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OVERVIEW OF THE AUSTRALIAN LEGAL SYSTEM

Prue Vines, *Law and Justice in Australia*

What is the law?

- The rule of law – all people are subject to the law and can rely on the law to set the bounds within which other people and governments can operate. Prevents the arbitrary abuse of power. E.g. Kables, as convicts who were attainted, or civilly dead were allowed to sue the Captain, who was not allowed to break the law with impunity.

Sources of law

- Legislation or Statute – Parliament made legislation, inc. constitutions, acts and regulations,
- Doctrine of precedent – Case law, judge made law based on case law (precedents). *Ratio decidendi* is the legal reason for which the judge came to their decision.
- Common law – particular branches of law, private law / equity (e.g. marriage, divorce, admiralty, trade practices, bankruptcy).

The importance of history to understanding law

- Australian law has developed from tradition of the English common law. The legal system can only be explained by reference to history.

Legal institutions

- Federal system is comprised of a Commonwealth and states and territories.
- Civil law systems (e.g. Germany, France, Italy) recognise only statutes and regulations as sources of law. Judges interpret and apply the law.
- International law derived from customary international law and treaty (convention).
- High Court of Australia – decides cases of significance, challenges to the constitutional validity of laws, appeals by *special leave* of Federal, State and Territory Courts. The full bench comprises 7 justices, including the Chief Justice. Final court of appeal covering criminal, contracts, torts, tax, bankruptcy, property as the final arbiter. Constitutional court to uphold and enforce Australia's constitution (7 judges), and general court of appeal (5 judges). Judiciary Act of the Commonwealth sets out criteria for grant of *special leave* must be a matter of importance, question of principle, question of which courts of states have differed, serious error in the administration of justice in the lower court. Resolve legal issues arising out of particular legal disputes.

Legal practices

- *Mabo v Queensland (No 2)* (1992), the courts recognised that *terra nullius*, a land held by no one was untrue. The High Court of Australia held that native title to land could exist separately from the common law and based on Indigenous customary law.
- *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh (1995)* – could a person who developed a criminal record after entry into Australia be denied resident status? The High Court considered the UN Convention on the Rights of the Child, Article 3.1 provides “in all actions concerning children, the best interests of the child shall be a primary consideration.” The UN Convention was ratified but not implemented into Australian law. But not clear how it should be applied to the rights of the children.
- Immigration Review Board reviewed the application and denied permanent resident status. The Minister for Immigration is at the executive level. The legislation sets out the legal framework and the policy. The administration is carried out by the Department of Immigration, the decision makers were the Immigration Review Board who interpret what the legislation requires, policy direction based on what the regulation allows.

- Section 6.2 created the power to grant permanent entry. The grant of permanent entry permit conferring resident status, the respondent was required to satisfy one condition, (b) spouse, child or aged parent of an Australian. (e) holder of a temporary entry permit which is in force and there are strong compassionate or humanitarian grounds for the grant.
- The Immigration Review Panel's recommendation to reject the respondent's application was based on the objection to his good character due to the existence of a criminal record. It is up to interpretation to the Panel of what it means to be of good character.
- Issue: whether provisions of the Convention are relevant to the exercise of statutory discretion and if so, whether Australia's ratification can give rise to legitimate expectation that the decision-maker will exercise that discretion in conformity with the Convention. Legitimate expectation that Teoh was a primary carer for his children.
- Held: The Panel did not regard the best interests of the children as a primary consideration. The Compassionate claims are not considered to be compelling enough for the waiver of policy in view of Mr Teoh's criminal record. Found there were no failure to take matters into account. No legitimate expectation arose.
- Under administrative law there is was a procedural unfairness, as the Immigration Review Panel did not inform Teoh's legal counsel of their reliance on submission (b). The Panel did not consider the rights of the children as a significant factor in the application. It would be fairer under administrative law that the Panel should have informed Teoh's legal counsel, so that that they could identify and apply the correct submission.

The relationship between law and justice

Courts & Justice – Australia & UK

The Highest Court (1998)

- Rule by law, judges are impartial arbiters who can enforce the rule of law. There must be a separation of powers between the Judiciary and Parliament. Judges must be independent of any source of power or influence.

