Australian Business Law

Australian Business Law is a must-have for law and business students, practitioners and those interested in modern business law.

It discusses the main areas of the law affecting business and includes case examples, references to legislation, links to the main government (and other) websites and flow charts and diagrams to support explanations.

The text has been reviewed and updated to improve readability and to reflect changes to the law, including those made by the Australian Consumer Law (ACL), Competition and Consumer Act, National Credit Code, Personal Property Securities Act, FOFA reforms and the “raising the bar” amendments.

This 2015 edition contains valuable expanded commentary on:

- Amendments to the Copyright Act
- The Franchising Code of Conduct 2014
- The repeal of the carbon tax and the new carbon tax price reduction obligation
- Obligations of the banking and finance sector
- Intellectual property
- The General Insurance Code of Practice 2014

It also includes the most recent case examples to illustrate the application of law in:

- What can be patented
- Non-traditional trade marks
- Promissory estoppel
- Unconscionable conduct under the ACL
- Unfair contract terms
- Cartel conduct
- Responsible lending laws
- Bailment
- Banking
- The regulation of insurance intermediaries.
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Australian Business Law

34th Edition
2015

Paul Latimer
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Preface

CCH business law titles are designed to provide a comprehensive yet concise statement of important areas of contemporary law. In addition to providing the lawyer and law student with a statement of the main features of the topic, these titles are also designed to assist those in business — the accountant, administrator, banker, compliance officer, manager, marketing executive, etc — and students of business and commerce working and studying in areas with legal content and compliance obligations. *Australian Business Law* takes its place alongside the other CCH business law publications, including loose-leaf and online services, and gathers together in one volume many of the aspects of the law in Australia affecting business.

Annual keyboarding of the updates has long replaced the first handwritten and manually typed manuscript in 1980, now made so much quicker with electronic resources, and each edition continues to bring the text up to date to incorporate changes in legislation and case law.

I must acknowledge Monash University for providing facilities and a supportive working environment to make *Australian Business Law* possible under its “workload model”. *Australian Business Law* has always been one of Monash University’s best known law “outputs”. After almost 35 years, it remains a book written by the author alone. No chapters are farmed out to others to write or update. There is no unacknowledged research assistant or research team ghosting the book.

All chapters of this 34th annual edition of *Australian Business Law* have been revised to ensure the continued relevance of *Australian Business Law* to tertiary education syllabuses and to professional readers. The paragraph numbering remains essentially the same so as not to disrupt course outlines.

As ever, the latest statutes and cases have been included with a good showing of 2014 references throughout the book.

I do appreciate feedback from readers, and especially the organisations and institutions listed on the Acknowledgments page.

In the interests of accuracy and completeness, the 2015 edition of *Australian Business Law* also contains minor updates and revisions to almost every page.

The law is stated as at 7 October 2014.

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Paul Latimer is an Associate Professor of Law and former Head and Deputy Head of the Department of Business Law and Taxation at Monash University, Melbourne, operating across seven campuses (Berwick, Caulfield, Clayton, Gippsland, Malaysia, Peninsula and South Africa), and also teaching in Prato, Italy. He has worked, researched, published and taught widely in the areas of business law covered by this major CCH publication. He has held visiting positions in the area of business law and financial markets regulation at the Attorney General’s Department, Canberra; Australian Securities and Investments Commission (ASIC); Columbia Law School, New York; New York University Law School; Wolfson College, University of Cambridge; Law School, Catholic University, Leuven, Belgium; Faculty of Law, University of Malaya, Kuala Lumpur; Faculty of Law, Universiti Kebangsaan, Malaysia; Laval University Law School, Quebec City, Canada; Centre for Corporate Law and Securities Regulation at Melbourne Law School; University of Nice Law School; the School of Accountancy at Queensland University of Technology (QUT) in Brisbane; the University of Montreal Law School in Canada and the Centre for Law and Finance at the University of Genoa in Italy.

