



TENETS OF BUSINESS LAW

Think Ahead

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We believe that accountancy is a cornerstone profession of society that supports both public and private sectors. That's why we're committed to the development of a strong global accountancy profession and the many benefits that this brings to society and individuals.

Since 1904 being a force for public good has been embedded in our purpose. And because we're a not-for-profit organisation, we build a sustainable global profession by re-investing our surplus to deliver member value and develop the profession for the next generation.

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About this report

ACCA believes that business is the driving force behind the economic growth which underpins the supply of goods and services, public and private, which form the basis of modern societies. These tenets of business law set out ACCA's view on the most fundamental elements of the legal arrangements that allow business partners to trust one another, resolve disputes when they arise, and above all create value for the wider good.

Foreword



Business is the backbone of modern society which contributes to economic prosperity and raising the standard of living for ordinary people.

In order to flourish, business requires an infrastructure which can provide the right conditions for entrepreneurship and for multinational businesses to commit. This report sets out that infrastructure by listing 4 principles and 5 key mechanisms which provide those right conditions for business.

The intention is for these principles to act as guidance to governments and other authorities engaged in facilitating the right conditions for business. They can also serve as a common denominator for discussions between such authorities, professional advisors and businesses, to reach an understanding on what both parties need from each other to encourage business and economic success as well as social prosperity.

Whilst the tenets are not meant to be exhaustive, they will all (to a greater or lesser extent) underpin success. The ACCA Global Forum for Business Law, which has been instrumental in drawing together these principles, will monitor and review the application of the tenets to ensure that the document remains relevant and useful for policymakers and businesses alike.

Faris Dean

Corporate and commercial solicitor, Chair of the ACCA Global Forum for Business Law

A handwritten signature in black ink, appearing to read 'F. Dean', with a stylized flourish at the end.

Faris Dean is a solicitor who advises and acts for clients on a range of matters including business sales and purchases, investment agreements, anti-bribery and data protection. His clients include national and international commercial and corporate businesses. As well as practising as a solicitor for over 13 years, he is a qualified chartered certified accountant having trained with two of the 'Big Four' international accountancy firms. His understanding of financial issues affecting business often helps provide another perspective when advising clients on corporate and commercial transactions.

ACCA tenets of business law

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Business is the foundation of modern society. However advanced an economy may be, the first initial step from subsistence to trading is having the ability to measure and account for a production surplus. The common frameworks that allow trade and business to flourish, not just between friends and peers but also between strangers, across distance and increasingly across national boundaries, are fundamental to economic activity and growth.

Accountants play a crucial part in the whole process of trade, business and economic growth. As the experts in understanding and interpreting the flows of numbers that dictate whether an individual business is economically viable, they are vital to translating that information for the policymakers and entrepreneurs whose decisions shape the productive capacity of the economy, by converting numerical data into vital business information. As ethical professionals, accountants should bring an additional dimension to business, looking beyond the numbers to the wider impacts on society, recognising the mutual dependency between business and society, and the basis of governments' and other public spending on the recognition of economic value of business for taxation purposes.

The laws that bind modern business have developed at different rates in different jurisdictions, reflecting different jurisprudential heritage, varying visions of society and wider political realities. Nonetheless, there are underlying similarities between codes, based as they all are on the experience of merchants, lawyers, businesspeople and accountants down the ages.

There are three principal aspects to business law. The form of the business (identifying its legal personality, whether incorporated or not, or having limited or unlimited liability) underpins the whole framework of business relationships. The next layer is the regulation of internal decision-making and conduct, including the relationships between managers, directors (or their equivalent) and employees. Finally, the widest sphere of regulation covers relationships with stakeholders external to the business itself, whether they are customers, suppliers or simply those affected by the wider implications of the business's activities.

The three levels, of course, interact. The recourse to be had by residents whose groundwater has been polluted by a factory will depend upon the legal form of the undertaking held responsible for the pollution under local laws. The limited liability of a corporation, bound by solvency rules and corporate guarantees, may actually be more valuable to a claimant than the supposedly unlimited liability of the same polluter if run by one or more individual owners operating as a sole trader or partnership.

ACCA believes there are key business law principles that underpin a good environment for doing business. These are:

Simplicity



Openness and transparency



Fairness



Accountability



To ensure that these principles have real meaning in practice, the law must:



Provide dispute resolution mechanisms



Provide encouragement for business enterprises



Support an ethical approach to business



Maintain stability and confidence



Enable business to drive society's prosperity

Simplicity



The laws that govern businesses should be stringent but not complex.

