

## Week 1 – Australian legal system

**Legal system** – totality of laws that regulate a state (a legally organised community), and the institutions through which these laws are made, promulgated/declared, applied and enforced.

Types of legal system:

- 1) Common law – laws are found in legislation (making laws) and the decisions of the judges + interpreting legislation develop the judge-made/case/common law.
- 2) Civil law – laws are **codified** (areas of laws collected and restated to form a legal code) – laid down in comprehensive statutory (written law) statements of the law.

Both systems have a legislative body creating laws (statutes), however the altering process is different either through judges or codification)

**Constitution** – the system of laws, customs and conventions which define the composition and power of the state (began Jan 1, 1901). The colonies (now States) gave up certain powers/rights/duties to the new central govt. But they still retained individual identities and a degree of legislative authority

### Sources of law:

Customary law – established by habitual use of a group of people over time

Common law – law developed by the courts NOT civil law – not a source of law – only restated

Legislation – laws made by a body recognised by the legal system as having the power and authority to make laws (Parliament)

### The requisites of law:

- Flexibility - responding without undue delay to the challenge of change at all levels of society.
- Fairness - if law is to be accepted by members of society, it should be equitable and reasonable.
- Accessibility - all people should have access to knowledge of the law, either directly or through intermediaries.
- Certainty - enabling people to engage in transactions and relationships, reasonably secure in knowing the consequences.

### Outline of current Aus. legal system:

- A common law system
- A federal system
- Based on the Westminster system – incorporates a constitutional monarchy, separation of powers, responsible govt., rule of law (law overrules all)

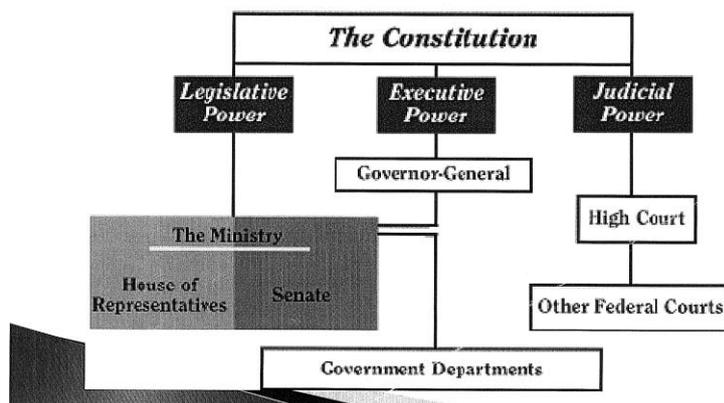
### 3 meanings of 'common law':

- 1) A system of law (as opposed to civil law systems)
- 2) Judge-made law (as opposed to legislation/codified law)
- 3) Judge-made law which developed in the common law courts (as opposed to **equity**, the judge-made law made in the Equity/Chancery courts)

**Federal system** – Australian constitution united all the colonies in Aus. in 1900, in a federation. This involved a **division of powers** between the States (former colonies) and the Commonwealth

**Separation of powers:** Functions of govt. are allocated to 3 different institutions

- 1) **Legislative** functions (make law) – Parliament – consists of Queen, Senate, and House of Representatives
- 2) **Executive** functions (administer/enforce law) – power vested in the Queen (exercisable by GG as representative) + Ministers of Federal Executive Council (Government)
- 3) **Judicial** functions (interpret law and apply it to individual cases) – High Court (consists of Chief Justice + other Justices) and other Federal Courts → supreme Court → District Court



**Rule of law** – requires all members of society (including govt.) to be subject to the law – maintains the balance between personal freedom and legislative power in a modern democracy.

### Week 2 – Parliament and Legislation

**Legislation** – formal declaration of legal rules by Parliament and bodies authorised by Parliament.

- Currently the source of law which dominates our commercial/social lives, and the courts' time is increasingly devoted to its interpretation.
- This is necessary as common law cannot provide immediate responses to changed circumstances.

