

## Week 1 – The Australian Legal System

### The Law and the Legal System

- **Law** → the system of control through which society operates
- **Legal system** → the totality of laws that regulate a state (a legally organised community), and the institutions through which these laws are enforced
- A legal system requires there should be:
  - A body of laws
  - Some source with the power necessary to create and alter those laws
  - Some institution with the authority to administer and enforce them
  - Some institution with the power to adjudicate disputes
- Types of legal systems:
  - **Common Law legal system** → laws are found in legislation and the decision of the judges developing common law and interpreting legislation
    - Australia is a Constitutional Monarchy – Head of state is the Queen who acts through the Governor General (Peter Cosgrove)
    - USA is a Presidential Republic – Head of state is president
  - **Civil Law legal system** → laws are codified – laid down in comprehensive statutory statements of the law
- **Constitution** → the system of laws, customs and conventions which define the composition and powers the state and regulate the relations the state to one another and to the private citizen
- Sources of law:
  - **Customary law** → established by the habitual use of a group of people over time
  - **Common law** → developed by the courts
  - **Legislation** → made by the body recognised by the legal system as having the power and authority to make laws (parliament)
- Requisites of law:
  - Certainty – know the consequences
  - Flexibility – responding to changes to society
  - Fairness – not inequitable, unfair or unreasonable
  - Accessibility – everyone can know the law
- Morality and justice are not precondition for a law, but requires the respect and cooperation of society

### The Australian Legal System

- New colonies were classified as either:

- Territory acquired by treaty or military victory – existing institution retained
- Territory that was settled – inhabitants not recognised and the English legal system applied
- Australia considered 'terra nullius' (land belonging to no one); it was settled by England rather than conquered
  - *Mabo v Queensland 1992*
    - High Court acknowledged Australia had not been 'terra nullius' and that common law recognises a form of native title to land
  - Native Title Act 1993 – Set up a Native Title tribunal to determine land claims
- Australia today:
  - Common law, federal system
  - Based on Westminster system, which incorporates:
    - A constitutional monarchy
    - Separation of powers
    - Responsible governments
    - Rule of law
- **Common law legal system** → based on traditions, procedures rules and institutions developed in England
  - System of law – opposed to civil law system
  - Judge-made law – opposed to legislation
  - Judge-made law developed in common law courts – opposed to equity
- Federal system
  - In 1900, the Australia Constitution united the colonies in a federation
  - Involved a division of power between the States and Commonwealth
- Constitutional Monarchy
  - Head of state is Queen → represented in Australia by GG
  - Queen holds that position pursuant to underlying constitutional arrangements rather than by force of arms
- Under the Westminster system the separation of powers is not absolute
  - Extent and nature of GGs reserve power is unclear
- The rule of law is a "tradition" rather than a law
  - Maintains balance between freedom and legislative power
  - Requires all members of society to be subject to the law

## The Constitution

- The Australian Constitution
  - 1899: constitution was put to referendum and approved
  - 1900: The British Parliament passed the *Australian Constitution Act*

- 1901: Commonwealth of Australia came into existence on 1/1, States gave up certain powers, rights and duties to new central government. Retained great deal of legislative authority
- Chapters:
  - The Parliament
    - Consists of Queen, Senate, House of Reps (s1)
    - Provides the establishment of Houses, the significant procedures and the powers of the Parliament
  - The Executive Government
    - Executive power of Commonwealth in Queen, exercisable by GG's the Queen's representative (s61) with the advice of the Federal Executive Council (s62)
  - The Judicature
    - Vests the judicial power of the Commonwealth in the High Court of Australia and any other Federal courts created by the Parliament (s71)
  - Finance and Trade
    - Section 90 grants exclusive power to the federal Parliament over customs and excise duties
    - Section 92 provides that "trade commerce and intercourse among the States ... shall be absolutely free"
  - The States
    - Preserves State constitutions (s106), State laws (s108) and power of State parliaments (s107)
    - Section 109 deals with conflicts between Commonwealth and State laws
  - New States
    - Provides for new states to be admitted to the Commonwealth (ss121,124) and for the territorial limits of a State to be altered (s123)
    - Provides for the Commonwealth Parliament's authority over the territories (s122)
  - Miscellaneous
  - Alteration of the Constitution
    - Section 128 provides the procedure by which the constitution may be amended
    - Amendment must be passed by:
      - Both Houses of Parliament
      - By majority of voters
      - By majority of States

## Separation of Powers

- Legislative functions (power to make the law) – Parliament (legislature), Queen, Senate, House of Reps (s1)
- Executive functions (power to administer the law) – The crown (Queen, GG, Ministers) and the government (s61)
- Judicial functions (power to interpret the law and apply it to individual cases) – courts (s71)

## The Executive Government

- Executive function is the carrying out, administration and enforcement of the law
- **Executive council** → established by section 62 and comprises all Ministers of the government
  - A formal advisory body which also has substantial powers to make laws under powers delegated to it by parliament
- **The cabinet** → comprises only the senior Ministers
  - Centre of government's decision making process
  - Not expressly referred to in the Constitution (neither is PM)
- **Public service** → carries out the admin of government
  - Divided in to policy area-based departments
- **Statutory authorities** → established by acts of parliament at the instigation of the government
  - More than 500 in Australia
- Making decisions:
  - Parliament can pass legislation that grants Ministers or public servants discretionary powers to make decisions with significant effects, e.g. grant or refuse a licence or pension, power to impose a penalty
- Challenging executive decisions:
  - The Ombudsman
  - Freedom of information laws
  - The Administration Appeals Tribunal – merits review
  - Judicial review of administrative decisions