

# LLB101 Lectures

## Week 1

### Australian Legal History

#### The 'Reception' of English Law

##### *Colonisation*

- Australia colonised by Great Britain in 1788
- Was Australia settled, conquered or ceded?
  - Conquered- fight to take the territory from its original inhabitants
  - Ceded- process of negotiation
  - Settled (as a matter of law: Mabo v Qld (No 2) (1992))

##### *Indigenous Law*

- Australia was deemed 'settled' despite having been populated by indigenous communities
- The High Court decision in Mabo (No 2) (1992) held that Australia was not terra nullius ('no-one's land'). But:
  - The British Crown still acquired sovereignty and the right to parcel out the land, without indigenous people's consent;
  - Australia is still classed as 'settled' from the point of view of international law – hence, no traditional law is directly enforceable in Australian courts;
  - Indigenous ownership of land ('native title') may still be recognised, by the common law, in some cases.
- Traditional indigenous law still operates, in many places, as a matter of fact. It is also sometimes taken into account by the Australian legal system (for example, in sentencing).

##### *English Law*

- As NSW was legally classed as 'settled' under established legal principles, the settlers brought with them all English law- common law and statute law- as was applicable to new colonies
- Key features of the English legal and governmental system:
  - three branches of government: legislature, executive, judiciary
  - responsible and representative government
  - the rule of law
- The legal profession (solicitors, barristers etc.)
- Values, traditions and procedures associated with the English legal system (e.g. jury, common law rights)

##### *What Law and When?*

- Law was 'received' into QLD in three waves:
  1. Under common law principles, English law (statute and common law, so far as relevant to the colony) was received into New South Wales (which then included Queensland) as at 26 January 1788.
  2. The *Australian Courts Act 1828* (Imp) 'updated' the received English law to 25 July 1828.
  3. Queensland separated from New South Wales on 6 June 1859. By Order-in-Council, all laws of New South Wales as at that date continued to apply in Queensland (including both English laws received in 1828 and new laws passed by the New South Wales Parliament since 1828).

##### *After the Reception of English Law*

- Great Britain granted limited self-government to each colony. The new colonial parliaments and courts could generally repeal, amend and add to the ordinary received English law.

- This position was confirmed by the *Colonial Laws Validity Act 1865* (Imp).
- Newly enacted British laws generally did not apply to the colonies (only to Great Britain).
  - However, some English laws did still apply by 'paramount force'. This was because the English Parliament remained supreme.
  - This position was confirmed by the *Colonial Laws Validity Act 1865* (Imp).
  - In this way an 'independent' body of Australian law was built up by legislatures and courts of the colonies.
- 'Independent' - but ultimate appeal court was an English court – Privy Council...

#### Federation

- A federal system is "A political system in which government power is shared between a central or federal government ... and regional governments." (*Butterworths Australian Legal Dictionary*)
- Inspired by USA not England
- In Australia, the Federation Movement gained momentum in the 1880's:
  - Several national conventions;
  - Colonies passed referenda;
  - *Commonwealth of Australia Constitution Act 1900* (Imp) assented to 9 July 1900; commenced 1 January 1901
  - Act gets passed, its assented to in Britain (by Queen) to become an act, act goes into operation 1 January 1901
  - On 1 January 1901, the modern nation of Australia came into being

#### De-Colonisation- the legislature

- Gradual *acquisition* of full legislative independence from Britain:
- *Statute of Westminster 1931* (Imp)
  - 2. (2) No law ... made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any ... Act of Parliament of the United Kingdom ... and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act ... in so far as the same is part of the law of the Dominion...
  - 4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend ... to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.
- *Statute of Westminster Adoption Act 1942* (Cth)
  - Backdated until outbreak of WWII 3 September 1939
  - Does not apply to the states
- 1986 saw complete (almost) legislative independence
- At the request of all State Parliaments, Commonwealth and United Kingdom Parliaments passes near-identical versions of the Australia Act 1986
- Section 3 allowed States to amend or repeal all English or Imperial laws - for the text, read s 2 of the *Statute of Westminster* with 'State' substituted for 'Dominion'.
- There are still some Imperial laws on the Queensland statute books
  - See *Imperial Acts Application Act 1984* (Qld)

### De-Colonisation- the courts

- Gradual abolition of judicial appeals to the Privy Council (equivalent to house of lords/supreme court of England)
  - Privy Council (Limitation of Appeals) Act 1968 (Cth)
    - abolished appeals in all matters involving federal laws
  - *Privy Council (Appeals from the High Court) Act 1975* (Cth);
    - limited appeals to PC from HCA to those matters which had been commenced in court before 8 July 1975.
    - or the next 9 years someone who had lost in a non-federal matter in a State Supreme Court had a choice of two final appellate courts – PC or HCA
    - *Australia Act 1986* (Cth) s 11
    - abolished all appeals to the Privy Council from Australia, except where leave to appeal had already been granted

### The Federal System

#### *Australia: A Federation with a Federal System of Government*

- Means two levels (Commonwealth/ Federal and State)
  - Parliament
  - Executive government
  - Courts
- Regulated by the Commonwealth Constitution
- ‘Entrenched’
- Carries out five main tasks:
  1. Recognises the existence of the six Australian colonies as they were in 1900, and continues in force their constitutions and laws except as changed by the *Commonwealth Constitution*.
  2. Creates a new set of ‘federal’ or ‘Commonwealth’ authorities of the central government, and outlines their functions and powers.
  3. Regulates the relations between Commonwealth authorities and those of the States.
  4. Establishes an Australian common market - by providing free trade between the States - and a common, external customs tariff.
  5. Establishes limited ‘Bill of Rights’ provisions.
- The five ‘express’ rights are (rights created by constitution):
  1. Right to be compensated for the acquisition of property by the Cth: s 51(xxxi).
  2. Right to a trial by jury when indicted under Cth law: s 80.
  3. Trade, commerce, and intercourse amongst the States: s 92.
  4. Freedom of religion: Section 116.
  5. Right of a resident of one state not to be discriminated against on the basis of their residency in a state: s 117.
- Implied rights:
  - Political communication *Lange v ABC* (1997) 189 CLR 520
  - Due process? *Kable v Director of Public Prosecutions for NSW* (1996) 189 CLR 51
  - (inferred from the terms of the constitution → not stated)

## Week 2

### Rights in the Constitution

- Right to vote s 41
  - No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

### An Australian Bill of Rights?

- A Bill of Rights is a constitutionally entrenched recognition of stated rights and freedoms
  - 'entrenched' means that special votes are required to change the law
- Rejected by inquiries into the Constitution in 1929 and 1959
- Several failed attempts to introduce a Statutory Bill of Rights (ie not entrenched); eg in 1973 and 1983
- Widespread Consultation around this issue in 2008-9
- Decision that Australia would not pursue either an entrenched or a statutory model

### Constitution of Queensland 2001 (Qld)

- Some sections entrenched
- Consolidates the complex legislation comprising the Constitution of Queensland.
- Sets out fundamental principles in relation to Parliament, the Governor and Executive, and the Courts.
- Whole commonwealth constitution is entrenched

### The Three Branches of Government

- 1) Legislature
- 2) Executive
- 3) Judiciary

### Legislature

- The function of the legislature is to make laws
- Commonwealth ('Federal') Parliament
- Queensland parliament (each state and territory has its own legislature)

### Commonwealth Parliament

- 'Bicameral' parliament
  - House of Representatives and Senate
  - Lower house and upper house respectively
  - Peoples house and states' house respectively
- See *Commonwealth of Australia Constitution Act 1901* (Cth) s 1:
  - The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called **The Parliament, or The Parliament of the Commonwealth.**
- Each state of Australia is divided into 'electorates'; each electorate elects a Member of the House of Representatives to represent it in parliament for the next 3 years
- Each state, acting as one electorate, elects 12 senators (ACT and NT, 2); half senate (6) election at each general election; term – 6 years.

## Commonwealth Parliament

- The Commonwealth Parliament makes laws for the whole of Australia in respect of the matters in which it has power.
- Section 51 of the *Constitution* lists most of these powers.
  - Business powers. The heads of power include: Corporations and bankruptcy.
  - Nation state powers. The heads of power include: Defence and external affairs.
  - Social powers. The heads of power include: Marriage and divorce.
  - Financial powers. The heads of power include: taxation.
- The powers enumerated in s 51 are 'concurrent powers'.
- The Commonwealth also has 'exclusive' powers. See *Constitution* ss 52 and 90.
- The States hold 'residual' power.
- If a valid Commonwealth law is inconsistent with a State law, the COMMONWEALTH law prevails and the state law is invalid to the extent of the inconsistency. See *Constitution* s 109.
- If the Commonwealth does not have constitutional power to make a law, that law will be struck down by the High Court (HCA).

