

Australian legal system

Common Law legal systems

- Laws are found in legislation and the decisions of the judges developing the judge made law (common law) and interpreting legislation. → **Australia uses Common Law**

Civil Law legal systems

- Laws are *codified* – laid down in comprehensive statutory statements of the law

The requisites of law

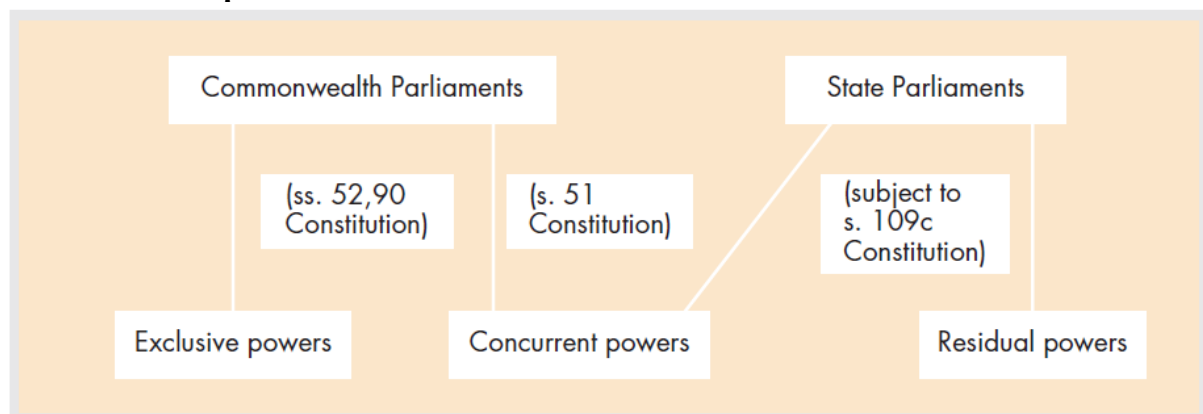
- Certainty:** enabling people to engage in transactions and relationships, reasonably secure in knowing the consequences.
- Flexibility:** responding without undue delay to the challenge of change at all levels of society.
- Fairness:** if law is to be accepted by members of society, it should not be inequitable, unfair or unreasonable.
- Accessibility:** all people should have access to knowledge of the law, either directly or through intermediaries.

Separation of Powers

- Legislative power** is the power to make law.
 >> **Parliament** (parliament question the government)
- Executive power** is the power to administer the law.
 >> **the Government**
- Judicial power** is the power to interpret the law and apply it to individual cases.
 >> **the Courts**

The ministers who comprise the executive council are members of the parliament.

The Division of power



Concurrent power S51

Commonwealth v Tasmania (1983) → Did section 51(xxix), the external affairs power, support Commonwealth legislation prohibiting Tasmania building a dam on the Gordon River to generate electricity?

Tasmanian government challenged these actions, arguing that the [Australian Constitution](#) gave no authority to the federal government to make such regulations. In May and June 1983, both governments put their case to the High Court of Australia

The federal government had taken a range of actions, which they claimed were authorised under specific subsections of section 51. The Tasmanian government disputed these claims. Section 51(xxix) of the Australian Constitution gives the federal parliament the power to make laws with respect to external affairs.

High Court held that the federal government had legitimately prevented construction of the dam, and that the *World Heritage Act* was authorised under the "external affairs" power.

Concurrent Example 2:

CASE: The Commonwealth v Australian Capital Territory (2013) HCA 55:

INTRO: The ACT passed a Marriage Equality (Same Sex) Act 2013 (ACT) which provided marriage equality for same sex couples.

CONFLICT: the marriage act 1961 (cth) which laid down marriage between a 'man and a woman'. however under s51 (xxi) it says that the concurrent powers include 'marriage' as one of the heads of power, which the ACT used to legislate this 2013 Marriage Equality Act. However, under s109, if there is a conflict between legislation regarding concurrent powers between Commonwealth and State Governments, Federal Parliament prevails.

RESOLUTION: Thus, 'the provisions of the ACT act remain inoperative because the marriage act continues to define marriage differently'.

Under s51 (xxi) permits that the federal parliament to make law with respect to same sex marriage

Exclusive Powers: the powers that only the government have, only parliament have invested in the federal commonwealth parliament by the constitution. E.g. Customs and Excise Duties = s90. Other exclusive powers granted by s52 - the seat of government.

