

## Topic 1

### What is Law? What is its Purpose?

- ❖ Set of rules made by **parliaments or courts** - enforceable by prosecution or litigation.
- ❖ **Business law** - set of rules regulating businesses and business activities made by the state and **enforceable** by prosecution or litigation.
- ❖ **Purposes** - Resolves disputes; Maintains social order; Preserves and enforces community values; Protects the disadvantaged; Stabilises the economy; and Prevents the misuse of power.

### Law, Rules, Justice and Morals

- ❖ Rules or codes of conduct are sometimes treated as binding, but not actually law: E.G. Sporting rules; Family rules; Industry codes of conduct; Rules of a religion; University rules; Course rules
- ❖ **Justice** can be understood as **fairness** - fairness is one goal of the legal system.
  - Law tries to find a balance between justice in each individual case and having a stable, predictable system - not every legal decision will be accepted as a fair decision.
- ❖ **Ethics and Morals** are principles and standards used to determine whether particular actions are right or wrong.
  - Some conduct may be unethical but not illegal, or illegal but not unethical

### Sources of Law

- ❖ **Common Law system** - divided into **Common law (Case law) and Statute**.
  - Case Law can be divided into Common law and Equity - Common law (case law) is created by the reported decisions of judges.
- ❖ **Statute law** - created by State and Federal parliaments - known as legislation or Acts of Parliament.
  - Includes laws made by other government bodies - delegated legislation - E.g. council / local government by-laws; orders; rules and regulations.
- ❖ **Statute is most important source of law as the majority of law comes from parliament** – general rule is statute law overrules common law in the **event of conflict** between them – depends on wording of the statute **statute law > common law**

### Common Law Case Law

- ❖ **Case law** is decided by judges – they do not make up the law; they are obliged to comply with the **Doctrine of Precedent**
- ❖ case law is **consistent and predictable** – means that a question was dealt with in a certain way continues to be dealt with in that way in similar later situations.
- ❖ **Case decisions/reports consist of two things:**
  - **Ratio Decidendi** ('reason for the decision') - that part of a judge's decision which sets out the legal principle upon which the decision was based, and which is binding precedent.
  - **Obiter Dicta** - ('saying by the way') - that part of a judge's decision other than the legal principle upon which the decision was based, including the identification of the relevant evidence, and discussion of alternative legal principles, alternative decisions if the facts had been different, and the historical development of the legal principles used in reaching the final decision.

### Doctrine of Precedent

- ❖ **Only** the ratio decidendi from a court of record can create binding precedent.
- ❖ Court **MUST** follow decisions of courts **higher than** itself in the same hierarchy of courts within the particular jurisdiction - Binding precedent only binds courts in the same level or lower than it in the same hierarchy (level) of Courts
- ❖ Decisions of courts outside the particular court hierarchy are **not binding** but may be **persuasive** depending upon the status of the court.
  - A previous decision of a court on same level is generally not binding but will not be departed from unless the earlier decision was wrongly decided.
  - A number of ways for a court to avoid having to follow a previous decision. **Distinguishing** involves the judge finds that material facts of two cases differ significantly that the earlier decision is not applicable.

### Types of Legal Systems

- ❖ **Civil Law:** Most common system; Primary source of law is legislation; Parts of Europe, Latin America, Asia & Africa
- ❖ **Common Law:** Two sources of law - legislation and case law; Put great emphasis on the judiciary; UK, AU, USA, Singapore
- ❖ **Many others:** Religions, Socialist, Indigenous systems

### Doctrine of the Separation of Powers

- ❖ The legislature, the executive and the judiciary should remain **functionally separate**.
- ❖ **Legislature:** arm of government to make law, takes the form of a parliament.
- ❖ **Executive:** arm of government to administer the law, takes the form of a council of ministers overseeing a public service.
- ❖ **Judiciary:** arm of government to interpret the law, takes the form of a system of courts.

