

## Business and the Law Course Notes –

### PART ONE: FOUNDATIONS

#### Chapter 1: Introduction to the Law

##### 1.1 Law and the Business Person

###### (a) Law and Personal Life

**Contract** – an agreement between two or more persons that is legally enforceable

**Consumer Credit Law** – provision of money or credit by a business to a consumer for non-commercial purposes and with the expectation of repayment at a later date

**Tort Law** – harmful act, other than a breach of contract giving the victim a right to sue for compensation e.g. trespass, nuisance, passing off

**Intellectual Property Law** – form of intangible creation e.g. expression of an idea, trade mark etc

**Litigation** – legal proceedings brought by one member of the community against another. Known as ‘Civil Action’

**Prosecuting** – legal proceedings brought in a court of law as a result of the state seeking to establish the guilt of a person charged with having committed a crime

- Some laws give rights he can enforce against others and some laws impose obligations upon him to do or refrain from doing certain things
- When laws are broken the person harmed may have the right to commence litigation against those who caused harm for compensation
- Other laws that if broken will lead to police or government authority prosecuting

###### (b) Law and Business

- Income Tax on business earnings is paid to the **Federal Government** (*pertains to the nation of Australia*)
- Employer must pay payroll tax to the **State Government** (*state within a federation*)
- Owner of the land must pay rates to the **Local Authority** (*statutory authority e.g. city council that exercises legislative power delegated to it by a State or Territory government*)
- Laws that must be complied with as a business owner: licensing, advertising, industrial relations, WHS etc.
- Three levels of government in Australia
  - o Federal government regulates national matters
  - o State and Territory government that regulates State and Territory matters
  - o Local government that regulates local matters
    - Each government makes its own laws and has own requirements
- Law ensures promises are kept and agreements are enforceable, tells people what they can and can't do in marketing and delivering goods and services, enables dispute resolution.

###### (c) Law in the Media

- Politicians talking about new **legislation**, lawyers and parties to litigation talking about controversial **case law**, police talking about criminal prosecutions and bureaucrats and others talking about legal problems.
- People and organisations in a legal system
  - o Politicians
  - o Judges
  - o Lawyers
  - o Police
  - o Bureaucrats & Citizens
  - o Parliaments
  - o Courts
  - o Police Force
  - o Government Departments
  - o Corporations

###### (d) Law in Popular Culture

- Law is more than an abstract set of rules and principles
- It manifests in and shapes the lives of real people

##### 1.2 The Nature of Law

### Defining Law:

**Law** – *system of rules made by the state and enforceable by prosecution or litigation.*

**Business Law** – *system of rules regulating businesses and business activities made by the state and enforceable by prosecution or litigation.*

- Law is essential foundation of stability and order in societies and in international relations

### A system of rules:

- Law is a type of rule

**Rule** – *statement of behavioural expectation*

- Not all rules are laws
- Difference between legal rules and non-legal rules is that legal rules incur penalties and the disapproval that follows from a breach of a social or moral rule can be seen as a type of penalty.
  - o Source of the rule

### Made by the State:

- Legal rules are made by the State
- In the Australian legal system, a law is a rule made by either the legislature (parliament) or the judiciary (the court system)

**Government** – *group of individuals and institutions charged with constitutional authority to make, administer and interpret the law*

**Sovereign** – Supreme ruler of a state (In Australia: Parliament)

### Enforceable by Prosecution or Litigation:

- Backed by the threat of punishment or coercion:

If **Criminal**: *set of legal rules and procedures that facilitate the prosecution by the state of those accused of having committed a crime – prosecution*

If **Civil**: *a person who contravenes the rule may be sued by the person they have harmed – litigation.*

### Law in Context: Natural Law vs. Legal Positivism:

- Positivist definition of law (disregards what the law ought to be and focuses on what law is). Can be contrasted w natural law theory
- Natural law theory and legal positivism are two of the major branches of the philosophy of law or **jurisprudence** *the philosophical study of the meaning and nature of law*

