CHAPTER 1

The Organisation of Law and Government in Australia

In this chapter:

- The concept, nature and purpose of law
- Law as a tool of social regulation
- The relationship between law and justice
- Law and ethics
- How law is classified and organised
- Key legal terms and concepts
- The origins of Australian law
- The structure of the Commonwealth of Australia
- The organs of Australian governments and their law-making powers
  - the Crown
  - legislatures
  - the executive
  - the courts
  - other organs of government.

[1.1] Introduction

Most students of business law have not studied law before. For you, the law may be a new subject with many strange concepts and a language all of its own. It is important, therefore, that some foundational facts, ideas and terminologies are explained at the start.

In this chapter, the concept of law, and its nature and purpose, are analysed and explained. The way in which laws are classified and organised is set out. The origins of Australian law are described. The relationship between government and law is explained. The organs of government in Australia are described and their law-making functions outlined. You will find that an understanding of these matters is essential to the study of law.

In addition to this chapter, there is an FPBL eStudy module *The organisation of law and government in Australia* that will help you learn and understand the legal concepts and rules outlined here. There is also a separate quiz in the module *Quizzes and case studies for revision* which you can use to test yourself when you think you have learned what you need to know.

[1.2] The Concept of Law

1.2.1 Different kinds of law

Everyone will have some idea of what law is and how it works. But not everybody will have thought about the true nature of law or how best to define it. We can begin to understand what law is by saying that law provides authoritative rules for how we are to behave. However, this description is not quite precise enough. This is because there are different kinds of 'law'. Reference is often made to concepts such as 'natural laws', 'moral laws', 'laws of God', 'custom' and 'national law'. What is the difference between these various kinds of law? The answer lies in how they are *identified* and how they are *enforced*.

- *Natural laws* are those rules of conduct that accord with our realised experiences of the physical world. We obey these laws because, in our experience, that is how things work. An example is the natural responsibility of parents to look after their offspring. This law of nature can be widely disregarded only at the peril of the species.
- *Moral and religious laws* are rules of conduct derived from belief systems, sometimes recorded in authoritative texts, sometimes passed on by oral tradition. Such rules are obeyed as a matter of individual conscience or as part of a religious community. An example would be the dietary rules prescribed by particular religions.
- *Custom* consists of rules of conduct that have been established by long usage and are obeyed because of peer pressure, or because they are convenient. An example would be the rituals, music and clothing styles commonly associated with marriage ceremonies. Obeying such rules provides continuity with tradition and a sense of shared identity.
- *National law* is made up of those rules of conduct that the government of a particular country or 'state' recognises and enforces as law. The key concept here is 'rules recognised and enforced by the authority of the state'. If the government of a state recognises a rule of conduct and enforces it, then that rule becomes part of the national law.

It is important to realise that there may be some overlap between the rules of national law and the rules of other kinds of law. Many rules of conduct originate as customary, moral or natural laws, but become part of the national law when a government decides to recognise and enforce those same rules. For example, most religions prohibit the killing of one human being by another, and governments in most countries recognise and enforce this same rule.

Each country has its own national law. Unless otherwise specified, the word 'law' in what follows is used to refer to the rules of national law that have been established and are enforced in Australia.

[1.3] Law as a Regulator of Behaviour

1.3.1 How law regulates conduct

Rules of law often regulate the behaviour of individuals to benefit the greater community. This is done in different ways. For example, particular rules of law might either restrict, prohibit, punish, permit or reward specified behaviour. For instance:

- The law generally *restricts the use of force* by individuals and forbids unauthorised violence. This is the foundation of peace and good order in society.
- Some laws *prohibit* and *punish* particular kinds of undesirable behaviour. For example, it is a rule of law that one person should not wrongfully take another person's property. This is called theft or stealing. It is prohibited, and people who are caught stealing are punished by the state.
- Other laws *permit* or *reward* particular behaviour that the government thinks is desirable. For example, a person may be allowed by law to import various kinds of goods into Australia. They may be further encouraged to do so by laws that give financial assistance (in the form of subsidies) to those who actually do so.
- Laws generally provide for the *creation of rights and duties* that can be enforced by an individual in court, without resorting to force. Laws provide appropriate remedies when rights are interfered with or when duties are not discharged. The creation of legally enforceable rights and duties allows individuals to plan for the future with reasonable certainty.

