 worth of damage, and a suit against the Daily Drivel Newspaper for writing a review saying “Happibites” cat food is pure poison.
 - (iv) Trade credits owing of \$18,000 from various debtors.

How would you categorise in legal terms the kinds of proprietary rights involved in the sale, and the legal means needed to transfer the assets and liabilities?

- (3)
- Outline the standard Torrens title conveyance in NSW.
 - What is “old system” conveyancing?
 - What are the potential pitfalls of a conveyancing transaction, including the issue of a “time of the essence” clause?
 - What is “strata title”?
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AREA 2

Intellectual property

- ✚ copyright
- ✚ designs
- ✚ patents
- ✚ trade marks
- ✚ general law remedies (passing off; confidential information)
- ✚ *Trade Practices Act* ss52, 53

Consider the Following:

- (1)
- To what forms of property do the intellectual property statutes apply? Is intellectual property really property?
 - What do these statutes achieve? How can they be justified? What is the general approach in intellectual property law to protecting and enforcing these rights? When is registration needed?
 - How does the general law protect proprietary rights of this type?
 - Is “goodwill” protected by this regime? How?
 - In what circumstances can a business enterprise expect to protect its own secrets?
- (2) Colossal Computers Ltd has spent 5 years and millions of dollars developing a new way of storing and retrieving data which is extremely valuable. They are worried that if they patent their invention competitors will devise ways of using their concepts without breaching the patent or alternatively will breach the patent and deny the validity of the grant. Since the company is short of capital it cannot afford protracted litigation. It therefore wishes to keep its system a trade secret.

However, several of its engineers and executives are offered new jobs at vast salaries by competitors, and leave. Can the company stop them leaving and if not can it stop them revealing the knowledge they have of the data storage and retrieval system? Can Colossal stop an equipment manufacturer, who has, as a sub-contractor, designed and supplied equipment based on the new system to them, from selling this equipment to other computer manufacturers who will be able to gain valuable hints as to the nature of the new system from it? (The contract between Colossal and the manufacturer prohibits this new equipment being sold except when incorporated and locked into the computer system).

The company has also developed a large number of specific computer programs for its own equipment and now finds that many manufacturers are making equipment to use these programs, and are duplicating them. It receives advice that there is a large warehouse full of “pirated” software and “look alike” hardware ready to flood the market. What can they do?

AREA 3

Tort Law

Tort law is (like contracts) a traditional area of common law. It imposes liability in damages upon defendants who commit one or another of the torts (a tort is a “civil wrong”). It is, in an approximate way, the civil law counterpart of the criminal law. Note that increasingly the law of tort, particularly negligence, has become subject to statutory intervention (eg Civil Liability Act 2002 (NSW) as amended).

The major focus will be on the tort of negligence (including vicarious liability) which is the most important tort in practice. However, it is also necessary to refer to other torts which protect property interests – trespass against land, nuisance, torts covering chattels.

Consider the Following:

- Distinguish liability in tort from liability in contract and crime.
 - What losses are remediable?
 - What are the remedies available in tort?
 - What defences are available?
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AREA 4

Trusts, succession and bailment

Trusts

- ✚ origin, concept
- ✚ classifying trusts
- ✚ creation of a trust
- ✚ position of the trustee
- ✚ position of the beneficiary
- ✚ termination of the trust

Succession

Bailment

- ✚ concept of bailment
- ✚ classifying bailments
- ✚ the bailee's duties
- ✚ bailor's duties
- ✚ special types of bailee

Consider the Following:

- (1)
 - what is the contemporary role of the trust?
 - how does a trust differ from a contract, company, bailment?
 - contrast the actions (a) for a breach of contract (b) in tort (c) for breach of bailment.
- (2) R drove her car into a car park operated by L. When R handed the car over to L's employee, she received a ticket in return for a deposit of \$3.00. The ticket contained on its face the following clause:

Charges are for the use of parking space only. The company assumes no responsibility for loss through fire, theft, collision or otherwise to the car or its contents, whether due to negligence or otherwise. Cars parked at owner's risk.

