

Principles of Business Law Notes

THE ORGANISATION OF LAW AND GOVERNMENT IN AUSTRALIA

The nature, origins and organisations of law

- Law provides **authoritative rules** for how we are to behave.
- Law consists of the **rules of conduct and organisation** that the government of a particular country (or state) **recognises and enforces** as law
- The laws of many modern states originate historically in the development of **Roman civil law and English common law**.
- **Common law** is used in most of the states of the United States of America, the English speaking parts of Canada, and many countries in Africa and Asia
- Rules of law can be classified, depending of what type of situation or conduct they regulate or refer to.

Categories of law

Jurisprudence

- Jurisprudence is the **science (or philosophy) of law**
- It is concerned with matters such as the nature, origins and purpose of law, the way law works and the general principles which the law ought to follow
- Jurisprudence is a very broad category of law.

International law

- International law is concerned with the agreements that are entered into between sovereign states and internationally observed customs, treated as binding on them.
- It also includes the established customs of inter-state behaviour.

National law

- National law is a general term that refers to all the law that is applied with the borders of a particular state (or country)
- **National public law**
 - **Constitutional law:** the organisation, powers and processes of government.
 - sets out how the government of a state or territory is established and organised
 - establishes the different organs (institutions) of government, lays down what powers these organs have, and what processes they must follow
 - **Administrative law** provides the rules that govern the processes of official decision-making
 - **Criminal law** prohibits conduct that is considered harmful to the general community and provides for punishment by the state of persons found guilty of breaking the rules of criminal law
- **National private law**
 - **Civil law** is concerned with the creation and enforcement of private legal rights and duties between individuals. It is a very general category of law.
 - **Tort law** creates liability for harm that is wrongfully caused by one person to another person or to their property. Its rules allow the person harmed to claim compensation, through the courts, from the wrongdoer.

formality.

1. Procedure in the House Review

- Initiation, First Reading, Second Reading, Committee and Third Reading - The procedures that were followed in the House of Origin are repeated in the House of Review.
- Un-amended Bills - If the House of Review passes a Bill without any amendments, the Bill is turned to the House of Origin and the proceeds to the final stages.
- Amended Bills - If the House of Review passes the Bill, but with amendments, the Bill is returned to the House of Origin for reconsideration. The House of Origin may accept or reject amendments. If agreement cannot be reached between the Houses, the Government can either abandon the legislation or resolve the deadlock by calling a general election.

2. Final stages before the Bill becomes operational as law

- Royal Assent - The Bill is sent to the Queen's representative to receive Royal assent.
- Publication - The Act is published in the Government Gazette.
- Commencement - The Act begins operating as law.

● The nine legislatures in Australia with constitutional power to make law:

	Lower House	Upper House
Commonwealth	House of Representatives	Senate
New South Wales	Legislative Assembly	Legislative Council
Victoria	Legislative Assembly	Legislative Council
Queensland	Legislative Assembly	
South Australia	House of Assembly	Legislative Council
Western Australia	Legislative Assembly	Legislative Council
Tasmania	House of Assembly	Legislative Council
Australian Capital Territory	Legislative Assembly	
Northern Territory	Legislative Assembly	

The legislative process

- Criminal law is not among the matters in which the Commonwealth government can make laws on.
- Different types of Acts
 - **Amending Act** - These Acts make changes to provisions in existing legislation.
 - **Repealing Act** - These Acts repeal existing rules of law and can also repeal common law rules.
 - **Original Act** - These are entirely new Acts which create new law.
 - **Codifying Act** - These Acts gather all the law (both common law and statute law) on a particular subject or matter and re-enacts it in new statutory form. This is useful when the legislature wants to recognise and clarify what has become a complicated