**The Federal Parliament** – consists of the House of Representatives (lower house), the Senate (upper house), and the GG as the Queen's representative.

**House of Representatives** – the 'people's house'

- Provides equal representation for people of Aus.
- Aus. is divided into electorates with roughly equal no. of workers. Each electorate elects a representative. Electorate = area represented by one member of Parliament
- Political party with the majority of members in the House of Representative forms govt.
- Prime Minister is traditionally a member of the lower house.

**The Senate** – the 'States' house'

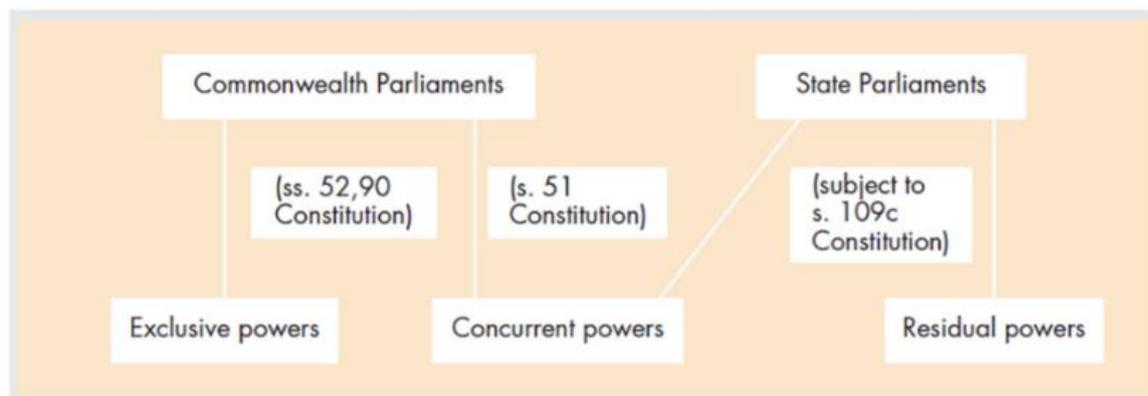
- Protects the rights of the States and acts as a house of review.
- Equal no. of Senators (12) from each State to protect the interests of the less populous States.
- Territories are represented by two Senators each.

**The Legislative process:**

- 1) The original idea – change may come from: govt. policy/govt. department/Parliamentary committee/law reform body/criticism of legislation in a judgement/pressure groups.
- 2) Drafting of a Bill – The original idea is then translated by Parliamentary law-drafters into the form of draft legislation, called a Bill.
- 3) Parliamentary process – Bill goes through: first reading stage, second reading stage → committee stage, third reading stage.
- 4) Royal Assent – after passed by both Houses, the Bill is presented to the GG (or Governor) for Royal Assent, where it becomes an **Act of Parliament** (now has the force of law). (Act is made up of statutes – written/codified laws).
- 5) Commencement

**If Senate rejects a Bill** passed by House of Representatives, Bill is reintroduced into and passed by the House of Rep. after 3 months. If Senate rejects Bill again, GG may dissolve both houses of Parliament (double dissolution – Federal election for all members of House of Rep. and Senators).

## Division of power (Commonwealth refers to Australia only)



- The Federal system requires the **division** of legislative power between the Federal Parliament and the State Parliaments.

**Exclusive powers** – exercisable only by the Parliament in which it is vested and no other. Exclusive powers of Commonwealth Parliament are: customs and excise duties [90], and the seat of govt [52].

**Concurrent powers** – exercisable by either Federal or State Parliaments. There are 39 concurrent 'heads of power' (e.g. trade/tax/marriage/immigration/allowances etc.). In the event of a conflict, the Federal legislation will prevail. If subject matter is not included within 39 heads, then Fed govt. has **no legislative authority** to deal with it.

**Residual powers** – includes all non-exclusive and non-concurrent powers. Residual powers are vested in the States, and include: education, health, traffic, property, crime, contracts.

