



DEPARTMENT OF BUSINESS LAW

UNIT OUTLINE

2010

BUSL 350 – MARKETING AND MANAGEMENT LAW

Convenor: Dr. Niloufer Selvadurai

**MACQUARIE UNIVERSITY
DEPARTMENT OF BUSINESS LAW
FACULTY OF BUSINESS AND ECONOMICS
UNIT OUTLINE**

Year and Semester: 2010, Semester 1
Unit Convenor: Dr. Niloufer Selvadurai
Credit Points: 3
Pre-requisites: (BUSL201 or BUSL 250)

Students in this unit should read this unit outline 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

This unit reviews areas of law relevant to marketing law, and related areas of management law. It aims to inform prospective managers, marketing personnel and other professionals of legal issues arising in commerce and professional practice.

TEACHING STAFF

Convenor and Lecturer - Dr. Niloufer Selvadurai

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CLASSES

The timetable for classes can be found on the University web site at: <http://www.timetables.mq.edu.au/>. Classes consist of a two hour lecture and one tutorial per week.

Students are expected to read the reading prescribed for the relevant module and contribute to class discussion.

Please see "Tutorial Questions" on page 9 of the Unit Outline.

REQUIRED TEXTBOOK

Gillies & Selvadurai, *Marketing Law*, 2008, Federation Press.

RECOMMENDED READING AND REFERENCE TEXTS

INTELLECTUAL PROPERTY

- McKeough, Stewart & Griffith, *Intellectual Property Law in Australia*, 2007, LexisNexis, Butterworths.
- Ricketson & Richardson, *Intellectual Property: Cases, Materials and Commentary*, 2008, Butterworths.

DEFAMATION

- George, *Defamation Law in Australia*, 2006, Butterworths.
- Butler & Rodrick, *Australian Media Law*, 2006, Law Book Co Ltd.
- Armstrong, Lindsay & Watterson, *Media Law in Australia*, 2004, Oxford University Press.

TRADE PRACTICES

- Miller, *Millers Annotated Trade Practices Act*, 2009, Law Book Co Ltd.
- Steinwall & Layton, *Annotated Trade Practices Act*, 2007, Butterworths.

UNIT WEB PAGE AND OTHER USEFUL INTERNET SITES

The web page for this unit can be found at: <http://learn.mq.edu.au/webct>.

The web site contains all the lecture slides used in lectures, links to the legislation discussed in lectures, links to other useful sites, extracts from relevant articles and the assignment (when it becomes available in week 6).

Other useful web-sites include.

Legislation: All statutes examined in the course are the subject of a hyperlink from the BUSL 350 Blackboard. All Commonwealth and State statutes and regulations are at <http://www.austlii.edu.au>.

Case Law: For *reported* case law, use the Macquarie University library to access the: Lawbookonline database; and Lexisnexis (Aus) database. For *unreported* case law, use: <http://www.austlii.edu.au>.

The Macquarie University library's Information and Technology Training Unit (ITTU) provides a range of computing and library research skills. ITTU web page: <http://www.lib.edu.au/services/>.

LEARNING OBJECTIVES AND OUTCOMES

The learning objectives of the Unit are to:

- a) provide an understanding of the fundamental principles of marketing law;
- b) provide a knowledge of the specific rules and principles in intellectual property law, defamation law, product liability law, trade practices law, insurance law, and other related areas; and
- c) develop skills of legal analysis, through the application of the law to hypothetical fact situations.

In addition to the above discipline-based learning objectives, the aim of this unit is that students develop their skills in:

- a) critical analysis skills through the analysis of legal issues and factual problems;
- b) problem-solving skills through the application of legal principles to solve factual problems; and
- c) creative thinking skills in determining and evaluating strategies and policies to improve the effectiveness and operation of the present laws.

TEACHING AND LEARNING STRATEGY

The unit is taught in a seminar format. Seminars consist of a lectures followed by discussion of relevant issues and an analysis of problem questions.

It is expected that students read the prescribed reading in advance. A week-by-week list of topics to be covered is found in the *Learning Modules* section at the end of this unit outline.

