

Australian Business Law



CCH

a Wolters Kluwer business

31st Edition

Paul Latimer

2012



CCH

a Wolters Kluwer business

Australian Business Law

31st Edition

Paul Latimer



CCH AUSTRALIA LIMITED

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

www.cch.com.au

Book Code: 39353A

About CCH Australia Limited

CCH Australia is a leading provider of accurate, authoritative and timely information services for professionals. Our position as the “professional’s first choice” is built on the delivery of expert information that is relevant, comprehensive and easy to use.

We are a member of the Wolters Kluwer group, a leading global information services provider with a presence in more than 25 countries in Europe, North America and Asia Pacific.

CCH — *The Professional’s First Choice.*

Enquiries are welcome on 1300 300 224.

Cataloguing-in-Publication Data available through the National Library of Australia.

| | | | |
|-----------------------|---------------|--------------------|---------------|
| First published | August 1981 | 1998 edition | December 1997 |
| 1983 edition | December 1982 | 1999 edition | December 1998 |
| 1984 edition | December 1983 | 2000 edition | December 1999 |
| 1985 edition | December 1984 | 2001 edition | December 2000 |
| 1986 edition | December 1985 | 2002 edition | December 2001 |
| 1987 edition | December 1986 | 2003 edition | December 2002 |
| 1988 edition | December 1987 | 2004 edition | January 2004 |
| 1989 edition | December 1988 | 2005 edition | January 2005 |
| 1990 edition | December 1989 | 2006 edition | January 2006 |
| 1991 edition | December 1990 | 2007 edition | January 2007 |
| 1992 edition | December 1991 | 2008 edition | January 2008 |
| 1993 edition | December 1992 | 2009 edition | January 2009 |
| 1994 edition | December 1993 | 2010 edition | January 2010 |
| 1995 edition | December 1994 | 2011 edition | January 2011 |
| 1996 edition | December 1995 | 2012 edition | January 2012 |
| 1997 edition | December 1996 | | |

ISBN 978-1-921948-62-6

ISSN 0811-4781

© 2011 CCH Australia Limited

Published by CCH Australia Limited

All rights reserved. No part of this work covered by copyright may be reproduced or copied in any form or by any means (graphic, electronic or mechanical, including photocopying, recording, recording taping, or information retrieval systems) without the written permission of the publisher.

Printed in Australia by McPherson’s Printing Group

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.

I must acknowledge Monash University for providing facilities and a supportive working environment to make *Australian Business Law* possible under its “workload model”. *Australian Business Law* has always been one of Monash University’s best known law “outputs”. After more than 30 years, it remains a book written by the author alone. No chapters are farmed out to others to write or update. There is no unacknowledged research assistant or research team ghosting the book.

This 31st annual edition of *Australian Business Law* builds on last year’s COAG edition. All chapters have been revised for this new 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 2011 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 NSW Fair Trading on the annual editions back to the 1980s.

In the interests of accuracy and completeness, the 2012 edition of *Australian Business Law* also contains minor updates and revisions to almost every page.

The law is stated as at 7 October 2011.

Paul Latimer
Monash University
email: Paul.Latimer@monash.edu

CCH Acknowledgements

CCH Australia Limited wishes to thank the following who contributed to and supported this publication:

Managing Director: Matthew Sullivan

Director, Books: Jonathan Seifman

Publisher, Books: Andrew Campbell

Commissioning Editor: Kate Aylett-Graham

Editor: Joshua Smith

Production Team Leader: Lily Lim Lee Lee

Production Editor: Serene Lim

Sub-editor: Abel Ooi

Indexer: Adrian Leow

Cover Designer: Mathias Johansson

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 the Attorney General's Department, Canberra; ASIC; 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:

Australian Transaction Reports and Analysis Centre (AUSTRAC); Tony Smith, Charles Sturt University; Commonwealth Bank (General Counsel); Consumer Affairs (SA), (Tas), (Vic), (WA); Consumer Credit Legal Service (Vic) Inc; Garry Claxton, Curtin University of Technology; AA de Fina, arbitrator; Department of Employment, Economic Development and Innovation (Qld); Scott Hart, University of Sydney; Department of Justice (NT), (Vic); Institute of Chartered Accountants; 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) and Westpac Banking Corporation (Retail Legal) Group.

