



Andy Gibson ■ Sarah Osborne

BUSINESS

11e
LAW

DETAILED CONTENTS

How to use this book	xiii
Educator resources	xviii
Preface	xix
About the authors	xxvii
Key to case report abbreviations	xxviii
Table of cases	xxix
Table of statutes	xxxiv

PART 1

THE LEGAL FRAMEWORK

1

CHAPTER 1

Legal foundations	2
What is 'law'?	3
Can we define 'the law'?	3
Are rules always law?	3
Where is the law found?	5
What are the characteristics of a legal system?	7
What are the major types of laws found in the Australian legal system?	9
What are Commonwealth and state powers?	12
What does separation of powers mean?	23

CHAPTER 2

How the legal system works	27
Section 1: Classification of laws	28
How are laws classified?	28
Section 2: Courts and tribunals	34
What is a court system?	34
What are the roles of the police and the courts?	35
What is a court hierarchy?	36
What is the difference between original and appellate jurisdiction?	37
What cases can state, territory and federal courts hear?	38
What are federal courts?	44
What are the features of a court hierarchy?	47
What alternative methods are there to courts?	48
What are judicial and quasi-judicial tribunals?	52
What is an ombudsman?	55
What is the composition of an adversary system?	55

What type of action is a representative or class action?	62
Section 3: Precedent and statute law	66
Where do you look for sources of law?	66
How do you find a case?	67
What is case law?	69
What is statute law?	76
What are the methods of statutory interpretation used by the courts?	79

PART 2

LAW OF CONTRACTS

91

CHAPTER 3

Creation of the contract	92
Section 1: The importance of contracts in society	93
What is the importance of contract law?	93
What are the sources of contract law?	94
What is the difference between a contract and an agreement?	94
What is a contract?	95
How is an 'apparent' simple contract created?	95
How do you know what has been created is enforceable?	96
How are contracts classified?	97
What is the importance to business of the distinction between formal and simple contracts?	100
Section 2: Agreement between the parties	105
What constitutes a contractual agreement?	105
Step 1: Is there agreement between the parties?	106
What are the rules relating to offer?	110
Can an offer be terminated?	119
What are the rules relating to acceptance?	123
What are the rules as to contracts by post?	127
How does electronic offer and acceptance work?	129
Section 3: Intention to create legal relations	135
What is intention?	135
Step 2: Is there intention to contract?	137
What is the statutory position?	142

What is the legal position with non-commercial agreements (agreements lacking serious intention)?	143		
Section 4: Consideration	149		
Step 3: Is consideration present?	149		
What is 'consideration'?	149		
What are the essential rules for consideration?	150		
What is promissory estoppel?	158		
CHAPTER 4			
Validity	165		
Section 1: Capacity of the parties	166		
Step 4: Do the parties to the contract have full contractual capacity?	166		
Who are infants (or minors)?	167		
Does a corporation have the capacity to contract?	173		
Do bankrupts have the capacity to contract?	173		
Do mentally unsound and intoxicated persons have the capacity to contract?	173		
Section 2: Is there genuine consent?	176		
Step 5: Have the parties consented?	176		
What is mistake?	176		
What is misrepresentation?	186		
What actions can constitute duress or undue influence?	192		
What are unconscionable (unfair) contracts?	197		
Section 3: Is the purpose of the contract legal?	204		
Step 6: Is the contract legal?	204		
What type of contracts are illegal by statute?	204		
What is the common law position of contracts that are illegal and contracts that are void?	207		
CHAPTER 5			
Terms of the contract	220		
What are express terms?	221		
What are collateral contracts?	226		
How important is the term?	228		
What are implied terms?	235		
What are meaningless terms?	237		
What are exclusion clauses or terms?	238		
CHAPTER 6			
Rights and liabilities of the parties, discharge and remedies	255		
Section 1: Rights and liabilities of the parties, and conclusion of the contract	256		
What is privity of contract?	256		
Can you assign liabilities and rights?	258		
How can a contract be ended?	260		
Section 2: Remedies for breach of contract	278		
What remedies are available at common law?	278		
How are damages determined for breach of contract?	281		
What are equitable remedies?	292		
When is there a loss of right to sue?	298		
PART 3			
CIVIL LIABILITY	301		
CHAPTER 7			
Civil liability: The law of torts and negligence	302		
Why is an understanding of the law of torts important to business?	303		
What are the general principles of tortious liability (negligence)?	304		
What are the time periods for tort actions?	307		
What is civil liability and the tort of negligence?	309		
What are the roles of the plaintiff and the defendant in establishing the elements of negligence?	310		
CHAPTER 8			
Applications of negligence to business	348		
Product liability (defective products): What is the legal position of manufacturers?	349		
How does the tort of negligence impact on the application of occupier's liability?	366		
What are the requirements of criminal negligence?	375		
PART 4			
CONSUMER LAW	381		
CHAPTER 9			
Statutory consumer guarantees and the <i>Australian Consumer Law</i>	382		
What are consumer guarantees?	384		
What are the consumer guarantees that apply to goods?	388		
What are the consumer guarantees that relate to the acceptability of goods?	390		
Are there situations where there is no overlap with the Sale of Goods Acts?	397		
Are there consumer guarantees relating to the supply of services?	398		
What are consumers' rights concerning guarantees for the supply of goods and services?	399		
What are the rights of action against manufacturers?	400		

Can an implied consumer guarantee be excluded?	401	What are the remedies of a principal for breach by an agent?	474
		What are some specific types of agency?	474
CHAPTER 10		CHAPTER 12	
General and specific consumer protections under the ACL	405	Sole traders and partnerships	480
What is the scope of the <i>Australian Consumer Law</i> ?	406	Who is a sole trader?	481
What is the purpose of Chapter 2—General protections?	409	What areas of law apply to partnerships?	481
What does Chapter 2, Part 2-1—Misleading or deceptive conduct (ss 18–19), cover?	410	What are the essential elements of a partnership?	482
What does Chapter 2, Part 2-2—Unconscionable conduct (ss 20–22), cover?	421	When does a partnership exist?	485
What is the effect on a contract of Chapter 2, Part 2-3—Unfair contract terms (ss 23–28)?	424	What other type of relationships can look like partnerships?	486
What are the protections in Chapter 3 against false representations (ss 29–31,37)?	426	How is a partnership created?	491
What other ‘unfair practices’ are caught by the ACL?	431	What is the relationship of partners to outsiders?	492
How does Chapter 3, Part 3-3—Safety of consumer goods and product related services, apply under the ACL?	435	What is the liability of partners in contract and tort?	493
What is manufacturer’s liability?	436	What does being an apparent partner or ‘holding out’ mean?	496
What is the liability of manufacturers for goods with safety defects under Chapter 3, Part 3-5, of the ACL?	439	Does a retiring partner continue to be liable for partnership debts?	497
What other consumer transactions are caught by the ACL?	442	What is the relationship between partners?	497
What does Chapter 5—Enforcement and remedies provide for breach of the ACL?	444	What are the rights of each partner?	498
Is there still a role for state and territory consumer protection bodies?	448	What are the duties of each partner?	499
		What happens to partnership property?	501
		What is the effect of dissolution?	501
		What is a limited partnership?	504
		CHAPTER 13	
		Introduction to companies and incorporated associations	510
		What is the role of ASIC in the administration of company law?	511
		What is a company?	512
		When will a court pierce the corporate veil?	514
		What is the best corporate structure for my business?	515
		What is the effect of incorporation?	518
		What is registration?	519
		How is the internal management of a company governed?	519
		What does being a director involve?	520
		What is the purpose of fundraising?	533
		How do I raise company capital?	534
		What is corporate insolvency?	536
		What are unincorporated and incorporated associations?	538
		CHAPTER 14	
		Choosing a business entity	542
		What factors should you consider in choosing a business entity?	544
		Who is a sole trader?	544
		What is a partnership?	545
		What is a company?	546
		What is a trust and who is a trustee?	547
PART 5			
BUSINESS ORGANISATIONS AND THE LAW	453		
CHAPTER 11			
Agency	454		
What is an agency relationship?	455		
How does an agency relationship differ from other relationships?	455		
How may agents be classified?	457		
How can an agent be appointed?	458		
What authority does an agent have?	461		
What are the duties owed by an agent to their principal?	464		
What are the rights of the agent against their principal?	468		
What is the liability of agents and principals to third parties?	469		
What is the liability of the principal and agent in tort?	472		
How can an agency agreement be terminated?	472		

