

W1

The Rule of Law

Rule of Law

1. The law should be applied to all people equally and should be known by everyone
2. No one is above or below the law

Implications

- all people are subject to the law and can rely on the law to set the bounds within which people and governments can operate.
- Can prevent the arbitrary abuse of power.
- Australian law has developed from English common law however was distinguished in Henry and Susannah Kable

Other Characteristics

- Prospective not retrospective

Henry and Susannah Kable

- Henry and Susannah Kable were prisoners being transported to Australia whose money disappeared after leaving it with the captain. Under English law the Kables were “civilly dead” and therefore could not sue. However they were able to sue in Australia as authorities released this law as impractical in a new penal colony.
- **Important**
 - This was the first civil case in Australia
 - Case demonstrates establishment of “the rule of law” which all individuals may access

Separation of Power

1. Legislature → enacts/amends the law
 - a. Made of Parliament (house of rep and senate), King and Governor-General
2. Executive → puts law in action
 - a. Made of prime minister and ministers (also King and Governor-General)
 - b. Enforces the law through agencies etc AFP, ATO
 - c. Provides services required by the law etc social services, military
3. Judiciary → makes judgements about the law
 - a. Made of Judges of the Federal Courts
 - b. Includes trials and sentences and decide if laws are constitutional

Common Law and Legislation/Statute

Defining Common Law

1. The system derived from the English legal system
2. Judge made law (precedent)
3. Particular branches of law EG: law that grew from Lord Chancellor's role (equity)

Common Law

- Based on precedent made by courts and judges, inherited from English and extended by Australian
- Principle that like cases are to be treated alike and the need for certainty in the law
- Ratio Decidendi = the legal reasoning a judge came to a conclusion needed for precedent
- Obiter dictum = a judge's expression of opinion, not needed for precedent

Precedent

- Stare decisis = the doctrine of precedent
- Hierarchy of Precedent
 - courts are bound by the decisions of higher courts in the same hierarchy.
 - jurisdiction are not binding but can be highly persuasive

Legislation / Statute

- Legislation or statutes enacted by parliament; state, territory, federal (Acts of Parliament)

W2

R v Wedge [1976] 1 NSWLR 581	
Court	Supreme court of New South Wales, 25 June 1976
Judge	Rath J
Plaintiff	
Defendant	Wedge
Material Facts	<ul style="list-style-type: none">• Defendant (Wedge) was an aboriginal man indicted for murder of another Aboriginal Man• Defendant argued Australian court had no jurisdiction over the case considering both men were Aboriginal and therefore Indigenous customary law should apply
Legal Issues	<ul style="list-style-type: none">• Does the court lack jurisdiction because they are Indigenous?• Defendant argued law does not apply as<ul style="list-style-type: none">◦ Aboriginal are sovereign people and not subject to English law◦ Even if they are not sovereign English law brought by colonists only applicable to themselves

Reasoning	<ul style="list-style-type: none"> • Arguments based on premise that NSW was not founded by settlement • NSW was settled according to authority of Privy Council in <i>Cooper v Stuart</i> <ul style="list-style-type: none"> ◦ Blackstone's definition of settlement "an inhabited country...discovered and planted by English subjects" ◦ Regarded as no settled inhabitants or a settled system of law "perceived absence of cultivation" • Therefore English law is in force of settled colony and applied over not settled Indigenous inhabitants • Therefore Indigenous are not sovereign, <i>R v Murrell</i> 1836 "Aborigines within the boundaries of the colony are subject to the laws of the colony, and there is no difference between an offence committed by them upon a white man and an offence upon another Aboriginal"
Decision	<ul style="list-style-type: none"> • Defendants plea of lack of jurisdiction failed and the court had jurisdiction to indict him for Murder
Ratio	<ul style="list-style-type: none"> • Ratio: <i>R v Murrell</i> is a legal precedent that the King's law extended throughout the colony

