



Andy Gibson

© **BUSINESS  
LAW**

12th Edition

# Detailed contents

Preface	xiv	Where do you look for sources of law?	66
About the author	xxii	Web resources	67
How to use this text	xxiii	How do you find a case?	67
Key to case report abbreviations	xxvii	What is case law?	69
Table of cases	xxviii	What is statute law?	75
Table of statutes	xxxiv	What are the methods of statutory interpretation used by the courts?	80
Educator resources	xxxvii	Delegated or subordinate legislation	87

## 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?	24

#### Chapter 2

How the legal system works	27
<b>SECTION 1: Classification of laws</b>	<b>28</b>
How are laws classified?	28
<b>SECTION 2: Courts and tribunals</b>	<b>34</b>
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?	48
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**

## PART 2

### LAW OF CONTRACTS 91

#### Chapter 3

Creating a contract	92
<b>SECTION 1: The importance of contracts in society</b>	<b>93</b>
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
Is the contract a formal or simple contract?	100
<b>SECTION 2: Agreement between the parties</b>	<b>105</b>
What constitutes a contractual agreement?	105
Step 1: Is there agreement between the parties?	106
What are the rules relating to offer?	109
Can an offer be terminated?	118
What are the rules relating to acceptance?	122
What are the rules as to contracts by post?	126
How does electronic offer and acceptance work?	129
<b>SECTION 3: Intention to create legal relations</b>	<b>134</b>
What is intention?	134
Step 2: Is there intention to contract?	135
What is the statutory position?	141
What is the legal position with non-commercial agreements (agreements lacking serious intention)?	141
<b>SECTION 4: Consideration</b>	<b>146</b>
Step 3: Is consideration present?	146
What is 'consideration'?	146
What are the essential rules for consideration?	147
What is promissory estoppel?	155

## Chapter 4

Validity 160

### SECTION 1: Capacity of the parties 161

Step 4: Do the parties to the contract have full contractual capacity? 161

Who are infants (or minors)? 162

Does a corporation have the capacity to contract? 167

Do bankrupts have the capacity to contract? 167

Do mentally unsound and intoxicated persons have the capacity to contract? 168

### SECTION 2: Genuine consent 170

Step 5: Have the parties consented? 170

What is mistake? 170

What is misrepresentation? 180

What actions can constitute duress or undue influence? 186

What are unconscionable (unfair) contracts? 190

### SECTION 3: Purpose of the contract 197

Step 6: Is the contract legal? 197

What type of contracts are illegal by statute? 198

What is the common law position of contracts that are illegal and contracts that are void? 200

## Chapter 5

Terms of the contract 213

What are 'express terms'? 214

The parol (oral) evidence rule 217

What are 'collateral contracts'? 219

How important is the term? 221

What are 'implied terms'? 228

What are 'meaningless terms'? 230

What are 'exclusion clauses or terms'? 231

## Chapter 6

Rights and liabilities of the parties, discharge and remedies 246

### SECTION 1: Rights and liabilities of the parties, and conclusion of the contract 247

What is privity of contract? 247

Can you assign liabilities and rights? 249

How can a contract be ended? 251

### SECTION 2: Remedies for breach of contract 269

What remedies are available at common law? 270

How are damages determined for breach of contract? 273

What are equitable remedies? 284

When is there a loss of right to sue? 289

## PART 3

### CIVIL LIABILITY 291

## Chapter 7

Civil liability: The law of torts and negligence 292

Why is an understanding of the law of torts important to business? 293

What are the general principles of tortious liability (negligence)? 294

What are the time periods for tort actions? 297

What is the tort of negligence? 299

What are the roles of the plaintiff and the defendant in establishing the elements of negligence? 300

## Chapter 8

Applications of the torts of negligence and defamation to business 338

Product liability (defective products): What is the legal position of manufacturers in negligence? 339

How does the tort of negligence impact on the application of occupier's liability? 341

How does the tort of negligence impact on the application of employer liability or vicarious liability? 352

Is there liability for a negligent misstatement? 360

Criminal negligence 368

Defamation and injurious falsehood 371

## PART 4

### CONSUMER LAW 377

## Chapter 9

The Australian Consumer Law: Misleading or deceptive conduct, false or misleading representations and unfair practices 379

