

Fundamentals of Law Notes

Topic A (Introduction to the Legal system)

- Neither scientific laws; the laws of nature and the law of gravity nor ethics or expectations of proper behaviour (eating with mouth shut) are “law” for our purposes.
- A law is a rule which the court will enforce. So if it is a rule which no court could enforce, then it is not a law (for example putting a tax on air). Although if someone drives their car on every day but each second Wednesday, then they could be fined.
- Laws must apply to everyone (equally), be predictable and enforced via fines or imprisonment (for breaches of the law). They must comply with the constitution (a written body to which a state or organisation will follow) which not only provides framework to prescribe the rule of law but also divides the legislative powers.
- The purpose of criminal law is to give not only the victim but also society protection, punish the wrongdoer, and demonstrate society’s dislike or abhorrence with the criminal act. However, the purpose of civil law might be to provide a process (family law), protect (consumer/environmental), support (family law), enable (civil procedure, empowering subordinate legislators), or provide a framework (planning laws).
- Written law may include a Statute or Act (from Parliament) and Subordinate Legislation (from a body authorised by Parliament or the Constitution to make law such as Regulations or Orders). Unwritten law or common law is made by courts. When there is a difference between statute and common law, statute wins. Equity isn’t used unless there’s a difference between statute and common law. Equitable principles fill the gaps when common law won’t apply. Equity is based on judicial assessment of fairness as opposed to the strict rule of common law. The Golden Rule is about statutory interpretation and it’s where ordinary meanings are attached to words.
- Division of powers is the term used to refer to the different law making/enforcement powers given to the Commonwealth Government in Australia and States/Territories.
- The Commonwealth can exercise only “Exclusive” powers, including interstate or international commerce, customs/excise, coinage/fiscal policy and foreign affairs.
- Other powers not mentioned in the constitution are “residual” powers. Because they aren’t given to the Commonwealth, they remain with the states/territories (emergency services provision, public transport/roads, criminal law administration/sentencing, prisons, schools).
- Doctrine of Precedent: Stare Decisis (the decision stands) or Doctrine Precedent is the basis of Australia’s common law system. When a court decides a case, the reason for the decision can become a precedent for future cases. Ration decidendi is the legal reason why a judge came to a particular decision. It’s binding on courts of lower jurisdiction. Obiter dicta is a remark or observation made by a judge which though included in the body of the court’s opinion, does not form a necessary part of the court’s decision.
- Shared powers are exercisable by either. The Commonwealth will prevail when a state or territory law is inconsistent with the CW (includes power to legislate for power for bankruptcy/insolvency, levy taxation, run the census and provide for meteorological/astronomical observations).
- Some powers are “referred”. The states/territories gave some of their powers to the Commonwealth. (The power of the States/Territories to levy sales tax and the power to make laws applying to the establishment of corporations were referred to the CW.)
- “Government” is both the whole machinery of government and the party/parties which have the majority in the lower house (Cabinet).
- Separation of powers/triás politica is exercised in written law (legislative/creation, executive/administration and judicial, or enforcement and interpretation).
- The legislative arm (creator) won’t administer or enforce the law. The executive arm (administrator) won’t create or enforce the law, and the judicial arm (responsible for its enforcement) won’t create or administer the law.
- The CW parliament consists of 2 houses: the senate (Upper House) and House of Representatives (Lower House) PLUS Governor General (there are 2 houses so it’s bicameral). The boss of the ruling coalition or party is the Prime Minister.

- In each state but Queensland, the 2 houses are called the Legislative Council and Legislative Assembly (PLUS governor). In Queensland and the 2 territories there's just one House (Legislative Assembly). These are unicameral.
- The leader of the ruling party or coalition at state/territory level is the Premier.
- Parliament isn't complete without the Governor General or Governor since Australia is still a constitutional monarchy. The head of state is the Australian Monarch, so the GG or Governor is her representative and is a crucial part of the legislature.
- Parliament MAKES law known as written law and this is called STATUTES or ACTS.
- However, other organisations exist which are a valuable part of the legislature (including the cabinet system where the GG and Cabinet make up the Executive Council, Parliamentary Committees and Subordinate Legislators).

