

TOPIC 1 - AUSTRALIAN LEGAL SYSTEM

What is law?

Any law that the courts will enforce

Sources of Law

- Parliament
- The Courts (judge-made law / Case law)

Rule of law

- Opposite of arbitrary government (eg Syria)
 - At all times citizens should know or have means of knowing whether there acts are lawful or not
- The laws apply to everyone (including government & businesses)
- No one is above the law
- No discrimination among different groups (often a question of relativity – formal v substantial)

Statutes

- Parliament
- Parliament passes statutes
- Laws are laws that are passed by government

If parliament ever decides to make a law a statute, then once parliament passes the statute it has primacy over the judge-made law. Parliaments laws trump The Courts (Judge-made law).

Federalism – what is it?

- In Australia power to make laws is divided between Commonwealth Parliament and the state parliaments.
- These relationships governed by the Constitution Act 1900 (Cth).
- Laws can be **exclusive** to Commonwealth Parliament or **concurrent** with state parliaments.

Division of power between States and Commonwealth

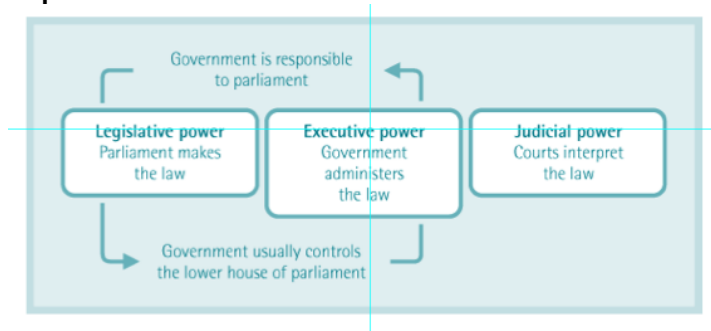
The Constitution grants exclusive, concurrent and residual powers.

- **Exclusive** – just Commonwealth (eg defence)
- **Concurrent** – both states & Commonwealth can make laws but if a clash, Commonwealth law prevails (eg corporations)
- **Residual** – areas not mentioned in Constitution come within the states' jurisdiction (eg secondary schools)

Jurisdictional difficulties

- When a dispute arises, determined by High Court of Australia
- Sometimes the states and Commonwealth work together to avoid conflicts and confusion eg
 - Company laws > **Corporations Act 2001 (Cth)**
 - Fair Trading Laws and *Trade Practices Act 1974 (Cth)* > **Australian Consumer Law 2011 (Cth)**

Separation of Powers



Interpreting a statute

- Parliament **creates** legislation but courts **interpret** it

- Courts aim to ascertain and give effect to parliament's intention when creating statute.
 - **Literal approach** – initially courts will look at the statute's words
 - When the literal approach leads to ambiguity which results in an absurdity, courts adopt the **golden rule**
 - To aid interpretation courts apply **purposive approach** by looking at extrinsic aids eg statements made by government

Firearms Act 1996 (NSW):

'It shall be an offence for a person to sell an offensive weapon including a rifle, shotgun or revolver in a public place'.

Is it an offence if:

1. A sold his flick knife to B while they were looking at magazines in a newsagency
2. C gave D his crossbow when C visited his home?
3. E auctioned F's grandfather's First World War rifle to G?
4. H, a minor, who lived in a semi-rural area, swapped his .22 rifle with J at the market for a Slingshot so that he could scare off bush turkeys?

Statute Law – Made by Parliament

Common Law – Judge made Law

Judge-made Law

- Referred to as **case law** or '**common law**'.
- Applied by judges in later cases involving similar facts using the doctrine of precedent (*'stare decisis'*).
- May be overridden by legislation unless the case decision examines whether that legislation is valid.

The many meaning of common law

- Common law may refer to
 - Law made by one of several historically different court systems
 - Judge-made law
 - The strict application of principles in earlier cases that result in an award of damages (money) as opposed to **equity** where the court grants an order designed to bring fairness and justice where rigid common law principles may not.

Interpreting a Case

- Courts in each jurisdiction are bound by the doctrine of precedent (***stare decisis***).
- A court's judgment may contain:
 - ***ratio decidendi***
 - ***obiter dicta***.
- It may be difficult to extract the ratio of any decision, particularly if there is more than one judge, each giving different reasons for the (majority) decision.

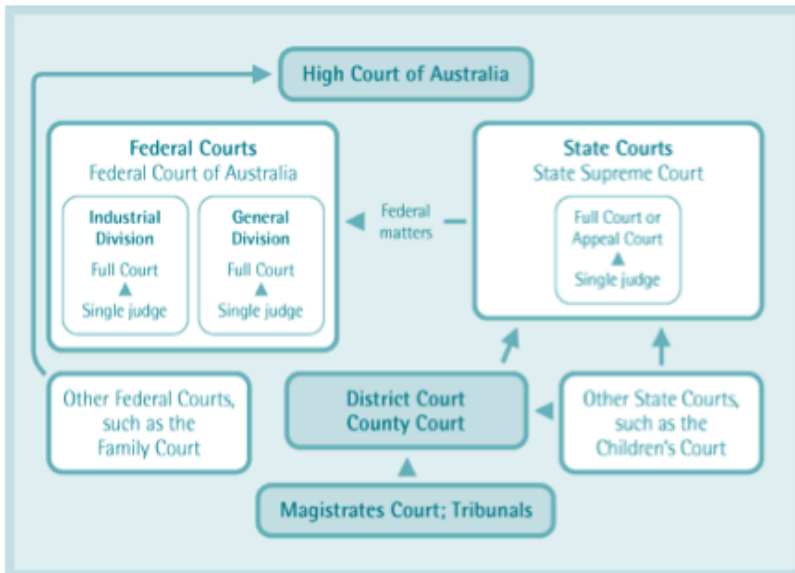
The doctrine of precedent (***stare decisis***)

