

- Australian Taxation Office (ATO)
- Australian Transaction Reports and Analysis Centre (AUSTRAC: ¶16-080)
- Director of Public Prosecutions (DPP: ¶2-110; ¶2-140), and
- IP Australia (<www.ipaustralia.gov.au>; ¶3-560, ¶3-580 and ¶3-660), which regulates Australian intellectual property (IP) laws.

Industry associations

Industry associations (self-regulators) introduced in this book include the Australian Bankers' Association (ABA), responsible for the Code of Banking Practice (¶16-041), the Franchise Council of Australia (FCA: ¶9-985) and the Insurance Council of Australia (ICA), responsible for the General Insurance Code of Practice (¶17-036).

Regulation

Regulation includes the legal rules set out in this book — including contract and competition and consumer law — and all the rules and legal restrictions imposed by government, the courts, regulators and industry.

Compliance

The bottom line of all this is the need for regulatory compliance — to comply with (fulfil) regulation.

There is now the compliance professional, who will have a good understanding of all topics in this book.

The peak body for the development and practice of compliance, and for working compliance, ethics, governance and risk into the fabric of organisations is the Governance Risk Compliance Institute (GRCI: <www.compliance.org.au>).

[¶1-015] The rule of law

Our legal system is built on the principle of the rule of law (supremacy of law) — that the authority of government (power) must be exercised according to law.

The rule of law has three aspects:²

- (1) **No arbitrary power.** The rule of law excludes arbitrary power. Official actions (including judgments) must be done in accordance with the law. No person can be punished unless there is a breach of the law. Law must be public and published (¶1-370).

The power of government is separated — under the separation of powers — among the three branches of government (¶1-475).

- (2) **Equal before the law.** All people are equal before the law. Nobody is above the law, for example, the Prime Minister, a judge or a soldier may be liable in criminal law (¶2-230). The rule of law is a prerequisite for democracy.

2 AV Dicey, *An Introduction to the Study of the Law of the Constitution* (London, Macmillan and Company Ltd, 10th ed, 1964) 202–203.

- (3) **Enforceable in court.** The rights of citizens are enforceable in the courts. In addition, in some jurisdictions there are special constitutional safeguards and Bills of Rights (Charters of Rights).

[11-020] Law and justice

The principle of the rule of law ([11-015]) suggests that law and justice are the same thing — but is an unjust law even a law? Must an unjust law be obeyed? Can matters of justice or morality or conscience ever take precedence over the law?

Natural law

The *natural law* school of legal philosophy sees law as coming from nature. Natural law sees law as expressing a higher truth and a higher justice than that contained in man-made law, like in the US Declaration of Independence (4 July 1776):

All men are created equal.

Christopher Saint-Germain, for instance, set out the criteria of a good law in *The Doctor and Student* (translated in 1530):

Also to every good law be required these properties: that is to say, that it be honest, rightwise, possible in itself, and after the custom of the country, convenient for the place and time, necessary, profitable, and also manifest, that it be not captious by any dark sentences, ne mixt [nor mixed] with any private wealth, but all made for the commonwealth.

Positive law

In contrast, the *positivists* see law as the rules imposed by the sovereign power over the sovereign's subjects. The study and the theory of law to the positivists concentrates on things as they are instead of things as they should be:

- Jeremy Bentham (1748–1832), the father of positivism, claimed that because law is man-made, it can be whatever man chooses to make it.
- John Austin (1790–1859) also divorced law from justice, basing law — not on ideas of good and bad — but on the power of the superior.

In modern times, HLA Hart pointed out that one of the problems with this view of the moral authority of law is that respect for the principles of legality is ‘unfortunately compatible with very great iniquity’.

The legal authority of the German Nazi state in the 1930s and 1940s sanctioned deportations, mass murders and ultimate forms of human degradation. However, these actions were ‘legal’ under the legal system then in force. Numerous war criminals were tried after the end of the Second World War in 1945 and some raised the defence of ‘obeying the law’. War criminals can expect to be punished and any defence that their actions were legal at the time will not be successful because they breached basic morality.

Law is changeable, so some conduct (abortion, alcohol or drug use) could be considered criminal yesterday, legal today and criminal tomorrow: what is crime? ([12-010]).

[¶1-025] Law, morality and society

Some areas covered by law and morals overlap and are the same — for example, the moral principle that promises should be kept is the foundation for the law of contract.

Some conduct is immoral but not illegal — for example, cheating, selfishness.

Some conduct is illegal but not immoral — for example, disobeying a 'no parking' sign (¶2-010).

Without codes of conduct giving effect to society's underlying ideologies and ways of life, there would be uncertainty. In a pluralist society where values are not universally shared, law plays a crucial role in maintaining social cohesion because it recognises and gives effect to community values, provides for the settlement of potentially disruptive disputes, and (ideally) provides for the orderly adaptation of rules to social change.

[¶1-026] E-commerce and Australian business law

The enacted law (statutes, legislation) and the unenacted judge-made case law that make up Australian business law have adapted to and embraced the fast-developing world of electronic commerce (e-commerce) and the internet. This shows the continuity of the common law (¶1-010) and how it can apply existing legal principles to new technology. This is the same as how the common law adapted to the Industrial Revolution in the 18th century (when the economy moved from agriculture to industry) and the arrival of the steam train and later the motor car.

What is e-commerce?

E-commerce means commerce by means of computer, the internet and other telecommunications links like electronic data interchange (EDI).

Increasingly, business is being done electronically rather than by traditional means involving face-to-face business discussions using paper-based documents.

Australian business has already adapted to e-commerce, such as:

- computer crime (¶2-300)
- e-contract — acceptance of an offer by fax, email and SMS (¶5-045; ¶5-320)
- the computerisation of financial markets, including the development of electronic share trading and the Clearing House Electronic Subregister System (CHES) for share ownership (¶5-030)
- the confirmation that email falls within the Commonwealth's power over 'postal services' under s 51(v) of the Constitution (¶1-475; ¶7-220), and
- electronic banking — financial institutions have been involved in closed-system e-commerce with their customers for the transfer of funds for many years for wholesale and retail transactions, including ATMs and EFTPOS terminals (¶16-650ff).

At a broader level, e-commerce refers to all business activity carried out with the aid of electronic devices, including telephone, fax, email, ATM and EFTPOS, which includes any transaction involving a card that uses electromagnetic data such as a prepaid phone card.

Very little data created today would not be in electronic form, and Australian business law has been revolutionised by e-commerce.