

## **Business law week 1: The AUSTRALIAN legal system**

**Law** is a body of enforceable rules, made by the state – the parliaments and the courts – that is enforceable by the state. [CALC 1.20]

The defining features of law: source or where it comes from (parliaments and courts) and enforceability by the state.

### **Functions of law [calc 1.30]:**

Provides rules and structures for dispute resolution  
 reinforces basic community values (for example, change in sentiment about the institution of marriage such as gay marriage)  
 promotes stability and cohesion  
 promotes justice and the rule of law  
 regulatory function

**Rule of law [1.40]:** people, including in the government and parliament, should be ruled by the law and obey it and the law should be such that people will be able and willing to be guided by it. Summary: “no one is above the law.”

Law binds commerce (buying and selling) and business to flourish.

Pre and post colonisation shape how law is enforced today.



### **Mabo v Queensland [No 2] [CALC 1.110]**

- The high court recognised that Australia had not been terra nullius (belonging to no one)
- Recognised concept “native title” post colonisation law: indigenous exercised traditional rights over land before colonisation, therefore based on traditional laws and customs, the law would recognise those rights.
- The Native title act 1993 of the Commonwealth was passed to regulate the ongoing operation of native title rights within Aus. Legal system

**Two sources of law:** coming from courts (Mabo v Q) and coming from parliament (Native Title)

Australian constitution: 1 Jan 1901 as own country and establishes Australia as a constitutional monarchy – before it was a part of British colonies.

Federal government and then separate governments operate at individual jurisdictions depending on state or territory. (individual laws depending on state).

Australia: Parliament, Executive, Judiciary. Parliament makes the law; executive administers the law and judiciary applies the law in the case of dispute.

Exclusive powers: parliament makes law

Concurrent: commonwealth and parliament make law

Residual: state makes law

→ **Collins v Godefroy**: promise to pay money to a witness for giving evidence is not enforceable as witness was legally required to give evidence by subpoena anyway

→ **Glasbrook v Glamorgan County Council**: promise by police to provide protection at a site of an industrial dispute was good consideration as new value is being provided and the police did more than what their public duty required

→ **Stilk v Myrick**: promise to remain working on ship after some sailors deserted is not good consideration as sailors were already required to do so under contract

→ **Hartley**: so many sailors had deserted that the ship was unseaworthy and by promising to stay on, that was a new promise above their existing promise to be a sailor on the ship under ordinary circumstances.

### Practical benefit test

Legal rule that says a promise may be enforceable even if the ordinary rules of consideration aren't satisfied if there is still a practical benefit that is accrued to the promisor. The requirements for this are:

- One party (the promisee) does not perform or is not performing their existing contractual obligations
- The other party (the promisor) makes a promise (e.g more money) to do the work originally agreed
- The promisee performs their obligations
- In doing so, the promisor receives a practical benefit or avoids a detriment

→ **Williams v Roffey Bros**: extra money promised, Roffey Bros gained practical benefits (didn't need to find another subcontractor, avoided penalties under head contract, avoided litigation for breach of contract).

### Deeds

Deeds: contracts under seal. This is different from a contract and gives the clear indication that a person or entity gives its most sincere promise that they will fulfil contractual obligations.

Can be binding **even without consideration but can contain binding promises.**

The seriousness is demonstrated here, in the case of deeds, by the formalities required to create a deed.

Deeds might be used in business contexts where consideration exists anyway.

### Difference between contracts under seal and simple contract

1. **Repudiation:** the innocent party has a right to terminate the contract if the other party demonstrates an absence of willingness or ability to perform their obligations.
2. **Anticipatory breach:** one party expresses lack of willingness or ability to perform contractual obligations *before* the performance is due. For example, signing a contract of employment and then accepting another job offer this is an anticipatory breach. The innocent party can then terminate the contract. Or, they can wait until that person was meant to start their employment and then sue for actual losses they sustained.
3. **Example:** *Laurinda PTY LTS V Capalaba Park Shopping Centre PTY LTD*, substantial delay in performance, timing issues, which amounted to repudiation. **The court agreed that the conduct was repudiatory because it showed an intention to perform the contract in a manner that was substantially inconsistent with its obligation.** Therefore, the defendant was right in termination.
4. **Example: Progressive Mailing House PTY LTD v Tabali PTY LTD**, does a lessee's conduct amount to repudiation? Cumulative effects of the breaches amounted to repudiation.

