

## Week 1 – Topic 1A – The Basic Concepts of Law

The law is comprised of a **set of rules** created over a period of time that attempt to **regulate the behaviour of individuals, businesses and society**.

A **legal rule** must be followed by all citizens of Australia for example the Trade Practices Act whereas a **non-legal rule** is a rule that is made by a specific institution that only affects those within the institution, e.g. a school or sporting club.

**Law** is divided into **two main areas** being *criminal law* and *civil law*.

**Criminal law** involves the enforcement by the state; these laws are designed to protect the individual and the community. It involves:

- ☆ Prosecution v. defendant
- ☆ Action is brought by the Crown (State) on behalf of the rest of society
- ☆ Burden of proof rests with the prosecution
- ☆ Standard of proof is *beyond all reasonable doubt*

The aim of criminal law is to punish the offender and protect/ control society. Some penalties include fines, community service and imprisonment.

**Civil law** involves the regulation of the actions of individuals in their dealings with each other. It involves:

- ☆ Plaintiff v. defendant
- ☆ Action is brought by one individual against another
- ☆ Burden of proof rests with the plaintiff
- ☆ Standard of proof is on the *balance of probabilities*

The aim of civil law is to compensate the injured party; some remedies include damages that may be monetary compensation.

Australia operates under the common law system that uses case/statute law, the origins of the common law system, equity law, the doctrine of precedent and the precedent of the court hierarchy.

### Common Law System Origins

- ★ In its evolution the law of England varied from region to region.
- ★ It was based on custom and was declared by the courts from case to case.
- ★ The law eventually became **common knowledge** to all, thus the common law of England.
- ★ One major feature of the Common Law System is precedent, which involves similar cases being decided in a similar manner
- ★ Damages: main remedy of Common Law

### Equity Law

- ★ Where people were unable to obtain a remedy for their grievances in the common law courts, they turned for help to the King's chancellor.
- ★ Consequently, the **Court of Chancery** emerged, which administered the law of equity. The **law of equity** was not seen as a rival system to the



common law but as supplementing it by providing remedies that the common law courts could not provide.

### **Equitable Remedies**

Order of Specific Performance

- ★ An equitable remedy compelling a person to perform his part of a contract where damages would not be sufficient compensation for breach of contract.

Injunction

- ★ A court order whereby a party to an action is required to do or stop doing a particular act.

All of the states and territories of Australia have *adopted a fusion of Common Law and Equity Law*. The **one court can administer both** of these but it is still necessary at times to refer to the position at common law or the position in equity law.

At times there can be conflict between equity and common law, if this does occurs ***the law of equity will always prevail.***

### **The Doctrine Of Precedent**

This is created in two ways:

1. Law made to cover cases in the first instance therefore there was no precedent beforehand.
2. Statutory Interpretation, this is where the courts interpret Acts of Parliament and upon completion this becomes precedent.

### **Australian Court Hierarchy**

Full High Court

High Court

Victorian Court of Appeal

Supreme Court

County Court

Magistrates Court

There are two types of precedent, one being binding precedent and the other being persuasive precedent. **Binding, lower courts are bound by the higher courts in the same hierarchy.** Persuasive is used as a guide and occurs when being persuaded by decisions from other court hierarchies (UK), same court level ad lower court level.

Law can **change** by the following occurring. A precedent can cease to be law or its application may be modified in several ways through overruling, reversing, distinguishing and disapproving.

A judgement or report on a case contains the title of the case, year, reference number, facts, division, ratio decidendi and obiter dictum. A judgment is a decision of a court regarding the rights and liabilities of parties in a legal action



or proceeding. Judgments also generally provide the court's explanation of why it has chosen to make a particular court order.

### **Ratio Decidendi and Obiter Dictum**

Ratio Decidendi is the “reason for deciding” binding part of precedent. The part of a precedent **that must be followed** and at times can be very difficult to find.

Obiter Dictum is the ‘statements made along the way’ that comprise of opinions, observations and general comments. These are only ‘**persuasive**’ and may be influential in the determination of a decision.

### **How to Recognise a Case**

Plaintiff or appellant is first name; defendant or respondent is second name. Year is the year when the case was reported in a law report, next is volume of law report, next refers to the series of law reports that is reported, next is the page where the volume begins.