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Paul Latimer

December 2014
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INTRODUCTION

\( 1-010 \) What is law — the legal and regulatory environment of business

Let us assume you are reading this book in a study or office, home or library. The environment where you are is as much of a legal creation as it is bricks and mortar, timber, steel, glass and plastic.

- All the details of your surroundings are regulated by laws like building regulations, local government permits and town planning orders. These affect the size, shape and quality of rooms, driveways, stairwells, light fittings, doors and windows and the position of the building on the block of land as well as the building’s power and sewerage.

- Legally enforceable agreements (contracts) make sure that the building is serviced by power supply, water and sewerage authorities. The construction of the building would have been carried out under many contracts.

Perhaps you are reading these lines on a train or bus. This transport is regulated by legislation (Acts of Parliament) covering railways and road traffic and the regulation which establishes standards for manufacturing vehicles. The fact that you are on a bus or train means that you have made a contract with the operating authority to be taken from one place to another.

This analysis could go on to as many pages as there are in this book if all the laws that govern what we do every day were to be listed in detail.

Business law is made up of the laws that set out the rights, duties and obligations of people in business. Business law balances the interests of those in business and people like producers and consumers, buyers and sellers, lenders and borrowers. It regulates business transactions under the law of contract, which explains when an agreement will be legally enforceable as a contract and is updated by competition and consumer law. It regulates those engaged in business (companies, partnerships, etc), their names, their funding (finance, credit), their banking and their insurance. Many aspects of criminal law (especially property offences) and tort (especially the law of negligence) impact on business.

What is law?

The law is a body of principles established by parliament (ie by our representatives) and by the courts. Law is therefore made by us (the men and women who are parliamentarians and judges) for us, is legally enforceable and was developed to set standards of conduct between people, businesses and government. If these standards of conduct are not followed, the law sorts the conflicts that arise, and punishes those who breach these standards of conduct.
The law is made up of:

- **enacted law**
  
  This is the law made (enacted) by parliament known as statute law, legislation or Acts of Parliament and delegated legislation (§1-180 – §1-200).

- **unenacted law**
  
  This is the judgments, usually written, of judges in cases heard by them, known as case law, precedent or sometimes common law (§1-180 and §1-350 – §1-410).

Together, enacted law and unenacted law in the English-speaking world are often known as the “common law”.

**The common law**

The expression “common law” has five meanings which depend upon the particular context:¹

1. **common to all of England** — the original meaning of the common law was the law which the King made common to the whole of England in 1154, in contrast to local law

2. **an historic meaning of common law** — the law administered in England until the end of the 19th century by the three royal courts of justice (the King’s Bench, Common Pleas and Exchequer)

3. **not equity law** — case law from the common law courts, in contrast to case law from the equity courts (below)

4. **case law, not statute law** — unenacted law written by judges in judgments (case decisions, precedents: §1-350) not based on an analysis of authoritative texts, and not statute law enacted by parliament (enacted law)

5. **the common law world** — statute law and case law, which originally developed in England, then later developed in Australia, New Zealand, Canada (except Quebec), the USA (except Louisiana) and the other former British colonies, in contrast to the “foreign” law of non-English jurisdictions. One subset of foreign law is the “civil law” of continental Europe.

As the common law develops in each jurisdiction, it results in the development of the common law of Australia in the same way that there is the common law of, say, England or Canada.

The common law, meaning enacted statute and unenacted case law (point (4) above), can be classified as follows:

**Civil and criminal law**

Civil law involves matters between person and person regarding the enforcement of rights and the carrying out of obligations. Most of the business law topics covered in this book involve civil law. Civil cases result in remedies for the person winning and liabilities for the person losing.

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¹ Based on PGA v The Queen [2012] HCA 21 at [20]–[25].
INTRODUCTION

Criminal law includes all statute and case law which make certain conduct an offence. Criminal law is enforced by the government (federal, state or territory), and is discussed in Chapter 2.

Civil law in the common law is not the same as the “civil law” in some countries (mostly in Europe), which is based on the civilian code of ancient Rome.

Common law and equity law

The main remedy of the common law is an award of damages (compensation), but this might be useless to stop harm or the continuing breach of a contract.