### *Effect of repudiation*

Repudiation gives the other party an option: ignore the breach and insist upon performance or accept repudiation and terminate the contract.

### *Breach in fulfilling terms of contract – an essential term*

1. **An essential term** – a term of such basic importance that the breach of it gives rise to a right to terminate the contract and sue for damages – is called a **condition**.
2. A **warranty** on the other hand is secondary to the main purpose of the contract so that if a breach of warranty occurs, **they cannot terminate the contract and only sue for damages**.
3. For example, failure by the purchaser of land to pay a deposit in accordance with the terms of the contract of sale was held to constitute breach of an essential term, entitling the vendor to rescind the contract (**Brien v Dwyer**). On the other hand, consistently late payment of rent does not constitute repudiation of a lease: **Shevill v Builders Licensing Board**.
4. Some parties may use the word condition in the wrong context as simply meaning a term of the contract and did not intend breach of the term to result in termination. **Examples:** *L Schuler AG v Wickham Machine Tool Sales Ltd*: clause 7 of the contract described as being a condition; stated that Wickham would send a sales person to each of a list of named customers once a week (1,400 visits in total); Wickham **failed to make one of the visits**; Schuler terminated the contract; Wickham argued it was a warranty which did not give Schuler a right to terminate the contract. The high court agreed it was only a warranty; condition used in wrong context.
5. Example: *Gumland Property Holdings PTY LTD v Duffy Bros Fruit Market*: payment of rent essential term; fell behind in rent; terminated lease before expiry; sued for damages; payment of rent essential term.

Although, **York v Ross Lucas**: sale of business. The company passed on information relating to the average weekly turnover of the business that was for sale during negotiations. This information was inaccurate and the company was found to have engaged in misleading and deceptive conduct. High court emphasises that it does depend on the circumstances.

4. Conduct: doing or the refusing to do any act. This includes making a statement, claim or promise (orally or in writing), performing an act or refusing to, not limited to words – includes publication of images and includes implied representations. For example, **ACCC V Thermomix**: by the company continuing to sell the product although aware of the safety issues, the company was found that it was representing the product to be safe and this was misleading and deceptive. Business activities are also included such as advertising, using social media for commercial purposes, making claims about goods or services including on packaging, and making representations during business negotiations or sales to consumers.

*However, can silence constitute conduct?*

In commercial dealings, there is not general duty to disclose information. **Miller v BMW finance**: broker had not engaged in misleading or deceptive conduct. It found that not disclosing information about the policy not being cancellable was not deceptive in conduct. However, it does depend on the circumstances.

Silence may contravene s 18 where:

- The information provided is incomplete; false impressions; failing to disclose whole truth or circumstances about to change. For example: **Henjo v Collins Marrickville**
- Failure to disclose information where there is a **reasonable expectation** to disclose would breach s 18: **Demagogue v Ramensky**: Demagogue's silence constituted misleading or deceptive conduct because there was a reasonable expectation that there should have been disclosure of the unusual circumstances surrounding access to the property.

5. **How to judge if conduct is misleading or deceptive? It must be capable of leading a person into error.** We do the objective test: consider conduct as a whole in the circumstances. If the conduct is directed at a specific individual such as contract negotiations, the court will assess the conduct as a whole, including the nature of the transaction and the parties involved (**court considered this in Hyder v McGrath**).

If the conducted is directed at the public at large (e.g advertising), we must consider: the target audience, conduct as a whole and any dominant message and impact on "ordinary or reasonable members" of the target audience (e.g **ACCC V Coles and ACCC V TPG 2013**)

In considering if there is a breach of s 18, consider the following questions:

## Week 10: the law of business organisations – Agency and partnerships

Which business structure to adopt?