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Issue

Rule of Law

Analysis

Conclusion

- Parliament isn't doing its job due to time, expertise, characteristics of a particular organisation or area, emergency action which is required, secrecy and efficiency.
- Contracts always contain different types of terms (said/written), some more important than others. The more important terms are conditions, while the less important are warranties. Conditions are important. Without them at least one of the parties wouldn't enter into the contract. The wronged party is entitled to treat the contract as either void, voidable or rescinded when there's a breach.

Issue

Have the essential elements of a contract been formed? Have both parties satisfied consideration to be legally bound? Was there a valid acceptance to the offer? Is there a valid revocation?

Rule of Law

The essential elements to form a legally binding contract:

Offer: Exists where one person indicates to another a willingness to enter into a binding agreement on certain terms. There must be certainty to the terms on offer and the offer must be communicated.

Acceptance: The offeree gives the offeror what was requested, such as the promise to carry out the terms which were originally offered. Acceptance of offer made forms a legal contract.

Consideration: the sufficient value provided by each party in return for the promise made to them and intention for the promise to be carried out.

Acceptance occurs when the letter is posted.

Rejection of an offer cancels any intention of being legally bound. Rejection to an offeree by the offeror must be received before any acceptance is received.

A revocation which gets the other party to make changes in their position is subsequently estopped from enforcing the contract.

In order for there to be a valid, binding contract between 2 parties to exist the law requires establishment of the essential elements to have been met.

- This is the path of a bill. In the House of Representatives, the bill is introduced (1st reading). Members of Parliament debate and vote on the main idea of the bill (2nd reading). There may be a public inquiry into the bill and reporting back to the house (House committee). Members discuss the bill in detail including any changes to it (Consideration in detail). Members vote on the bill in its final form (3rd reading). The bill is passed in the House of Representatives and sent to the Senate where the bill is introduced (1st reading); after this, senators debate and vote on the main idea of the bill (2nd reading). (A senate committee is a public inquiry into the bill and reporting back to the Senate. Members discuss the bill in detail, including any changes [Committee of the whole]). Senators vote on the bill in its final form (3rd reading). The bill is passed in the senate and the Governor-General signs the bill (Royal Assent) which becomes an Act of Parliament and a law for Australia.

Topic B (Contract)

