

Australian Business Law



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28th Edition

Paul Latimer

2009

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GPO Box 4072, Sydney, NSW 2001

Head Office North Ryde

Phone: (02) 9857 1300 Fax: (02) 9857 1600

Customer Support

Phone: 1 300 300 224 Fax: 1 300 306 224

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Book Code: 34276A

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ISBN 978-1-921485-27-5

ISSN 0811-4781

Production team: Clare Audet (Head of Marketing), Beverley Kirby (Indexer), Lee Li Lian (Subeditor), Jennifer Lim (Marketing Manager), Lily Lim Lee Lee (Team Leader), Lata Prabakaran (Relationship Manager), Raja Nazri Raja Musa (Production Editor), Peter Rodrigues (Editor-in-Chief), Joshua Smith (Editor).

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First published	August 1981		
1983 edition	December 1982	1996 edition	December 1995
1984 edition	December 1983	1997 edition	December 1996
1985 edition	December 1984	1998 edition	December 1997
1986 edition	December 1985	1999 edition	December 1998
1987 edition	December 1986	2000 edition	December 1999
1988 edition	December 1987	2001 edition	December 2000
1989 edition	December 1988	2002 edition	December 2001
1990 edition	December 1989	2003 edition	December 2002
1991 edition	December 1990	2004 edition	January 2004
1992 edition	December 1991	2005 edition	January 2005
1993 edition	December 1992	2006 edition	January 2006
1994 edition	December 1993	2007 edition	January 2007
1995 edition	December 1994	2008 edition	January 2008
		2009 edition	January 2009

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Printed in Australia by McPherson’s Printing Group

Australian Business Law

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Preface

CCH business law titles are designed to provide a comprehensive yet concise statement of important areas of contemporary law. In addition to providing the lawyer and law student with a statement of the main features of the topic, these titles are also designed to assist those in business — the accountant, administrator, banker, compliance officer, manager, marketing executive, etc — and students of business and commerce working and studying in areas with legal content. *Australian Business Law* takes its place alongside the other CCH business law publications, including loose-leaf, CD-ROM and online services, and gathers together in one volume many of the aspects of the law in Australia affecting business.

Annual keyboarding of the updates has long replaced the first handwritten and manually typed manuscript in 1980, now made so much quicker with electronic resources, and each edition continues to bring the text up to date to incorporate changes in legislation and case law.

All chapters have been revised for this twenty-eighth annual edition to ensure the continued relevance of *Australian Business Law* to tertiary education syllabuses and to professional readers. The paragraph numbering remains essentially the same so as not to disrupt course outlines.

As ever, the latest statutes and cases have been included with a good showing of 2008 references throughout the book.

I do appreciate feedback from readers, and especially the organisations and institutions listed on the Acknowledgements page. Top of the list here is the “couple of pages” which I have received from the NSW Office of Fair Trading on the annual editions back to the 1980s.

In the interests of accuracy and completeness, the 2009 edition of *Australian Business Law* also contains minor updates and revisions to almost every page.

The law is stated as at 7 October 2008.

Paul Latimer

Monash University

email: Paul.Latimer@Buseco.monash.edu.au

About the Author

Paul Latimer is an Associate Professor of Law and former Head and Deputy Head of the Department of Business Law and Taxation at Monash University, Melbourne, operating across seven campuses (Berwick, Caulfield, Clayton, Gippsland, Malaysia, Peninsula and South Africa), and also teaching in Prato, Italy. He has worked, researched, published and taught widely in the areas of business law covered by this major CCH publication. He has held visiting positions in the area of business law and securities regulation at Columbia Law School, New York; New York University Law School; Wolfson College, University of Cambridge; Law School, Catholic University, Leuven, Belgium; Faculty of Law, University of Malaya, Kuala Lumpur; Faculty of Law, Universiti Kebangsaan, Malaysia; Laval University Law School, Quebec City, Canada; Centre for Corporate Law and Securities Regulation at Melbourne Law School; University of Nice Law School; the School of Accountancy at QUT in Brisbane; and the University of Montreal Law School in Canada.

Acknowledgements

Acknowledgements are due to the following people and organisations for information, practical assistance or for permission to use material, in this or recent editions:

ACT Office of Fair Trading; Adelaide Bank; ANZ Bank; Attorney-General's Department (NSW); Australian Transaction Reports and Analysis Centre (AUSTRAC); Financial Ombudsman Service; Commonwealth Bank (General Counsel); Consumer Affairs (NT), (SA), (Tas), (Vic), (WA); Consumer Credit Legal Service (Vic) Inc; Barbara Hewitt, Curtin University of Technology; Registrar, Darwin Magistrates Court; AA de Fina, arbitrator; Deacons Lawyers; Department of Industries and Business (NT); Department of Justice (NT); the Latimer family, and in memory of my late father, John Latimer LLB (Syd), solicitor 1951–1983, Sydney; Monash University colleagues present or past (including Professor Bob Baxt, Hope Ashiabor, Andrew Coleman, Pascal Kasimba, Dr James Mayanja, Paul Sugden and Kui Hua Wang); Monash University Law Library staff; Office of Fair Trading (NSW), (Qld), (NT); Lloyd Gould, University of WA; and Westpac Banking Corporation (Retail Legal) Group.

