

Introducing Law & Justice - LAWS1052
FINAL EXAM STUDY NOTES

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WEEK ONE:

2. THE DISTINCTIVENESS OF THE AUSTRALIAN LEGAL SYSTEM AND THE PLACE OF AUSTRALIA IN GLOBAL LAW

The rule of law:

1. The law should be applied to all people equally and should be known by everyone
2. No one is above the law i.e. the law should not be applied arbitrarily. The rule of law may reduce arbitrariness but this does not necessarily promote fairness

- The rule of law means that all people are subject to the law and can rely on the law to set the bounds within which people and governments can operate.
- That is the rule of law can operate to prevent the arbitrary abuse of power.

Some of the derivatives of the (current) Australian Legal System from English heritage:

- A system of representative democracy using parliaments to make laws: Aust parliamentary government is based on ideas of individual liberty and limits on govt power in order to prevent the abuse of power.
- A legal profession divided formally or informally into solicitors and barristers.
- A 'common law' system: Common law has three meanings.
 - 1. The system derived from the English legal system. 2. Refers to judge made law (precedent). Legal reason for which judges decide their cases if called the ratio decidendi (common law is contrasted with parliament made law otherwise known as statutes or legislation).
 - 3. The third meaning of the phrase of common law refers to particular branches of law. In our law, there is a division based on the difference between the law which grew from the medieval royal courts and other areas of law, particularly the law which grew from the medieval Lord Chancellor's role (equity). Equity is theoretically distinct from the common law. It developed almost concurrently with the law of the royal courts, in a separate court over which the Lord Chancellor presided: the Court of Chancery. Common law in this sense is also distinguished from a number of other specialised areas of law which are distinct from both law and equity: for example, matrimonial causes law, admiralty law, trade practices law, and bankruptcy.
- Decision making in courts after an adversarial trial: The adversarial nature of our courts relates back to the historical 'trial by battles' which was brought to England by the Normans. Trial by jury was eventually introduced and this is also a derivative within our current system from the English tradition.

- A courts system for dispute resolution: The use of courts to resolve disputes is derived from heritage as well as the division of subject matter among the courts. In NSW the Court is divided into Common law and Equity Divisions.

The distinctiveness of Australian law

- The federal system made up of a Commonwealth and states and territories: A federal system is a way of separating the powers of different bodies of government. This was a pragmatic solution to the existence of separate dominions or sovereign states with some common problems.
- Limited recognition of indigenous customary law: In 1992, when *Mabo v Queensland (1992)* was decided, the courts recognised for the first time that the legal fiction that Australia was terra nullius, a land held by no one, was untrue. The High Court of Australia held that native title to land could exist separately from the common law and based on Indigenous customary law. Although the recognition this gave to native title has been partly eroded by statutory modification, the case marks a significant moment in Australian legal history. Other forms of recognition of Indigenous customary law are ad hoc, but do exist: for example, in the criminal justice system in the Northern Territory, punishments for crime may be carried out on a customary basis rather than under the common law in certain cases; and there have been cases where damages have been assessed differently because of customary law. Customary law marriage is recognised as marriage, and certain aspects of Indigenous heritage have been protected by statute.

WEEK TWO: 2. COURTS IN ACTION

- While the dominant pattern in the Australian legal system is adversarial, some areas are inquisitorial for example, the coronial jurisdiction and the use of directions by judges to expedite matters in the courts. The parties in the adversary system initiate it, set it up, call the evidence, call witnesses and merely use the court as a forum.

Adversarial	Inquisitorial
Judge unfamiliar with matter pre-trial	Judge directs pre-trial inquiry
Judge passive in development of evidence	Judge actively directs evidence
Advocates call and question witness	Judge calls and questions witness
Complex rules of evidence	Few rules of evidence
Defendant has right to silence	Defendant thoroughly questioned throughout trial
Guilt determined then sentence	Guilt and sentence determined together
Proof- Balance of Probability or Beyond Reasonable doubt	'Full proof' mathematical proof
Limited rights of appeal (law only)	Broad rights of appeal on law and fact
No new evidence admitted on appeal	new evidence may be admitted on appeal
Acquittal is final	Acquittal may be appealed
Lay juries	No lay juries
Prosecutor has discretion regarding charges (may plea bargain)	No prosecution discretion (no plea bargaining)

Adversarial versus inquisitorial classification

The role of the judge

- In the adversarial system, the judge sits on the bench and makes rulings about what evidence is admissible and what procedure should be followed, but otherwise does not

interfere with the running of the case. He or she does not ask questions except to clarify or ask a witness to repeat inaudible matter and the like.

