

Seminar 7

Legislation: History (Parliament); Reading legislation— Week of 11 April

The Australian Legal System

Seven Key Characteristics

Rule of Law Liberal Democracy Common Law Legal System Constitutional
Monarchy Federation Separation of Powers Responsible Government

Rule of Law

- The principle that government authority must be exercised only in accordance with written, publicly disclosed laws that are made and enforced in accordance with established procedure.
- According to Dicey, there are at least 3 important characteristics
 - The law is applied equally to everyone, regardless of their social status, culture, religion or political beliefs.
 - The courts uphold the legal rights of the citizens, including the right to personal freedom.
 - No person may be punished other than for conduct that is expressly made illegal

Liberal Democracy

- Australia is a *liberal democracy* as it emphasis is placed upon individual freedom and other liberal values.
- It is a representative democracy in which laws are made by the executive government, which consists of elected representatives who exercise their power subject to the rule of law and to the various Federal and State constitutions.

Democracy

- A form of government in which citizens have a say in the decisions that affect their lives, including participation in the proposal, development, and passing of legislation.
- Voting in Federal and State/Territory elections is compulsory according to **s. 245 Commonwealth Electoral Act 1918 (Cth)**

Representative Democracy

- A form of democracy where the citizens vote for officials who represent them when engaging in the **legislative** (law-making) and **executive** (administrative) aspects of government.
 - Can be contrasted with *Direct Democracy* where the citizens participate directly in the processes of government
- Australia may also have a *direct democracy* where there is a referenda or when expressing a community view about an important political issue

Liberal Democracy

- A form of representative democracy
- The will of the majority and the decision-making power of the elected representatives are constrained by the rule of law and by a constitution that emphasises and protects the individual rights and liberties of citizens
- 11 principal characteristics of liberal democracy according to Diamond **pg.117**

Common Law Legal System

- Australia's *common law legal system* is as a result of the British colonies
- Placed emphasis upon common law, or case law, which is law made by judges and is recognised in Australia as one of the two sources of law
- The body of judicial decisions is called 'common' law because the rules established by judges are consistent across the relevant jurisdiction

Constitutional Monarchy

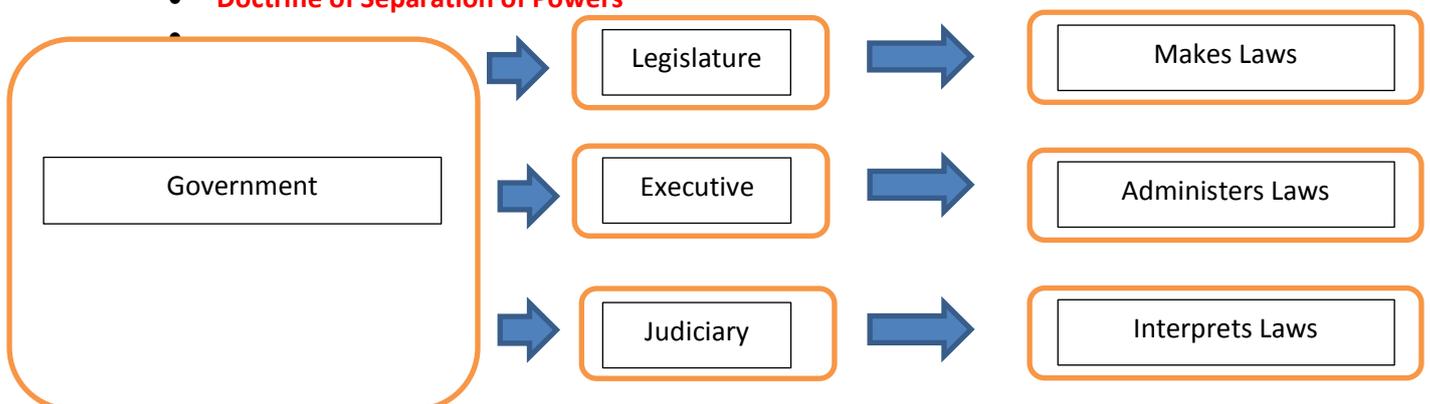
- Australia is a *Monarchy* because the head of state of the Commonwealth of Australia and of the various States is a king or queen. Under the ***Commonwealth of Australia Constitutional Act***, the king or queen of England is automatically the monarch of Australia
- 'Constitutional' monarch because they hold their position not by force of arms but according to the will of the Australian people as expressed in the Australian constitution.
- The monarch is represented by Governor-General, State Governors, and a Territory Administrator