Procedure for Passing a Bill

- In the House of Origin
 - Notion of motion by the minister
 - Intro and First reading (becomes a public document)
 - Second Reading (minister makes a speech in favour)
 - Debate on the bill → is it intra/ultra vires (constitutionally approved)
 - Committee Stage (house sits as a committee and reviews/makes amendments)
 - Third reading (final vote is taken)
- Second House
 - First Reading
 - Second Reading
 - Committee of the Whole
 - Third Reading
- The Royal Assent = the bill is enacted once accepted by the governor general and the bill comes into effect 28 days later

Subordinate ('delegated legislation')

- legislation made not directly by an Act of the Parliament, but under the authority of an Act of the Parliament

- Authority for the governor or other bodies to make
 - Ordinances (laws made for territories of Australia)
 - By-laws (for municipal councils)
 - Rules (government departments)
 - Regulations (general laws that establish details of act)

Consolidated Statutes and Codes

Consolidated Statutes

- Consolidation brings together a number of statutes that cover the same subject

Codes

- Includes the changed legislation and common law

Structure of an Act

Format

- Long title
- Short title
- Words of enactment
- Sections (Called clauses until royal assent)

Common vs Statute Law

- Parliamentary sovereignty → Common law always gives way to statute law

Rules

- However common law judges can always interpret “construe” statutes using
 - “Literal Rule” interpret by the intent of parliament by examining the language
 - “Golden Rule” the court can modify literal rule if it is inconsistent with the rest of the legislation
 - “Mischief rule” interpret by the intent of the act and the mischief it is intended to prevent

Specific Rules

- *Eiusdem generis* = a general phrase for a list of specific words EG: listing a class of animals as dangerous
- *Expressio unius est exclusio alterius* = if something is explicitly referred to, that will exclude other matters

- Grammar and punctuation can impact interpretation

The Modern Approach

- Look at the grammatical meaning
- Look at the context/purpose
- Look at extrinsic material

Presumptions of Statutes

- Parliament does not interfere with fundamental rights
- Against retrospective operation of the statute
- Legislation does not bind the crown
- Not to legislate extra extraterritorially → EG: A NSW individual can't vape in Victoria

Hickling v Laneyrie 1991

Court	Court of Appeal
Judge	Clarke and Handley JJA
Plaintiff	
Defendant	Hickling
Material Facts	<ul style="list-style-type: none"> • The appellant supplied liquor to a customer who was 16 • The offence was alleged to have occurred at a Liquorland bottle shop • The customer was male, over 6 feet in height, and had a beard • The appellant did not ask him to produce documentary evidence proving his age • Sergeant Laneyrie required the magistrate to state a case for the opinion of the Supreme Court as to whether the "common law defence of a honest and reasonable mistake" was available to the defendant • The judge excluded common law defence and the appellant appealed to the Courts of Appeal
Legal Issues	<ul style="list-style-type: none"> • Whether the defence of a reasonable and honest belief is upheld

Reasoning	<ul style="list-style-type: none"> • Liquor Act 1982 "It is a defence to a prosecution...if it is proved that the person to whom the liquor was sold or supplied was of or above the age of 14 years and was, on reasonable grounds, believed by the defendant to be of or above the age of 18 years." <ul style="list-style-type: none"> ◦ Was considered in Campbell J in Ovens v Laneyrie ◦ Was later amended in 1989 to include "before the liquor was sold, supplied or obtained, there was produced to the defendant documentary evidence" • In 1989 the law had a clear and deliberate change making suggestive intention to remove reasonable and honest belief as a defence
Decision	<ul style="list-style-type: none"> • Appeal dismissed
Ratio	<ul style="list-style-type: none"> • The provisions of s 114(5) of the Act exclude the operation of the 'defence' of reasonable and honest belief as expressed in Proudman v Dayman • The legislative history demonstrates the aim to tighten the law dealing with under-age drinking by narrowing the existing defence under section 114(5) <ul style="list-style-type: none"> ◦ This was after the decision of Ovens v Laneyrie (1987) which said Campbell J held that the appearance of a customer alone might afford the defendant reasonable grounds for believing that he or she was over eighteen.