What are franchises?	552	CHAPTER 18	
Why have a business name?	556	Property and mortgages	663
ADDITIONAL CONTENT		What is the difference between	
CHAPTER 15		ownership and possession?	664
Other business-related torts	562	Can possession of land give title?	664
What other tortious liabilities at law are		Can possession of goods be evidence	
relevant to business?	563	of ownership?	665
What are trespassory acts?	563	What is the difference between real	
What are the essential elements of		and personal property?	666
defamation?	575	What is the extent of land?	671
In what business situations might		What types of interests exist in land?	672
a plaintiff rely on an economic tort?	584	What are the methods by which land	
What are public and private nuisance?	591	ownership is established?	674
Statutory torts: What are the elements		What is a mortgage?	687
of breach of statutory duty and		What is the mortgagor's right to deal	
statutory nuisance?	595	with the property?	689
What are the contemporary new torts?	596	What remedies are available to	
		the mortgagee?	689
		What is the difference between	
CHAPTER 16		a licence and a lease?	691
Insurance	598	What are the different categories of lease?	692
What is risk?	600	What are the terms of agreement	
What is an insurance contract?	600	for a lease?	693
Who are the parties to an insurance		What are the terms of a leasing contract?	693
contract?	601	How can leases and tenancies be	
What are the sources of insurance law?	601	terminated?	694
What is the <i>General Insurance Code</i>		Can the landlord recover possession	
<i>of Practice</i> ?	602	of the premises?	695
Who regulates the insurance industry?	602	What is the purpose of residential	
How are industry complaints resolved?	603	tenancies legislation?	695
What are the key concepts underlying		Who does retail tenancies legislation	
insurance law?	603	protect?	698
How is a contract of insurance made?	616	CHAPTER 19	
How is the insurance policy construed?	622	Intellectual property	703
What is the difference between an		What is intellectual property?	704
agent and a broker?	626	What is copyright?	705
What is fire insurance?	627	What are designs?	716
What other kinds of general		What are patents?	720
(indemnity) insurance are there?	628	What are trade marks?	723
CHAPTER 17		What is passing off?	728
Sale of goods—business to business	634	Can the <i>Australian Consumer Law</i> —	
What are non-consumer sale of		Unfair practices provide trade	
goods contracts?	635	mark protection?	729
Sale of Goods Act or ACL?	636	Can confidential information	
How is the contract formed?	637	be protected?	729
What are the terms of the contract?	640	CHAPTER 20	
Why is the distinction between property		Ethics and business practice	734
and possession important in business?	642	What is the relationship between law	
Why is the classification of		and morality?	735
goods important?	643	Are morals and ethics the same thing?	737
How does risk pass?	650	What are the main theories of ethics?	738
Can there be a transfer of title by		What kinds of situations raise ethical	
a non-owner?	651	issues in business?	739
What are the rights and duties of the		Is there a link between corporations	
parties in performance of the contract?	653	and ethics?	744
What remedies are available for		What is ethical investing?	746
breach of contract?	656	What is ethical professional advice?	746
What is the Vienna Sales Convention?	659		

CHAPTER 21

Criminal law in a business context	753
What are the sources of the criminal law?	754
What are the differences between criminal law and civil law?	754
How are criminal offences classified?	755
How are criminal proceedings commenced?	757
What elements must be present for a person to be found guilty of a crime?	758
What is the standard of proof in a criminal matter?	758
What is a white-collar crime?	759
When can statutory criminal liability arise in business situations?	763
When can a company face criminal liability?	767
What is a civil penalty?	769

CHAPTER 22

Competition law	773
How does the <i>Competition and Consumer Act</i> operate?	774
How is the CCA administered?	775
What are the concepts of 'market' and 'competition' in business under the CCA?	776
What restrictive trade practices are prohibited by Part IV?	778
What are authorisations and notifications?	791
What enforcement procedures and remedies are available for breaches of Parts IV and IVB?	792
What is the purpose of industry codes of conduct?	792

CHAPTER 23

Insolvency and debt recovery	797
When should legal proceedings be commenced?	798
What is the debt recovery process?	798
What is the process for bankruptcy proceedings?	800
Are there any other effects of bankruptcy?	802
What are the key aspects of bankruptcy?	802
What is an act of bankruptcy?	806
What is the effect of a sequestration order?	809
What are the alternatives to bankruptcy?	809
What property is available for payment of debts?	812
What power does a trustee have to avoid antecedent transactions?	817
Can money or property be collected from third parties?	818
What is the order of payment of debts?	818
What are discharge and annulment of bankruptcy?	819
What is corporate insolvency?	821

CHAPTER 24

The work environment and the employment relationship	827
What is employment law?	828
What is the employment relationship?	829
How is the contract of employment formed?	832
What implied duties exist in a contract of employment?	834
How can a contract of employment be terminated?	839
How does the national workplace relations system work?	841
What are human rights-based work regulations?	844
What is the interrelationship between work health and safety and workers' compensation?	851

CHAPTER 25

Electronic commerce	862
Electronic transactions legislation— How do we make contracts electronically?	864
Are there legal aspects to maintaining a business website?	870
Is there electronic commerce consumer protection?	873
Does the Internet create jurisdictional problems?	875
What is privacy in the context of the Internet?	876
Is cybercrime a problem for business?	879
What is electronic banking?	880

CHAPTER 26

Negotiable instruments	885
Why is negotiability an exception to the <i>nemo dat</i> rule?	886
What is a bill of exchange?	887
What are cheques?	891
What is the liability of the parties?	894
What is the difference between a bearer and an order cheque?	896
What are the duties of the financial institution and the customer?	901
What are bank cheques?	907
What other methods of money transfer are there?	908
What is the code of banking?	910
What is the role of AFCA?	910
What is the purpose of the <i>Financial Transaction Reports Act 1988</i> ?	911

CHAPTER 27

Consumer credit and privacy	917
What are the operational areas of the <i>National Credit Code</i> ?	918

What types of credit arrangements can you have?	919	CHAPTER 28	
What formalities must a credit provider meet?	921	Ethics and regulations in marketing and advertising	940
What is the purpose of a mortgage or guarantee?	923	Why is ignorance of the law no excuse?	941
What is the effect of hardship?	925	What is the difference between the law and ethics?	943
What are the obligations of government agencies and businesses under the <i>Privacy Act</i> ?	928	What is the role of ethics in a business context?	944
What was the impact of the <i>Privacy Amendment (Enhancing Privacy Protection) Act</i> on the <i>Privacy Act</i> ?	931	What does marketing law cover?	945
What is hire-purchase?	936	What is advertising law?	959
		Glossary	G-1
		Index	I-1

HOW TO USE THIS BOOK

CHAPTER 2

How the legal system works



- Section 1: Classification of laws
- Section 2: Courts and tribunals
- Section 3: Precedent and statute law

LEARNING OBJECTIVES

On completion of this chapter, you should be able to:

- LO 1 Identify the main sources of law in the Australian legal system
- LO 2 Explain the role of police and the courts in administering law and resolving disputes
- LO 3 Describe the hierarchy and jurisdiction of the courts in the state and territory court systems
- LO 4 Describe the hierarchy and jurisdiction of the courts in the federal court system
- LO 5 Explain the adversarial system, and describe the various alternative methods of dispute resolution
- LO 6 Discuss the function and purpose of state and federal tribunals
- LO 7 Explain the role and purpose of the ombudsman
- LO 8 Discuss the roles and purpose of the legal profession, judiciary, juries and parties in criminal and civil trials
- LO 9 Discuss the various methods that can be used to locate relevant legislation and case law
- LO 10 Explain the doctrine of precedent and the rules for its operation in the court system
- LO 11 Explain the importance of statute law
- LO 12 Explain the rules of statutory interpretation and how they are applied by the courts
- LO 13 Explain how delegated legislation is created and what its purpose is

KEY TERMS

The following key terms are highlighted in the text and the accompanying definition can be found in the margin:

Act (or statute)	delegated legislation	ombudsman
Bill	extrinsic material	prima facie
citation	indictable offences	private law
civil law system	international law	public law
court hierarchy	jurisdiction	summary offences
Criminal Code	municipal (or domestic) law	sunset clause

Learning objectives are stated at the beginning of the chapter, and are signposted in the margin where they are covered in the chapter. They provide an excellent framework and revision tool.

