

LAWS1052 COURSE NOTES

INTRODUCTION TO LAW AND JUSTICE



LAWS1052: Introduction to Law & Justice Course Notes	1
Chapter 1: THE DISTINCTIVENESS OF AUSTRALIAN LAW	1
Chapter 15: INTERPRETING STATUTES	3
Chapter 2: THE PLACE OF AUSTRALIA IN GLOBAL LAW	5
Chapter 12: COURTS IN ACTION.....	5
Chapter 3: THE ROYAL COURTS AND DEVELOPMENT OF COMMON LAW.....	9
Chapter 13: THE DOCTRINE OF PRECEDENT	13
Chapter 4: LAWYERS & THE EARLY DEVELOPMENT OF PRECEDENT.....	16
Chapter 16: THE MODERN LAWYER	19
Chapter 5: LAW, CIVIL WAR AND THE GLORIOUS REVOLUTION	20
Chapter 17: THE IMPORTANCE OF LAW	28
Chapter 6: THE IMPACT ON THE INDIGENOUS INHABITANTS.....	29
Chapter 7: BRITAIN & THE COLONISTS: USING THE HERITAGE	31
Chapter 8: THE NATURE & SCOPE OF PARLIAMENTARY DEMOCRACY	33
Chapter 9: FEDERATION AS THE WILL OF THE PEOPLE	34
Chapter 10: INDEPENDENT ATTITUDES, RACE & JUSTICE	36
Chapter 11 CLASSIFYING AUSTRALIAN LAW	37
INTENTIONAL TORTS	39
Case Summary	42
Glossary of Terms	54

LAWS1052: Introduction to Law & Justice Course Notes

Chapter 1: THE DISTINCTIVENESS OF AUSTRALIAN LAW

Introduction

(pp 3)

English or Australian Law?

(pp 4-5)

A snapshot of the current Australian legal system

(pp 5-8)

Characteristics of our legal system which derive from English heritage.

- In the ideal legal system, law and justice go together automatically.
- The **rule of law** means that all people are subject to the law and prevents the arbitrary abuse of power.
- Australian law has developed from the traditions of the English common law.
 - The condition the colonists found and demands of a developing country created a distinct system of law.

- Australian law was treated as a derivative of English law.
 - *Henry and Susannah Kable Story*
- There was no study of the history of the Australian legal system.

Some characteristics which derive from English heritage are:

- **A system of representative democracy using parliament to make laws.**
 - All Australian jurisdictions use systems in which people vote for representatives.
 - Based on philosophical context of **Western liberalism** – the idea of individual liberty and limits on government power in order to prevent the abuse of power.
- **A legal profession divided into solicitors and barristers.**
 - **Solicitors** are to advise clients and manage their affairs.
 - **Barristers** are to advocate in court.
 - For centuries, judges were chosen from the advocacy branch; only in the late twentieth century was this rule broken in Australia.

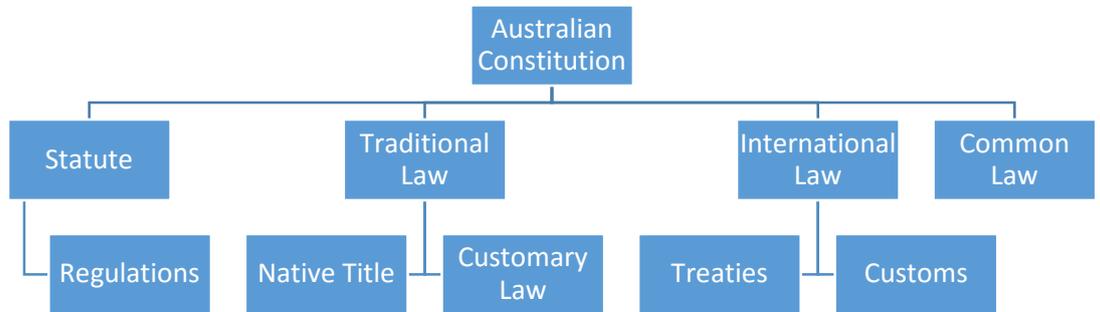
- **A ‘common law’ system.**

This term has three meanings:

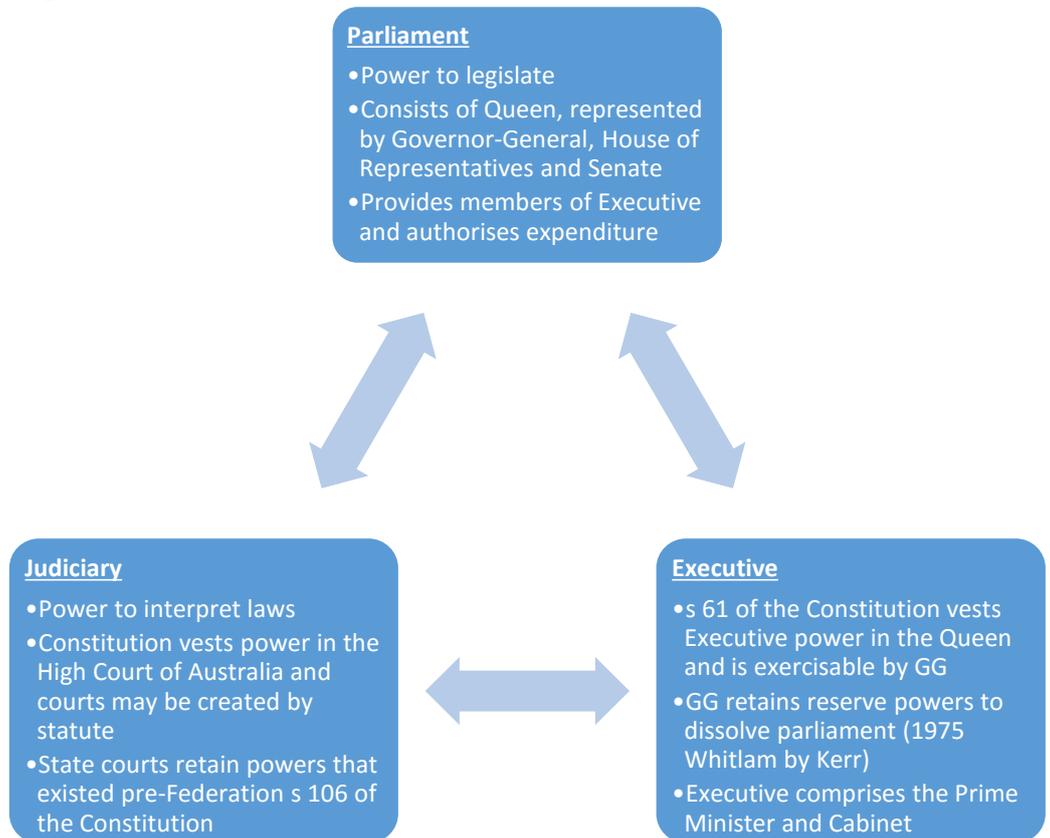
- Law derived from the English legal system – **adversarial system of law**.
 - Judges make the law which is based on decided cases (**precedent**) and develop sets of principles which is called ‘**case law**’.
 - The legal reason for which the judge came to their decision is called the *ratio decidendi*.
 - A precedent must be followed in a court lower in the same hierarchy.
 - Common law is distinguished from the other main source of law: legislation or statute law.
 - Particular branches of law, for example:
 - Matrimonial law (marriage and divorce)
 - Admiralty law
 - Trade practices law
 - Law which grew from medieval royal courts (‘the courts of common law’) and law which grew from the medieval Lord Chancellor (‘equity’).
 - Presided the Court of Chancery
 - Within private law or the law between persons.
- **Decision-making in courts after an adversarial trial.**
 - Decision-making by judges and juries (in criminal matters of a certain severity and limited civil matters).
 - Adversarial nature related to historical ‘trial by battle’.
 - Trial by battle was overtaken by jury trial during the time of Henry II (1154–89)
 - *Ashford v Thornton* (1818) 1 B & Ald 45.
 - Statute: 59 Geo III c.46 (Abolition of Appeals of Felony and Trial by Battle)

- **A court system for dispute resolution**
 - Divided by hierarchy and jurisdiction (geographic and subject-matter).
 - Division of subject matter among courts.
 - Commercial and equity division
 - Common law division
 - Criminal law division in Trial division

- **Sources and Hierarchy of Legal Authority**



- **Tripartite structure**



- **Separation of Powers**

- Drawn from USA: **power is dispersed** between three separate branches of government wherein each branch acts as a check on the others

- **Responsible Government**

- ‘While the core of the British principle of responsible government is clear, the edges are fuzzy and ill-defined’ – George Winterton, *Parliament, the Executive and the Governor-General* (1983) 2.
- Responsible government means that **the Executive is drawn from Parliament, is responsible to Parliament**, and that the Governor-General exercises their powers on the advice of responsible ministers

The Distinctiveness of Australian Law
(pp 8-9)

Classification of statutes
(pp 391)

- Most statutes are Public Acts intended to operate on the public at large.
- Private Acts must include a provision establishing it as a Private Act of Parliament
- Private Acts traditionally had to be specially proved, whereas it is assumed that judges know of Public Acts.

