

Foundations of Law

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Overview of the Australian Legal System

Required reading

Prue Vines, *Law and Justice in Australia: Foundations of the Legal System* (Oxford University Press, 2nd ed, Melbourne, 2009), pp. 3-16 (Chapter 1); pp. 17-32 (Chapter 2).

Introduction (pp. 3-4)

The purpose of law is to ensure **justice**. A basic principle of justice is the doctrine of the **rule of law** which aims to prevent the arbitrary use of power.

Henry and Susannah Kable

- The Kables were prisoners being transported to Australia. They deposited money with their ship's captain but the money disappeared.
- Under English law, the Kables were 'civilly dead' due to the **doctrine of attainder**.
 - However, they were allowed to sue and this because the first civil case in Australia.

A snapshot of the current Australian legal system (pp. 5-8)

Much of Australian law is derived from Britain.

A system of representative democracy using parliaments to make laws

- Australia uses a system of **representative democracy** whereby people vote for representatives who sit in parliament and make laws.

A legal profession divided either formally or informally into solicitors and barristers

- There is an **informal** distinction between solicitors, who advise clients and barrister, who appear in court.

A 'common law' system

- The term '**common law**' has three meanings:
 1. The **common law legal system** which is a legal system derived from England as opposed to civil law (French, Germany etc.) or other legal systems.
 2. Common law also refers to the fact that judges make law based on decided cases. This is known as the system of **precedent**.
 3. Common law also refers to particular **branches of law**:
 - Common law.
 - Equity.

Decision-making in courts after an adversarial trial

- The adversarial system use **juries** to decide matters of fact.

A court system for dispute resolution

- Disputes are resolved in courts through juries and judges.

The distinctiveness of Australian law (pp. 8-9)

A federal system made up of a Commonwealth and states and territories

- Australia became a federation in 1901. This federal structure divides power between the state and Commonwealth parliaments.

Limited recognition of Indigenous customary law

- There is limited recognition of Indigenous customary law in Australia.
 - Since *Mabo v Queensland (No 2)*,¹ the High Court overruled the **doctrine of terra nullius** and allowed for a system of native title rights.

R v Wedge [1976] 1 NSWLR 581

- Affirmed the decision in *R v Murrell*,² that the plea of no jurisdiction has no substance.

¹ (1992) 175 CLR 1.

- 'The civil rights of all subjects of the King in NSW whether white or Aboriginal, were equally entitled to the protection of the criminal law; and secondly, that the jurisdiction of the Supreme Court of NSW extended to all persons in NSW'.

Australian law as an example of a common law system among other systems of law (pp. 17-22)

Legal traditions

- Each legal system has unique characteristics; many characteristics are also shared. Examples of other legal systems include:
 - **Islamic law:**
 - Muslim law which is derived from the religious teachings of Islam. This body of law is known as the **Sharia** or the path of life to follow.
 - **Talmudic law:**
 - Law derived from the first five books of the Bible.
 - **Civil law:** (Germany, France, Italy etc.)
 - Civil law legal systems use the **inquisitorial process of trial** rather than the adversarial system.
 - Most law is **codified** and it does not recognise the role of judges as a source of law.
 - **Customary law:**
 - Refers to the legal system of Indigenous peoples. This is often based off spiritual and cultural connections to the land.

International law (pp. 23-32)

International law refers to the law between countries or states. It is derived from:

- **Customary international law.**
- **Treaty (or convention) law.**

Signing a treaty does not bind the state. It requires the **ratification**:

- This involves lodging a formal document with the body nominated in the treaty.

International law and its relationship with municipal law

- There are two basic theories about the relationship between municipal and international law:
 - **Monism:** international law automatically binds a country domestically and enters into the domestic law of the country because all law is part of a universal legal order.
 - **Dualism:** the two legal systems are entirely distinct and so before an international treaty can become part of the domestic law; it normally has to be incorporated into domestic legislation.
 - Most countries such as Australia, UK and Canada take the **dualist** view.

Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh (1995) 183 CLR 273

- The ratification of an international convention can be the basis of a **legitimate expectation** as parliament, prima facie, intends to give effect to it. Therefore, if a decision-maker's ruling is inconsistent with a legitimate expectation; **procedural fairness** requires that persons affected will be given notice and an adequate opportunity to contest that course of action.
 - Note: the High Court has been reluctant to follow *Teoh*.
 - However, in *Plaintiff S 157/2002 v Commonwealth*,³ Gleeson CJ referred to *Teoh* when he observed: 'First, where legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of ambiguity a court should favour a construction which accords with Australia's obligations'.

² (1836) 1 Legge 72.

³ (2003) 211 CLR 476, [29] (Gleeson CJ).

The Courts in Action

Required reading

Prue Vines, *Law and Justice: Foundations of the Legal System* (Oxford University Press, 2nd ed, Melbourne, 2009), pp. 269-272 (Chapter 11); pp. 295-327 (Chapter 12).

Adversarial and inquisitorial procedures (pp. 269-272)

Adversarial

- A type of legal system found in **common law jurisdictions** that is characterised by opposing parties arguing their case before a neutral third party (a magistrate, judge and/or jury).
 - Complex rules regarding evidence – judges make rulings on admissibility of evidence.
 - Courts are not permitted to make enquiries or use their own personal bias.
 - Where there is a jury, the judge directs them on the law that they should apply to the facts..

Inquisitorial

- A type of legal system found in **civil law jurisdictions** that is characterised by a judicial officer having responsibility for the pre-trial investigations, and the conduct of the trial.
- The judge has an active role and may:
 - Direct parties to present witnesses or collect evidence.
 - Question witnesses.
- Minimal rules of evidence.
- Juries are rarely used.

Jurisdiction (pp. 297-299)

Jurisdiction refers to the scope of a body's power to hear a matter, determine what the facts are, and apply the law to make a judgement.

- It includes the range of power and the territorial boundaries for the use of such power.
- No court can hear a matter over which it does not have jurisdiction.
- Jurisdiction is defined by statutes.
 - In NSW, the Supreme Court jurisdiction is unlimited.⁴

State courts (pp. 299-303)

Supreme courts

- The Supreme Court is a superior court of record with general jurisdiction.
 - It has unlimited jurisdiction unless a statute limits it.
 - It has an inherent power to regulate its own procedures, the right of the audience before it and to grant bail.
 - Its decisions cannot be void; they must be set aside by **writ of error** or **appeal**.
- It deals with very serious indictable offences such as murder and treason.
- It deals with civil matters which are outside the jurisdiction of lower courts.
- In the civil sphere, the court may hear appeals as a **single judge** or as the constituted **Court of Appeal**.
- In the criminal sphere, appellate jurisdiction is exercised by the **Court of Criminal Appeal**.
- It may hear appeals from tribunals and specialist courts.

Intermediate courts

- District or County Courts are intermediate courts of record with jurisdiction limited by their enabling act.⁵

⁴ *Supreme Court Act 1970* (NSW) s 23 – 'The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales'.

⁵ *District Court Act 1973* (NSW).

- Original jurisdiction:
 - Criminal: most indictable offences.
 - Civil: monetary value up to \$750,000 unless both parties consent.
 - Unlimited jurisdiction over motor accident matters.
- Appellate jurisdiction:
 - Not all intermediate courts have appellate jurisdiction.
 - The larger states – Qld and NSW allow appeals from the Magistrates (local) Court.

Magistrates (local) courts

- Magistrates (local) courts are inferior courts and are where the majority of cases are heard. Its jurisdiction is limited by its enabling act.⁶
- Original jurisdiction:
 - Criminal:
 - Summary offences.
 - Committal hearings for indictable offences.
 - Coronial issues (**Coroner's Court**).
 - Children's issues (**Children's Court**).
 - Traffic matters.
 - Civil: small claims up to a monetary value of \$60,000 unless both parties consent.

