

## W1 The Australian Legal System

### Learning objectives

1. Business and the law
2. Law and legal system
3. Australian legal system
4. The Constitution
5. Separation of powers
6. Executive branch of government

### Reality of business regulation

- Complex federal legal system with federal, state/territory and local government laws
- Massive body of legislation
- Increasingly comprehensive and complex regulation
- Impact of judge-made law interpreting legislation and developing the unwritten law
- Increasingly litigious environment supported by class actions and litigation funding despite the growth of alternative dispute resolution (ADR)
- Powerful regulatory agencies
- Legal action as a potent commercial weapon
- Personal and corporate liability

### Law and legal system

- Law: system of control through which society operates
- State: a legally organised community
- Legal system: totality of laws that regulate the state and institutions through which these laws are promulgated, applied and enforced
- Requirements for legal system
  - Body of laws
  - Some source with the power necessary to create and alter those laws
  - Some institution or process with the authority to administer and enforce those laws
  - Some institution with the power to adjudicate disputes→ i.e. laws, parliament, gov, courts
- **Types of legal systems** – Common law legal system & Civil law legal system
  1. **Common law legal systems** (= Adversarial system)
    - Laws are found in legislation and the decision of the judges developing the **judge-made law (common law)** and interpreting legislation

- 3 meanings of the term 'common law':
  - o type of legal system (common law legal system)
  - o **judge-made law** (as opposed to legislation, also refers to **precedent = unwritten law**)
  - o judge-made law which developed in the common law courts (as opposed to equity, the judge-made law made in the equity/chancery courts) → more in depth in week 3
- Common law ≠ common law system
- Law that has evolved through **judicial decision** and practice
- Common law found in decisions of cases (**case law**)
- e.g. of countries using common law: Australia, NZ, US, UK, Malaysia, Canada, Singapore, India, etc
- However, there are still differences within each type of law system
- E.g. Australia and US both follow a common law legal system, **but Australia is a constitutional monarchy while US is a presidential republic**
  - o Constitutional monarchy: country is ruled by a king and queen whose power is limited by a Constitution
  - o Presidential republic: democratic and republican system of government where head of government leads an executive branch that is separate from the legislative branch. This head of the government is also the head of the state mostly, called president.

## 2. Civil law legal systems (= Inquisitorial system)

- Laws are codified – laws are laid down in comprehensive statutory statements of the law
- i.e. **written law**
- e.g. of countries using civil law system: Germany, France, Europe, Asia, South Africa, etc

\*There are still many other types of legal systems; **Australia has 9 separate legal systems**

- Legal systems around the world



## Sources of law

- **Customary law:** law established by the **habitual use** of a group of people over time (verbal)
- **Common law:** **law developed by courts** (Common law started to replace customary law as time passed)
- **Legislation:** laws made by a body recognised by the legal system as having the power and authority to make laws (usually Parliament)

**Requisites of law** – certainty, flexibility, fairness, accessibility

### ① Certainty

- Enabling people to engage in transactions and relationships, reasonably secure in knowing the consequences
- The worst law is the law with uncertainty

### ② Flexibility

- Responding without undue delay to the challenge of change at all levels of society
- Flexibility is required in changing uncertain law to certain law with justice

### ③ Fairness

- If law is to be accepted by members of society, it should not be inequitable, unfair or unreasonable
- Although there are no specific legal requirements that law should be fair and moral, morality is still important especially in multicultural society like Australia

④ Accessibility: All people should have access to knowledge of law, either directly or through intermediaries

**Law, morality, justice and social values**

- Morality and justice are not necessary preconditions for a law
- However, respect and cooperation of society is the condition for legal system to function
- “Respect for law is the condition upon which our whole social order depends” – Lyndon B. Johnson
- Parliament and the Courts sometimes struggle to reconcile public opinion and law, particularly in multicultural country such as Australia

### Australian legal system

- Origins of Australian legal system
  - Colonisation and reception of English law
  - Increasing legislative power of the colonies
    - *Colonial Laws Validity Act 1865 (UK)*
    - *Statute of Westminster Act 1931 (UK)*
  - Colonial/State Constitutions
  - Colonies to States on Federation
- New colonies were classified as either:
  1. Territory acquired by treaty/military victory: existing institutions were retained until changed
  2. Territory that was settled (by colonising power): inhabitants were not recognised and English legal system was implemented
- Australia was considered to be **terra nullius**
  - It was **settled by England** rather than conquered
  - Terra: land, nullius: nothing, 0 → empty continent
- Overturing terra nullius occurred throughout 2 main cases:
  1. ***Mabo v Queensland (No.2) [1992] HCA 23***: The High Court acknowledged that Australia had not been terra nullius and that common law recognises a form of native title to land
  2. ***Native Title Act 1993 (Cth)***: Set up a Native Title to determine land claims  
\*(Google) Mabo decision was a turning point for recognition of Aboriginal and Torres Strait Islander people’s rights as it acknowledged their unique connection with the land and also led to Australian Parliament passing the Native Title in 1993

**Australian legal system today** – Common law legal system, Federal system, Westminster system (Constitutional monarchy, separation of powers, Responsible government, Rule of law)

### ① Common law legal system

- (mentioned above)

- Based on the traditions, procedures, rules and institutions **developed in England**
- Common law legal system VS Civil law legal system

## ② Federal system

- Until 1 Jan 1901, Australia did not exist. The continent was named Australia, but only referred to the world largest island, not a nation or a state
- In 1900, the Australian Constitution acted by English Parliament (since Australian Parliament did not exist) united the colonies of one country, Australia, in a federation (연합)
- Federation involves **division of powers** between the States (the former colonies) and **the Commonwealth**  
(division of powers to be discussed in depth in W2)

③ Based on **Westminster system** (which incorporates **constitutional monarchy**, **separation of powers**, **responsible government**, **rule of law**)

### **Constitutional monarchy**

- Monarchy: The **head of the state is the Queen** → Represented in Australia by the **Governor General** (or for the states, the Governor)
- (as mentioned above) Constitutional monarchy: country is ruled by a king and queen whose power is limited by a constitution
- The Queen holds that position pursuant to underlying constitutional arrangements rather than by force of arms

**##Separation of powers** – Legislative function (Parliament), Executive function (Government), Judicial function (Courts)

There are **3 functions of government** which are allocated to different institutions (Delegation of 3 main gov functions)

#### 1. Legislative function – Parliament

- Legislative power is the power to make and decide the law
- Parliament is the only government that can make the law