

Instructor resource guide

to accompany

Business and Company Law

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by

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Chapter 1

Business and 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?

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 trademarks.
- 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?

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

- the judges who make case law are themselves members of the community

- 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 20 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 — The nature of law

Can you construct a definition of law that acknowledges law's relationship with justice and morality?

The definition of law offered on page 6 of *Business Law* is as follows:

The law is a system of rules made by the state and enforceable by prosecution or litigation.

This is a 'positivist' definition of law because the focus is upon law as a system of rules and upon the source of those rules. There is no reference to what those rules should be, and whether those rules need to be moral or fair in order to be categorised as 'law'.

An example of such a definition would expand upon the positivist definition and include a requirement that the law made by the state be consistent with natural law, or with the community's ethical values or notion of justice, or with the preservation of fundamental or universal human rights.

Note: The purpose of this question is to remind students that there is no single 'correct' definition of law, and that there are many who insist that the law should (even must) be directed towards the common good and universal principles of morality and justice.

Exercise 1.4 — The purpose of law

Identify three laws that have attracted media attention this week. For each law, identify what you believe to be the purpose or objective of the law.

In Chapter 1, six possible purposes for law are identified:

1. resolving disputes
2. maintaining social order
3. reinforcing community values
4. helping the disadvantaged
5. stabilising the economy
6. preventing the misuse of power.

It is likely that any law that is the focus of media attention was made with one or more of the above purposes.

Note: This exercise will demonstrate to students the extent to which laws influence public life and are the focus of public attention. It will also show students the wide range of reasons why law are made.

Exercise 1.5 — The categories 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.

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 1.6 — Justice, ethics and politics

Download a news item/story from a news site such as www.news.com.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.**

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 1.7 — 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?

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 1.8 — 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?

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 1.9 — Law and ethics

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

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 1.10 — Law and politics

Identify at least two arguments in support of, and two arguments opposing, the feminist conception of law referred to in this chapter.

On page 19 of *Business Law*, there is a very brief description of the intimate relationship between law, politics and power. On page 24 the following is noted:

According to some legal theorists, the law is inescapably political. 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.

This is a controversial perspective upon the law. There are those who agree with it, and those who disagree.

The arguments in support of this perspective on the law include the following.

1. If the law is a reflection of the dominant values within the community, and many of our laws were made at a time when male values were dominant, then the foundations of our legal system reflect male values and priorities at the expense of female values and priorities.
2. The major law-making institutions — the parliament and the courts — have until recently been comprised primarily of men. Even today women make up a minority of parliamentarians and judges. Male perspectives have therefore informed the making of laws over the past few centuries.

The arguments opposed to this perspective include the following.

1. The inequality between men and women is no longer as significant or as pervasive as it was historically, it is generally accepted (at least in Australia) that women have the same rights and entitlements as men, and laws today no longer privilege men over women.
2. Law are supposed to be consistent with universal principles of morality and justice, and with the existence and protection of fundamental human rights. These rights and principles do not distinguish between men and women, and are concerned with promoting the common good regardless of sex or gender.

Further reading: Stanford Encyclopaedia of Philosophy, 'Feminist Philosophy of Law' (2013)
<http://plato.stanford.edu/entries/feminism-law/>.

Note: This exercise is intended to introduce students an important critical perspective on the law, and to encourage them to reflect upon the possibility that contrary to orthodox portrayals of legal rules and doctrines, the law is not politically and ideologically neutral but is intended to benefit some groups at the expense of others.