Unlike the federal court system, the **jurisdiction of each state and territory stops at the border**. This means, for example, that New South Wales law does not apply outside the borders of New South Wales, and Queensland law does not extend beyond the borders of Queensland. The same is generally true in all Australian state and territory jurisdictions. However, there is an exception, and that can be found in an initiative between Western Australia (*Cross-Border Justice Act 2008*), South Australia (*Cross-Border Justice Act 2009*) and the Northern Territory (*Cross-Border Justice Act 2009*) called the **Cross-Border Justice Scheme**. In this scheme there are effectively no legal state or territory borders in the outback region where they meet. The Cross-Border Justice Scheme enables police, magistrates, fines-enforcement agencies, community corrections officers and prisons of one jurisdiction to deal with offences that may have occurred in another participating jurisdiction.

The process of bringing and maintaining, or defending, a legal action (called **litigation**) is both time consuming and costly (the higher up the court hierarchy you go, the more expensive it becomes) owing to the complex procedural rules (or rules of evidence) employed within our court systems. This partly explains why there has been a shift in recent times towards alternative methods of dispute resolution such as tribunals, mediation, arbitration and neighbourhood dispute centres.

The **legal system in Australia is adversarial in nature** (compared with civil law systems such as those found in Europe, which are **inquisitorial**) and if the matter involves going to court, while using a solicitor or barrister is not compulsory, most parties will inevitably use them when they are involved in litigation. The solicitor will be used in pre-trial matters, while the barrister will represent the party in court. In the case of a matter being heard by a tribunal or alternative dispute resolution, it is not unusual for legal representation for the parties **not** to be allowed.

WHAT ARE THE ROLES OF THE POLICE AND THE COURTS?

The role of the police

In theory, everyone in the community is responsible for apprehending law-breakers. However, in practice this is a function that is usually better left to the police force. **The police force plays no direct role** (although it certainly plays an indirect role) **in the creation of new laws. Nor is it concerned with the punishment of wrongdoers.**

LO 2

Explain the role of police and the courts in administering law and resolving disputes

IN BRIEF

THE ROLE OF THE POLICE

The main function of the police is to enforce the laws created by other authorities. They serve the law itself, and are independent of the government.

The police are the **community guardians of the peace**. (The armed forces are the guardians of the state.) The duties of the police include:

- the prevention of crime;
- the apprehension of offenders against the criminal law;
- the protection of life and property;
- the enforcement of the law; and
- the safety of the public.

CHAPTER 5

Terms of the contract

KEY CASES

The key cases in this chapter are listed below:

- Associated Newspapers Ltd v Banks [1951] HCA 24
- Bolton v New Ferry Co Ltd v Robertson [1966] HCA 83
- Baltic Shipping Company v Dillon [1991] NSWCA 19
- Darlington Futures Ltd v Delco Australia Pty Ltd [1986] HCA 82
- Fitzgerald v Masters [1956] HCA 53
- Le Mass Grand Prix Circuits Pty Ltd v Hladis [1998] 4 VR 561
- Perri v Coolangubra Investments Pty Ltd [1982] HCA 29
- The Council of the City of Sydney v West [1965] HCA 68

LEARNING OBJECTIVES

On completion of this chapter, you should be able to:

- LO 1 Identify terms in a contract and distinguish them from a representation
- LO 2 Discuss the parol evidence rule and the number of qualifications subject to it
- LO 3 Identify a collateral contract and explain the significance of its contractual effect
- LO 4 Recognise the importance of different terms, and identify conditions, warranties and statutory consumer guarantees
- LO 5 Explain the types of terms implied into a contract
- LO 6 Describe exclusion clauses, the approaches to their interpretation and the statutory protection available to consumers

KEY TERMS

The following key terms are highlighted in the text and the accompanying definition can be found in the margin:

condition precedent	consumer guarantees	parol evidence rule
condition subsequent	exclusion clause	warranty
	intermediate or innominate terms	

■ **Key cases** are listed at the beginning of relevant chapters.

■ **Key terms** are listed at the beginning of each chapter, and are highlighted in the text with an accompanying margin definition to assist students' understanding of the material (go to the glossary for a full listing of all key terms).

Where a person contracts with another to do work or perform services, and it can be inferred that the person employed has been selected because of their personal skills, competency or some other personal skill, failure to execute the work personally entitles the other party to treat the contract as at an end. It is irrelevant that a third party who offers to take the place of the contracting party is equally well qualified to do the job. An exception to this rule is where the liability that is transferred is one that involves no particular skill and is not connected with the character, credit or any other personal qualities of the promisor.

Novation

If all of the parties consent, liability may be transferred by way of novation. This is a tripartite (or three-party) agreement where the original parties agree to rescind their contract in consideration of a new contract being entered into on the same terms between one of the original parties and a third party. This involves substituting one original party with the third party in what is a new agreement. For example, if a partner in a partnership dies, the old partnership is dissolved and replaced by a new one; if the creditors of the old partnership continue to deal with the new partnership, they are considered to have accepted the new partner as their debtor.

Assignment of rights

Equitable assignment

At common law, assignment of rights is not possible. Equity, however, permits the assignment of contractual rights, including debts, provided that the following matters are complied with:

- 1 The intention to assign must be clear.
- 1 An assignment of a chose in action (interest or right in an intangible item such as a debt) requires consideration if the new holder is to have enforceable contractual rights.
- 1 The debtor is not bound until the debtor receives notice, although it is enforceable between the assignor and the assignee. If the right involves a debt and the debtor is unaware of the assignment and pays the original creditor, it is a discharge for that payment and the assignee will have rights against only the assignor, not the debtor.
- 1 The assignor cannot give a better title than the assignor has. For example, if the creditor assigns a debt to a third party and the creditor also owes the debtor, the debtor may not set off one debt against the other (called a set-off) to the disadvantage of the third party.

By statute

Property law statutes of the states and territories allow rights to be assigned and for the assignee to sue in their own name as long as:

- 1 the assignment is absolute; and
- 1 the assignment is in writing and signed by the assignor; and
- 1 notice is given in writing to the debtor or person liable under the contract.

The assignee cannot obtain a better title than that of the assignor because assignees take their rights 'subject to equities'. That is, they cannot obtain a better title than the transferor.

By operation of law

In certain cases, assignment of rights can take place by operation of law. For example:

- 1 The executor of a will can enforce the rights that a deceased person had in contracts at the time of the person's death.

RIGHTS AND LIABILITIES OF THE PARTIES, DISCHARGE AND REMEDIES CHAPTER 6 259

Remedies and time limitations

As a claim in negligent misrepresentation is generally a claim for pure economic loss, the claim must be brought within six years of the action accruing under the Limitations Acts of the various Australian jurisdictions (in the Northern Territory it is three years). However, if the misrepresentation results in personal injury, then the Limitations Acts uniformly provide that an action must be commenced within three years of the occurrence of the injury.