[1.4] 'Law' and 'Justice'

1.4.1 The relationship between law and justice

The relationship between law and justice is an important one, but it is not simple. It is a relationship that has to take account of practicalities and realities that sometimes may be in conflict.

1.4.1(a) Justice as the objective of law

It has often been suggested that the ideal purpose of law is to achieve outcomes that are considered good and fair by the community. This is what the Roman Emperor Justinian, a great law-giver, meant when he said: 'Law is the art of the good and the just'. It is the objective of achieving justice that morally underpins using the power of the state to enforce legal rules. And, on a practical level, a community will more willingly support and conform to laws that are considered just.

Of course, governments do not always make and enforce laws for good and just purposes. Governments can use their power to enforce unfair rules, such as discriminatory laws which favour one racial group or a particular gender. However, the fact that unjust laws exist from time to time does not diminish the validity of the idea that law *ought* to aim at achieving good and fair outcomes.

1.4.1(b) Balancing justice and predictability

One important aspect of modern law is that it can be discovered with a degree of clarity and certainty that makes its application predictable. This is very useful. If we can find out the rules that govern particular kinds of behaviour, then we can choose to act in accordance with those rules and avoid unwanted consequences. This means that law is most useful as a regulator of conduct when the rules are clear and their application is predictable. Sometimes, however, it is not possible to find a rule of law that clearly applies to the exact situation that has arisen. Many rules of law are expressed quite broadly and do not take account of special detailed circumstances. A rule of law that has worked well enough in the past might not seem to provide a fair or just outcome when additional or new circumstances are taken into account. When this happens, the requirements of justice and predictability may conflict and the judges who apply the law may have to make difficult choices. Sometimes justice is given preference; in other cases certainty and predictability are seen as more important. The old adage 'hard cases make bad law' is a reminder that treating too many cases as exceptional in the pursuit of justice can damage the predictability and certainty of the legal system overall.

[1.5] 'Law' and 'Ethics'

1.5.1 The nature of ethics

Law is also influenced by what are called 'ethics'. Ethics refers to ideas about right and wrong conduct, or what is moral or immoral, based on the idea of avoiding unjustified and unnecessary harm to other beings. The word derives from the Ancient Greek word *ethos*, meaning habit or custom which reminds us that ethical views can, and do, differ between communities, depending on their circumstances and traditions. Ethics are concerned with identifying guiding values, such as honesty, fairness and empathy, and with establishing standards of conduct. An ethical question focuses on what is the right choice or conduct in a particular situation. This is a different question to what is legal or illegal: conduct may, strictly speaking, be legal (that is, within the law), but not ethical and vice versa. In some circumstances, where harm may be caused to another person, it may be necessary to choose between what the law allows or requires, and what ethical considerations dictate.

1.5.2 Ethics in specific settings

Particular ethical values and standards of conduct apply to specific activities or professions. For lawyers, ethical questions might be how best to represent a client's case while still fulfilling their duties, as lawyers, to the court. For accountants, ethical rules might relate to carrying out an audit accurately, or keeping a client's information confidential. For students at a university or college, ethical standards require honesty and completing one's own work to the best of one's ability. Submitting another person's work as your own for the purposes of assessment is called plagiarism and is clearly unethical.

1.5.3 Ethics and the world of business

We need to consider 'business ethics'—that is, the ethical values and standards relevant to business entities and business activities. Persons engaged in businesses tend to be

motivated by profit. But profit is not the only thing which should guide business activities. Businesses are also expected to act ethically, for example by treating their employees fairly, marketing their goods and services honestly, and providing customers with safe and appropriate products. Most people also expect businesses to minimise any harmful impacts that their activities may have more broadly, such as on the natural environment or on wider communities. Unfortunately there are many historical instances of business persons engaging in unethical conduct and causing widespread harm, for instance, by price-fixing, bribing corrupt government officials, or obtaining contracts through unethical means such as dishonesty or threats.

