PART ONE
THE LEGAL FRAMEWORK
CHAPTER 1

THE AUSTRALIAN LEGAL SYSTEM

COVERED IN THIS CHAPTER
After successfully completing this chapter, you will be able to:

• explain what is meant by law
• outline the rules of precedent
• identify the main sources of law and understand the origins of Australian law
• understand the Australian Constitution and the federal system
• understand the exclusive and concurrent powers of the Commonwealth
• understand the doctrine of the separation of powers
• explain how the Constitution can be changed
• explain the different approaches to the interpretation of legislation
• have an appreciation of law and ethics.

CASES TO REMEMBER
Mabo v State of Queensland (No 2) (1992)
Commonwealth of Australia v Tasmania (1983)

INTRODUCTION

THE NATURE OF LAW

This chapter introduces us to the legal framework under which commercial or business law operates. To understand how such legal principles can be applied, it is necessary, in the first place, to have an understanding of the nature of law itself.

Law, which has always held a fascination for many, is difficult to define and many legal writers and philosophers have, for centuries, attempted to do so. Such attempts at defining law have led to different conclusions, inferring that any view on what the law is may be shaped in the long run by an individual’s moral, religious, political or ethical views and the general influence of the society in which he or she lives.

Yet, despite the lack of agreement on a precise definition of ‘law’, it is still possible to identify common themes. A useful general definition may be that ‘law’ is a system of rules that operate in our society to regulate, control and influence the behaviour or relations of individuals and groups. Where people live together in social groups, it is in their interests that some limitations should be placed on the freedom to act...
as they like. A society without rules will be in absolute disorder and confusion. Yet rules must be distinguished from laws. There are many rules governing behaviour that are not laws. They include rules that control how sporting contests are played and our rules for social interaction. To determine when rules become laws, consideration should be given to questions such as:

- Where do the rules come from?
- When rules are broken, who is to determine whether the offenders are punished? How will the offenders be dealt with?
- Will the offenders be punished and by whom?

The rules we have come from laws made in two main ways: by Parliament enacting Acts of Parliament or statutes, and by the courts. Australia has inherited many of its laws, together with its legal system, from England. These inherited laws have evolved, developed and been modified to suit the Australian context. They are made by our parliamentarians and judges, are legally enforceable, and have established standards of conduct between citizens and between citizens and government.

The law maintains a balance between the interests of those in business and answers to the needs of persons as manufacturers, retailers, buyers and consumers. It serves as a regulator of business transactions, and in so doing applies, for example, contract law, consumer law, competition law, company law and finance law. It also regulates the business structures and entities in the commercial world—for example, companies, partnerships, joint ventures and franchises—and their funding, banking and insurance requirements, as well as their registration where necessary.

**THE PURPOSE OF THE LAW**

The purpose of the law, as alluded to earlier, is to regulate the conduct of the individuals for the benefit of society. The rule of law excludes arbitrary power. Thus, if there is conflict arising, the legal system makes available a mechanism to hear and settle disputes by an independent and impartial process through, for example, the court system. At the same time, it must be reminded that the law is enforceable, and has been developed to set standards of behaviour between the citizen and the state. If these standards of conduct are blatantly breached, the law penalises those who are responsible for doing so. Yet, it should be remembered that the law also plays other roles in a democracy, such as fostering freedom for all citizens and guaranteeing free enterprise where few restrictions are placed on business activities and ownership.

**BUSINESS LAW**

Business law, with which this book is concerned, has evolved as a set of rules to control and preserve economic and commercial endeavours. In Australia, it comprises the rules that determine the rights, duties and obligations of people who are engaged in commercial activities. People are involved in commercial
transactions every day, although they do not necessarily think about the legal implications of their acts. For example, when taking a bus, who would think about contract law when paying the fare, the statutes that have had to be enacted by Parliament to get them to their destination, and the remedies to which they may be entitled if they are hurt on the way?

In recent years, there have been enacted statutes to regulate specific aspects of business or commercial law. The statutes that come to mind include, for example, the Australian Competition and Consumer Act 2010 (Cth) (formerly, the Trade Practices Act 1974 (Cth) which control restrictive trade practices and provide protection to consumers; and the Corporations Act 2001 (Cth) which is concerned with the legal principles applying to the formation and general operation of companies.

There are still, nevertheless, areas of business law that are not regulated by statute, but are determined by the principles of the common law, that is, the law developed by the decisions of courts in cases over a period of time, such as contract law. The evolution and development of this law is a dynamic rather than a static process. Thus, it has to be reinterpreted and amended to adequately reflect and serve the needs and requirements of a rapidly evolving Australian society.