## Queensland Parliament

- Subject to the Commonwealth Constitution, the Queensland Parliament has power to make laws for the 'peace, welfare and good government' of Queensland (see s 2 of the *Constitution Act 1867* (Qld)).
- Subject to constitutional limitations
- The Queensland Parliament consists of:
  - The Queen (represented by the Governor);
  - The Legislative Assembly (elected Members of Parliament)
  - See *Constitution Act 1867* (Qld) s 2A
- Queensland abolished its 'upper house' (the Legislative Council) in 1922.
  - The only Australian state to have a **unicameral** legislature.
  - Would need a referendum to reintroduce Legislative Council
  - See *Constitution Act Amendment Act 1934* (Qld) s 3
- Queensland is divided into 89 electorates
  - *Constitution of Queensland 2001* (Qld) s 11
- Each electorate elects a Member of the Legislative Assembly (MLA)
- 3 yearly elections (?)
  - *Constitution Act Amendment Act 1890* (Qld) s 4
  - *Constitution Act Amendment Act 1934* (Qld) s 4
  - Constitution (Fixed Term Parliament) Amendment Bill 2015 (Qld)

## The Executive

- What is the function of the executive branch of government?
  - responsible for administering the law
  - made by the legislature
- What does it mean to 'administer' the law?
  - To put the laws into effect to ensure the smooth running of the nation for the benefit of its citizens
  - Almost everything the executive does or wants to do is achieved through a legal framework

## Who is the Executive?

- Executive power is vested in 'the Crown'.
- At Commonwealth level, this power is exercisable by the **Governor-General in Council**:
  - The Governor-General is the Crown's representative, who is advised by...
  - The Federal Executive Council, which consists of...
  - The Prime Minister and the Senior Ministry (Cabinet).
- In Queensland, this power is exercisable by the **Governor in Council**.
  - The Governor is the Crown's representative.
  - The Executive Council is the Premier and all members of the Ministry.
  - The 'Governor in Council' is a title used when the Governor is acting by and with the advice of the Executive Council.

## Who really runs the show?

- Commonwealth:
  - Prime Minister (Malcolm Turnbull) and Cabinet
  - The Prime Minister is the leader of the party with the majority in the House of Representatives (Westminster convention not constitution)
  - He or she, in practice, leads the 'government' – ie the body that runs Australia
  - PM selects ministers to assist with the task of government – senior ministers comprise Cabinet
- Queensland:
  - Premier (Annastacia Palaszczuk) and cabinet
  - Premier is the leader of the party with the majority in the Legislative Assembly
  - Cabinet contains Premier and all the ministers (maximum 19 ministers)
    - *Constitution of Queensland 2001* (Qld) ss 42, 43

## The Judiciary

- What is the function of the judicial branch of government?
  - Judicial power is the power to interpret and apply the law
  - Made by the legislature
  - And administered by the executive the law
- What is the function of the judicial branch of government?
- Judicial power is the power to interpret and apply the law
- made by the legislature
- And administered by the executive the law
- Judiciary = courts
- Courts exercise 'judicial' power
- Courts are presided over by a judge or judges
- What does this mean?
  - legal disputes come before a court and the court gives a decision on who is right/wrong; who must pay a penalty/who is entitled to compensation; who can do 'what'/who can't
- These decisions are not based on whim or individual belief, but on the LAW.
- Judges must work out what the LAW is (interpret the law) before they give a decision (apply the law)

## Queensland Court Hierarchy

- High Court of Australia

- Court of Appeal
- Supreme Court
- District Court
- Magistrates court

# Federal Court Hierarchy

## High Court of Australia

Full Federal Court – Full Family Court

Federal Court – Family Court

## Federal Circuit Court

### Jurisdiction

- Each court has a different jurisdiction.
- What is meant by 'jurisdiction'?
  - ... 'The scope of a court's power to examine and determine facts, interpret and apply the law, make orders and declare judgment. Jurisdiction may be limited by geographic area, the type of parties who appear, the type of relief that can be sought, and the point to be decided.' (*Butterworths Australian Legal Dictionary*)
- Note different jurisdictions:
  - federal v state/territory;
  - civil v criminal;
  - original (or 'first instance' or 'trial') v appellate.
- Federal (Commonwealth) laws set up Federal courts, and give them jurisdiction over matters such as:
  - Trade practices/consumer protection;
  - Taxation, bankruptcy/insolvency;
  - Immigration;
  - Family law.
- State laws set up State courts, and give them jurisdiction over other matters, such as:
  - Enforcing contracts;
  - Remedies in tort (such as negligence, trespass, defamation);
  - Land law.

## Week 3

### Separation of Powers

- 18<sup>th</sup> century - Montesquieu (France), Locke and Blackstone (England)
- If each kind of governmental power is kept in a different set of hands then the opportunity for oppression and injustice is minimised.
  - Legislative – parliament
  - Executive – prime minister/premier and cabinet (Governor-General/Governor)
  - Judicial – courts ('judicature')
- Is there a true separation of powers in Australia? No. Does it matter?

### Problem: Delegated or Subordinate Legislation

- The executive can legislate...
- *Delegated* or *subordinate* legislation is a 'lower level' of legislation. E.g. road rules
- An Act may authorise the executive government to make regulations or rules that also have the force of law.
- Local laws are delegated laws which have only a local effect. Laws made by local councils authorised by the *Local Government Act 2009* (Qld).

### Protection?

- Delegated legislation can only be passed under the authority of and consistent with a 'parent' act. E.g. disability reasonable adjustment
- Provision is also made for some parliamentary scrutiny of delegated legislation
  - See, eg, *Statutory Instruments Act 1992* (Qld) ss 49 and 50.
- If delegated legislation goes beyond what an Act dictates, it will be struck down

### Problem: Overlap of the Executive and Legislature

- The role of the Executive Council is to meet and give legal form to Cabinet decisions.
  - The Cabinet is responsible for the development and co-ordination of the policies of the Government.
- The members of the Executive Council are drawn from the **Parliament**.
- Hence, there is only a **partial** separation of powers.

### Protection?

- The Doctrine of Responsible Government is a feature of our inherited 'Westminster System' of government.
  - See eg *Constitution of Queensland 2001* (Qld) s 42
- the Executive is 'responsible' to the Legislature.
- In turn, the members of the Legislature are 'responsible' to the people at elections.
- Ministers are 'responsible' (answerable) to Parliament and, thereby, to the public, both:
  - Collectively - for Cabinet decisions; and
  - Individually – for conduct of the Minister's Department.

### Problem: judges make law

- It is a feature of our common law system that judges make law through the precedents set by their decisions – 'legislative power'?
- Should unelected judges make law?
- Judges made law before parliament existed...



- If parliament doesn't like a law made by judges → it can make a law to override this law

#### Protection

- Parliamentary sovereignty
- Statute law prevails over common law – parliament can change the law made by judges if it (or the electorate...) doesn't like it

#### Problem: Judges are appointed by the Executive

- Who are our judges?
- Appointed by the executive from the ranks of experienced lawyers, usually barristers but sometimes solicitors
  - See, for example, s 72 of the *Constitution* which provides that judges (HCA and other commonwealth courts) must be appointed by the Governor-General in Council.
- In practice, appointments are made on the advice of the government

#### Protection

- judges are appointed for life (or until they turn 70...); and
- swear an oath to serve without 'fear or favour'
- Courts are open to public scrutiny

#### The Rule of Law

- *Magna Carta 1215*.
- The exercise of power by government must be shared with the people and cannot be concentrated in the ruler.
- Everyone is subject to the law – even the ruler...
- The rule of law underpins our legal system, providing for stability, and for order in society, by preventing autocratic rule by government.
- Professor Albert Venn Dicey.
  - The absolute supremacy of government by law as opposed to government by arbitrary fiat;
  - Governments can operate only if they have specific legal authority to do so; and
  - Anyone can be punished only for a breach of the law, and not otherwise.
- The “**fundamental legislative principles** are the principles relating to legislation [in Qld] that underlie a parliamentary democracy based on the rule of law”.
  - *Legislative Standards Act 1992* (Qld) s 4.
- The law must be:
  - General;
  - Publicly promulgated;
  - Prospective;
  - Clear, intelligible and free from contradictions;
  - Stable and sufficiently constant; and
  - Practical and not impossible to obey.
- See Stephen Bottomley and Simon Bronitt, *Law in Context*, 4<sup>th</sup> ed, The Federation Press, Sydney, 2012, Chapter 2.
  - Law Library: 340.15 BOTT

## Sources of Law

- Legislation/statute law
- Common law/case law/ judge-made law
- Custom
- International and comparative law

## Legislation

- Legislation is law made by Parliament.
- In Australia, this includes statutes enacted by both the Commonwealth and State Parliaments.
- Similar terminology:
  - Acts of Parliament;
  - Statutes
  - Enactments or enacted law (to be compared with 'unenacted' or case law);
- Legislation is generally used as a generic term to include both statutes/acts and delegated legislation
- Never say or write 'legislations'... (already plural) (an act, a statute, a piece of legislation)
- Legislation provides a more flexible method of law making than the common law (judge-made law).
- In most instances, parliament is free to vary existing statutes or introduce new statutes as it wishes.