SOURCE OF LAW: CASE LAW

Case law as a source of law

- Case law is created when the courts decide a case, which then becomes a **precedent for similar cases that arise in the future.**
- When judges decide new cases, they routinely refer to past court decisions and use them as a guide.
- When judges follow the previous decisions that the courts have made in the past, they are taking them as 'precedents'. In other cases, they decline to do so.
- Case law is law made by the courts.
- English case law was made by the courts of England.
- Historically English courts were divided into what were known as 'common law courts' and 'courts of equity'.
- The common law consists of the rules of law that were developed by the King's judges and that were applied uniformly throughout the whole of England, displacing earlier local laws and customs.
- Equity consists of the rules of law that were developed by the Court of Chancery, a court that was established to hear and decide certain particular types of case and appeals from the King's common law courts.
- The Court of Chancery gave **particular consideration to notions of fairness and justice when deciding appeals.**
- The word 'equity' which means fairness reflects the purpose of the Court of Chancery.
- **Common law is made up of the decisions of both the common law courts and courts of equity. However, it is the common law that makes up the greater part of case law.**
- In Australia, the various courts established in the Commonwealth, the states and the territories are not separated into common law courts and courts of equity. Instead, they draw on the established principles and rules of both to decide new cases.
- **Court hierarchies in Australia:**

High Court of Australia - Highest court in all jurisdictions

Cth	NSW	Vic	Qld	SA	Tas	WA	ACT	NT	NI
Full Court of the Federal Court	Court of Appeal Court of Criminal Appeal	Court of Appeal	Court of Appeal	Full Court of the Supreme Court Court of Criminal Appeal	Full Court of the Supreme Court Court of Criminal Appeal	Court of Appeal	Court of Appeal	Court of Appeal Court of Criminal Appeal	Federal Court of Australia
Federal Court of Australia	Supreme Court (Various divisions)	Supreme Court (Various divisions)	Supreme Court (Various divisions)	Supreme Court (Various divisions)	Supreme Court (Various divisions)	Supreme Court (Various divisions)	Supreme Court (Various divisions)	Supreme Court	Supreme Court
Federal Circuit Court	District Court	County Court	District Court	District Court		District Court			
	Local Court	Magistrates Court	Magistrates Court	Magistrates Court	Magistrates Court	Magistrates Court	Magistrates Court	Magistrates Court	Court of Petty Sessions

- in what is called a 'hierarchy' of courts.
- **Commonwealth, state and territory courts exist in a hierarchy within their own separate jurisdiction. Previous decisions of a particular court are only potentially binding on courts lower down in the same hierarchy,**

Precedents that are binding

- The previous decision of a court will be **binding** on a court that is deciding a new case only when:
 - The **material facts** of the two cases are **sufficiently similar** and cannot be distinguished; and
 - The **previous decision** is a decision of a **superior court** in the same court hierarchy as the court deciding the new case.
- Even if a previous decision is **not binding**, it might, on its merits, be treated as '**persuasive**' and treated as providing a suitable rule of law. This is possible even if the previous decision is not a decision of an Australian court.
- 'Persuasive' means that a court is inclined to accept that the non-binding precedent is correct in principle and that it should therefore be followed.
- Because of the close ties between English and Australian law, Australian courts also often choose to follow the persuasive precedents set by English courts.

The '**ratio decidendi**' of a case

- The **decisions** that courts make are published in written reports.
- Essentially, it is the ratio decidendi of the earlier court that is binding on the later court.
- The ratio decidendi of a case consists of the **material facts** which define **the type of situation** being considered by the court, and the **particular rule of law** which the court has used to resolve the issue raised by those facts.
- The ratio decidendi is best regarded as having two components:
 - The **material facts** which define the type of situation being considered by the court; and
 - The **particular rule of law** which the court has used to resolve the issue raised by those facts.
- When delivering judgement, a court does not simply state the ratio decidendi. A judgement usually includes some explanatory discussion, historical perspective and an account of the judge's reasoning, which are parts outside of the ratio decidendi. They are referred to as **obiter dicta (meaning 'surrounding words')** to distinguish them from the essential facts and rules of law on which the outcome of the case was decided.

