

LECTURE 2: LEGISLATURE

Historical Origins of Australian law

- The very first system of law before European settlement – aboriginal law. There were many small tribes and many systems of law.
When Western Europeans colonised many parts of the world, English law became the general law of Australia, almost completely displacing indigenous law.
- Two main streams of Western jurisprudence:
 - Roman law (sometimes referred to as the Civil law)
 - English law (often referred to as the Common law).
- Western European colonial settlement explains why most modern countries have a national law based on either English law or Roman law, and sometimes a combination of both

Nature of law

- Law is dynamic rather than static –constantly changing. Over a 200 year period, Australian law has developed as a legal system distinct from English law.
- Changes that are made to a nation's laws tend to be changes of detail rather than the wholesale adoption of fundamentally different principles.
- The legal system of a country tends to retain its basic principles and character, despite ongoing change. This explains why Australian law still shares many similarities with other legal systems that are also based on English law.
- Legal change must be brought about by a body with a recognised law-making power.
It's through disputes and adjudication of these disputes that the law is developed.
Civil law: courts adjudicate dense and comprehensively written laws (no gaps for court-made law)

Law-making bodies in Australia

- There are 2 major bodies in Australia with law-making powers.
 - Courts
 - Legislatures and local government councils
(and Government ministers and officials with specified powers)
- Laws made in the form of legislation is the most prolific source of new law in most modern countries. In Australia, there are many legislatures – the Commonwealth, states and self-governing territories all have legislative bodies.
When Commonwealth government was formed in 1901, states united (federation) but states still retained some law-making powers.
- Commonwealth and state legislatures can be referred to as either legislatures or parliaments.
- **Government** – the party or coalition of parties that holds the majority of seats in the lower house
Cabinet – prime minister, treasurer, and other key ministers

Identifying legislation

- Law made by legislature is called '**legislation**' or '**statutory law**' or an '**Act of Parliament**'.
- Each Act has a name. An example is the *Damage By Aircraft Act 1999* (Cth).

Law making powers of Australian Legislatures

- Each state and territory legislatures have a general legislative power “to make law for peace, order and good government”. This power is limited to their particular territory.
- State and territory legislatures share some powers with the Commonwealth parliament – **concurrent powers**.
- **The Commonwealth government has less general legislative power than the state and territory governments.**
The Commonwealth Constitution gives the Commonwealth parliament power to make law in relation to **specified matters only**.
Also, legislative powers of territories are smaller than states.

- Some of these powers are **exclusive** to the Commonwealth parliament while others are shared with the states:
 - Exclusive power → only commonwealth government can make laws in this area and states are restricted
E.g. s52 of the Commonwealth Constitution
 - Concurrent power → shared powers between Commonwealth and states
E.g. s 51 of the Commonwealth constitution
- To the extent that it is properly enacted in accordance with its constitutional powers, **Commonwealth legislation applies in all parts of Australia**.
- If the Commonwealth Parliament and a state or territory legislature legislate in a sphere **where legislative power is shared**, the enacted provisions **exist alongside each other** as long as the provisions **do not conflict**.
- **s109**: If Commonwealth and state or territory legislation conflicts in a sphere where the power is shared, the federal legislation prevails over the state legislation to the extent of the inconsistency.
E.g. McFain Case (doctor refused IVF treatment to a single patient)
Under Vic law, IVF services were only offered to married women or in de facto relationships.
Vic law regulated IVF services on a discriminatory way. Commonwealth law states there must be no discrimination when providing services based on marital status.

Law making powers of local governments

- Local governments are established by **state** and **territory governments**.
- Have specified powers to make laws called '**by-laws**' which operate in a small geographic location

The Legislative process

must be able to sufficiently explain: Bill, Explanatory Memorandum, First and second reading of a Bill, Debate, Passes both houses of Parliament (house for unicameral systems), royal assent (by GG) and Commencement

In **Victoria**, **Lower House = Legislative Assembly** and **Upper House = Legislative Council**

If lower house decisions are being overruled/dominated by larger populated states (more representation in parliament), then **upper house acts as a check**.

In a bicameral system, Bills can be introduced into the upper OR lower house (with some exceptions). Typically, bill is introduced to lower house.

