

Introduction to Law and Contracts

All you wanted to know but was afraid to ask

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Why do we have laws?

- Why do we have laws?
- Where did it come from?
- Are you free to do as you please?
- Have you broken the law (lately)?
- Are you a criminal?

Jurisdiction: Forms of legal action

In Australia, the legal system can be broadly classified into 4 different jurisdictions:

- Criminal Jurisdiction
- Civil Jurisdiction
 - Contract Law
 - Tort Law
- Administrative Jurisdiction
- Equity

A criminal action does not prevent a plaintiff from taking civil action (O.J. Simpson).

Where did our laws come from?

- Australia's body of law arrived in Australia with the first settlers, which includes:
 - UK Statutes; and
 - Common Law

Levels of Government

How many layers of government do we have in Australia?

Answer: Three

- Federal Government;
- State Government; and
- Local Government.

Short History of Government

- **State** governments were the principle governing instrument since settlement;
- State governments had the **autonomy** to make its own laws, but UK Parliament reserved the right to enforce its will through **paramount force**.
- Since **Federation** (1901), the Federal Government came into existence and was given a constraint right to make laws for the whole of Australia.
- The Federal government's power is enumerated in the **Australian Constitution**
- In 1986, *Australia Act (Cth)* **severed** UK's influence.

Bills to Statutes

- Before a law can come into force, the **Bill** must pass through both (**Lower** and **Upper**) Houses of Parliament.
- For Federal laws, the Bill must then be signed by the **Governor-General** and a start date **proclaimed** in a Government Gazette.

The Common Law

- This is the **unwritten law** derived from the traditional law of England.
- Developed by judicial **precedence**, interpretation, expanded and modified by the **Courts**.
- A statute **will not be taken to have replaced** the common law unless it **explicitly** or **implicitly** shows such an **intention**.

What is a contract?

- It is a legally binding **promise** between 2 parties.
- It can be either **oral** or **written**.
- **Failure to fulfill** your end of the bargain may result in damages for **breach of contract**.
- Contracts can be:
 - **Unilateral**; or
 - **Bilateral**
- **Privity** doctrine prevents **non-parties** from enforcing contractual promises that benefit them.

Elements of a contract

- **Offer**
 - Offer/counter offer
 - Invitation to treat
- **Acceptance**
- **Consideration**
- An **intention** to create legal relations
- **Certainty**

Terms of the contract

- **Express** Terms
 - **Warranty**: no rights to terminate
 - **Condition**: rights to terminate for breach
 - **Mere representations**: no remedy
 - **Whole of contract term**
- **Incorporation** of Terms:
 - **Notice** (timing, knowledge, reasonableness)
 - **Course of dealings** (*Balmain New Ferry Co Ltd v Robertson*)

Case Example 1: L'Estrange v F Graucob

Effect of Signature

- Purchase cigarette vending machine
- Signed 'Sale Agreement'
- Machine delivered did not work
- Sued seller, machine not reasonably fit for the purpose
- Seller relied on clause excluding all implied conditions and warranties.
- **Judgment**: **contract binding** regardless whether purchaser read the contract or not.

Case Example 2: Curtis v Chemical Cleaning and Dyeing Co

- Curtis took white satin wedding dress to be dry cleaned
- She was asked to sign a paper headed 'Receipt'
- Before doing so she asked why and was told that they would not be accepting liability for damage to dress trimmings
- She signed it and dress was returned stained and claimed damages
- **Judgment:** Court finds for Curtis because the Respondent had **misrepresented the the extent of the clause**.
- It was also suggested that Curtis may not have understood that a receipt was also a contract

More Terms

- **Construing Terms**
- **Implied Terms** (course of dealings, business efficacy, obviousness)
- **Parol Evidence Rule**
 - Excludes any evidence other than the language contained in the written contract.
 - Exception: when the contract is **ambiguous**.
- **Exclusion Clauses:** can't exclude statutes (eg: TPA)

Beware of what you agree to

- **Read the contract** or license carefully before you agree to the terms.
- **Time:** Beware of how long the contract is binding for.
- Clicking an OKAY button on a webpage or during installation is **legally binding**.
- Do you often even know what you are agreeing to? Consider the Microsoft Windows 7 license agreement.

Termination can occur:

- By an **express term** in the contract
- **Implied right** (that both parties would not have intended the contract to continue indefinitely).
- **Express agreement** (new contract which agrees to release the other from the original contract)
- **Abandonment**
- **Breach** of condition (right to damages)
- **Repudiation** (anticipatory breach)
 - Conduct, words, unwillingness to perform
- **Delay** (time is of the essence)
- **Affirmation** (keep the contract on foot) or Termination

Things to watch out for

- What is a condition?
- Intermediate (**innominate** term)
 - Warranty
 - Intermediate
 - Condition
- **Root** of the contract
- **Estoppel**
 - where an aggrieved party has been induced to act to their detriment you are estopped from exercising your legal right

Things to watch out for

- You cannot contract away your legal rights
- You cannot contract to do something illegal
- You cannot change/vary the contract unilaterally
- Penalty clauses