State tribunals and specialist courts

- Each state tribunal will have legislation pertaining to its jurisdiction and the process of appeal.
- Examples include the Drug Court in NSW.

Federal courts (pp. 304-308)

The High Court

- The High Court is a superior court of record with a defined jurisdiction. It is the highest point of appeal.
- Original jurisdiction:⁷
 - Matters arising under any treaty.
 - Matters affecting consuls or representatives of other countries.
 - Matters where the Commonwealth is a party.
 - Matters between states or between residents of different states.
 - Matters in which a writ of Mandamus or prohibition or an injunction is sought against a Commonwealth officer.
- Appellate jurisdiction: over any matter which has been granted **special leave to appeal** and requires:
 - A question of law that is of public importance.
 - A necessity to resolve differences of opinion in lower courts.
 - A determination for the administration of justice.

The Federal Court of Australia

- The Federal Court is a superior court of record of law and equity with defined jurisdiction.
- Original jurisdiction: in areas including: (Note: its criminal division is minor and incidental).
 - Bankruptcy.
 - Trade practices.
 - Federal administrative law.
 - Admiralty.
 - Corporations law.
 - Civil jurisdiction over tax disputes.
 - Native title.

⁶ *Local Courts Act 1982* (NSW).

⁷ *Commonwealth Constitution* s 75.

- Intellectual property.
- Appellate jurisdiction:
 - From a single judge as of right.
 - From the Norfolk Island Supreme Court.
 - From the Federal Magistrates Service (in non-family law matters) as of right.
 - From State Supreme Courts exercising federal jurisdiction.
 - Leave to appeal must be sought in **interlocutory** matters.
- The Federal Court also has **accrued jurisdiction** which means that matters of state jurisdiction but are related to a Federal Court claim. This means the Federal Court can decide cases provided:
 - It is within its jurisdiction.
 - The ground is genuine and material.
 - It is not completely separate from issues which are not within its jurisdiction.

Federal Magistrates Court

- The Federal Magistrates Court was established in 1999 and exercises only civil jurisdiction.⁸
- It has the power to award up to \$750,000 in damages.
- Original jurisdiction:
 - Family law, child support, parenting orders and determination of parentage.
 - Property disputes with a monetary value less than \$300,000 unless both parties consent.
 - Concurrent jurisdiction with Federal Court on matters of administrative law, bankruptcy, human rights, piracy and trade practices.

Family Court

- The Family Court is a federal superior court with limited jurisdiction.⁹
- It has **accrued jurisdiction** at times.¹⁰
- Original jurisdiction:
 - Matrimonial causes.
 - Marriage.
 - Custody of children.
 - Maintenance of spouses and children (and adoption in ACT and Norfolk Island).
- Appellate jurisdiction:
 - Appeals from the Federal Magistrates Court as of right.
 - Appeals from a single judge in the Family Court.

Federal tribunals

- Tribunals exercise administrative, not judicial power and have a statute outlining jurisdiction.
- They are subject to review in the Federal Court of Australia.
- Examples: Administrative Appeals Tribunal and the Social Security Appeals Tribunal.

Federal-state court interaction (pp. 309-310)

State and federal jurisdiction often overlap:

- The state court will have jurisdiction as s77 of the *Commonwealth Constitution* provides for state courts to exercise federal jurisdiction (“**autochthonous expedient**”) unless a statute has removed jurisdiction.
- Federal courts cannot be vested with non-federal jurisdiction (the **Cross Vesting Scheme** which vested state courts with federal jurisdiction and federal courts with state jurisdiction was invalidated.¹¹ Federal courts cannot hear a **non-accrued** state matter.

⁸ *Federal Magistrates Act 1999* (Cth).

⁹ *Family Law Act 1975* (Cth).

¹⁰ *Smith v Smith* (1985) 8 Fam LR 283; *Smith v Smith* (1986) 161 CLR 217.

¹¹ *Re Wakim: Ex parte McNally* (1999) 163 ALR 270.