

Solution Manual

to accompany

BUSINESS LAW

3rd edition

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Chapter 1 | Introducing the law

Exercise 1.1 — The nature of law

How will knowledge about the law generally, and about business law in particular, help you to succeed in your chosen career?

See *Business Law* pp 6-8.

The range of possible answers offered by students include the following:

- Knowledge about law and ethics will help me to conduct myself in a manner that is not only legal but also ethical.
- Knowledge about the Australian legal system will help me to better comprehend information presented in the media about Australian politics.
- Knowledge about legal research will help me to more easily locate the relevant rules regulating my profession.
- Knowledge about tort law will make me aware of the legal consequences of deliberately or carelessly causing harm to customers or employees.
- Knowledge about contract law will help me to be aware of the point at which business negotiations lead to a legally binding contract.
- Knowledge about competition law will make me aware of the distinction between acceptable and unacceptable levels of cooperation with the other participants in my industry.
- Knowledge about intellectual property law will make it more likely that I will take the necessary steps to protect my intellectual creations such as trade marks.
- Knowledge about partnership and corporations law will ensure that in the event I am a partner or a company director I am aware of my legal obligations to the organisation.

Note: Use this exercise as a prompt to talk about (1) the sorts of things that are covered by business law, and (2) why knowing about the law will help the students not only in their careers but also in their personal lives. The objective of the exercise is to ensure that business law students are aware of the reasons why most of them are required to study business law as part of their degree.

Exercise 1.2 — The nature of law

It is said that, among other things, law preserves community values. Of course, there are many issues about which there is clear division within the community: questions about abortion, prostitution, drug use, capital punishment, the environment, tax, defence and immigration. The law must nevertheless take a position on each of these issues. If law is based on certain values, upon whose values are laws about these issues based?

See *Business Law* pp 11-13, 18-19, 27.

The law as a general rule reflects community values, because:

- the judges who make case law are themselves members of the community; and
- the politicians comprising the parliaments that make legislation are not only members of the community but also concerned to remain popular with the electorate.

In relation to those issues about which community opinion is divided – for example, abortion, prostitution, drug use, capital punishment, the environment, tax, defence, immigration – there are a number of different ways in which the law can be determined:

- It may be based upon the views of the majority, provided of course that there is a majority and that community opinion is not evenly divided or too impossible to ascertain.
- It may be based upon the views of the most vocal lobby groups, that is, those groups within the community who feel most strongly about the issue and are best able to influence law makers.
- It may be based upon the views of the law makers themselves: government policy, or the values of the politicians and judges.

According to critical legal theory, most laws in fact reflect the values of a dominant elite rather than the majority. From p 22 of the text:

Within a community, different points of view and different interests compete for dominance. The law is influenced by the preferences and perspectives of the dominant members of the community, and is used by those dominant members of the community to protect and enhance their own interests. This is not always obvious, however. Those using the law to exercise power and maintain dominance often portray the law as universal and apolitical rather than specific and ideological. They convince the rest of the community that the way they want things to be is the normal way, or the way things must always be. Law is used as a mask for power. For example, feminist legal theorists point to the fact that many laws were developed by legal institutions dominated by men — parliaments and courts — and that the law is inevitably biased in favour of the male perspective, serving to perpetuate the dominance of men over women.

Note: The purpose of this exercise is to encourage students to reflect upon the fact that the law is not created and does not operate in a vacuum. Rather it is an outcome of historical, political and ideological processes, and a particular legal rule will not necessarily be one with which the majority of the community agrees.

Exercise 1.3 — Justice, ethics and politics

Download a news item/story from a news site such as www.news.com.au or www.abc.net.au that has some connection with the law and complete the following tasks:

- a) Write a brief summary of the item/story.
- b) Allocate the item/story to one or more of the categories of law identified in this chapter.
- c) Describe the interactions between law, politics, justice and ethics within the item/story.

See *Business Law* pp 14-18, 20-28.

Note: This exercise can be used to demonstrate to students (1) the way in which the law and legal issues dominate the news, (2) the wide variety of fields of legal regulation, and (3) the close relationship between law, politics, justice and ethics.

Exercise 1.4 — Law and justice

Strict adherence to the rules of court procedure, particularly the rules of evidence, are usually justified by the claim that it is better that a guilty person walk free than that an innocent person be imprisoned unjustly. Do you agree with this claim?

See *Business Law* p 20-24.

The claim referred to in the question applies to criminal trials rather than civil trials. In a criminal trial the Crown bears the onus of proof. This means that the Crown is responsible for establishing the guilt of the defendant and if it is unable to do so the defendant must be released without charge. The standard of proof – the extent to which the court must be convinced of the defendant's guilt – is a high one: beyond all reasonable doubt. The evidence relied upon by the Crown in establishing its case must comply with the strict rules of evidence, rules designed to ensure that only evidence that is relevant and which was gathered fairly is taken into account by the court in reaching its decision. The defendant must be informed of the charges against them and must be given the opportunity to respond to the charge.