Many years ago, some people (litigants) appealed directly to (petitioned) the King or Queen, or the Lord Chancellor, or the Chancery — later the Court of Chancery, and now the Equity Court or the court in its equitable jurisdiction. Equity law developed an alternative set of rules to the common law courts in areas to do with fairness and good conscience.

Maxims of equity

Equity means the rules (equitable remedies) originally developed and administered by the Court of Chancery (equity court) which supplement common law rules and procedures. The maxims (principles) of equity are the rules which are applied by the equity courts, such as:

- “equity acts in personam” (equity acts on the conscience, not the property)
- “equity aids the vigilant”
- “equity does nothing in vain” (¶6-400)
- “equity follows the law”
- “equity never wants a trustee” (¶9-760)
- “equity will not assist a volunteer” (¶5-040)
- “one who comes into equity must come with clean hands”
- “one who seeks equity must do equity”
- “the person who is first in time has the stronger legal claim” and “where the equities are equal, the law prevails” (¶3-270).

Equity can grant an injunction (¶6-410) or an order for specific performance (¶6-400). These are called “equitable remedies”.

The law of equity continues and is now fused with the common law, and both systems are administered by the same courts. Equitable principles (eg concerning unconscionability; ¶5-730) have made, and continue to make, an important impact on the development of modern business law.

Australian business law regulators and business law enforcement

Regulation to improve the legal environment of Australian business is in the hands of regulators such as:

- Australian Competition and Consumer Commission (ACCC: ¶8-725)
- Australian Crime Commission (¶2-270; ¶2-300)
- Australian Financial Security Authority (AFSA: ¶13-558), which regulates bankruptcy (¶13-558) and the Personal Property Securities Register (PPS Register: ¶13-170).
• Australian Prudential Regulation Authority (APRA) — a banking regulator (Chapter 16) and an insurance regulator (Chapter 17)
• Australian Securities and Investments Commission (ASIC: ¶9-380) — the Australia-wide one-stop shop for the regulation of areas like business names, banking, companies, credit, financial services, and insurance
• Australian Taxation Office (ATO)
• Australian Transaction Reports and Analysis Centre (AUSTRAC: ¶16-080)
• Director of Public Prosecutions (DPP: ¶2-110; ¶2-140), and
• IP Australia (www.ipaustralia.gov.au; ¶3-560, ¶3-580 and ¶3-660), which regulates Australian intellectual property (IP) laws.

Industry associations
Industry associations (self-regulators) introduced in this book include the Australian Bankers’ Association (ABA), responsible for the Code of Banking Practice (¶16-041), the Franchise Council of Australia (FCA: ¶9-985) and the Insurance Council of Australia (ICA), responsible for the General Insurance Code of Practice (¶17-036).

Regulation
Regulation includes the legal rules set out in this book — including contract and competition and consumer law — and all the rules and legal restrictions imposed by government, the courts, regulators and industry.

Compliance
The bottom line of all this is the need for regulatory compliance — to comply with (fulfil) regulation.

There is now the compliance professional, who will have a good understanding of all topics in this book.

The peak body for the development and practice of compliance, and for working compliance, ethics, governance and risk into the fabric of organisations is the Governance Risk Compliance Institute (GRCI: www.compliance.org.au).

¶1-015 The rule of law

Our legal system is built on the principle of the rule of law (supremacy of law) — that the authority of government (power) must be exercised according to law.

The rule of law has three aspects:²

1. **No arbitrary power**

   The rule of law excludes arbitrary power. Official actions (including judgments) must be done in accordance with the law. No person can be punished unless there is a breach of the law. Law must be public and published (¶1-370).

   The power of government is separated — under the separation of powers — among the three branches of government (¶1-475).

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INTRODUCTION

(2) Equal before the law

All people are equal before the law. Nobody is above the law, for example, the Prime Minister, a judge or a soldier may be liable in criminal law (¶2-230). The rule of law is a prerequisite for democracy.

