

**Lecture 1 – General Introduction**

**Law:** provides authoritative rules for how we are to behave.

**Legal meanings** refer to the particular meaning or significance that words or phrases have in a specific area of law.

**Commonwealth of Australia** – 6 states and 10 territories

**6 states** – NSW, Qld, SA, Tas, VIC, WA

**Mainland territories** – Australian Capital Territory, Northern Territory

**External territories** – not self-governing, governed directly by federal government

**Constitutions** – Written documents, formally enacted as law

Resemble the **British model of Govt.** – the “Westminster” system of Govt

C.A has its own constitutions, so does each Australian state

**9 separate govt** with law-making powers – CA, 6 states, ACT, NT

**Organs of Government In Australia – Constitutional law**

Head of State - Crown		
The Executive	Legislature (Parliaments)	The Courts
The Civil Service, Statutory Officers, Statutory Boards, etc		
Local Governments		
Political Parties		

**Crown** – Queen; act through representatives – Governor General (Federal level), Governor (State level)

**Executive** – Crown, Chief Minister, other ministers, statutory bodies and offices

**Legislature** – Authority to make law (9 legislature)

C.A and the state legislatures can be called “**parliaments**”

Australia legislatures are **bicameral** (Upper and Lower House) – except Qld (Unicameral)

**The courts** – hear and decide disputed matters, in accordance with existing law

Case comes to trial first time – **original, hearing at first instance**

If decision taken at higher court to be considered – **appeal**

9 separate court system

**Court’s jurisdiction** – power to hear and decide cases

**Hierarchy of courts** – ranked according to power to hear cases and make orders

The <b>High Court of Australia</b>	
Federal, State and Territory <b>Superior Courts</b>	
Federal, State and Territory <b>Inferior Courts</b> ; Intermediate and Lower Courts	

How judges decide cases:

1. Important facts ascertained
2. Relevant rules of law found and interpreted
3. Relevant rules applied to material facts to deduce outcome – consistent with similar cases decided in the past – considered fair and reasonable

Courts do not have direct power to make new law in the way legislatures do, judges create law indirectly when they decide particular cases.

Law can be made by judges when they decide cases and this law is referred to

**1. cases**

Judges simply find an established rule as “**case law**”, “**common law**” or “**general law**” – to distinguish it from legislation

Local government – look after social, economic and environmental needs of their area

**Lecture 2 – Legislation**

Prior the arrival of Europeans in Australia, Aboriginal law and custom applied. Later on, English law became the general law of Australia – displacing indigenous

Legal change must be brought by a body with a recognized law-making power

**2 major bodies** in Australia with law-making powers:

- The courts
- Legislatures and local government councils

In Australia, there are many legislatures; 9 governments – 9 legislative bodies

Law made by a legislature is called “legislation” or “statutory law” or “Act of Parliament”

**Law making powers of Commonwealth vs. State vs. local governments**

- Commonwealth government
  - Power applies in all parts of Australia
  - The Commonwealth has legislative power only in relation to specified matters listed in the Commonwealth Constitution.
  - Less general legislative power than state and territory governments

- Power is derived from commonwealth constitution, to make law about specific matters within it only
- Some power is exclusive to Commonwealth parliament e.g. s 52 Commonwealth constitution
- Shared powers with state: s 51
  - State and Commonwealth legislatures exist alongside each other, as long as they don’t conflict
  - If they do conflict, federal prevails over state – state provision is deleted, and the rest of Act is left as is.