- Contract law is important; it affects almost all commercial dealings and almost everyone almost every day in almost everything they do (for example getting a job, owning a mobile phone, renting a place to live and booking an overseas holiday).
- A contract is an agreement that the law will enforce. There are both contracts under seal and simple contracts which comply with certain formalities
- Almost all contracts involve an exchange of promises, a promise in exchange for an act, or an act in exchange for an act. A contract can also be: executory, partly executed, or executed.
- A contract can be made in writing (contracts for the purchase of land **MUST** be in writing), orally or both in writing and oral.
- The essential elements of a contract are **offer, acceptance, consideration, intention to be bound**, mutuality, capacity and legality. Furthermore, an **exclusion clause** is effective only if notice has been given of the clause. So if there's ambiguity in the document as a result of the clause then it will be interpreted against the interest of the person who drafted it. If it's neither misleading nor deceptive then you can exclude liability for negligence in a contract.
- An offer is either a promise to do (or not do) something together with an intention to be contractually bound on acceptance by the other party **OR** a clear statement of the terms on which an offeror is prepared to be **contractually bound**.
- Offers can be made to one person, a group and the world at large.
- An invitation to treat/puff/request for information/statement of intention aren't an offer. In *Carlill v Carbolic Smoke Ball* the accused said it was an invitation to treat. "Red Bull gives you wings" is puff.
- An offer is finished because of revocation by the offeror/rejection by the offeree/lapse of time/change of circumstances/failure of a condition/death of one of the parties/supervening incapacity.
- Acceptance of an offer happens only if there is a **FINAL** and **UNQUALIFIED** assent to the terms of an offer.
- Acceptance **generally** must be **communicated** to be effective. Such communications may be by **words** or **action**. **Silence** cannot be **stipulated** as the required means of acceptance (*Felthouse v Bindley*). An offeror can **waive** his or her right to communication of acceptance. The offeror can **require** acceptance to be in a prescribed manner. Acceptance must be on the **same terms** as and be **in response** to the offer. So know the diff between acceptance and things which look similar but aren't (such as a counter offer, cross-offers, any request for information/negotiations or a stipulated condition precedent which must be satisfied before a contract).
- Normally acceptance takes place when it is communicated to the offeror but where acceptance by **MAIL** or **TELEGRAM** is **CONTEMPLATED BY THE PARTIES** – such as where the offer is in a letter or post is stipulated as the means of acceptance, the acceptance is complete when the letter is posted or the telegram is sent.
- Acceptance can be revoked if the revocation comes to the offeror's attention before the offeror gets the acceptance.
- **Valid and enforceable** means a contract is recognised as lawful and able to be enforced by either party against the other.
- **Valid but unenforceable** means while the court will recognise a contract exists, it will not enforce it against normally one party.
- **Voidable** means a contract is regarded as valid and enforceable **BUT** only until the innocent party takes action to avoid it which they can in certain circumstances.
- **Void** means the contract is considered to have never been created.
- The intention to be legally bound separates a **mere agreement** from a **contract**. The agreement can be domestic or social where intention was not presumed, or either commercial or business where intention was presumed.
- Consideration is the price paid by the promisee for the promisor's promise. In almost all contracts there are bilateral obligations and expectations created. It must be present in every simple contract. This can be wholly oral, wholly in writing or partly both. In order to enforce a promise made in such a contract, the promise must be supported by consideration.
- Consideration can be executory or executed, **BUT NOT** past.

- Consideration is something of **value in the eyes of the law** BUT it need not be of an **equivalent market value** to the promisor's promise. It must be **sufficient** but normally need not be **adequate**.
- Mutuality is a 'meeting of the minds' or the contract is void. Some problems (vitiating elements) can prevent such a meeting; for example mistake, duress and undue influence, where there is a contract tainted by unconscionability or non est factum.
- Mistake: something is so fundamental to the contract or the agreement, a mistake around it means it cannot or should not be completed.
- Duress and undue influence: the conduct of A (duress) or the relationship A has with B (undue influence) means B cannot exercise freedom of choice to enter a contract.
- Non est factum: A, who suffers some contractual disability such as illiteracy, enters a contract which is entirely different to that they understood they were entering.
- Unconscionability: similar to duress or undue influence, where A, a powerful contracting party, gets B, a weak party, to enter a contract which favours A; A can't enforce the contract.
- If a contract has in its object or in the way it is carried out, something which is forbidden or discouraged by the law, the contract may be rendered illegal by statute, void by statute, illegal at common law or void at common law.
- It is illegal to carry on a business with no licence to do so.
- Generally, only the contracting parties can enforce a contract once you have one.
- **Damages:** the common law remedy in contract. Means compensation, designed to put the plaintiff in the position they would have been in had the other party performed their contractual obligations.
- **Specific performance:** a remedy requiring one party to complete their contractual obligations.
- **Quantum Meruit:** an equitable remedy allowing a party who has partially completed a contract to get paid for what it is worth.
- **Rescission:** an equitable remedy which permits the innocent party effectively to cancel the contract from the outset.
- **Termination:** a remedy which cancels the contract from the time of termination.
- **Rectification:** where the court orders a written contract be amended to reflect the actual agreement.
- **Injunction:** an equitable remedy requiring or preventing a particular action.
- A contract can be discharged by **performance/agreement/operation of law** and through **frustration/breach**
- Discharge by performance happens when **both** parties have **completely performed** their obligations under the contract.
- Discharge through breach occurs when if one party breaches a contract in a major way then the other party may choose to treat it as terminated.
- An actual breach is an actual failure to perform as required when performance is due and an anticipatory breach or clear indication by one of the parties he or she will not perform when performance is due.
- The innocent party can accept the breach and sue for damages; or reject it and attempt to have the contract performed perhaps through the remedy of specific performance which only works sometimes.
- Undertakings and promises in the contract are a warranty, innominate terms or of a **condition**.
- A breach can be less than repudiation (such as breach of condition, breach of a warranty or innominate term).
- Discharge by agreement occurs if the parties agree to stop a bond part-way through.
- Discharge through frustration occurs because normally performance of the agreed obligation gets impossible through no fault of either party. So no party can demand further performance. Unless there has been total failure of consideration, any payment to this point cannot be recovered.
- Discharge by operation of law occurs because the law needs a contract to end. The contract automatically ends when this happens irrespective of what the parties intend