Paul Latimer

December 2008

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Chapter 1

Introduction to Business Law

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INTRODUCTION
(¶1-010 – ¶1-025)

¶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 many regulations which establish standards for manufacturing vehicles. Your very presence on a bus or train means you have contracted 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 consumer law and trade practices 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 – §1-340), 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), and is discussed in Chapter 2.

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.

Equity means the rules (equitable remedies) developed and administered by the Court of Chancery 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” (§6-400)
- “equity follows the law”
- “equity never wants a trustee” (§9-750ff)
- “equity will not assist a volunteer” (§5-040)
- “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” (§3-270).

Equity can grant an injunction (§6-410) or an order for specific performance (§6-400), and these are called “equitable remedies”.

Equity law continues and is now fused with the common law, and both systems are administered by the same courts. Equitable principles — eg concerning unconscionability (§5-730) — 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 (§2-230). The rule of law is a prerequisite for democracy.

(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 (§2-010)?

¶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 (§2-010).

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

THE LEGAL SYSTEM AND THE ADMINISTRATION OF LAW

(¶1-030 – ¶1-170)

¶1-030 The legal system and personnel

The legal system is the framework in which the law operates. It is created by us, the people, who elect representatives from among ourselves to meet together in parliament as lawmakers (MPs, politicians, legislators) to pass laws to make up the legal environment in which business is conducted.

The legal system is built in the culture in which we live and it absorbs the values of the culture. Our culture supports and expects the honouring of contracts, the compensation of injuries, the protection of person and property; it supports the constitutional formula of peace, order and good government (§1-475).

An effective legal system

The legal system “works” when its laws are:

- certain — based on stability and predictability
- flexible — able to adapt to new situations

- known — available by being published (§1-015; §1-370)
- reasonable — having widespread acceptance as fair, just and necessary.

For a legal system to “work”, its laws must be respected, observed, obeyed and the authority of the lawmaker must be respected and supported.

The people in the legal system

The legal system involves many people.

Those who make the laws

Law is made by the members of the Commonwealth, six state and two territory parliaments (legislators).

The senior law officer of the Commonwealth, state and territory parliaments is the Attorney-General, who is a member of parliament. The Attorney-General and the Attorney-General’s department provide the legal support for the government.

Those who apply the laws

The judges, tribunal members, magistrates, judicial registrars, registrars and their supporting administrations apply the laws.

Those who enforce the laws

Prosecution can be started by authorities such as the Director of Public Prosecutions (DPP) (§2-110; §2-140), Australian Competition and Consumer Commission (ACCC) (§8-725), Australian Securities and Investments Commission (ASIC) (§9-380), Australian Taxation Office (ATO), the Australian Crime Commission (§18-020) and environment protection authorities. Law enforcement involves corrective agencies (including prisons).

Those who advise on the law

Legal advisers include the legal profession (§1-040), Legal Aid Offices and community legal services.

Those who administer the law

In addition to the administrative staff supporting all of the above, the law is administered in areas such as debt collection and process service, and by registration authorities such as those registering companies (ASIC: §9-380), land (Land Titles Offices: §3-300), names, patents, trade marks and so on.

Those who research, write about and teach the law

This happens in schools, universities, continuing education, law reform agencies (§1-420), etc.

§1-040 The legal profession

The legal profession includes all those who have passed a professional law course at most Australian universities (usually LLB or JD) or, in addition in New South Wales, the Legal Practitioners Admission Board course (to be

contrasted with business law degrees which do not qualify a graduate for legal practice).

After graduation and usually following an apprenticeship (as an articled clerk, or by taking a short postgraduate professional practice or legal skills course such as that at the College of Law in Sydney), a law graduate may be admitted by the court to practise as a lawyer, legal practitioner, barrister *or* solicitor, or as a barrister *and* solicitor (depending on the jurisdiction).

Judges

At the top of the legal profession are the judges, tribunal members, magistrates and registrars who apply the law to make a judgment or decision. There are about 1,000 judges and magistrates in Australia.

Judges are appointed by the relevant government department, usually on the recommendation of the relevant Bar Council (representing the Bar), usually from the senior ranks of practising barristers. All lawyers are eligible for judicial appointment, and solicitors, law professors, senior public servants and politicians such as attorneys-general have been appointed to the bench.

The independence of the judiciary — and the whole legal profession — is important, and in most jurisdictions this is reinforced by judges' appointment to retirement age or for life. Judges are an independent branch of government and must be free from political interference:

“judges are meant to be hard to get at”.³

The legal profession

The division of lawyers/legal practitioners into barristers and solicitors follows the English pattern.

Solicitors

Solicitors are legal practitioners who have offices which the public can go to for legal advice on a whole range of matters.

Many solicitors are the general practitioners of the law, giving legal advice to clients and doing work such as:

- business law — all the topics in this book, like banking, competition, contracts, consumer law, finance and insurance
- conveyancing (transfer of land: ¶3-430)
- court work — appearances for clients especially in magistrates' courts, and acting as an intermediary between client and barrister if a barrister has been briefed (contracted)
- drafting wills and administering deceased's estates (¶3-700)
- workplace relations.

Some solicitors specialise in highly technical areas. Some specialise in advocacy and court work.