**Delegated legislation** – legislation not made by Parliament but by a delegate upon whom Parliament has conferred/granted legislative power.

- The most common delegate of Parliament is the executive govt – executive council.
- It is now increasingly common for Acts to simply provide a general framework for law, leaving delegated legislation to 'fill in the gaps'.

## Statutory interpretation

- Each jurisdiction in Aus. has an **Acts Interpretation Act 1901 (Cth)** - shorten other Acts by prescribing meanings for frequently used terms. They also contain provisions requiring a **purposive approach** to interpretation, and allowing the use of **extrinsic materials**.

### Rules of interpretation:

- Ejusdem generis** – general words at the end of a list of particular words should be read down in the light of the meaning of the specific words (specific words have more weighting).
- Expressio unius est exclusion alterius** - The mentioning of one member of a list or class implicitly excludes other members of the list or class.
- Noscitur a sociis** - The meaning of a word or phrase is to be derived from its context.
- Generalia specialibus non derogant** – where there is a conflict between general and specific provisions/clauses, the specific provisions prevail.
- Purposive approach** – using constructions that would promote the purpose of the Act.
- Literal rule** – the court should give a literal effect to the legislative language

**Extrinsic materials** - materials or documents not forming part of the Act being interpreted e.g. Ministerial Press Releases, Second Reading Speeches, Explanation memoranda.

- Section 15AB 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.

## Week 3 – The Courts and the Common Law

### The role of courts:

1. Interpret and apply legislation
2. Develop the common law/judge-made law in areas that Parliament have not yet legislated

### Equity part of common law:

Equity is influential in the development of laws relating to:

- Unconscionability – extremely unjust contract laws in favour of a side with bargaining power or conduct that is so harsh that it goes against good conscience
- Undue influence – when a person takes advantage of a position of power
- Fiduciary duties – where a person has legal obligation to act for another's benefit
- Confidential information

### The doctrine of binding precedent

**Res judicata** – once a case is solved, it's finished completely for current parties concerned

- But, the decision has a life beyond these parties as it is binding on lower courts in similar cases – it is a **binding precedent** (exemplar/model).

**Stare decisis** – a court is bound to follow decisions of courts higher than itself in the same hierarchy of courts within the particular jurisdiction.

The doctrine of binding precedent promotes:

1. Certainty – creates a clear guide for conduct of individuals in the future
2. Equality – all cases are then treated alike
3. Efficiency – once a court has determined an issue, subsequent courts need not expend time and resources to reconsider it
4. Justice – creates impartial/non discriminating rules of law not based upon the personal views or **biases of a particular judge** – achieved by impersonal and reasoned judgement over time

**Ratio decidendi** – part of the decision which is binding/persuasive - the reason for the decision lives on and is binding

**Obiter dicta** – the other legal arguments and statements of principle found in judgements that are not part of the ratio decidendi are not binding on courts, but may be persuasive

**Distinguishing prior authority** – involves the judge finding that the material facts of the two cases differ so significantly that the earlier decision is not binding authority

**Rejecting prior authority** – an **appeal court** may declare an existing statement of common law to be wrong by **overruling or reversing** the prior authority (another way of overcoming previous decisions/prior authority)

### Judicial hierarchy

- Decisions of courts outside a particular hierarchy are not binding but can be persuasive depending on the court's status
- A previous decision of a court on the same level is generally not binding but will not be departed from unless the earlier decision was wrongly decided
- Persuasive authorities – previous decisions may not be binding precedents but may still be followed due to its persuasiveness

