

## Week 1: The Nature & Function of Law

### 1) Legal and non-legal rules

We can define law as “*rules of conduct or organisation that **are recognised, applied and enforced by the power of the state***”.

Non-legal rules are rules of conduct or organisation that are enforced by things such as peer pressure, a need for co-operation, feelings of goodwill, or convenience.

Non-legal rules are derived from a variety of sources, eg:

- moral or philosophical beliefs
  - religious beliefs
  - the ‘laws’ of nature
  - social values
  - rules that have become customary in a community.
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- Non-legal rules work well enough in smaller groups and communities.
  - In larger groups, non-legal rules become inadequate. Rules enforced by the state are common in all larger societies as a necessary means of regulating conduct.
  - The particular rules that the state chooses to enforce are identified and made in different ways.
  - One possibility is for the state to decide to enforce rules that originate as non-legal rules, e.g. philosophical beliefs, or established customs.
  - Another possibility is for new rules to be created in response to a perceived need for regulation.

**CRITICAL DIFFERENCE = NON-LEGAL RULES ARE NOT ENFORCED BY THE STATE**

#### How Law Regulates Conduct:

- Restrict the use of force by individuals and forbids unauthorised violence
- Prohibit and punish particular kinds of undesirable behaviour
- Permit or reward particular behaviour the government thinks is desirable
- Provides for the creation of rights and duties that can be enforced by an individual in court

### 2) Who Makes law?

- In Australia, the power to make law is exercised by the various governments that exist at **federal** (national or Commonwealth = other names), **state & territory** and **local** level.
- Governments make law through specified agencies, following recognised procedures or processes.
- **Enactment = legislation = statute = an act = statutory law = laws passed by respective parliament**
- (pages 16-17) The main agencies of law making at federal, state and territory level in Australia are:
  - elected legislatures, and
  - the courts.
- **Courts:**
  - 1) Decide facts of case by hearing evidence of both parties,
  - 2) decide who they believe by considering evidence
  - 3) identify applicable law relevant to the dispute: have to interpret law and decide what it means (statutory task of interpretation/construed), then apply it to the facts
  - 4) make a decision (*make an order – e.g. money, prison sentence*) compensation = e.g. of a **remedy**

### 3) Law in an everyday context

- Many aspects of daily life are governed or affected by the law.  
Each term refers to a generally recognised 'division', 'area' or 'category' of law.
  - **Contract law** (about enforceability of agreements- if an agreement isn't complied with: only for enforceable ones)
  - **Tort law** (tort = *civil wrongs*- liability for harm wrongfully caused by one person to another or their property, main one we look at is negligence (carelessness), usually looking for money compensation, *injunction* = *an order to stop something*)
  - **Property law** (the acquisition and transfer of private rights in goods and land- when you own something, divided into real (land) and property of goods/ chattels)
  - **Agency law** (the use of a representative to acquire or discharge legal rights or duties)  
= branch of contract law – when will someone who works for you be able to bind you – make you enter into a contract with a third party)
  - **Corporations law** (the creation, organisation and administration of companies: what you need to do to set up a company and run it, rights of owner and directors)
  - **Constitutional law** (the organisation, powers and processes of government: the extent of their power for each level (federal, state and local) – who's responsible for what)
  - **National and international law** (national = law in one country) (international = concerning Australia's relationship with other countries= agreements between sovereign states)
  - **Criminal Law:** The prohibition and punishment by the state of conduct considered harmful to the general community
- It is important to note that each area of law is concerned with particular types of conduct or situations. Dividing legal rules into areas helps to clarify the nature and structure of the law.
- If you take examples of particular situations or events, you should be able to identify the relevant area of law.
- For example, if a person is arrested for deliberately setting fire to a building, the facts suggest that the criminal law is relevant, because this conduct is prohibited and punished by the state.
- What about:
  - Forming a new company and registering it? **Corporate law**
  - Buying an apartment in the city? **Property law/ contract law/ negligence**
  - Getting the latest iPhone on a cheap mobile plan? **Contract law/ consumer protection (part of contract)**
  - Slipping on a wet floor at the supermarket and sustaining serious injury? **Tort law/ negligence**

### 4) What is Business Law?

*Business law consists of selected rules of law that are of particular relevance to business activities.*

For example, business law includes aspects of:

- contract law
- tort law
- consumer law
- plus selected topics from other traditional divisions of law.

**Important to learn business law:** Knowledge of business law is important because it enables a person to:

- Recognise the legal aspect of typical business situations and understand the legal rules involved.
- Know the extent to which they can rely on legal rights and duties.
- Know how to use the law constructively to achieve desired outcomes.
- For example:
  - Enforceable agreements for goods and services can be created.

- Property rights can be acquired and protected.
- Business organisations can be created.
- How finance can be raised.

## 5) An Anatomy of Law

- In studying law, you will encounter references not just to 'the law' as a whole, and to the major 'areas of law', but also to things such as legal 'concepts', 'principles' and 'rules'. **Textbook page 5**
- Rules = most precise, then principles then concepts

The Law	Areas of law	Concepts	Principles	Rules	Meaning
<p>All the rules of organisation and conduct recognised and enforced by the government of a state.</p> <p><b>Examples:</b> Australian Law English law Malaysian law</p>	<p>Categories of convenience used to group together the rules of law that are considered to be related in some way.</p> <p><b>Examples:</b> Contract law Property law Tort law Business law</p>	<p>The broad ideas which determine the nature and scope of an area of law and which, when organised appropriately, provide a coherent framework and sequence of ideas.</p> <p><b>Example:</b> <b>Contract</b> Contract formation Consensus Offer Acceptance Intention Consideration Contract obligations</p>	<p>The fundamental and non-negotiable components of concepts. Principles serve to demarcate concepts, and indicate their nature, scope and content.</p> <p><b>Examples:</b> Contracts are created only when the parties to an agreement intend to be legally bound.</p> <p>An intention to be legally bound is ascertained objectively rather than subjectively.</p>	<p>The detailed mechanisms designed to give effect to particular legal principles. Rules delimit and qualify principles in specific ways, and cater for specific situations that may fall under a particular principle. Rules can be changed without destroying the underlying principle.</p> <p><b>Example:</b> An intention to be legally bound is to be inferred from the known circumstances at the time of agreement.</p>	<p>The sense in which concepts, principles, rules and words are to be understood. Meaning may be assisted by definition, interpretation and context.</p> <p><b>Example:</b> The word 'consideration', when used in contract formation, means something given by one party in exchange for what is being promised by the other.</p>

## 6) Decision making in the courts

- The strictly logical application of existing rules promotes certainty and predictability.
- The fair and just nature of judicial decisions promotes respect and support for the law.
- By taking proper account of significant differences of fact, and finding appropriate rules to apply to each type of case, the courts can strike a balance between the strict application of established rules and the pursuit of fair outcomes.

**CASE LAW = COMMON LAW = GENERAL LAW:  
FROM JUDGES/ COURTS**

**LEGISLATION = AN ACT = STATUTE = BY-LAW (LOCAL GOV. LEGISLATION)  
FROM PARLIAMENT**