RELATIONSHIP BETWEEN ASSESSMENT AND LEARNING OUTCOMES

(a) Research Exercise – To be submitted in Week 4

Covers:	Module 1
Where available:	Research Exercise will be made available in Week 2
Length:	Maximum of 300 words
When:	Weeks 4
To be submitted:	To lecturer in class.
Mark:	2 % of total mark

(b) Mid-Term Assignment

Length:	750-1,000 words.
Covers:	Modules 1-6 (inclusive) only.
When available:	Week 4 of the Semester.
Where available:	On BUSL 350 Blackboard site.
Mark:	38 % of total mark.
Submission:	To be submitted in Week 7
To be submitted:	To lecturer in class.

(c) Exam

Length:	Two hours (with additional ten minutes reading time).
Nature:	<u>Open book exam</u>
Covers:	Modules 7-13 (inclusive) only.
Mark:	60% of total mark.

Research Exercise –*The Research Exercise is designed to test the student’s ability to conduct legal research an area of law that relates to the content of module 1.*

Mid-Term Assignment - *The Assignment will assess the student's ability to analyse a legal problem and apply legal principles to reach a likely conclusion. Skills of legal analysis, research and the structuring of a legal case will be assessed.*

Exam - *The Exam will test the nature and extent of the student's understanding of the law of marketing and management through a mixture of problem questions and essay questions.*

You are expected to present yourself for examination at the time and place designated in the University Examination Timetable. The timetable will be available in Draft form approximately eight weeks before the commencement of the examinations and in Final form approximately four weeks before the commencement of the examinations. <http://www.timetables.mq.edu.au/exam>. Information about unavoidable disruption and the special consideration process is available at <http://www.reg.mq.edu.au/Forms/APSCon.pdf>

All students are expected to ensure that they are available until the end of the teaching semester, that is the final day of the official examination period.

STUDENT SUPPORT SERVICES

Macquarie University provides a range of Academic Student Support Services. Details of these services can be accessed at <http://www.student.mq.edu.au>.

LEARNING MODULES

MODULE 1: BRANDING

READING:

Gillies & Selvadurai, *Marketing Law*, 2008, Federation Press, Chapter 2.

CONTENT OF MODULE:

The application of the regulatory framework governing trade marks to branding and the use of logos.

MODULE 2: PASSING OFF

READING:

Gillies & Selvadurai, *Marketing Law*, 2008, Federation Press, Chaps

CONTENT OF MODULE:

The module examines the application of the common law doctrine of passing off.

MODULE 3: INVENTIONS

READING:

Gillies & Selvadurai, *Marketing Law*, 2008, Federation Press, Chapter 3.

CONTENT OF MODULE:

The application of the laws of patents to methods of manufacture and inventions.

MODULE 4: CONFIDENTIAL INFORMATION

READING:

Gillies & Selvadurai, *Marketing Law*, 2008, Federation Press, Chap 6.

CONTENT OF MODULE:

The module examines the application of the common law doctrine of confidential information and its application to marketing practices.

MODULE 5: THE EXPRESSION OF IDEAS

READING:

Gillies & Selvadurai, *Marketing Law*, 2008, Federation Press, Chapter 1.

CONTENT OF MODULE:

The application of copyright laws to the creation of advertising material (both print and digital).

MODULE 6: DESIGNS

READING:

Gillies & Selvadurai, *Marketing Law*, 2008, Federation Press, Chapter 3.

CONTENT OF MODULE:

The application of the laws of designs to the creation of designs.

MODULE 7: DEFAMATION LAW

READING:

Gillies & Selvadurai, *Marketing Law*, 2008, Federation Press, Chapter 5.

CONTENT OF MODULE:

A study of defamation law, including: Liability for defamation; and Defences to defamation.

MODULE 8: INSURANCE LAW

READING:

Gillies & Selvadurai, *Marketing Law*, 2008, Federation Press, Chapter 12.

CONTENT OF MODULE:

A study of insurance law, including: Definitions; Duty of utmost good faith; Misrepresentation; Indemnity; Double insurance; Doctrine of contribution; Subrogation; Privity; and Standard classes of insurance.

MODULE 9: UNFAIR SELLING PRACTICES AND PRODUCT LIABILITY LAW

READING:

Gillies & Selvadurai, *Marketing Law*, 2008, Federation Press, Chaps 7 and 8.

