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Essential Australian Business Law

Paul Latimer

2011



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Preface

Welcome to this first edition of Essential Australian Business Law.

Essential Australian Business Law is an abridged version of the full text of Australian Business Law 2011 edition. It is designed for courses which focus on the core chapters of Australian Business Law — introduction, tort, contract, consumer law, business structures, partnership and agency. Those looking for chapters on property, crime, competition law, business names, business finance, bankruptcy, consumer credit, bailment, cheques and banking, and insurance will continue to find them in the unabridged Australian Business Law.

The latest statutes and cases have been included with a good showing of 2010 references throughout the book.

From 2012, Essential Australian Business Law will be published at the same time as the new annual editions of the full text Australian Business Law .

The law is stated as at 7 October 2010.

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April 2011

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INTRODUCTION

(¶1-010 – ¶1-026)

¶1-010 What is law — the legal environment of business

Let us assume you are reading this book in a study or office, home or library. The environment where you are is as much of a legal creation as it is bricks and mortar, timber, steel, glass and plastic.

- All the details of your surroundings are regulated by laws like building regulations, local government permits and town planning orders. These affect the size, shape and quality of rooms, driveways, stairwells, light fittings, doors and windows and the position of the building on the block of land and the building's power and sewerage.
- Legally enforceable agreements (contracts) make sure that the building is serviced by power supply, water and sewerage authorities. The construction of the building was carried out under many contracts.

Perhaps you are reading these lines on a train or bus. These are regulated by legislation (Acts of Parliament) covering railways and road traffic and the regulation which establishes standards for manufacturing vehicles. The fact that you are on a bus or train means that you have made a contract with the operating authority to be taken from one place to another.

This analysis could go on to as many pages as there are in this book if all the laws that govern our daily acts were to be listed in detail.

Business law is made up of the laws that set out the rights, duties and obligations of people in business. Business law balances the interests of those in business and people like producers and consumers, buyers and sellers, lenders and borrowers. It regulates business transactions under the law of contract — this explains when an agreement will be legally enforceable as a contract and is updated by competition and consumer law. It regulates those engaged in business (companies, partnerships, etc), their names, their funding (finance, credit), their banking and their insurance. Many aspects of criminal law (especially property offences) and tort (especially the law of negligence) impact on business.

What is law?

The law is a body of principles established by parliament (ie by our representatives) and by the courts. Law is therefore made *by* us (the men and women who are parliamentarians and judges) *for* us, is legally enforceable and was developed to set standards of conduct between people, businesses and government. If these standards of conduct are not followed, the law sorts the conflicts that arise, and punishes those who breach these standards of conduct.

The law is made up of (¶1-180):

- **enacted law**

This is the law made by parliament known as statute law, legislation or Acts of Parliament (¶1-200), and delegated legislation (¶1-180).

- **unenacted law**

These are the judgments, usually written, of judges in cases heard by them, known as case law, precedent or sometimes common law: ¶1-180; ¶1-350 – ¶1-410.

Together, enacted law and unenacted law are often known as the “common law”.

The common law

The expression “common law” has four possible meanings which depend upon the particular context:

- (1) the law made common to the whole of England by the King in 1154 instead of law of only local application
- (2) the unenacted law written by judges in judgments (case law, precedents) — compared to the statute law enacted by parliament
- (3) both case law from the common law courts and statute law, as distinct from *equity law* (which had been developed separately from the 13th century by the King’s Chancellor, and later by the Court of Chancery)
- (4) the law which originally developed in England and later in Australia, New Zealand, most states of the USA, and the other former British colonies, as opposed to “foreign” law of non-English jurisdictions. One subset of foreign law is the “civil law” of continental Europe.

As the common law develops in each jurisdiction, it results in the development of the common law of Australia in the same way that there is the common law of, say, England or Canada.

The common law (meaning enacted statute and unenacted case law: (4) above) can be classified as follows.

Civil and criminal law

Civil law involves matters between person and person regarding the enforcement of rights and the carrying out of obligations. Most of the business law topics covered in this book involve civil law — civil cases result in remedies for the person winning and liabilities for the person losing.

Criminal law includes all statute and case law which make certain conduct an offence. Criminal law is enforced by the government (federal, state or territory).

Civil law in the common law is not the same as the “civil law” in some countries, mostly in Europe, which is based on the civilian code of ancient Rome.

Common law and equity law

The main remedy of the common law is an award of damages (compensation), but this might be useless to stop harm or the continuing breach of a contract.

Many years ago some people (litigants) appealed directly to (petitioned) the King or Queen, or the Lord Chancellor, or the Chancery — later the Court of Chancery, and now the Equity Court or the court in its equitable jurisdiction. Equity law developed an alternative set of rules to the common law courts.

Maxims of equity

Equity means the rules (equitable remedies) originally developed and administered by the Court of Chancery (equity court) which supplement common law rules and procedures. The maxims (principles) of equity are the rules which are applied by the equity courts, such as:

- “equity acts *in personam*” (equity acts on the conscience, not the property)
- “equity aids the vigilant”
- “equity does nothing in vain” (§4-400)
- “equity follows the law”
- “equity never wants a trustee” (§6-750ff)
- “equity will not assist a volunteer” (§3-040)
- “one who comes into equity must come with clean hands”
- “one who seeks equity must do equity”
- “where the equities are equal, the first in time prevails”.

