

CLAW2214 - business law

Module 1 - the Australian legal system

Business & the Law

Why study business law

- Law is integral to all aspects of commerce
- Business transactions and relationships are embedded in legal frameworks
- Law and management are interconnected → knowing the law helps business decisions
- Business school law courses aim to make better businesspeople (Bowal)

Why Business Law is Important for Accountants

- Recognised by CAANZ and CPA Australia as essential knowledge
- Accountants regularly interact with the law:
 - Drafting and interpreting contracts
 - Legal liability for fraudulent financial statements
 - Tax accounting requires legal understanding

Realities of Business Regulation

- Federal system with multiple layers of govt (Federal, State, Local)
- Large and growing body of legislation and regulation
- Significant role of judge-made law
- Increasingly litigious society (class actions, litigation funding)
- Strong regulatory agencies (e.g. ASIC, ACCC)
- Legal action used as a business strategy
- Risk of both personal and corporate liability

Law and the Legal System

What is Law?

- “Law is the system of control through which society operates.” (Terry & Giugni)
- Controls how society runs and operates daily

What is a Legal System?

- A complete structure of laws and institutions that:
 - Promulgate (create), apply, enforce, and adjudicate the law.

Requirements of a Legal System

- A body of laws
- An authority to make and change laws
- Institutions to enforce laws
- Mechanism to resolve disputes

Types of Legal Systems

- Common Law (e.g. Aus, UK, US):
 - Based on legislation and judge-made law
- Civil Law (e.g. France, Germany):
 - Codified statutes govern all areas
- Other Systems:
 - Religious law (e.g. Sharia)
 - Customary law (e.g. Indigenous systems)

Requisites of a Good Legal System

- Certainty: Predictable outcomes
- Flexibility: Adaptability to change
- Fairness: Perceived legitimacy
- Accessibility: People must know or access the law

Law vs Morality & Justice

- Law does not require morality or justice, but public support is vital
- Courts focus on legality, not ethics

The Australian Legal System

Historical Development

- Based on British law due to colonisation
- Colonial Laws Validity Act 1865 (UK) and Statute of Westminster 1931 (UK) increased local powers
- Federation in 1901: Colonies became States under a federal system.

Doctrine of Terra Nullius & Mabo

- Australia was deemed uninhabited (terra nullius) by the British
- Mabo v Qld (No. 2) [1992] overturned terra nullius:
 - Recognised native title in common law
 - Led to the Native Title Act 1993 (Cth) and the Native Title Tribunal

Features of the Australian System

- Common law tradition
- Federal structure
- Westminster model:
 - Constitutional monarchy
 - Separation of powers
 - Responsible govt
 - Rule of law → no matter how high of a status someone has in society they are still subject to the law

The Constitution

Definition

- A constitution defines the structure, powers, and limits of govt

Enactment of Australian Constitution

- 1900: British Parliament passed the Constitution Act → Aus can create their own country, draft constitution
- 1901: Commonwealth of Australia established
 - States ceded certain powers but retained legislative authority
 - States gave up some powers and responsibilities but maintained their law making power

Altering the Constitution (Section 128)

- Must pass:
 - Both Houses of Parliament
 - National majority of voters
 - Majority of States
- Few referendums succeed (e.g. 1977 yes, 1999 & 2023 no).

Separation of Powers

Power	Institution	Constitutional Reference
Legislative <i>power to make law</i>	Parliament	Section 1
Executive	Government	Sections 61 & 62
Judicial	Courts (HCA etc)	Section 71

- Note: Under the Westminster system, separation isn't absolute → ministers are part of both the Parliament and Executive (responsible govt)

Parliamentary Sovereignty

Origins

- 1688 Glorious Revolution established parliamentary supremacy over the monarchy
- Bill of Rights limited monarchical power

Dicey's Definition

- Parliament can "make or unmake any law whatsoever" and no body can override it

In Australia

- Modified due to:
 - Federal system (division of powers)
 - Parliament can't bind its future sovereignty
 - Political checks limit practical power

Division of Legislative Power

Types of Powers

Exclusive Powers (Commonwealth Only)

- One exercisable only by the Parliament in which it is vested and no other
- Section 90: customs/excise duties
- Section 52: federal govt matters (e.g. seat of govt)

Concurrent Powers (Shared)

- Those exercisable by both state and federal parliaments
- Section 51 lists 39 powers (e.g. taxation, marriage, corporations)
- Section 109: Federal law prevails in case of conflict

Residual Powers (States Only)

- Comprise all non-exclusive and non-current powers
- Not listed in the Constitution
 - e.g. education, health, traffic, property, crime, contracts, consumer protection

CASE LAW SUMMARIES

Australian Communist Party v Commonwealth (1951)

- S.51(vi) (defence) and (xxxix) (incidental) used to try banning Communist Party
- **Held:** Invalid in peacetime → defence must have direct link to national defence

Commonwealth v Tasmania (1983) → "Franklin Dam Case"

- S.51(xxix) external affairs power
- The Commonwealth used the UNESCO treaty to ban dam construction
- **Held:** No need for 'international flavour'; valid use of power.

NSW v Commonwealth (2006) → "WorkChoices Case"

- S.51(xx) corporations power
- Commonwealth regulated employer-employee relations
- **Held:** Valid use of power
- Dissent: Kirby J (limits via s.51(xxxv)); Callinan J (referenda history)

Ravbar v Commonwealth (2025)

- Upheld legislation to place CFMEU under administration
- Fair Work (Registered Organisations Amendment) Administration Act
- Valid under s.51(xx) corporations power

Commonwealth v ACT (2013)

- Federal Marriage Act defined marriage as between a man and woman
- ACT passed same-sex marriage law
- **Held:** Federal law covered the entire field (s.109), ACT law invalid
- After a public plebiscite, the Marriage Act amended to include "union of two people"
- Shows that:

- Law is not a one to one reflection of morals at the time a law is in power
- Law and societies morals will never be one to one
- Created on the majority of people

IMPORTANT POINTS

Inconsistency (Section 109)

- Federal laws override conflicting State laws
- Courts check if Commonwealth intended to ‘cover the field’
- If so, any State law entering upon that field is invalid
- Example → Commonwealth v ACT (2013)

Expanding Commonwealth Power

- Engineers Case (1920): Heads of power in s.51 interpreted broadly
- Financial Strength: Commonwealth controls income tax, giving it leverage
- Section 96 Tied Grants: Allows conditional grants to States
- Ceding Powers: States may voluntarily transfer power (e.g. corporations law)
- Cooperative Schemes: Joint action (e.g. Australian Consumer Law)

Module 2 - sources of law

Legislation

Definition

- Formal declaration of legal rules by Parliament or authorised bodies
- Dominates modern commercial & social life
- Courts spend increasing time on statutory interpretation

Federal Parliament

Bicameral structure:

- House of Representatives (People’s House)
 - Equal representation of electorates (150 seats)
 - The majority party forms the govt
 - PM is usually a lower house member
- Senate (States’ House)
 - Equal state representation (12 senators/state)
 - Territories: 2 senators each
 - Acts as a review body
- Governor-General represents the King

Legislative Process

1. The original idea