Subordinate or delegated legislation
(pp 391-392)

- An Act contains authority for the governor or some other body to make delegated legislation – ordinances, by-laws, rules and regulations.
 - For example, councils have the power to make by-laws regulating the use to which land can be put, imposing building safety requirements and operating community services such as libraries and parks.

Codes and consolidated statutes
(pp 393)

- After several amendments, statutes can become unwieldy, and parliament can authorise a reprint of the Act with all the amendments.
- A consolidation repeals the existing legislation and replaces it with law which represents the law as it has been amended.
- A code incorporates the legislation as it has been changed, but also the common law, so that the code now exhaustively states the law for that subject area.
 - Because a code is supposed to be exhaustive, judges may refuse to consider previous cases which interpreted that area of law.

Structure of an Act
(pp 393-394)

- A statute has a long title which states its purpose, and a short title which is the title by which it is to be cited.
- The rest of the statute is set out in sections, and it may also be divided into parts and divisions.
- Headings and margin notes are used, but these are not operative parts of the Act and cannot be used to establish the Act's meaning.

The relationship between common law and statute
(pp 398)

- **Common law gives way to statute** where there is a conflict between them. However common law judges can always interpret ('construe') statutes.

The traditional rules of interpretation
(pp 399)

- The common law involves an interpretation of statute law. Statute law is presumed not to abrogate fundamental common law rights and freedoms, but in the event of clear and unambiguous intention by Parliament to infringe such rights, statute prevails – the **Principle of Legality**.

The traditional rules of interpretation ('construction') of statutes were threefold:

- **Literal rule**
 - The fundamental rule of interpretation is that a statute is to be expounded according to the intent of the Parliament that made it.
 - Explained by Higgins J in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (the *Engineers case*) (1920) 28 CLR 129.
- **Golden rule**
 - The court would modify the meaning under the literal rule if the result would be absurd or repugnant or inconsistent with the rest of the legislation.
 - Principle of legality where there is an interpretation of the law that is open, it should adhere to the rights of people.
 - *Grey v Pearson* (1857) 6 HL Cas 61 per Lord Wensleydale at 106.
- **Mischief rule**
 - The interpreter looked at the mischief that the parliament was attempting to prevent by passing the statute. **This to find the purpose of the act.**
 - It did not work with legislation covering new areas of policy

<p>Presumptions (pp 403)</p>	<ul style="list-style-type: none"> ○ It was very difficult to determine the parliament's purpose when the rules of construction confined the interpreter to the words of the statute alone. <ul style="list-style-type: none"> - Established in <i>Heydon's Case</i> (1584) 3 Co Rep 7a. <p>There are some presumptions of interpretation:</p> <ul style="list-style-type: none"> • The presumption that the parliament does not interfere with fundamental rights. • The presumption against retrospective operation of the statute • The presumption that legislation does not bind the Crown • The presumption that parliament does not legislate extraterritorially. • The presumption that later laws impliedly repeal earlier laws.
<p>The Modern Approach (pp 416-417)</p>	<ul style="list-style-type: none"> • Statutory interpretation is now concerned with giving effect to the purpose or intention or legislation through a broad contextual approach to the words in issue. • Purposive approach is mandated by State and Federal legislation. <ul style="list-style-type: none"> ○ s 15AA of the <i>Acts Interpretation Act</i> 1901 (Cth) • Purposive approach is to be adopted from the outset. It is not necessary to discern an ambiguity in the text before considering the purpose of the legislation.

