

LAW1104 Notes

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ALWAYS START EXAM ANSWER WITH “in this question I am asked to

Then: IRAQ = Issue, rule, application, conclusion

The nature of law

What is law?

- Law is the body of principles or rules made by parliaments and the courts that regulates the way we live.
- Rules of conduct and/or organisations which are recognised and engraved by the power and organs of the state.
- Man is a social animal. Laws are not necessary for a hermit. But in a society laws are vital. Why? -> THE GREAT PARADOX: To maximise individual liberty
- Law is a means of social control: laws inform us what we *can* do, what we *cannot* do, without incurring sanctions and what we are *obliged* to do, if we wish to avoid sanctions. Law also provides a means of dispute resolution.

The Rule of Law

- All power in the society is conferred by and is only exercisable in the rule of the law. All persons are equal before the law (treated the same)
- No person is above the law, it applies to everyone, from the prime minister down throughout society.
- It assumes an independent judiciary, which judges separate from the government and the executive branch.
- The essence of the rule of law is, first, that power should be exercised according to law, not arbitrarily on the basis of an individual's or group's personal whim and, second, all people are equal before the law. The rule of law is about what is sometimes called *due process*.
- Know the case against you. You must have the chance to put your side of the story to get the claims against you gone.

Business and Commercial Law

- Business and commercial law is concerned with those parts of the law most commonly associated with ordinary business activities, such as the law of contract, the law of torts and consumer law.

The Australian constitutional system

Pre-Federation

- Before the arrival of European settlers, Aboriginal and Torres Strait Islander peoples inhabited most areas of the Australian continent. European settlers dispossessed Indigenous peoples of their land and did not recognise traditional laws or customs.
- Australia was regarded as “terra nullius” (or unoccupied land) that was “settled”, rather than “conquered”, by Britain. See *Cooper v Stuart* (1889).
- The Privy Council ruled that since the land was 'practically unoccupied and without settled inhabitants' in 1788, the colony of New South Wales should be treated as a 'settled' (rather than a conquered) colony as at that date and that, in that situation, the applicable common law rule was that the laws of England arrived in NSW with the original English settlers like some sort of invisible baggage.
- The day the land was officially 'claimed' we took on the law of the people who claimed it. Our law is based on English Common Law
- One of the changing cases: In *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, the High Court overturned the ruling in *Cooper v Stuart* and held that the common law of Australia recognised a form of native title, namely, the rights of the indigenous inhabitants to their traditional land in accordance with their laws and customs. -> the high court recognised that the land was not Terra Nullius when the settlers arrived. The court ruled that the land did in fact belong to Mabo and his tribe.
- What effect did this have on the 'reception doctrine' (how the law was accepted into Australian settlement on the day it was colonised)? The answer is none.

Constitutional development of the Australian States and Federation

- A constitution is a foundational text that, in a legal sense, creates an entity.

On 1 January 1901, the Commonwealth of Australia came into being (the British government passed the constitution act of Australia).

The Commonwealth Constitution created a federal government with three branches of government:

1. The executive – the body which administers the law (government)
2. The legislature – the body which makes written law (Parliament)
3. The judiciary – the body which makes common law, interprets the law, resolves disputes and determines sanctions (courts)

- This constitutional structure is described as a “separation of powers” however there is some overlap.

Doctrine of separation of powers between the branches of government and how that doctrine applies in the Australian constitutional context:

- Based off the USA political system to some degree – but with different names.

Division of law making power between the Commonwealth and the States/Territories

- Commonwealth of Australia Constitution Act 1900 created a federation consisting of 6 states and 2 self-governing Territories.

Separation of powers:

3 Branches of government:

- The Legislature (body which makes the laws)
- The executive (body which administers or carries out the law)
- Judiciary (body which declares what the law is and interprets the law, resolves disputes concerning its application and determines the sanctions for its breach.)

The Legislature

- The federal parliament consisting of the Queen (governor general), the Senate and the House of Representatives.
- Constitution sets out the matters in respect of which the Commonwealth parliament has power to legislate.
- Commonwealth Parliament only has such power as the Constitution confers upon it and can only make laws on such matters as are expressly mentioned in the Constitution as being within Commonwealth power. Power to make laws on all other matters resided in the state parliament.
- Concurrent powers - can be exercised by either the Commonwealth or the states.
- If a state law is inconsistent with a law of the Commonwealth, the commonwealth prevails and the state law is invalid.
- Parliament has a limited number of exclusive powers ie. Raise naval or military force, coining money, admit new states to the commonwealth.

The Executive

- The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative. She has an Executive Council (2 or 3 gov. ministers) to advise on matters concerning the government.
- GG is empowered to appoint ministers to administer the Commonwealth departments of state.
- No person can be a minister unless he/ she is a member of the Senate or House of Representatives.
- Prime Minister allocates portfolios to the ministers appointed ie. Each minister becomes responsible for one or more government departments.
- The Cabinet comprises those members of the ministry responsible for determining the policy and objectives of the government.
 - Ministers must be members of Parliament and may be questioned in Parliament about matters relevant to their portfolio (PM can be questioned on anything)
 - Where the government or an individual minister loses the confidence of parliament (loses a vote on the floor of the Lower House) it must resign.
- The GG will act as advised by the PM however there are some situations where the GG may exercise her or powers ie. To dismiss a government without/against the will of Ministers (like John Kerr did to Whitlam Gov.)