CONTENT OF MODULE:

A study of the law relating to unfair selling practices under the *Trade Practices Act* 1974 (Cth), including: Bait advertising –s 56; Referral selling – s 57; Accepting payment without intending or being able to supply as ordered –s 58; Misleading statements about certain business activities –s 59; Harassment and coercion –s 60; Pyramid selling – s 61; Unsolicited credit cards – s 63; Assertion of right to payment for unsolicited goods or services; Making entry in directory – s 64; Liability of recipient of unsolicited goods –s 65.

The law relating to product liability, including: conditions and warranties in consumer transactions; transactions against Manufacturers and Importers of Goods; False descriptions; Unsuitable goods; Non-compliance with warranty; Liability of Manufacturers and Importers of Defective Goods.

MODULE 10: ARRANGEMENTS RESTRICTING COMPETITION

READING:

Gillies & Selvadurai, *Marketing Law*, 2008, Federation Press, Chapter 9.

CONTENT OF MODULE:

The module examines the law relating to the operation in Part IV, ss 45 and 48 of the *Trade Practices Act* 1974 (Cth).

MODULE 11: EXCLUSIVE DEALING

READING:

Gillies & Selvadurai, *Marketing Law*, 2008, Federation Press, Chaps 9 & 10.

CONTENT OF MODULE:

The module examines s 47 of the *Trade Practices Act* 1974 (Cth).

MODULE 12: MISUSE OF MARKET POWER

READING:

Gillies & Selvadurai, *Marketing Law*, 2008, Federation Press, Chapter 11.

CONTENT OF MODULE:

The module examines s 46 of the *Trade Practices Act* 1974 (Cth) prohibiting corporations with substantial market power from using their market power to unduly impair competition.

MODULE 13: CONSUMER PROTECTION LAW

READING:

Gillies, *Marketing Law*, Chapter 4.

CONTENT OF MODULE:

The module examines the consumer protection provisions of the *Trade Practices Act* (1974) Cth, focussing on ss 52 and 53.

UNIVERSITY POLICY ON GRADING

Academic Senate has a set of guidelines on the distribution of grades across the range from fail to high distinction. Please read the University policy on grading at: <http://www.mq.edu.au/senate/MQUonly/Issues/Guidelines2003.doc> or <http://www.mq.edu.au/senate/MQUonly/Issues/detailedguidelines.doc>.

PLAGIARISM

Please read the University's practices and procedures on plagiarism.

These can be found in the Handbook of Undergraduate Studies or on the web at www.student.mq.edu.au/plagiarism.

TUTORIAL QUESTIONS

TUTORIAL 1 - BRANDING AND PASSING OFF

Question 1

Read the case extract of *Johnson & Johnson Australia Ltd v Sterling Pharmaceuticals Pty Ltd* (1991) 30 FCR 326 on p 56 of the textbook.

In what way does the case outline the principles applicable to the registration of trade marks?

In applying the *Trade Marks Act*, how does the court distinguish between distinctive and non-distinctive marks?

Question 2

Can you think of any real life examples of trade marks? Applying the *Trade Marks Act*, do you think these trade marks should be registered?

TUTORIAL 2 - PATENTS, COPYRIGHT AND DESIGNS

Question 1

Read sections 7 and 18 of the *Patents Act 1990* (Cth). (This section is extracted in the textbook.)

Summarise the operation of s 7 and 18.

How do these sections set out the requirements for a registrable patent?

Question 2

Read the extract of the case of *TCN Channel Nine Pty Ltd v Network 10 Pty Ltd (No 2)* on p 35 of your textbook.

How does the court explain the concept of “substantial reproduction” in the area of infringement of copyright?

Question 3

What are the requirements for a registrable design under the *Designs Act* (Cth)?

TUTORIAL 3 - PROBLEM QUESTION ON MODUELS 1-6

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?

The contract between Colossal and the manufacturer prohibits this new equipment being sold except when incorporated and locked into the computer 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 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?

Advise Colossal referring to relevant case law and legislation.

TUTORIAL 4 - DEFAMATION LAW

Read Chapter 5 on Defamation in your textbook.

What is the test for determining whether a publication is defamatory?

What is innuendo?

What is the role of the general law in determining whether a publication is defamatory?

How does the law determine whether a publication is likely to injure the professional reputation of a plaintiff?

How does the law determine whether a publication is likely to injure the personal reputation of a plaintiff?

Does the *Defamation Act* apply to statements that injure the reputation of a corporation?