UK Supreme Ct (2012)

- The Judiciary should be seen to be free from the influence of Parliament.
- Separation of powers - Judges should be wholly independent from those who make the laws and those who are bound by them and those who administer them.
- The UK Supreme Court establish new precedents and make new case law, interpret Parliamentary law.

Commonwealth of Australia

- The Constitution is the legal document that governs how the Australian nation functions. It sets out the role of the Governor-General and the three arms of government, the Parliament, the Executive (PM, minister and their departments) and the Judiciary (the courts).
- Separation of powers doctrine – Parliament makes the laws, the Executive carries them out, the Courts determines that they are legal and constitutional. Federal Judicial power resides with the High Court.

Robert French CJ HCA (2012) Emory Law School USA

- Judiciary Act 1903 provides for State courts to exercise federal jurisdiction, matters arising under the constitutions and laws of the Commonwealth etc. In 1976, the Federal Court of Australia was created, has jurisdiction in federal matters concurrent with those of the State, general accrued jurisdiction.

- National integrated judiciary – Single appellate jurisdiction (High Court), separation of powers (judiciary vs. legislature), doctrine of incompatibility. cross-vesting scheme, State courts of repositories of federal jurisdiction.

PR Michael Kirby (2012)

- The role of lawyers in righting wrongs for lawyers.
- Justices are appointed by an independent panel of other lawyers, not political appointments.

THE COURTS IN ACTION (FACTS & LAW)

Prue Vines, *Law and Justice in Australia*

Adversarial System

- Adversarial system is dominant in Australian legal system – parties are in charge of the action, initiate, set up, call evidence, call witnesses and use the court as a forum. Civil (plaintiff vs. defendant), criminal (prosecutor vs. defendant).
- For civil proceedings evidence is collected by the process of discovery and interrogatories under complex set of rules. For criminal matters, evidence is collected by the police.
- At trial, evidence is generally presented orally by direct questioning, court is not entitled to make own enquiries or act on its own knowledge to reach a decision.
- Advocates have a duty to their party and to the court.
- Judge sits on the bench and makes rulings about what evidence is admissible and procedure to be followed, but does not interfere with the running of the case. After trial, the judge decides on the law and writes a judgement which becomes precedent
- Problems arise for people whom the mainstream language and culture of law is foreign – migrants and Indigenous people.

Evidence

- Civil - Burden of proof – on the balance of probabilities
- Criminal matter – standard of proof is beyond reasonable doubt.

Court Hierarchy and Jurisdiction

- Jurisdiction – scope of a body's power to hear a matter, determine the facts, and apply the law to make judgment. Range of power and territory in which that power can be exercised in.
- State Court Hierarchy (Civil) - High Court > Court of Appeal / Full Court of Supreme Court > Supreme Court > District Court > Local Court / Petty Sessions / Magistrates Court
- State Court Hierarchy (Criminal) – High Court > Court of Criminal Appeal / Full Court > Supreme Court > District Court > Local Court / Coroners / Magistrates / Petty Sessions.

Federal Court

- *Autochthonous expedient* means that state courts could be invested with federal jurisdictions.
- Limited jurisdiction under the Constitution (e.g. family court, federal court, federal magistrates court).

High Court

- Highest court in the Commonwealth hierarchy, defines law for all jurisdictions
- Original jurisdiction – the court in which the matter is first heard. Distinguished with appellate hearing.
- Appellate court - special leave to appeal under the *Judiciary Act*.

Supreme Court

- Court of general / unlimited jurisdiction, can hear any kind of legal dispute but can choose which matters to hear, can regulate own procedures.
- Court of record, need formal writ of error to set aside the decision, recorded judgment

Local court

- Committal hearings, which is the brief of evidence that police prosecutor bring to determine whether a trial of committal hearing trial is required.
- Judge decides whether there is sufficient evidence to justify the matter going to trial, judgment about how serious the trial is based on bail applications.
- Bail application matters are dealt with initially in the local, supreme court and district court.
- Has summary jurisdiction, judge can hear evidence and make a determination.