The car park employee then volunteered to park the car for R. In attempting to do so, and before the car ever reached the parking space, he ran it at relatively high speed into the side of another car already parked, causing considerable damage to both cars.

R brought an action against L for damages for negligence or in the alternative, for breach of the contract of bailment.

- (i) Should her action succeed?
- (ii) What if R, after simply taking a ticket at the entrance, which by the terms of entry must be presented when exiting, continued on into the parking station to leave the vehicle in a vacant parking space and on her return she discovers that her car has been damaged by persons unknown.

AREA 5

Insurance Law

- ✚ basic concepts
- ✚ duty of utmost good faith
- ✚ misrepresentation
- ✚ indemnity
- ✚ subrogation
- ✚ standard classes of insurance

Consider the Following:

(1)

- Can a person over-insure?
- What duties of disclosure rest on the person seeking insurance?
- What are the consequences of (a) an unwitting misrepresentation (b) a knowing misrepresentation, by an applicant for insurance?
- What is the relationship between insurance and the law of tort?

(2) Peter, a friend of yours, explains that he has recently purchased a car for \$6,000. Because of his youth and previous driving conviction, he has persuaded his uncle to negotiate with the insurance company for insurance cover. Thus the uncle has pretended to be the car owner, and the policy has been insured in the uncle's name. It "seemed like a good idea at the time", but he is now not sure and seeks your opinion on the matter. The car is insured for \$8,000.

He also explains that he left the car for a few minutes, with the engine running, in a 'no standing' zone outside a shop while he purchased a drink. On his return he found the car had moved, crashing into a car parked downhill. The parked car's owner, Dorothy, witnesses the accident. She calms down after seeing Peter's distress. She tells Peter not to worry, as she is insured and will claim on her own insurance policy, and will not sue Peter. Peter's car is a write-off.

- a) Advise Peter on the validity or otherwise of the insurance policy, explaining fully the doctrines which apply.
 - b) Irrespective of the outcome of (a) above, in respect of the accident,
 - (i) Will Peter's negligence affect his own insurance?
 - (ii) Advise Peter whether he can rely on Dorothy's statement, and consider himself free of liability for the crash?
 - (iii) Peter has lodged a claim for the full sum insured on his own car. Assuming that the claim is allowed, discuss the method(s) by which the amount payable may be calculated.
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AREA 6

Insolvency – personal and corporate.

Bankruptcy

- ✚ history, concept, rationale of bankruptcy regime
- ✚ administration of the regime
- ✚ initiation of bankruptcy
- ✚ acts of bankruptcy
- ✚ effects of sequestration order
- ✚ administration of bankrupt's estate
- ✚ property available

- ✚ inclusionary, exclusionary rules
- ✚ order of payment of debts
- ✚ discharge
- ✚ arrangements with creditors without sequestration

Consider the Following:

1. Discuss the purpose of insolvency legislation generally; and the effect of making a sequestration order under the Bankruptcy Act.
2. What are the alternatives to bankruptcy where a person can't meet their commitments?
3. The day before he contracted a debt which ultimately led to his bankruptcy, B, a keen sailor, sold his boat to his mother for its full value. That day she leased the boat back to him for ten years, at an annual rental equal to 1/10th of the purchase price paid for the boat. Upon B later being made bankrupt will this transaction be void as against the trustee?

How will the trustee of B's bankrupt estate deal with each of the following?

- (a) B gets a cheque for \$4,240, being back pay owing, following a backdated award increase in his pay, after a sequestration order is made.
- (b) B's sister claims the sum of \$1,000 being the amount of debt owed by B to her. She had not previously given notice of the claim within the advertised period for claims, because she wanted to "keep it quiet".
- (c) A claim by the mortgagee of B's house for 6 months arrears of interest, \$4,200, and principal of \$50,000. He wants to sell the house.

Corporate Insolvency

- ✚ Arrangements and reconstructions
- ✚ Receivership
- ✚ Voluntary administration
- ✚ Liquidation (including insolvent trading)

Consider the Following:

- (1) In relation to Voluntary Administration:
 - Who appoints an Administrator?
 - What is the rationale behind administration?
 - How could it be useful to directors?
 - What are the possible outcomes of administration?
 - Is a restructure always the best for creditors?
 - Are all creditors treated the same?
 - What company debts is the administrator liable for during the administration?
- (2) How are receivers appointed and what are their duties?

