

- **Party autonomy:** Business people should be free to make their own private law (through contracts etc). Should be freedom under the law including ability to fetter ones own freedom + contractual undertakings help secure predictability.
- **Predictability:** Essential in commerce as many standardised + high value transactions.
- **Flexibility:** Allows development of law in accordance with changing needs of people
- **Self-help:** self-help remedies to obviate the need to go to court.
- **Reciprocity of Rights:** Idea of exchange of burden and benefit but also the idea of equality of burden procedurally and substantively. Adapted from Church law.

The Australian Perspective:

- Laissez faire attitude aimed at protecting freedom of contract based on ideological assumptions of the amoral neutrality of contract law + equality of bargaining power
- Model based on conscience + morality + fair price for goods/services
- Legal Developments include wide federal powers, more regulatory bodies including ACCC, ASIC, APRA, drift from reliance on UK law, increase in consumer law.
- **Individualised Justice:** We can no longer say in all but exceptional cases the rights + liabilities to a contract can be discovered by reading it. Changes mean courts are more ready to imply terms into contract + use discretionary powers. Heydon J
- Excessive discovery, expert reports etc have lengthened litigation
- Federal court now has exclusive jurisdiction in tax, bankruptcy + IP law.

Week 2: Commercial Law in Theory and Practice: Relational Contracting

Relational vs Classical Contracts:

- Critics of legal profession note that lawyers induce mistrust + suspicion + deflect citizens candid responses into socially destructive gaming
- From ex ante perspective we can conclude lawyers are a crucial function of capitalism
- Stuart Macaulay: Non-contractual relationships in business- empirical study based on interviews of 48 companies + 6 firms. What secures performance of business dealings isn't threat of law enforcement but threat of termination of business r'ships.
 - o Many businesses see contracts not as binding obs but as expressions of intent
 - o McNeil + Bernstein- contractual model based on expectations + reliance
 - o Detailed contracts might have negative effect on business relationships as they show distrust and prevent flexibility in the ongoing management of a r'ship
 - o Businessmen don't want to perform obs to the letter + prefer vagueness
 - o Threat of litigation has detrimental effect on r'ship + bringing action costs time + \$
 - o Commitments must be honoured, 1 ought to produce good product + stand by it.
 - o Lawyers play a role of last resort to be avoided when possible + only call in lawyers when a r'ship has irretrievably broken down.
 - o Business people place heavy reliance on good will and unwritten law/custom- this is referred to as **relational contracting**.

- Trade was based on reputation networks that spread info about a trader's past
- Campbell/Harris: Classical theory assumes contractual promises are legal expression of intentions of rational, utility-maximising people making discrete exchanges in perfectly competitive markets
- Long term r'ships not based on individual opportunity maximisation but on conscious cooperation analogous to partnership
- Utility maximisation achieved through long-term cooperative behaviour manifested in trust + not reliance on obs specified in advance.
- Classical contract theory assumes parties turn to contractual remedies if breached as it gives them best return. Evidence says parties rarely avail themselves of legal remedies even if it gives them gain as they rely on vague norms of fairness.

Down Side of Relational Contracting:

Posner: social costs to relational exchanges include:

- Possibility of cartel development + creation of barriers to competition
- Relational interaction can serve as a basis for collusion in restraint of trade

Goldwasser and Ciro:

- 2 sources of commercial governance have different foundations. Self-imposed norms have self-interest and profit maximisation as their foundation whereas doctrinal norms are aimed squarely at regulating conduct + reinforcing standards of good behaviour.
- Profit maximisation and long-term economic interest considerations play a significant role but only alongside friendship, altruistic desires, relationships, reputation etc.
- Ss 18, 20, 21 & 22 CCA- law fills in to regulate non-legal norms of trust/relationships side of contracts where appropriate.

Extra- Legal Influences:

- **Trade & Custom:** Lisa Bernstein on dispute res in NY diamond district. Arbitration in DDC trading guide requires diamond club members to use club arbitration process over legal mechanisms. Central forum operates as reputation guarantee, cartel control, reputation crucial, arbitrators have specialised industry knowledge, secrecy paramount
- **Tokyo Tuna Court:** speed + adjudication of disputes critical as fish perishable. Formal state-backed resolution process is fast + inexpensive. Effective, creates + preserves order in market (located in market + is easily accessible). Fosters not damages r'ships. Substantive rules on remedies that can be granted, prescribes system to choose judges, appeals into formal legal system are possible. Judges paid by private parties not Gov.
 - Somewhat resembles staple courts of early UK. But jurisdiction differs- unlike tuna court which controls few cases, lex mercatoria was not targeted at particular kind of business + generally seen as largely autonomous from the state.
 - Tuna Court lessens market tension + negative feelings that accompany litigation