### *Passage of Legislation through Queensland Parliament*

- 1) Presentation, explanatory speech and first
- 2) Reading
- 3) Committee consideration
- 4) Committee report
- 5) Second reading
- 6) Consideration in detail
- 7) Third reading
- 8) Royal assent

### *Passage of Legislation through Queensland Parliament*

- The process is similar to that described for Queensland; but
- Each piece of proposed legislation – 'bill' – must be passed by *both* houses before it becomes 'law'
- Most bills can be introduced in either the senate or the house of reps
  - Which bills must be introduced in the House of Reps? See s 53.
- What happens if a bill is not passed by both houses? See s 57.

## Common Law

- Common law has a variety of different meanings depending upon the context in which it is used:
  - 1) The original meaning can be traced back to the Norman Conquest of England in 1066 - law 'common' to the whole of the realm, as opposed to the local law based on local custom found in the local courts, which pre-dated the Norman Conquest.

- 2) The law of England and other 'common law' countries such as Australia and New Zealand, as opposed to the 'civil' law system found in many European countries such as, France, Germany and Italy.
- 3) Law developed by the old common law courts, as opposed to that developed by the Courts of Chancery. That is, it is law that is not equity.
- 4) The law administered by ordinary courts, as opposed to the law administered by special courts or tribunals.
- 5) Judge-made law built up on a case-by-case adjudication of disputes.

#### *Common Law as a Source of Law*

- Common law refers to the law made by the courts.
- That is, it refers to the body of law that has developed through the recording of the decisions in cases coming before the courts.
- Similar terminology:
  - case law
  - judge made law
  - judgments

#### *What is a Case*

- The individual matter in dispute before the court, its facts and parties and the decision made by the court is known as a 'case'
- The decision/judgment delivered at the conclusion of the proceedings by the court who is hearing the matter decides the outcome of that case and also may provide a judicial statement on a legal rule that may become a precedent for other cases that come before the legal system at a later time
- Parties?
  - plaintiff/applicant/complainant v defendant
  - appellant v respondent

#### *Doctrine of Precedent – Stare Decisis*

- Two principles stated to be fundamental to justice are said to be:
  - That like cases should be decided alike; and
  - That the courts should decide cases 'according to the law'.
- The English courts have always, therefore, observed a doctrine that 'precedents' (the rules stated in previous cases) should be followed.

#### *Doctrine of Precedent*

- A court is bound to follow the decisions of courts *superior* to it in the same hierarchy.
- This promotes equality, consistency, certainty, efficiency and justice.
- The *ratio decidendi* of the case is the part that binds later courts.
- *Ratio decidendi* means 'reason for deciding'.

#### *Legislation and Common Law*

- The general rule is that the law made by parliament is supreme over judge-made law: 'parliamentary sovereignty'
- Parliament is free to pass laws that are inconsistent with existing common law principles
- Judges have to accept that any law made by parliament is supreme over their judge-made law

- Though judges still have the power to *interpret* a new law which has overridden some old judge-made rules...
- A court can override a law made by parliament only if:
  - The proper procedures have not been complied with in enacting the law; or
  - The parliament does not have the power under the relevant constitution to make a law of that nature.
- However, if both of these requirements have been satisfied, the courts cannot say that a law is invalid just because, in their view, for example, it is a bad law or the courts would have preferred different wording

#### Custom as a Source of Law

- Custom can be used in a number of senses...
- **'customary law'** - a body of rules, norms and traditions which are accepted and enforced within a community.
  - When Australia was first settled, it was assumed that aboriginal law was not sufficiently developed to be usefully recognised and enforced. The law was not written down, nor was it necessarily uniform throughout the continent.
  - Even prior to the decision in *mabo v queensland no. 2* (1992) 175 CLR 1, the Australian law reform commission had conducted research into the recognition of aboriginal customary laws.
  - Many of the recommendations in this report have not been implemented.
  - Aboriginal customary law provides a special challenge within the Australian legal context.
- The conventions of parliamentary practice in constitutional law; and
- The customary commercial practices of business people.

#### International/comparative law as a Source of Law

- English law has always been influential in the development of Australian law...
- In addition to English law, in recent years, the High Court of Australia has shown a tendency to have regard to and be influenced by both:
  - 1) the **comparative law** of other jurisdictions/countries (such as Canada and the United States); and
  - 2) **international law** norms and rights, particularly as evidenced by international conventions and treaties (for example, *International Covenant on Civil and Political Rights*).
- International Law is the law that governs relations between countries or sovereign states, rather than between citizens of individual states.
  - It has its origins in 'natural' law and its development very much coincided with the development of independent states in the sixteenth and seventeenth centuries.
  - Various commentators have questioned its standing as 'law' because of the absence of an enforcing body or sanctions for non-compliance.

#### The Legal Profession

- In Queensland admitted to practice as a 'lawyer'
- Join the roll of SOLICITORS or BARRISTERS
- Queensland Law Society and Queensland Bar Association
- Experienced lawyers may be appointed as magistrates or as judges
- There are many other career paths for people with a law degree...

- Three kinds of governmental power:
  - Legislative
  - Power to make law
  - PARLIAMENT
  - Member of parliament; parliamentary staffer; parliamentary counsel
- Executive
  - Power to implement law
  - 'THE GOVERNMENT'
  - Minister; public servant; policy advisor; researcher; lawyer
- Judicial
  - Power to interpret and apply the law
  - COURTS
  - Judge; judge's associate; researcher; librarian; barrister; solicitor

## Week 4- Case Law

### Case Law

- Law made by judges through their decisions on the issues before them
- A case? Dispute between the parties which needs to be resolved by an independent decision maker
  - Civil trials: decision maker is the judge.
  - Criminal trials: decision maker about issues of law is the judge.
- Judges apply the law in working out the resolution of the dispute – sometimes need to work out what the law IS before they can apply it.
- If the law on a particular issue is uncertain, then decisions made by judges about its meaning and scope will help clarify it and, over time, develop it

### Case Law and Legislation

- Legislation ‘prevails’ over case law
- But case law still governs some areas of the law with only limited statutory interference - eg contract law.
- Even in areas governed by legislation, cases interpreting that legislation are important
- these cases do not ‘make’ law here so much as ‘interpret’ it, but they must be read in conjunction with the legislation

### Example – Battery

- ‘The tort of battery is the actual application of unwelcome physical force without consent or lawful excuse. To amount to a battery, the act complained of must be direct, intentional and voluntary.’ *Torts Study Guide*
- What is actual application?
- What is physical force?
- What is unwelcome?
- What is consent?
- What is lawful excuse?
- What is direct?
- What is intentional?
- What is voluntary?
- The courts have worked out tests for all of these ‘elements’ over time through the decisions they have made in the cases that come before them.
- Now the tests for all of these elements are relatively ‘settled’
- you will find them listed in text books, but originally each was contested before a court or courts

### Case law and the court hierarchy

- The decisions of ‘superior’ courts are principally the cases we are concerned with here
- Note LAW not FACT
- the general rule is that only questions of law may be appealed

### The Doctrine of Precedent – *Stare Decisis*

- A court is bound to follow the decisions of courts ‘superior’ to it in the same hierarchy.
- In this context, ‘superior to it’ means a court that can overturn or ‘reverse’ its decision.
- These are courts to which its decision may be appealed.

- Decisions of other courts may be 'persuasive'
- Australian and Queensland court hierarchies in week 6
- Niceties of which courts bind others in weeks 7 and 8.

### Rationale of the Doctrine of Precedent

- Equality –
  - like cases should be decided alike
- Consistency and certainty –
  - if this was the law last week, then it shall be the law next week (subject only to its being overturned by a higher court or by parliament)
- Efficiency –
  - time is not wasted arguing if legal principles are settled
- Justice –
  - impartial rules and not a judge's 'whims' are behind the decision

### *Telstra Corporation v Treloar* (2000) 102 FCR 595, 602 (Branson and Finkelstein JJ)

- The doctrine of *stare decisis* takes its name from the Latin phrase "*stare decisis et non quieta movere*" which translates as "stand by the thing decided and do not disturb the calm". It is a doctrine based on policy. The rationale for the doctrine can be grouped into four categories: certainty, equality, efficiency and the appearance of justice. *Stare decisis* promotes certainty because the law is then able to furnish a clear guide for the conduct of individuals. Citizens are able to arrange their affairs with confidence knowing that the law that will be applied to them in future will be the same as is currently applied. The doctrine achieves equality by treating like cases alike. *Stare decisis* promotes efficiency. Once a court has determined an issue, subsequent courts need not expend the time and resources to reconsider it. Finally, *stare decisis* promotes the appearance of justice by creating impartial rules of law not dependent upon the personal views or biases of a particular judge. It achieves this result by impersonal and reasoned judgments.