Court hierarchy

- Binding precedent may originate in lower courts, does not necessarily originate from the highest level court.

Court process

- Applied for bail when on appeal to the Federal Court and to the High Court.
- No concern for expert evidence, or procedural unfairness.

Classification of Law (Public and Private)

- Classification of law is important because the category of an issue's clarification signals different processes of legal reasoning or different procedures to be used within the court system.
 - Public law – at least one party will be a state entity. Constitutional, administrative, criminal, taxation
 - Private law – law about relationship between individuals. Torts (civil wrongs e.g. negligence), contracts (agreements made between people), property (ownership and possession). Common remedy is compensatory damages.

The Legal Profession

Ref to Prue Vine lecture.

Thinking like a lawyer

- Learning the patterns of argument that lawyers use, through cases and statutes. Intellectual and critical understanding of the law and its context.

Reading a case

R v Wedge (1976)

The Supreme Court of NSW, an Aboriginal man had been indicted for murder of another Aboriginal man. The accused argued the court did not have jurisdiction over the case because they were both Aboriginal and should be dealt with by customary law. The plea of lack of jurisdiction failed.

Cheung v Derrick

A personal injury case by the plaintiff who was a 21-month old child and crossed a busy street and 'darted' into the path of the defendant's car.

- *District Court of NSW (Civil Jurisdiction)* (1998), Chesterman ADCJ considered whether the driver had been driving in the manner of a reasonable person at the time of the accident. i.e. had the driver been driving negligently?

- Chesterman ADJC found that the defendant drove negligently at the material time. The plaintiff established a liability against the defendant in negligence.
- *NSW Court of Appeal* (1999) Stein and Fitzgerald JJA found the significance of speed is that he could avoid the pedestrian only by stopping. Circumstances of city driving may cause drivers to drive too fast for prevailing conditions and may still lead to a breach of duty of other road users. Travelling within the designated speed limit and in conformity with the traffic flow is ordinarily reasonable. The trial judge reached his decision taking all surrounding circumstances into account. Dismissed appeal with costs. Davies AJA found that the appellant was driving at a reasonable speed and in a responsible manner. Based on *Steward v Carnell* (1984), there are limits on the extent to which irrational behaviour of pedestrians should be reasonably anticipated. Davies recommended to allow the appeal.
- *High Court of Australia* (2001) Gleeson CJ, Gaudron, Kirby, Hayne and Callinan JJ found that the incident did not occur near a school or bus stop where reducing driving speed of special caution might be required. Court of Appeal held that driving at a speed which was 'reasonable' in one sense did not mean that it was not a breach of duty to other road users. Upheld the appeal as there was no basis of negligence of the appellant. Allowed the appeal, appellant to pay the respondent's costs.

Cheung v Derrick

- Lower court is the fact finding court, hearing conducted by Judge alone
- District court is the intermediary court, civil jurisdiction allows it to deal with motor vehicle accidents irrespective of amount being claimed.
- Material fact – driver was driving at 45-50kmph in a 60kmph zone.
- Tort of negligence –
- Precedent case in *Stock v Baldwin* (1996) established four criteria to determine negligence; extent of damage likelihood; likelihood that a pedestrian will suddenly come into the path of an ongoing vehicle, extent of precautions driver took; extent of what the driver is able to do when confronted with danger.
- There's no precedent that precludes Chesterman from concluding that the driver was negligent. Reason that if found negligent then third party compensation will be available as a remedy for the serious and lifelong insurance.
- NSW Court of Appeal - appeal should only be relevant if there is a finding of facts. No substitution of interpretation of facts. Dismissed the appeal as the appropriate criteria was applied correctly, but nothing to suggest that the conclusion reached to the trial judge was invalid. Driver should not be considered morally responsible, but legally responsible.
- Davies dissented by focussing on the actions of the driver, and could not find any evidence that the driver failed to exercise a duty of care.
- High Court – reversed the NSW Court of Appeal decision. Plaintiff has failed to prove that the defendant was negligent.