

# INTRODUCING LAW AND JUSTICE

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# Overview of the Australian Legal System

## Required reading

Prue Vines, *Law and Justice in Australia: Foundations of the Legal System* (Oxford University Press, 3<sup>rd</sup> ed, Melbourne, 2009), pp. 3-9 (Chapter 1); pp. 18-33 (Chapter 2).

## Introduction (pp. 3-4)

The purpose of law is to ensure **justice**. A basic principle of justice is the doctrine of the **rule of law** which aims to prevent the arbitrary use of power.

Australian law has developed from English law, but immediately became distinct from it. The first distinction was made by Henry and Susannah Kable:

### Henry and Susannah Kable

- The Kables were prisoners being transported to Australia. They deposited money with their ship's captain but the money disappeared.
- Under English law, the Kables were 'civilly dead' due to the **doctrine of attainder**.
  - However, they were allowed to sue and this because the first civil case in Australia.

## A snapshot of the current Australian legal system (pp. 5-8)

Much of Australian law is derived from Britain.

### A system of representative democracy using parliaments to make laws

- Australia uses a system of **representative democracy** whereby people vote for representatives who sit in parliament and make laws.

### A legal profession divided either formally or informally into solicitors and barristers

- There is an **informal** distinction between solicitors, who advise clients and barrister, who appear in court.

### A 'common law' system

- The term '**common law**' has three meanings:
  1. The **common law legal system** which is a legal system derived from England as opposed to civil law (French, Germany etc.) or other legal systems.
  2. Common law also refers to the fact that judges make law based on decided cases. This is known as the system of **precedent**.
  3. Common law also refers to particular **branches of law**:
    - Common law.
    - Equity.

### Decision-making in courts after an adversarial trial

- The adversarial system use **juries** to decide matters of fact.

### A court system for dispute resolution

- Disputes are resolved in courts through juries and judges.

## The distinctiveness of Australian law (pp. 8-9)

### A federal system made up of a Commonwealth and states and territories

- Australia became a federation in 1901. This federal structure divides power between the state and Commonwealth parliaments.

### Limited recognition of Indigenous customary law

- There is limited recognition of Indigenous customary law in Australia.
  - Since *Mabo v Queensland (No 2)*,<sup>1</sup> the High Court overruled the **doctrine of terra nullius** and allowed for a system of native title rights.

<sup>1</sup> (1992) 175 CLR 1.

- The subject of Indigenous law had a lot of implications on the Australian legal system, and was discussed in *R v Wedge* (which was before *Mabo*):

### *R v Wedge* [1976] 1 NSWLR 581

- Affirmed the decision in *R v Murrell*,<sup>2</sup> that the plea of no jurisdiction has no substance.
  - 'The civil rights of all subjects of the King in NSW whether white or Aboriginal, were equally entitled to the protection of the criminal law; and secondly, that the jurisdiction of the Supreme Court of NSW extended to all persons in NSW'.
- It has been decided that NSW was a 'settled' colony, and therefore the English law was immediately transferred to it and to all its inhabitants.
- English law is the only law in Australia, and applies to Aboriginals as well.

## Australian law as an example of a common law system among other systems of law (pp. 17-24)

### Legal traditions

- Each legal system has unique characteristics; many characteristics are also shared. Examples of other legal systems include:
  - **Islamic law:**
    - Muslim law which is derived from the religious teachings of Islam. This body of law is known as the **Sharia** or the path of life to follow.
  - **Talmudic law:**
    - Law derived from the first five books of the Bible.
  - **Civil law:** (Germany, France, Italy etc.)
    - Civil law legal systems use the **inquisitorial process of trial** rather than the adversarial system.
    - Most law is **codified** and it does not recognise the role of judges as a source of law.
  - **Customary law:**
    - Refers to the legal system of Indigenous peoples. This is often based off spiritual and cultural connections to the land.

## International law (pp. 25-33)

International law refers to the law between countries or states. It is derived from:

- **Customary international law.** (practice that should be uniform across many states. States comply with it out of a sense of legal obligation)
- **Treaty (or convention) law.** (Agreements made between countries that can be bilateral or multilateral.)

Signing a treaty does not bind the state. It requires the **ratification**:

- This involves lodging a formal document with the body nominated in the treaty.
- Australia courts must obey the Australian law, regardless of the breach of international law. This is a matter of Australian constitutional law.

### International law and its relationship with municipal law

- There are two basic theories about the relationship between municipal and international law:
  - **Monism:** international law automatically binds a country domestically and enters into the domestic law of the country because all law is part of a universal legal order.
  - **Dualism:** the two legal systems are entirely distinct and so before an international treaty can become part of the domestic law; it normally has to be incorporated into domestic legislation.
    - Most countries such as Australia, UK and Canada take the **dualist** view.

### *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273

<sup>2</sup> (1836) 1 Legge 72.

- The ratification of an international convention can be the basis of a **legitimate expectation** as parliament, prima facie, intends to give effect to it. Therefore, if a decision-maker's ruling is inconsistent with a legitimate expectation; **procedural fairness** requires that persons affected will be given notice and an adequate opportunity to contest that course of action.
  - Note: the High Court has been reluctant to follow *Teoh*.
    - However, in *Plaintiff S 157/2002 v Commonwealth*,<sup>3</sup> Gleeson CJ referred to *Teoh* when he observed: 'First, where legislation has been enacted pursuant to 依据, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of ambiguity a court should favour a construction which accords with Australia's obligations'.

## The Courts in Action

### Required reading

Prue Vines, *Law and Justice: Foundations of the Legal System* (Oxford University Press, 3<sup>rd</sup> ed, Melbourne, 2009), pp. 267-273 (Chapter 11); pp. 295-327 (Chapter 12).

### Adversarial and inquisitorial procedures (pp. 269-272)

#### Adversarial

- A type of legal system found in **common law jurisdictions** that is characterised by opposing parties arguing their case before a neutral third party (a magistrate, judge and/or jury).
  - Complex rules regarding evidence – judges make rulings on admissibility of evidence.
  - Courts are not permitted to make enquiries or use their own personal bias.
  - Where there is a jury, the judge directs them on the law that they should apply to the facts..

#### Inquisitorial

- A type of legal system found in **civil law jurisdictions** that is characterised by a judicial officer having responsibility for the pre-trial investigations, and the conduct of the trial.
- The judge has an active role and may:
  - Direct parties to present witnesses or collect evidence.
  - Question witnesses.
- Minimal rules of evidence.
- Juries are rarely used.

### Jurisdiction (pp. 297-299)

Jurisdiction refers to the scope of a body's power to hear a matter, determine what the facts are, and apply the law to make a judgement.

- It includes the range of power and the territorial boundaries for the use of such power.
- No court can hear a matter over which it does not have jurisdiction.
- Jurisdiction is defined by statutes.
  - In NSW, the Supreme Court jurisdiction is unlimited.<sup>4</sup>

### State courts (pp. 299-303)

#### Supreme courts

- The Supreme Court is a superior court of record with general jurisdiction.
  - It has unlimited jurisdiction unless a statute limits it.

<sup>3</sup> (2003) 211 CLR 476, [29] (Gleeson CJ).

<sup>4</sup> *Supreme Court Act 1970* (NSW) s 23 – 'The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales'.