W2 C2

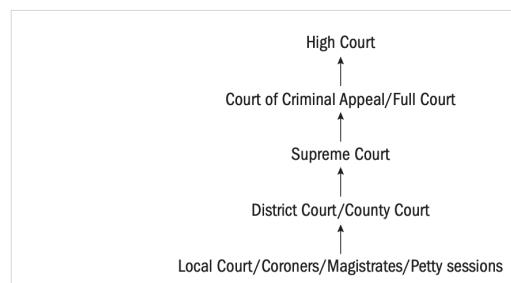
Jurisdiction

- **Jurisdiction** = the scope of a body's power to hear a matter, determine what the facts are and apply the law to make a judgement
- A statute which establishes a court will define its jurisdiction

State Courts

- State court hierarchy for all states except Tasmania

FIGURE 12.2 THE STATE COURT HIERARCHY (CRIMINAL)



Supreme Court

- Governed by the Supreme Court Act 1970 (NSW)

Features:

- Not limited to their original jurisdiction unless later statute limited
- Unlimited jurisdiction
- Authority to regulate its own procedure, determine the right of audience, and grant bail, (specific matters like bail may be subject to statutory regulations)
- Decisions made by the court cannot be deemed void; instead, they must be set aside through a writ of error or an appeal.

Criminal Cases

- Criminal Cases → Serious cases such as murder or treason

Civil Cases

- Civil Cases → matters outside the jurisdiction of the lesser courts (monetary limits for maximum penalty limits)

Appellate Jurisdiction (The power of a higher court to review decisions of a lower court)

- May hear appeals or tribunals (depending on provisions of legislation establishing the tribunal)
- NSW Court of Appeals

Appeals

- Appeals may end up to the court of appeal or court of criminal appeal

Intermediate/District Courts

- Governed by the District Court Act 1973 (NSW)

Civil Jurisdiction

- Jurisdiction limited by their enabling act
- Available in all jurisdictions except TAS and territories
- Limited by monetary constraints which define maximum amount which can be claimed in court for a wrong
 - Usually limit 1.25mil unless both parties consent, in this case there is no limit
 - Unlimited for motor accidents

Criminal Jurisdiction

- Allowed to hear all indictable offence (triable by a judge and jury)
- Some states exclude treason and murder from jurisdiction (NSW, VIC, SA)
- In QLD and WA, all indictable offences except max penalty >14 years

Appellate Jurisdiction (The power of a higher court to review decisions of a lower court)

- Jurisdiction not available for all intermediate courts
- QLD, NSW, VIC allow appeals from Magistrate courts

Appeals

- Note the interaction between legislation concerning different courts' jurisdiction and procedure. The District Court Act 1973 (NSW), s.127(1) provides: "A party who is dissatisfied with a Judge's or a Judicial Registrar's judgement or order in an action may appeal to the Supreme Court."
- However, by s.48 of the Supreme Court Act 1970 (NSW), appeals from the District Court are assigned to the Court of Appeal.
- Appeals go to the court of appeal

Magistrates (Local Courts)

- Governed by the Local Court Act 2007 (NSW), the Crimes (Appeal and Review) Act 2001 (NSW), and the Criminal Procedure Act 1986 (NSW).
- Not preceded by a judge but a magistrate

Criminal Jurisdiction

Two Roles in Criminal Cases

- Carry out committal process (decide whether there is a case to answer in relation to indictable offence)
- Decide whether it should go to trial in district or supreme court

Smaller Criminal Cases

- Deal with lesser issues: coronial issues, children (juvenile and protection of child), traffic matters

