



John Carvan

Understanding the Australian Legal System

Fourth edition

LAWBOOK CO.

A THOMSON COMPANY

Understanding The Australian Legal System

by

John Carvan

LLB, Dip Ed

Fourth Edition

LAWBOOK CO. 2002

Published in Sydney by

Lawbook Co.

100 Harris Street, Pyrmont, NSW

First edition.....1992

Second edition.....1994

Third edition.....1999

Fourth edition2002

National Library of Australia

Cataloguing-in-Publication entry

Carvan, John.

Understanding the Australian legal system.

4th ed.

Includes index.

ISBN 0 455 21814 5.

1. Law - Australia. I. Title.

349.94

© 2002 Thomson Legal & Regulatory Limited ABN 64 058 914 668 trading as Lawbook Co.

This publication is copyright. Other than for the purposes of and subject to the conditions prescribed under the Copyright Act, no part of it may in any form or by any means (electronic, mechanical, microcopying, photocopying, recording or otherwise) be reproduced, stored in a retrieval system or transmitted without prior written permission. Inquiries should be addressed to the publishers.

All legislation herein is reproduced by permission but does not purport to be the official or authorised version. It is subject to Commonwealth of Australia copyright. The Copyright Act 1968 permits certain reproduction and publication of Commonwealth legislation. In particular, s 182A of the Act enables a complete copy to be made by or on behalf of a particular person. For reproduction or publication beyond that permitted by the Act, permission should be sought in writing from Ausinfo. Requests and inquiries concerning reproduction and rights should be addressed to the Manager, Legislative Services, Ausinfo, GPO Box 84, Canberra ACT 2601.

Publisher: Karolina Kocalevski

Senior Editor: Jessica Perini

Product Developer: Melinda Jollie

Sales and Marketing Manager: Sherlyn Moynihan

Designed and typeset in AGaramond and Univers, 11 on 12½ pt,
by Southern Star Design, South Tacoma, NSW

Printed by Ligare Pty Ltd, Riverwood, NSW

Understanding The Australian Legal System

Presented by



Australian Government

Australian Education International

澳大利亚驻上海总领事馆教育科学处赠

HEAD OFFICE: 100 Harris Street PYRMONT NSW 2009

Tel: (02) 8587 7000 Fax: (02) 8587 7100

For all sales inquiries please ring 1800 650 522
(for calls within Australia only)

INTERNATIONAL AGENTS & DISTRIBUTORS

CANADA

Carswell Co
Ontario, Montreal,
Vancouver, Calgary

HONG KONG

Sweet & Maxwell Asia
Hennessy Road, Wanchai

Bloomsbury Books Ltd
Chater Road, Central

MALAYSIA

Sweet & Maxwell Asia
Petaling Jaya, Selangor

NEW ZEALAND

Brooker's Ltd
Wellington

SINGAPORE

Sweet & Maxwell Asia
Albert Street

UNITED KINGDOM & EUROPE

Sweet & Maxwell Ltd
London

UNITED STATES

Wm W Gaunt & Sons, Inc
Holmes Beach, Florida

William S Hein Co Inc
Buffalo, New York

JAPAN

Maruzen Company Ltd
Tokyo

“To none will we sell, to none will we deny or delay,
right or justice.”

The Great Charter 1215

*Dedicated
with love and gratitude
to my parents
Ena and Jack Carvan*

Preface



More and more students are studying introductory legal subjects in Universities and Colleges. Many of these students come from non-English speaking backgrounds or are mature age students with varying levels of secondary education.

It became apparent to me while teaching students in these categories that there was a need for a textbook that would provide a pathway into the more detailed and generally excellent writings in introductory law subjects.

My hope for the first edition of this book was that students would treat it as preliminary reading for their prescribed texts. This would help them gain that pre-knowledge necessary for the study of law. That remains the purpose of this fourth edition.

There have been some modest changes. I have included material on legal reasoning and added a chapter giving a brief and general outline of negligence law.

I have based this text on the law of New South Wales but much of it is common throughout Australia. Where appropriate, I have noted those differences in the law that apply in the other States and Territories. The law is as I have found it at 30 June 2001.

Where applicable, I have included sample questions with suggested answers and self-testing questions.

I thank Melinda Jollie, Sherlyn Moynihan and Jessica Perini of Lawbook Co for their assistance with this fourth edition and Kay Carvan for her past help and encouragement.

My final thanks go to my children for their patience and understanding. The time that I have spent researching and writing the editions of this book rightfully belonged to them.

JOHN CARVAN
November 2001

Acknowledgments

The following extracts have been reprinted with the kind permission of

- **Butterworths Australia:** Australian Law Reports (ALR).
- **Council of Law Reporting of Western Australia:** Western Australian Reports (WAR).
- **The Incorporated Council of Law Reporting for England and Wales:** Appeal Cases (AC).
- **The Lawbook Co (part of Thomson Legal & Regulatory Limited):** Commonwealth Law Reports (CLR); Federal Court Reports (FCR).
- **Stevens & Sons, UK:** (M&W) English Reports.