SOURCES OF LAW

The main sources of law can be identified as:

- **Enacted law.** This is the law made by Parliament, defined as statute law or legislation and delegated legislation. Statute law or legislation is established by the people through their federal or state parliamentary representatives (members of Parliament). Delegated legislation is established by government departments and instrumentalities in the form of by-laws, orders, rules and regulations.

- **Unenacted law.** This is law that is made by means of decisions of the courts, and is known as case law.

These are the primary sources of law. The secondary sources are textbooks and legal journals, which supply commentaries, explanations and speculations about the law or the need for reform in the law.

Both enacted law and unenacted law are often known as the ‘common law’.

Common law can be classified as:

- **Civil and criminal law.** Civil law involves matters between one person and another regarding the enforcement of rights and the carrying out of obligations. A civil action is undertaken by an individual, and where successful, will result in the granting of a remedy. Criminal law includes all statute and case law recognising certain actions as constituting offences, and is enforced by the state.

- **Common law and equity.** The common law traditionally only gave a remedy of damages, which may not be that useful to prevent the continuing occurrence of harm or the continuing breach of a contract. Historically, the common law
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refers to rules developed by the common law courts, which originally were the Courts of King’s Bench and Common Pleas. As an alternative to the common law courts (which had very rigid procedural requirements in the early days), equity law developed by direct appeal to the sovereign, then to the sovereign’s Chancellor and in time to the Court of Chancery.

The body of rules devised by the Court of Chancery, which supplemented common law and procedures, became known as ‘equity’. It developed through appeals to the king where it was felt that decisions had been unjust. Equity law, which is another form of case law, provides more flexible remedies in that it can grant remedies where common law remedies were inadequate. Equity, unlike common law, can grant, for example, an injunction or an order for specific performance, and these remedies are defined as ‘equitable remedies’. These equitable remedies will be discussed further in Chapter 4.

Equity law is now fused with the common law, resulting in both systems being administered by the same courts. The principles of equity, such as unconscionability, continue to have a significant influence on the development of modern law, and specifically to modern business law.

FIGURE 1.1 Sources of law

DOCTRINE OF PRECEDENT OR STARE DECISIS

The basis of the doctrine of precedent is this: 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 (‘the decision stands’). What this means, in simple terms, is that where a court has decided a case in a certain way on a particular set of facts, subsequent cases involving similar facts should be decided in the same way in the lower courts in the same court hierarchy. For example, a decision of the Supreme Court of New South Wales is binding on District Courts should they have to decide the same question in a later case.

It should be noted that not every aspect of a higher court’s judgment is necessarily binding on a lower court. Only the reason or reasons given for deciding, called the
'ratio decidendi' and often abbreviated as the 'ratio', constitutes a binding precedent. So it is only the ratio decidendi of a previous case that is binding upon a subsequent court.

The ratio must be distinguished from a statement made in a judge’s decision that was not strictly necessary or relevant. Such a statement is called an obiter dictum (plural obiter dicta) ('remarks in passing'), and is not binding but may be persuasive.

EXAMPLE: PRECEDENT

Suppose that Elaine sues Frank for damages, claiming that Frank acted negligently and caused her injury. Suppose that Elaine is in the right. In court the judge may say this:

Frank acted negligently. This was because he knocked down Elaine while cycling on the footpath at excessive speed and fractured Elaine’s left leg and badly bruised her left shoulder. If Frank had been more cautious by cycling slowly and by being aware of his surroundings, he would not have acted negligently.

The judge made three statements. The judge’s first statement is her decision. Her second statement is her reason for her decision: the ratio decidendi. Her third statement is something said by the way: an obiter dictum. The judge’s ratio decidendi or ratio is a binding precedent. Her obiter dictum is only of persuasive value.

THE COURTS

Like most countries, Australia has adopted a hierarchical or tiered court system. Both the states and the Commonwealth have adopted such a system. Under the hierarchical court system, the position of a court in the 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.

Where a matter goes to court for the first time, the court that hears the case is called a ‘court of first instance’ and is said to have an original jurisdiction. If the decision in the case goes on appeal to a higher court, the court hearing that appeal is known as the appeals or appellate court, and 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.

Legal matters and legal disputes in Australia are heard in a variety of courts. Each state has a roughly similar hierarchy of courts, with the High Court the highest court of appeal. In addition, Chapter 111, s 71 of the Constitution provides for a federal court hierarchy. The courts within this federal court hierarchy that are of importance to business law are the High Court of Australia and the Federal Court.
The Federal Court was created under s 71 of the Constitution in 1976 to cover areas of Commonwealth jurisdiction, such as bankruptcy, tax, industrial law, intellectual property and trade practices.