Paul Latimer
December 2011

Table of Contents

| | Page |
|---|-------|
| Preface | vii |
| Acknowledgements | viii |
| Chapter 1: Introduction to Business Law | 1 |
| Chapter 2: Crime in the Business World | 81 |
| Chapter 3: Property | 113 |
| Chapter 4: Tort in the Business World | 221 |
| Chapter 5: Formation of Contract | 291 |
| Chapter 6: Operation of the Contract | 417 |
| Chapter 7: Consumer Law | 487 |
| Chapter 8: Competition Law | 603 |
| Chapter 9: Business Structures | 659 |
| Chapter 10: Partnership | 765 |
| Chapter 11: Agency | 835 |
| Chapter 12: Business Names | 875 |
| Chapter 13: Business Finance and Bankruptcy Law | 885 |
| Chapter 14: Consumer Credit | 955 |
| Chapter 15: Bailment | 991 |
| Chapter 16: Cheques and Banking | 1,007 |
| Chapter 17: Insurance | 1,073 |
| Glossary | 1,119 |
| Key to Abbreviations | 1,129 |
| Table of Cases | 1,137 |
| Table of Statutes | 1,169 |
| Index | 1,183 |

CHAPTER 1

Introduction to Business Law

INTRODUCTION

| | |
|---|--------|
| What is law — the legal environment of business | ¶1-010 |
| The rule of law | ¶1-015 |
| Law and justice | ¶1-020 |
| Law, morality and society | ¶1-025 |
| E-commerce and Australian business law | ¶1-026 |

THE LEGAL SYSTEM AND THE ADMINISTRATION OF LAW

| | |
|---|--------|
| The legal system and personnel | ¶1-030 |
| The legal profession | ¶1-040 |
| Hierarchy of courts | ¶1-060 |
| Courts of summary jurisdiction | ¶1-070 |
| Intermediate courts | ¶1-080 |
| Supreme courts | ¶1-090 |
| Federal courts and tribunals | ¶1-100 |
| The Federal Court of Australia: www.fedcourt.gov.au | ¶1-110 |
| The High Court of Australia: www.hcourt.gov.au | ¶1-130 |
| Family Court of Australia: www.familycourt.gov.au | ¶1-140 |
| Abolition of Privy Council appeals | ¶1-150 |
| Challenging the bureaucracy: administrative tribunals | ¶1-160 |
| Challenging the bureaucracy: review of administrative decisions | ¶1-165 |
| Other administrative law remedies: the Ombudsman | ¶1-166 |
| Other administrative law remedies: freedom of information | ¶1-167 |
| Courts and tribunals: the right of appeal | ¶1-170 |

SOURCES OF THE LAW

| | |
|--|--------|
| Where does the law come from? | ¶1-180 |
| Sources of the law illustrated | ¶1-190 |
| Sources of the law: (1) legislation | ¶1-200 |
| Sources of the law: (2) case law — <i>Donoghue v Stevenson</i> | ¶1-350 |
| Case law: analysis of a law report | ¶1-360 |
| Case law: reporting law cases — www.austlii.com.edu.au | ¶1-370 |
| Case law: the <i>ratio decidendi</i> /proposition of a case | ¶1-380 |
| Case law: obiter dicta/non-binding observations of a case | ¶1-390 |
| Case law: legal cases as precedents | ¶1-400 |
| Case law: law-making by judges | ¶1-410 |
| Sources of the law: (3) Law Reform Commissions, inquiries, reports | ¶1-420 |

LEGAL PROCEDURE

| | |
|--|--------|
| Using the courts | ¶1-425 |
| Civil procedure | ¶1-430 |
| Debt recovery | ¶1-435 |
| Criminal procedure | ¶1-440 |
| Alternative dispute resolution (ADR) | ¶1-441 |
| Mediation | ¶1-442 |
| Commercial arbitration | ¶1-443 |
| Alternative dispute wrap-up | ¶1-444 |

REGULATION OF BUSINESS

| | |
|---|--------|
| Commonwealth and state Constitutions | ¶1-450 |
| Regulation of Australian business law 1788–1900 | ¶1-455 |
| The Commonwealth Constitution 1900 | ¶1-460 |
| Constitutional limits by the Commonwealth on the law- making powers of state parliaments | ¶1-470 |
| Constitution limits the law-making powers of the Commonwealth Parliament | ¶1-475 |
| Business regulation under the Commonwealth Constitution | ¶1-480 |
| The Australia Act 1986 | ¶1-485 |