(3) Enforceable in court

The rights of citizens are enforceable in the courts. In addition, in some jurisdictions there are special constitutional safeguards and Bills of Rights (Charters of Rights).

¶1-020 Law and justice

The principle of the rule of law (¶1-015) suggests that law and justice are the same thing — but is an unjust law even a law? Must an unjust law be obeyed? Can matters of justice or morality or conscience ever take precedence over the law?

Natural law

The natural law school of legal philosophy sees law as coming from nature. Natural law sees law as expressing a higher truth and a higher justice than that contained in man-made law, like in the US Declaration of Independence (4 July 1776): "All men are created equal".

Christopher Saint-Germain, for instance, set out the criteria of a good law in The Doctor and Student (translated in 1530):

"Also to every good law be required these properties: that is to say, that it be honest, rightwise, possible in itself, and after the custom of the country, convenient for the place and time, necessary, profitable, and also manifest, that it be not captious by any dark sentences, ne mixt [nor mixed] with any private wealth, but all made for the commonwealth."

Positive law

In contrast, the positivists see law as the rules imposed by the sovereign power over the sovereign’s subjects. The study and the theory of law to the positivists concentrates on things as they are instead of things as they should be:

● Jeremy Bentham (1748–1832), the father of positivism, claimed that because law is man-made, it can be whatever man chooses to make it.

● John Austin (1790–1859) also divorced law from justice, basing law — not on ideas of good and bad — but on the power of the superior.

In modern times, HLA Hart pointed out that one of the problems with this view of the moral authority of law is that respect for the principles of legality is "unfortunately compatible with very great iniquity".

The legal authority of the German Nazi state in the 1930s and 1940s sanctioned deportations, mass murders and ultimate forms of human degradation. However, these actions were "legal" under the legal system then in force. Numerous war criminals were tried after the end of the Second World War in 1945 and some raised the defence of "obeying the law". War criminals can expect to be punished and any defence that their actions were legal at the time will not be successful because they breached basic morality.
INTRODUCTION TO BUSINESS LAW

Law is changeable, so some conduct (abortion, alcohol or drug use) could be considered criminal yesterday, legal today and criminal tomorrow: what is crime? (¶2-010).

¶1-025 Law, morality and society
Some areas covered by law and morals overlap and are the same — for example, the moral principle that promises should be kept is the foundation for the law of contract. Some conduct is immoral but not illegal — for example, cheating, selfishness. Some conduct is illegal but not immoral — for example, disobeying a “no parking” sign (¶2-010).
Without codes of conduct giving effect to society’s underlying ideologies and ways of life, there would be uncertainty. In a pluralist society where values are not universally shared, law plays a crucial role in maintaining social cohesion because it recognises and gives effect to community values, provides for the settlement of potentially disruptive disputes, and (ideally) provides for the orderly adaptation of rules to social change.

¶1-026 E-commerce and Australian business law
The enacted law (statutes, legislation) and the unenacted judge-made case law that make up Australian business law have adapted to and embraced the fast-developing world of electronic commerce (e-commerce) and the internet. This shows the continuity of the common law (¶1-010) and how it can apply existing legal principles to new technology. This is the same as how the common law adapted to the Industrial Revolution in the 18th century (when the economy moved from agriculture to industry) and the arrival of the steam train and later the motor car.

What is e-commerce?
E-commerce means commerce by means of computer, the internet and other telecommunications links like electronic data interchange (EDI).
Increasingly, more and more business is being done electronically rather than by traditional means involving face-to-face business discussions using paper-based documents.

Australian business has already adapted to e-commerce, such as:
• computer crime (¶2-300)
• e-contract — acceptance of an offer by fax, email and SMS (¶5-045; ¶5-320)
• the computerisation of financial markets, including the development of electronic share trading and the Clearing House Electronic Subregister System (CHESS) for share ownership (¶5-030)
• the confirmation that email falls within the Commonwealth’s power over ’postal services’ under s 51(v) of the Constitution (¶1-475; ¶7-220), and
• electronic banking — financial institutions have been involved in closed-system e-commerce with their customers for the transfer of funds for many years for wholesale and retail transactions, including ATMs and EFTPOS terminals (¶16-650ff).
INTRODUCTION

At a broader level, e-commerce refers to all business activity carried out with the aid of electronic devices, including telephone, fax, email, ATM and EFTPOS, which includes any transaction involving a card that uses electromagnetic data such as a prepaid phone card.