FIGURE 1.2 Hierarchy of courts

THE RULES OF PRECEDENT

From what has been said above, some rules of precedent can be discerned:

- A judge in a lower court must follow the decisions of a higher court in the same judicial hierarchy but not the decisions of other judges at the same level in the same hierarchy. At the same time, a higher court can overrule a prior decision of a lower court in the same hierarchy.
- Courts in Australia do not have to follow the decisions of higher courts in a different judicial hierarchy. However, such decisions may be persuasive: that is, although they are not binding, they may be considered by the court in making its decisions, and may be followed. This is especially so in respect of the decisions of the superior courts in the English hierarchy. The reason for this is that the common law of Australia, as mentioned, is derived from English common law.
- The highest court (the High Court of Australia) can overrule its previous decisions, although it will not do so lightly and without due consideration, unless a decision is clearly wrong or unless it is in the interests of justice.

ORIGINS OF AUSTRALIAN LAW

To properly understand our laws and our legal system, we must look at the origins of the common law and equity, and how they became part of the law of Australia.
In 1788, Captain Arthur Phillip was given authority by the British Government to establish a colony in New South Wales. The country was largely treated as uninhabited, and consequently the laws of England became its laws. The presence of indigenous people did not make any difference to this view.

The English settlers considered the Aborigines’ complex system of laws and customs as a type of ‘primitive law’ and had little regard and respect for them. They did not recognise any Aboriginal rights to the land they inhabited. The view that the colony was *terra nullius* (literally ‘unsettled’ or ‘empty’ land) in 1788 has now been comprehensively rejected by the High Court of Australia in the following case.

**A CASE TO REMEMBER**

*Mabo v State of Queensland (No 2) (1992) 175 CLR 1*

**Facts:** This celebrated case has a ten-year history. In May 1982, Eddie Mabo and four other Murray Islanders, who were members of the Meriam people, initiated legal proceedings in the High Court, claiming ownership of most of the land of the Murray Islands in the Torres Strait, on the basis that they could trace their occupation back to before white settlement (implying thereby the existence of a continuous ownership in the land).

**Decision:** In 1992 the High Court held in a majority decision (6–1) that the Murray Islanders were entitled to possession, occupation, use and enjoyment of their land on the basis that Australia at the time of settlement was not *terra nullius*. On that basis, the common law of Australia recognised a form of native title which reflected the rights of the indigenous inhabitants to their traditional land in accordance with their laws and customs. The Meriam people were entitled to the occupation, use and enjoyment of the lands of the Murray Islands.

The High Court noted that native title could be extinguished by the Crown enacting legislation that showed a clear intention to nullify native interests, or by traditional title holders. However, any such action may be subject to the *Racial Discrimination Act 1975* (Cth).

In *Mabo*, the High Court noted that the common law recognised a form of native title, namely, the rights of the indigenous inhabitants to their traditional lands in accordance with their laws and customs. The colony was therefore not *terra nullius* when the first British settlers arrived. There was a form of ownership recognised by the Aboriginal people and the settlers dispossessed the Aboriginal people of most of their traditional lands. The court held that these rights should be acknowledged unless there was subsequent exercise of control by the appropriate parliament over the particular landholding. The question of the reception of English law into Australia was an important consideration in the *Mabo* case, and the decision has been of continuing importance for contemporary Australia. An important common law case since *Mabo* was the decision of the High Court in the *Wik Peoples v the State of Queensland* (1996) 187 CLR 1,
where it was held that native title was not necessarily extinguished (terminated) by
certain pastoral leases (Crown land the government allows to be leased, for the
purposes of farming).

It is also now clear that the Aboriginal peoples had a form of law based on social
custom, which included a system of land ownership. The Aborigines had, in the
words of Blackburn J in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, a ‘subtle
and elaborate system highly adapted to the country’. There was perhaps in their law
no formal structure of a type then acknowledged by English law.

Within 50 years after the settlement of New South Wales, colonies were also
established in Tasmania, Queensland, Victoria, South Australia, and Western
Australia. In the 1850s, the various colonies formed their own parliaments. However,
these parliaments were still subject to the British Parliament and their powers were
restricted. The colonial governments were still appointed by the British Government.

In the years between 1850 and 1890 the colonies prospered greatly, became more
complex and sophisticated politically and socially, and were granted more local powers
in the form of responsible government, whereby the executive was elected by the
citizens. There was soon strong agitation for the Australian colonies to unite. Eventually,
in 1899, the colonies formally expressed their willingness to become a single nation
under a federal system of government. The British Parliament heeded their request and
gave them approval to form a federation by passing the *Commonwealth of Australia
Constitution Act* in 1900. From then on, every colony surrendered certain powers to a
central parliament called the Commonwealth or Federal Parliament.