House of origin = where legislation is first introduced

House of review = Second house the legislation passes through

Before the Bill...Proposals for new Legislation

Identifying the need for a new law	Circumstances or beliefs give rise to particular ideas and policies that require change to the law
Political processes	A decision is taken by those with political power to introduce new proposals into the legislature
Development of specific proposals	A Bill is drafted by parliamentary draftspersons

Drafting a new law

- **Gov proposals** for a new law are **considered by Cabinet** to settle any policy issues
- A request is made to a **parliamentary draftsperson** to prepare a Bill (draft legislation)

How a Bill becomes Law

- Bill must be passed by legislature to become law
- Most Aus legislatures are **bicameral**. Some Aus legislatures (State QLD and Territories) are unicameral.

Procedure in the HOUSE OF ORIGIN

Initiation	<ul style="list-style-type: none"> - Clerk of the house lists the Bill for its first reading. (sets the date)
First Reading	<ul style="list-style-type: none"> - The house grants permission to introduce the Bill and its <u>long title is read out</u>. - No debate at this stage. Debate is adjourned. - Copies of the bill are circulated to members of parliament – allows time for them to understand the Bill.
Second Reading	<ul style="list-style-type: none"> - It's moved that the <u>Bill be read a second time</u>. - Relevant Minister makes a speech explaining the <u>purpose of the Bill</u>. Opposition and government members speak in turn. (Non-government members can also introduce bills, but relatively rare since they don't have the majority.) - <u>Debate occurs</u>, and the motion is then <u>voted on</u> - If agreed to, the <u>title</u> of the Bill is <u>read a second time</u>. - Explanatory memorandum (summarises the intention of Bill and how it achieves it) passed out.
Committee	<ul style="list-style-type: none"> - Members of the house <u>form a committee to consider the Bill in detail</u>, or the house refers the Bill for consideration to a select committee for a <u>thorough review</u>.
Third Reading	<ul style="list-style-type: none"> - It's moved that the <u>Bill be read a third time</u>. - House <u>votes</u> on the motion. - If agreed to, <u>title of the Bill is read a third time</u>.

Procedure in the HOUSE OF REVIEW

Initiation, First Reading, Second Reading, Committee and Third Reading	Procedures that were followed in the House of Origin are followed again in the House of Review.
House of review can reject the bill in its entirety, pass the law, or propose amendments to the Bill.	
Un-amended Bills	Bill is <u>returned to the House of origin</u> and then <u>proceeds to the next stage</u> .
Amended Bills	Bill is <u>returned to the House of Origin</u> which may <u>accept the amendments in identical form or reject them</u> . If agreement can't be reached, Government can be dissolved and a general election called.
Royal Assent	Bill is sent to the <u>Governor General</u> , the Queen's representative, for royal assent.
Publication	Act is <u>published in the Government Gazette</u> .
Commencement	Act <u>commences operation</u> as law. Commencement date may refer to day royal assent was granted.

Finding a Particular Act

In law libraries, by ordering a copy from the government printer, or looking up legislation on Internet (e.g. austlii.edu.au)

Reading Legislation

- Skim through the legislation as a whole to get an idea of its structure, content and overall purpose
Take note of: title, objects clause, table of provisions, use of section numbers and headings, definitions section

- Find sections most relevant to your enquiry. Read them and surrounding sections. Follow up any cross-references to other sections. Check for defined terms.

E.g.



Mutual Recognition (Victoria) Act 1998 [Assented to 27 October 1998]

The Parliament of Victoria enacts as follows:

PART 1 - PRELIMINARY

1. Purpose

The main purpose of this Act is to continue the adoption of the Mutual Recognition Act 1992 of the Commonwealth.

2. Commencement

- (1) This Part, section 8 and Part 3 come into operation on the day on which this Act receives the Royal Assent.
- (2) Part 2 (except section 3) is deemed to have come into operation on 1 July 1998.

PART 2 - MUTUAL RECOGNITION

3. Definition

In this Part-
"Commonwealth Act" means the Mutual Recognition Act 1992 of the Commonwealth.

4. Adoption of Commonwealth Act

- (1) The Commonwealth Act, as originally enacted and as amended by regulations made before the enactment of the Mutual Recognition (Victoria) Act 1998, is adopted within the meaning of section 51(xxxvii) of the Commonwealth of Australia Constitution.
- (2) The adoption under sub-section (1) has effect for a period commencing on 1 July 1998 and ending on the day fixed under section 6 as the day on which the adoption terminates.