Information in law reports

- When a court has heard and decided a case, the judges record their decision and reasons in a **written 'judgement'**, which is then compiled into a report of the case, known as a '**law report**'.
- Law reports make it possible to find out how previous cases were decided.
- Law reports contain the facts of a case, the rule applied by the judges and their reasons to their decision.
- Case names

- **bound to it.**
- An **informal agreement** is legally binding only if at the time the agreement was made, **each party gives something in exchange for what they are getting.**
- A formal contract is one that is executed in the form of a deed, that is, in accordance with the special requirements of a deed.
- A deed must not only be in writing, but must be signed, witnessed, sealed and a copy delivered to each party.
- **Formal contracts do not need to be supported by consideration, but informal contracts must be.**

Consideration

- Whatever is given by each party at the time the agreement was made, the exchange for what they are getting is called 'consideration'.
- Whatever is given in exchange for a promise **does not have to be of equivalent values.**
- Consideration must be **at least 'real' rather than illusory.**
- A valuable consideration, in the sense of the law, may consist either in **some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given suffered, or undertaken by the other.**
- **Past consideration is not good consideration.**
- **Executed consideration** is something done in the expectation that a binding promise to pay for it will be made sometime later and is **not sufficient** to make a later promise legally enforceable.
- For executed consideration, the courts treat unilateral contracts as a special case.
- **A practical benefit as consideration counts as good consideration even if consideration by the other party is already due.**
- A compromise based on a genius belief (even if possibly incorrect) can count as good consideration.
- Agreement is sometimes called 'consensus ad idem' (a meeting of the minds)
- A person making an offer is referred to as the '**offeror**'. The person to whom an offer is made is called the '**offeree**'.
- Advertisements are more likely to be construed as an invitation, asking potential customers to make an offer to buy (an **invitation to treat**).
- **Acceptance by post takes effect when the letter is posted**, not when it is received.
- **Acceptance by fax takes effect when it is received.**
- If the person to whom the communication was sent to designated an information system (such as an email address) for the purposes of communication, the receipt takes place when the communication **reaches** that system. If not, the receipt takes place only when the communication **comes the addressee's attention.**
- An act can only operate as acceptance of an offer if the person acting knows of the offer and acts in expectation of receiving what was promised.
- Silence is not consent.

THE CONTENTS OF A CONTRACT

Terms, opinions, puffery and representations distinguished

- **Statements not intended to be binding** are called "**representations**".
- Because representations are **not terms of the contract** there is **no contractual liability** if a representation proves untrue (misrepresentation). However, liability for misrepresentation may exist in tort law.
- **Opinions are not legally binding** as they are too subjective
- **Puffs or puffery are not enforceable** as they are without any real or measurable substance.

Express and implied agreement to terms

- Terms recognised as implied ad hoc must satisfy the requirements:
 - The term is **sufficiently obvious** that a suggested term was agreed to without being expressly stated.
 - The suggested term must be **reasonable and fair**.
 - It is **needed to make the contract workable or commercially complete**.
 - The term **can be clearly expressed**.
 - It is **compatible with the expressly agreed terms** of the contract.

Terms that exclude or limit liability

- **The courts will give effect to limitation and exclusion of liability clauses** to the extent that they are **properly incorporated** into the contract, and to the extent that their meaning is **clear**.
- Limitation and exclusion of liability clauses are intended to operate within the context of the agreement, and **do not extend to circumstances that fall outside of the four corners' of the agreement**.
- Such terms will be enforced by the courts provided that they are properly included in the contract and are **unambiguous**. But courts will **interpret them as narrowly as possible**.

Proving the existence of agreed terms

- When a written contract appears on its face to be a complete agreement, the courts will presume that the parties intended it to contain all the agreed terms. Therefore, further evidence of additional oral terms won't be allowed.
- **The parol (or oral) evidence rule forbids leading evidence of orally agreed terms when the contract in question is recorded in writing and appears complete.**
- The benefit of the parol evidence rule is that **it gives certainty as to agreed terms** when contracts appear to be completely expressed in writing.
- If enough terms are recorded to appear to be a complete and workable agreement, the parol evidence rule comes into operation.
- If what was agreed orally is of **great importance** in the circumstances **or** the sort of term that would **usually be found** in that type of agreement, **the court may conclude that oral undertaking was intended to be a part of the contract**. Hence, the parol evidence

