

CLAW1001 - Foundations of Business Law

31/7 - Lecture 1 - The Australian Legal System

Business and the Law

- Australia has a complex legal system that involves a combination of federal, state and local government laws
- Many powerful regulatory bodies that enforce, regulate and uphold the law
- **Law:** the system of control through which society operates
- **State:** a legally organised community
- **Legal system:** the totality of laws that regulate a state, and the institutions through which these laws are promulgated, applied and enforced
- **Legislation:** laws made by a body recognised by the legal system as having the power and authority to make laws (usually the parliament)
- Basic requirements:
 - ↳ A body of laws
 - ↳ Some source with the power necessary to create and alter those laws
 - ↳ Some institution or process with the authority to administer and enforce those laws
 - ↳ Some institution with the power to adjudicate disputes
- ie. laws, parliament, government and courts
- 2 main types of legal systems
 - ↳ Common Law legal system
 - ↳ Laws are found in legislation and the decisions of judges developing the judge-made law (common law) and interpreting legislation
 - Judge-made law which developed in the common law courts
 - Law that has evolved through judicial decision and practice
 - Common law found in the decisions of cases → consists of case law
 - ↳ Civil Law legal system
 - ↳ Laws are codified; they are laid down in comprehensive statutory statements of the law
 - People decided on laws that covered all situations, and any disputes are resolved by reference to these codes
 - ↳ (Customary Law legal system) → less prevalent today
 - ↳ Unwritten law established by the habitual use of a group of people, over time
- There are still differences within each type of law
 - ↳ eg. Australia and the United States both follow a common law system, however Australia is a constitutional monarchy, whereas the United States is a presidential republic

- **Constitution:** the basis of the legal system of any state
 - ↳ “A constitution is the system of laws, customs and conventions which define the composition of powers of the organs of the state and regulate the relations of various state organs to one another and to the private citizen” - Professor Hood Phillips, *Constitutional and Administrative Law (1973)*
 - ↳ The constitution outlines the delegations of the functions of law
 - ↳ The most important roles of the constitution is the division of powers between the Federal and State legislatures
 - ↳ US constitution also includes the “Bill of Rights”
 - ↳ Three functions of law
 - ↳ Legislative function - decide the laws (Parliament)
 - ↳ Executive function - carry out and enforce the laws (Government)
 - ↳ Judicial function - power to determine disputes (Courts)
- The requisites of law
 - ↳ Certainty - enabling people to engage in transactions and relationships, reasonably secure in knowing the consequences
 - ↳ 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 not be inequitable, unfair or unreasonable
 - ↳ Accessibility - all people should have access to knowledge of the law, either directly or through intermediaries
- Morality and justice are not necessarily preconditions for a law, but respect for the law is the condition upon which our whole social order depends
 - ↳ Reconciliation of law and public opinion can be tough, especially in multicultural societies such as Australia
- Origins of Australian legal system
 - ↳ Colonisation and reception of English law
 - ↳ Increasing legislative power of the colonies
 - ↳ *Colonies Laws Validity Act (1865)* - UK
 - ↳ *Statute of Westminster Act (1931)* - UK
 - ↳ Colonial/State constitutions
 - ↳ Colonies to States during Federation
- New colonies were either acquired by treaty/military victory (in which case existing institutions remained) or they were settled (in which case English legal system was implemented)
 - ↳ Australia was regarded as “terra nullius” so was settled rather than conquered
 - ↳ Overturning “terra nullius” occurred through 2 main cases
 - ↳ *Mabo v Queensland (No. 2) [1992] HCA 23*