Foundations of Law LPAB 01 Summer 2023/24

Summary notes for exam

Law and its sources (Topic 1) 2
Legal research (Topic 2 – not assessed) 4
Legal problem solving (Topic 3 – not assessed) 4
Australian legal institutions (topic 4) 5
The legal profession (Topic 5 – not assessed) 15
Statutory Interpretation (not assessed) **+ Doctrine of Precedent (Topic 6)** 19
Revision (Topic 7 – not assessed) 25
English legal and constitutional foundations (Topic 8) 26
NSW and Cth legal and constitutional history (Topic 9) 38
Commonwealth Parliament (Topic 10) 49
NSW Parliament (Topic 11) 61
Executive Government (Topic 12) 67
Court system (Topic 13) 76
Tribunals, arbitration and alternative dispute resolution (Topic 14) 84
Timeline of English and Australian Legal System 91

FREE SAMPLE | LPAB01 Foundations of Law: Exam Notes | Sample page 1 of 4 | Full version: 98 pages

Law and its sources (Topic 1)

What is Australian Law?

Law is a collection of rules which govern our society. Australian law governs all aspects of Australians' lives including business, healthcare, government, families and the environment.

Australia inherited its legal system from England with the arrival of English colonialists in 1788. Prior to colonisation, Indigenous Australians followed their own legal systems. For more information about Indigenous Australian law, see chapter Aboriginal and Torres Strait Islanders and the Law.

There are two main categories of law in Australia, private law and public law. Public law describes laws that apply to our entire society. Public law includes criminal, administrative and international law. Private law describes laws that only affect a few individuals at any one time. Private law includes contract, commercial, property and family law.

Where does Australian law come from?

Our law comes from parliaments and courts. Parliaments make legislation while courts make common law. Parliaments and courts make both private and public law.

Common law and the courts

Australia is a common law country. This means that when judges and magistrates settle legal disputes in court they must decide cases along the lines of earlier decisions made in similar cases. This practice is called the doctrine of precedent which means to 'stand by that decided', and it is the backbone of the common law system.

The doctrine of precedent provides an important constraint on judicial decision-making. The general idea behind the doctrine of precedent is that judges, when they are deciding cases, must pay proper respect to past judicial decisions and make consistent decisions. If the facts of a case are unique judges may be required to make more innovate decisions. These cases create new legal precedents. Donoghue v Stephenson ([1932] UKHL 100) is one well-known example of a precedent case.

Australian judges must abide by the doctrine of precedent. This means that lower courts must follow the decisions of appellate courts and especially decisions of the High Court of Australia, which is Australia's superior court. As a result, when the High Court makes a novel decision it establishes new legal precedent. The Mabo decision (Mabo v Queensland (No 2) [1992 HCA 23; (1992) 175 CLR 1) is one well-known example of the High Court establishing a new precedent.

If a judge's decision is not consistent with established precedent, the judge must state that they are not following precedent and explain their reasoning. In some cases judges of lower courts express dissatisfaction with the common law precedent but are nevertheless bound to follow it.

Judgments are published in a variety in places, including online.

Legislation and Parliaments

Federal legislation is made by the Commonwealth Government in Parliament. Every State and Territory in Australia also has a body which makes legislation. For example, ACT legislation is made by the ACT Legislative Assembly. The States all have State Parliaments.

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Australian legal institutions (topic 4)

Rule of Law

- The rule of law has its origins in the Magna Carta
- The rule of law is a key feature of Australia's democracy and legal system.
- The 'rule of law' is the principle that both the government and citizens know the law and are ruled by it. This means that the law applies to everyone, regardless of their position or status. To make sure everyone knows the law and their rights, laws should be easy to understand, findable and enforced.
- The term is not mentioned in the constitution, but it was famously described by Dixon J as an 'assumption' in the *Constitution in Communist Party v Commonwealth (1951).*
- Covering clause 5 of the Australian Constitution states that all the laws made by the Australian Parliament apply to everyone—including those that made them.
- The rule of law limits the powers of governments, businesses and citizens, and protects citizens against the use of arbitrary power – autocratic decisions not based on law.
- An important part of the rule of law is reviewing, updating and removing laws to make sure they are fair and reflect social values. The Australian Law Reform Commission is an independent agency that provides recommendations for law reform to the Australian Government.

Elements of the rule of law

- Although there is a broad definition of the rule of law, there is debate about what else it includes. Some parts of Australia's legal system that are generally considered to be part of the rule of law are:
    - Citizens can't be found guilty of an offence that wasn't a law when they committed the act – retrospective laws
    - Everyone is innocent until proven guilty – presumption of innocence – in a fair and public trial
    - Citizens can't be punished, or their rights affected, unless a court has decided a law has been broken
    - The government can be challenged about its actions by the media and citizens, and through the courts
    - All citizens are given 'natural justice' – procedural fairness.

What are the benefits of the rule of law?

- Strengthens democracy because laws are made by representatives of the people.
- It provides a predictable and ordered society.
- All citizens are treated equally and lawfully which protects citizen's rights.
- All citizens are free from arbitrary arrest and imprisonment, or standing trial for breaking an unknown law.
- An independent, impartial and transparent judicial system.

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English legal and constitutional foundations (Topic 8)

PRE-NORMAN CONQUEST

- Anglo-Saxon settlers brought with them their own traditional customs, religions and government system that impacted on the development of the law.
- When they migrated to Britain, there was no established body of law that citizen abided by, the
- system was inconsistent and reflected the fractured structure of the English society.
- Britain was governed heavily by the monarch and the court of law was based purely on whether the outcome pleased the crown. Absurd and unreasonable punishments were also issued by the crown under this system of law.
- Prior to the Norman conquest, English legal institutions were decentralised. Laws were a mix of local customs and traditions. Saxon Kings would declare laws, ruling more through moral authority than legal authority.
- Local governments consisted of villagers within a community who would meet and discuss local matters and administer justice. They acted as a rubber stamp for the monarch and essentially consented to all laws the King decided was necessary.
- Administratively, England was divided into shires, administered by a shire reeve (Sheriff) being the King's delegate, counties and hundreds administered through local assemblies called moots.
- Moots were meetings which local governments would get together and discuss local matters and administer justice. These meetings consisted of villagers within their respective communities.
- As time went on and more administration was needed, villages combined together (hundreds) to reduce work load. As crime increased and the population expanded, hundred moots combined to create county moots.
- This was the origin to what later became the court of justice.

POST NORMAN CONQUEST - 1066

FEUDALISM and common law development

- William the Conqueror (henceforth William) retained much of the legal system and institutions. He promoted a more unified (common law) system
- The Normans introduced feudalism. This is a system of land ownership based upon a formal social hierarchy.
- Feudalism is the combination of **legal and military customs** in medieval Europe: the nobility held lands in exchange for military service from the crown, while the peasants were obliged to live on their lord's land and give him homage, labour, and a share of the produce, in exchange for military protection.
- At the top of the hierarchy sat the King who had dominion over all lands in the Kingdom. Under the King sat the land-owning nobles (tenants-in-chief). Beneath the nobles was a series of descending levels of sub-tenants.
- The cohesion of the feudal structure came about through alliances sworn to the Lord (the immediate superior in the chain), resulting in an obligation to provide a share of crops and engage in Military Service on the Lord's behalf if required. In return for these alliances, the King and Lords promised to protect and assist their tenants in time of need.
- Under feudalism, the King travelled extensively to collect taxes and resolve disputes. Pre-existing Saxon laws were adopted but the Normans would resolve disputes by treating "like cases in the same manner" under local custom. This is known as stare decisis.

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