### When will the Doctrine of Precedent Apply?

- A court is
  - faced with a dispute involving facts similar to - if not the same as - the facts of a case already decided by a superior court; and
  - faced with a dispute involving the same legal context – ie the same legislation or a common law point
- Lawyers will argue about the extent of the factual similarities as a means of attracting or avoiding the application of a particular precedent
- Attempting to avoid the obligation to follow a case in this manner is called 'distinguishing' a case
- We will see that a court extending the factual situations in which a legal rule will apply is a means of 'building' the law, 'brick by brick'
- We will look at an example of this in the Week 5 tutorial in the context of a case called *Cohen v Sellar*
- Sometimes there are no precedents to be built upon...
- *Donoghue v Stevenson* [1932] AC 562 is an example of such a case
- What do judges do then?
  - Activist judges

- Conservative judges

## Judicial Reasoning

- Inductive reasoning
  - There are other situations where a duty of care is recognised so there must be some underlying legal rule which can be extrapolated from those cases...
  - *c/f Heaven v Pender* (1883) 11 QBD 503
- Deductive reasoning
  - Start with a general legal rule and then apply it to the specific fact situation
  - There is a duty of care to treat your neighbour as you would treat yourself therefore there is a duty here...
- Comparator jurisdictions
  - 'It is always a satisfaction to an English lawyer to be able to ...' [find that the law is the same in the US] (598).
- Common sense
  - 'I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society ...' (583)
- Morality
  - 'The liability for negligence ... is no doubt based upon a general public sentiment of moral wrongdoing ...' (580)
- Consequences
  - If Miss Donoghue misses out then so do even more worthy persons (583)
- Much more on judicial reasoning in LLB105

## Which parts of the case are binding?

- The *ratio decidendi* - 'reason for deciding' - of the case is the part that binds later courts
- The ratio of a case is the statement of law by the judge/s as applied by him or her to reach the decision
- The judge/s will determine what the law is after hearing argument from both sides about what it is, or, in some cases what it 'should be'
- The judge/s will, generally, not have to decide what the law is on every issue - there will be just one or two aspects that must be clarified before a decision can be made

## Ratio Decidendi – complications

- The ratio of a case is not written according to a fixed formula.
- There is no symbol or formula in the text of a decision to highlight the ratio:
  - There may simply be a bold/bald statement of a rule or principle: 'On acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to the land in that part'.
  - Or there may be 'hinting' introductory words: I conclude; it is the law that; it is plain that; it is clearly the case that; I think that; It may be said, therefore, that; what then is the principle to be applied? It is...
- A judge may not explain clearly what principle he or she is applying leaving readers to 'infer' the ratio
- A judge may say the same thing in the same case in different ways
- When you have a bench of judges deciding a case different judges may say the same thing different ways or may say different things altogether about the law that they are applying



- See the following examples from *Laying Down the Law* (6<sup>th</sup> ed) in Ch 4 at 4.6.

#### *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 69 (Brennan J)

- On acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to the land in that part. Native title to land survived the Crown's acquisition of sovereignty and radical title. The rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.

#### *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 86 -7, 89 (Deane and Gaudron JJ)

- [U]pon the establishment by settlement of the Colony of New South Wales...the radical title to all land in the new Colony vested in the Crown... [I]f there were lands within a settled Colony in relation to which there was some pre-existing native interest, the effect... would not be to preclude the vesting of radical title in the Crown. It would be to reduce, qualify or burden the proprietary estate in land which would otherwise have vested in the Crown, to the extent which was necessary to recognize and protect the pre-existing native interest...[C]ommon law native title...was susceptible of being extinguished by an unqualified grant by the Crown of an estate in fee or of some lesser estate which was inconsistent with the rights under the common law native title.

#### *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 182, 184, 195, 196 (Toohey J)

- The acquisition of sovereignty was effected... by the acquisition by the British Crown of radical title...[T]raditional title to land is not extinguished by the act of state amounting to annexation but is presumed to continue unless and until lawfully terminated...Where the legislation reveals a clear and plain intention to extinguish traditional title, it is effective to do so...[W]here an executive act is relied upon to extinguish traditional title, the intention of the legislature that executive power should extend this far must likewise appear plainly and with clarity.

#### Simple Summary

- Upon settlement of Australia the Crown acquired title to all land, but that title did not necessarily or automatically extinguish native title. To extinguish native title the Crown must do an act clearly inconsistent with the survival of native title – eg, grant unencumbered title to the land to someone else.

#### Ratio Decidendi

- This means that
  - it can be difficult, sometimes, to extract the ratio from a case
  - there is argument between lawyers about the rationes of the cases to be considered by a court
  - there may be arguments about the scope and relevance of precedents placed before the court
- The problem of the 'contested' ratio is more of an issue in emerging or unsettled areas of the law. Most of the cases you will study will have a long established and uncontroversial ratio
- A particular way of contesting the ratio of a case is to manipulate the way it is stated to suit your case

- A ratio may be stated very narrowly – confined to the peculiar facts of the case in which it is located
- A ratio may be stated at increasing levels of abstraction to pick up a wider and wider range of factual circumstances and, therefore, cases
- This is related to the tactic, described earlier, called ‘distinguishing’

### Example

- *Donoghue v Stevenson* [CMD; *Laying Down the Law* Ch 4, 4.13]
- A manufacturer of ginger beer is liable to the consumer of that ginger beer, if the ginger beer was contaminated with the decomposing remains of a snail during the manufacturing process, and the consumer of the ginger beer got sick after drinking it
- A manufacturer of a soft drink is liable to the consumer of that soft drink, if the soft drink was contaminated with the decomposing remains of a snail during the manufacturing process, and the consumer of the soft drink got sick after drinking it
- A manufacturer of a soft drink is liable to the consumer of that soft drink, if the soft drink was contaminated during the manufacturing process, and the consumer of the soft drink got sick after drinking it
- A manufacturer of a food product is liable to the consumer of that product, if the product was contaminated during the manufacturing process, and the consumer of the product got sick after consuming it
- A manufacturer of a product is liable to the end user of that product if the product is faulty as the result of some deficiency in the manufacturing process and the end user is injured by using it
- *Donoghue v Stevenson* has come to be acknowledged as precedent for the following rule which is the basis of the tort of negligence:
- A defendant owes a duty of care to a plaintiff where it is reasonably foreseeable that the acts or omissions of the defendant may cause harm to the plaintiff or to a member of a class of persons which includes the plaintiff

### Obiter Dicta

- Not everything said in a ‘precedent’ case is binding on other courts
- Things that the judge or judges say in speculation
  - About what the law should be but is not; or
  - About how they would decide if the facts were different
- are not binding on later courts
- Such speculations are called *obiter dicta* – comments made ‘by the way’
- Invented Battery Example [you won’t find this in a case]
- Issue – is intentionally leaving the porch light on so that it shines into the neighbour’s bedroom when he is trying to sleep, an ‘actual application of unwelcome physical force’?
- Judge says no, but says this: ‘*The law of battery has taken a ridiculously intrusive path into regulating social interaction. I believe that only cases involving the violent application of force should properly be called battery*’ – obiter
- Judge decides no, but says this: ‘*I may well have decided differently if the light were not a diffuse light, but a spotlight deliberately directed to shine through the window and onto the neighbour’s face*’ – obiter
- Note the left on light may well be a ‘nuisance’ as you will find out later in torts
- If the judge or judges making the speculative comments are from a court high in the hierarchy, however, their obiter may be highly persuasive to later courts

## Terminology

- CWL 10.3 pp 437-8
- When considering the applicability of a precedent to a current matter a court may
  - Apply or follow it
  - Distinguish it
  - Consider it
  - Cite it
- When considering a matter/issue on appeal an appellate court may
  - Overrule existing precedent
  - Adopt a precedent from another jurisdiction
- In deciding the appeal the appeal court may
  - Uphold the decision and dismiss the appeal
  - Reverse the decision and allow the appeal
    - Substitute a decision
    - Remit the matter to the original court for rehearing

## Format of a law report

- Citation details, including the names of the parties, which is the name of the case
- Court
- Place and Date of Hearing
- Place and Date of Judgment
- Judge(s)
- Catchwords
- Headnote
- \*Case Lists
- \*History of Litigation
- \*Argument of Counsel
- \**Cur adv vult*
- Names of Barristers who appeared in Court for the parties
- Text of Reasons for Judgment
- Formal Order
- Names of Solicitors acting for parties
- Reporting Lawyer's name or initial
- **\*Not included in all reports**

## Week 5

### Ethical Dilemma

- Three categories of ethical dilemma: a conflict between:
  - 1) the legal practitioner's **personal interest** and the **duty to the client**;
  - 2) Between the **duties owed** by the legal practitioner to **two different clients**; or
  - 3) between the **client's interest** and the proper **administration of justice**