These rules are intended to ensure that if a defendant is to be found guilty and punished, it is only if the court is almost certain of their guilt and the defendant has been given every reasonable opportunity to convince the court otherwise. These precautions are considered to be important because (1) the Crown is seen to have access to more resources than the defendant in preparing for the criminal trial, and (2) the consequences of a court's finding of guilt in a criminal trial can be extremely serious, such as a lengthy jail term. It is often claimed that the injustice that would occur if an innocent person were to be punished would far outweigh the potentially negative consequences of a guilty person being released without

punishment, and it is thus thought to be more appropriate to err in favour of innocence rather than guilt. In other words, if there is any doubt, the defendant should be found not guilty.

The opposing argument is that in some circumstances the potential risk to the community in allowing a possibly guilty person to be released is so serious that it is worth taking the risk of detaining an innocent person. Some of the more recent anti-terrorism provisions in the Commonwealth and State criminal statutes appear to be drafted with this in mind, exposing potentially innocent Australians to the risk of detention in the effort to ensure that the plans of terrorists are not fulfilled.

Note: This exercise can be used to provoke a discussion not only about one of the most fundamental principles within our criminal legal system – ‘innocent until proven guilty’ - but also about the nature and purpose of criminal law generally: Is it to punish offenders? To achieve justice? To protect the community?

Exercise 1.5 — Law and justice

Locate a news item that describes a legal decision or new law that in your opinion is not just or fair. Upon which conception of ‘justice’ are you relying in your categorisation of the legal decision or new law as unjust?

See *Business Law* pp 18-22.

There are a number of different ways we can think about the source of justice.

- Justice as natural law — Justice is a universal and absolute concept, an objective standard against which all laws and legal processes can be judged. For example, if Johnny breaks a promise he should compensate the promisee because breaking promises is wrong, and people who do wrong should compensate those harmed by the wrongful conduct, and that is just the way it is.
- Justice as divine command — Justice is the authoritative command of a deity such as the Christian, Islamic or Jewish God. For example, if Johnny breaks a promise he should compensate the promisee because the Koran says so.
- Justice as authoritative command — Justice is whatever those in power say it is. For example, if Johnny breaks a promise he should compensate the promisee because that is what the law of contract — as declared by those in authority — requires.
- Justice as mutual agreement — Justice is whatever the community agrees that it is. For example, if Johnny breaks a promise he should compensate the promisee because most members of the community agree that promises should be kept and that people who break promises should compensate the promisee.
- Justice as consequentialism — Justice is the decision or action that has the best consequences in terms of total welfare. This is a pragmatic conception of justice. For example, if Johnny breaks a promise he should compensate the promisee because this is likely to deter both Johnny and others within the community from breaking promises, and this will benefit the entire community.

Note: This exercise can be used to illustrate the different conceptions of justice and to demonstrate to students the fact that what one person sees as justice another may see as injustice.

Exercise 1.6 — Law and ethics

What is the difference between conducting business legally, and conducting business ethically? Do the two necessarily coincide?

See *Business Law* p 24-27.

When a person is conducting business legally they are doing so in a way that does not breach any applicable laws. For example, they are not committing a crime, committing a tort, breaching a contract or breaching the provisions of a statute. When a person is conducting business ethically they are doing so in a way that is seen to be ‘good’, that is, morally acceptable. They are, for example, being honest and not causing unnecessary harm to others.

Legal and ethical conduct frequently coincide because most laws are consistent with the community’s ethical values. The Australian Consumer Law, for example, is a law that requires a business to behave ethically in that it prohibits a business from misleading or deceiving consumers. A business that is complying with its legal obligations will usually be acting ethically, and a business that is engaging in illegal conduct will usually be acting unethically.

However the two do not *necessarily* coincide. It is possible for a business to behave legally but not ethically. For example, the directors of a company may be legally entitled to pay themselves very large salaries even though the company itself has not made a profit and has in fact terminated the employment of a large number of employees. Although their conduct is legal many would say that it is unethical.

Similarly it is possible for a business to behave ethically but not legally. A restaurant that gives away leftover meals to homeless people at the end of the evening may be in breach of food handling and hygiene regulations but it is nevertheless behaving ethically because it is seen to be ‘doing the right thing’

Note: Students should be encouraged to come up with their own examples of situations where law and ethics do not coincide.

Exercise 1.7 — The sources of law

Institutions administering public international law include the United Nations, the International Court of Justice, the International Labour Organization, the World Trade Organization and the International Monetary Fund. Give a brief description of the role of each of these organisations.

