

TABL1710 – Part I Legal Framework

Chapter One: Legal Foundations

What is law?

- The law is systematic set of rules to regulate or control conduct within a society
- A set of rules that will be enforced by the courts
- The law declares how we must behave
- Rule of law: a means of maintaining the balance between personal freedom and legislative power in a modern democracy

The constitution

- Establishes the basic rules for the operation of the federation and sets out the powers of the federal parliament to make laws
- Any action or legislation must be in accord with the constitution, or if challenged the High Court of Australia will declare if invalid
- Divided into 8 chapters
 1. The Parliament
 2. Executive government
 3. The judicature
 4. Finance and trade
 5. The states
 6. New states
 7. Miscellaneous
 8. Alteration of the constitution
 - The proposed amendment must be passed by an absolute majority of both Houses of Parliament
 - The proposed amendment must be put to the voters in the form of a referendum and be passed by:
 - Majority of voters
 - Majority of states
 - The proposed amendment must receive royal assent

Source of laws in Australia

- Aus. has adopted the English common law system
- The main types of laws in the English legal system are:
 - Statute law
 - Laws made in the parliament (enacted law)
→ may be changed by parliament and interpreted by the courts
 - Common law or case law (judge-made law)
 - Laws made by the courts (unenacted law) through the reported decisions of the judges

→ may be changed by the parliament and developed by future court cases

- Aus. unique as judges can make decisions that may become laws
- In event of conflict, statute law prevails

Classifications systems in Australian law

- International v domestic law
 - Internal law is concerned with regulating the conduct between nation states
 - Also applies to private individuals engaged in international transactions
 - Domestic (aka municipal) laws come from statute or case law
 - These laws regulate relations between people or organizations within the borders of the state (or country)
- Public law/private law
 - Public law: the organization of government and its relationship with the people
 - Private law: deals with disputes between individuals or organizations
- Substantive law/procedural law
 - Substantive law: the actual rights and duties of individuals and organization under the law
 - Procedural law: is concerned with the rules of evidence and the conduct of criminal and civil proceedings
- Common law/civil law
 - Common law: system of law where laws are made by both the Parliament and by the courts (decisions of the judges/precedent)
 - Used in UK, Australia, USA
 - Civil law system: is a written collection of rules/laws, the primary source of law is a legal code
 - No “judge-made” law
 - Used in most of Europe, Japan, central and south America
- Civil actions vs criminal actions
 - Civil: action brought by one individual/entity against another with an emphasis on remedies
 - Criminal: actions are brought by the crown (state) against an accused individual with an emphasis on punishment

Equity

- Equity is a body of legal principles or legal rules developed by the Courts of Chancery (“Courts of Equity”) in England
- England had two parallel court systems:
 1. Courts that could only award money damages
 2. Courts of equity that could issue broader range decisions
 - This has subsequently expanded to more than monetary compensation, imply more fairness and justice by expanding the remedies available
- Courts of equity developed as a result of the growing inflexibility and rigidity of the common law → came out of court, expanded equitable remedies

- Implies fairness a justice in the law
- Does not apply to criminal law
- Two types of equitable remedies sought:
 1. Injunction: a court order directing a person to stop doing something
 2. Specific performance: a court order directing a person to carry out an obligation

Chapter Two: Origins of Australian Law

Timeline:

1788: arrival of the first fleet and establishment of penal colony for convict settlement.

Australia inherits English system of law.

1823: court system and legislative council established

1828-1853: development of the NSW parliament and limited self-government

1865: Colonial Laws Validity Act gives right to make some laws independent of Britain (i.e. beginning of some legislative independence)

1901: Federation – commonwealth of Australia established

- The commonwealth of Australia constitution act 1900
 - Came into effect on 1 January 1901
 - Can be changed by a referendum which requires approval by absolute majority of both Houses of Parliament
 - Collection of rules that allows the government to make rules to look after the country, how courts are set up, how they work
 - In conjunction of creating commonwealth created dual government
 - Federal parliament with jurisdiction set down in com con
 - State (territory) parliaments with jurisdiction within their own borders
 - Transformed the six independent colonies into states

1931: Statue of Westminster gives rights for Commonwealth Parliament to repeal or amend laws made by Britain and states future British laws will have no force in Australia

1986: Australia Act removes all remaining legislative and judicial dependence and High Court becomes final court of appeal

Westminster System

- Inherited the Westminster system from Britain
 - Constitutional monarchy
 - The Queen of England is the head of the Australian legal system, but her role is really only ceremonial: The Queen acts on the instructions of the elected Australian government
 - Separation of powers
 - The functions of government are allocated to different institutions
 - The parliament → the legislature
 - The executive → the government/public service
 - Governor general (acts on advice of Prime Minister and Cabinet)
 - Prime minister & cabinet

- Government departments
 - The judiciary (judges/courts) → interprets the law
- Responsible government
 - A form of government which is responsive to public opinion and answerable to the electorate

Separation of Powers (part of the Westminster system)

- Under the doctrine of separation of powers:
 - The legislature (parliament) is the supreme law-maker
 - In reality there is no separation between the legislature (parliament) and the executive (government)
- Parliament
 - Role of parliament is to make and change the statute law
 - In all Australian parliaments there are houses of parliament (upper and lower) and legislation must pass both houses of parliament
 - The House of Representative (lower house and green house)
 - 150 members
 - each member represents an electoral division which contain approx. equal number of electors)
 - members elected by a system known as preferential voting, under which voters rank candidates in order of preference
 - the government must have a majority in the house of representatives
 - term of candidature: up to three years, after which general elections for a new house must be held
 - the senate (upper house and red house)
 - 76 senators, twelve from each of the six states and two from each of the mainland territories
 - term of candidature: six years' terms on rotation
 - plays an active role in making of legislation but cannot introduce bills parliament that:
 - authorize government expenditure or public revenue
 - bills that impose taxation
 - can only be done by the HoR

Separation of powers under the constitution

- exclusive power
 - those granted under the constitution to federal parliament exclusively and if there is a state law that conflicts with federal law s 109 of the constitution provides that state law will be invalid
- concurrent powers
 - are powers that the commonwealth shares with the states
- residual powers
 - are those powers that states exclusively hold because the constitution says nothing about them e.g. education, transport etc