

BUSINESS LAW GUIDEBOOK

SECOND EDITION

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CHAPTER 1: THE AUSTRALIAN LEGAL SYSTEM

TEST YOUR KNOWLEDGE

1. Distinguish between ‘statute law’, ‘common law’ and ‘equity’. Where does the common law originate? Is it possible to say that equity is part of the common law?

ANSWER

Statute law is the law that emanates from Parliament. It is created by legislation. The Australian Federal Parliament can only enact legislation in certain specified areas under s 51 of the Constitution.

Common law originated from England. Common law is the unwritten law based on custom or court decision, as distinct from statute law. Equity is a body of rules developed in the Court of Chancery in England and followed in other common law countries, serving to supplement and remedy the limitations of the common law. Equity initially co-existed with common law. Equity developed in response to the rigidity of the common law.

2. Explain what the doctrine of precedent (*stare decisis*) is and how it operates.

ANSWER

The doctrine of precedent says that a preceding case serves as an example for or a justification in subsequent cases. The doctrine can be explained this way: like cases should be decided alike, in other words, the legal principles applied in similar situations should be consistent. The common law gives effect to this by what is called *stare decisis*. What this means, in simple terms, is that where a court has decided a case in a particular way,

subsequent cases involving similar facts in the lower courts in the same court hierarchy should be decided in the same way.

3. What is the *ratio decidendi* of a case? What is the difference between *ratio decidendi* and *obiter dicta*?

ANSWER

The *ratio decidendi* (the reason for deciding) is the legal reasoning upon which the decision in a particular case is based and may be used by judges in future cases when confronted with similar facts. Unlike the *ratio decidendi*, the *obiter dicta* (singular *obiter dictum*) are observations made by the judge on a matter of law. The *obiter dicta* are not essential for the decision, and are therefore not part of the binding precedent established by the case, but may be persuasive.

4. Distinguish between a binding precedent and a persuasive precedent.

ANSWER

A binding precedent must be followed (whether the judge agreed with the principle contained therein or not) whereas a persuasive precedent does not have to be followed, but is considered by the court in making its decision and may be followed.

5. Explain briefly the difference between concurrent and exclusive legislative powers of the federal parliament.

ANSWER

Concurrent powers are powers which allow both the Commonwealth and state Parliaments to pass laws on the same matter. Exclusive legislative powers are powers which only the federal parliament has, for example, those which allow it to pass laws to impose customs and excise (s 90); military forces (s 114); currency (s 115) and freedom of trade between the states (s 92).

6. Explain what is meant by saying that there is an inconsistency between a state law and a Commonwealth law.

ANSWER

In a federal system there are two types of laws: federal and state. Sometimes citizens, subject to both a state and a Commonwealth law may find that they are not compatible. When this occurs we say that there is an inconsistency between the state law and the Commonwealth law. There arises then the question of which law is to be obeyed. Section 109 of the Constitution provides that if there is a valid Commonwealth law that is inconsistent with an otherwise valid state law, then the Commonwealth law prevails. The state law is, to the extent of the inconsistency, invalid.

7. Discuss the doctrine of separation of powers. Explain how this doctrine applies to the different arms of government in Australia.

ANSWER

The doctrine of the separation of powers provides for the separation between the legislative, executive and judicial powers of the Commonwealth. The doctrine applies to the arms of government of Australia in the following ways:

- the legislative function—the making of laws which vests in the Commonwealth, state or territorial governments
- the executive function—the formulation of policy and its administration through the Cabinet (or the Ministers within the Cabinet) of the elected Commonwealth or state government
- the judicial power—the power to interpret and enforce laws, and the power to declare a law unconstitutional. This power is vested in the High Court and such other courts as the Parliament creates.

In practice, there is no strict application of the doctrine in Australia. There is no real separation of powers in Australia between the executive power and the legislative power since the Prime Minister and the executive ministers are required under our 'Westminster system' to be elected members of the Commonwealth Parliament.

8. What is a court hierarchy? Explain its importance.

ANSWER

A court hierarchy refers to the ranking of courts in respect of their importance or significance. Under the hierarchical court system, the position of a court in a hierarchy indicates the types of cases that it will hear, as well as providing an appeal process for a decision from a lower court to a higher court. If the decision in the case goes on appeal to a

higher court, the court that hears that appeal is known as an appeals or appellate court, and it is said to have an appellate jurisdiction. To understand how the doctrine of precedent or *stare decisis* works, it is necessary to have some understanding of the court hierarchies in Australia. Each state has its own hierarchy of courts.

