

Chapter 1 – The Law, the Legal System and the Constitution

The Nature and the Role of the Law

- **Law** — the system of control through which society operates
- **Legal system** — the totality of laws that regulate a state (a legally organized community) & the institution through which these laws are promulgated, applied and enforced
- Morality and Justice are not preconditions of a law
- A primary function of the law = order

Requirements of a Legal System

- A body of laws
- Source of power to create and alter laws
- Institution/process w/ authority to administer & enforce laws
- Institution w/ power to adjudicate disputes

Types of Legal Systems

- **Common Law systems**
 - Laws are found in legislation and the decisions of judges developing the judge made (common law) & interpreting legislation
 - Australia & US
- **Civil Law systems**
 - Laws are *codified* – laid down in comprehensive statutory statements of the law
- A **constitution** is the basis of the legal system of any state

The sources of law

- **Customary law:** Unwritten law established by the habitual use of a group of people over time
- **Common law:** law developed by the courts
- **Legislation:** laws made by a body recognized by the legal system as having the power and authority to make laws (usually the Parliament)

The requisites of law

- **Certainty** – reasonably secure in knowledge of what they are doing and the consequences
- **Flexibility** – responding w/o undue delay to change in society
- **Fairness** – not inequitable, unfair or unreasonable (to be tolerated)
- **Accessibility** – all people have access

The Development of the Australian Legal System

The reception of English Law

- Colonization
- Reception and application of English laws
- Increasing legislative power of the colonies
- Colonial/State Constitutions
- Colonies to States on Federation

Terra nullius, Mabo and native title

- New colonies were classified as:
 - Territory acquired by treaty or military victory, in which case the existing institutions were retained (until changed) **OR**

- Territory that was settled, ie., the inhabitants were not recognised and the English legal system applied.
- Australia was considered to be *terra nullius*, settled by England rather than conquered
 - allowed England to impose its legal system
 - legal fiction
- **Mabo v Queensland 1992**
 - High Court rejected *terra nullius*, recognized Australia as settled
 - Agreed common law recognized native title
- → **Native Title Act 1993**
 - Set up a Native Title Tribunal to determine land claims

Outline of the Australian Legal System today

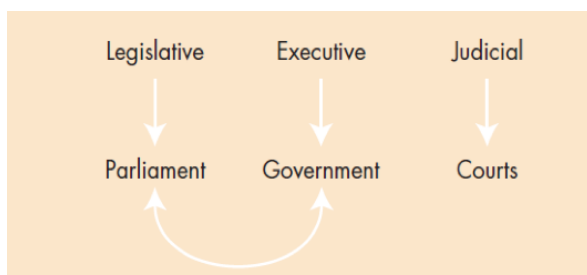
- A **common law** system
- A **federal** system
- Based on the **Westminster system**:
 - *A constitutional monarchy*
 - *Separation of powers*: exec, judicial, legislative
 - *Responsible government*: responsive to public opinion via elections
 - *Rule of law*: all members of society are equally subject to the law
- The Constitution 1901

Chapters:

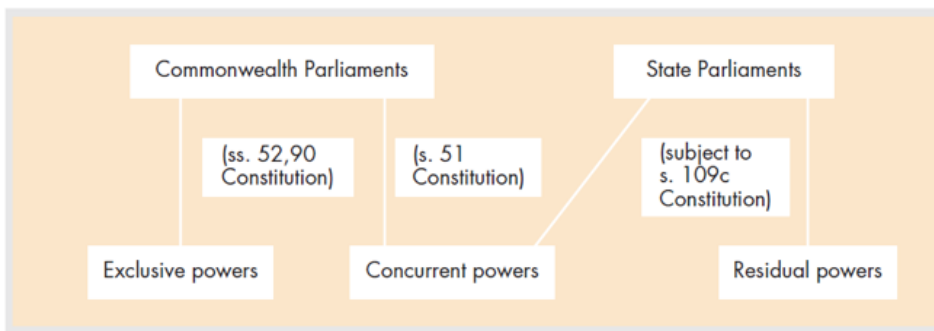
1. **The Parliament**
2. **The Executive government**
3. **The Judicature**
4. **Finance and Trade**
5. **The States**
6. **New States**
7. **Miscellaneous**
8. **Alterations of the Constitution**

The separation of powers - Legislature, Executive and Judicial powers

- **Legislative** power is the power to make law – Parliament
- **Executive** power is the power to administer the law – Government
- **Judicial** power is the power to interpret the law and apply it to individual cases – the Courts
- Under the Westminster system the separation of powers is not absolute
- **The ministers who comprise the Executive Council are members of the Parliament**
- **R v Kirby - The Boilermakers' Society of Australia 1956**
 - held: judicial power must be separated from executive power