- **Importance of the breach**
 - **Breach of a condition - justifies termination** if performance if the non-defaulting party wishes
 - **Breach of a warranty - does not justify termination** of performance
 - **Breach of an innominate term - justifies termination ONLY IF the breach substantially deprives the plaintiff of an intended benefit of the contract**
- **Non-performance - justifies termination** of performance
- **Partial performance** (that is less than substantial performance) - **justifies non-performance only if there is partial performance of one or more conditions in the contract**, or if the partial performance gives rise to a **sufficiently serious breach of an innominate term**. However, partial performance of a warranty, or performance that amounts to less than a serious breach of an innominate term, does not justify termination of performance.
- **Substantial performance - does not justify termination** of performance
- **Hidden defects - justifies termination** of performance **ONLY IF** the hidden defects amount to a **breach of condition, or to a serious breach of an innominate term**.
- **Late performance - does not justify termination** of performance as promises in a contract are treated as non-essential terms (warranties) **UNLESS intended otherwise**
- **Anticipatory breach - justifies IMMEDIATE termination** of performance, even before performance is actually due, **ONLY IF** there is an anticipatory breach of an **entire contract, of condition or a repudiation of an innominate term which would amount to a serious breach**.
 - However, the non-defaulting party may elect to continue with the contract despite a serious anticipatory breach, hoping that performance will be made when it becomes due.
 - A party who wishes to terminate performance on grounds of anticipatory breach must decide to do so within a **reasonable period of time**.
 - **A decision to terminate must be communicated clearly to the other party by words or conduct**.
 - **A decision cannot be reversed** unless there is another breach.
- **The decision to terminate performance**
 - Even if the non-defaulting party terminates performance of the contract, he is still **entitled to claim damages** from the defaulting party on grounds of breach of contract
 - Termination of performance does not wipe out the entire contract. It only **puts an end to the defaulting party's right to discharge outstanding obligations** by performing them. It follows from this that any outstanding obligations remain enforceable at law, so that the non-defaulting party has a contractual right to claim damages for the defaulting party's breach of contract. The payment of damages has the effect of discharging these obligations, in place of actual performance.
 - A decision not to terminate performance of a contract is **binding** on a non-defaulting party if the decision is made with knowledge of the facts that gave rise to the right to terminate, even if the non-defaulting party had not sought legal advice and did not know of their right to terminate.

- **particular occasion** by a person with who they have a relationship and in whom they have **placed their confidence and trust**.

Unconscionable dealing

- While a degree of inequality must be tolerated, **conduct that is contrary to good conscience is not tolerated**.
- The word 'conscience' means the inner sense of what is right or wrong in one's conduct or motives.
- Unconscionable conduct may arise when the **inequality between contracting parties is serious and obvious**, and the **stronger party takes advantage** of this to an extent that good conscience should not allow.
- Even if a party suffers from a disability that seriously diminishes his bargaining power and his ability to judge what is in his own best interest, it is unlikely that the contract be set aside on the grounds of unconscionable dealing if it was not made obvious to the other party.
- If a person was properly informed and able to judge what was in her own best interests, the contract would probably not be set aside. This could be obtained by **getting legal advice before agreeing to the legal obligations**.
- If a **spouse** giving a guarantee did not understand its effect, and gained no financial benefit from the undertaking; and the creditor failed to ensure that the transaction had been properly understood, then the transaction **will be set aside as void**.

Mistake

- There are three types of mistakes:
 - **Mutual mistake** - a situation where the parties to a transaction think they have reached agreement but it later becomes apparent that, at the relevant time, each of them had a **different mistaken belief**.
 - **Common mistake** - a situation where the parties reach agreement, but that agreement is based on some assumed fact or facts about which they are **both wrong**.
 - **Unilateral mistake** - a situation where **only one of the parties is mistaken** about some assumed fact, while the other knows the true facts
- **Mutual mistakes**
 - When because of some **ambiguity in the words used, or because the parties are at cross-purposes** for some reason, there is **no objective 'meeting of the minds' (consensus), then no contract is created: the agreement is legally void**.
- **Common mistakes**
 - To decide whether the contract is valid despite a common error, the courts ask whether it can be inferred from the known facts that the agreement was **conditional on the truth** of the mistaken belief. **If the parties would not have entered the contract if they had known the truth, the agreement is voidable**.
 - **When the contract is declared void, performance must be reversed**.
 - Since mistakes about quality are easily made, the common law is reluctant to treat the agreement as voidable unless the error 'makes the thing contracted for