- Proof may be dealt with mathematically, so that a piece of evidence is regarded as “half-proof” or “quarter-proof” before all is weighed up.
- Coronial justice: the coroner takes an active role in sending police to investigate matters, ordering post-mortem examinations and so on. This is an inquisitorial process, now called an inquest. The law of evidence does not operate as it does in a normal court.

Jurisdiction

- When a case goes before a court, it begins in the court which has original jurisdiction
- At its simplest level, ‘jurisdiction’, simply means the scope of a body’s power to hear a matter, determine what the facts are and apply the law to make a judgement.
- In *Harris v Caladine* (1991) 172 CLR 84, Toohey J said ‘jurisdiction is the authority which a court has to decide the range of matters that can be litigated before it; in the exercise of that jurisdiction a court has powers expressly or impliedly conferred by the legislation governing the court and “such powers as are incidental and necessary to the exercise of the jurisdiction or the power so conferred”.
- Jurisdiction is defined by section 77 of the constitution.

Court Hierarchy

- Neither Tasmania nor the Territories has a District (or intermediate) Court.

The State Court Hierarchy (criminal)

1. Local Court/ coroners/ magistrates/ petty sessions → 2. District court/ Country Court → 3. Supreme Court → 4. Court of Criminal Appeal/ Full Court → 5. High Court

The State Court Hierarchy (civil)

1. Local Court/ coroners/ magistrates/ petty sessions → 2. District court/ Country Court/ specialist courts and tribunals → 3. Supreme Court → 4. Court of Appeal/ Full Court of Supreme Court → 5. High Court

Supreme Court

- The Supreme Courts are the heirs to an ancient tradition. This ancient description means there is no limit on their original jurisdiction. As a court of record, a Supreme Court can summarily punish for contempt of court without legislative authority.

Intermediate Courts (District/ County Courts)

- The original jurisdiction of these courts in the civil domain is normally defined by monetary limits. The general jurisdictional limit in 2007 in NSW District Court was \$750 000 unless both parties consent.
- The pattern of criminal jurisdiction: Generally, jurisdiction is given to hear all indictable offences except for some specific offences.

Magistrates (local) Courts

- Magistrates have two core roles in their criminal jurisdiction: one is to carry out the committal process- that is, to decide at first instance whether or not there is a case to answer in relation to an indictable offence, and therefore whether the case should go to trial in the District or Supreme Court. The other major area in the criminal jurisdiction to deal summarily with particular lesser offences, coronial issues, children issues, traffic matters and so on.
- Magistrates also preside over a large range of civil matters, including small debts and small civil claims, and residential tenancy matters. Sometimes these are actually called 'tribunals' although magistrates preside. Maximum civil monetary limit in NSW is \$60 000 (unless the parties consent).

State tribunals and specialist courts

- These include the Drug courts.
- In administrative law, a tribunal is different from a court in that it may review the merits of administrative decisions as well as the legal issues, while a court would be confined to the legal issues.

Federal Courts

- In the 1970s the Federal Court and the Family Court were established and in 1999 the Federal Magistrates Court was established.
- Chapter III of the Cth Constitution provided that federal courts could be established and that state courts could be invested with federal jurisdiction. The latter is known as the 'autochthonous expedient'.

The High Court

- The High Court is a superior court of record with the same power to punish for contempt as the Supreme Courts. However, it is a court of limited or defined jurisdiction. The High Court has both original and appellate jurisdiction. As the highest court in the Cth hierarchy, it defines the law for all the jurisdictions, not just federal law. The original jurisdiction is set out in section 75 of the Cth Constitution.

- Section 76 allows the parliament to make laws which confer further original jurisdiction on the High Court in matters arising under the Constitution or involving its interpretation.
- Appeals as of right to the High Court were abolished in 1984 by amendments to the Judiciary Act and now appeals can only take place by special leave of the court.