1.5.4 Ethics and law

Ethics are not created and enforced in the same way that law is. But ethical standards are sometimes compiled into what are called 'voluntary Codes of Conduct'. A business might agree to comply with such a Code and to be held accountable for behaving in accordance with the ethical principles contained in the Code.

It must also be remembered that many rules of law reflect ethical norms, by requiring or prohibiting specific kinds of conduct as acceptable or unacceptable. In this way, enforcement of the law reinforces what is seen as ethical or unethical. For instance, the Australian Consumer Law targets a range of dishonest or otherwise unethical business practices, like falsely offering gifts or prizes. In the chapters that follow, attention will be drawn to those circumstances where laws relate to particular aspects of business ethics.

[1.6] The Classification and Organisation of Law

1.6.1 Classifying laws

In a modern country, there are many thousands of legal rules. These rules arose over many years, and developed from traditional legal forms or processes. As a result, legal rules tend to be classified, organised and collected in particular ways. This has the benefit of making those rules manageable, orderly and easily locatable. Broadly speaking, each rule of law is classified as belonging to a particular category (or area) of law. These categories of law are named to indicate the theme or nature of the rules grouped within them. The categories of law are arranged systematically, in accordance with traditional and well-known legal concepts, to provide an overall structure.

1.6.2 Categories of law

There are many established categories (or areas) of law. Some may be familiar to non-legal audiences, for example, criminal law and contract law. Others may be less familiar, such as tort law or administrative law. The table below sets out some of the traditional categories of law and briefly describes the rules of law that are found within them. The basic categories will help you to put individual topics you study in business law into context and will help you to find particular rules of law when you need them.

[1.7] The Anatomy of Law

1.7.1 Terms and phrases that describe the law

While studying law, you will find references not just to 'the law' as a whole and to 'categories (or areas) of law', but also to things such as 'legal concepts', 'legal principles', 'legal rules' and 'legal meanings'. These terms help to describe how law is structured and organised. Knowing what these terms mean will help you to understand legal materials.

- *Categories (or areas) of law.* These are a convenient way of grouping together particular laws which are considered to be related, usually because they refer to the same type of concept, situation or conduct. The table opposite explains some of the commonly found categories of law.
- *Legal concepts.* These are the ideas that determine the scope and nature of a particular category of law. For example, in contract law, there is the broad concept of 'contract formation', under which fall the more precise concepts of 'agreement', 'intention to be bound' and 'consideration'. Identifying and organising key concepts will enable you to build a mental framework of a specific area of law.
- *Legal principles.* These are the broad precepts that recognise and give effect to a particular point of view, value or policy. For example, in Australian law, the concept of contract formation is based in part on the principle that a contract is only made if the parties intend to be legally bound by their agreement. It is a further principle that an intention to be legally bound is ascertained objectively rather than subjectively.
- *Legal rules.* These provide the detailed mechanisms by which legal principles are given effect. Rules specify particular requirements or provide what should happen in specific situations. For example, there are many rules in contract law that specify the different ways in which agreement may be reached or what should happen if performance of an agreement becomes impossible.
- *Legal meanings.* These refer to the particular meaning or significance that words or phrases have in law. For example, in contract law, the words 'party', 'consideration' and 'frustration' have specific legal meanings that differ from their ordinary meanings.
- *Legal authorities* are the sources of particular legal principles, rules or meanings. For example, a legal rule may originate in a particular decision of a court or in an Act of Parliament.