- State and territory legislature
  - Have general legislative power “to make peace, order and good government”, limited to their own territory – can legislate on anything provided they abide with peace and order etc.
  - Share some powers with Commonwealth
- Local government
  - State and territories establish them
  - Laws they make are called by-laws
  - Invalid if they conflict with state/federal law, or if they exceed power given to local government

The legislative process – to validly enact a new legislation

- Bill – Draft legislation by parliamentary drafts person
- Explanatory Memorandum – summarize bill and explain
- First, Second Reading of a Bill
- Debate
- Passes both houses of parliament – bill must be passed by legislation
- Royal Assent (by Governor General) – sent to Queen
- Publication – Act is published in the Government Gazette
- Commencement – Act commences operation as law

	Lower House	Upper House
Commonwealth	House of Representatives	Senate
6 States	Legislative Assembly (Except SA and Tas which are called House of Assembly instead)	Legislative Council (except QL is unicameral and does not have the UH)
Self-governing ACT, NT	Legislative Assembly	

With some exceptions, legislation can be first introduced into either the UH or LH. We call the house where legislation is first introduced the House of Origin and the other house becomes the House of Review.

**Procedures:**

House of origin: First R(title, no debate), Second R(debate), Third R(voting)

House of review: Repeat:

- if amended return to HOO – accept/reject – if agreement can’t be reached, govt dissolved and a general election called
- if un-amended, bill returned to HOO and proceeds to next stage

Final stages: Royal assent (sent to queen), publication, commencement (if no commencement date displayed; operate after 28 days from royal assent)

Citation of legislation: Name of act, year legislation enacted, abbrev. ref (Cth/Vic)

**Interpreting Legislation** – when judges decide what legislation means – legal rules:

Literal: dictionary definition;

Golden rule: if absurd result, modify meaning; <emergency only>

Purpose: if literal not clear, check purpose of act - intrinsic/extrinsic evidence

Intrinsic evidence: evidence in act – objects, title, divisions and headings

Extrinsic evidence: evidence not part of act – draft bills, records of parliament debates, second speech, <used at any time>

**Lecture 3 – Case Law**

**2. Basic procedures in a civil case:**

- Exchange of written docs (pleadings) – to define nature and extend of dispute
- Case comes to trial in court – evidence from witness or documents to establish facts
- Each side present argument – what relevant law is and how to apply (plaintiff v defendant & appellant v respondent)
- Court decides what facts are proved and what law is – case decided

**3. Judge power to make law**

- Apply existing law to cases
- Judges have no direct authority (e.g. from a constitution) to make law
- Judges make law indirectly when they decide cases

Opportunities to make law when deciding of law and apply it, but sometimes the judge may not be able to find an established rule of law to apply. They may:

## Week 7 – Remedies for breach of contract

### 1. Remedies for breach of contract

If there is **breach of contract**, party can ask court for **remedy**.

Types of Law	Remedies
Common Law Remedies	<b>Damages</b> to compensate for loss <b>Terminating</b> right to perform
Equitable Remedies	<b>Specific Performance</b> <b>Injunction</b>
Statutory (Legislatory) Remedies	e.g. Sales of Good legislation Australian Consumer Law
Agreed Remedies	Agreed terms in the contract (if any) regarding remedies

### 2. Choosing a remedy

- Party can request **what remedy they want** – can be combination of remedies, for e.g. terminate and claiming damages
- Nature of performance may affect remedies available

### 3. Damages for breach of contract

- Damages – **award of money** paid by the defendant **to the plaintiff**
- Damages intended to be **compensatory** – **not punitive**
- Compensate loss suffered by the plaintiff caused by the breach
- Damages aim to **put plaintiff in the same position as if the contract had been properly performed**

\*objective of an award of damages is to put the non-defaulting party in the position that would have been occupied had the breach of contract not occurred.

Radford v de Froberville  
Tabcorp Holdings v Bowen

### 4. Direct loss and consequential loss

Damages can be claimed to compensate 2 types of losses:

- **Direct loss** – loss that is fairly and reasonable foreseeable as arising naturally from breach itself according to normal course of events  
**Koufos v Czarnekow Ltd**
- **Consequential loss** – more remote (unlikely) loss that should have been in the contemplation of both parties as the probable result of breach at time contract was made  
**Hadley v Baxendale, McRae v Cth, Baltic Shipping Co v Dillon:**

### 5. Mitigation of loss

**Plaintiff must do everything** that is reasonably possible to **minimize losses** that flow with the breach.

Plaintiff **cannot claim losses** from a defendant **if losses could have been avoided by plaintiff**.

