

Week 2 – Sources of Law and Legal Institutions

Separation of Powers

- Legislature – makes law.
- Executive – administers law.
- Judiciary – interprets law.

Representative Government

- Members of Parliament elected by citizens of Australia.
- Senate and House of Representatives shall be composed of members of each state, directly chosen by the people of the state.

Rule of Law

- Government must find lawful authority for every action that it takes.
- Authority must be found in the common law or legislation.
- Absent authority from either of these sources – government prevented from taking action.

Responsible Government

- Executive branch of government is accountable to the legislature.
- Ministers comprising the executive are elected representatives who are also members of parliament and answerable to parliament.

Parliamentary Sovereignty

- Parliament holds the supreme law making power.
- Can create new legislation, repeal legislation and delegate the authority to make legislation.
- Parliament can always overturn the common law – where a court makes a decision parliament doesn't like they can overturn it.

Sources of Law

- Primary:
 - Legislation/statute/act of parliament.
 - Delegated legislation.
 - Words to look for to determine – “Act”.
 - Case law.
- Secondary:
 - International law.
 - Law reform commission reports.
 - Academic commentary.
 - Words to look for to determine – “regulations”, “ordinances”, “by-laws”, “rules”.

Where the Authority Comes From

- Commonwealth of Australia Constitution Act 1900:
 - Exclusive.
 - Concurrent.
 - Residual.
- Constitution Act 1855 (Vic).

Statute.	Delegated Legislation.
Made by parliament.	Made by bodies/office-holders delegated law making power.
Commonwealth Parliament.	Governor-General.
State Parliaments (Vic, NSW, QLD).	Governor.
Legislative Assemblies (ACT and NT).	Minister of the Crown.
	Statutory body (VicRoads, ATO).
	Municipal council.

Function of Legislation

- To make new law.
 - Charter of Human Rights and Responsibilities Act 2006 (Vic).
- To repeal and old law.
 - Summary Offences Act 1966 (Vic).
 - E.g. when societal norms change.
- Codify existing law.
 - Wrongs Act 1958 (Vic).

- Torts used to be primarily common law but the legislation tried to codify case law to make them into common law.

Delegated Legislation

- Not made by the parliament enactment process.
- Methods may be prescribed by the statute which authorises the particular form of delegated legislation.
- Regulations, the most common form of delegated legislation, are made by a process of signature, notification and tabling in parliament.
- Never called an "Act".

Primary Sources of Law

- Case Law:
 - Decisions about a legal issue.
 - Authoritative explanations of legal principles.
 - Can assist in understanding the meaning of an Act and how the Act should be interpreted and applied.
 - Court has to make a decision between competing arguments on a legal issue.
- Jurisdiction:
 - The power of a court to adjudicate on particular matters.
 - Original jurisdiction.
 - Appellate.
 - Civil.
 - Criminal.
 - State.
 - Federal.

Civil.	Criminal.
Individual against individual (usually about financial compensation).	State versus person.
Burden – about the probabilities.	Burden – beyond reasonable doubt.
Juries – 6 members.	Juries – 12 members.
Result – financial compensation.	Result – guilty or not guilty.
Outcome – compensation.	Outcome – imprisonment, fines, corrections, etc.

Federal Jurisdiction

- High Court of Australia – *Commonwealth Constitution*:
 - Original – sits as a single justice – hears disputes about federal law (if unhappy – appellate).
 - Appellate – sits as a panel of three, five or seven justices and hears appeals from decisions of state/territory Supreme Courts, Federal Court, Family Court and any HCA justice exercising original jurisdiction.
 - Special leave to be sought – no automatic right of appeal.
- Federal Court of Australia – *Federal Court of Australia Act 1976* (CtH):
 - Original – single judge dealing with matters of federal law such as consumer protection, compensation regulation, intellectual property and bankruptcy.
 - Appellate – full court of 3 judges and hears appeal from decisions of the single Federal Court judges and from the Federal Circuit Court.
- Family Court – *Family Law Act 1975* (CtH):
 - Original – single judge hears matters regarding divorces, property settlement and maintenance and custody of children.
 - Appellate – full court hears appeals from single judge of the Family Court, from the Federal Magistrates and State/Territory Magistrates exercising family law jurisdiction.
- Federal Circuit Court of Australia – *Federal Magistrates Act 1999* (CtH):
 - Established to reduce the workload of the Federal Court.
 - Less than 2 years waiting times.
 - Half cost of Federal and Family Courts.
 - More expedient and cheaper for litigants to access.
 - Jurisdiction is concurrent with the Family and Federal Courts.
 - Runs out of the same building.

State Jurisdiction

- Supreme Court of Victoria - *Supreme Court Act 1986* (Vic):
 - Original – unlimited civil and criminal jurisdiction.
 - Can award as much money as they think you deserve.
 - Appellate – sits as full court (Court of Appeal) consisting of 3 judges.
 - Hears appeals from Magistrates' Court on points of law.
 - Hears appeals from County Court on all issues.

- County Court of Victoria – *County Court Act 1958* (Vic):
 - Original – single judge hearing civil matters (unlimited monetary amount) and criminal matters involving most indictable offences (requires trial).
 - Faster and cheaper than Supreme – gives same amount of reward.
 - Appellate – single judge hearing appeals from the Magistrates’ Court in relation to an imposed sentence or conviction.
- Magistrates’ Court of Victoria – *Magistrates’ Court Act 1989* (Vic):
 - Single magistrate.
 - Jurisdiction to hear civil matters up to \$100,000.
 - If seeking more – straight to County or Supreme.
 - Jurisdiction to hear criminal matters involving minor offences such as shoplifting and traffic offences.

Tribunals

- Created by parliament to hear and decide specific matters.
- Administrative alternatives, not judicial alternatives.
 - Cannot actually change the common law.
- E.g. VCAT - *Victoria Civil and Administrative Tribunal Act 1998*.

Secondary Sources of Law

- Sources that guide the decision making of the courts and parliament when making primary sources of law.
- The sources that assist you in locating and understanding the relevant primary sources.
- E.g. a Victoria Law Commission Report – may guide new legislation parliament is going to introduce.

Law Reform Commission Reports

- Academic research on areas of law that require reform.

Academic Commentary

- Textbooks.
- Journal articles.
- Conference papers.

International Law

- Public or private.
- Not authoritative – compare when there is no law in Australia.