### Category 1: Conflict of duty and interest (a)

- **A person who undertakes to act for another is referred to as 'a fiduciary'**
- When a solicitor agrees to act for a client the solicitor becomes a fiduciary

### Category 1: Conflict of duty and interest (b)

- Contrast an **'arm's length' relationship**
- Arm's length relationship: Each party is engaged in conducting their own affairs; acting in their own self-interest; not required to disclose everything they know to the other party
- Fiduciary duties are imposed on lawyers **by reason of their specialised skill**; special opportunity to exercise a power or discretion to the detriment of the client who is accordingly vulnerable to abuse by the fiduciary

### Aspects of the fiduciary duty

1. To **disclose to the client everything** which the legal practitioner knows that may be of assistance to the client; not to withhold information from the client
2. Not to make, or attempt to make a **personal profit** from the lawyer's position, (apart from the fees)
3. To avoid **conflicts of duty and interest** – that is conflict between the duty to the client and the lawyer's own personal interest
4. To **protect the interests of the client**

### What is a duty of confidentiality?

- Legal practitioners owe a **separate duty of confidentiality** to the client
- The law implies a term into the contract between the solicitor and the client to the effect that communications between the solicitor and client will be kept secret
- In order to be able to give legal advice the client must be able to tell the legal practitioner **all of the surrounding facts** and anything that may be relevant
- Anything disclosed to the legal practitioner for the dominant **purpose of obtaining legal advice** cannot be revealed to a third party without the client's consent. The information is said to be **'privileged'**

### Conflict of Duty and Interest

- **Queensland Law Society Incorporated v Carberry** Respondent solicitor signed a cheque for \$10,000 on her behalf under the power of attorney, which he used to pay off some of his debts.
- '...A legal practitioner may let a client down in many ways, mishandling of clients' money being only one of them; but **fair dealing with such money is basic.**'
- Overlaps with offences relating to Trust Accounts contained in the *Legal Profession Act 2007* – such offences more often than not lead to striking off.

### Category 2: conflicting duties to two separate clients

- **Conflict of duty and duty** (conflicting duties to different clients)
- fundamental duty to act with **undivided loyalty to a client**
- How can you serve two masters?
- Compare –
  - acting for vendor and purchaser in a real estate transaction, where there is no real area of disagreement between parties – fully informed consent?; with
  - Acting for both former husband and former wife in an acrimonious Family Court property settlement?

### Category 3: Conflict of duty to the client and duty to the court

- What is the role of a lawyer?
- Is it just to be a **hired gun for the client**, or is it **something else**?
- When you are admitted to practice you become an **officer of the court** and have an overriding **duty to the administration of justice**

### Duty to the Administration of Justice

- The efficient administration of justice depends on the **probity and candour** of the practitioners who appear before the courts and tribunals; they must not mislead or lie to the courts
- Where there is any conflict between the duty to the client and the duty to the court, **the duty to the court must always prevail**

### Nature of adversarial proceedings

- Judge acts as an umpire
- **Administration of justice depends on each party's lawyer presenting evidence and argument fairly and honestly**
- Each party's barrister decides what evidence to lead and how to conduct the case
- Barristers interview witnesses before the trial and to decide which witnesses to call
- **Opportunities to subvert justice**
- barristers **must not coach witnesses** before the trial
- Rule 45 of the **Barristers Rule**:
- 'A barrister must not suggest in any way...to any prospective witness...the content of any particular evidence which the witness should give...'

### What is the process of discovery?

- Must disclose and make available on request to the other party all of the documentary evidence that it has in its possession or control that may be of relevance or assistance to the other side in preparing its case for the trial
- **Withholding relevant material from the other side constitutes a breach of the duty to the administration of justice**

### *Legal Services Commissioner v Mullins*

- Mr White had been rendered quadriplegic as a result of motor vehicle accident. Barrister (Mullins) acted for White in claim for compensation for personal injuries. Compensation payable depended in part how long White was expected to live: the longer he was expected to live, the greater the compensation

- Some time before the mediation and settlement, White informed Mullins that he was suffering from cancer and that this would further reduce White's life expectancy
- **White instructed Mullins not to disclose this information to the insurer since it would reduce his payout**
- **Ethical dilemma:**
- Should Mullins obey his instructions from his client and keep quiet about White's cancer and reduced life expectancy?
- Should Mullins ignore his client's instructions and **breach his duty of confidentiality by disclosing the cancer to the insurer?**
- What would you do in Mullins' place?
- Tribunal: **Paramount duty to the administration of justice, not to mislead the insurer;** overrides the duty of confidentiality owed to client
- Professional misconduct
- Penalty: \$20,000 and public reprimand

### Topic 3: Legal Profession Act 2007

- A fundamental policy objective of the LPA 2007 is **to protect the rights of legal consumers and to improve standards of conduct in the profession**
- **Unsatisfactory professional conduct**
- s 418: *'conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the **standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner**'*
- Key words: "diligence" and "competence"
- Concise Oxford Dictionary defines "**diligence**" to mean "**care and conscientiousness in one's work**".
- Breaches of **diligence** arise if practitioner **unreasonably slow** in responding to the telephone calls, letters or emails of their clients or **not responding at all**
- The Concise Oxford Dictionary defines "**competent**" as "**having the necessary skill or knowledge to do something successfully**".
- Breaches of competence arise if practitioners fail to complete tasks with the **level of skill and precision that a member of the public would be entitled to expect** from a legally qualified practitioner
- The test of unsatisfactory professional conduct is an **objective** one
- Tribunal does **not** have regard to the age, level of experience, or personal, subjective qualities of the particular practitioner whose conduct is at issue
- Test is the standard of competence that a *member of the public is entitled to expect of a **reasonably competent practitioner***
- **Professional misconduct**
- The Act provides for **two categories** of professional misconduct:
- **Category 1** – s.419 (1)(a) provides that professional misconduct includes **unsatisfactory professional conduct** of an Australian legal practitioner, if the conduct involves a **substantial or consistent** failure to reach or keep a reasonable standard of competence and diligence
- **Category 2** – s.419 (1)(b) provides that professional misconduct includes conduct of an Australian legal practitioner, ***whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law*** that would, if established, justify a finding that **the practitioner is not a fit and proper person to engage in legal practice**

## Unsatisfactory professional conduct or professional misconduct?

- LPA provides a **non-exhaustive list** of conduct which is capable of constituting either unsatisfactory professional conduct or professional misconduct in s.420:
- conduct consisting of a **contravention of a relevant law, including a breach of the Solicitors Rule or the Barristers Rule**

## What would constitute a breach of the Australian Solicitors Conduct Rules?

- Breach of fiduciary duty
- Breach of duty to disclose
- Breach of duty of confidentiality
- Conflict of duty and personal interest
- Conflict of duties to different clients
- would also constitute **unsatisfactory professional conduct** or **professional misconduct, depending on seriousness or frequency**

## Conclusion

- **Professional misconduct**
- Statutory standards assessed by reference to **consumer expectations of a reasonably competent practitioner**
- This means practitioners must:
  - **Know the law**, processes and procedure;
  - **Know how to apply the law** to the facts;
  - **Communicate** with clients in a timely manner;
  - **Not breach ethical obligations** owed to clients; but
  - **Not breach over-riding duty to the court** and to the administration of justice

## Scenarios

- **Scenario 1-** You are flying to Melbourne to attend a settlement conference on behalf of a client. As per normal billing practice you are charging the client a scheduled hourly charge for your time spent travelling and away from the office. You are fully prepared for this conference. During the two hour flight you use your laptop to work on another client's file. Can you bill both client's for the same two hours.
- **Scenario 2-** Firm A are a property developer and building business. They approach Firm B, a law firm, proposing that they refer clients who are contracting for the building of new homes to Firm B for their conveyancing work. In consideration for this, the law firm would agree to add a percentage onto their legal fees to each client, to be paid back to Firm A as a consultancy fee. Is this ethical?
- **Scenario 3-** Mr A is a person accused of committing a number of violent bank robberies in Brisbane over the past few years. He has been committed to trial and intends to plead not guilty. Approaching the date of trial he admits to his barrister that he did in fact commit the robberies but that he is intending to flee the country to avoid prosecution. When the client leaves his chambers, the barrister calls the police to warn them that the accused is trying to flee the jurisdiction.
- **Scenario 4-** Ms X is the only solicitor in a small rural town. A local married couple are making an application for a divorce through the Family Court of Australia. Neither have enough money to retain lawyers from another town or city and they ask the solicitor if she can represent both of them if they just agree about all the terms of the divorce.