### 6. Termination of performance (as a remedy) – termination of defendant's right to perform

- A plaintiff seeking to terminate performance must be able to prove either:
  - Less than substantial performance of a condition, or
  - A serious breach of an innominate term
- Remedy of "termination" allow the plaintiff to:
  - (a) Reject the unsatisfactory performance, and/or
  - (b) Put an end any future specific performance of the contract
- Defendant's right to perform is terminated, contract itself exist and the unperformed obligation still exist. These obligations must be discharged by payment of damages, to the extent that the failure to perform has caused loss.

### 7. Classifying terms in a contract

- Conditions: Essential and fundamental terms
- Warranties: lesser importance
- Depends on the intention of the parties, as evidenced by the circumstances. Ask whether the promise was so important that the person to whom it was made would have never entered the contract without it, and this was so apparent to the person making the promise

### 8. Electing to terminate

- The aggrieved party must choose whether or not to terminate
- Once made, decision to terminate is final. However, decision not to terminate bring right to terminate to an end
- Decision must be communicated to the defaulting party
- Decision must be unambiguous, either by word or deed

- Contract may have special procedures agreed to regarding termination
- Terminating for breach of conditions imposed in contracts by Sale of Goods legislation
  - Breach of this implied term = plaintiff has the right to reject goods, and treat contract as repudiated and **get money back**
  - BUT if good has already been accepted by owner, condition is treated like a warranty – damages awarded by the court

### 9. Specific performance – made when plaintiff asks for actual performance rather than damages

Specific performance – equitable remedy – to court's discretion

Specific performance only ordered if:

- Damages don't give adequate relief (e.g. unique goods)
- Performance doesn't involve a close personal relationship, goodwill or cooperation – because might be carried out badly, leading to further disputes
- Continuous supervision by court is not necessary

### 10. Injunctions

- Injunction – court orders requiring a person to do (or not do) something. They can be used to prevent a threatened (likely) breach of contract to occur (or stop a continuing breach)
- Injunctions are an equitable remedy – won't be ordered if damages is an adequate remedy

## Lecture 8 – Vitiating factors – factors that invalidate contracts

### 1. Behavioral imperatives in legal transactions

Law does not allow certain types of conduct, e.g. behavior that is contrary to good conscience. If a legal transaction (including a contract) is entered in such circumstances, it may be treated as void.

A legal transaction is said to be:

- "void ab initio" – void from the start, attempt to create, has no legal effects
- voidable "ab initio" when a valid transaction is initially created, but a court sets it aside as from its beginning - makes it 'vitiating'

Validity of a legal transaction can be affected by:

- Duress - threat
- Mistake – mutual, bilateral, unilateral
- Undue influence – one party trusting the other, e.g. old man to nurse
- Unconscionable dealing - disability or disadvantage of contracting party
- Misleading conduct

### 2. Duress

- One party uses or threatens to use unlawful force or harm to obtain the other party's agreement
- Physical harm or economic harm or illegal actions
- Harm directed to the party or their family members

Court will void contract IF the victim takes action within a reasonable time

**Santon v Armstrong, North Ocean v Hyundai**

### 3. Undue influence

- When one party places trust and confidence in the other – influences their decision making
- Contract set aside if they act within reasonable time
- Relationships inevitably involving a presumption controlling influence  
**Allcard v Skinner**
  - Judge makes presumption that strong party has control over weaker one
    - Parent and child
    - Doctor and patient
    - Solicitor and client
    - Religious advisor and believer