Table 1.1 Categories of law

Category of law		Description
Jurisprudence		The science or philosophy of law.
International law		Agreements (treaties) between sovereign states and internationally observed customs.
National law		Law as applied within the borders of a particular country (state), eg Australian law.
National public law	Constitutional law	The organisation, powers and processes of government.
	Administrative law	Rules governing the processes of official decision making.
	Criminal law	The prohibition and punishment by the state of conduct considered harmful to the general community.
National private law Traditional categories of law	Civil law	The creation and enforcement of private legal rights and duties between individuals. This category of law is very large, encompassing some of the other categories, such as contract law, tort law and property law.
	Tort law	Liability for harm wrongfully caused by one person to another person or to their property.
	Contract law	Private agreements that give rise to legally enforceable rights and duties.
	Agency	The use of a representative to acquire or discharge legal rights or duties.
	Consumer protection law	Legal protections for consumers in their dealings with suppliers of goods or services.
	Corporations law	The creation, organisation and administration of companies.
	Property law	The acquisition and transfer of private rights in goods and land.
Specialist categories of law	Business law	Rules that are particularly relevant to business activities, taken selectively from the more traditional categories of law, such as contract law, agency, tort law, banking law, insurance law, employment law, corporations law and tax law.

[1.8] The Development of Western European Legal Systems

1.8.1 The origins of Australian Law

You have already learned that the law of a particular country (its national law) consists of the rules of conduct that are recognised and enforced by the government of that country. You might expect the laws of each country to be very different, but in fact they often turn out to be quite similar in many ways. This similarity suggests that they were not developed independently, but that they share a common origin, and this is in fact the case. The story of the development of the laws which have been adopted by so many modern states goes back a long way in western European history. It begins in the Roman Empire with Roman law (sometimes called 'Roman civil law' or *ius civilis Romanus*) and is continued later, in England, with what is known as English law (sometimes called 'common law'). If you examine the laws of the states that make up the modern political world, you will find that most of those laws have been derived from, or strongly influenced by, either Roman law or English law—and sometimes both. For that reason, a short explanation of the development and spread of Roman law, and then English law, is necessary for a proper understanding of modern law.

1.8.2 Roman law

Roman law began its development in 753 BC when Rome was established as a small city state. Over the next 1,200 years, as Rome expanded into a large and commercially active empire, its laws developed and grew until they became the most sophisticated or complex system of law the Western world had yet seen. In 533 AD, the Emperor Justinian decided that this vast body of law should be reorganised and collected in a Digest. This Digest, together with some other collections of law, are collectively known as the *Corpus Iuris Civilis* (Compendium of the Civil Law).

Not long before the completion of the *Corpus Iuris Civilis*, the western part of the Roman Empire was invaded by tribes from the north. In 476 AD, the Western Empire collapsed and Europe entered a period known as the Dark Ages. Roman law was largely forgotten for hundreds of years. Then, in the 12th century AD, copies of the *Corpus Iuris Civilis* were discovered in libraries in Italy. Scholars took a renewed interest in Roman law and knowledge of it quickly spread. As a result, Roman law became influential in the legal developments that took place in the emerging states of modern Europe. In particular, the *Corpus Iuris Civilis* served as the foundation for several new European codes of law: the French Code Napoleon of 1804, the Austrian code of 1811, the German code of 1889, and the Swiss codes of 1889 and 1907. In later years, these codes were used as models by countries outside of Europe. For example, the Code Napoleon was taken as the basis for the law of the French parts of Canada, the state of Louisiana in the USA and many countries in South America. The German code was the model for the law of Hungary, Brazil, Greece and Japan. Turkey has adopted the Swiss code. The Republic of South Africa, Sri Lanka, Zimbabwe and Scotland also have legal systems based on Roman law.

1.8.3 English law

English law also has a long history, going back to the 12th century. Instead of adopting Roman law as other European countries had done, England chose to develop its own

local laws and customs. Over the years, English common law (law that was 'common' to all of England) became a complex system of law. England also became a powerful nation with a large empire and worldwide trade relations. When England invaded and colonised various parts of the world, English law was introduced as the law of those colonies. These legal foundations have, in the main, been retained since the colonies have become independent. This is what happened in Australia. For the same reasons, common law is also the foundational law of most of the states that make up the United States of America, the English speaking parts of Canada and many countries in Africa and Asia.