Federation

- In addition to the national government (Federal or the Commonwealth government) there are various State governments.
- The two levels of government are partners, and power is shared in accordance with the Australian Constitution
- Federal Parliament is expressly granted certain '**exclusive**' and '**concurrent**' powers under the Australian Constitution
- '**Residual**' powers remain vested in the State parliaments

Separation of Powers

- **Doctrine of Separation of Powers**



Seminar 8

8. Legislation: Reading and Understanding Legislation

14/04/2016

Interpreting the Law.pg. 237

Statutory interpretation

- Statutory interpretation is the interpretation by the courts of legislation when called upon to decide whether the legislation applies to a particular set of facts or whether a particular statutory rule has been contravened.
- Forms of statutory interpretation includes:
 - Literal Approach
 - Contextual Approach
 - Purposive Approach
 - Common Law Presumptions
 - Statutory Rules

Literal Approach

- To focus upon the actual words used in the legislation and interpret them literally (the 'literal rule') unless a literal interpretation is clearly absurd or inconsistent with the rest of the statute (the 'golden rule')
- **The Literal Rule**
 - When reading a statute a court should interpret the statute literally, giving the words and phrases in the statute their ordinary and natural meanings.
 - Not uncommon for a court to refer to a dictionary such as the Macquarie Dictionary or the Oxford English Dictionary
 - When you read a text literally, you disregard what you think the author might have meant and you focus instead upon the actual words used
 - *There are, however, instances where a literal reading leads to a clearly absurd result or does not clarify the meaning of the text at all.*
E.g. A traffic sign with the words 'no standing' would, if interpreted literally, prohibit people remaining on their feet near the sign by would not prohibit parking near the sign.
In such circumstances one would have recourse to the 'golden rule'
- **The Golden Rule**
 - If reading a statute literally leads to an absurd result, the court should modify the literal meaning so as to avoid the absurdity; the court should not be *too* literal.¹

Contextual Approach

¹ Gray v Pearson (1857) 6 HLC as 61, 106

Seminar 14

14. Australian Legal System: History (1901 to current)

- Protection Era and Indigenous Australian citizenship
- Federalism
- Basic purpose and structure of the Australian Constitution

In the late 1800s, with England's blessing, the colonies decided to 'federate' – that is, unite and form a nation state under a federal model of governance. This involved the drafting of a Constitution over a series of meetings in the 1890s, which the Australian people (at least, those who had the power to vote) had to finally approve at election. In this era, government policy shifted on the treatment of Indigenous Australians and throughout the bulk of the 1900s, the 'Protection Era' was in force.

Protection Era and Indigenous Australian citizenship

The Stolen Generations

- Practice began in early years of settlement and used children as servants, guides and farm labour
- **1909 – *Aborigines Protection Act*** created the Aborigines Protection Board and authorized it to take Indigenous children from their families
- A 1915 amendment to the Act allowed the board to remove children without parental consent or court order
- This was the policy of the government until 1969 when the Board was abolished
- 1995 – Attorney-General created a *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* which published a report, *Bringing Them Home*, in 26 May 1997 that found that between 1 in 3 and 1 in 10 Indigenous children had been removed from their families under past government policies
- The report recommended that Australian parliaments apologise to the Stolen Generation ! State and Territory governments apologised, as did many government agencies and churches.
- 13 February 2008 – Rudd apologised for Federal Government

Northern Territory Intervention

- 2007 – *Little Children are Sacred* report issued by NT Board of Inquiry into the Protection of Aboriginal Children from Sex Abuse
- Found that large number of children were abused in some Indigenous communities
- Federal government responded by:
 - o passing the *Northern Territory National Emergency Response Bill 2007* which banned possession of porn in some areas and extended mandate of the Australian Crime Commission to include Indigenous violence and child abuse
 - o provided Commonwealth with ability to retain an interest in buildings and infrastructure on Aboriginal land if it funds them