The **STRONGER** party has the onus of proving undue influence did not occur

- Relationships in which controlling influence is not evitable
  - Judge does not make assumption that there is an inevitable controlling influence - **Johnson v Buttress**
    - Husband and wife
    - Principle and agent
    - Accountant and client
    - Banker and consumer
    - Dentist and patient
    - Employer and employee

**Weaker party proves** stronger party had a general controlling influence

- Actual undue influence affecting a specific transaction
  - Improper controlling influence used to bring about a particular transaction
    - where there is NOT a general controlling influence e.g. not a proper relationship, but do rely on them

### Week 3 cases

Taylor v Johnson: **unilateral mistake**, equity, contrary to good conscience, **not void**, one party mistaken, other party aware (**effect of unconscionability**), 2<sup>nd</sup> party deliberately act before discovered, contract therefore set aside

Balfour v Balfour: Husband agrees to pay wife monthly, later divorced, **not legally enforceable**, agreements **b/w spouses** don't intend legal consequences

Cohen v Cohen: Husband promised wife dress allowance; domestic agreements **not legally bound**, **no consideration = no contract**

Merritt v Merritt: **relationship broken down**, wife pay off loan = **consideration**, husband transfer; **intention to be legally bound**

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### Week 4 cases

Price v Easton: Builder owes P money, E says will pay for builder but never does, P **not a party** to agreement between E and builder (**doctrine of privity**), **cannot enforce E's promise**

Coulls v Bagot: B contracts with **Mr C only**, pay royalties to Mr and Mrs C, Mr C dies, **wife no right to enforce contract** – not a party (**doctrine of privity**)

Carlill v Carbolic Smoke Ball Co: Company adv and offer to pay those w/flu after using product, **intention to be legally bound** as \$1000 **deposited in bank** – **sufficient consideration**

Emogenous v Greek Orthodox Community: Church invite E as head – employment by church is legally binding, so he is entitled his accumulated leave pay

Esso Petroleum v CC: giving free coins to motorists who buy petrol – intended to be **legally binding** – taxable as it is a commercial agreement; unless onus of proof feelings/friendship

Placer Development v Commonwealth: Govt promise subsidy at an unspecified amount of money – **not legally enforceable** – **illusory promise** – **not an offer**

Patridge v Crittenden: unlawfully offering birds for sale? Mo, advertising do not amount to an offer – only an invitation to treat, therefore not an offer

Masters v Cameron: C selling farm – contract stated "agreement subject to preparation of formal contract" – **still subject to condition** – **not intended to be legally bound** until formal contract prepared and signed

Henthorn v Fraser: acceptance made the moment letter is posted, unless otherwise stated by offeror

Brinkibon v Stahag: B in London telefax acceptance to S in Vienna, contract made in Vienna – telefax effective when and where acceptance is received

Thomas v Thomas: After death of Mr Thomas, Ms Thomas pays \$1 a year for rent and promise to keep house in good condition is still a consideration. Agreement enforceable as sufficient consideration.

Stylk v Myrick: Getting ship home safe is **past consideration** and therefore Captain's promise to share the pay cannot be binding – crew gave nothing new

Musumeci v Winadell: W leases to a competing shop against M, and W promises to lower rent – **legally binding**; practical benefit of keeping M as W doesn't need to find a new tenant – **sufficient consideration**

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### Week 5 cases

Van den Eschert v Chappell: Right before buying house, C asks V if house free of white ants, v agrees, not in written contract – **partly written/oral**, parol evidence ineffective – inquiry important therefore C can sue seller

Handbury v Nolan: the pregnancy test of cow is a **statement of fact**, intended to be a legally binding promise, therefore became an **expressed term of contract**

Oscar Chess v Williams: W trade car to O, different ages, O sued W – Age mere representation, **not contractually binding**, O (dealer) had expertise in case, W did not

Associated Newspapers Ltd v Bancks: To publish cartoon on front page so important (conditions – term was essential), Bancks would not have entered contract without – **right to terminate**