- **Scenario 5-** Ms Y was injured when a taxi in which she was a passenger was driven negligently. She has retained the services of your law firm to act for her in her negligence action against the cab company. She then discovers that your firm is currently also acting for the cab company in defending a class action brought by some other plaintiffs in relation to a commercial dispute. Can your firm act for both parties, given that they would be acting for each party in separate matters?



## Week 6

### Jurisdiction

- Each court has a different jurisdiction.
- What is meant by 'jurisdiction'?
  - ... 'The scope of a court's power to examine and determine facts, interpret and apply the law, make orders and declare judgment. Jurisdiction may be limited by geographic area, the type of parties who appear, the type of relief that can be sought, and the point to be decided.' (*Butterworths Australian Legal Dictionary*)
- Note different jurisdictions:
  - federal v state/territory;
  - civil v criminal;
  - original (or 'first instance' or 'trial') v appellate.
- Federal (Commonwealth) laws set up Federal Courts, and give them jurisdiction over matters such as:
  - Trade practices/consumer protection;
  - Taxation, bankruptcy/insolvency;
  - Immigration;
  - Family law.
- State laws set up State Courts, and give them jurisdiction over other matters, such as:
  - Enforcing contracts;
  - Remedies in tort (such as negligence, trespass, defamation);
  - Land law.

### Superior, inferior and intermediate...

- most serious and costly cases are handled by the highest level of the courts in the first instance, that is, when they go to **trial**.
- These courts are referred to as the '**superior courts**'.
  - Queensland example : Supreme Court of Queensland.
- Minor criminal offences *or* civil proceedings where less money is involved are heard by the '**inferior courts**'.
  - Queensland example : Magistrates Court.
- In most jurisdictions, in between those two levels of courts there are the '**intermediate courts**'.
  - Queensland example : District Court.
- Note intermediate courts have similar jurisdiction (power to hear cases) as the superior courts *except that* they have some financial or other limitation in civil matters or are limited as to the type of offences they may hear in criminal matters.

### Queensland Courts

- Magistrates Court
- District Court
- Supreme Court
- Court of Appeal
- High Court of Australia ('common apex' of all Australian court hierarchies)

## Magistrates Court

- Magistrates Courts are situated in centres all around Queensland – Charleville to Cairns, Maryborough to Mt Isa.
- Chief Magistrate – Judge Ray Rinaudo (status - Judge of the District Court)
- Subject to this Act—
- (a) every personal action in which the amount claimed is **not more than the prescribed limit**, whether on a balance of account or after an admitted set off or otherwise; and
- (b) every action brought to recover a sum of **not more than the prescribed limit** which is the whole or part of the unliquidated balance of a partnership account, or the amount or part of the amount of the distributive share under an intestacy or of a legacy under a will; and
- (c) every action in which a person has an equitable claim or demand against another person in respect of which the only relief sought is the recovery of a sum of money or of damages, whether liquidated or unliquidated, and the amount claimed is not more than the prescribed limit
- may be commenced in a Magistrates Court, and all Magistrates Courts shall within their respective districts have power and authority to hear and determine in a summary way all such actions.

## District Court

- Courts in cities and large provincial towns
  - Brisbane, Beenleigh, Southport, Ipswich, Maroochydore, Rockhampton, Townsville and Cairns have permanent judges. Circuits are scheduled to other centres.
- Chief Judge – Judge Kerry O’Brien
- More extensive equitable jurisdiction than the Magistrates Court including the power, in certain defined circumstances, to make orders for specific performance and declarations and to grant injunctions.
- **68 Civil jurisdiction**
- (1) The District Court has jurisdiction to hear and determine—
- (a) all personal actions, where the amount, value or damage sought to be recovered does not exceed the monetary limit including—
- (i) any equitable claim or demand for recovery of money or damages, whether liquidated or
  - unliquidated...
- (2) In this section—
- **monetary limit** means \$750000

## Supreme Court

- Supreme Courts are located in Brisbane, Rockhampton, Townsville and Cairns.
- Chief Justice – Catherine Holmes

## Supreme Court- civil jurisdiction

- *Supreme Court of Queensland Act 1991* (Qld)
- Civil jurisdiction not limited as to amount
- Complete equitable jurisdiction – i.e. can award the full range of equitable remedies
- Why, then, aren’t all civil cases heard in the Supreme Court?

## Appeals

- What is an appeal?
  - ... An appeal is 'An application to a higher court to reconsider the decision of a lower court, on the ground that there has been an error in the decision of the lower court' (*Butterworths Concise Australian Legal Dictionary*)
- An appeal can exist either 'as of right' or 'with leave'.
- When heard, appeals may be dismissed, upheld, remitted to a lower court to reconsider, or allowed in part.
- Terminology:
  - Trial: Plaintiff v Defendant
  - Appeal: Appellant v Respondent

## Court of Appeal

- A division of the Supreme Court
- Some judges appointed as 'judges of appeal' (JA) – may, but usually won't, conduct trials
- Judges of the Supreme Court, trial division, also sit in appeal from time to time (J)
- President - Justice Margaret McMurdo (P)
- Constituted by 3 or [very rarely] 5 judges
- Replaced the Full Court of the Supreme Court of Queensland
- No original jurisdiction

## Appellate jurisdiction of courts in Queensland - Civil Matters

- Rights of appeal are granted by legislation
- **Magistrates Court to District Court:**
  - Need leave of the District Court where not more than \$25,000 (minor civil dispute amount)
  - s 45 Magistrates Courts Act 1921 (Qld)
  - sch 3 Queensland Civil and Administrative Tribunal Act 2009 (Qld) (def'ns minor civil dispute; prescribed amount)
- **District Court to Court of Appeal**
  - need leave of Court of Appeal where **less than \$150,000** (Magistrates Court jurisdictional limit)
  - s 118 *District Courts Act* 1967 (Qld)
- **Supreme Court to Court of Appeal**
  - Generally as of right...
  - s 62 *Supreme Court of Queensland Act* 1991 (s 69 renumbered s 62 in late 2012)
- **Court of Appeal to High Court of Australia**
  - Special leave always required to appeal to the High Court of Australia – the 'My God' test
  - ss 35, 35A *Judiciary Act* 1903 (Cth)

## High Court – criteria for granting special leave

- **35A Criteria for granting special leave to appeal**
- In considering whether to grant an application for special leave to
- appeal to the High Court under this Act or under any other Act, the High
- Court may have regard to any matters that it considers relevant but
- shall have regard to:

- (a) whether the proceedings...involve a question of law:
- (i) that is of public importance, whether because of its general application or otherwise; or
- (ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and
- (b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates.

## Federal Courts

- Federal Circuit Court
- Federal Court and Family Court
- Full Federal Court and Full Family Court
- High Court of Australia

## Federal Circuit Court (FCCA)

(WAS Federal Magistrates Court (FMC) until 11 April 2013)

- Chief Judge - Judge John Pascoe
- Commenced 3 July 2003
- Created by *Federal Magistrates Act 1999* (Cth)
- Renamed by *Federal Circuit Court of Australia Legislation Amendment Act 2012*
- Created to ease pressure on Federal and Family Courts
- Shares registries of the Family and Federal Courts
- Approx 80% of workload in family law but also hears matters involving administrative law, bankruptcy, human rights, consumer protection and trade practices, privacy, migration, copyright, industrial law and admiralty law.

## Federal Court

- Chief Justice – Justice James Allsop
- Commenced 1 February 1977
- Created by the *Federal Court of Australia Act 1976*
- Queensland registries in Brisbane and Townsville
- The Federal Court's original jurisdiction is conferred by over 150 Commonwealth statutes
- Consumer law, administrative law and migration law disputes dominate

## Family Court

- Chief Justice – Justice Diana Bryant
- Created by the *Family Law Act 1975* (Cth)
- Commenced 5 January 1976
- Registries in Brisbane, Rockhampton, Townsville and Cairns
- Most States have referred power to make laws with respect to custody and maintenance of children to the Commonwealth (see *Commonwealth Constitution*, s 51(xxxvii)); jurisdiction vested in the Family Court.
- Jurisdiction over all matters under the *Family Law Act*.
- *Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988* (Cth) gave the Court jurisdiction over some federal administrative law, bankruptcy, income tax and consumer protection matters.