Professionals

The Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Victoria have established a statutory standard of care for professionals. The term 'professional' applies to doctors, and may include people in other professions, such as dentists, architects and solicitors. In Western Australia the term applies only to health professionals.

The standard to be applied by the court in determining whether such a person has acted with due care, as can be seen in *Dobler v Halverson* [2007] NSWCA 335, is determined by:

- 1 reference to what could be reasonably expected of a person professing that skill (and not a greater level of skill); and
- 2 the relevant circumstances as at the date of the alleged negligence and not a later date.

IN BRIEF

PREREQUISITES TO RECOVERY FOR NEGLIGENT MISSTATEMENTS

For a plaintiff to recover damages for a negligent misstatement, the plaintiff must establish:

- 1 **A duty of care.** Regard must be given to all of the circumstances of the case, and, while reasonable foreseeability is important, the **relationship between the parties**, combined with **reasonable reliance** by the recipient on the misrepresentation and an assumption of responsibility by the speaker, **must be shown**. In addition, the court may take into account:
 - the environment (request for factual information, professional advice or social comment) and the seriousness of the enquiry in the context of the environment;
 - whether there is a voluntary assumption of responsibility or if it has been excluded—for example, by an exclusion clause as occurred in *Hedley Byrne*;
 - whether the maker of the statement should know that the statement is to be used for a serious purpose (it is not necessary to know the precise purpose); and
 - whether there is a third-party reliance (in *Bryan v Mottley*, earlier, the builder who had built a house for a third party was liable to any subsequent purchaser of the property).
- 2 **A breach of duty.** The plaintiff must establish that:
 - the defendant made a representation or statement; and
 - the defendant knew, or ought to have known, it was being requested for a serious purpose; and
 - the representation and statement by the defendant would be acted on (actual reliance); and
 - if the statement was inaccurate, they could suffer loss.(No distinction is made between provision of information and provision of advice. Even predictions and omissions may be caught.)
- 3 **Damage.** The plaintiff must establish that there is a connection between the defendant's omission and the damage they have suffered: the causative element. This means establishing that they have relied to their detriment on the defendant's information or advice.

foreseeability
A question of fact based on an objective test of whether a reasonable person would have foreseen that, taking into account all the circumstances of the particular case, there was a real risk of the likelihood of injury to people in the plaintiff's position.

In brief boxes summarise key points relevant to the particular area of law under discussion.

Character advertising

Character advertising—that is, the association of a product with a well-known character or personality—can be an effective way of advertising a product. For example, in recent times there has been a significant increase in advertisers capitalising on the popularity of sporting personalities for product promotion. But care needs to be taken by advertisers to ensure that:

- 1 approval has been obtained to use a character; see, for example, *Re Pacific Dunlop Ltd v Paul Hogan, Rainfire Films Ltd and Burns Phillip Trustee Co Ltd* [1989] FCA 185 (the advertisement suggested that a product had some association with Hogan's character, Crocodile Dundee, which it did not), where approval had not been obtained and the court held that the advertisement was misleading and breached s 52 TPA (which now would be caught by s 18 of the ACL); and
- 2 approval has been given by the personality; see, for example, *Talmax Pty Ltd v Telstra Corporation Ltd* [1996] ATPR 441-484, where Telstra featured the swimmer Kieren Perkins in its advertising without his approval and it was argued that there was an association between the two which did not exist. In this instance the claim was unsuccessful, but it still resulted in court action because permission had not been obtained from the swimmer to use his image.

BUSINESS RISK MANAGEMENT ALERT

When using character advertising, ensure that permission has been gained from the personality or character.



BUSINESS TIP

Minimising the problem of association

The problem associated with character advertising can be reduced through the use of an express disclaimer repudiating any suggestion of a link between the character and the product or service being advertised.



Conduct in bad taste

Section 18 does not catch conduct that is undesirable or in bad taste or involves obvious exaggeration unless it is misleading or likely to mislead and has caused the consumer to think wrongly.

Representations as to the future

Section 4, which deals with misleading representations with respect to future matters, has the effect of widening the operation of 'misleading' in s 18 by providing that, where a person makes a representation with respect to any future matter without reasonable grounds for making the representation—for example, knowing it was untrue or incorrect or not caring whether it was true or not—the representation will be taken to be misleading. It also reverses the onus of proof by, under s 4, requiring the person who made the representation to show that they had reasonable grounds for doing so.

Promises, predictions or opinions

Unfilled promises, predictions or opinions can amount to misleading or deceptive conduct, but only in limited situations. Each case is determined on its own particular facts and tested at the

Business tips and **Business risk management alerts** identify areas of the law that people in business need to be alert to or aware of.

Mistake and third parties

While the parties themselves may not be concerned about being restored to their original positions, innocent third parties may not feel the same way. Suppose A sells a car to B under an 'apparent' contract. B then sells the car to C. If the original contract between A and B is now declared void for mistake, B has no title to (ownership of) the car and therefore cannot pass title on to C. The contract is void from the beginning and the title to the car will remain vested in A. C, who is a third party, would be required at common law either to return the car to A or pay A its value. C's right to sue B is generally limited because B usually disappears. It is because of this kind of injustice that the courts place such stringent limitations on the operation of mistake.

Mistake of fact

Two principles are clear:

- Only **mistakes of fact** can render a contract **void**. If one of the parties makes a mistake of law (e.g. wrongly interpreting a statute), a mistake of judgment (e.g. buying clothes and then not liking the style or colour) or a mistake as to quality, then that party generally cannot rely on the mistake to avoid the contract. However, **money paid under a mistake of law may be recoverable**, as *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48 illustrates, if the money was paid by the payer under a mistaken belief that they were under a legal obligation to pay it or that the payee was legally entitled to payment of it.
- There are very few mistakes of fact that provide grounds on which courts can invalidate a contract. As a result, a plaintiff may prefer to bring an action under s 4 of the *Australian Consumer Law* (ACL) for 'misleading representations with respect to future matters', under ss 20-21 for 'unconscionable conduct' or under s 29 for 'false or misleading representations'.

DAVID SECURITIES PTY LTD V COMMONWEALTH BANK OF AUSTRALIA [1992] HCA 48

THE COURT: High Court

FACTS: David Securities (one of the appellants) entered into an agreement with the Commonwealth Bank for a foreign currency loan. Part of the agreement provided that the appellants were to pay the bank in respect of its withholding tax liability. The Full Court of the Federal Court held that the provision in the loan agreement for payment of the withholding tax was void under the Income Tax Assessment Act 1936 (Cth).

ISSUE: Were the additional amounts paid in respect of the tax by the appellants recoverable, since the money was paid under a mistake of law? Before this case, such payments had been thought to be unrecoverable.

DECISION: Payments made under mistake of law should be prima facie recoverable from the payee (on the basis of restitution). The tax was payable by the bank, not the borrower.

COMMENT: The borrower paid the bank only the amount necessary to cover the tax because the bank had represented that this was what the borrower was obliged to do. But the clause requiring the borrower to pay the tax was void. Therefore, the borrower did not owe anything to the bank. And as the bank did not give good consideration for receipt of the tax payments from the borrower, it was therefore being unjustly enriched.

CASE REFLECTION: What does the expression 'restitution' mean, and is it a common law or equitable remedy?

VALIDITY CHAPTER 4 177

■ The **key cases** listed at the beginning of relevant chapters are identified by a red background in the text. The authors consider these cases important because they may have established new legal principles or clarified existing areas of law.

■ Boxed **cases** that are broken up into parts, to make them as user-friendly as possible, have been integrated into the text. They contain:

- the **court** in which the case was heard (which is often important for determining the importance of the case for the purposes of precedence);
- an outline of the **facts**;
- the main **issue(s)**;
- the **decision** of the court in which the case was heard;
- a brief **commentary** providing additional information about the case; and
- a **case reflection** question to encourage students to reflect on the case, the decision of the court and its application to business.