Litigating

- Burden of proof
 - Civil: **Balance of probability**
 - Criminal: **Beyond a reasonable doubt**
- The burden of proof is on the party bringing the action (the Plaintiff)
- Plaintiff is usually after "**specific performance**" OR
- to be placed in the same situation with respect to **damages** as if the contract **had been performed**

Alternate Dispute Resolution

- Litigation can be **costly** and something to be **avoided**
- Consider **mediation** and **arbitration** for civil matters
- In some contracts, mediation is an **explicit** term of the contract.
- It is cheaper to **correct a clause** before you sign a contract than after
- Getting the contract drafted well can avoid problems later on.
- If unsure, seek legal advice

Laws That Effect Engineers and Computer Scientists

- *Competition and Consumer Act 2010* formerly known as the *Trade Practices Act 1974 (Cth)/Fair Trading Act* and includes new *Australian Consumer Law* amendments
- *Corporations Act 2001 (Cth)*
- *Australian Securities and Investment Commission Act 2001 (Cth)*
- *Freedom of Information Act 1989 (Cth)*
- *Privacy Act 1988 (Cth)*
- *Telecommunications Act 1997 (Cth)*
- *Copyright Act 1968 (Cth)*
- *Occupational Health and Safety Act 1991 (Cth)*
- *Electronic Transactions Act 1999 (Cth)*
- *Patents Act 1990 (Cth)*
- *Spam Act 2003 (Cth)*

E-Commerce

- All e-commerce transactions are governed by an [agreement](#)
- [Clickwrap](#) agreements - no one reads them
- Productivity Commission's report:
 - "Review of Australia's Consumer Policy Framework - Productivity Commission Inquiry Report 2008"
 - **Does not** believe we need any new consumer policy in this area

E-Commerce - Issues

- [Enforceability](#) of contracts and remedies
- Forum shopping and [Jurisdiction](#)
- [Sovereignty](#)

E-Commerce - Jurisdiction

ACCC v Hughes (2002) ATPR 41-863 Federal Court of Australia

- website hosted in the US, no corporate presence in Australia
- Hughes living in Australia contravened s 52, s 53(e) TPA misleading representation re price, s 53(c) performance characteristics
- Unlawful selling of pharmaceutical products
- **Judgment:** court restrains Hughes from continuing to unlawfully supply pharmaceuticals, was imprisoned for contempt for disregarding those orders.

E-Commerce - Jurisdiction

ACCC v Chen (2003) 132 FCR 309 at 318 Federal Court of Australia

- Chen US Citizen, no ties with Australia
- sets up number of website purporting to sell tickets to Sydney Opera House at double the price - tickets were bogus
- sought injunction against Chen
- injunction granted but could not be enforced against him

E-Commerce - Interstate Jurisdiction

Law v MCI Technologies Pty Ltd [2006] VCAT 415 at [43]
Victorian Civil and Administrative Tribunal

- Queensland Company
- shrinkwrap licence agreement stating that the licence is governed by the laws of Queensland
- Law sought refund for purchase in VCAT under Victoria's FTA 1999
- Respondents claim VCAT has no jurisdiction
- VCAT has jurisdiction because the goods was supplied to and delivered to Victoria, the FTA applied.

E-Commerce - Electronic Contract Variation *Douglas v Talk America Inc* 495 F 3d (2007) 1062 at 1066 US Court of Appeals (9th Circuit)

- Douglas contracted for telephone service with America Online
- subsequently sold to Talk America who then added 4 provisions to the service contract and posted it on their website
- Plaintiff continued to use service for 4 years
- becomes aware of additional fees and charges as a result of the 4 provisions
- Douglas filed a class action against Talk America
- Talk American sought to dismiss claims relying on the 4 provisions in the contract
- Judgment: Talk American cannot rely on the 4 provisions because Plaintiff was not made aware of the unilateral change to the contract. No notice was given to Plaintiff.

Cloud Computing

- **Where** is the data kept?
- **Who** owns the information?
- **What** laws govern your privacy?
- What happens when **things go wrong**?
 - Loss of data, backups
 - Connectivity issues
 - Performance issues
 - Security
- Who do you seek **redress** from when things go wrong?
- Imagine having servers in 3 different countries, where's your data?

Cloud Computing: Dylan Marcheschi Google cloud user

- Suddenly discovered one day that all of his Google accounts had been suspended.
- Was unable to find out why his accounts were suspended.
- Can fix something if he doesn't know what he rule he's broken
- Intervention by Google's Senior VP Vic Gudontra
- Dylan was working on a book "The Evolution of Sex"
- Auto scanning of photos deemed images as child ponography
- PM has seem selection of images and considers them to be innocuous and Google's VP agrees
- Google has re-enstated his account but deleted the images.

Reference: ABC radio PM, story reported Jul 27, 2011

Cloud Computing

- What is your **responsibility** as an Engineer?
- Do you **hide** behind a "No Warranty" clause
- Do you choose a **jurisdiction** that's kind to the way you do business?
- Do you provide some form of **performance guarantee**? If not, why not?
- These problems aren't going to go away
- United Nations (**UNCITRAL** Model Laws)
- **Hague Conventions** (recognition of forum clauses for B2B)
- Still a long way to go.