Equity can grant an injunction (§4-410) or an order for specific performance (§4-400) — these are called “equitable remedies”.

The law of equity continues and is now fused with the common law, and both systems are administered by the same courts. Equitable principles — eg concerning unconscionability (§3-730) — have made, and continue to make, an important impact on the development of modern business law.

§1-015 The rule of law

Our legal system is built on the principle of the rule of law (supremacy of law) — that the authority of government (power) must be exercised according to law.

The rule of law has three aspects:¹

(1) *No arbitrary power*

The rule of law excludes arbitrary power — official actions (including judgments) must be done in accordance with the law. No person can be punished unless there is a breach of the law. Law must be public and published (§1-370).

The power of government is separated — under the separation of powers — among the three branches of government (§1-475).

(2) *Equal before the law*

All people are equal before the law. Nobody is above the law, for example the Prime Minister, a judge or a soldier may be liable in criminal law. The rule of law is a prerequisite for democracy.

¹ Dicey, AV, *Introduction to the study of the law of the Constitution*, London, Macmillan, 10th ed, 1964, pp 202–203.

(3) Enforceable in court

The rights of citizens are enforceable in the courts. In addition, in some jurisdictions there are special constitutional safeguards and Bills of Rights (Charters of Rights).

¶1-020 Law and justice

The principle of the rule of law (¶1-015) suggests that law and justice are the same thing — but is an unjust law even a law? Must an unjust law be obeyed? Can matters of justice or morality or conscience ever take precedence over the law?

Natural law

The *natural law* school of legal philosophy sees law as coming from nature. Natural law sees law as expressing a higher truth and a higher justice than that contained in man-made law, like in the US Declaration of Independence (4 July 1776):

“All men are created equal”.

Christopher Saint-Germain, for instance, set out the criteria of a good law (in 1530):

“Also to every good law be required these properties: that is to say, that it be honest, rightwise, possible in itself, and after the custom of the country, convenient for the place and time, necessary, profitable, and also manifest, that it be not captious by any dark sentences, ne mixt [nor mixed] with any private wealth, but all made for the commonwealth.”

Positive law

In contrast, the *positivists* see law as the rules imposed by the sovereign power over the sovereign's subjects. The study and the theory of law to the positivist concentrates on things as they are instead of things as they should be:

- Jeremy Bentham (1748–1832), the father of positivism, claimed that because law is man-made, it can be whatever man chooses to make it.
- John Austin (1790–1859) also divorced law from justice, and based law not on ideas of good and bad but on the power of the superior.

In modern times, HLA Hart pointed out, one of the problems with this view of the moral authority of law is that respect for the principles of legality is “unfortunately compatible with very great iniquity”.

The legal authority of the German Nazi state in the 1930s and 1940s sanctioned deportations, mass murders and ultimate forms of human degradation. However, these actions were “legal” under the legal system then in force. Numerous war criminals were tried after 1945 and some raised the defence of “obeying the law”. War criminals can expect to be punished and any defence that their actions were legal at the time will not be successful because they breached basic morality.

Law is changeable, so some conduct (abortion, alcohol, drugs) could be considered criminal yesterday, legal today and criminal tomorrow: what is crime?

¶1-025 Law, morality and society

Some areas covered by law and morals overlap and are the same — for example, the moral principle that promises should be kept is the foundation for the law of contract.

Some conduct is immoral but not illegal — eg cheating, selfishness.

Some conduct is illegal but not immoral — eg disobeying a “no parking” sign.

Without codes of conduct giving effect to society’s underlying ideologies and ways of life, there would be uncertainty. In a pluralist society where values are not universally shared, law plays a crucial role in maintaining social cohesion because it recognises and gives effect to community values, provides for the settlement of potentially disruptive disputes, and (ideally) provides for the orderly adaptation of rules to social change.²

¶1-026 E-commerce and Australian business law

“How will you cope when everything is digital?”³

This first chapter of *Australian Business Law* shows how the enacted law (statutes, legislation) and the unenacted judge-made case law that make up Australian business law have adapted and apply to the fast-developing world of electronic commerce and the internet. The adaptability of the law shows the continuity of the common law (¶1-010) and how it can apply existing legal principles to new technology. This is the same as how the common law adapted to the Industrial Revolution in the 18th century (when the economy moved from agriculture to industry) and the arrival of the steam train and later the motor car.

What is electronic commerce?

Electronic commerce means commerce by means of computer, the internet and other telecommunications links like electronic data interchange (EDI).

Increasingly, business is being done electronically rather than by traditional face-to-face business and with paper-based documents.

Australian business has already adapted to electronic commerce, such as:

- computer crime
- acceptance of an offer by fax, email and SMS (¶3-320)
- the computerisation of financial markets, with the development of SEATS (Stock Exchange Automated Trading System) for share trading and CHES (Clearing House Electronic Subregister System) for share ownership (¶3-030)
- the confirmation that email falls within the Commonwealth’s power over “postal services” under s 51(v) of the Constitution (¶1-475; ¶5-220)

2 Brennan, G, *Law, values and charity* (2002) 76 ALJ 492.

3 The title of an article by Lawrence, A at (2005) 42(11) LSJ 64.