- (3) What factors are relevant to assess whether a company is insolvent?
- (4) Mr T and Mrs T are directors of P Pty Ltd which trades as “Fluffy Donuts of Avalon”. Mrs T makes the donuts and serves while Mr T attends to financial matters. In fact Mrs T was attracted to Mr T before they married because as an accountant he could, she believed, provide her with the financial guidance that she lacked.

The business operates from premises owned by the company worth \$500,000 but mortgaged to the sum of \$475,000. The company also owns a certain stock and fittings valued at \$15,000. Bad weather has slowed business, however, Mr T’s spiritual adviser says the weather will get better. Accordingly he takes out advertising to the value of \$60,000. Suppliers are owed \$40,000, but have held off enforcing their debts because they also believe that the weather will get better. There is group tax outstanding for the two part-time employees.

Mrs T trusts Mr T’s judgement. The rain stops, but customers do not return. The advertising company (owed \$60,000) winds P Pty Ltd up and a liquidator is appointed.

Discuss the liability of Mr and Mrs T under s588G.

- (5) Albert Side took over his father’s funeral business in the early 1980’s and soon set about updating its products and image. He changed the name of the principal operating company to “The Other Side Pty Ltd” (TOS) and within a few years TOS had:

10 funeral parlours throughout Australia, all of which were rented.

A substantial quantity of equipment (including hearses and cremators) leased from finance companies and secured by personal guarantees from Albert and his wife.

Three subsidiaries as follows

Dearly Departed Pets Pty Ltd (Pets)

Creative Coffins and Stonemasonry Pty Ltd (Coffins)

TOS Embalming and Cryogenics (Cryogenics)

In the more austere 1990’s, it was much harder to persuade people to spend money on funerals for pets so Pets has been running at a loss for several years. This is unlikely to change in the foreseeable future.

Coffins is a very profitable business and operates out of a factory in Geelong that it owns outright. However, most of the profits have been drained off to cover the losses in Pets and to fund the start-up costs in Cryogenics. Those start-up costs have been substantial so, for the time being, Cryogenics is a significant drain on the rest of the TOS group. But independent marketing consultants have reported that the future for the Cryogenics industry is very promising and, as one of the few suppliers of these services in Australia, there is a realistic prospect that in one or two years, the investment in Cryogenics will pay substantial dividends.

TOS itself is profitable but only just. It too is suffering from the drain on funds caused by Pets and Cryogenics and its 80s image is starting to pale with the customers.

The group is financed by loans totaling \$10 million from Eastpac Bank (Eastpac). Eastpac has security in the form of standard fixed and floating charges over all the assets of each company, except the Coffins' factory site. The local manager of Eastpac agreed to release this from the bank's charge when Albert told him the group was planning to enter into a sale and leaseback arrangement to raise more funds. This has not yet been implemented. The loans from Eastpac are also secured by a personal guarantee from Albert and his wife.

Albert is concerned that he may not be able to keep things afloat long enough for the profits from Cryogenics to come on stream. He is particularly worried about his personal exposure under the guarantees he and his wife have given and about the welfare of his employees who have been very loyal during difficult times. TOS has been late in the payment of rent on its flagship parlour in Sydney each month for the last seven months but has managed to find the necessary funds, usually at about the time the second threatening letter has arrived. One or two of the cheques sent to the landlord have bounced the first time they were presented. His debt of \$2,090 to the local church choir is way overdue. One of the choristers is a law student and has helped the vicar to prepare and send a statutory demand. The 21 days expired yesterday.

Albert has approached an insolvency practitioner who has in turn sought your assistance in advising Albert about what he should do. One option he is considering is selling the Geelong factory site to his family company for less than its full market value.

You are asked to advise Albert about his options and what factors might influence the ultimate outcome of any decision he takes. In particular, your advice should consider what Eastpac Bank is likely to do.