### Natural Law Theory:

- A branch of jurisprudence that insists there is an intimate and necessary relationship between the law and a set of higher values
- Things are objectively right or fair, objectively wrong or unfair and laws should be made, administered and interpreted in a way that it correspond w objective standards.
- Important in the development of English common law
- Relied upon now by those seeking to establish a system of universal moral values

### Legal Positivism:

- Should focus on what the law is
- Consistency w universal standards of morality and justice isn't necessary
- One question needed to be asked is whether or not it is a legitimate law – whether it has been made properly and in accordance with the requirements of the relevant constitution.

### The Purpose of Law:

#### Resolving Disputes:

- Parties to the dispute can refer to the relevant legal rules directly and resolve the disputes themselves if clear enough
- If application of relevant rules to the dispute isn't clear, the parties can seek legal advice
- If the legal advisers cannot resolve, parties can take the dispute to court and resolve it by litigation.

#### Maintaining Social Order:

- Laws are necessary to keep the peace and to prevent chaos and anarchy
- Laws maintain social order because without them people could be in perpetual conflict

- By establishing a clear set of standards with which everyone must comply, the law ensures that order is maintained.

#### Reinforcing Community Values:

- Preserves and enforces community values
- Ensures that community values are applied equitably and respected by all members of the community

#### Helping the Disadvantaged:

- Mechanism for ensuring that resources and opportunities are distributed fairly within a community
- Law is supposed to ensure that those who cannot fend for themselves are not disadvantaged.
- Tax laws – seek to ensure the wealthier members of the community pay more tax than the less wealthy
- Welfare seeks to ensure the disadvantaged are entitled to appropriate assistance
- Anti-discrimination laws seek to prevent conduct that unfairly disadvantages those who are ‘different’

#### Stabilising the Economy:

- Changes to the law have economic consequences
- Tax Law – increase in rate of personal income will result in members of the community having less spending money – will impact prices – inflation and interest rates
- Civil Liability – if law makes more difficult for victims to sue for compensation, fewer compensation payouts will be awarded meaning in insurance companies will be required to pay fewer claims, insurance premiums will be lower and consumers will have more spending money.
- Primary consideration when changing laws

#### Preventing the Misuse of Power:

- Consistent and transparent system of law ensures government cannot oppress members of the community
- Liberal Democracy = Australia, seek to comply with the **rule of law** *governmental authority must be exercised only in accordance with written, publicly disclosed laws that have been adopted and are enforced in accordance with established procedure.*
- In a state that aspires to the rule of law, government shouldn't be able to exercise state power arbitrarily

#### Rule of Law: Characteristics

- Law will be applied equally to everyone
- Courts will uphold legal rights of the citizens
- No person will be punished other than for conduct that is expressly made illegal

#### Rule of Law: Principles

- **Doctrine of Separation of Powers** *according to which there must be a clear separation between those who make the law (legislature), those who administer the law (executive) and those who interpret the law (judiciary)*
- Principle that a person shouldn't be tried more than once for a given crime (double jeopardy)
- Principle that a person who has been arrested must be told what crime they have been accused of and be given a fair trial

#### Categories of Law:

##### Substantive and Procedural Law:

- Concerned with the difference between what the law *is* and how the law *works*

**Substantive Law** – *system of legal rules that set out the rights and obligations of individuals and the state. Determines whether a contract exists, a person has committed a crime, entitled to compensation*

**Procedural Law** – *system of legal rules that regulate legal process such as civil litigation or a criminal prosecution. Determines whether a defendant is entitled to a jury, entitlement to appeal to a higher court.*

##### Public Law and Private Law:

- Substantive law traditionally been organised into two broad categories: public and private law

**Public Law** – *concerned with the relationship between the individual and the state.*

- Set of legal rules that establish the rights and obligations of the individual when dealing with the state and the rights and obligations of the state when dealing with the individual.

