



## EXAMINER'S REPORT

MAY 2004

### REGULATORY ENVIRONMENT FOR MARKETING

#### General Comments

The pass rate this year at 71% shows a decline from the previous year's figure of 76%. The reasons that candidates fail this subject remain the same as identified in previous reports, but their repetition is justified as a guide to future and repeat candidates.

The identified reasons are as follows:

1. Not answering the required number of questions. As with last year only three candidates who attempted less than five questions achieved a pass mark. It appears that a number of candidates decide to concentrate on a fixed number of topics in the hope that they will appear on the paper.
2. The failure to use relevant case-law to illustrate and support the answer with particular reference to the area on contract law.
3. Not answering the question asked or in the case of a question divided into two or more parts, only answering a part of the question. No matter how thorough the answer is to a part of a question only the marks allocated to that part can be awarded.
4. In the context of 'problem situation' questions such as Question 4 and Question 6 on this paper, a failure either to appropriately identify the legal issues involved and/or the total lack of appropriate authority, such as illustrative precedents, to support the conclusions reached.

#### Question 1

This was a direct question concerning the Competition Act 2002. In particular, the question asked about the 'principal changes and innovations' in the Act, therefore it was not necessary to develop to any great extent the provisions of Sections 4 and 5 of the Act concerning anti-competitive activities and abuse of a dominant position except the changes in the 2002 Act to these 'core' provisions. The better answers used some of the recent prosecutions and proceedings brought under the Act by the Competition Authority.

#### Question 2

The least popular question on the paper but generally well answered by those who attempted the question. There were some particularly good answers which developed the concept of 'direct effect' as regards directives and also made use of illustrative examples to demonstrate the application of EU secondary legislation in Ireland. These included the Liability for Defective Products Act 1991 as regards directives and the proposed Government subsidy of Aer Lingus as regards decisions.

### **Question 3**

The most popular question on the paper, attempted by almost 90% of candidates. There were many exceptional answers which combined both the legal principles involved and the use of relevant illustrative cases. No apparent difficulties appeared to arise regarding the answering of this question.

### **Question 4**

One of the two 'problem situation' questions on the paper. Effectively the question is built around issues relating to offer, acceptance and the communication of both offer and acceptance. Issues that should have been identified included the distinction between an offer and an invitation to treat, communication of an offer and acceptance and unilateral contracts. Many answers made good use of standard illustrative case-law but some also made reference to recent and current examples of the issues of using websites to negotiate and finalise contracts. A very small number of candidates made reference to the Electronic Commerce Act 2000, which has clear application to the factual situation detailed in this question.

### **Question 5**

Generally, parts (a) and (c) of this question were answered very competently. As regards part (a), the exclusion of 'primary agricultural' produce was removed from the definition of a product in 2000. In part (b) the answer should have concentrated on the issue of the safety that a consumer could reasonably expect, having particular regard to the presentation of the product, the use to which the product could reasonably be put and the time when the product was put into circulation. The provisions of the Sale of Goods legislation is not relevant to this issue of defective products which are not safe.

### **Question 6**

The second problem situation on the paper, this time dealing with the possibility of misrepresentation. Most candidates immediately presumed that there was misrepresentation and that it was fraudulent. Before arriving at this conclusion, there were two relevant issues to be considered, i.e. does silence constitute misrepresentation and, if so, in what circumstances and secondly, the principle of 'caveat emptor – let the buyer beware'. Few candidates developed either of these issues which are central to the given situation. An analysis of the elements that constitute misrepresentation, with particular reference to the general requirement that there must be a statement, would have resulted in a better analysis of the situation.

### **Question 7**

With very few exceptions, most candidates who attempted this question immediately developed the implied terms in a sale of goods contract and not a supply of services contract, as requested. In the commercial context, supply of services contracts are very often of greater significance than sale of goods contracts. If the candidate misread part (a), inevitably part (b) would also be affected. In part (b) the development of the issues of 'dealing as a consumer', notice to the consumer of an exclusion clause and the test of fair and reasonable was central to appropriately answering the question.

### **Question 8**

As indicated in previous reports, the issue of intellectual property rights now forms a crucial aspect of both new product development and the marketing strategy for such products. Most candidates chose to develop both Patents and Trade Marks in part (b) of the question. A few candidates did develop the principal issues relating to copyright and related issues. No candidate developed design protection in part (b) of the question. A small number of candidates appeared to be unaware of the Patents Act 1992 and the Trade Marks Act 1996 and developed the legal position prior to the introduction of these Acts.