Simplified rules to govern business are easier to administer than unduly complex laws and it is important that compliance and engagement with the formal economy should not impose substantial cost burdens on businesses.

Business structures and the laws setting them out should be limited in scope and easy to understand and explain.

It is a practical reality that in many countries the burden of regulation falling upon business has grown significantly over the past century. As a matter of practical expediency, policymakers may consider adopting a one-minus-two approach whereby for every new business law adopted, two unnecessary laws are removed, such as the UK "Red Tape Challenge" proposal¹.

Countries may want to consider adopting sunset clauses in their business laws, whereby a law automatically expires at a certain date, if not renewed. It is notable that in many cases socially undesirable business outcomes can be traced back to outdated and inappropriate business forms being used². Revision of the regulations can help to ensure that they remain up to date and appropriate for society's current needs. Heed should be taken not just of the business laws themselves but also of the surrounding social and political environment, to ensure that interactions do not drive unnecessary or undesirable behaviours.

The simpler a law is, the harder it is to break undetected – whereas complex laws allow more opportunities to skirt round or defeat their object.

Openness and transparency



Lawmakers should be open and transparent with businesses when designing and implementing business law.

Government and business exist side by side as essential supporting pillars of society. Government relies upon the continuance of economic activity to support it and society both directly and indirectly. To create the greatest returns, business will require a predictable environment. Government should give indications of its future intentions and the direction in which it wants to steer the business environment. This allows businesses to plan for the long term and encourages a degree of stability.

Governments should consult with stakeholders in business before implementing new business laws. Ministers must recognise that they will not necessarily be best placed to appreciate all the factors and pressures influencing business decisions. Consultation and open conversation will aid understanding and help to ensure that laws designed to meet the wider needs of society do not inadvertently introduce sanctions or incentives that distort the desired outcomes. Governments should give a reasonable time frame before implementing new business laws to allow businesses to plan efficiently.

¹ See <<http://webarchive.nationalarchives.gov.uk/20150522175321/>>, <<http://www.redtapechallenge.cabinetoffice.gov.uk/home/index/>>, accessed 12 February 2017.

² Guardian newspaper (2014) 'Financial strategy of Southern Cross homes blamed for old people's deaths', <<https://www.theguardian.com/society/2014/jun/09/financial-strategy-southern-cross-care-homes-blamed-deaths-old-people>>, accessed 19 December 2016.

Fairness

**Business law must be applied consistently and equally among business enterprises.**

The legitimacy of business law will depend on businesses adopting it and following it voluntarily and in the belief and expectation that it has been designed and is operated for the wider public good. A perception that regulation is designed exclusively for one group will dissuade others from engaging with it.

Business law should be fair not just between businesses, but also between business and society and between discrete groups of stakeholders. Countries should cooperate with each other with the spirit of encouraging business enterprise, avoiding protectionism and unjustified international sanctions, where possible.

Governments should be ready to step in where it becomes clear that the legitimate exploitation of competitive advantage has become an abuse, and especially so where such activity is coordinated between interests to create an impression of

acceptability. Governments themselves must also avoid the temptation to implement rules that discriminate unfairly against businesses from outside their jurisdiction.

Governments should act to break up cartels, because these stifle fair competition in the business environment. That action may be direct, or may involve the implementation of other mechanisms, such as independent non-governmental organisations, to address such undesirable behaviours.

Care should be taken to ensure that the application of uniform codes of law does not disadvantage particular groups. It may well be that elements designed to deal with the affairs of large or complex businesses should be specifically disappplied for smaller businesses for which they have no direct relevance, especially where smaller business may not have the resources to deal with such burdens and society would derive no benefit from them.

Accountability

**Business law should facilitate the accountability of business, fostering trust in businesses.**

There should be a framework to encourage business enterprises to communicate regularly with external stakeholders (for example, through the publishing of annual accounts). Businesses should be prepared and able to explain their actions and strategies to stakeholders. The legal framework created within which business operates should be designed so as to enable that openness, and at the

same time give stakeholders confidence that the disclosures presented by business are complete, comparable and reliable.

There should be a degree of openness in businesses when communicating with their internal stakeholders (such as employees) and with external stakeholders (such as the stock market).

Dispute resolution mechanisms for business



There should be a framework for resolving disputes between business enterprises in a fair and transparent manner.

The dispute resolution mechanisms should provide a reasonably fast, cost-effective and confidential resolution between the parties.