TUTORIAL 5 - PROBLEM QUESTION ON MODULE 7

On 31 August 2001, the following article appears in the NSW Daily Drivell newspaper:

MINISTER FOR FOREIGN AFFAIRS SPICED UP.

Rumours abound that the Australian foreign affairs minister, George Rios, is spending a week frolicking on secluded Majorca Island with English pop sensation, Miss Spice. This report follows recent speculation that the "Minister for Affairs" as he is affectionately known, has recently ended

relationships with two other women he has claimed are “just good friends”. Mr Rios’s long-suffering wife when asked about his latest trip replied, “I wash my hands of him –this time he has gone too far”.

Mr Rios denies the claims that he has been unfaithful to his wife, and states that his trip to Majorca was related to his Ministerial duties. He brings a defamation action against the publisher of the Daily Drivell in the Supreme Court of NSW.

What are Mr Rio’s chances of success? Detail defences that may be available to the defendant.

TUTORIAL 6 - PROBLEM QUESTION ON MODULE 7

PROBLEM QUESTION

The following article was published in the Northern District Star, a weekly local newspaper with a small distribution.

LOCAL LADY WINS BEST DOG

(beneath this headline were a large photograph of Ms Ida Green, a local Labrador breeder, and her prize-winning dog. The photo was captioned – “Happy Smiles from Ida and Lucky”)

The report continues –

“A local professional Labrador breeder, Ms Ida Green, has been honoured by one of her dogs, Lady Luck, taking out the Best Dog in Show at the recent Royal Easter Show. Lady Luck (nicknamed Lucky) is a three-year old golden Labrador who adds the Easter Show trophy to many others won throughout Australia.

On a less happy note, we feel bound to inform our readers that an unnamed source telephoned the Star after Lucky’s win, to tell us that Ms Green was extremely fortunate to take out the prize because her dog has a foul temper and is restrained from biting the judges only through the use of sedatives. This paper wouldn’t like to comment on these allegations, except to say that it abhors cheating in any guise.

As you can see from the photo, Ms Green is certainly sporting a winner’s grin. Her blonde hair, bright eyes and full figure clearly demonstrate the old saying that dogs look like their owners – or is it that owners look like their dogs?

Congratulations Ms Green, and best wishes from the Star for next year’s Easter Show.”

Advise Ms Green on her likely success should she decide to bring an action in defamation against the Northern District Star. Make full reference to relevant statute and common law on defamation in NSW in your answer, and detail any defences which may be available to the Star.

TUTORIAL 7 - INSURANCE LAW

Question 1

Read sections 21 of the *Insurance Contracts Act 1984* (Cth) – The section is extracted in your textbook.

Explain how the section sets out the insured's duty of disclosure.

What does an insured need to disclose?

Does the insurer have any obligations under s 21?

Read section 28 of the *Insurance Contracts Act 1984 (Cth)* – The section is extracted in your textbook.

What is the difference between non-disclosure and misrepresentation?

What is the consequence of a deliberate misrepresentation?

What is the consequence of an unintentional misrepresentation?

TUTORIAL 8 - PROBLEM QUESTION ON MODULE 8

PROBLEM QUESTION

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.**

TUTORIAL 9 - ARRANGEMENTS RESTRICTING COMPETITION AND RESALE PRICE MAINTENANCE

Question 1

What is the difference between s 45(2)(a)(i) and s 45(2)(a)(ii) of the Trade Practices Act? (These sections are extracted in your textbook.)

Question 2

Read sections 96(3) of the *Trade Practices Act 1974 (Cth)* (The section is found on p 236 of the textbook.)

Outline the different ways in which the prohibition against resale price maintenance may be breached.

What are the differences between the categories outlined in s 96(3)?

What amounts to inducing?

TUTORIAL 10- EXCLUSIVE DEALING

- 1) Do these provisions in Part IV of the Trade Practices Act ban the defined conduct outright, or permit parties to seek authorisation? Do they apply only to contracts having the defined effect? Are such arrangements uniformly objectionable or can there be countervailing public benefits?
- 2) Does a supermarket company operating through a chain of stores, breach any of these provisions by sending its managers a standard price list from time to time, prescribing a fixed price for all products? Would the situation be any different where a fast food chain imposes uniform pricing upon its franchisees?
- 3) What are the categories of exclusive dealing delineated in s 47? Can any of these be authorised?
- 4) Does an insurance company which appoints approved panel beaters, to which it sends all its car insurance customers with damaged vehicles - in return for which the panel beater agrees to fix the cars for a price approved by the insurer - breach s 47?
- 5) Does the food wholesaler breach s 47, by entering into an exclusive contract for two years with an independent grocer to supply the latter, infringe s 47?
- 6)

TUTORIAL 11 - MISUSE OF MARKET POWER

Question 1

Read s 46 of the *Trade Practices Act 1974 (Cth)* (This section is extracted in the textbook.)