- A court's decision is binding on courts lower in the same court hierarchy when the lower court is deciding cases of a similar nature.
- What binds the lower court?
 - Only the reasons given for deciding the earlier case.
 - This is called the ***ratio decidendi***.
- What part of a decision is not binding on the lower court?
 - Statements made which are not strictly necessary for the decision: ie, comments or statements made 'by the way'.
 - This is called ***obiter dictum*** (*obiter dicta* if plural).

The court hierarchy

The doctrine of precedent relies on the court hierarchy within that jurisdiction. Judges of lower courts are bound by decision of judges in higher courts.

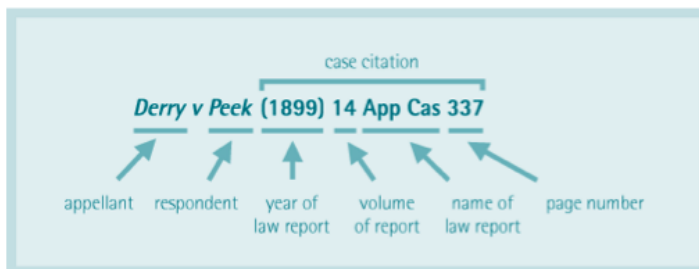
The Australian court hierarchy



Statute Citation

- Proper reference to legislation includes
 - name of Act
 - year Act passed
 - jurisdiction of Act.
- **Corporations Act 2001 (Cth)**
- **Acts Interpretation Act 1954 (Qld)**
- **Racial Discrimination Act 1975 (Cth)**

Case Citation



For example: *Derry is suing Peek in 1899*

Case citations (references) include the case name *and* full details of where the case was reported.

- **Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256**
 - *Carlill's* case can be found in volume 1 of the Queen's Bench reports of 1893 beginning at page 256.
- **Waltons Stores (Interstate) Ltd v Maher (1988) 76 ALR 513**
 - *Waltons Stores'* case can be found in volume 76 of the Australian Law Reports beginning at page 513. This case was heard in 1988.

Applying case law to later cases

- Only the **ratio decidendi** is binding. **Obiter dicta** has persuasive force only.
- Generally no two cases are exactly the same.
 - The court may find the current case sufficiently similar to apply the *ratio* of the precedent to the current case.
 - The court may distinguish a previous case from the current case based on material differences between the cases.
 - Higher courts can overturn or refuse to follow the *ratio* of a lower court of the same jurisdiction.

The role of Equity

- Equity developed as a result of the growing inflexibility and rigidity of the common law.
- Equity implies **fairness** and **justice** in the law.
- It is supplementary only; rather than a complete legal system in its own right.
- In the event of a conflict with the common law, equity will prevail.
- Equity law does not apply to all civil disputes and it has no application in criminal law.
- There are two main types of equitable remedies sought:
 - **Injunction** – a court order directing a person to stop doing something; and
 - **Specific Performance** – a court order directing a person to carry out an obligation.

The parties to a case

We refer to parties according to whether it is the first hearing; an appeal, and the jurisdiction.

- First hearing:
 - Civil cases:
 - **Plaintiff** is the party suing the **defendant** (state court).
 - **Applicant** is the party suing the **respondent**.
 - Criminal cases
 - **The Crown** prosecutes the **defendant**.
- Appeal
 - The **Appellant** is the person lodging the appeal against the other party (**Respondent**).

The adversarial nature of the common law system

Features of the adversary system

- Two opposing sides who argue their case in a court presided over by a neutral third party (e.g. Judge).
- One side will “win”; one side will “lose”
- In a **civil case** – parties prove their case. ‘**on the balance of probabilities**’.
- In a **criminal case** – the Crown proves the case ‘**beyond reasonable doubt**’.

Case notes in textbook

<p>Partridge v Crittenden [1968] 2 All ER 421 (Queen's Bench Division)</p>
<p>Facts Partridge placed an advertisement in a magazine which read in part: 'Bramblefinch cocks, bramblefinch hens, 25s each.' (A bramblefinch is a type of bird.) Partridge was charged with 'offering' a protected bird for sale contrary to the Protection of Birds Act 1954 (UK).</p>
<p>Issue Was the advertisement an 'offer' to sell the birds?</p>
<p>Decision The charge was dismissed on the basis that Partridge had not 'offered' the birds for sale. His advertisement was not an offer, but an invitation to treat.⁸</p>

Alternative Dispute Resolution

Faster, and cheaper than litigation.