- Subcategories of public law are constitutional and administrative laws also includes criminal law and taxation law:

Constitutional Law – regulates the relationship between the various arms of government and between the government and its citizens and grants HR and civil liberties to citizens.

Administrative Law – regulates the administrative activities of the government. Allows citizens to hold administrative bodies e.g. local governments and government departments accountable for their actions, gives citizens the right to seek judicial review of administrative decisions.

Criminal Law – establishes criminal offences and the penalties for their infringement

Taxation Law – law regulating the administration and collection of tax.

**Private Law** – *concerned with the relationships between persons within the community.*

- Set of legal rules that establish the rights and obligations of individuals when dealing with or interacting with other individuals.
- Subcategories include: tort law, contract law, consumer law, competition law, property law, company law, partnership law, commercial law, employment law.

Tort Law – provides a remedy for those harmed by the acts or omissions of another. Civil wrong other than a breach of contract. Trespass, negligence, defamation, nuisance, passing off.

Contract Law – law regulating agreements and promises. Contract is a legally enforceable agreement.

Competition Law – seeks to ensure that business organisations don't misuse their power

Consumer Law – set of rules that seek to protect consumers from unfair commercial practices by business organisations

Property Law – regulates property rights in things (personal property) and land (real property).

Commercial Law – regulates various commercial matters – agency, franchises, insurance and bankruptcy

Employment Law – regulates the relationships between employers and employees.

Company Law and Partnership Law – regulate the establishment, management and dissolution of corporations and partnerships.

#### Criminal and Civil Law:

- Criminal Law: establishes criminal offences and the penalties for their infringement. In a criminal trial, the dispute is between the state (prosecutor) and the individual
- Civil law equates with private law. In a civil trial the dispute is between two+ individuals.

#### Domestic and International Law:

**Domestic Law/Municipal Law** – *law that regulates persons within a particular jurisdiction e.g. nation or State.*

**Public International Law** – *system of rules regulating the relationship between states. No international government so sources of public international law are custom and increasingly treaties and conventions*

e.g. Vienna Sales Convention: regulates international sale of goods

Berne Convention: regulates international protection of copyright

- International treaties and conventions aren't automatically law: not legally enforceable in Australia unless enacted into domestic legislation
- Institutions administering public international law include UN, ICJ, ILO and WTO and International Monetary Fund.

**Private International Law/Conflict of Laws** – *system of rules that determine which state's laws should be applied to resolve a dispute between people in different states*

Three issues must be addressed before an Australian Court can resolve an international legal dispute:

1. Does the court have the basic jurisdiction to hear the case
2. Which law should apply
3. Is the court the most convenient and appropriate forum in which to resolve the dispute.

An Australian court will only have basic jurisdiction to hear an international legal dispute if:

- The defendant is present in the courts jurisdiction when the **statement of claim** (*a document setting out the plaintiff's claim that commences a civil action*) is served on them
- The defendant submits to the court's jurisdiction
- The court authorises someone to find and serve the statement of claim upon the defendant outside the jurisdiction.

If an Australian court decides it does have basic jurisdiction to hear an international legal dispute, it must then decide which law is to apply: Australian law or the law of the other state.

- Decided by the type of claim being made
- Australian courts have the discretion to refuse to hear a case or send it elsewhere (forum non conveniens)
- Will only exercise this discretion and refuse to hear a matter if the Australian court is a 'clearly inappropriate forum' and a foreign court exists that has the power to hear the case instead

E.g. *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575: Defamatory references

#### The Changing Law:

- Political Change – law changes because of a change in government
- Fixing Problems – laws aren't applied or interpreted in the way which law-makers intended. Lawyers find loopholes in law enabling them to circumvent effects of the law. Amend the law
- Changing Values – law must change with values to keep pace
- Lobby Groups – changed as a result of pressure exerted upon the government by certain groups within the community.
- Changing Technology –