By operation of law

Situations where a contract can be discharged without either party wishing it can be through the operation of law, and include the following:

- Bankruptcy:** if a person liable under a contract becomes bankrupt, that person is statutorily released from all debts and liabilities.
- Material alteration:** where a material alteration is made to a written contract without the consent of the other party, the contract becomes unenforceable for the party making the alteration.
- Merger:** the merger of a simple contract into a formal contract (a deed) discharges the simple contract.
- Death of either party:** a contract for personal services will be discharged by the death of either party.
- Limitations legislation:** lapse of time under the statute of limitations legislation of the states and territories will discharge a contract.

By lapse of time at common law

In addition to the statute of limitations legislation of the states and territories, an offer doesn't remain open for acceptance for an indefinite length of time at common law. It may cease to exist by lapse of time, which is what happened in *Ballas v Theophilus (No 2)* [1957] HCA 90 (below). However, the length of time depends on the nature of the contract. The courts will look at each case on its merits and **decide what is reasonable** (whether the goods are perishable, subject to market fluctuations, demand and supply, the type of goods, etc.).

BALLAS V THEOPHILOS (NO 2) [1957] HCA 90

THE COURT: High Court

FACTS: A partnership deed gave the surviving partner an option to purchase the deceased partner's share. The deed didn't specify a time limit for the exercise of the option, and the surviving partner didn't exercise it until some 16 months had elapsed.

ISSUE: What is a reasonable length of time for an offer to remain open?

DECISION: The offer had lapsed by the 'passage of time'. It was not reasonable for the surviving partner to wait 16 months before exercising his option.

COMMENT: If no time limit is specified, the offer will lapse after a reasonable time, and this is assessed by the court on the basis of what is objectively reasonable in the circumstances. It is hard to imagine a situation arising where 16 months is reasonable.

CASE REFLECTION: In this case, what would you consider to be a reasonable length of time before the offer should lapse?

By virtue of a term in the contract

Terms may be included in an agreement that will have the effect of either preventing the agreement from becoming a contract (condition precedent) or bringing the contract to an end on the occurrence of a certain event (condition subsequent). These terms were discussed in Chapter 5.

allows this). The cooling-off provisions do not apply to the renewal, extension or transfer of an existing franchise.

Copy of lease
The franchisee must be given a copy of the lease or proposed lease.

Association of franchisees
The association of franchisees cannot be prohibited by the franchisor.

Prohibition on general release from liability
A franchisee cannot be required to give the franchisor a general release from liability to the franchisee.

Right to transfer franchise
A franchisor must not unreasonably withhold consent to transfer the franchise.

Termination
The franchise agreement may be terminated:

- 1) by the franchisor where there is a breach by the franchisee (the franchisee must be given reasonable time to remedy the breach);
- 2) by the franchisor where there is no breach by the franchisee (notice must be given six months before the end of the agreement); or
- 3) in special circumstances.

Resolving disputes
The parties should try to resolve a dispute through mediation, or at least approach the resolution of the dispute in a reconciliatory manner and in good faith.

REVIEW QUESTIONS

14.1 Explain the characteristics and advantages and disadvantages of:

- a. a sole trader;
- b. a partnership; and
- c. a company.

14.2 Discuss the purpose of a trust.

14.3 Discuss the powers of a trustee.

14.4 If you decide to purchase a franchise, what documentation must the franchisor provide you with?

LO 4
Explain the process and purpose of registering a business name, and the protection given by doing so

WHY HAVE A BUSINESS NAME?
The majority of businesses register a business name when they commence trading, rather than using the names of the owners. All business name registrations are now managed by the Australian Securities and Investments Commission (ASIC) under a National Business Name Registration (NBNR) system established under the *Business Names Registration Act 2011* (Cth).

BUSINESS RISK MANAGEMENT ALERT

If an entity is carrying on business in Australia or is registered under the *Corporations Act 2001* (Cth), and is not trading in the individual's name or the name of the company, then its business name must be registered. Failure to register under the Act is a strict liability offence and carries a penalty.

556 PART 5 BUSINESS ORGANISATIONS AND THE LAW

■ In-chapter **Review questions** provide an opportunity for students to test their understanding of key concepts and issues as they arise in a chapter, and also serve as a quick revision.

KEY POINTS
An understanding of the following points will help you to better revise material in this chapter.

1. **What is the difference between representations and terms?** A representation is a statement of fact, made by one party before or at the time of the making of the contract, which leads the other party to enter into the contract. Representations are pre-contractual and do not form part of the contract, and are not intended to be legally binding. Thus, they are not actionable in contract law. A term, on the other hand, is a statement of fact that is intended to be legally binding and is part of the contract.
2. **What is the importance of collateral contracts?** Where a pre-contractual statement is not a term of the main contract, it may still have contractual effect as a collateral contract, thus providing the injured party with a remedy. Such a contract has an independent existence from the main contract and may be enforced by an action for breach of a promise. More importantly, the collateral contract is not caught by the parol evidence rule because it is oral.
3. **What types of terms are found in a contract?** Terms found in a contract will either be express or implied. An express term is either oral or written, while implied terms are those terms read into the contract by the parties or the courts.
4. **What is the difference between conditions, warranties and innominate terms?** A condition is a term that is essential to the contract, breach of which allows the injured party to rescind or seek damages (or both). A warranty is a term of lesser importance and allows the injured party only to recover damages. An innominate term is an intermediate term that falls between a condition and a warranty and may allow the injured party to terminate the contract.
5. **When are terms implied into a contract, and what is their effect?** Five conditions must be satisfied for a term to be implied into a contract. The term must be reasonable and equitable; necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; so obvious that 'it goes without saying'; capable of clear expression; and not in contradiction of any express term of the contract. Implied terms are intended to give business efficacy to the contract and may be implied from custom or usage, by statute, previous dealings or by the courts.
6. **What is an exclusion clause, and what is its effect on a contract?** An exclusion clause—also known as an exemption clause, 'exception clause' or 'limitation of liability clause'—attempts to limit or exclude the liability of the person inserting it. In the case of signed documents, unless fraud or misrepresentation can be established or there is statutory protection available, the signor is bound (*L'Estrange v Graucob Ltd*). In the case of unsigned documents, would a reasonable person have expected to find such a clause in that type of document? Have reasonable steps been taken to give sufficient notice of the term and, if not, can they be implied by trade usage or custom trade? If the clause has been properly incorporated into the contract, the courts will construe the clause *contra proferentem* (strictly against the party relying on it). Generally, a third party is not protected by an exemption clause unless there is express intention by the contracting parties to cover third parties. If an exemption clause excludes liability for all terms in a contract, there is nothing left in the contract and it will be struck down by the courts.

TUTORIAL QUESTIONS

1. Pontus leased a shop from Westminster Properties, and he also lived on the premises. When the time came for the lease to be renewed, Westminster Properties wanted to include a new clause in the tenancy agreement that the shop could be used only for business premises. Pontus made it clear that he wished to continue to live above the shop and that he would not sign the new lease. Westminster Properties stated that if Pontus signed the new lease, with the new term, there would be no objection to him continuing to live on the premises. Pontus signed for a three-year period. If Pontus

252 PART 2 LAW OF CONTRACTS

■ At the end of every chapter (or chapter section) there is material to engage, challenge and test students' understanding of the area covered in the chapter. This includes:

- **Key points**, which provide a summary of points and a good foundation for students to build their notes from; and
- **Tutorial questions** to encourage discussion and debate among students.

EDUCATOR RESOURCES

A suite of resources is provided to assist with delivery of the text, as well as to support teaching and learning.

Solutions Manual

The Solutions Manual provides educators with detailed, accuracy-verified solutions to the in-chapter and end-of-chapter questions in the book.

