CLAW5001 Legal Environment of Business

Topic 1: introduction to the Australian legal system

Overview：

1. What is law?

2. Common law

3. Equity

4. Legislation

5. The Australian legal system

6. The Australian constitution

The Australian Constitution

Required Readings

Topic 1 Reading 1 – *Laying Down the Law*, pp. 3-12.

Topic 1 Reading 2 – *Understanding Law*, pp. 36-47, 52-54.

Topic 1 Reading 3 – *Law in Commerce*, pp. 3-21, 25-27.

Topic 1 Reading 4 – *Vermeesch and Lindgren's Business Law of Australia*, pp. 23-61.

1.What is law?

1.1 Law is…:

Oxford Dictionary – 'The system of rules which a particular country or community recognises as regulating the actions of its members and which it may enforce by the imposition of penalties.'

1.2 'A system of rules'

There are many different kinds of legal systems.

Internationally, there are 'common law' systems, 'civil law' systems, and mixed systems.

1.2.1 Civil law

Europe, and most of Africa, are civil law systems.

Civil law systems are governed by 'codes'.

Codes are laws made by governments/parliaments that represent the entire body of law covering a particular area of law, e.g. contract, property, etc.
In civil law systems, courts/judges merely interpret the codes to settle legal disputes between litigants.

2. Common law

Australia, England, New Zealand, Canada, and the USA are common law systems.
Common law systems are governed by legislation and court/judge made case law.
In common law systems, a particular area of law (e.g. contract, property) can be covered by a combination of case law and legislation.
In common law systems, judges make and decide case law AND interpret legislation.

2.1The common law system

The common law system is quite different than a civil law system.
As Spigelman CJ said, 'Our law is not based on a single code of civil obligations from which specific rights and duties can be deduced. Our legal tradition is much messier than that. Each of tort, contract and equity, constitute distinct bodies of doctrine with their own history. There is an interaction between each area of law and the lines are often blurred, but they remain distinct bodies of doctrine.' (*Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10 at [14])
Domestically, there are also different kinds/types of laws, that together make up the Australian legal system.These are known as common law, equity, and legislation.

To properly understand these different kinds of laws, it is necessary to discuss their history and development…

2.2 History of the common law

In 1066, England was conquered by William, Duke of Normandy. William became the king of England (William I, or William the Conqueror).It was said that, due to his conquest, that all of England now belonged to him.
One of William's first acts as king was to promise the English that they could keep their old laws.
The king, though, was the supreme legal authority, 'which preserves the use and custom of its law at all times and in all places and with constant uniformity.' (*Leges Henrici Primi*, vi. 6 (Downer ed.), p. 97, 109)Under William I's decedents, English kings delegated authority to members of the king's court, later known as 'justices' (or judges).Their job was to travel across England to settle various legal disputes.The law, as stated by these justices, was considered to be the king's law. Therefore it applied across all of England.This was how it became known as 'common law'.

2.3 How though, did the common law work?

2.3.1The function of early common law：

To bring an action at common law required a 'writ'. A writ permitted a person access to royal justice in a court of common law. A writ was issued by the chancellor on behalf of the king.
At first, the writ simply stated a complaint, which required the person to whom it was addressed to either:
1. Redress the complaint; or
2. Come before the king's court to explain why he or she should not, i.e. to defend him or herself against the complaint.

Originally, there was no limit on how many different kinds of writs there could be.
A new one could always be invented if the facts did not fit an existing writ.
The problems with the writ system：
By the middle of the 13th century though, it was thought that there were too many writs.
People complained the chancellor was issuing writs that were contrary to law; that were 'novel, unheard of, and against reason'. (*Abbot of Lilleshall v Harcourt* (1256) 96 SS xxix, 44)
2.3.2 The rigidifying of common law
The result of these complaints were the Provisions of Oxford 1258.These decreed that the chancellor was not allowed to issue any new writs without permission of the king's council. As a result, unless a person's complaint fitted within a pre-existing writ, he or she could not access the common law courts. Accordingly, the common law became rigid.
2.3.3The logic of the common law
The rigid nature of the common law system left many without any recourse to justice, despite something morally wrong being done to them.
The logic of the common law was that, 'it was better to suffer a mischief to one man than an inconvenience to many, which would subvert the law.' (*Waberley v Cockeral* (1542) B & M 257 at 258) In other words, certainty and predictability became more important than individual justice.
The king however, was sworn 'to do equal and right justice and discretion in mercy and truth'. (Coronation Oath of Edward II)This led to the creation of a new jurisdiction; one whose rationale was to do individual justice.