The Federal Court of Australia

- The Federal Court is a superior court of record of law and equity established under the Cth Constitution section 71. It differs from the Supreme Courts in that it has defined or limited rather than general jurisdiction. Its original jurisdiction is conferred and defined by more than 150 acts of legislation. They include bankruptcy, trade practices, federal administrative law, admiralty, corporations law, civil jurisdiction over federal tax disputes, native title, and concurrent jurisdiction over intellectual property cases.
- The Federal Court also has accrued jurisdiction. This arises where matters of state jurisdiction or common law which are not matters of federal jurisdiction but are related to a Federal Court claim come to the court.

Federal Magistrates Court

- The Federal Magistrates Court was established as the Federal Magistrates Service by the Cth Parliament at the end of 1999. The jurisdiction of the Federal Magistrates is entirely civil.

Family Court

- The Family Court was established by the *Family Law Act 1975* as a federal superior court of record with limited jurisdiction.

Federal tribunals

- Federal tribunals exercise administrative, not judicial, power.

Notes and questions

1. What is the 'autochthonous expedient'?

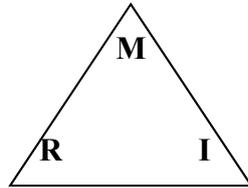
- Cth Constitution provides for state courts to exercise federal judicial power (s77) as well as state judicial power.

2. What is the difference between 'associated' and 'accrued' jurisdiction?

- Associated Jurisdiction: Power and authority to entertain proceedings in respect of matters not otherwise within the jurisdiction of the court but which are sufficiently connected with matters within jurisdiction.
- Accrued Jurisdiction: Generally the power or authority to adjudicate in the whole of a matter before the court.

- In *Re Wakim* the High Court gave a broad reading of the accrued jurisdiction: that there should be a single ‘justiciable controversy’, identifiable separately from the proceedings, with a ‘common substratum of facts’.

Case Law:



- 1. **Material Facts:** details of the case, background facts, Facts which are pertinent to the issue- not unnecessary facts void of value.
- 2. **Issue:** Legal issues.
- 3. **Rule/ Ratio/ principle:** the law that comes out of this case.

Reading a case:

- Know the ending: Who won?
- Go straight to the front and read the head note

Reading a case:

- Issue
- Material Facts:
- Re-read Issue:
- Arguments of Counsel:
- Evaluation of Arguments of Counsel:
- Explain the rule/ principle:
- Apply: (apply the rule or principle to the case itself)
- Order:

How Precedent is used

- Follow → Apply → Distinguish
- Same → Similar → Different

Legal Argumentation

- Literalist / formalist approach- looking at the letter of the law
- Purposive approach- arguing the purpose
- Analogy- Comparison

WEEK THREE & FOUR:

2. COMMON LAW COURTS: HISTORY AND METHOD

ROYAL COURTS AND THE DEVELOPMENT OF THE COMMON LAW

- The common law has developed in England by a series of courts established under Royal authority in the period following the Norman Conquest of 1066.
- William's insistence that he did not conquer England and the insistence in Australia that it was settled not conquered by the British.

The Royal Justice System

- Part of Henry II's genius was to centralise royal justice as both a means of raising revenue for the Crown and also consolidating England into one country, with loyalty owed to the king rather than merely to the immediate lord. His ability to delegate was vital, because he spent long periods out of the country in his other dominions such as Normandy.

Trial by Jury

- By the late 1600s, juries were expected to weigh up the evidence which was given to them and come to a conclusion based on that evidence.
- Minor criminal matters are generally tried summarily (that is without a jury) but it is usual to have a jury for more serious matters.
- Section 80 of the Commonwealth Constitution protects the right to trial by jury for indictable offences under federal law, although this right has been read down almost to non-existence.

The Magna Carta

- Magna Carta, the Great Charter, was a document King John was forced to sign in 1215
- There are clauses in the charter which limit the arbitrary use of power, and clauses relating to the court system.
- Magna Carta demonstrates that the king could be restrained.
- Clause 39: "No freeman shall be taken or/and imprisoned or disseised, or exiled, or in any way destroyed now will we go upon him nor will we send upon him, except by the lawful judgement of his peers or/and by the law of the land.
- Charter- recognises three basic principles namely, i) primarily every free man has an inherent individual right to his life, liberty, property, and citizenship ii) his individual rights must always yield to the necessities of the general welfare at the will of the state iii) the law of the land is the only mode by which the state can so declare its will.
- Habeas corpus → a prerogative writ which orders a person detaining another to bring them before the court so the legality of detention can be determined.