

## BTC1000 Course Notes

### 1 - The Australian Legal System

**Positive Law** – comes from two sources: the courts and parliament.

- Its capacity to be enforced is large, which is not found in any other set of rules. Enforced by the State.

#### Role of Law

- **Regulatory Function:** directs us how to act or behave. Tells us what we can do (entering into a contract), what we cannot do (underpaying employees) and what we must do (pay taxes).
- **Dispute Resolution:** courts and judges are delegated responsibility to resolve disputes and provide justice.
- **Stability & Social Cohesion:** law creates social stability without mass conflict and insecurity. Thus brings trust, order and predictability. Give more certainty about the future.
- **Justice and Rule of Law:** to uphold.
- **Community Values:** law can respond to social change, e.g. legalising gay marriage, or it can promote social change, with regards to certain environmental sustainability practises being enforced (e.g. carbon tax). Law aims to respond and promote social change.

#### The Rule of Law

- Recognises that everyone is equally subject to and protected by the law. Individuals invested with power by the state must also be subject to the law.
- Notion that no one is above the law comes from the **Magna Carta**... before it was created, Monarch of England had unlimited power.
- Each branch of government (legislative, judiciary and executive) can limit the power of the other branches, called **checks and balances**.
- Judiciary must always be independent from the other two branches, which may overlap.  
**Judicial Independence**
- Law needs to be public, clear and accessible for everyone. **Knowing the Law**
- All members of society must have access to a court/justice (**access to justice**), e.g. Legal Aid for those without sufficient financial backing.
- **Freedom of the Press.** Role of the media is to scrutinize and criticise those in power, and thus is fundamental in the role of checks and balances in the branches of government.

#### Doctrine of the Separation of Powers

- Says government has 3 main branches.
- **Judiciary:** to apply the law and decide legal disputes
- **Executive:** to put the law into practise
- **Legislative:** to make laws
- Must be kept separate, and that different people must hold different powers with regard to the law.
- Citizens are more protected when power is separated between different people in comparison to one person.
- Can sometimes overlap – executive branch appoints members of the judiciary, the legislative and executive are both a part of parliament, the Crown is also a part of the executive and legislative (royal assent).

**Checks & Balances** – principle that each branch of government has the power to limit or check the other two. Creates a balance between the 3 separate powers. Mechanism that allows a review of the other branches, and thus each branch is accountable for each other.

### Role of the Media

- Often triggers the checks and balances to occur within the branches of government through information and scrutiny provided regarding decision making.

**Federation:** system where a **central** government and **state** governments coexist. The 3 branches of gov (executive, judicial, legislative) are also split up with differences at the federal and state level.

- Citizens must comply with both federal and state law.
- Central authority with smaller units making it up.
- Issues of a national level are decided at the federal level, smaller units (states) decide things of a state level.

### Federal Government

- **Organisation:** Parliament (legislative), Prime Minister and Cabinet (executive), High Court and other courts (judicial).
- Formed by **the Senate and House of Representatives**. They make federal/commonwealth law. Party with most seats in HOR form executive government, and leader of this party will become PM. Executive government comes from the parliament, and therefore separation between legislative and executive branches are not that clear, and overlap. Regardless of this, **Judiciary is always independent** and separate from the other two branches.
- **Westminster Based Parliamentary System:** where executive and legislative overlap.

### Legislative Powers – Cth vs States

- Legislative powers are distributed between the Cth and States. The matters which are addressed by the Cth Parliament are set out in S.51 of the Constitution.
- **Exclusive powers:** areas of law making that only the Cth can enact.
- **Concurrent powers:** areas of law making shared by the Cth and the States.
- **Residual powers:** any matter not mentioned in the Constitution for the Cth are left to the States.

With Concurrent powers, State and Cth law may be inconsistent. When this occurs, the Cth law prevails due to S.109 of the Constitution stating that when State and Cth law are different regarding the same/similar matters, state law becomes invalid.

### E.g. EHT 18 v Melbourne IVF

State law: needs consent from husband for IVF to be issued to woman.

Cth law: it is unlawful to refuse services based on sex or marital status.

- Thus there is an inconsistency in law regarding the rejection of IVF treatment to the woman, and as the Cth law prevails, the state law becomes invalid, and thus the husband's approval does not need to occur.