Chapter 2: THE PLACE OF AUSTRALIA IN GLOBAL LAW

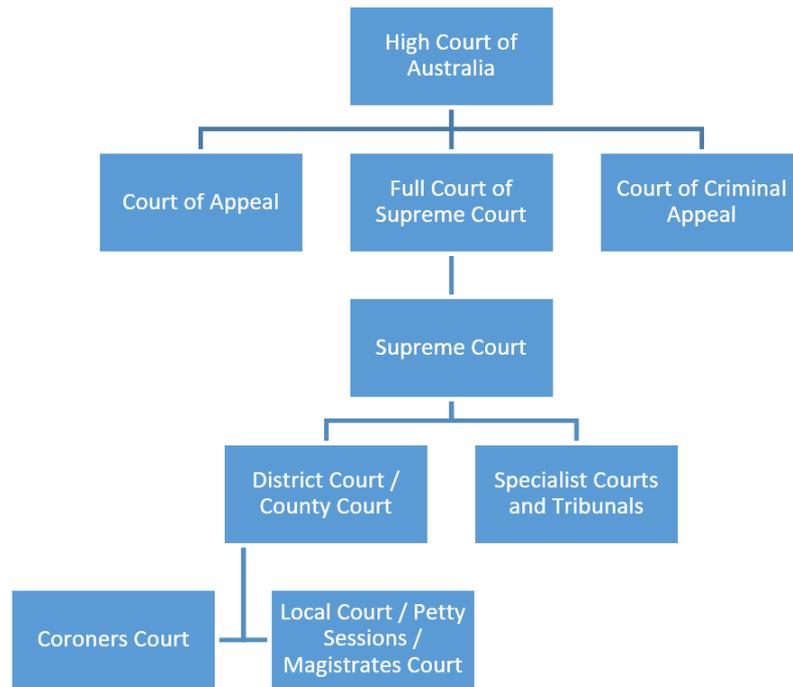
<p>International Law (pp 25-26)</p>	<p>Law which applies to the relationships between countries.</p> <p>It is said to be derived from two sources:</p> <ul style="list-style-type: none"> • Customary international law. <ul style="list-style-type: none"> ○ UN Declaration of Human Rights. • Treaty or convention law. <ul style="list-style-type: none"> ○ Agreements made between countries – bilateral or multilateral. ○ A treaty becomes binding in stages. <ul style="list-style-type: none"> - Signing a treaty merely signals intention to be committed. - Ratification involves integrating the treaty into the legal system of the state.
<p>International law and its relationship to municipal law</p>	<p>Two basic theories:</p> <ul style="list-style-type: none"> • Dualism <ul style="list-style-type: none"> ○ See the two legal systems as entirely distinct from one another. ○ In most cases for international law to become part of the domestic law, it has to be incorporated by legislation. • Monism <ul style="list-style-type: none"> ○ Takes the view that international law automatically binds a country domestically and enters the law of the country because all law is part of a universal legal order.

Chapter 12: COURTS IN ACTION

<p>Jurisdiction (pp 298)</p>	<ul style="list-style-type: none"> • Jurisdiction means the scope of a body's power to hear a matter, determine what the facts are, and apply the law to make a judgment. <ul style="list-style-type: none"> ○ It can be defined by subject, territories or parties. ○ No court can hear a matter which it does not have jurisdiction. ○ <i>Harris v Caladine</i> (1991) 172 CLR 84, Toohey J said 'Jurisdiction is the authority which a court has to decide the range of matters that can be litigated before it; in exercise of that jurisdiction a court has power expressly or impliedly conferred by the legislation governing the court and "such powers are incidental and necessary to the exercise of the jurisdiction or the power so conferred"'. <ul style="list-style-type: none"> ○ Generally, the statute which established the court will define its jurisdiction.
-----------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

State Courts
(pp 299-303)

State Court Hierarchy



Supreme Court

Supreme Court

- ‘Superior courts of record with general jurisdiction’ – unlimited jurisdiction.
- As a superior court of record, a Supreme Court’s decisions cannot be void, but must be set aside by writ of error or by an appeal.
- Can summarily punish for contempt of court without legislative authority.
- Inherent power to regulate its own procedure, to regulate the right of audience before it, and to grant bail.
- **The Doctrine of Autochthonous Expedient** means that federal matters may be heard in Supreme Courts and determined in them.
- May hear appeals either as a single judge, or as the separately constituted Court of Appeal or Full Court.

Intermediate Court

Intermediate Courts

- District or Country Courts are courts of record with jurisdiction limited by their enabling act.
- The original jurisdiction of these courts in the civil domain is normally defined by monetary limits.
 - In NSW, general jurisdiction limit is \$750 000 unless both parties’ consent.
 - Equity matters limit is \$20 000.
 - Unlimited jurisdiction in relation to motor accident matters.
 - Monetary limit for personal actions is \$200 000.
 - Probate jurisdiction (jurisdiction to establish the validity of wills).
- General jurisdiction is given to hear all indictable offences except for some specific list.
 - Treason and murder are specifically excepted in NSW.
- Not all intermediate courts have appellate jurisdiction.
 - NSW allows an appeal as of right within 21 days on questions of law only.

When a judge misapplies the law in the case: misconstrued a statute or misunderstood.

- Question of law: misunderstood a statute
- Question of fact: misunderstood the actions of the case

Local Court

Magistrates Court

- Where a majority of cases are heard.