INTERPRETATION OF STATUTES

| | |
|--|--------|
| Constitutional model of the separation of powers | ¶1-490 |
| The literal approach to statutory interpretation | ¶1-500 |
| The golden rule of statutory interpretation | ¶1-510 |
| The mischief rule for statutory interpretation | ¶1-520 |
| Purposive approach to interpretation | ¶1-530 |
| The contextual approach to interpretation | ¶1-535 |
| Use of extrinsic material for statutory interpretation | ¶1-540 |
| Rules of construction — general principles | ¶1-550 |

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 what we do everyday 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 – ¶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.

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” (§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) — 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 (§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 Dicey, AV, *Introduction to the study of the law of the Constitution*, London, Macmillan, 10th ed, 1964, pp 202–203.

¶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

¶1-026 E-commerce and Australian business law

*"How will you cope when everything is digital?"*³

The enacted law (statutes, legislation) and the unenacted judge-made case law that make up Australian business law have adapted to and embraced the fast-developing world of electronic commerce and the internet. This 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 (¶2-300)
- acceptance of an offer by fax, email and SMS (¶5-045, ¶5-320)
- the computerisation of financial markets, including the development of SEATS (Stock Exchange Automated Trading System) for share trading and CHES (Clearing House Electronic Subregister System) for share ownership (¶5-030)
- the confirmation that email falls within the Commonwealth's power over "postal services" under s 51(v) of the Constitution (¶1-475; ¶7-220)
- electronic banking — financial institutions have been involved in closed-system electronic commerce with their customers for the transfer of funds for many years for wholesale and retail transactions, including ATMs and EFTPOS terminals (¶16-650ff).

At a broader level, electronic commerce refers to all business activity carried out with the aid of electronic devices, including telephone, fax, email, ATM and EFTPOS, which includes any transaction involving a card that uses electromagnetic data such as a prepaid phone card.

Very little data created today would not be in electronic form, and Australian business law has been revolutionised by e-commerce.

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.

For example, with electronic publishing most legal material is available electronically on databases such as www.austlii.edu.au and www.cch.com.au (¶1-370).

E-administration of the law

Information technology has revolutionised the administration of the law.

- The electronic court (e-court) allows electronic filing, document management and imaging of court processes, including registration, document lodging, e-searching, listing of cases for hearing, e-trials, in-court processing of judgment orders and outcomes and enforcement procedures. Service of documents has been allowed by Facebook (¶1-430). Initiatives include NSW's Online Court (ecmCourt — electronic case management) which is like an internet bulletin board where parties can post submissions asking for directions or documents. Online Court has replaced the need for going to court for straightforward matters. It is run online, all the parties can participate, and judicial officers can make court orders.⁴
- Internet access among, and electronic data transfer between, courts and tribunals, law enforcement agencies such as the DPP and the legal profession continues to expand.
- Complex information can be processed and recorded more quickly.
- Evidence can be taken from absent witnesses by audio-visual technology.
- Judgments are published on the internet.
- Courts and tribunals have their own websites.

There have been many warnings that lawyers and law firms who do not adapt to information technology (IT) will be obsolete.⁵

Will IT make legal advice redundant?

As an important regulator of e-commerce in Australian business law, ASIC (¶9-380) aims to ensure that:

- business regulation is technology-neutral
- regulatory requirements for e-commerce are no more onerous than those applying to traditional business
- consumers have at least the same levels of protection as with traditional business.

Geo-identification

It is said that the internet is “borderless”, but a contract made online — or defamation online — are sourced within a legal jurisdiction somewhere. Geo-identification helps to identify just where the internet user is located.⁶

⁴ eg *E-courts* (2006) 80 ALJ 282; *E-discovery: cheap and cheery or billion dollar industry* (2009) 83 ALJ 284.

⁵ eg Susskind, Richard, *The end of lawyers? Rethinking the nature of legal services*, OUP, 2008.