Business law should take into account the fact that disputes will arise. The mechanisms available for dispute resolution can include mediation, arbitration and use of formal court proceedings. Each has its place and offers particular benefits. Where the parties take their dispute to formal litigation there should be an independent court system that deals justly and at proportionate cost with disputes, allied to an expectation of reasonable publicity for the decision.

Arbitration bodies should consider publishing principles of decisions for the benefit of other businesses. The availability of digests of principles and decisions will enable other parties to disagreements to anticipate the probable outcome at arbitration, reducing the need for formal processes. In jurisdictions where arbitration clauses are compulsory in commercial agreements, recourse to the courts is comparatively rare, reducing the burden on society of regulating private disputes.

A balance will always need to be struck between the benefits to society of full transparency of process and decision-making as against the efficiency and utility of a confidential process that may encourage parties to compromise more readily for the mutual benefit of the parties and society.

Providing encouragement for business enterprise



The business law framework should establish a system that encourages entrepreneurship and business enterprise while ensuring accountability and transparency.

Academic research has indicated that the most successful entrepreneurs are not simply those who take risks (indispensable though that may be), but rather those who are able to manage risk sensibly.³ Countries may consider adopting a limited liability corporate structure to limit entrepreneurs' exposure to risk while making sure there are systems to encourage sensible risk taking. Alternatively, generous limits around personal bankruptcy can perform a similar function in situations where entrepreneurs see the operation of separate legal personalities as less advantageous.

The limited liability corporation has been characterised as nothing more than a mechanism for shifting personal liability for mistakes made in pursuit of profit onto society generally. This fails to recognise the corresponding benefits to society of

enabling the limited liability corporate form. Business as a whole exists in society as more than simply a means of generating profit. The interdependencies between the economic, social and wider environmental factors create a 'triple context'⁴ within which business exists, and there is increasing recognition that a long-term sustainable business model relies upon balancing the enterprise's contribution to all three 'contexts'. Corporations 'enable society to achieve feats which would not be available to it without some way of aggregating capital and managing risk.'⁵ Recent events have highlighted that profit maximisation is not the only goal. There is an increasing drive towards 're-incorporating society into corporate purpose'⁶ and companies should remain keenly aware of the importance of integration into the wider tapestry of societal interactions.

3 'The Handbook of Research on Freelancing and Self-Employment' (2015), <<http://www.crse.co.uk/research/handbook-research-freelancing-and-self-employment>>, accessed 3 April 2017.

4 'Tomorrow's Business Forms Tomorrow's Company' (2015), <<http://tomorrowscompany.com/publication/tomorrows-business-forms-making-the-right-choices-of-ownership-structure-and-governance-to-deliver-success-for-business-and-society/>>, accessed 19 December 2016.

5 'The purpose of the Corporation', Note by the Environmental Law Service <http://en.eps.cz/sites/default/files/privady/purpose_project_concept_note.pdf> accessed 20 December 2016.

6 *ibid.*

Supporting an ethical approach to business



There should be a framework to encourage enterprises to undertake ethical business, commensurate with the prevailing cultural sensitivities.

Countries may consider adopting legal as well as voluntary codes to encourage ethical business. Encouraging businesses to adopt corporate social responsibility principles is likely to encourage ethical business. If a banking system is in place then governments need to ensure that it is ethical, reliable and is not burdensome on business.

Employment laws need to be established that provide at least minimum protection to employees while not restricting business enterprise.

There should be a framework encouraging business to adopt the principles of corporate social responsibility, which benefit the environment in which the business operates.

Maintaining stability and confidence



Government should aim to establish a stable environment for business to operate within.

As part of this, it must also instil a degree of confidence in the market in which businesses operate. Government should project the notion that it is supportive of business. This includes acting when there is unfairness in the market, making business laws that are fair, being consistent in its implementation of such laws, and making sure there is regular dialogue between government and business.

Government should facilitate an environment in which businesses have confidence when dealing with each other.

Governments should facilitate a financial system that provides confidence and serves the needs of businesses when performing transactions.

Enabling business to be the driver of society's prosperity



Lawmakers should formulate a framework in which business success makes a net positive contribution to society's prosperity.

Government should act to reduce bribery practices in business, for example by adopting and ratifying the OECD Anti-bribery convention. This can be achieved not only by addressing the issue head on, through education and sanctions, but also indirectly through the general format and structure of business law. Unnecessary discretion can offer opportunities for abuse, and simple, clear laws reduce the scope for ambiguity.

Business should engage positively with the social environment in which it operates, which may well be by adopting corporate social responsibility practices.

Governments may want to consider supporting small and medium-sized businesses, since they employ the majority of workers within most jurisdictions.

Links to further resources