Concurrent Powers: those exercisable by either federal or state parliament = overlapping powers. **S51** of the constitution says there are 39 specific heads of powers, e.g.

- 1) trade and commerce with other countries
- 8) Astronomical observations
- 10) Fisheries in Australian waters beyond territorial limits
- 28) The influx of criminals

Section 109: In the event of a conflict between state and federal parliament, the constitution states that the federal parliament overrides.

Residual Powers: all powers that are non-exclusive and non-concurrent powers, "The rest". E.g. education, roads, transport, crime.

The legislative process

1. **The original idea**
2. **Drafting of a Bill**
3. **Parliamentary process** (1st reading – place bill before parliament; 2nd reading [committee stage – all parties sit down and argue/compromise]; 3rd reading – parties vote on it)
4. **Royal Assent** (Governor General signs off)
5. **Commencement**

- **Delegated legislation** is legislation made not by Parliament but by a delegate upon whom Parliament has conferred legislative power.
- By-laws, rules, regulations

- Reasons for delegated legislation
- The most common delegate of Parliament is the executive government.
- It is becoming increasingly common for Acts to simply provide a general framework for the law, leaving delegated legislation to ‘fill in the gaps’.

Challenging executive decisions

- The Ombudsman
- Freedom of information laws
- The Administrative Appeals Tribunal – merits review
- Judicial review of administrative decisions

Legislation vs. Common Law

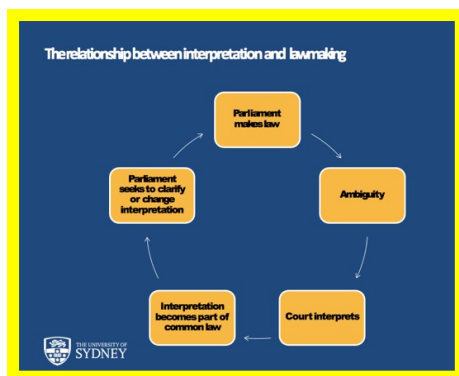
- Legislation operates from the **general** to the **particular**.
- Cases operate from the **particular** to the **general**.

Common Law

- System
- Judge made law
- Judge made in Common Law court and Equity court

The role of courts

- The courts possess the critical double function of:
 - Interpreting and applying legislation
 - Continuing the still important tradition of the common law



Equity

- King's Law – through Governor General
- Development of the common law was restricted by procedural limitations
- Petitions for relief from the inadequacies of the common law were considered by the Lord Chancellor
- Cases were initially decided according to the Chancellor's ideas of "equity and good conscience"
- In time, a complex body of law developed, supplementary to the common law, and known as **equity**
- The UK *Judicature Acts* of 1873 abolished the separate court systems and established a High Court of Justice, which administered both common law and equity.

- Fusion of systems in NSW in 1972 (only one Supreme Court)
- Influential in the development of laws relating to
 - Unconscionability
 - Undue influence
 - Fiduciary duties
 - Confidential information
- Legal and equitable ownership and the *Trust*
 - Used for tax purposes, flexibility



e.g. Father dies and uncle takes over the castle before father's son become of age → this make the uncle the Trustee (legal owner) managing on behalf of the son who is the beneficiary (equitable owner)

Res judicata

"The thing has been decided"

- means that the decision reached by the court in determining the case before it is, subject to any appeal, a final resolution of the issues raised in it, insofar as the parties to the proceedings are concerned.
- The decision nevertheless has a life beyond the parties as it is a **precedent** which is binding on lower courts in that jurisdiction in similar cases.

Stare decisis: the doctrine of binding precedent

- A court is bound to follow decisions of courts higher than itself in the same hierarchy of courts within the particular jurisdiction.
- It **promotes certainty, achieves equality, increases efficiency and creates justice.**

The judicial hierarchy

- Decisions of courts outside the particular hierarchy – e.g. federal or particular state – are not binding but may be persuasive depending upon the status of the court.
- A previous decision of a court on the same level is generally not binding but will not be departed from unless the earlier decision was wrongly decided.
- **Privity of contract** – the relation between the parties in a contract which entitles them to sue each other but prevents a third party from doing so.

Ratio decidendi

- The ***ratio decidendi*** is that part of the decision which is binding precedent or persuasive → material facts plus decision
- **It is the reason for the decision**, or the principle underlying the decision, or the legal proposition which the court has applied to the material facts of the case in order to arrive at its decision / **part of decision which is BINDING/PERSUASIVE**
- Ratio decidendi = Material facts + Reason for Decision