



## **Miles and Dowler, *A Guide to Business Law 21st edition***

### **Study Aid – Chapter summaries**

#### **Chapter summary – ch 22 – e-commerce**

##### **A. What is e-commerce?**

1. E-commerce is an abbreviation of electronic commerce which is the rapidly expanding industry of trade and commerce by electronic methods such as the internet.

##### **B. Australian guidelines for business-to-consumer e-commerce**

1. In March 2006, the Commonwealth government released the Australian Guidelines for Electronic Commerce which applied to business-to-consumer electronic commerce.
2. The Guidelines apply to all traders operating within Australia but do not apply to any electronic transactions between individuals neither of whom are engaged in a business capacity.
3. These Guidelines do not replace legal obligations under any State or commonwealth consumer protection legislation and the fact that a business complies with the guidelines does not exempt them from liability under any relevant statute law.
4. The Treasury has supplied to businesses a “checklist” of factors to examine when involved in e-commerce with consumers and some of these factors include:
  - Does the business follow “fair business practices”?
  - Are consumers supplied with important information about the business and contact details?
  - The terms of any contract must be clear, accurate and easily accessible to the consumer.
  - Do consumers have easy and appropriate methods of payment?
  - Does the business ensure its marketing messages avoid breaching the *Spam Act 2003*?
  - Do consumers have easy access to dispute resolution procedures?

##### **C. E-commerce and contracts**

1. Contracts can be negotiated by electronic means and to a large extent the formation of electronic contracts is governed by common law principles of



contract.

2. Most contracts can be validly created and recognised electronically although there are some contracts that are still required to be in writing such as wills, Powers of Attorney and real estate agreements. The recent decision in *Getup Pty Ltd v Electoral Commissioner* has given increased recognition for the use of electronic signatures.
3. The *Electronic Transactions Act 1999* (Cth) allows for the recognition of electronic communications and allows for documents to be created electronically and treated equally as written documents. The Act provides for:
  - transactions performed electronically to be valid;
  - documents in electronic form to satisfy the requirement for written documents;
  - electronic signatures may authenticate documents; and
  - information may be recorded and stored electronically.
4. The traditional rules of contract law have application to e-commerce. The main requirements for a valid contract include:
  - intention to make legal obligations;
  - offer and acceptance: contracts can be negotiated by email, internet etc – the rules usually require any offer to be communicated and accepted; an offer is treated as being accepted when the acceptance enters the designated information system and is read;
  - consideration: there must be some value exchanged between the parties;
  - consent: the parties must have voluntarily entered into their agreement;
  - capacity: each party must have the mental ability to understand the contract – one problem with e-contracts is that the parties are not face-to-face and it is difficult to know if you are dealing with a minor or someone otherwise lacking comprehension; and
  - illegality: even electronic contracts will be void, unenforceable or voidable if they offend common law or statutory restrictions.

The recent case of *Smythe v Thomas* has established that offers made in online auctions constitute legitimate contractual offers.

#### **D. E-commerce and defamation**

1. Defamation is the publication of material that identifies the plaintiff and causes injury to their reputation.



2. Defamation can occur over the internet or by emails or other electronic forms as well as the more traditional ways of publication such as newspapers, radio, television and magazines.
3. In earlier findings, courts have had difficulty with jurisdictional issues relating to internet material: see *Macquarie Bank v Berg*. However, it has been recognised that defamation occurs in the place where the defamatory material has reached its intended audience.
4. There have been successful defamation cases involving material on websites, emails, bulletin boards and “chat lines”.
5. Under the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) ISPs and content hosts may avoid liability themselves where they can prove they were innocent distributors of the material because they did not know the material was defamatory and they acted carefully (without negligence).

## **E. E-commerce and copyright**

1. Traditional materials that are normally protected by copyright are equally protected in relation to the internet environment.
2. With the widespread use of the internet it is difficult to protect material against unlawful copying and dissemination.
3. Material that can be legally protected under copyright laws includes:
  - graphics;
  - database or software materials; and
  - websites.
4. Protection against breach of copyright can be obtained in a variety of ways including:
  - encrypting;
  - restrictions on access; and
  - payments/negotiated agreements.
5. The Roadshow/iiNet case will have considerable impact on the downloading of films from the internet, but the current Federal court finding is on appeal to the High Court of Australia.

## **F. E-commerce and privacy**

1. With the increasing use of the Internet important privacy issues are raised. In emails and any information submitted to hosted sites an unlimited amount of



information and personal details can be communicated.

2. The Commonwealth introduced the *Privacy Act 1988* in 1988 setting out guidelines for the use of personal information by Commonwealth and ACT agencies, credit providers and credit reporting agencies.
3. In 2000, the *Privacy Amendment (Private Sector) Act 2000* regulated the storage and use of personal information by non-government bodies. There are 10 National Privacy Principles (NPPs) on how to collect and use personal information. The commonwealth laws are administered by the Office of the Australian Information Commissioner.
4. In 2014, a number of recent changes were made to federal privacy laws. The Privacy Act now includes a set of 13 new privacy principles, called the Australian Privacy Principles, that regulate the handling of personal information by Australian government agencies and some private sector organizations. They replace both the Information Privacy Principles and the National Privacy Principles.
5. In New South Wales, the *Privacy and Personal Information Protection Act 1998* was passed in 1998 and whilst it is mainly concerned with the public sector, it does allow for investigations into disputes with private organisations and individuals. The Office of the Privacy Commissioner in New South Wales administers the Act.

## **G. Spam: prohibitions in advertising and marketing**

1. Spam is unsolicited (junk) mail used in e-commerce to advertise and market products and services.
2. The main laws dealing with the problem of spam are the *Spam Act 2003* and the *Spam (Consequential Amendments) Act 2003* which came into effect on 10 April 2004. They target commercial e-messages; ie any message offering or marketing products and services, land, investments or suppliers of any products or services.
3. The main features of the Acts include:
  - it is illegal to send most commercial emails/electronic messages without the prior consent of the customer; and
  - any lawful message must contain accurate information and contact details of the sender.

## **H. E-commerce and domain names**

1. Where a business has a website it must have an internet address of its current computer site. The address is referred to as the *domain name*.
2. Registering a domain name allows the holder to use the name on the Internet and prevents another from registering the same or a deceptively similar name or



using the same or similar name in their business.

3. Domain names may be protected against infringement in the following ways:
  - compliance with the new *Australian Consumer Law*;
  - if the name is registered as a trade mark then it may gain protection under the *Trade Marks Act 1995* which will prevent its use by another or the use of a deceptively similar mark by another; and
  - the tort of “passing off” where someone registers a domain name that is identical or deceptively similar to a registered name or well-known trade mark: see *Marks & Spencer v One-In-A-Million Ltd*. The courts may view the conduct as the offender passing off their goods/ services as being associated with the holder of the domain name or trade mark.

## **I. E-commerce and consumer protection**

1. Consumer protection laws apply just as readily to e-commerce as the traditional types of business. Online marketing is similar to any other commercial situation and can attract both State and Commonwealth statute laws.
2. In *ACCC v Chen*, the court found an overseas website had engaged in serious misrepresentations about selling tickets to the Australian Opera House and was in breach of s 52 of the *Trade Practices Act 1974*.
3. In *ACCC v Icellnet*, an overseas resident operating a website was found to have engaged in the prohibited restrictive practice of “pyramid selling” in breach of Pt IV of the *Trade Practices Act 1974*.