Some key terms in the ACL 380

What is misleading or deceptive conduct? (s 18) 384

What are false or misleading representations? (s 29) 392

What are unfair practices? (ss 30–38) 396

## Chapter 10

Other consumer protections under the Australian Consumer Law 406

What is unconscionable conduct? (ss 20–22A) 407

What are unfair contract terms? (ss 23–28) 411

Which consumer transactions are protected by the ACL? (ss 51–64A) 413

What safety standards are created by the ACL? (ss 104–132A) 427

What is the liability of manufacturers? (ss 138–142) 428

Manufacturers' liability for goods with safety defects (ss 138–142) 430

Failures in the supply of goods and services (ss 259, 260) 432

What remedies and penalties are included in the ACL? (pt 5-1) 439

Is there still a role for state and territory consumer protection bodies? 444

## PART 5

### BUSINESS ORGANISATIONS AND THE LAW

447

#### Chapter 11

##### Agency 448

What is an agency relationship? 449

How can an agent be appointed? 452

What authority does an agent have? 455

What are the duties owed by an agent to their principal? 458

What are the rights of the agent against their principal? 463

What is the liability of agents and principals to third parties? 464

What is the liability of the principal and agent in tort? 466

How can an agency agreement be terminated? 467

What are the remedies of a principal for breach by an agent? 469

What are some specific types of agency? 469

#### Chapter 12

##### Sole traders and partnerships 474

Who is a sole trader? 475

What areas of law apply to partnerships? 476

What are the essential elements of a partnership? 476

When does a partnership exist? 479

What other type of relationships can look like partnerships? 480

How is a partnership created? 485

What is the relationship of partners to outsiders? 487

What is the liability of partners in contract and tort? 488

What does being an apparent partner or 'holding out' mean? 491

Does a retiring partner continue to be liable for partnership debts? 491

What is the relationship between partners? 492

What are the rights of each partner? 492

What are the duties of each partner? 494

What happens to partnership property? 495

What is the effect of dissolution? 495

What is a limited partnership? 498

#### Chapter 13

##### Introduction to companies and incorporated associations 503

What is the role of ASIC in the administration of company law? 504

What is a company? 505

When will a court pierce the corporate veil? 507

What is the best corporate structure for my business? 509

What is the effect of incorporation? 512

What is registration? 512

How is the internal management of a company governed? 512

What does being a director involve? 514

What is the purpose of fundraising? 528

How do I raise company capital? 529

What is corporate insolvency? 531

What are unincorporated and incorporated associations? 536

#### Chapter 14

##### Choosing a business entity 540

What factors should you consider in choosing a business entity? 542

What is a trust and who is a trustee? 545

What are franchises? 550

Why have a business name? 554

#### Chapter 15

##### Insurance 560

What is risk? 562

What are the key concepts underlying insurance law? 565

How is a contract of insurance made? 578

How is the insurance policy construed? 583

What is the difference between an agent and a broker? 589

What types of general insurance policies are available? 590

#### Chapter 16

##### Ethics and business practice 596

What is the relationship between law and morality? 597

Are morals and ethics the same thing? 599

What are the main theories of ethics? 600

What kinds of situations raise ethical issues in business? 601

Is there a link between corporations and ethics? 606

What is ethical investing? 608

What is ethical professional advice? 609

#### Chapter 17

##### Insolvency and debt recovery 615

When should legal proceedings be commenced? 616

What is the debt recovery process? 616

What is the process for bankruptcy proceedings? 618

Are there any other effects of bankruptcy? 620

What are the key aspects of bankruptcy? 620

What is an act of bankruptcy? 624

What is the effect of a sequestration order? 627

What are the alternatives to bankruptcy? 627

What property is available for payment of debts? 630

What power does a trustee have to avoid antecedent transactions? 635

Can money or property be collected from third parties? 636

What is the order of payment of debts? 636

What are discharge from and annulment of bankruptcy?	637
What are the duties and powers of a trustee?	638
What offences exist under the <i>Bankruptcy Act</i> ?	639
What is corporate insolvency?	639

## Chapter 18

<b>The work environment and the employment relationship</b>	<b>644</b>
What is employment law?	645
What is the employment relationship?	646
What types of contracts of employment can be formed?	649
How is the contract of employment formed?	649
What implied duties exist in a contract of employment?	651
How can a contract of employment be terminated?	656
How does the national workplace relations system work?	659
What are human rights-based work regulations?	663
What is the interrelationship between work health and safety legislation and workers' compensation?	669