9. In interpreting statutes, what rules will the court follow?

ANSWER

The rules used are:

- *The literal rule*

Applying this rule, the courts are to give a literal interpretation of the words used, that is, they must give the words their natural and ordinary meaning.

- *The golden rule*

This qualifies and moderates the literal approach by allowing the courts to disregard the literal or actual meaning of the words used in the statute if they would produce an absurd result.

- *The purpose approach*

The purpose or purposive approach tries to determine the intention of Parliament when it passed the Act and requires the interpretation of the words in the legislation to help those words achieve their purpose.

- *The use of extrinsic materials*

In the event of ambiguity or doubt, legislation in some jurisdictions provides for the use of extrinsic materials, which are those outside the Act, to assist interpretation, for example, tabled reports related to the legislation, including reports of Royal Commissions, committees of inquiry, or reports of parliamentary proceedings.

There are two further principles used in statutory interpretation, these being aids to construction (interpretation) rather than inflexible rules:

- The *ejusdem generis* rule. Where two or more specific words are followed by a general word, the meaning given to the general word is limited to the same class as the specific words. Thus, a law which applies to any root, lawn, compost or shrub would not extend to a tree.

- The *noscitur a sociis* rule, often referred to as the 'words of a feather flock together' rule refers to the fact that a word or phrase is to be derived from its context. For

example, a law that prohibits drinking alcohol in any home, canteen, restaurant, should not extend to drinking in a public lane because the previous specific places indicate that the law applies to enclosed areas.

10. A case concerning company law came before the Supreme Court of Victoria which handed down a decision. Explain the impact this decision has on later decisions by:

- (a) other Victorian courts**
- (b) the Supreme Court of New South Wales**
- (c) Papua New Guinea courts.**

ANSWER

- (a) Later decisions of other Victorian courts which are courts in the same judicial hierarchy will have to follow the decision handed down by the Supreme Court of Victoria.
- (b) The Supreme Court of New South Wales does not have to follow the decision that is handed down by that of the Supreme Court of Victoria because the latter court is in a different judicial hierarchy. Nevertheless, the decision of the Supreme Court of Victoria may be persuasive in that it may be considered by the Supreme Court of New South Wales in making its decisions and may be followed.
- (c) Papua New Guinea courts do not have to follow the decision of the Victorian Supreme Court because they are not in the same judicial hierarchy as that of the latter. However, as explained in (b) the decision of the Victorian Supreme Court may be persuasive.

11. Explain what is meant by native title.

ANSWER

Native title is the form of title to land held by Aborigines as Indigenous Australians over their traditional land. When the first English settlers arrived, they did not recognise that Indigenous people had a valid system of land ownership. The continent of Australia was considered to be *terra nullius* ('empty land' belonging to no one). This was typically the view of the law which was commonly applied in the lands the English had conquered.

12. Explain the effect of the *Mabo* case (*Mabo v State of Queensland (No 2)* (1992) 175 CLR 1) on native title.

ANSWER

The *Mabo* case overturned the idea that Australia was *terra nullius* and in doing so it also recognised the customary system of law of Indigenous Australians. The law now recognises, as mentioned earlier, a form of native title, namely, the rights of the Indigenous inhabitants to their traditional lands in accordance with their laws and customs.

13. What was the finding of the High Court in the *Tasmanian Dam* case (*Commonwealth of Australia v Tasmania* (1983) 158 CLR 1)?

ANSWER

The *Tasmanian Dam* case demonstrated that, among other things, the Commonwealth of Australia had the power under s 51 (xxix) to stop the Tasmanian Hydro-Electric Commission's construction of a dam and a power station. This power was based on Australia's international obligations under the UNESCO World Heritage Convention for the Protection of the World Cultural and Natural Heritage, which Australia had ratified in 1974.

14. It is said that there are benefits for people in the business world to be ethical. Discuss.

ANSWER

It is good business practice to operate ethically, and people in the business world who do so will, in the long run, produce a more profitable outcome. Ethical business practice in the consumer's eyes will bring about an enhanced business reputation and relationship with customers who will continue to return to the business. This will in turn generate more profits for the company. On the other hand, bad business ethics can lead to negative publicity and a reduced consumer confidence in the products or services of the company, resulting in lower profits.