Topic C (Property)

- It has nothing to do with contracts, torts, organisations and constitutional law.
- It can be real or personal (tangibles/intangibles). There is also equitable (under will/trust) and legal (possession/title/risk/security interest/disposal) property

- Real property includes freehold title, life interests, leasehold title, interests in land and **fixtures** and security interests in land: **immovable** property
- The traditional concept of freehold title meant ownership of land meant absolute rights for the owner over a wedge with the point in the middle of the earth and expanding into the heavens
- Leaseholds are sometimes regarded as personal property but not real property. They are subject to the rights of the freeholder and are limited in time
- Interests in land include rights which are less than possession and do not normally cover all the parcel of land, such as easements, licenses or rights of way
- Fixtures are attached to land, including buildings, fences, trees, generators, gas stoves, gas pipelines and dams. However, even treatment of these might change
- Security interests in land include interests held by someone over land which involves the right to possess and sell if the owner of estate in the land fails to satisfy the terms of the security
- Personal property is anything but real property (tangible/choses in possession/chattels and intangible/choses in action)
- Choses in possession includes anything other than land or interests in land which can be possessed (but the possession offers benefits). Includes goods and clothes
- Choses in action includes interests besides land and tangibles (includes money)
- Real property cannot be destroyed, is immovable, and the title is not in the land itself but in a parcel of rights in the land
- A leasehold is considered real property depending on the parties, terms and length
- Normally rights in land are protected and enforced in Australia through the land registration system = the Torrens System. This involves ownership of and legal claims/interests against land being registered in the Land Titles Office or equivalent besides the title and claims/interests which are searchable by members of the public
- Some land is not registered under the Torrens system, for example Native titled land is registered under the Register of Native Title Claims (Mabo decision)
- The **Mirror Principle** (where the record reflects all legal interests concerning the title over the land), **Curtain Principle** (where someone searching the record will not need to go behind the register to check whether the record is complete and accurate), **Insurance Principle** (where if a person relies on the register and suffers loss then he can seek compensation from the government) and **Indefeasibility Principle** (where once a title is transferred in reliance on the register, it cannot be defeated by **any legal or equitable claim**) underlie the Land Registration System
- Register your interests in land if you can, lodge a caveat or ensure those dealing with the land know you have a legal/equitable interest, to protect your land

Topic D (Torts)

