

**LEGAL PROFESSION ADMISSION BOARD**

**SEPTEMBER 2008**

**COMMERCIAL TRANSACTIONS**

**TIME: Three Hours.**

This paper consists of **six** questions in two sections A and B.

Candidates are required to attempt any **two** questions from **EACH** section for a **total of four questions**.

If more than four questions are answered, **only four** will be marked. If more than two questions are attempted from the same section, the last question answered will not be marked.

All questions are of equal value.

The questions may be answered in one exam booklet.

Each page of each answer must be numbered with the appropriate question number.

Candidates must indicate which questions they have answered on the front cover of the first examination booklet.

Candidates must write their answers clearly. Lack of legibility may lead to a delay in the candidate's results being given.

**Permitted Material:**

**This is a closed book exam. No materials are permitted in the examination room.**

**As some instances of cheating and of bringing unauthorised material into the examination room have come to the attention of the Admission Board, candidates are warned that such conduct will result in instant expulsion from the examination and may result in exclusion from all further examinations.**

*This examination should not be relied on as a guide to the form or content of future examinations in this subject.*

## SECTION A

### **Question 1.**

In the 1950s, a series of 22 very large canvas paintings by aboriginal artists came into existence. They had been the result of a government sponsored community project in Western New South Wales.

At that time, indigenous art was not very popular. The paintings were purchased from the NSW Government for a token \$50 by the Art Gallery of NSW ('the Art Gallery') at the insistence of the Minister, but never recorded as an item in its collection. As the Curator of the Art Gallery did not want them, was very keen to be rid of them, believed they did not match the projected image and collection envisioned, and determined there was not very much storage space at the Gallery, he asked the NSW Museum whether it would take them; which it did. The paintings were placed in the basement of the Museum, added to its inventory, and forgotten.

Everyone associated with this situation died before 2000.

In 2006, the Museum Manager was surprised to find the stored paintings. A major exhibition was mounted in 2007. It drew hundreds of thousands of visitors and generated revenue of \$7,000,000. There were requests for foreign exhibition tours. Merchandising offers poured through the door. This was very welcome, as it would enable the Museum to greatly enhance its offerings and research in various areas.

Tristan, the curator of the Art Gallery, jealous of the rival Museum up the road, wondered where these magical paintings had come from. "Why, from your Gallery, of course", said William, the Museum Manager. "The Art Gallery gave them to us in 1957".

Lawyers for the Gallery have sent a letter to William, demanding the paintings be returned to the Gallery at the end of the current exhibition.

**Advise William on the legal position of the Museum with respect to the canvasses.**

**(25 marks)**

**(Question 2 follows)**

## **Question 2.**

In February, 2007 Tim, a resident of Sydney, lost vision in his right eye a few months after using a contact lens solution known as Teardrops. He had been using it for 4 years at a cost of \$400/year.

In February 2007 Tim had two weeks in hospital. Steroid injections were administered every twenty minutes. Since then he has had to administer eye drops and takes strong painkillers for agonising pain. His only hope for recovery of sight in his right eye is a cornea transplant. It has an 80% chance of success. The earliest availability for the procedure is February 2009.

He has not been able to work since the loss of his sight, cannot drive, is unable to watch television or use a computer for longer than 10 minutes at a time, and cannot tolerate sunlight.

Teardrops were manufactured by Celestial Optics Limited, a Californian company, and imported and distributed by Forrest Pty Limited, a small family company in Killara, Sydney NSW.

In May 2007, Teardrops was withdrawn from sale in the US following a warning by the US Centre for Disease Control and Prevention that the risk of developing *acanthamoeba keratitis* (a rare sight threatening corneal parasitic infection) was at least 7 times greater for those using the product, than those using other contact lens solutions on the market. It was withdrawn from sale in Australia in June 2007, at which time, there were approximately 377,000 users of the product.

**Advise Tim on what action he might take in order to recover compensation for the loss of vision, and any other loss sustained.**

**(25 marks)**

**(Question 3 follows)**

### Question 3.

Valley Hardware Co-operative Limited (Valley Co-op) acted as a warehouse and wholesaler to members.

Various companies supplied hardware products to Valley Co-op on a “charge-through” system. Under this system, both suppliers and members would enter into credit arrangements with Valley Co-op. Members were free to order directly from suppliers (and have items either delivered directly, or via Valley Co-op), or to purchase stock held by Valley Co-op. All suppliers invoiced Valley Co-op, which would then bill members and pay suppliers monthly.