### Common Law - Civil Law and Criminal Law

- ❖ Civil – action brought by **one individual against another** - emphasis on remedies
- ❖ Criminal – actions brought by **the Crown (state) against an accused individual** - emphasis on punishment

### Common Law v Equity

- ❖ Common law: case law historically developed by King's courts in England.
- ❖ Equity: case law historically developed by the Lord Chancellor to supplement and redress the deficiency of common law.
- ❖ A single court system which administers both has been established.
- ❖ Common law and equity still refer to two separate and distinct sets of rules. E.g. the only common law remedy is, damages (compensation), whilst equitable remedies are discretionary, and include injunction and specific performance.
- ❖ In the event of a conflict between equity and common law, equity would prevail. **Equity > Common Law**

### The Australian Legal System

- ❖ A federal system - Six states agreed to give power to the federal government
- ❖ States retain all other powers, but delegate some to local (municipal) government.
- ❖ Australia's system of government is a Constitutional Democracy - The *Commonwealth of Australia Constitution Act (Imp)* passed by British Parliament in 1900
- ❖ **Section 9** of that Act contains the Australian Constitution sets out the division of power between the Federal and State governments in Australia and how the Federal government is to function.

### Balancing and Changing

- ❖ **Australian Constitution - Section 109** **Commonwealth law > State law**
  - When a law of a State is **inconsistent** with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.
- ❖ **Change the Constitution**
  - **Section 128:** An amendment to the Constitution **must** be **passed** by both Houses of Parliament; and by a **majority of voters and by a majority of States**.
  - 44 attempts to amend the Constitution made since 1901, 36 failed.

### Interpreting the Law - Statutory Interpretation

- ❖ **Judges** interpret Common Law Case Law and Statute Law.
- ❖ **Statutory Interpretation** - the interpretation by the courts of legislation when called upon to decide whether or not the legislation applies.
- ❖ Statutory rules exist regarding the reading and interpretation of statutes.
- ❖ For Commonwealth Legislation – the *Commonwealth Acts Interpretation Act 1901 (Cth AIA)*;
- ❖ For Queensland Legislation – the *Queensland Acts Interpretation Act 1954*;
- ❖ **Sections 15AA and 15AB** of the Cth AIA and **sections 14A and 14B** use purposive approach – E.g. Cth AIA - **Sections 15AA** Interpretation best achieving Act's purpose or object
  - In interpreting a provision of an Act, the interpretation **that would best achieve the purpose or object of the Act** (whether or not that purpose or object is expressly stated in the Act) **is to be preferred to each other interpretation**.
- ❖ In determining the purpose or object of the legislation, or resolving any ambiguity, courts can resort to **extrinsic materials** – E.g. Cth AIA – **Section 15AB** Use of extrinsic material in the interpretation of an Act:
  - ❖ if any **material not forming part** of the Act is capable of assisting in the ascertainment of the meaning of the provision, **consideration may be given to that material...to confirm** that the meaning of the provision **is the ordinary meaning** conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or to determine the meaning of the provision when... **the provision is ambiguous or obscure**; or the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and **the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable**.
- ❖ **Section 15AB** – lists the **types of extrinsic material** may be considered, in the interpretation of a provision of an Act – non-exhaustive - may include:
  - Explanatory memorandums/notes forming part of the legislation;
  - Relevant reports either made by parliament or a royal commission, law reform commission, similar body brought before parliament before the provision was enacted;
  - The speech made by the Minister who introduced the Bill into Parliament;
  - The records of parliamentary debates about the Act.
  - Example: Re Warumungu (1987) 77 ALR 27.
- ❖ **Section 15AB – ordinary meaning and a result that is manifestly absurd or is unreasonable:**
  - *Fisher v Bell [1961] 1 QB 394* - A flick knife with a price tag displayed in shop window.
  - *Smith v Hughes 1960 1 WLR 830* - Prostitutes "in the street"

### Class Rule

- ❖ The class rule (ejusdem generis) – Where two or more specific words are followed by a general word, the general word is interpreted as restricted to the same class/meaning as the specific words – E.g.