Division of Legislative Power



- **Exclusive power:** one exercisable only by the Parliament in which it is vested and no other
 - o **Section 90:** customs and excise duties
 - o **Section 52:** the seat of government
- **Concurrent powers:** those exercisable by either Federal or State Parliaments
 - o **Section 51...** 39 "heads of power"
 - o **Section 109:** Conflict → Federal legislation prevails
 - **Commonwealth vs. Act** (2013) - same sex marriage
 - ACT passed Marriage Equality Act, legalizing same-sex marriage
 - The Commonwealth Constitution, section 51(xxi), provides the federal parliament with power to make laws with respect simply to "marriage"
 - the High Court unanimously struck the act down in its entirety
- **Residual powers:** all non-exclusive and non-concurrent powers
 - o vested in the States

Inconsistency

- **Section 109:** When a law of the State is inconsistent w/ a law of the Commonwealth, the latter shall prevail, the former is invalid to the extent of the inconsistency
- The test applied by the courts is to determine whether or not the Federal Parliament expressly or implicitly intended to cover the whole field... if so, any State law entering upon the field is invalid
- **Commonwealth v ACT [2013]:** same sex marriage → S-51 dictates that federal Gov has power to make laws over marriage = conflict = federal prevails
 - o If not in Section 51, Federal Gov has no legislative authority

Expansion of Commonwealth legislative competence

- "External affairs" power
 - o Virtually uninhibited growth provided some relevant international agreement is entered into
- "Corporations power"
- Founded largely in its financial strength
 - o collection and control of customs and excise duties
 - o States revenue is sourced primarily from federal funding

Done by:

- **Liberal interpretation of s51**
- **Uniform Tax Scheme**
- **Tied Grants**
- **Ceding power**
- **National cooperative schemes**

Chapter 3 – The Parliament and Statute Law

The nature and significance of legislation

- **Legislation** is the formal declaration of legal rules by Parliament & people or bodies authorized by Parliament
- Today it is the source which dominates our commercial and social lives
 - the courts' time is increasingly devoted to its interpretation
- This is necessary and inevitable as the common law cannot provide an immediate response to changed circumstances
 - dependent on the appropriate cases brought before them

The modern institution of Parliament

The Federal Parliament

- A **lower house**, the House of Representatives
- An **upper house**, the Senate
- The Governor-General as the Queen's rep

The House of Representatives

- Provides = representation for Australians
- Australia divided into electorates w/ ~ = #s of voters
 - each elects a rep
- The political party w/ House majority forms govt

The Senate

- Protects the rights of the States + acts as a house of review
- = # of Senators from each State (12) to protect the interests of less populous States
- The Territories are represented by 2 Senators each

The Legislative Process

- **The original idea**
 - May come from a variety of sources in or out of govt
- **Drafting of a Bill**
 - Translated by Parliamentary law-drafter into the form of draft legislation, aka a **Bill**
- **Parliamentary process** (stages in each House)
 - 1st reading stage
 - 2nd reading stage - committee stage
 - 3rd reading stage
- **Royal Assent**
 - after being passed by both Houses, the Bill is presented to the Governor-General for Royal Assent
- **Commencement**
 - ... becomes an Act of Parliament

The Interpretation of Legislation

- It is unlikely that legislation can ever be drafted with such precision and clarity that interpretation is not required
- Language is imprecise by nature
 - political compromise
 - drafting pressure
 - unintended consequences

Techniques of interpretation

- Each jurisdiction in Australia has an *Act Interpretation Act*
 - o establishes ground rules for the interpretation of that jurisdiction's legislation
 - o shorten the content of other Acts, e.g. prescribing meaning to frequently used terms, providing direction
- Contain provisions requiring a **purposive approach** to interpretation, and permitting the use of **extrinsic materials**
 - o **15AA(1)**, with the express purpose of countering unrealistically literal interpretations:
 - taken when the intention of the legislation cannot be fulfilled by its language
 - o **Section 15AB(2) of the Acts Interpretation Act 1901** (Cth) now provides that courts may refer to extrinsic materials, although many judges are still reluctant to do so
 - The common law position is that extrinsic materials are not to be used by judges in determining legislative intention

Rules of interpretation

- **The purposive approach:** courts interpret an enactment within the context of the law's purpose
- **Extrinsic materials:** materials or documents not forming part of the Act
- **The literal rule:** requires the court to give literal effect to legislative language, in context
- **The mischief rule:** allows courts to interpret legislation as to overcome a defect or mischief the legislation was passed to overcome
- **The golden rule:** if the language = a ridiculous outcome the meaning can be interpreted differently
- ***Ejusdem generis*:** where general words follow a number of specific rules, the general words are read as applying to other items in a similar category as the specific words
- ***Expressio unius exclusion alterius*:** the express mention of one thing excludes all others
- ***Noscitur a sociis*:** the meaning of an ambiguous word or phrase is to be derived from its context
- ***Generalia specialibus non derogant*:** where there is a conflict between general and specific provision, the specific provisions prevail

The Court's interpretative role may be "narrow" or "broad"

- *Competition and Consumer Act 2010* (Cth)
 - o "Consumer" is defined in s3 and the court's interpretative role is therefore limited
 - o "Misleading or deceptive conduct" is not defined and the court's interpretative role is very broad - in interpreting such provisions the courts are in effect "writing the rules"