5. Regulations for temporary exemptions for goods

Without limiting any other power under any other Act, the Governor in Council may make regulations for the purposes mentioned in section 15 of the Commonwealth Act as adopted.

6. Termination of reference

The Governor in Council, by proclamation published in the Government Gazette, may fix a day as the day on which the adoption of the Commonwealth Act under section 4 of this Act terminates.

7. Transitional

Anything done or purporting to have been done after the expiry of the Mutual Recognition (Victoria) Act 1993 and before the enactment of this Act is deemed to have, and always to have had, the same effect as it would have had if the Mutual Recognition (Victoria) Act 1993 had not expired.

8. Consequential amendments

- (1) In section 170 of the Building Act 1993, sub-sections (3) and (4) are repealed.
- (2) Section 63D of the Legal Practice Act 1996 is repealed.
- (3) Section 4 of the Medical Practice Act 1994 is repealed.

PART 3 - TRANS-TASMAN MUTUAL RECOGNITION

9. Amendment of Trans-Tasman Mutual Recognition (Victoria) Act 1998

In section 4(2) of the Trans-Tasman Mutual Recognition (Victoria) Act 1998, for the words and expressions beginning "ending on the fifth anniversary" and ending at the end of the sub-section, substitute "ending on the day fixed under section 6 of this Act as the day on which the adoption terminates".

10. New section 6 substituted

For section 6 of the Trans-Tasman Mutual Recognition (Victoria) Act 1998 substitute-

"6. Termination of reference

The Governor in Council, by proclamation published in the Government Gazette, may fix a day as the day on which the adoption of the Commonwealth Act under section 4 of this Act terminates."

NOTES

Minister's second reading speech-

Legislative Assembly: 3 September 1998

Legislative Council: 7 October 1998

The long title for the Bill for this Act was "to continue the adoption of the Mutual Recognition Act 1992 of the Commonwealth, to amend the Trans-Tasman Mutual Recognition (Victoria) Act 1998 and certain other Acts and for other purposes."

Interpreting Legislation

- Sometimes, meaning of a section of legislation is uncertain. The section could mean one thing rather than another, or it could be applied too widely or narrowly. Such situations require statutory interpretation.
- **During statutory interpretation, we interpret law in a way that best suits the purpose of the Act.** (found in Part 1 – Preliminary)
- **Rules of interpretation** (these should be applied to resolve interpretation questions)
 - **Literal approach:** Give the words used their ordinary, natural meaning, taking into account the purpose of the legislation.
 - **...qualified by:**
 - **The 'golden rule':** If the literal approach gives an absurd result, or one that's repugnant, or inconsistent with the overall Act, modify the literal meaning to the extent necessary to avoid the absurdity or inconsistency. Applies very rarely.
 - **The 'purpose' approach:** If the literal approach doesn't give a clear meaning, and as a general aid to the literal approach, choose the meaning that best serves the intention of Parliament when it passed the Act.

When there's only 1 meaning → look at literal approach or golden rule

When there's more than 1 meaning → look at purpose approach and choose the meaning that most satisfies the purpose of the Act, looking at the intrinsic and extrinsic evidence

E.g. (LITERAL APPROACH) Higgon v O'Dea

- s84 *Police Act 1892*: every person who shall keep any house, shop or room... and suffers persons under the age of sixteen years to enter and remain...be liable to a penalty
- More modern cases see the literal approach as the starting point.

E.g. (GOLDEN RULE) Grey v Pearson

- s 61B *Wills, Probates and Administration Act 1898*: if the intestate (person died without leaving a will) leaves a husband or wife...the estate shall be held in trust for the husband **and** wife
- should have said '**or**', not '**and**'

The Purpose Approach

Intrinsic evidence of the legislature's purpose can be found in within the Act.

- ✓ Object sections, titles, long titles
- ✓ Structure of the act, including divisions and headings
- ✓ Information in schedules and annexures

Extrinsic evidence are secondary information which provide evidence of the legislature's purpose not within the Act.

- ✓ Parliamentary papers, reports and documents, including Second Reading speech
- ✓ Reports of law commissions and committees
- ✓ Background documents (e.g. international treaties and agreements)