Explain the meaning of the word “purpose” in the section.

What are the categories of proscribed conduct?

What is predatory pricing?

Question 2

- 1) Is this head of liability in s 46 too widely defined, or too narrow? Can it be authorised? Does the manufacturer, which through volume can produce goods more cheaply, thereby inhibiting entry, by competitions, breach s 46?
- 2) Does the fast food chain which uses its superior advertising budget to generate immense goodwill, thereby deterring independent competitors from emerging, breach the provision?
- 3) Do the dominant capital city newspaper companies in Australia, whose franchise is so powerful as to deter competitive entrants, fall foul of the provision?

TUTORIAL 12 - CONSUMER PROTECTION

- 1) Does Realty Ltd breach s 52, where it advertises a block of units as having superb ocean views, when after all its units have been sold off the shelf, another block gets under way between Acme's block and the ocean?
- 2) Pies for Us (PU) contracts with Realty Ltd to take a lease on a food kiosk in Realty's mall, after assurances that the adjacent pie shop will not be permitted to sell buckets of hot chips separately (as distinct from being offered as an accompaniment to pies). PU's contract which PU did not read, reserves power to Realty to decide what business will be run at any of its shops, and what products will be permitted to be sold. Realty authorises the pie shop to sell buckets of chips. Can PU sue under s 52?
- 3) Acme Ltd's car park has a standard exclusion sign outside its car park, Mary asks the attendant, and "will my van fit under your roof?" The attendant tells her yes. In fact a water pipe suspended below the ceiling, scrapes the roof of her car. Can she invoke s 52 or any other provision in the TPA?
- 4) A real estate agent marketing Bills' house, tells prospective buyers that the property is shortly to be rezoned for units. Jane pays a premium price, anticipating a quick resale at a profit. The zoning remains unchanged. Can Jane sue (a) the agent and (b) Bill?
- 5) Image Ltd contracts with Beancounters Ltd to mount a major marketing campaign for Beancounters Ltd's brand new discount stockbroker business. In fact Image Ltd's campaign is woeful – Image Ltd never had the experience, the personnel or financial standing to mount a major campaign. Much hinged on the campaign – Beancounters Ltd had its competitors, but through its spending power was going to establish a dominant brand name, and then on sell the business to a foreign bank at a hefty mark-up. Can Beancounters Ltd sue Image Ltd under s 52?

Notes

2010 SCHEDULE

Module	Week	Lecture Topic	Content
1-2	1	<i>Introduction Overview of Marketing Law Overview of Legal Research Branding Passing Off</i>	Introduction Areas covered by marketing law Legal research techniques Trade Marks Passing Off
3-4	2	<i>Inventions Confidential Information</i>	Patents Law Confidential Information
5-6	3	<i>Expression of Ideas Designs</i>	Copyright Law Designs Law
7	4	<i>Defamation Law</i>	Liability * Research Exercise is Due * Assignment Question available on BUSL 350 Blackboard website
7	5	<i>Defamation Law</i>	Defences
8	6	<i>Insurance Law</i>	Insurance Law
9	7	<i>Unfair Selling Practices Product Liability</i>	Unfair Selling Practices Product Liability * Assignment due. To be submitted in class.
BREAK			
10	8	<i>Arrangements Restricting Competition</i>	Arrangements restricting competition Resale Price Maintenance
11	9	<i>Exclusive Dealing</i>	Exclusive Dealing

12	10	<i>Misuse of Market Power</i> <i>* Model Answer to Assignment</i>	Monopolisation * Assignment returned in class. Model answer to assignment explained.
13	11	<i>Consumer Protection</i>	Misleading or Deceptive Conduct
13	12	<i>Consumer Protection</i>	Misleading or Deceptive Conduct False Representations
-	13	<i>Revision</i>	Revision