Cottini v Gye: Attendance at rehearsals doesn't go to root of contract – missing rehearsal is warranty, not condition; B had a reasonable excuse (not being well) – **can't terminate further performance**

Estrange v F Grayson: L bought a cigarette machine, clause exclude any implied warranty/conditions, L signed w/o reading, machine unsatisfactory – L bound by terms of the contract – faulty machine can't be fixed or returned

Causer v Browne: statement on docket not a term of contract – docket not a contractual document, B still liable for damaged goods

Godella Construction v State Rail: believed C could work 24/7. Due to injunction, longer construction and C is claiming extra payments – **term not implied adhoc** (if only one person thinks it is implied adhoc, not a contract), failed bystander – discharged by frustration – unforeseen circumstances, open to parties to negotiate new agreement

Woodhead v Brennan: Publisher B refused to publish M's book without his intro – **term implied adhoc** that B can't obstruct M's opp to earn \$, B breached term. Term needed for business efficacy, fair, clear expression, not contradicting...

BP Refinery v Hastings Shire: BP paying lower municipal rates to HS before site is transferred to a subsidiary. **No implied term** that the subsidiary should be charged reduced fare too. When asked of suggested term was part of agreement – **didn't reply** of course. Term **not needed** to give business efficacy, not fair, not obviously intended...

Secured Income Real Estate v St Martins Investments: SM bought property from SI, amount owed based on leases. SI wants to lease remaining but SM rejects – **implied term to cooperate**, but unbreached. After proper evaluation, believed it might not benefit both parties

Ferri v Coolangub Investments: P to buy C's property but must first sell his own – **failed to do so in reasonable time** – breached implied condition to do all reasonable – C has right to terminate

Expo Aluminium v WR Pateman: Buyer stated and relied on seller to provide weatherproof windows but windows found leaked – **implied term** that goods be suitable for buyer's purpose breached S19(a)

Baldry v Marshall: M stated name of car, but also purpose he needed for car – **implied term in S19(a) still valid**, B breached this by producing faulty cars

Alcatel Australia Ltd v Sarcella (1998) 44 NSWLR 349 (p. 130) – Seeking fire safety inspection is not "unreasonable exercise" of Sarcella's power – had legal right, used contractual power honestly. Burger King Corp v Hungry Jack's Pty Ltd [2001] NSWCA 187 (p. 130) – Burger King used contractual powers dishonestly, not in "good faith" – breached universal term – forced HJ to breach contract for purposes extrinsic to contract

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### Week 6 cases

Maritime National v Ocean Trawlers: Only 3 licences, 5 boats. M avoided contract for O's boat – **not entitled to frustration**, M's own fault/ deliberate act

Cehave v Bremer: C bought citrus pellets for animal feed – not in good condition but still suitable – **breach of innominate term** – not serious breach, treated as warranty – **only damages claimed** –

Koompahtoo Local v Sanpine Pty: Joint land development. S required to keep account but failed – **termination justified** – serious breach of innominate term

Varley v Whipp: V selling "old machine" but describes it as "new" – breached of condition – failure to deliver good as described – W entitled to reject

Szele v Tardian: Firewood cut wrong by T (too thick), S accepted regardless, **partial performance** but entitled payment – pay pro rata. Initially breach of condition (root of contract) – But S lost right to terminate

Hoeng v Isaacs: H's paint job badly done – I not obliged to pay full price BUT can only deduct cost of repairs (**only claim damages**) b/c **substantial performance** – fault easily fixed at modest cost of \$55 – **breach of warranty**

Connor v Stainton: S construct fences 18 feet instead 12 feet apart – **not substantial performance** – breach of contract – not entitled to payment. Putting droppers to fix it is not same as agreed in contract – **materially different**

Holland v Wiltshire: 2 breaches of contract by H; H failed deadline to pay AND didn't intend to carry with the sale – **late performance** and **time is of essential importance**. W can terminate and, resold property to another third party at lower price and is entitled to claim damages the loss