See *Business Law* p 17.

The **United Nations** is an international organisation the aims of which are to facilitate cooperation in international law, international security, economic development, social progress, human rights and achieving world peace. The UN was founded in 1945 to stop wars between countries and to provide a platform for dialogue. There are currently 192 member states, including nearly every recognised independent state in the world. See www.un.org.

The **International Court of Justice** is the primary judicial organ of the United Nations. It is based in the Peace Palace in The Hague, Netherlands. The main functions of the ICJ are to settle legal disputes submitted to it by member states and to give advisory opinions on legal questions submitted to it by international organisations, agencies, and the UN General Assembly. See www.icj-cij.org.

The **International Labour Organisation** is a specialised agency of the United Nations that deals with labour issues. Its headquarters are in Geneva, Switzerland. One of its principal functions is setting international labour standards through the adoption of conventions and recommendations covering a broad spectrum of labour-related subjects (the International Labour Code). The topics covered include freedom of association to health and safety at work, working conditions in the maritime sector, night work, discrimination, child labour, and forced labour. See www.ilo.org.

The **World Trade Organisation** is an international organisation of states the aim of which is to supervise and liberalise international trade. It deals with the rules of trade between states, the negotiating and implementation of new trade agreements, and the policing of member states' adherence to the WTO agreements. The WTO has 153 members, which represents more than 95% of total world trade. The WTO's headquarters is in Geneva, Switzerland. See www.wto.org.

The **International Monetary Fund** is an organisation of 185 countries that seeks to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty. It oversees the global financial system by following the macroeconomic policies of its member countries, in particular those with an impact on exchange rates and the balance of payments. It was formed to stabilise international exchange rates and facilitate development. It also offers financial and technical assistance to its members, making it an international lender of last resort. Its headquarters are located in Washington, D.C., USA. See www.imf.org.

Exercise 1.8 — The Australian legal system

According to Justice Brennan in the Mabo case, the High Court was not free ‘to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency’. What do you think he meant by this?

See *Business Law* pp 37-38.

Brennan J is explaining that the High Court does not have an unlimited discretion in making decisions that appear to be consistent with modern ideas about justice and human rights. There is an important limitation upon the High Court’s discretion: the decisions of the High Court cannot undermine the very legal system of which it is a part.

In the Mabo case the High Court of Australia decided that the previous view that Australia was *terra nullius* (empty land) at the time of British settlement was incorrect, and formally acknowledged the existence of the indigenous Australian society. However, the High Court did not – and according to Brennan J could not – reverse the doctrine of reception and the view that Australia was settled rather than conquered by the British. Since Australia was settled by the British, the new arrivals brought the British law with them and the Australian legal system was founded upon the British legal system. If the High Court in Mabo had decided that the doctrine of reception should also be reversed, because Australia was in fact conquered rather than settled by the British, the foundations of Australia’s present system of laws would have disappeared with nothing to replace them. All legislation passed and all judicial decisions reached in the previous 200 years would have become illegitimate, leading to widespread uncertainty if not social and economic collapse.

Exercise 1.9 — The Australian legal system

What is the Australian Law Reform Commission, and how does the work of the Commission relate to the matters addressed in this chapter?

See *Business Law* p 18-19.

The law changes for a variety of reasons. Sometimes a new government wishes to implement a new policy, sometimes lobby groups or the media press for reform, sometimes changes in community values or advances in technology necessitate a change in the law. And sometimes a law reform body conducts an inquiry into an area of law and recommends reform. One such law reform body is the Australian law reform commission.

The ALRC was established in 1975. It is an independent federal statutory corporation, and presently operates under the *Australian Law Reform Commission Act 1996* (Cth). The ALRC conducts inquiries into areas of law reform at the request of the Attorney-General of Australia. Although it is accountable to the Federal Parliament, it is not under the control of government and is able to operate independently.

The ALRC's focus is on federal laws and legal processes. Its objectives are to simplify and modernise the law; improve access to justice; remove obsolete or unnecessary laws, and

eliminate defects in the law; suggest new or more effective methods for administering the law and dispensing justice; ensure harmonisation of federal, state and territory laws where possible; and monitor overseas legal systems to ensure Australia compares favourably with international best practice. See www.alrc.gov.au.

Exercise 1.10 — Local government

Locate the website for the local government in the area where you live in order to answer the following questions:

- a) When was your local government established?**
- b) Is your local government called a city council, a shire council, a district council, a borough or some other term?**
- c) Who is your present mayor?**
- d) What services are provided by your local government?**

See *Business Law* p 42.

Note: This exercise is intended to encourage students to learn more about their local authority. It can be used to initiate a discussion about the need for this ‘third’ level of government.