Test Bank

The Test Bank provides a wealth of accuracy-verified testing material. Updated for the new edition, each chapter offers a wide variety of true/false, short-answer and multiple-choice questions, arranged by learning objective and tagged by AACSB standards.

Questions can be integrated into Blackboard, Canvas or Moodle.

PowerPoint lecture slides

A comprehensive set of PowerPoint slides can be used by educators for class presentations or by students for lecture preview or review. They include key figures and tables, as well as a summary of key concepts and examples from the text.

Digital image PowerPoint slides

All the diagrams and tables from the course content are available for lecturer use.

PREFACE

The eleventh edition of *Business Law* continues to provide students of commercial or business law with an accessible and student-friendly but authoritative and comprehensive textbook. It provides extensive coverage of business law topics and considers the legal environment in which businesses must operate. Care has been taken to ensure that the text represents current law in **all** states and territories. *Business Law* will satisfy the requirements of most business or commercial law subjects throughout Australia.

This edition has retained the distinctive layout of the previous ten editions. The learning aids, such as **In brief**, **Business tips** and **Business risk management alerts**, and the boxed **cases** and **flowcharts**, continue to feature strongly throughout the text.

Perhaps the most significant change in this edition has been the consolidation of contract law into four chapters rather than the 10 chapters found in previous editions. The aim is to try and make it easier for students to:

- › **understand how a contract is created** (Chapter 3, ‘Creation of the contract’, contains an introductory section and then three sections: agreement, intention and consideration, all of which must be present for the creation of a simple contract);
- › **consider the validity of the contract** (Chapter 4, ‘Validity’, considers whether the contract that the parties have created in Chapter 3 is valid; this requires consideration of three further elements—the capacity of the parties, what they have consented to and the legality of their agreement);
- › **decide what terms the parties have agreed to** (Chapter 5, ‘Terms of the contract’, considers what it is exactly that the parties have agreed to and the importance

that should be attached to any statement in the contract that is a term rather than a mere representation—that is, whether it is a condition, warranty, innominate term or a consumer guarantee under the *Australian Consumer Law* (ACL)); and

- › **consider the rights and liabilities of the parties**, including the issue of discharge, and the remedies available to an innocent party in the form of monetary compensation and/or an equitable remedy such as specific performance or an injunction (Chapter 6).

Further features of the text are as follows.

- › The citation for Australian cases, where possible, is now in what is referred to as ‘report-neutral’ form. The reference to where the case may be found is cited not to a law report but rather to where it can be accessed online at sites such as AustLII or the sites of the courts and tribunals of the Commonwealth, states and territories. Students often cannot access a law library or understand how to find a law report or statute easily. However, today they are so computer literate that it is easier for them to look up what they need online.
- › Topic coverage has been increased in a number of areas to reflect changing needs in student understanding of how the law interfaces and interacts with business. Discussions have also been fine-tuned throughout the text.
- › All cases now contain a **Comments** section after the decision, setting out points to note about the case and putting it into a context that will help to give business students a better understanding of where a legal principle might have emanated from or how it applies to a particular fact situation.

- 】 All cases also contain a **Case reflection** question at the end of each case, asking students to think about the case and the decision, and to reflect on the importance of the case and its application to business.
- 】 Important cases have been more clearly identified: a list of key cases is provided at the beginning of the chapter where relevant, and each case is distinguished by a red background within the chapter. The authors consider these cases important because they may have established new legal principles or clarified existing areas of law, such as the decision of *Grant v Australian Knitting Mills*. They should be read to get a better understanding of how or why the law might have developed in, for example, the area of negligence in tort law.
- 】 In addition to the text chapters that cover the subject material in most Business Law units, custom chapters are also available that cover a diverse range of other business topics.

The legal environment of business

Text chapters

Business Law presents topics that are traditionally part of business law courses.

Part 1—The legal framework contains two chapters that introduce the student to the legal framework of business.

- 】 **Chapter 1 (Legal foundations)** discusses what law is; the interface between business and law; its major characteristics; the major sources and classifications of law; the origins of major sources of English law; the interface between Commonwealth and state powers and the role of the *Australian Constitution*; the division of powers under the *Constitution*; the difficulty of changing the *Constitution*; the role of the High Court in federal expansion; and, finally, what the separation of powers is.
- 】 **Chapter 2 (How the legal system works)** is divided into three sections.
 - **Section 1 (Classification of laws)** looks at the classification of laws and the laws that make up the Australian legal system.

- **Section 2 (Courts and tribunals)** considers the role of the police and the courts within the Australian legal system that make up the federal, state and territory systems, including their jurisdictions (what matters they can deal with); the growth of e-technology in the courts; and the growth in alternatives to the courts, including alternative forms of dispute resolution, quasi-judicial tribunals and the ombudsmen. The section concludes by providing an overview of the adversary system, the role of the various parties in it, as well as the role and growth of class actions.
- **Section 3 (Precedent and statute law)** looks at where law comes from and how it can be found, as well as how to correctly cite cases and statutes for essays or answering problem questions. It then goes on to explain the importance of case law (the ratio decidendi and obiter dicta) and what is precedent as a source of law within the Australian legal system. The final part of this section begins by looking at how statute law is made by Parliament and then interpreted by the courts when doubts arise about the meaning of words or phrases when applied to particular facts; and concludes with a brief overview of the growing importance of delegated or subordinate legislation as a regulatory tool by all levels of government.

Part 2—Law of contracts contains four chapters on contracts: how a contract is created, whether the contract that has been created is valid and enforceable, what are the terms that the parties have agreed to in the contract, and what are the rights and liabilities of the parties including breach and remedies. Without contracts, business and the community as we know them today would not exist.

- 】 **Chapter 3 (Creation of the contract)** looks at how a contract is created. It is not concerned with whether the contract is valid; that is for the next chapter. This

chapter is concerned with the elements that **must** be present for the creation of a simple contract. They are not in any order of importance—each has to be considered. The chapter has been divided into sections for reader convenience:

- **Section 1 (The importance of contracts in society)** explains the role and importance of contracts in society as well as some of the terminology you will encounter when reading the next four chapters. Without understanding what the purpose of a contract is and how it is created, it is difficult to see its relevance or importance to both business and the community generally. This section also considers the sources of contract law, what elements need to be considered in the creation of a simple valid contract, and the various ways in which a contract may be classified.
- **Section 2 (Agreement between the parties)** considers whether there has been an offer by one party and acceptance by another, as these two elements together form the basis of an agreement between the parties. If the parties have not reached an agreement on what it is they are contracting about, can there even be a contract? Can you contract by post or electronically?
- **Section 3 (Intention to create legal relations)** considers the element of ‘intention’; that is, do the parties intend to create a contract that is legally enforceable in a court of law? If they do not intend to create legal relations, what have the parties created? Is the agreement commercial and serious in intent or non-commercial and lacking serious intent?
- **Section 4 (Consideration)**, the final step in determining whether a contract exists, looks at the element of ‘consideration’; that is, what is the price paid to buy the other person’s promise? This payment is what distinguishes a bargain from a gift. No consideration, no contract.

】 **Chapter 4 (Validity)** considers the issue of validity of the contract. Is the simple contract that was created in Chapter 3—because the elements of agreement, intention and consideration were present and identifiable—capable of being valid and enforceable? To determine validity, it is necessary to look at more elements: in this case, capacity of the parties, what they have consented to and whether what has been agreed to is legal. As with Chapter 3, these elements are in no particular order of importance in terms of determining whether the contract is valid or not.