Very little data created today would not be in electronic form, and Australian business law has been revolutionised by e-commerce.

For example, with electronic publishing, most legal material is available electronically through the Australasian Legal Information Institute (AustLII) database (www.austlii.edu.au) and subscriber portals or platforms, such as CCH Australia’s “IntelliConnect” platform (www.cch.com.au).

E-administration of the law

Information technology has revolutionised the administration of the law in the following ways:

- The electronic court (e-court) allows paperless electronic filing, case and document management and imaging of court processes, including registration, document lodging, e-searching, listing of cases for hearing, in-court processing of judgment orders and outcomes and enforcement procedures. Electronic trials, where all the trial documents are available electronically, go back to the mid-1990s.

  Service of documents has been allowed by Facebook.

  Initiatives include the Online Court in New South Wales (www.onlineregistry.lawlink.nsw.gov.au/content), which is like an internet bulletin board where parties can post submissions asking for directions or documents. Online Court has replaced the need for going to court for straightforward matters. It is run online, all the parties can participate and judicial officers can make court orders.

- Internet access among, and electronic data transfer between, courts and tribunals, law enforcement agencies such as the Director of Public Prosecutions (DPP) and the legal profession continues to expand.

- Complex information can be processed and recorded more quickly.

- Evidence can be taken from absent witnesses by audio-visual technology.

- Judgments are published on the internet.

- Courts and tribunals have their own websites.

Will IT make legal advice redundant?

As an important regulator of e-commerce in Australian business law, the Australian Securities and Investments Commission (ASIC) aims to ensure that:

- business regulation is technology-neutral

- regulatory requirements for e-commerce are no more onerous than those applying to traditional business, and

- consumers have at least the same levels of protection as with traditional business.
Geo-identification

It is said that the internet is “borderless”, but a contract made online — or defamation online — is sourced within a legal jurisdiction somewhere. Geo-identification helps to identify just where the internet user is located.


The Australian Guidelines for Electronic Commerce (available at www.treasury.gov.au) aim to improve business awareness of the main issues to be considered when dealing with consumers through e-commerce. This aims to increase consumer confidence in business to consumer e-commerce — focusing on protection, information, choice and redress — with guidance to businesses on matters such as:

- accessibility, disability access
- advertising and marketing
- dispute resolution
- engaging with minors (§5-520)
- fair business practices
- information — contractual — disclosure of terms and contracting
- information — identification of the business
- payment
- privacy, and
- security and authentication.

Compliance with the Australian Guidelines for Electronic Commerce is monitored by ASIC (§9-380).

Spam Act 2003 (Cth)

The development of e-commerce has led to a large amount of spam on the internet. Spam involves invasion of privacy (including the trading of addresses), misleading or deceptive conduct and unfair practices under the Australian Consumer Law (ACL: §7-250; §7-460), and illegal or offensive content.

Especially common is spam in areas like financial scams, pornography and promotions for dubious “health” products. Spam may also be used to transmit computer viruses. Spam threatens the effectiveness and efficiency of e-commerce because it is illegal, offensive and unscrupulous, and may involve tactics that would not be commercially viable if they were not electronic. Spam also imposes costs on the recipient.

The Spam Act 2003 (Cth):

- regulates commercial email and other types of commercial electronic messages
- bans unsolicited SMS (§5-320) and Multimedia Messaging Service (MMS) messages that advertise, offer or promote goods or services or suppliers of goods or services (s 16)
- requires that commercial electronic messages include accurate sender information (s 17)

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3 Spam is unsolicited commercial electronic messages, which range from commercial advertising and offensive material to messages which are part of criminal and fraudulent activity.