Civil Matters

- Deal with civil matters: small debts and civil claims, residential tenancy, tribunals which hear family law, mining applications, liquor licence applications, mental health and industrial
- Usually monetary jurisdiction limit anywhere from 50k to 150k among states
 - NSW 100k

Appeals

- Appeals go to the district court

Tribunals/Commission

- Each state tribunal will have its own legislation on jurisdiction and appeals
- A tribunal is a body appointed to adjudicate disputes
- EG: personal injury commission, dust diseases tribunal

Federal Courts

FIGURE 12.3 FEDERAL CIVIL COURT HIERARCHY

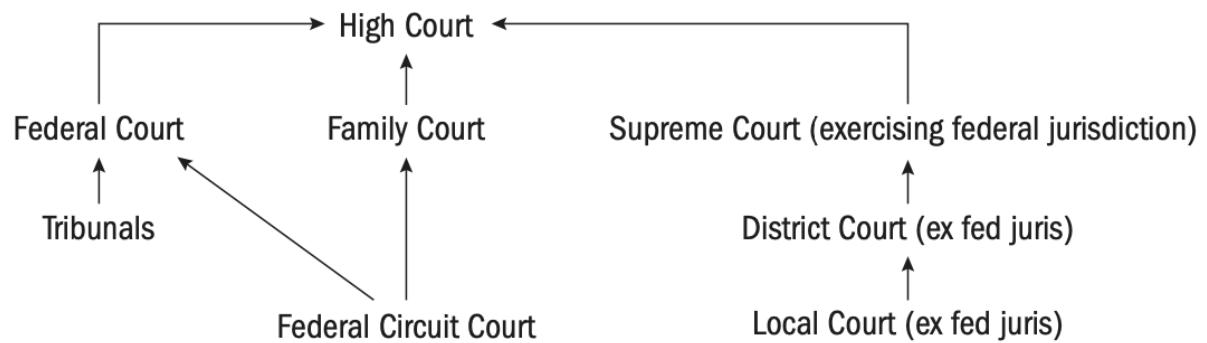
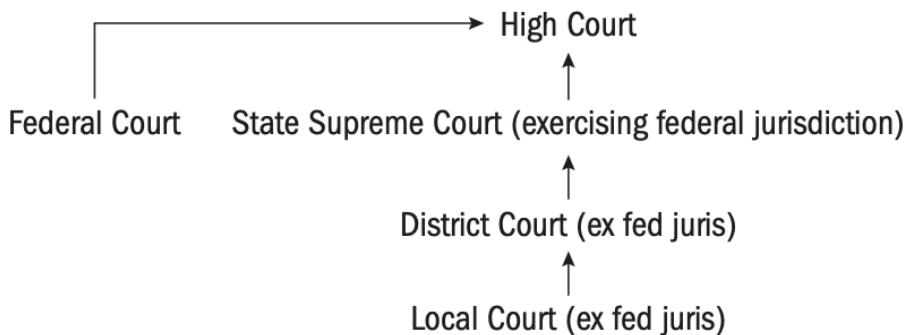


FIGURE 12.4 FEDERAL CRIMINAL COURT HIERARCHY



The High Court

- Original jurisdiction set out in s 75 of Constitution
- Highest court in land defines the law for all jurisdictions
- Deals with matters arising under any treaty, matters affecting consuls or other representatives, matters between states

Appellate Jurisdiction (The power of a higher court to review decisions of a lower court)

- Appeals can take place by *special leave of the court* (application process for appeal to be heard)
 - Decided whether there is a question of law which is public importance
 - Whether it is necessary to resolve differences of opinion in the courts below

The Federal Court

- Established under Commonwealth Constitution s 71

Jurisdiction

- Established by 150 acts of legislation in various areas such as bankruptcy, trade practices, federal admin law, corporations law, native title...

Appellate Jurisdiction (The power of a higher court to review decisions of a lower court)

- Appeals from a single judge