- Negotiated settlement **between parties**

Use of **impartial outsider**

- Mediation
- Conciliation and/or arbitration

Law in Commerce

- **Contracts and statutes**
 - Essential for operation of business/commerce by ensuring people are bound to agreements that meet certain rules.
 - Based on *laissez faire* (freedom of contract)
 - Fairness?? ACL
- **Torts and statutes**
 - Establish minimum standards of conduct for people/companies in commerce
- **Business structures**

- Unless sole trader, may need other people = agency, incorporation etc

Business, Law & Ethics

Ethics

Typical ethical questions

- Can we afford the cost of making this product safe?
- Can we afford to admit negligence even though we know that we did the wrong thing?

Ethics - approaches

- **Utilitarianism** — assessing consequences
 - Bentham – *the end justifies the means* if it is for the common good) A **Balance Sheet approach**. ?? e.g. torture a terrorist, *Corvair*
 - Ignores justice and fairness and tends to inequality
- **Deontological theories** — that do not depend on consequences
 - The opposite of Bentham. Immanuel Kant – “is this action intrinsically *right* no matter what are the consequences?”
 - But who is to say what is “right”?
- **Social contract theory** — agreeing to be bound by certain rules for civilised life to exist.
 - Thomas Hobbes – we agree to be bound by certain rules for civilised life to exist
- **Virtue ethics** — how would a good person behave?
 - Plato - a universal general theory which provides a solid framework for leading an ethical life. It emphasises virtues like honesty, compassion, kindness, fairness, integrity and humor.
 - Problems with the consequences – e.g. what happens if the truth will inflict harm on others?

THE PARTIES TO A CASE

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CONSTITUTION & STATUTES

- The Constitution is the official statement of rules explaining how the government of Australia works.
- A statute is a law written by parliament (the government) as opposed to a judge made law.

TOPIC 1 – IMPORTANT TO UNDERSTAND

SOURCES OF LAW

What is Law: Any rule which a court of law would enforce.

2 Main Sources: Parliament & The Courts (judge-made law)

What do we call laws derived from each of these sources?

Statute Law (Parliament) & Case Law (Judge-made Laws, Courts)

Where there is inconsistency between laws from these 2 sources, which law will prevail?

Parliamentary law will prevail over any inconsistent judge made law because parliament plays a crucial role in the course of the law. Parliaments intervene to regulate social and economic life.

FEDERALISM

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WHAT IS THE CONNECTION BETWEEN LAW & ETHICS?

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TOPIC 2 – CONTRACTS (OFFER AND ACCEPTANCE)

What is a contract?

- A contract is an agreement between two or more persons which will be enforced by the courts
- All contracts are agreements but not all agreements are contracts
- Intention is important in determining whether an agreement is a contract
- Does not, in most cases, need to be in writing

Origins of Contract Law?

- Based on capitalist imperatives such as *laissez faire*
- Courts left parties to determine their own bargain (contract)
- Assumes a level playing field

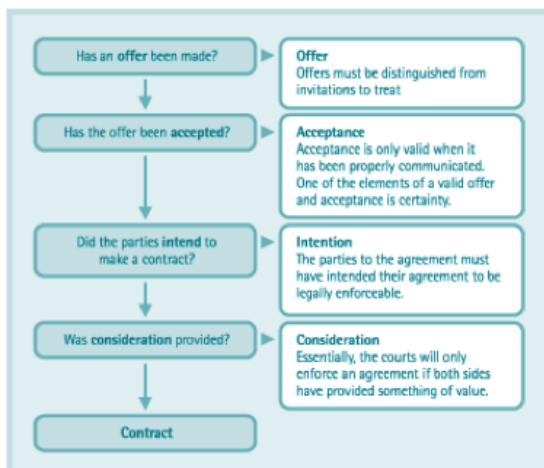
Sources of Contract Law

- **Common law**
 - Rules/principles laid down in an earlier case going back to *Pinnel's case* still apply
 - The majority of contract law is common law e.g. Offer & Acceptance
- **Statute law**
 - From mid 1900s parliaments become more active
 - Especially in relation to consumer protection
 - Both states and Commonwealth engaged in consumer protection laws e.g. ACL

What happens when a contract is breached?

- When a party to a contract fails to comply with all the terms the innocent party has a number of possible remedies.
 - Termination/rescission (for serious breaches)
 - Damages
 - Specific performance
 - Injunction

The essential elements of a contract



The Offer (Essential element #1)

- An offer may be described as the indication by one person to another of their willingness to enter into a contract with the other on certain terms
- *Reasonable person test (objective test)* is applied

Tenders

Example – a land developer calls upon builders to submit (tender) their prices to build

- Generally it is the person who submits the tender who makes the offer (*Hughes Aircraft v Airservices*)
- The person calling for tenders can choose any one of the tenders or none
- But look at the wording. Person calling for tenders may be bound if wording suggests intention to be bound by lowest etc (*Hughes Aircraft Systems and Harvela v Royal Trust*)

The fate of the offer