One supplier, Ronita Pty Limited (Ronita) had a Romalpa clause in its terms and conditions as follows:

#### *Title and Risk*

*Notwithstanding any arrangements made for delivery, all Products sold are at the risk of the Customer from the time products leave Ronita 's premises. Notwithstanding delivery and passing of risk, title will not pass to the Customer or any related persons until payment in full has been received by Ronita and all negotiable instruments cleared. Prior to such payment, the Customer holds products as bailee. In the event of a Customer failing to make payment and disposing of products to a third party, the Customer agrees that the proceeds of such sale will be kept separately until Ronita has been paid in full.*

On 14 May 2008, Valley Co-op was placed into Receivership. At the time, there were some Ronita products still in stock at Valley Co-op, some which had been sold to Members by Valley Co-op from its stock, and some which had been ordered by and delivered directly to members. Valley Co-op had not paid Ronita for any of them.

Valley Co-op had only one bank account and all receipts went into that account.

- (1) Ronita is claiming from the Receiver:  
The immediate return of the Ronita products still in stock  
Payment from the Valley Co-op account of the proceeds of sale of its products because they were sales on behalf of Ronita
- (2) Ronita is also claiming return of products delivered to Members directly, but not paid for by Valley Co-op.

#### **Advise:**

- I. the Receiver, re (1)**
- II. the Members affected by (2)**

**(25 marks)**

**(Section B follows)**

## SECTION B

### **Question 1.**

Coastal Media Pty Limited (Coastal) is a company now in receivership, at the instigation of its major creditor, Northern Bank Limited. (Northern). Northern had a fixed and floating registered charge over various assets of Coastal. The floating charge over all negotiable instruments and book debts crystallised and became fixed on 16 August 2008 and the Receiver was appointed on 17 August 2008.

On 12 August 2008, Coastal sold a web design business to Weblinks Limited. Weblink paid on that day with a cheque for \$1,107,000. When it was banked on 14 August 2008, it was dishonoured. When the Receiver rang on 20 August 2008 to remind Weblink of their obligation to pay for the business acquired, Weblink said that it stopped the cheque because it is entitled to set off against the purchase price of \$1,107,000 a claim for \$481,000.00.

Particulars of the Weblink claim provided so far include the following:

- Coastal fraudulently retained copies of software in breach of the web design business sale agreement,
- Coastal knew at the time of sale that 8 items of equipment were subject to hire purchase agreements with third parties and did not belong to Coastal,
- 27 client websites listed and paid for, as work in progress, had been made live prior to completion so that payment could be collected, leaving Weblink to finish the job at its cost,
- There was a lot of unlicensed software being used unlawfully in the business.
- Written representations as to likely future income failed to take account of free services for the lifetime of particular contracts.

**Advise the Receiver of Coastal on their legal position with both Northern and Weblink regarding:**

- i. the dishonoured cheque for \$1,107,000; and**
- ii. the claim for \$481,000.00 by Weblink.**

**(25 marks)**

**(Question 2 follows)**

**Question 2.**

Ms Adam insured her car with OBIE Insurance Limited (OBIE) in 2006 and renewed it for 2007. In between first obtaining the policy and the renewal, her brother, Sam, was subject to criminal penalties arising out of property offences involving dishonesty, but no conviction was recorded. Although she knew that her brother would regularly drive her car, Ms Adam did not disclose these penalties to OBIE either in 2006 or 2007.

Sam was subsequently involved in an accident while driving Ms Adam's car. OBIE denied her claim on the grounds that she had breached the duty of disclosure.

The documentation Ms Adam received when she first effected the policy contained a standard notice explaining the duty of disclosure but it did not appear on any documents given to her on renewal. There was no stated obligation that OBIE must be advised of drivers other than Ms Adam.

**Advise Ms Adam.**

**(25 marks)**

**(Question 3 follows)**

**Question 3.**

**Answer ONLY 5 of the following.**

- (a) Describe an issue in the Opes Prime debacle relevant to our course.
- (b) Planet Limited is a company that operates a social network on the Internet. List 10 items of personal property it is likely to have, either as an asset or a liability.
- (c) Describe one way in which the provisions of the Sale of Goods (Vienna Convention) Act 1986 differ from the Sale of Goods Act 1923.
- (d) What are the implications of the High Court decision in *Associated Alloys Pty Ltd v. Metropolitan Engineering and Fabrications Pty Ltd (in Liq)* 2000 171 ALR 568 for a financier lending to an industrial manufacturer?
- (e) You are a commercial litigation lawyer. At an interview for a position as a commercial dispute mediator, you have been asked to describe what changes in mindset (if any) you will have to accomplish to make the transition. What is your answer?
- (f) Under what circumstances can an unpaid seller claim a lien over goods sold?
- (g) Explain why damages measured as those directly and naturally resulting from a breach of contract can be different to damages actually suffered by a plaintiff.
- (h) What is a negotiable instrument?
- (i) Describe what Alternative Dispute Resolution methods are available to customers who are in dispute with their bankers.
- (j) There are provisions in the Insurance Contracts Act 1984 that permit courts to temper the strict application of the law where there has been "a little bit of fraud"; namely s.31 and ss.56(2) and 56(3). Please describe the application of one of these with reference to a decided case.

**(5 marks each)**

**- END OF PAPER -**