### Judicial law making

**Donoghue v Stevenson [1932] AC 562**

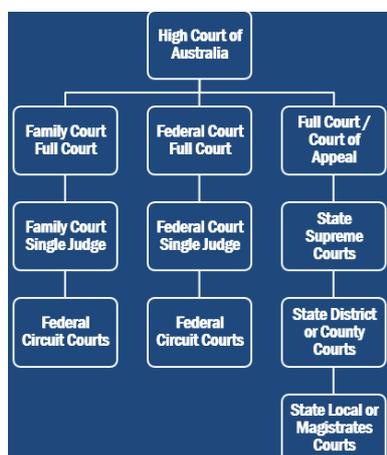
- Opaque bottle – no opportunity for inspection
- Contained decomposed snail
- Suffered stomach illness/nervous shock, and later died as a result (Donoghue)
- No contract action
- Recovery in tort of negligence – Donoghue sued the manufacturer in court due to 'lack of duty of care'
- Held (3/2) by judges: the manufacturer was liable to Donoghue in negligence

**Tort** - a wrongful act or an infringement of a right (other than under contract) leading to legal liability.

The ratio decidendi here:

- Narrow **liability principle** – specific to only snail and beer
- Wider **manufacturer liability principle** – dead animals in drinks
- Even wider **neighbourhood principle** for general **duty of care** in negligence
- Narrowest would be specific to only snail and beer, but this was recognized as a sensible and necessary development of the tort of negligence – therefore, similar cases can also be claimed under tort due to judges providing a wider ratio decidendi here.

## The Court System



## Jurisdiction

- Most courts possess both original jurisdiction and appellate jurisdiction.
- Original jurisdiction - the court is acting in "first instance" to determine a matter for the first time.
- Appellate jurisdiction - the court hears and determines an appeal from a lower court's decision.

## The judge

- Judges are appointed by the government but are otherwise independent.
- Judges' salaries cannot be lowered and they are immune from liability for anything they might say as judges.
- Judges cannot be removed except in extraordinary circumstances (established misbehavior)

## The jury

- 1) In criminal cases, only the most serious crimes are heard by a jury; most criminal cases are dealt with by **magistrates** (a judge dealing with less serious crimes) without a jury.
- 2) In civil cases, juries are used infrequently; in some cases, either party may request a jury.

## The adversary system/litigation

- Essential features include:

- └ The conduct of **litigation** (taking legal action) in the hands of the parties
- └ Evidence is elicited by questions asked by the parties, not the judge

### The inquisitorial system (civil law)

- **The judge**, usually a government official, is an inquisitor **actively seeking out the facts**
- In Australia, inquisitorial procedures are increasingly adopted in non-judicial dispute resolution processes.

### Pre-trial procedures

- 1) **Interrogatories** - series of questions requiring written answers on oath.
- 2) **Discovery** - requires a person to declare on oath all relevant documents in his or her possession, and to allow them to be inspected.
- 3) **Interlocutory orders** - orders to correct incomplete pleadings or compliance with interrogatories or discovery.
- 4) **Interim injunctions** - urgent orders preserving an existing position or restraining a party from doing something.

### Trial

- The jury decides **questions of fact**.
- The judge decides **questions of law**.

### Burden and standard of proof

- **Burden of proof**: Which party has the onus of proving the truth?
  - └ civil trials: the plaintiff
  - └ criminal trials: the prosecution (side of a legal case arguing that another person is guilty)
- **Standard of proof**: To what degree must the facts be established?
  - └ civil trials: on the balance of probabilities
  - └ criminal trials: beyond all reasonable doubt

### Elements of justice

- Clear and published rules of law
- Reasoned and public decisions
- Open justice: courts are open to the public
- Right of review and appeal against decisions made by government officials and judges
- Independence of judges

### Dispute resolution

Despite the court's efficiency in the resolution of disputes in accordance with the law, there are problems in: access, cost, delay, formalities, damaged publicity

### Alternatives to litigation

- Arbitration – using an arbitrator to solve dispute
- Alternative dispute resolution (ADR)
  - └ Mediation or conciliation

### Answering problem questions:

1. Identify legal issues
2. State relevant legal principles for each issue, citing authority (legislative provisions/case law)
3. Apply legal principles to the facts of the problem – apply/distinguish precedents & interpret/apply legislation
4. Conclusion