

TOPIC 1: Introduction and foundations of Australian Law: The Australian Legal System

Lecture Notes

- **The Australian legal system has four key aspects:**
 - Aus is a democratic constitutional monarchy
 - The head of state is represented by the Governor General (Cwlth) and Governors (State)
 - All states, territories and the Cwlth have a constitution
 - Australia's system of government is marked by a separation of powers
 - Executive – 'executes' or 'gives effect' to the laws. Usually the cabinet ministers and the governor
 - Legislature – Passes the laws – the elected Parliaments of the Cwlth and States
 - Judiciary – Decides disputes as to the law – and the validity of laws in accordance with the Constitution
 - Australia is a federation
 - Aus is a Federal system of government – established by the **Australian Constitution in 1901**
 - Two sovereign tiers of government – Federal/Cwlth and State
 - Federal legislative powers are set out in the Constitution
 - Only the Cwlth Gov. is recognised in international law
 - Aus is a common law country
 - Legal system inherited from England
 - Civil law – heavy influence of Roman Law
- **Case Law/Common Law**
 - Judicial decisions can perform two roles:
 - Settlement of dispute between the 'parties'
 - Lay down new rule to be applied in future disputes
 - Rules laid down in cases determined before superior courts
 - Courts are arranged in a 'hierarchy'
 - Aus has nine hierarchies
 - 1 Cwlth/Federal
 - 6 states
 - 2 Territories
 - The highest court for all hierarchies is Australia's High Court
- **Statute Law/Legislation**
 - Laws passed by parliament
 - Most law today is now statute-based – passed by parliament
 - 9 legislatures, as there are court hierarchies
 - More comprehensive and systematic law-making than piece-meal judge-made decisions
 - In the event of inconsistency between State and Federal legislation, Commonwealth legislation prevails

Readings (Chapters 1,2,3)

- Australia is a common law country and its legal system is based on the English common law system
- Principles of civil law developed by deduction from the principles in the codes
- Principles of common law emerge based on cases decided by the courts
- Public Law governs the operation of the state and the relationship between the state and its citizens
- Private law is concerned with the relationship between citizens
- Civil law is the law of private disputes
- Criminal law is concerned with standards of conduct that their breach may result in punishment

- Parliament can make laws but cannot enforce them; the executive is inhibited from making new laws; the umpire of the system, the courts, can only monitor, not enforce these limits
- Public international law: the body of laws governing the rights and obligations of sovereign nations
- Private international law: also known as 'conflict of laws', determines issues of forum and choice of law in connection with disputes that cross national boundaries

TOPIC 2: Foundations of Australian Law: Indigenous Australians and the System of Law and Justice

Lecture Notes

- **Common Law System**
 - Law keeps changing and evolving
 - Origins of common law lie in history of Britain
 - Common law began in small communities
 - Judicature Acts of 1873 and 1875 (England)
- **The Roots of English Law**
 - England was initially part of Roman Empire
 - Anglo Saxon law was based on local custom
 - William – the Duke of Normandy conquered England, 1066
- **Creation of the Common Law Courts**
 - Common law courts consist of:
 - Court of Common Pleas – disputes between commoners
 - Court of Exchequer – heard financial disputes
 - Coram Rege (King's Bench) – heard disputes involving the king or royal interests
- **Magna Carta and the First Parliaments**
 - **1215 Magna Carta** – first serious step to constitutional government
 - 1414 Crown acknowledged no new statutes without the assent of the 'Commons'
- **Recognition of Indigenous customary laws**
 - At the time of colonization – Aus regarded as 'terra nullius' (empty land)
 - Led to non-recognition of prior ownership, any pre-existing body of law in Aus
 - English common law arrived at that time with concept of Crown's radical title to all land
 - 1971 Millirpum v Nabalco Pty Ltd (NT Supreme Court) – traditional customs and laws regulated relations of Indigenous people with the land, but not recognised by Australian common law
 - 1992 Mabo (High Court decision)- acknowledged Australia was NOT terra nullius at time of colonisation – Australian common law can recognise co-existence of Crown's radical title with a beneficial native title – depends on:
 - No subsequent inconsistent use
 - Native title claimants continuing connection with the land
 - **Native Title Act 1993** – mechanism for implementing common law as laid down in Mabo decision
 - 1996 Wik decision (High Court) – developed further notion of co-existence between native title and pastoral leases – what is inconsistent?

Readings (Chapter 4)

TOPIC 3: Case Law and Precedent

Lecture Notes

- **What is Case Law?**
 - 'Common law' or 'judge-made law' – law developed by judges
 - Important source of law in common law jurisdictions
 - Although statute dominates, case law is still important as courts interpret statutes
 - In each decision, courts:
 - Resolve the dispute before them
 - Can lay down a principle of law to be applied in future cases -
 - Courts therefore do not prevent disputes, they resolve them
- **How case law works?**
 - Legislation provides a complete framework of rules, but cases are different –cases are thought of as a separate building block
 - Each case lays down a principle – a building block – the legal principles often evolve over time
 - This is how the doctrine of precedent works (Court applies the principles or develops them by analogy)
- **Finding cases?**
 - Cases of lower courts – local and magistrates courts and district or country courts are rarely reported
 - Cases can be either reported or unreported – refers to whether or not they appear in a series of print Law reports
 - Authorised and unauthorized series of reports – unauthorised ones appear quicker, authorised are checked by the judges
- **Case citation**
 - Three types of case citation:
 - Catalogued by Volume Number
 - Catalogued by Year – or square brackets
 - Medium Neutral Citation
- **Case**
 - Cases are known by the names of people or parties
 - They are the parties to the dispute or case
 - Two types of cases
 - Civil – Hendron (Plaintiff) v Cockburn (Defendant)
 - Criminal – R (Rex or Regina – 'Crown': sometime 'State' or 'DPP' = The prosecution) v (against) White (accused) – R v White
- **Appeal Cases**
 - The name that appears first is the appellant – person bringing the appeal
 - The party who defends against an appeal is the respondent
 - In criminal cases, it becomes White v The Queen rather than 'R' if the crown is the respondent
- **Judges and Justices**
 - Normal to write the judge's name followed by his/her title in abbreviated form e.g. Gaudron J = Justice Gaudron and French CJ = Chief Justice French
 - Where there are multiple judges it is usual to write JJ

- **Reading and analysing cases – what is found in a case?**
 - Simple Method
 - Citation
 - Brief statement of material facts
 - Grounds of appeal/issue to be decided
 - Reasons for the decision – explains how laws are applied
 - Decision
 - Detailed Method
 - Citation
 - Court
 - Brief statement of material facts
 - Procedural history
 - Grounds of appeal/issue to be decided
 - Summary of courts analysis of the law
 - Principle of law to be applied
 - Description of how law was applied to the facts
 - Decision
 - Orders made
 - Social/cultural context
- **Material Facts**
 - Crucial to the court's decision – facts important to the court's reasoning progress
 - Who could see what and when
 - What speed people were driving
 - Was caution used
 - When dealing with an appeal case, the outcome of the previous decision is not a 'material fact' but part of the procedural history
- **Procedural History**
 - Record of the various courts in which the case has been heard before
 - A case that is being heard for the first time is said to be heard at first instance
- Issues to be decided/grounds of appeal
- Court's analysis of the law
- Principle of law to be applied
- How is the law applied to the facts?
- Decisions and orders
- Social or cultural context
- Appeals and multiple Judges

Readings (Chapter 6)