- But for is an important test. Materially contribute is the second test. Did the plaintiff cause their own harm? They must prove the defendant owed a **Duty of Care** which was **breached** and **injury resulted**. There must also be adequate **connection** between Breach and damage (causation)
- With the "trespass" torts which include both assault and trespass to land, the plaintiff won't have to prove injury/damage.
- Proof of harm is essential for the plaintiff to win in the case of "actions on the case".
- In *Donoghue v Stevenson* (1932) a lady complained of negligence (or failure to behave with the same level of care which someone of ordinary prudence would have exercised under the same circumstances) since there was a rotten snail in her bottle of ginger beer. So she sued the manufacturer. This behaviour can consist of omissions or actions when there is some duty to act
- In *Hollis v Vabu Pty Ltd* a cyclist knocked down a pedestrian who sued Vabu.
- Main remedies for torts include general damages (for example loss of enjoyment of life or damage to reputation), special damages (such as court costs) and injunction.
- Vicarious liability exists where the defendant is not personally to blame but nonetheless liable.
- A tort is a civil wrong in the absence of contract. Society works only if members have consideration for each other, which is both negative and positive.
- If a defendant is charged in court only because they didn't nurse children properly, then they have to clarify their innocence. Perhaps there was no fence around a pool.

- The burden of proof is on the balance of probabilities. For one thing, the plaintiff must show the defendant owed a duty of care. For another, they breached their duty. They therefore suffered. There must also be adequate connection between the breach and the loss.
- There are a few defences to negligence. Lack of foreseeability: P's damages are too remote. An intervening event breaks the chain of causation or P voluntarily assumed the risk of D's negligence (voluntary assumption of risk).
- The "neighbour principle" is when someone will owe another a duty of care.
- My neighbour is people who are closely and directly affected by my act that I should reasonably have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.
- This duty of care is not owed to everyone but only those who can reasonably be assumed would be hurt by my reckless actions. This is "proximity" or "foreseeability".
- It is owed by a manufacturer and suppliers to consumers. Road users must also nurse other road users by not driving dangerously

Topic E (Organisations/Trading arrangements)

- No sole trader, partnership or trust has separate legal responsibility. But public organisations for example a corporation sole, office holder, corporation aggregate or powers by virtue of legal process do. Private organisations such as incorporated associations and companies also must be examples of a legal personality.
- In law someone with "legal personality" has legal rights, powers and responsibilities.
- These are different and separate from those rights, powers and responsibilities held or owed by the human beings who make up this separate person, so where it is in the "public" sphere, the law specifies that a person (sole) or group (aggregate) have specified rights/responsibilities/powers because they have been selected/elected according to a legal process and these are separate from those they have as private individuals. Where it is in the "private sphere", the law specifies that the organisation has rights/powers/responsibilities separate from its members
- Secondly, a business organisation (sole trader, partnership, company, trust) is not a trading arrangement (whether it is a franchise or joint venture).
- A sole trader owns and conducts a business enterprise for profit (although it has limited duration, limited access to finance and unlimited liability)
- Since a sole trader's liability is unlimited, creditors can claim all assets held in the sole trader's name including personal assets
- A partnership involves over 1 person carrying on business in common with a view to profit
- Often called a firm, it is essentially contractual BUT if there is no contract or a limited one, the Partnership Act lists the implied terms of the contract
- A company must be registered and exists only since it has been registered
- Profits are shared between partners, though losses are also shared (personal liability for business debts). Joint liability exists for the firm's debt and obligations. Joint and several liability for wrongful acts or omissions committed by a partner in the ordinary course of the business of the firm also exists. A partnership legally ends on the departure of a partner or the entry of another
- Trusts involve 3 parties: the testator/settlor (who may be a beneficiary or trustee), the trustee (who may be the settlor or beneficiary) and the beneficiary (who may be a settlor/trustee). BUT one person cannot be all 3! Where the settlor directs a person (trustee) to whom he gives property to use that property for the benefit of the beneficiaries (the object/s) is the child of the law of equity
- A trust can give support to family members, protect assets from risky business ventures/creditors, give charitable support and give support to individuals. Governing law is state-based.
- Trustees must not only comply with the trust and law, keep accounts and provide information, or give care and loyalty but also pay beneficiaries. They can be sued for breach of trust/complying with the trust but not the law. They have rights to reimbursement, to seek advice and direction from the Court and be discharged.
- A corporation isn't a partnership due to its structure, initial costs, liability, taxation and management.