- **Section 1 (Capacity of the parties)** looks at the ability of the parties—including infants, corporations, bankrupts and mentally unsound and intoxicated persons—to fully understand what they have entered into (their ‘capacity’ to understand what they are entering into).
- **Section 2 (Is there genuine consent?)** considers what the consequences are if one (or both) of the parties say they have misunderstood the situation (e.g. because of mistake, misrepresentation, duress, undue influence or unconscionability). Has an agreement been reached?
- **Section 3 (Is the purpose of the contract legal?)** looks at the purpose of the contract and whether it is legal. What is the legal standing of the parties if a statute or the common law says the contract is void or illegal? Can it still be enforceable?

If each of the elements is satisfied in Chapters 3 and 4, then the contract can be considered to be valid. But that is not the end of the matter. There can still be uncertainty over exactly what the parties have agreed to. If this is the case, then the courts might need to examine what it is that the parties have agreed to.

】 **Chapter 5 (Terms of the contract)** considers what it is that the parties have agreed to (the ‘terms’ of the contract). The chapter begins by considering whether the statements made by the parties during

negotiations are intended to be ‘mere representations’ that are not enforceable or terms that the courts will enforce. Where a statement is a term, the chapter then considers its importance; that is, whether it is a condition, a warranty, an innominate term or, if a consumer contract, a consumer guarantee caught by the ACL. Strange as it may seem, it sometimes happens that what the parties think they have agreed to is not the same, and a dispute eventuates.

】 **Chapter 6 (Rights and liabilities of the parties, discharge and remedies).** As for Chapters 3 and 4, this chapter is divided into Sections.

- **Section 1 (Rights and liabilities of the parties, and conclusion of the contract)** begins by considering the rights of the parties and who is a party to the contract (an issue of privity) before moving on to consider the issue of assignment of liabilities and rights. This section concludes by looking at the ways in which a contract may be ended; that is, by performance, agreement, frustration, operation of law or lapse of time or dissolved or breached by virtue of a term such as a condition, innominate term, or warranty (or consumer guarantee if it is a consumer contract and caught by the ACL).
- **Section 2 (Remedies for breach of contract)** considers the remedies that are available to the innocent party (i.e. the party not in breach). The innocent party may seek a remedy at common law in the form of damages. These may be nominal, ordinary or ‘real’, or exemplary, and liquidated (for a fixed amount), unliquidated (left to the court to determine) or a penalty. The innocent party may also seek a remedy in equity, which will generally be either specific performance to make a person carry out their contractual obligations or an injunction to restrain a party from breaking their contract.

Part 3—Civil liability The following two chapters outline tort law, in particular the tort of

negligence. An understanding of negligence is important for business from an employer, managerial and employee perspective. These chapters will assist students to understand, recognise and evaluate tortious liability and potential negligence scenarios that may arise in business. Chapter 15 (additional content) contains further commentary on other areas of tort law that are relevant to business operations, including business decision making.

】 **Chapter 7 (Civil liability: The law of torts and negligence)** begins by considering why an understanding of the law of torts is so important to business; the different types of tort actions; some of the general principles of tort law; the range of remedies available; the compensation available outside tort law; the importance of time in terms of commencing an action; and the distinction between tort and criminal law, and tort and contract law. The chapter then moves on to examine the tort of negligence, and what an injured party or plaintiff needs to establish in order to have a cause of action in negligence—for the plaintiff, the elements of duty, breach and damage; and for the defendant, the issue of defences. This is particularly relevant to business, for understanding and thereby mitigating potential losses in damages. The chapter concludes with a brief overview of what a successful plaintiff will recover if they win their case. It should be noted that, the duty question aside (which is still based on the common law), the remaining elements of breach, damage, defences and remedies are all now based on the civil liability legislation (for example, the *Civil Liability Act 2002* and *Legal Profession Act 2004* in New South Wales, the *Civil Liability Act 2003* and *Personal Injuries Proceedings Act 2002* in Queensland, and the *Wrongs Act 1958* in Victoria).

】 **Chapter 8 (Applications of negligence to business)** then explores some of the areas of tort absorbed by negligence, including occupier’s liability, product liability,

non-delegable duties and strict liability, product liability, defective structures, negligent misstatements, the liability of professionals, vicarious liability, non-delegable duties and strict liability, breach of statutory duty and, finally, criminal negligence.

Part 4—Consumer law contains two chapters. The primary focus of this part is on consumer rights and protection, the changes that have occurred as a result of the ACL and the referral by the states and territories of their consumer protection powers to the Commonwealth.

- ▶ **Chapter 9 (Statutory consumer guarantees and the *Australian Consumer Law*)** examines the interpretation of the implied statutory consumer guarantees and their application to contracts involving consumers. The position of non-consumers (i.e. businesses) is examined in Chapter 10. The ACL replaced the implied terms of condition and warranty found in the old state and territory [Sale of] Goods Acts with non-excludable statutory guarantees, and extended the meaning of ‘sale’ by using the term ‘acquire’ instead. These terms were implied by the ACL into every contract for the sale of goods and services, and have expanded a consumer’s rights in the event of a supplier or manufacturer failing to comply with a consumer guarantee.
- ▶ **Chapter 10 (General and specific consumer protections under the ACL)** discusses the consumer protection provisions contained in the ACL in regard to prohibited unconscionable conduct, misleading and deceptive conduct, and unfair trading practices. It also examines the new national regulation of consumer transactions, in particular unfair contract terms, unsolicited consumer agreements and lay-by agreements. The chapter examines the national scheme for product safety, product information and product liability created by the ACL. It then outlines the new system for enforcement and remedies under the new penalty regime introduced by the federal government in September 2018, bringing the penalty provisions in

the ACL into line with the trade practices provisions of the *Competition and Consumer Act 2010* (Cth) (which can mean fines of up to \$10 million per breach for corporations and \$500 000 for individuals). The chapter concludes by providing a brief overview of the role of the states and territories in the protection of consumers.

Part 5—Business organisations and the law contains four chapters covering the law of agency, sole traders and partnerships, companies and incorporated associations, and choosing a business entity.

- ▶ **Chapter 11 (Agency)** examines the law of agency, the purpose of an agency and how it is created, the authority of the agent, the rights and duties of the agent and principal to each other, their liability to third parties, and how the agreement can be terminated.
- ▶ **Chapter 12 (Sole traders and partnerships)** begins by considering what is perhaps the simplest form of business ownership—the largely unregulated sole trader—how it is created and its advantages and disadvantages for a business operator, before moving on to consider a more formally regulated business structure: the partnership. The chapter then examines the essential characteristics of a partnership, how it is created, how it is distinguished from another similar entity (the joint venture), what the rights and liabilities of the partners are, as well as their duties, and how a partnership may be dissolved and its assets distributed. The final part of the chapter looks at what a limited liability partnership is.
- ▶ **Chapter 13 (Introduction to companies and incorporated associations)** examines perhaps the most important form of business ownership that exists in Australia today: the company. This chapter begins by considering the essential characteristics of a company, before discussing the different types of company that a business can choose from, and the legal requirements related to the management and winding-up of the company. The chapter concludes

by considering one other form of incorporated body—the statutory association—which is widely used by clubs and associations that want the protection offered by incorporation but are not trading bodies.

- 】 **Chapter 14 (Choosing a business entity)** examines which business entity is most suited to a particular business; that is, sole trader, partnership, company, trust or franchise (including a commentary on the *Franchising Code of Conduct*). The chapter also includes a commentary on the ASIC's national Business Names Register.

Additional content

If you prefer to customise the content to suit the needs of your course, we have a suite of additional chapters available for you.

- 】 **Chapter 15 (Other business-related torts)** examines some other business-related torts that are of growing importance to business that students should be aware of, be able to identify and then provide possible resolution for. First are the intentional torts, including trespass, defamation and the economic or business torts (which protect business interests and include intimidation, interference with contractual relations, conspiracy, passing off, injurious falsehood, deceit and misrepresentation). The second group is probably a misnomer because it consists of only one tort: nuisance. It is concerned with indirect harm involving the use and enjoyment of land and takes three forms: public nuisance, private nuisance and statutory nuisance. Finally, there is a brief overview of what are known as the statutory torts.
- 】 **Chapter 16 (Insurance)** is concerned with a very important topic for businesses, because they cannot operate without incurring some risk and sometimes subsequent loss. Insurance is a means for business to protect its assets against the risk of loss and obtain compensation where loss occurs. This chapter examines the concepts underlying insurance, the making and construction of the insurance contract, the law

regarding agents and brokers, and some common forms of business insurance.