Ownership, extent of control, taxation, cost to establish and run and personal liability are driving factors.

**Law of agency:** allows one person to authorise another person to do any act that he or she has capacity to do themselves. Agency is acting through another person. Principal and agent relationship: principal appoints and authorises the agent, agent deals with third party on behalf of principal and third parties; contract created between third party and principal and agent's role has been completed.

Whether the agent has acted within their authority is crucial to whether the principal will be bound by the actions of the agent. There is **actual authority**: express statements (as well as limitations) and implied: incidental to carrying out acts within express authority – to do everything in the usual course of business to complete the transaction. E.g. salesperson in a retail shop. Agent has actual authority to do X.

There is also **apparent authority**: agent appears to others to have authority to do X. Agent acts outside of their authority and done something they're not allowed to do. How are they perceived to third parties? E.G a salesperson giving a discount on goods and not authorised to do so. **Principal is bound if within apparent authority**. This protects third parties – but only if third party was not aware agent had no actual authority.

– eg. by hiring the person as a salesperson, the store is representing to customers that the individual has the power that one would expect a salesperson of that type to normally have. How would a reasonable person in the position of the customer have seen the salesperson's authority?  
 - Size of discount relevant? 10% vs 50%?

### Partnerships (e.g. accounting firm)

**Formation:** arise from an agreement between two or more people who decide to go into business together. No formalities to create This becomes a contractual relationship. The contract can be express or implied and includes pool assets and liabilities. At least two people and a maximum of 20.

Partnerships are also referred to as firm.

**Weaknesses:** personal liability of partners; not a separate legal entity. Each partner is personally liable for each debt and liabilities of the partnership. It is possible to establish a limited partnership under the **Partnership Act** (can have liability limited to a fixed proportion but cannot participate in management of the business). At least one person must be fully liable for anything that goes wrong in the business.

## Duties of directors and other officers

Officer: directors, secretaries and more generally a person who participates in or makes decisions that can have a substantial effect on the business.

**They have a duty to prevent insolvent trading** (unable to pay debts as and when they fall due and continues to incur further debt). Section 588G. Applies to executive and non-executive directors (eg ASIC v Plymin). Indicators include trading losses, unpaid invoices, unpaid employees.

Defences 588H: business was solvent even with the new debts (ss2), had reasonable grounds to rely on information provided by a competent and reliable person that the company was solvent (ss3), did not take part in management owing to illness or other good reason (ss4), took all reasonable steps to prevent the company from incurring the debt (ss5). Only need to establish one defence to avoid liability.

**Safe harbour defence:** section 588GA: directors develop one or more courses of action that are reasonably likely to provide a better outcome for the company than ceasing to trade. Director need to show that they were properly informing themselves of company's financial position or advice has been obtained from a qualified entity or there are company restricting plans.

Consequences: personally liable for debts, civil penalty, disqualification (Plymin) or criminal offence means jail time (ASIC v Young)

**They have a duty of care, skill and diligence** (s 180 (1)) – that a reasonable person would exercise if they were a director/officer in the circumstances and were in the position of the director/officer. They will determine this by the reasonable person test – exam actual amount of care, skill and diligence and compare with the reasonable person standard. They must safeguard the corporate assets such as money and reputation.

CEO held to higher standard of care than an employee.

Liable for their actions if it was reasonably foreseeable that their failure to act might cause harm to the interest of the company.

What needs to be done to satisfy the duty at a minimum? If these are not met, then there is a breach of duty of care (Daniels v Anderson):

- Be familiar with fundamentals of business
- Keep informed of activities and make inquires
- Monitor affairs and policies
- Keep informed of financial status of company
- Attend board meetings

**ASIC V Healey:** significant mistake in financial statements and not detected by management and external auditors. Duty of care and diligence breached.

Exercising due care and diligence involves thinking beyond financial consequences. Consider corporate culture, reputational harm and non-compliance with the law. For example,