

Lecture 1 (W1) The Australian Legal System

Outcomes

- Business and the Law
- The Law and the Legal System
- The Australian Legal System
- The Constitution
- Separation of Powers
- The Executive Branch of Government

1. Business and the Law

- *"The law is not simply peripheral to commerce. The transactions and relationships that constitute commerce are embedded in the law. Indeed, the whole fabric of commerce is woven from a complex legal regime, judicial and statutory, which regulates all commercial activity"* (Terry & Giugni).
- The realities of business regulation:
 - Complex federal legal system with federal, state/territory and local government laws.
 - Australia – 9 separate legal systems: Federal (Canberra), 6 states & 2 territories (each with own law making bodies, system of courts and laws).
 - 9 jurisdictions – each with level of lower, intermediate and superior courts.
 - Massive body of legislation.
 - Impact of judge-made law interpreting legislation and developing the 'unwritten law'.
 - Increasing litigious environment despite growth of alternative dispute resolution (ADR).
 - Class actions and litigation funding.
 - Powerful regulatory agencies – ACCC, ATO, APRA etc.
 - Legal action as a potent commercial weapon.
 - Personal and corporate liability.

2. The Law and the Legal System

- *"Law is the system of control through which society operates"*. (Terry & Giugni).
- What is a legal system?
 - **Legal system** – the totality of laws and institutions that regulates a state.
 - Basic requirements are that there should be:
 - A body of laws.
 - Some source with the power necessary to create and alter those laws.
 - Some institution/process with the authority to administer and enforce them (the executive).
 - Some institution with the power to adjudicate disputes.
- Types of legal systems?
 - Common Law legal systems.
 - Australia has a common law legal system (Constitutional monarchy).
 - Not all common law systems are the same e.g. USA = Presidential republic.
 - Civil Law legal systems.
 - Statutory codes set out all of the laws; inquisitorial system is common in civil law jurisdictions e.g. Italy.
- Constitutions
 - **Constitution** – the basis of the legal system of any state (written document).
 - *"...define the composition and powers of the organs of the state and regulate the relations of the various state organs to one another and to the private citizen"*. (Professor Hood Phillips 1973).
- The sources of law
 - **Customary law** – law established by the habitual use of a group of people over time e.g. Indigenous.
 - **Common law** – law developed by the courts (judge-made law).
 - **Legislation** – laws made by a body recognized by the legal system as having the power and authority to make laws (usually the Parliament); statutes/Acts of Parliament.
- The requisites of 'good' law

- Certainty – enabling people to engage in transactions and relationships, reasonably secure in knowing the consequences.
- Flexibility – responding without undue delay to the challenge of change at all levels of society.
- Fairness – if law is to be accepted by members of society, it should not be inequitable, unfair or unreasonable.
- Accessibility – all people should have access to knowledge of the law (directly or through intermediaries).
- Law, morality, justice and social values
 - “Morality” and “justice” are not necessary preconditions for a law.
 - A legal system does not operate in a vacuum – it requires the respect and cooperation of society.
 - Parliament and the courts sometimes struggle to reconcile public opinion and the law (particularly in a multicultural country such as Australia).

3. The Australian Legal System

- Origins/history:
 - Colonisation and reception of English law.
 - Increasing legislative power of the colonies.
 - **Colonial Laws Validity Act 1865 (UK)** & **Statute of Westminster Act 1931 (UK)** – allowed Australia to legislate for themselves.
 - Colonial / State Constitutions
 - Colonies to States on Federation.
 - New colonies were classified as either:
 - Territory acquired by treaty or military victory → existing institutions/law of the colony retained;
 - OR:
 - Territory that was settled i.e. the inhabitants were not recognized and the English legal system applied.
 - Australia was considered to be **terra nullius**; it was settled by England rather than conquered.
 - **Mabo vs Queensland**
 - The High Court acknowledged that Australia had not been *terra nullius* and that common law recognizes a form of native title to land.
 - **Native Title Act 1993 (Cth)**
 - Set up a Native Title Tribunal to determine land claims.
- **Outline of Australian legal system today:**
 - A common law system.
 - A federal system.
 - Based on the *Westminster system*, which incorporates:
 - A constitutional monarchy.
 - Separation of powers.
 - Responsible government.
 - Rule of law.

- Common law legal system:
 - Combination of statute law (Acts) and cases decided by judges (e.g. Australia).
 - Based on the traditions, procedures, rules and institutions developed in England.
 - The three meanings of 'common law':
 - A system of law (as opposed to civil law systems).
 - Judge-made law (as opposed to legislation – sources of law).
 - Judge-made law which developed in the common law courts (as opposed to EQUITY – the judge made law made in the Equity/Chancery courts).
- Federal system:
 - In 1900, the Australian Constitution united the colonies of one country, Australia, in a federation – **Commonwealth of Australia Constitution Act 1900**.
 - Federation involves a division of powers between the States (the former colonies) and the Commonwealth.
- A constitutional monarchy:
 - **Monarchy** – the head of state is the Queen.
 - **Constitutional monarchy** – the Queen holds that position pursuant to underlying constitutional arrangements rather than by force of arms.
- Separation of powers:
 - Allocates different powers to the different arms of government:
 - **Legislative** functions – Parliament – making laws.
 - **Executive** functions – Government – administering laws.
 - **Judicial** functions – Courts – applying laws to individual cases.
- Responsible government:
 - An executive government that is responsible to the legislature.
 - A government that is *"responsive to public opinion and answerable to the electorate"* (Walker).
- The rule of law:
 - Helps to maintain the balance between personal freedoms and the legislative power to make laws.
 - Requires all members of society (including the government) to be subject to the law – no one is above it.
 - *"Acts as a bar to untrammelled discretionary power"* (Dyson).

4. **The Constitution**

- Enactment of the Australian Constitution:
 - 1900: The British Parliament passed the Australian Constitution Act.
 - 1901: The Commonwealth of Australia came into existence on 1 January.
 - The colonies (now States) gave up certain powers, rights and duties to the new central government.
 - They retained their individual identities and a great deal of legislative authority.
- **Chapters of the Constitution**
 - I. The Parliament
 - Vests the **legislative** power of the Commonwealth in a Federal Parliament (Queen + Senate + House of Reps); provides for the establishment of the House, the significant procedures and the powers of Parliament.
 - II. The Executive Government
 - Vests the **executive** power of the Commonwealth in the Queen, exercisable by the Governor-General.
 - **Section 62 Federal Executive Council**
 - **Section 64 Ministers of State**
 - III. The Judicature

- Vests the **judicial** power of the Commonwealth in the HCA and any other Federal courts.
- IV. Finance and Trade
 - **Section 90** grants exclusive power to the Federal Parliament over customs and excise duties.
 - **Section 92** states that trade commerce and intercourse among the states shall be absolutely free.
- V. The States
 - Preserves State constitutions, State laws and powers of State Parliaments.
- VI. New States
 - Provides for new States to be admitted to the Commonwealth and for the territorial limits of a State to be altered; also provides for the Commonwealth Parliament's authority over the territories.
- VII. Miscellaneous
- VIII. Alteration of the Constitution
 - **Section 128** states that amendments must be passed by both Houses of Parliament, by a majority of voters AND by a majority of States (referendum).