- 】 **Chapter 17 (Sale of goods—business to business)** examines the statutory rules that business has to operate under involving the sale of goods. The two earlier chapters on consumer protection (Chapters 8 and 9) largely focused on the rights of the consumer. This chapter considers how the contract is formed, the importance of the distinction between property (or ownership) and possession, the different classifications of goods, the transfer of title, how the contract may be performed, and the remedies for breach by either party. The chapter concludes by briefly examining what the legal position of the parties is when they are in different countries (the Vienna Sales Convention).
- 】 **Chapter 18 (Property and mortgages)** begins by looking at the distinction between real property (or realty) and personal property. It includes a reference to the very important *Personal Property Security Act 2009* (Cth). It also considers interests in land and how ownership and possession may be obtained, the mortgaging and leasing of land, and the rights and duties of residential and commercial landlords and tenants.
- 】 **Chapter 19 (Intellectual property)** looks at a completely different kind of 'property' right called intellectual property, such as patents, designs, copyrights and trade marks. This is a particularly important area for a business because the failure to protect and manage its intellectual property can mean the difference between success and failure.
- 】 **Chapter 20 (Ethics and business practice)** briefly discusses business ethics and morals, emphasising the idea that 'just because it is legal does not make it right'. The concepts of ethics and morals are considered in the context of the law, with reference to several ethical theories.
- 】 **Chapter 21 (Criminal law in a business context)** discusses the criminal law aspects

of business relationships. It considers white-collar crime as well as examples of criminal offences created by the various statutes referred to in the book. 'Chain of responsibility' legislation and its impact on management are also considered.

- 】 **Chapter 22 (Competition law)** examines the operation and administration of the restrictive trade practices provisions contained in Part IV and the authorisations and notifications contained in Part VII of the *Competition and Consumer Act 2010* (Cth) on businesses. Part IV prohibits anti-competitive business practices that could have the effect of substantially lessening competition such as cartel conduct. The aim of the Act is to strengthen competitiveness of businesses at the various levels of production and distribution of goods and services for the benefit of consumers and business in general. As a result of these aims, the Act has enormous importance for business.
- 】 **Chapter 23 (Insolvency and debt recovery)** looks briefly at the process of debt recovery in the lower courts before examining personal bankruptcy and the choice for a debtor between a debtor's petition (voluntary bankruptcy) and a creditor's petition (involuntary bankruptcy), what amount to acts of bankruptcy, what the alternatives are to bankruptcy, and what property is available for payment of debts. The chapter concludes by looking at the issue of corporate insolvency.
- 】 **Chapter 24 (The work environment and the employment relationship)** begins by considering whether a person is an employee or an independent contractor, and why the distinction is important, before explaining how a contract of employment is formed, and what the rights and duties are of the employer and the employee. The chapter then considers aspects of the work environment, including the *Fair Work Australia Act 2009* (Cth), the issue of discriminatory behaviour in the workplace and the national work health and safety regimen.

- 】 **Chapter 25 (Electronic commerce)** looks at an area that is becoming very important for business. This is the area of electronic commerce, and this chapter examines some of the issues confronting business, including the electronic transactions legislation and electronic contracts, the legal aspects of maintaining a business website (and the jurisdictional problems that raises), and the issues of privacy, cybercrime and electronic banking.

- 】 **Chapter 26 (Negotiable instruments)** looks at the different methods that are used to pay for goods or services (i.e. bills of exchange, cheques, credit/debit cards and the growing use of electronic payments). The purpose and operation of the *Financial Transaction Reports Act 1988* (Cth) is also examined.

- 】 **Chapter 27 Consumer credit and privacy)** examines consumer credit under the new National Credit Code and the issue of privacy. It includes a reference to the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth).

- 】 **Chapter 28 (Ethics and regulations in marketing and advertising)** begins by examining the connection between business and ethics before looking at aspects of marketing law, including the marketing mix and the legal factors impacting on marketing, and concludes by looking at some of the ethical and legal requirements for advertising in Australia.

Business application

Many business law textbooks take a legalistic approach to presenting legal topics to business students. A common comment from students in business courses is: 'Why are we studying law? We aren't going to be lawyers. If we need legal help or advice, we will go and see a lawyer.' While this statement is partly true, the reality is that an awareness of one's legal rights and a general knowledge of the law are increasingly important in business today. Regulators who make and enforce the

law, such as the ACCC, assume that individuals and companies both have an understanding of the legal processes that impact on their business. A failure to understand this in an area such as consumer law today, when the ACCC has introduced a new penalty regime for breaches of the *Australian Consumer Law*, could have catastrophic results for the business, as well as for the directors and officers of the business. This book recognises that what is important to students studying commercial or business law is a basic understanding of the application of court decisions, statutes and government regulation to both business and their daily lives.

A number of features have been incorporated into *Business Law* to demonstrate the application of law and government regulation to the business environment. These features are tools to make your learning more effective and help you see the relevance of the book's content to your life and work.

Acknowledgments

Pearson Australia and the authors are indebted to the many academics, known and anonymous, who were surveyed or interviewed and who provided feedback in the planning, development and production stages

of this new edition. As usual, your input has ensured that, while this edition retains all the hallmarks of earlier editions, it is a true collaborative effort, ensuring we put the business law student, and the business perspective, at the centre of this new, re-launched edition. We would specifically like to acknowledge Mr John Tretola of the University of Adelaide for his detailed review of the manuscript.

The authors would also like to acknowledge the efforts of all the Pearson Australia staff who have been involved in publishing the 11th edition. In particular, special thanks should go to Anna Carter (Development Editor) and Julie Ganner (Copy Editor) for their great editorial work, and the support of Nina Sharpe (Portfolio Manager) throughout the process of producing another edition.

We would be grateful for any further comments or suggestions from teachers or students concerning *Business Law*. Your feedback will improve future editions.

You can contact us at the email address below (and, yes, you will get a reply, as we do appreciate the input).

Andy Gibson and Sarah Osborne
andygibson100@hotmail.com.au
April 2019

ABOUT THE AUTHORS



Andy Gibson

Andy Gibson has worked in private legal practice and lectured in business law now for 40 years, first at the (then) Royal Melbourne Institute of Technology, then at Griffith University and finally at Southern Cross University. Andy has co-authored a number of business law texts with Doug Fraser, as well as being sole author of another. He has jointly authored a text on the law of torts and was the founding editor of a sports law loose-leaf publication. Andy was Financial Director of the Australian and New Zealand Sports Law Association (ANZSLA) and is now a life member. He writes current case and legislative summaries for the ANZSLA online publications *Sports Shorts* and *The Commentator*, as well as being a reviewer for the ANZSLA peer-reviewed *Sports Law Journal*. He also writes occasional articles on various sports law issues that clubs and associations in sport face today for the Sport Australia publication, *Play by the Rules*, as well as conducting seminars for sporting bodies on legal issues such as governance and disputes.



Sarah Osborne

Sarah Osborne has taught for 10 years across business law, accounting and finance at Australian universities, including The Australian National University, The University of Queensland and Bond University. She is currently a Lecturer of Business Law in the School of Accountancy at Queensland University of Technology. Her research focuses on private equity transactions and the complexities of the mergers and acquisitions regulatory environment. In addition, Sarah researches corporate law and government regulation around insider trading and FinTech. She has worked in both the Australian Government and private legal practice, and has a keen interest in a blended-learning student learning experience.