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# THE AUSTRALIAN LEGAL SYSTEM

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## Characteristics of a legal system

- Clarity and certainty
- Flexibility
- Fairness
- Accessibility

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## SOURCES OF LAW

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### Common Law

Common law is the law created through the reported decisions of judges (the doctrine of precedent) in the higher courts. It is non-statutory, as it is law made by the courts

### Statute Law

These are the laws made by federal and state parliaments in the form of statute law or legislation or other government bodies in the form of by-laws, orders, rules and regulations and known as delegated legislation.

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## MAJOR LEGAL SYSTEMS IN THE WORLD

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### Civil law system

Derived from Roman law, it is a complete code of written laws whose primary source of law is legislation. It is inquisitorial in form and forms the basis of the legal systems of most Western European countries, Japan and parts of Africa

### Common Law

Derived from case law (or precedent) and statutes, is accusatorial in form with an emphasis on remedies. It forms the basis of English law, and can be found in the United States as well as in commonwealth nations.

- Originated during the Norman conquest 1066

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## CLASSIFICATION UNDER COMMON LAW

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### Civil Law

Area of law providing for actions to be brought by one individual against another

- Emphasis is on
  - Resolution and remedial action
  - Compensating for loss
- The standard of proof
  - On the balance of probabilities
- Outcome
  - Remedies
  - Damages, injunction, specific performance
- Two primary types of civil action

- Tort law
- Contract law

### Criminal law

Area of law providing for actions brought by the crown/prosecution/state against an accused individual or individuals

- Emphasis is on punishment
  - Seeking retribution and deterrence
- Prosecutor prosecutes defendant
- Standard of proof
  - Beyond reasonable doubt
- Outcome
  - Imprisonment
  - Fine
  - Community order

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### EQUITY

- Equity rules were developed to mitigate the severity or the constraints of the common law

Common Law	Equity
<ul style="list-style-type: none"> <li>• Compressive system</li> <li>• Developed by circuit judges from English customary law</li> <li>• Upholds rights irrespective of the motives or intentions of the parties</li> <li>• Restricted remedies that are not discretionary</li> <li>• Rights are enforceable at any time</li> </ul>	<ul style="list-style-type: none"> <li>• Developed by chancellors</li> <li>• Developed as a result of the growing inflexibility and rigidity of the common law</li> <li>• Implies fairness and justice in the law</li> <li>• Not comprehensive</li> <li>• Remedies are discretionary operates with reference to the common law</li> <li>• Court of conscience</li> </ul>

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### ORIGINS OF AUSTRALIAN LAW

Colonisation can happen in 3 ways

1. Terra nullius
2. Be invited in and to apply their laws
3. War

Australia was colonized under the Terra Nullius classification

In *Mabo v Queensland (No 2) [1992] HCA 23* which related specifically to Aboriginal land rights, the High Court acknowledged that:

- Australian had not been terra nullius; and
- Aboriginals had rights to native title under common law

### NSW Parliament

Bi-cameral parliament similar to the federal parliament

- Legislative council-upper house
- Legislative assembly- lower house

### Australian constitution

*Commonwealth of Australia Constitution Act 1900 (UK)*

- Commenced 1 January 1901
- Created two separate government and legal systems
  - Federal
    - Commonwealth of Australia
  - States and Territories
    - NSW, Vic, QLD, SA, WA, Tas, ACT, NT
- Three key parts
  1. Legislative
  2. Executive government
  3. Judicature

### Separation of powers doctrine

- Legislative power
  - Is vested in the senate and House of Representatives
- Executive power
  - Vested in Queen exercisable by the Governor-general (s61)
  - Its job is to carry out the day-to-day government and administration of the country and to execute the laws
- Judicial power
  - Provides for the exercises of the Commonwealth judicial powers by the High Court of Australia and other Federal Courts created by parliament

### Key features of the constitution

#### Exclusive powers

- Only held by the Commonwealth government

#### Concurrent

- Forming the bulk of the Commonwealth's powers; and
- Both the Commonwealth and the states can legislate

#### Residual powers

- Powers exclusive to the states as the constitution is silent on particular areas,
- Eg. Education and transportation

### Section 51- Concurrent powers

The Commonwealth has power to make laws concurrently with state on 39 matters set out in s 51

These include

- Interstate and international trade (51(1))
- Taxation (51(ii))
- Postal and telecommunications (51 (v))
- Currency and banking and insurance (51 (xii, xiii. Xiv))
- Interstate banking bills of exchange and promissory notes (51 (xvi))
- Bankruptcy and insolvency (51(xvii))
- Copyright, patents, designs and trade marks (52(xviii))
- The corporations power (51 (xx))
- External affairs (51 (xxix))
- Settlement of interstate industrial disputes (51(xxxv))

### Section 52- Exclusive powers

To make laws dealing with

- The federal public service