The Lawbook Co., part of Thomson Legal and Regulatory Limited, is thankful to the publishers/authors above for allowing the reproduction of their Law Reports in this book. While every care has been taken to establish and acknowledge copyright, Lawbook Co. tenders its apology for any accidental infringement.

Table of Statutes



COMMONWEALTH

Aboriginal Land Rights
(Northern Territory) Act
1976: 106

Acts Interpretation Act 1901
s 15AA: 104, 106, 113
s 15AB: 106, 107

Family Law Act 1975: 65

Trade Practices Act 1974: 124,
136, 137, 138
s 51AB: 133
s 52: 124, 125, 133

War Crimes Act 1945: 3, 29
s 9: 3

UNITED KINGDOM

Australia Act 1986: 30, 31, 32,
33, 39

Australian Constitution Act
1900: 29, 34, 42

Australian Constitutions Act
1842: 28

s 51: 49, 55
s 51(vi): 55
s 51(i)-(xxxix): 50-51
s 76: 52
s 92: 52
s 109: 49, 54
Pt V: 50-51

Australian Courts Act 1828:
28

Colonial Laws Validity Act
1865: 28, 29, 30, 39
s 2: 39

Merchant Shipping Act 1894:
30

New South Wales Act 1823:
28

New South Wales Government
Act 1855: 28

Offensive Weapons Act
s 1: 102

Statute of Westminster 1931:
30, 33

NEW SOUTH WALES

Adoption Information Act

1990: 97, 114-118

s 2: 98

s 4: 99

ss 15-20: 98

Constitution Act 1902: 28

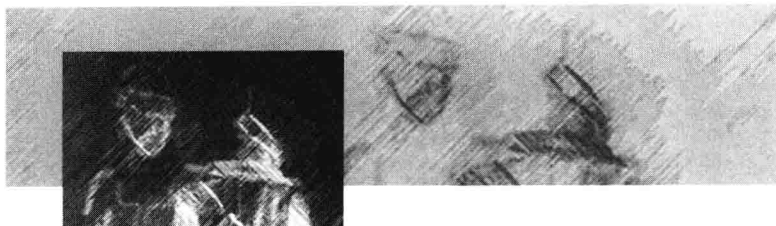
Contracts Review Act 1980: 132

Crimes Act 1900: 88

Frustrated Contracts Act 1978:
142Sale of Goods Act 1923: 135,
137, 138**WESTERN AUSTRALIA**

Police Act 1892: 101

Table of Contents



<i>Preface</i>	vii
<i>Acknowledgments</i>	viii
<i>Table of Cases</i>	x
<i>Table of Statutes</i>	xiii
 1 Studying Law.....	 1
2 The Sources of Australian law.....	23
3 The Law-Making Process.....	41
4 The Legal System.....	57
5 Precedent	77
6 The Interpretation of Statutes.....	97
7 Contracts and Commercial Dealings	119
8 Torts and the Law of Negligence	145
9 Some Basic Legal Concepts.....	157
 <i>Index</i>	 173

Table of Cases



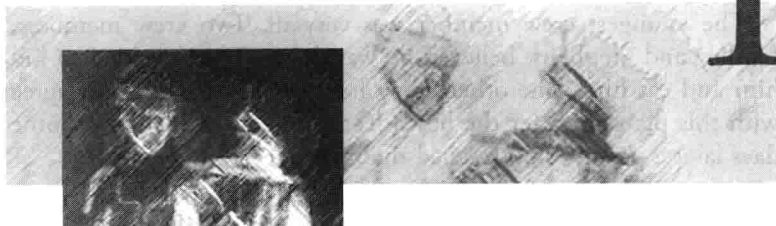
Adler v George [1964] 2 QB 7	102
Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129	100, 101
Armory v Delamirie (1722) 1 Strange 505; 91 ER 665	169
Attorney General v Waverley Council (1979) 38 LGRA 372	109
Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485	79
Baltic Shipping Co Pty Ltd v Dillon (1993) 79 ALJR 228	143
Bisticic v Rokov (1976) 135 CLR 552	30
Bolton, Re (1987) 162 CLR 514	104
Brodie v Singleton Shire Council [2001] 75 ALJR 911	152
Burnie Port Authority v General Jones Ltd (1994) 68 ALJR 331	155
Byrne v Van Tienhoven (1880) 5 CPD 344	124
Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256	122
Chapman v Hearse (1961) 106 CLR 112	151
Cheatle v The Queen (1993) 67 ALJR 760	71
Commercial Bank v Amadio (1983) 151 CLR 447	132
Cooper v Stuart (1889) 14 App Cas 286	27
Curtis v Chemical Cleaning Co [1951] 1 KB 805	138
D, Re [1976] Fam 185	4
David Jones v Willis (1934) 52 CLR 110	137
Donoghue v Stevenson [1932] AC 562	83, 85, 86, 89, 90-95, 148, 149, 155