- In practice, handles complex parenting and financial settlement cases

## High Court of Australia

- Mentioned in the *Commonwealth Constitution* – see Chapter III – The Judicature
- Created by *High Court of Australia Act 1979* (Cth).
- Original jurisdiction see ss 75 and 76 of the *Constitution* and s 30 *Judiciary Act 1903* (Cth)
- In practice most original jurisdiction cases are constitutional law matters
- [Chief Justice French AC](#), 1 September 2008
- [Justice Hayne AC](#), 22 September 1997
- [Justice Kiefel](#), 3 September 2007
- [Justice Bell](#), 3 February 2009
- [Justice Gageler](#), 9 October 2012
- [Justice Keane](#), 5th March 2012
- [Justice Nettle](#), 3 February 2015
- [Justice Gordon](#), 9 June 2015 (wife of Justice Hayne)
- **s 75 Original jurisdiction of High Court**
  - In all matters:
    - (i) arising under any treaty;
    - (ii) affecting consuls or other representatives of other countries;
    - (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
    - (iv) between States, or between residents of different States, or between a State and a resident of another State;
    - (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
  - the High Court shall have original jurisdiction.
- **S 76 Additional original jurisdiction**
  - The Parliament may make laws conferring original jurisdiction on the High Court in any matter:
    - (i) arising under this Constitution, or involving its interpretation;
    - (ii) arising under any laws made by the Parliament;
    - (iii) of Admiralty and maritime jurisdiction;
    - (iv) relating to the same subject matter claimed under the laws of different States.
- See s 30 *Judiciary Act 1903* (Cth):
- **s 30 Original jurisdiction conferred**
  - In addition to the matters in which original jurisdiction is conferred on the High Court by the Constitution, the High Court shall have original jurisdiction:
    - (a) in all matters arising under the Constitution or involving its interpretation;
  - and
  - (b) in trials of indictable offences against the laws of the Commonwealth.

- See also *Judiciary Act 1903* (Cth) s 38 - High Court given exclusive jurisdiction in these matters
- (a) matters arising directly under any treaty;
- (b) suits between States, or between persons suing or being sued on behalf of different States, or between a State and a person suing or being sued on behalf of another State;
- (c) suits by the Commonwealth, or any person suing on behalf of the Commonwealth, against a State, or any person being sued on behalf of a State;
- (d) suits by a State, or any person suing on behalf of a State, against the Commonwealth or any person being sued on behalf of the Commonwealth;
- (e) matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court.
- but in some instances can remit to Federal Court: *Judiciary Act 1903* (Cth) ss 39B, 44

### Federal Court/Federal Circuit Court

- Appeals on points of law from the Administrative Appeals Tribunal and various other tribunals are available to the Federal Court and in some circumstances may be referred to the Federal Circuit Court
- See eg ss 44, 44AAA, 44AA of *AAT Act 1975* (Cth)

### Full Federal Court

- Constituted by 3 judges of the Federal Court – or, theoretically, ‘more’ see s 14 *Federal Court of Australia Act 1976* (Cth)
- Hears appeals from the FCA and FCCA (federal court matters)
- See Part III, Division 2A *Federal Court of Australia Act 1976* (Cth) for appellate jurisdiction provisions

### Full Family Court

- Constituted by 3 judges of the Family Court - or, theoretically, ‘more’ see s 4 *Family Law Act 1975* (Cth)
- Hears appeals from the FamCA and FCCA (family law matters)
- See Part X *Family Law Act 1975* (Cth) for appellate jurisdiction provisions

### High Court of Australia

- See *Judiciary Act 1903* (Cth) s 34:
- **34 Appeals from Justices of High Court**
- (1) The High Court shall, except as provided by this Act, have jurisdiction to hear and determine appeals from all judgments whatsoever of any Justice or Justices, exercising the original jurisdiction of the High Court whether in Court or Chambers.
- (2) An appeal shall not be brought without the leave of the High Court from an interlocutory judgment of a Justice or Justices exercising the original jurisdiction of the High Court whether in Court or Chambers.
- Remember the ‘My God’ test – s 35A
- Appeals from Full Family and Federal courts by leave

### Criminal Jurisdiction – original

- State courts have jurisdiction over all breaches of Commonwealth criminal law: s 68 *Judiciary Act 1903* (Cth).
- Therefore, there is only one court hierarchy (Queensland) to consider.

- Two ways for court to 'hear' criminal offences:
  - **On indictment:** i.e. before a judge and jury (in the Supreme or District Courts), sometimes following a *committal* (preliminary) hearing before a Magistrate to determine if is enough evidence to put defendant on trial.
  - **Summarily:** i.e. before a Magistrate sitting alone.
- Essentially two types of criminal matters:
  - **Indictable offences** (crimes, misdemeanours), which are serious offences.
  - Some *must* be tried on indictment, others *may* be tried summarily.
  - **Summary offences** (simple and regulatory offences), which are less serious and are always tried summarily.

### Magistrates Court

- Criminal jurisdiction is given by the *Justices Act 1886* (Qld) in combination with the *Criminal Code* (Qld).
- In criminal proceedings, the Magistrates Court can still consist of two Justices of the Peace (who now have to be specially qualified), and this still occurs in some country areas and aboriginal settlements.
- Hears lesser offences – assault, stealing, traffic
- May also try some indictable offences summarily
- May also conduct committal hearings – enquiry into whether there is sufficient evidence to commit a person charged with an indictable offence (more serious offence) to trial

### District Court

- Criminal jurisdiction is given by the *Justices Act 1886* (Qld), the *Criminal Code* (Qld) and the *District Court of Queensland Act 1967* (Qld).
- The District Court has jurisdiction in respect of those indictable offences with a maximum penalty of not greater than 20 years and certain specified offences in respect of which the maximum penalty is greater than 20 years, see *District Court of Queensland Act 1967* (Qld), ss 60-61.
- In practice, hears all indictable offences except murder, treason and very serious drug offences

### Supreme Court

- The provisions relating to its criminal jurisdiction are found in the *Criminal Code* (Qld)
- In theory, jurisdiction to hear all indictable offences
- In practice – murder, treason and serious drug offences

### Nature of appeal in criminal matters

- Note that a convicted person may appeal against conviction or sentence or both
- The Crown may appeal against dismissal of a simple offence by a magistrate
- The Crown may not appeal against an acquittal in respect of an indictable offence but may seek clarification from a higher court on a point of law – 'case stated'
- The Crown may appeal against sentence

### District Court

- Appeals from Magistrates Court
  - See *Justices Act 1886* (Qld) s 222

- Re simple offences: Both prosecution and defence can appeal to the District Court
- But re indictable offences: Where the Attorney-General has a right of appeal or a right to refer a point of law from the Magistrates Court, the appeal/reference will lie not to the District Court but to the Court of Appeal. See *Criminal Code* (Qld), s 669A.

### Court of Appeal

- Appeals/reference of point of law from Supreme Court, District Court and, sometimes, Magistrates Court
- See *District Court of Queensland Act 1967* (Qld) s 118 and 119; *Criminal Code* (Qld) ss 668D, 668E, 668F, 669, 669A

### High Court

- See ss 35, 35A *Judiciary Act 1903* (Cth)
- Special leave always required to appeal to High Court
- 'My God' test

### QCAT

- Queensland Civil and Administrative Tribunal (QCAT)
- Legislation passed June 2009, started 1 December 2010
  - *Queensland Civil and Administrative Tribunal Act 2009* (Qld)
  - *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld)
- Supreme Court Justice David Thomas, President
- Consolidates and replaces 23 other tribunals, for example:
  - Anti-Discrimination Tribunal
  - Children Services Tribunal
  - Commercial and Consumer Tribunal
  - Guardianship and Administration Tribunal
  - Independent Assessor under the *Prostitution Act 1999*
  - Health Practitioners Tribunal
  - Legal Practice Tribunal
  - Racing Appeals Tribunal
  - Retail Shop Leases Tribunal
  - Small Claims Tribunal

### QCAT- key features

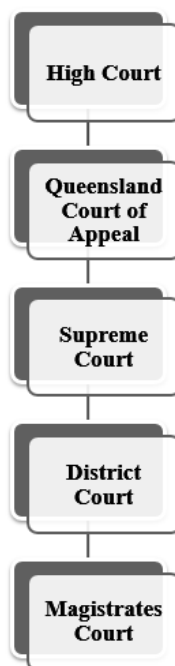
- Will not be studying in detail this semester
- Decision makers
  - President and Vice President
  - Members (may not have legal qualifications)
  - All Magistrates are automatically appointed as members of QCAT to hear minor civil disputes
  - Adjudicators – lawyers appointed to resolve minor civil disputes
- Appeals
  - Some appeals to an Internal Appeals Tribunal
  - Other appeals to Court of Appeal



## Alternative (or Additional) Dispute Resolution – (ADR)

- Not all matters proceed to trial.
- Only a handful of civil cases – ‘hard cases’ do not settle as the result of pre-trial built around ADR processes ranging from settlement negotiations to court mandated mediations.
- Advantages – cost, time, privacy, ‘win-win’, flexibility of outcome.
- ADR processes are even having an impact on the resolution of criminal disputes – ‘restorative justice’

## QUEENSLAND COURT HIERARCHY



- Read Connecting with Law Chapter 10
- Read Judicial Reasoning and the Doctrine of Precedent Chapter 5 (CMD)
- Read Laying Down the Law Chapter 7 (CMD)
- Listen to the lecture and print out these powerpoints

### Introduction

- What is the Doctrine of Precedent?
  - A principle that like cases should be decided alike.
  - Judge's rely upon the Doctrine to help reach a decision in the case before them.
- Which courts bind which other courts?
- If a court is bound to follow the decision of another court, what part of the decision must be followed?