## Chapter 19

<b>Ethics and regulations in marketing and advertising</b>	<b>680</b>
Why is ignorance of the law no excuse?	681
What is the difference between the law and ethics?	683
What is the role of ethics in a business context?	684
What does marketing law cover?	685
What is advertising law?	701
Glossary	G-1
Index	I-1

## ADDITIONAL CHAPTERS

### Chapter 20

<b>Other business-related torts</b>
What other tortious liabilities at law are relevant to business?
What are trespassory acts?
In what business situations might a plaintiff rely on an economic tort?
What are public and private nuisance?
What are the elements of breach of statutory duty and statutory nuisance?
What are the contemporary new torts?

### Chapter 21

<b>Sale of goods—business to business</b>
What are non-consumer sale of goods contracts?
Sale of Goods Act or ACL?
How is the contract formed?

What are the terms of the contract?
Why is the distinction between property and possession important in business?
Why is the classification of goods important?
How does risk pass?
Can there be a transfer of title by a non-owner?
What are the rights and duties of the parties in performance of the contract?
What remedies are available for breach of contract?
What is the Vienna Sales Convention?

## Chapter 22

<b>Property and mortgages</b>
What is the difference between ownership and possession?
Can possession of land give title?
Can possession of goods be evidence of ownership?
What is the difference between real and personal property?
What is the extent of land?
What types of interests exist in land?
What are the methods by which land ownership is established?
What is a mortgage?
What is the mortgagor's right to deal with the property?
What remedies are available to the mortgagee?
What is the difference between a licence and a lease?
What are the different categories of lease?
What are the terms of agreement for a lease?
What are the terms of a leasing contract?
How can leases and tenancies be terminated?
Can the landlord recover possession of the premises?
What is the purpose of residential tenancies legislation?
Who does retail tenancies legislation protect?

## Chapter 23

<b>Intellectual property</b>
What is intellectual property?
What is copyright?
What are designs?
What are patents?
What are trade marks?
What is passing off?
Can the Australian consumer law—unfair practices provide trade mark protection?
Can confidential information be protected?

## Chapter 24

<b>Criminal law in a business context</b>
What are the sources of the criminal law?
What are the differences between criminal law and civil law?

How are criminal offences classified?  
How are criminal proceedings commenced?  
What elements must be present for a person to be found guilty of a crime?  
What is the standard of proof in a criminal matter?  
What is a white-collar crime?  
When can statutory criminal liability arise in business situations?  
When can a company face criminal liability?  
What is a civil penalty?

## Chapter 25

### Competition law

How does the competition and consumer act operate?  
What are the concepts of 'market' and 'competition' in business under the CCA?  
What restrictive trade practices are prohibited by part IV?  
What are authorisations and notifications?  
What enforcement procedures and remedies are available for breaches of parts IV and IVB?  
What is the purpose of industry codes of conduct?

## Chapter 26

### Electronic commerce

Electronic transactions legislation—how do we make contracts electronically?  
Are there legal aspects to maintaining a business website?  
Is there electronic commerce consumer protection?  
Does the internet create jurisdictional problems?  
What is privacy in the context of the internet?  
Is cybercrime a problem for business?  
What is electronic banking?

## Chapter 27

### Negotiable instruments

Why is negotiability an exception to the *nemo dat* rule?  
What is a bill of exchange?  
What are cheques?  
What is the liability of the parties?  
What is the difference between a bearer and an order cheque?  
What are the duties of the financial institution and the customer?  
What are bank cheques?  
What other methods of money transfer are there?  
What is the code of banking?  
What is the role of AFCA?  
What is the purpose of the *financial transaction reports act 1988*?

## Chapter 28

### Consumer credit and privacy

What are the operational areas of the *National Credit Code*?  
What types of credit arrangements can you have?  
What formalities must a credit provider meet?  
What is the purpose of a mortgage or guarantee?  
What is the effect of hardship?  
What are the obligations of government agencies and businesses under the *Privacy Act*?  
What was the impact of the *Privacy Amendment (Enhancing Privacy Protection) Act* on the *Privacy Act*?  
What is hire-purchase?

