



EXAMINER'S REPORT

MAY 2005

REGULATORY ENVIRONMENT FOR MARKETING

Statistics

Total	A	B	C	D	E	F
100%	3.2	14.0	21.3	36.1	2.1	23.4

General Comments

The pass rate this year at almost 75% shows a slight increase from the previous year's figure of 71% and is similar to the figure of 76% for May 2003. In a number of recent reports for this subject a consistent pattern of reasons for failing have been identified. Unfortunately this pattern continues this year and in the hope that prospective candidates for future papers will learn from the errors of previous years the reasons are set out again as follows:

1. Only three candidates who attempted less than the required number of questions achieved a pass grade. This figure is in fact identical to the two previous years. All of the failed candidates in this category achieved an 'F' grade.
2. The failure to use relevant case-law to illustrate and support the answer with particular reference to the area of contract law. This issue had relevance to Q1, 3, 4 and 7 in particular.
3. Not answering the question asked. This was particularly true as regards Q3 and to a lesser extent in relation to Q4 and 5.
4. In the context of the questions on the paper which required the analysis of a factual situation, i.e. Q1 and Q4, the failure to appropriately identify the legal issues involved and/or to support the answer with relevant authorities including illustrative precedents. Also many of the answers to these questions were extremely brief.
5. A total lack of familiarity with or knowledge of the legal topic involved. This was the case with many of the answers to Q2.

Question 1

A question dealing with the issue of the communication of acceptance and the related difficulty of the revocation of acceptance. The question centred on the so-called 'Postal Rule' regarding the communication of acceptance. The answer should have dealt with the appropriate method of reply in the circumstances, the effect of the postal rule on the timing of acceptance and the effect of the 'attempted' revocation of the acceptance once communicated. The answer had to be supported by reference to illustrative case-law dealing with the 'postal rule' and the better answers considered the circumstances in which the rule will not apply. The 'postal rule' is a rule of convenience which will be applied in the absence of a contrary intention being indicated by the parties involved. It was surprising how many candidates simply dismissed the application of the 'postal rule' in the factual situation supplied.

Question 2

The Consumer Credit Act 1995 is one of the most significant pieces of consumer protection legislation. The area of the provision, advertising and marketing of consumer credit is a very significant market and therefore these factors should be reflected on an examination paper such as this one. The question was the least popular on the paper and in general the answers were very limited with some notable exceptions. The best advice that can be offered on this topic is that the websites of the Office of Director of Consumer Affairs and the Irish Financial Services Regulatory Authority contain very good explanatory material on the 1995 Act, which is specifically written with the consumer in mind. These websites can be accessed at www.odca.ie and www.ifsra.ie.

Question 3

A question concerning the duties of an agent. This was the most popular question on the paper and was attempted by almost 90% of the candidates. It is not a question concerning the different types of agent nor on the creation of the relationship of a principal and an agent. Appropriate issues to be developed include, performance unless the agent is gratuitous, exercising due skill and diligence, disclosure, confidentiality, personal performance and non-delegation, acting in good faith, conflict with the duty to the principal and the duty to account.

Question 4

Quite simply a question dealing with 'retention of title'. It is a cause of concern as to the number of candidates that failed to identify the basic legal issue involved in the given factual situation. The issues to be developed include the provision for the retention of title as provided for in Sec.19 of the Sale of Goods Act 1893. The advantages and limitations of such a clause should be developed, the use of instructive legal decisions such as the Romalpa case [1976] and the effectiveness of such clauses to recover not alone the goods, which remain identifiable but also to 'trace' the proceeds of the sale of the goods which were the subject of such a clause. The better answers considered whether or not the clause would constitute a 'charge' on the assets of the retail company, which would require registration under the Companies Acts?

Question 5

One of the central objects of the Competition Act 2002 was to improve the effectiveness of the Competition Authority as an enforcement agency and in this regard to substantially redraft the provisions of the competition legislation dealing with criminal prosecutions and convictions in particular. This should have been reflected in the answer in addition to the role of the Authority as regards mergers and take-overs, advocacy and the review of particular areas/practices in the market place. The better answers provided examples of the enforcement and prosecution powers of the Authority. The best source for such material is the website of the Authority at www.tca.ie. The question focused on the role of the Competition Authority and was not a general question on Competition Law and Policy.

Question 6

This question allowed a candidate to demonstrate his/her knowledge of two of the most important forms of intellectual property of their choice. As with virtually all forms of such property rights these two areas have been the subject of substantial statutory reform in the last 10-15 years. The structure of the question pointed to the requirement that the answer would have to draw on these statutory provisions. Almost all candidates chose to deal with two of three from patents, trademarks and copyright protection. Most of the answers were satisfactory. There was an answer from one candidate who decided to deal with the issues of confidentiality and 'know-how'. This was a particularly original approach to the topic of intellectual property. The better answers did make reference to relevant illustrative case-law. A small number of

candidates still appear to be unfamiliar with the statutory provisions which now apply to differing forms of intellectual property.

Question 7

One of the most popular questions on the paper and the second question to deal directly with the law of contract. The answers tended to divide equally between those who were familiar with topic of damages as a remedy and those who were not. Issues that should have been developed included; the object of awarding damages, liquidated and un-liquidated damages, remoteness of damages and the rules developed in the decision in *Hadley v Baxendale* [1854], the measure of damages and in particular financial and non-financial loss and finally mitigation of loss. As with all contract questions, the use of illustrative precedents is usually critical to obtaining a high mark. Many candidates simply wrote on all remedies for a breach of contract. That was not the question.

Question 8

A relatively popular question and one that has appeared on this examination paper over the years. A knowledge of the significance of the European Union as a source of Irish law is essential to the study of a subject such as this. Most of the impact of this source is to be found in the legislative instruments of the European Union and their incorporation into the Irish legal system. Many of the answers were excellent, particularly those which developed such issues as the 'direct effect' of a directive in appropriate circumstances. One particularly pleasing aspect of many answers occurred in the part dealing with EU decisions. A substantial number of candidates referred to the decision of the EU Commission regarding the proposed subsidy package that had been offered by the Irish Government to Intel. In addition numerous candidates referred to examples of Irish legislative provisions which have their origins in EU directives, for e.g. the Liability for Defective Products Act 1990.