Power of attorney

- The phrase '**power of attorney**' means a **formal, written appointment and authorisation of an agent by a principal**. A power of attorney is not necessary in every case, but is required in some special cases, for example, where an agent is appointed for a period of more than one year.
- An **enduring power of attorney** is used to appoint an agent to act on behalf of their principal **even when the principal becomes unable to make his/her own decision**.

End of agent-principal relationship

- If the principal **loses mental capacity**, the principal-agent relationship automatically dissolves (unless an enduring power of attorney is used)
- If either the principal or the agent **dies**, the contractual relationship ends.
- The agency dissolves if either the principal or the agent **withdraws** from the contract.

Irrevocable agency

- An agency is said to be **irrevocable** when the principal and agent agree that the **agent's authority** to represent the principal **cannot be withdrawn for a specified period**.
- In fact, even when an agency power is agreed to be irrevocable, the principal can effectively revoke it, and bring the power of representation to an end. However, in these circumstances the principal will be liable to the agent for breach of contract.
- An agency power is **only truly irrevocable if that power was granted to guarantee some interest of the agent**, such as a payment due by the principal to the agent: in such cases the agency power cannot be revoked.

Definitions Section

- ◆ **Ab initio** - from the outset
- ◆ **Administrative law** - law on the processes of official decision-making
- ◆ **Agency law** - law which regulates the ways in which powers of representation are given by one person to another, and regulates the relationships between the persons involved
- ◆ **Amending Act** - an Act that make changes to provisions in existing legislation
- ◆ **Anticipatory breach (or repudiation)** - a breach that occurs before performance is actually due, occurring either when a party indicates in advance that they will not perform when performance is due (i.e. they repudiate their obligations) or when they fail to do what is necessary to prepare for performance so that it is obvious in advance that a breach will occur
- ◆ **Appeal** - if the decision of one court is taken to a higher court for the earlier decision to be reconsidered
- ◆ **Australian Consumer Law** - legislation that, since 1 January 2011, applies uniformly throughout Australia for the purpose of protecting consumers in their dealings with suppliers, manufacturers and imported of goods and services. This legislation replaces the older consumer protection legislation if the Commonwealth, states and territories, most notably the Trade Practices Act 1974 (Cth)
- ◆ **Bill** - the completed draft of a proposed law, written by the Office of Parliamentary Counsel
- ◆ **Business law** - a specialist category of law, collecting together the rules of law that are particularly elegant to business activities
- ◆ **By-laws** - laws made by local councils
- ◆ **Case laws** - laws made by judges in the course of deciding a case. Also known as 'common law'
- ◆ **Civil law** - a very general category of law that is concerned with the creation and enforcement of private legal rights and duties between individuals
- ◆ **Coalition** - when two or more political parties join forces to form a majority in the lower House of Parliament
- ◆ **Codifying Act** - an Act that gathers all the law (both common law and statute law) on a particular subject or matter and re-enacts it in new statutory form
- ◆ **Commencement date** - the date in which legislation comes into effect
- ◆ **Common error** - a situation where the parties to a transaction share the same mistaken belief
- ◆ **Common laws** - laws made by judges when deciding a case
- ◆ **Complete performance** - doing everything required by the terms of the contract, thus, fully discharging the obligations created by the contract
- ◆ **Condition** - a term in a contract that is of fundamental importance, and without which the person for whose benefit those benefit those terms exist, would not have entered into the contract
- ◆ **Consequential (remote) loss** - loss caused by a breach of contract, but only indirectly, which is claimable only if it can be shown that the parties must have contemplated such losses as the probable consequence of a breach. Not all consequential losses are