The Judiciary

- The High Court of Australia – responsible for interpreting the Constitution. They determine the constitutionality of legislation (whether a particular Commonwealth or State statute was a valid exercise of legislative power).
- Highest court of appeal from decisions of the highest state and territory courts and the Federal Court.

Amending the Constitution

- Difficult to do
- Once both Houses of the Parliament have passed the proposed amendment to the Constitution there is a referendum of all voters who are asked to vote “yes” or “no”.
- If proposal is approved by a majority then the constitution is amended.

Sources of Australian law

The two basic sources of law:

- Primary – A document that contains the law itself ie. Case or Statute
- Secondary – Resource that explains or analyses the primary source or is prepared for law reform purposes ie. Scholarly texts, articles in academic journals, law reform commission reports and other commentary.

2 Primary Sources

1. Statute law (Acts of Parliament)
2. The judge made ‘common law’ (Legal principles enunciated in court [judicial] decisions)

Statute law

- Statutes are written laws, Acts made by Parliament.
- Federal arena alone -> 1,400 statutes and 600 regulations
- Parliament passes Bills which, on receipt of the royal assent are called “statutes” or Acts of Parliament.

Statutes can:

- (a) Bring new laws into existence
- (b) Repeal old laws created either by earlier statutes, or by decisions of the courts
- (c) Codify the law (that is, include not only previous statutory provisions but also common law principles from court decisions)

Making Statutes

- A Bill will be drafted when - intended to make a new law on a particular matter or amend an existing law
- Bills may be introduced by either House of Parliament in which the Minister in charge of the bill sits
- Mostly introduced in the Lower House (House of Representatives – in Commonwealth Parliament or Legislative Assembly – in State Parliaments)

Stages of Legislative Process:

- a) *Initiation*: the proposed bill is listed on the notice paper of the house.
- b) *First Reading*: formality- the bill is introduced by having its title read out by the Clerk of the house and copies are distributed to all the members.
- c) *Second Reading*: the minister responsible for the area that the bill covers speaks about the intent of the bill and then the shadow minister speaks, usually against the bill, then a member of the government will speak in favour and then a member of the opposition will speak against etc.
- d) *Consideration-in-Detail*: any amendment proposed is debated and then voted on.
- e) *Third Reading*: the whole bill is put to the vote.
- f) *Transmission to Other House*: the bill is then taken to the other house (usually goes from the lower house to the upper house) and all those stages happen again.

- g) *The Royal Assent*: the Governor signs the bill on the Queen's behalf and then it becomes an act of parliament.
- h) *Proclamation*: the date in which the act becomes law is written in the legislation or if it's not in the legislation, then it is automatically comes into force 28 days after Royal Assent.
- Problems when: Upper House refuses to pass a Bill passed by Lower House = "deadlock"
 - If senate rejects a Bill then after 3 months the Bill can be re-introduced into House of Reps
 - If House of Reps again passes but the Senate doesn't then the GG may dissolve both houses ("double dissolution") and call an election.
 - If after the election, the House of Reps passes the Bill and Senate still rejects ect. The GG may convene a joint sitting of both Houses and it works on majority vote.

Parts of a Statute:

- Act Number, Long title & Short Title, Commencement date
- Object/ purpose
- Definitions, sections, marginal notes
- Chapters, parts or Divisions, Schedules.

Interpretation of statutes

The three *traditional*(no longer used) common law rules of statutory interpretation are:

- **Literal rule** [1.390] - the courts must give words their natural, ordinary and grammatical meaning. I.e. "car or truck or van" = people thought it didn't apply to motor or pedal cycle
- **Golden rule** [1.400] – applies where a literal interpretation would be "absurd" i.e. "in the street" = from a window (when the literal interpretation is not the meaning intended by parliament)
- **Mischief rule** [1.410] – where the literal interpretation is not possible, the court should consider the "mischief" which Parliament passed the Act to remedy. I.e. "in the vicinity of" = "in"

Acts Interpretation Acts (15AA) (15AB)

- Sets down some basic rules or presumption of interpretation, define some common terms and deal with a number of other matters relating to form, content and operation of statutes.
- Purposive Construction– this requires courts to give meaning to the words of a statute which will give effect to the intended purpose or objective of the Act, rather than sticking to a strict or literalist approach.
- This new 'purposive' approach is actually very similar to the old common law Mischief Rule. However courts no longer have any choice in relation to this issue - because the 'purposive' approach is now enshrined in and made mandatory by the *Interpretation Acts* of all Australian jurisdictions.

Extrinsic Materials

- *Acts Interpretation Act 1901* now allows the court to take into consideration certain extrinsic material in interpreting an ambiguous or obscure provision in an Act.
 - To confirm that the meaning of the provision is the ordinary meaning
 - To determine the meaning of the provision when the provision is ambiguous or obscure, or the ordinary meaning is absurd or unreasonable.
- Material may be; Law Reform Commission reports, relevant parliamentary committee reports, the explanatory memorandum for the Bill, the second reading speech of the Minister on the Bill and relevant material in parliamentary debates.

Maxims of interpretation: the courts apply a number of principles or "maxims" of statutory interpretation, the principles are aids to construction, rather than inflexible rules.