### Rationale

- See *Telstra Corporation v Trelor* (2000) 102 FCR 595 at 602. (Page 117-118 of Laying Down the Law).
- Certainty
- Equality
- Efficiency
- The Appearance of Justice

### Precedent in 30 Seconds

- A court will be bound by a decision of a superior court in the same hierarchy
- A court is bound to follow the **ratio decidendi** of an earlier decision, but will not be bound to follow the **obiter dictum** of that earlier decision

## Basic Rules

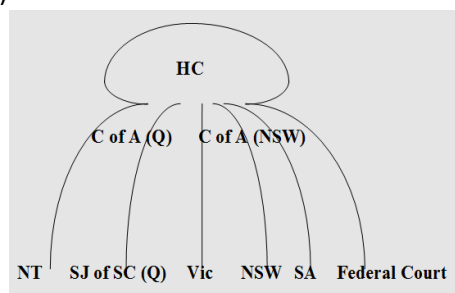
- Rule:
  - A court is bound to follow the decisions of courts superior to it in the same hierarchy.
- Authority:
  - *Broome v Cassell & Co Ltd* [1971] 2 QB 354
  - *R v Casey; R v Smythe* [1977] Qd R 132
- Textbook
  - Pages 72-73 (CMD)

## When is a court superior to another court?

- A court is superior to another court if it lies higher up in the appeal chain to the lower court.
- The rationale for decisions of a superior court being binding on lower courts in the same hierarchy is that the superior court has the power to overrule decisions of the lower court on appeal.
- Exception: The doctrine of precedent does not apply between the District Court and the Magistrates Court even though appeals from the Magistrates Court go to the District Court
- Authority: *Valentine v Eid* (1992) 27 NSWLR 615.
- Example:
  - A decision of a single judge of most courts – even the High Court – is not binding on courts below.
- Authority:
  - *Bone v Commissioner of Stamp Duties* [1972] 2 NSWLR 651
- Textbook
  - Pages 77-78 (CMD)

## Courts at the 'Common Apex' of Different Hierarchies

- The Privy Council (until 1986) and now the High Court of Australia sit at the very top or 'apex' of all the state and territory jurisdictions.
- Rule:
  - A decision of a court at the common apex of different hierarchies will be binding back down through all of those hierarchies provided the question of law is the same.
- Authority:
  - *Bakhshuwen v Bakhshuwen* [1952] AC 1
  - *Mayer v Coe* (1968) 88 WN (Pt 1) (NSW) 549
  - *R v Rowland* [1971] SASR 392
  - *R v Masciantonio* [1994] 1 VR 577
- Textbook:
  - Pages 83-85 (CMD)



### Per Incuriam Decisions

- A decision that has been reached through want of care
  - Where a court has overlooked a case
  - Where a court has overlooked a relevant piece of legislation
- If a higher court has made a per incuriam decision, what can a lower court do?
  - See *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166.

### Conflicting Decisions

- Express or Implied Overruling
- A decision loses its binding status if it is overruled
- The court can state in its reasons that it believes a previous case is wrong (express overruling)
- Alternatively, a court's decision might overrule a previous decision, without specific mention of the earlier case (implied overruling)
- See: *Ratcliffe v Watters* (1969) 89 WN (NSW) Part 1 409.
  
- Wilful Disregard of Binding Precedents
- *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443
  - The decision of the still higher court must be assumed to have been correctly distinguished (or otherwise interpreted) in the decision of the immediately higher court.
  - In our example, the SJ of the SC would be bound to follow the C of A decision.

### Majority Opinions

- A majority decision will create a binding precedent, if the majority agree on the outcome *for the same reasons*.
- *Lake v Quinton* [1973] 1 NSWLR 111
- If there is a majority decision, but the majority have different reasons for the outcome (ie no discernable ratio), lower courts are still bound to reach the same outcome, but are not bound by any reasoning
- *Re Tyler; Ex parte Foley* (1994) 181 CLR 18

### Equally Divided Courts

- Equally divided courts can occur through sickness, illness or otherwise.
- Does an equally divided court have any effect as a precedent?
- Yes – treated similarly to *Tyler*
- *Langley v Langley* [1974] 1 NSWLR 46

## Week 8

### Review from last week

- A court will be bound by a decision of a superior court in the same hierarchy
- A court is bound to follow the **ratio decidendi** of an earlier decision, but will not be bound to follow the **obiter dictum** of that earlier decision
- Some courts not part of the appellate structure
- Courts at the 'Common Apex' of different hierarchies
- Per Incuriam decisions
- Express or Implied Overruling
- Wilful Disregard of Binding Precedents
- Majority Opinions and Equally Divided Courts

### Previous Decisions of the Same Court

- Are courts bound by their own previous decisions?
- Short answer = No
- Only exception is the civil division of the English Court of Appeal
- Even though not technically bound to do so, it is very rare for a court to depart from a previous decision
- The Privy Council has never been bound by its own previous decisions
  - *Read v Bishop of Lincoln* [1892] AC 644
- The High Court of Australia has never regarded itself as being bound by its previous decisions
  - *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261
- See Laying Down the Law (CMD) pp 161-172 for examples of when the High Court might depart from its previous decisions
- The Full Court of the Federal Court and the Court of Appeals in each state are not bound by their own previous decisions.
  - *Nguyen v Nguyen* (1990) 169 CLR 245
  - pp187-189 (LDL)
  - The Queensland Court of Appeal held itself bound by its own decisions for a period of time, but ceased to do so after *Nguyen*
- What about single judges?
  - A single judge is not bound by the decision of a fellow single judge
  - This applies to single Supreme Court Justices, single Federal Court Justices, District Court Judges and Magistrates
- *La Macchia v Minister for Primary Industries and Energy* (1992) 110 ALR 201 at 204
  - 'The doctrine of stare decisis does not, of course, compel the conclusion that a judge must always follow a decision of another judge of the same court...But the practice in England, and I think also in Australia, is that "a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance...unless he is convinced that the judgment was wrong"'.

### Appellate Courts in other Australian jurisdictions

- It may be an oversimplification to think of previous cases as being either
  - Binding
  - Merely persuasive

- MacAdam & Pyke refer to a third type of decision:
  - 'de facto' binding cases. The precedential value of these cases lies somewhere between binding and merely persuasive
- Rule:
  - Intermediate appellate courts (and courts below) will be defacto bound to follow the decisions of other intermediate appellate courts when interpreting commonwealth legislation, national uniform legislation or the common law – unless they are clearly wrong.
- A decision of the New South Wales Court of Appeal is de facto binding upon the Qld Court of appeal, a single judge of the Supreme Court, District Court and Magistrates Court.
- In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 the High Court stated:
  - 'Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong. Since there is a common law of Australia, rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law.'
- What should a court do where there are conflicting decisions of intermediate appellate courts (ie Courts of Appeal)?
- See *Re J & E Holdings Pty Ltd and the Corporations Law* (1995) 36 NSWLR 541 per Shellar JA at 551:
  - '...only in an extreme case would an intermediate appellate court or a judge of first instance not follow the latest decision by an immediate appellate court if, in that latest decision, the arguments have been fully reviewed and a conclusion reached that an earlier decision of another intermediate appellate court was plainly wrong'

### The effect in Australia of English decisions

- Decisions of the Supreme Court of the United Kingdom will not be binding on Australian courts (although they will be highly persuasive).
- The House of Lords has never been part of the Australian court hierarchy and yet Australian courts (including the High Court) held themselves bound to follow HOL decisions until 1963. Some Courts continued to hold themselves bound by HOL decisions until 1986!
- The Privy Council was the highest appellate court in Australia until the passing of the:
  - *Privy Council (Limitation of Appeals) Act 1968* (Cth)
  - *Privy Council (Appeals from the High Court) Act 1975* (Cth)
  - *Australia Act 1986* (Cth) (Imp)
- As a result, no decision of any English court, and no decision of the Privy Council made after 1986 is binding on any court in Australia
- The High Court of Australia also ruled in *Viro v The Queen* (1978) 141 CLR 88 that it was not bound by any decision of the Privy Council whenever made.
- What about the effect of pre-1986 decisions of the Privy Council (and House of Lords) on:
  - Australian Courts of Appeal
  - Supreme Courts
  - District Courts
  - Magistrates Courts

- There are two differing views:
  - 1) *R v Judge Bland; Ex parte Director of Public Prosecutions* [1987] VR 225
    - Per Nathan J – No decisions of the Privy Council (whenever given) are binding on any Australian Court
  - 2) *Britten v Alpogut* [1987] VR 929
    - Pre-1986 decisions of the Privy Council and HOL would be binding on a single judge of the Supreme Court and below (in the absence of relevant Australian authority), but would not bind a Court of Appeal