⁶ Svantesson, D, Geo-identification and the internet — A new challenge for Australia's internet regulation (2007) 14(2) *Murdoch University e-law journal* 155; Hogan-Doran, J, *Jurisdiction in cyberspace: the when and where of on-line contracts* (2003) 77 ALJ 377.

Guidelines for Electronic Commerce (2006)

The *Guidelines for Electronic Commerce* (available at www.treasury.gov.au) aim to improve business awareness of the main issues to be considered when dealing with consumers through e-commerce. This aims to increase consumer confidence in business to consumer e-commerce — focusing on protection, information, choice and redress — with guidance to businesses on matters such as:

- accessibility, disability access
- advertising and marketing
- dispute resolution
- engaging with minors
- fair business practices
- information — contractual — disclosure of terms and contracting
- information — identification of the business
- payment
- privacy, and
- security and authentication.

Compliance with the *Guidelines for Electronic Commerce* is monitored by ASIC (¶9-380).

Spam Act 2003 (Cth)

The development of e-commerce has led to a large amount of spam on the internet.⁷ Spam involves invasion of privacy (including the trading of addresses), misleading or deceptive conduct and unfair practices under the Australian Consumer Law (¶7-250; ¶7-460), and illegal or offensive content.

Spam is especially common in areas like financial scams, pornography, promotions for dubious “health” products and virus-borne spam.

Spam threatens the effectiveness and efficiency of e-commerce because it is illegal, offensive, unscrupulous and may involve tactics that would not be commercially viable if they were not electronic. Spam imposes costs on the recipient.

The *Spam Act 2003* (Cth):

- regulates commercial email and other types of commercial electronic messages
- bans unsolicited SMS (Short Message Service: ¶5-320) and MMS (Multimedia Messaging Service) messages that advertise, offer or promote goods or services or suppliers of goods or services (s 16)
- requires that commercial electronic messages must include accurate sender information (s 17)
- requires that commercial electronic messages must contain a functional “unsubscribe” facility (s 18)
- prohibits the supplying, acquiring or using of address-harvesting software and harvested-address lists (s 20–22)

⁷ Spam is unsolicited commercial electronic messages, which range from commercial advertising and offensive material to messages which are part of criminal and fraudulent activity.

- provides for remedies for breaches of the Act including civil penalties, injunctions and enforceable undertakings (compare ¶17-520) (Pt 4-6).

Courts will also be able to compensate businesses which have suffered as a result of spam. For those organisations that choose to ignore the law, the penalties could be significant as the courts can award damages of up to \$1.1m per day in the most severe circumstances.

Enforcement of the *Spam Act 2003* (Cth) is in the hands of the Australian Communications and Media Authority (ACMA) (www.acma.gov.au).



Case example: Spam Act

DC Marketing⁸

ACMA fined DC Marketing (a mobile phone marketing company) \$149,600 for making 102 calls to mobile phones only to hang up and leave a "missed call" message. When mobile phone owners returned the calls, they received marketing information from DC Marketing. Consumers would not know who the missed call was from, so when they returned the call to DC Marketing, they were paying to receive DC Marketing's unsolicited marketing messages.

This case is a reminder of the importance of a Spam Act compliance program in modern businesses.

Internet Industry Spam Code of Practice (2006)

ACMA has registered a code of practice for internet service providers and email service providers with the Australian Communications Authority. The Code aims to set up industry-wide practices and procedures relating to spam to balance industry interests and viability, and end user interests. The Code is available at www.acma.gov.au.

Do Not Call Register Act 2006 (Cth) www.donotcall.gov.au

This Act sets up the Do Not Call Register so that individuals can block unsolicited and unwanted telemarketing calls to their home or mobile phone number.

The Act provides details on how to register, stops calls to registered numbers and sets out civil penalty offences for breaches enforceable by ACMA, including issuing infringement notices.⁹

E-commerce: future directions

The world continues to shrink as people around the world increasingly connect through the internet, technology improves and e-commerce expands. There is more efficiency for less cost.

Many business law issues arise with these developments.

⁸ ACMA, Enforceable undertaking, 29 August 2007.

⁹ Telemarketing company FHT Travel Pty Limited and its sole director Yvonne Earnshaw incurred a civil penalty of \$120,000 for breaching the *Do Not Call Register Act 2006* (Cth) by making more than 12,000 marketing calls to people on the Do Not Call Register: ACMA, 16 June 2011.