Essanda v Finance Corp'n v Ltd v Peat Marwick Hungerfords (1997) 188 CLR 605	155
Esso Petroleum v Mardon [1976] 1 QB 801	131, 133
Felthouse v Bindley (1862) 11 CB (NS) 869	123
Fisher v Bell [1961] 1 QB 394	101
Grant v Australian Knitting Mills Ltd (1936) 54 CLR 49	155
Grey v Pearson (1857) 6 HLC 61; 10 ER 1216	102
Hadley v Baxendale (1854) 156 ER 145	143
Harvey v Harvey (1951) 68 WN (NSW) 241	111
Heaven v Pender (1883) 11 QBD 501	85, 86, 89
Heydon's Case (1584) 3 Co Rep 7a; 76 ER 637	102–103
Higgon v O'Dea [1962] WAR 140	101
Hilton v Commissioner of Taxation (1992) 38 FCR 170	105
Jaensch v Coffey (1984) 155 CLR 549	150
Koowarta v Bjelke-Petersen (1982) 153 CLR 168	13–17
Krell v Henry [1903] 2 KB 740	140
Langridge v Levy (1837) 2 M & W 519; 150 ER 863	84, 85, 86, 89
Leaf v International Galleries [1950] 2 KB 86	130, 133
Lewis v Averay [1971] 3 All ER 907	130
M, Re (1924) 26 WALR 15	112
Mabo v Queensland (No 2) (1992) 175 CLR 1	32, 36, 170
Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141	26
Panorama Developments (Guildford) v Fidelis Furnishing Fabrics [1971] 3 WLR 440	158
Pharmaceutical Society of Great Britain v Boots Cash Chemists [1953] 1 QB 401	121
R v Bourne [1939] 1 KB 687	35
R v Clarke (1927) 40 CLR 227	124

R v Davidson [1969] VR 667	35
R v Wald (1971) 3 DCR 25	35
Richardson v Austin (1911) 12 CLR 463	109
Roscorla v Thomas [1842] 3 QB 234	126, 133
Rose and Frank v Crompton [1923] 2 KB 261	120
Salemi v The Minister (1977) 14 ALR 1	109
San Sebastian Pty Ltd v The Minister (1986) 162 CLR 340	154
Saraswati v The Queen (1991) 172 CLR 1	104
Schroeder Music v Macaulay [1974] 1 WLR 1308	134
Shaddock v Parramatta Council (1981) 150 CLR 225	131, 154
Stewart v Lizards [1965] VR 210	109
Thornton v Shoe Lane Parking [1971] 2 QB 163	138
Wakeling v Ripley (1951) 51 SR (NSW) 183	121
Walker v New South Wales (1995) 69 ALJR 111	33
Waltons v Maher (1988) 164 CLR 387	128
Warumungu Land Claim; Ex parte Attorney General (NT), Re (1987) 77 ALR 27	106
Winterbottom v Wright (1842) 10 M & W 109; 152 ER 402	84, 86, 89
Wyong, Council of the Shire of v Shirt	150

Studying Law

1



CONTENTS

The meaning and nature of law	1
Theories of law	4
Classification of laws	5
The common law	10
What a court case is about	11
Legal research	13
Answering legal questions	20

THE MEANING AND NATURE OF LAW

It is not easy to define law. *Jurisprudence*, the philosophy of law, studies the meaning of law and the way legal systems work.

There are differences between law and justice, and law and morality, and between law as an idea and law as a legal system. As you continue your studies of law, you will find that these concepts do not always coincide.

Consider these two case studies.

Case study 1

In 1884 four crew members of an English boat were shipwrecked and cast adrift in a lifeboat for many days. They had only small amounts of food and water and these supplies soon ran out.

After seven days without food and water, the three adult members of the crew discussed what they should do. One crew member suggested that they should cast lots. The loser would be killed and the others would eat him. The others did not accept this suggestion.

The youngest crew member was very ill. Two crew members, Dudley and Stephens, believed he was dying. They decided to kill him and eat him. The other crew member, Brooks, did not agree with this plan but after the boy's death ate part of his body. Some days later a passing ship rescued the men.

Upon return to England the authorities tried the two men, Dudley and Stephens, for murder. *Murder* is the deliberate and unlawful killing of a human being. The two men were convicted of murder and received a death sentence. There was a public outcry and the government reduced this sentence to six months' imprisonment.

Think about some issues in this case.

1. Dudley and Stephens deliberately killed another human being. Should they escape punishment because the boy was dying anyhow, or because it was necessary to save their lives? Should necessity be a defence to murder? Can necessity be a defence to a lesser crime?
2. Should there be different degrees of murder? Should one type of murder have a different penalty to another?
3. The killing took place in the middle of the ocean. Normally legal systems do not operate outside their own country. Assuming this, did Dudley and Stephens break the laws of any country?
4. Brooks did not consent to the killing and did not participate in it. He did not attempt to prevent the killing and shared in the boy's flesh. Should he be punished? What kind of punishment should he receive?
5. What if the original plan to draw lots had been carried out? If the killing thus took place with the consent of the victim, would this have made a difference? Would there be any moral obligation by the person selected not to change his mind? Should the victim of a crime have the right to consent to the crime?