Because modern Australian law derives much of its content from English law, Australian law is similar to the laws of other countries that share the same heritage. Australian law is less similar to the law of countries that have received or been influenced by Roman or other legal systems. As with most common law countries, there are two main sources of law in Australia: cases (legal disputes) decided by courts and legislative Acts created by parliaments.

The extent to which either English or Roman law has been received, and the extent to which that law has been modified since its reception, vary markedly between countries. A good example is Malaysia, whose legal system contains substantial elements inherited from English law, but whose sources of law also include legislation enacted in Malaysia, local laws deriving from custom and Muslim law (the last-mentioned being applied only to Muslims in sharia courts).

1.8.4 Indigenous custom and law

In Australia, the received English law, now considerably adapted and expanded since independence, exists alongside indigenous custom and law. Indigenous Australians, who occupied the land for tens of thousands of years before colonisation, lived in defined groups, each with their own laws and customs. These laws were not written down but were passed on orally to each generation and have survived to the present day. Indigenous law is particularly important in relation to family and community issues and land rights; less so in relation to commercial matters.

[1.9] The Establishment of the Australian Commonwealth, States and Territories

1.9.1 The first Australians and British occupation of Australia

Australia has been inhabited by its aboriginal peoples for thousands of years. European occupation of Australia began in 1788 when the British established the colony of New South Wales. Over the next 50 years or so, other colonies were established: Queensland, Victoria, Tasmania, Western Australia and South Australia. In more recent times, Australia's non-indigenous population has been further augmented by the arrival of people of many different nationalities, making modern Australians a diverse mix of cultural and ethnic identities.

1.9.2 Government of the Australian colonies

Though Britain initially ruled its Australian colonies directly, during the 1800s the colonies were allowed by Britain to become self-governing with general powers to administer,

enforce and make new law. Specifically, each colony was given the general power 'to make laws for the peace, welfare and good government of the colony', but with some important restrictions: they could not make law that was inconsistent with laws made by the British parliament, and they could not generally make laws to operate outside their own borders.

1.9.3 Establishment of the Commonwealth of Australia

The Commonwealth of Australia was formed in 1901 after lengthy negotiation during the 1890s between the Australian colonies and with Britain. The Commonwealth was established by the *Commonwealth of Australia Constitution Act 1900*, a law enacted by the British parliament. This law contains both the detailed provisions of the constitution of the Commonwealth and the 'covering clauses' that authorise the new arrangements for government in Australia.

1.9.4 The Australian states and territories

As part of the process of forming the Commonwealth of Australia, the colonies became 'states'. The states are New South Wales (NSW), Queensland (Qld), South Australia (SA), Tasmania (Tas), Victoria (Vic) and Western Australia (WA). The Commonwealth of Australia is a confederation of states rather than a unitary state. Notwithstanding the formation of the Commonwealth, each new state retained the power to govern within its own borders, with responsibility for a wide range of matters. But they also agreed to give specified powers to a new federal Australian government, which would have responsibility for matters of national importance throughout the whole of the Commonwealth.

In addition to the six states, there are 10 'territories' in the Commonwealth of Australia. The mainland territories are the Northern Territory and the Australian Capital Territory. The external territories are: Ashmore and Cartier Islands; Christmas Island; the Cocos (Keeling) Islands; the Coral Sea Islands; Jervis Bay Territory; Heard Island and McDonald Island; Norfolk Island; and the Australian Antarctic Territory.

[1.10] The Structure of Government in Australia

1.10.1 The meaning of 'government'

It is necessary, at this point, to explain the different meanings of the word 'government'. In one sense, the word refers to the institutions or 'organs' that have been created within the Australian states and territories. These institutions provide the formal structures of government and allow for the division of governmental power. Examples of organs of government are the Crown, the executive, the courts and legislatures. These are explained below.

In another sense, the word 'government' refers to the elected representatives, appointees and employees who, at any particular time, occupy positions within the institutions of government and exercise the day-to-day powers of governing.

As long as these possible meanings are kept in mind, the sense in which the word is used can normally be understood from its context.