

Contents

Australian Legal System	4
Categories of Law	4
Criminal Law v Civil Law	4
Public Law v Private Law	4
Substantive Law v Procedural Law	5
Domestic Law v International Law	5
Categorised by subject matter	5
Sources of Law	5
Primary sources	5
Secondary Sources	6
International Law: where does it fit?	6
What is 'common law'?	6
Common law v legislation	7
Common law system v civil law system	7
Common law v equity	8
Rule of law	8
What is Law	9
The purpose of law	9
Resolving disputes	9
Maintaining social order	9
Reinforcing community values	9
Helping the disadvantaged	9
Stabilising the economy	9
Preventing the misuse of power	10
Law and morality	10
Natural law	10
Legal positivism	11
Legal History: origins of the judiciary	12
British History	12
Norman conquest	12
Feudalism	12
The origins of common law (including the writs system)	12
The origins of equity	12
The doctrine of precedent	13
The court hierarchy	14
Case Law	16
Doctrine of Precedent	16
Ratio, Obiter	16
Problem Solving	16

Legislation: statutory interpretation	17
Approaches to statutory interpretation	19
Literal approach	19
Purposive approach	19
Contextual approach	20
Extrinsic Material	20
Maxims	20
Noscitur a Sociis – ‘it is known by its associates’	20
Ejusdem Generis – ‘of the same kind’	20
Generalia Specialibus - ‘general things do not derogate from special things’	21
Expressio Unius– ‘the express mention of one thing is the exclusion of another’	21
Legal History: the origins of the Westminster System	22
Legislative and Executive Power	22
British History	22
Magna Carta	22
The rise of Parliament	22
The Glorious Revolution	22
More...	22
The adoption of the British Parliamentary and governmental system in Australia	24
Key concepts	24
Separation of powers	24
Rule of law	25
Constitutional monarchy	26
Responsible government	26
Universal suffrage	26
Parliamentary sovereignty	27
Case Law	28
Reasoning by	28
Deduction	28
Induction	28
Analogy	28
Policy considerations	28
Terra nullius and Australian colonialism	29
Indigenous law	29
Terra nullius	29
Colonisation	30
Independence from British law in the 1800s	31
Repugnancy and reception	32
Federation and the Australia constitution	33
Protection era and indigenous Australian citizenship	33
Federalism	33

Basic purpose and structure of the Australia Constitution _____	35
<i>International law: Australia in a global setting</i> _____	39
Different legal and governmental systems _____	39
Defining international law: _____	39
Types of international law: public and private _____	40
Sources of international law: treaties and customary law _____	40
Australia and international law _____	40
Ratification of treaties _____	41
International law and Australian common law _____	42
International law's social and political influence _____	42
Case Studies: _____	42
Asylum seekers _____	42
<i>Indigenous Law: Sovereignty and recognition</i> _____	43
Indigenous Australian Law _____	43
The distinction between 'law' and 'custom' _____	43
The recognition of indigenous law in anglo-australian law _____	43
Native title _____	43
Circle sentencing _____	44
The question of legal pluralism _____	44
The question of indigenous sovereignty _____	44
<i>Jurisprudence: judicial reasoning</i> _____	46
Legal formalism _____	46
Legal realism _____	47
Judicial activism _____	47
Critical legal studies _____	49
<i>Jurisprudence: the law and power</i> _____	50
Marxist legal theory _____	50
Feminist legal theory _____	51
Earth jurisprudence _____	51

Australian Legal System

Categories of Law

Criminal Law v Civil Law

Civil

- Starting point: decision by the plaintiff to litigate
- Negative factors of going to court:
 - o Evidence is required
 - o There is always a chance of an unfavourable outcome
 - o Costs are extremely high (depends on the level of the courts and the complexity of the matter)
 - o Time – delays are commonly encountered
 - o Stress – the personal effects of litigation can often be very damaging
- Proceedings are commenced by a statement of claim – filed in the relevant court and served upon the defendant
 - o Service= the court needs to be satisfied that the defendant received a copy of the document
 - o Defence= defendant responds to the statement of claim
 - o Counterclaim= the defendant brings an additional suit against the plaintiff
 - o Default judgment = if the defendant fails to file a defence, the plaintiff automatically wins the trial by default
- Most disputes are settled during the pre-trial process. A pre-hearing conference is often held to encourage the parties to settle their dispute before trial
- Focus on compensation
- Burden of proof: on the balance of probabilities (OJ Simpson case)

Criminal

- Starting point: the arrest or charge of the person accused of committing a crime
 - o The accused may apply for bail (the judge agrees to release the accused person from custody pending trial on payment of a bond to ensure they show up for the trial)
- Proceedings commence when the accused person is charged with a specific offence[s]
 - o Accused person pleads guilty or not guilty to each offence
 - o The trial determines whether they are guilty and/or the appropriate sentencing
 - o Prosecutor= represents the Crown
- Plea bargaining = The prosecutor may seek to persuade the defendant to plead guilty to a lesser offence than the one with which they were initially charged, in order to resolve the dispute more quickly
- Committal hearing = determines whether the prosecutor's case is strong enough to justify proceeding to full trial. Held if the defendant is charged with an indictable offence
- Focus on punishment
- Burden of proof: beyond reasonable doubt (OJ Simpson case)

Public Law v Private Law

Public law = concerned with the relationship between the individual and the state. Incl. constitutional law, administrative law, criminal law and taxation law

Private law = concerns the relationships between persons within the community. Incl. tort law, contract law, property law and company law