**THE AUSTRALIAN CONSTITUTIONAL SYSTEM**

**A FEDERAL SYSTEM**

Australia is a federation. It consists of a central Commonwealth Government, and
a number of states or territories, all having law-making powers. As a result, there
are two legal systems for each citizen: the central or federal legal system (the
Commonwealth), and that of his or her state or territory.

The main feature of the Australian federal system is that there is a written
constitution that sets out the powers of the Federal Government and its
legal relationship with the states or territories. In Australia, this is found in the
*Commonwealth of Australia Constitution Act* 1900, an Act of the United Kingdom
Parliament, which came into effect in 1901.

The Constitution itself is a broad charter of principles, which sets out how
government institutions will work, and their relations to each other. It is a legal
document which was instrumental in the formation of a federation of the former
Australian colonies. This federation can be seen as a political and economic union.
Thus the significance of the Constitution was to create a united Australia.
COMMONWEALTH JURISDICTION

Section 51 of the Constitution gives the Commonwealth Parliament 39 powers to make laws for peace, order and good government. They include the following important categories:

- trade and commerce with other countries and among the states: s 51(i)
- taxation: s 51(ii)
- postal, telegraphic, telephone and other like services: s 51(v)
- currency, coinage, and legal tender: s 51(xii)
- banking: s 51(xiii)
- insurance: s 51(xiv)
- bills of exchange and promissory notes: s 51(xvi)
- foreign corporations, and trading or financial corporations: s 51(xx)
- marriage: s 51(xxix)
- immigration and emigration: s 51(xxix)
- external affairs: s 51(xxix).

The Commonwealth Parliament has only those powers that are given to it by the Constitution, as enumerated in s 51. In contrast, the powers of the state parliaments are general.

In some areas, it appears that the powers have been increased, widened, and interpreted in favour of the Commonwealth. For example, the enactment of the Competition and Consumer Act 2010 (Cth) (formerly, the Trade Practices Act 1974 (Cth)) was authorised through the use of the corporations power (s 51(xx)), which enabled the Commonwealth to pass laws with respect to the regulation of restrictive trade practices and the protection of consumers.

In the same way, the external affairs power (s 51(xxix)) has been used to support the regulation of environmental activity by a federal law translating international obligations contained in a treaty into municipal (domestic Australian) obligations. For example, the World Heritage Properties Conservation Act 1883 (Cth) and the National Parks and Wildlife Conservation Act 1975 (Cth) are each associated with the Convention for the Protection of the World Cultural and Natural Heritage 1972. An example of such an interpretation of the external affairs power by the High Court was seen in Commonwealth of Australia v Tasmania (1983) 158 CLR 1 (the Tasmanian Dam case). There the Commonwealth relied on the external affairs power to prevent the construction of a dam that it regarded as environmentally unacceptable. This case will be remembered in the law because of what the High Court said about external affairs. The World Heritage Properties Conservation Act also invoked the corporations power for the first time outside the area of trade practices and consumer protection.
A CASE TO REMEMBER

*Commonwealth of Australia v Tasmania* (1983) 158 CLR 1

**Facts:** The case involved a controversial proposal to construct a dam and a power station on the Gordon River below its junction with the Franklin River, an area in the renowned Western Tasmanian Wilderness National Parks. On the basis of persuasion by environmentalists and a commitment to an election promise, the new Hawke Labor Government, in addition to making regulations under the *National Properties Conservation Act 1983* (Cth), passed the *World Heritage Properties Conservation Act 1983* (Cth).

Section 6 of the latter Act authorised a proclamation to be made in relation to certain identified property. The proclamation brought s 9 into operation and applied to property suitable for entry into the World Heritage List under the *Convention for the Protection of the World Cultural and Natural Heritage*, ratified by Australia in 1974. Section 9(1) (h) prohibited any person, without the Minister’s consent, from engaging in acts specifically prescribed in relation to the property, and Regulation 4(2) of the World Heritage Properties Conservation Regulations 1983 prescribed construction work for a dam within the proclaimed area.

The construction of the dam and the power station to generate cheap electricity was empowered by the *Gordon River Hydro-Electric Power Development Act 1982* (Tas), a law of Tasmania that came into force on 12 July 1982.

However, the Commonwealth Government wanted to stop the construction of the dam because it would cause considerable damage to a wilderness area that was of historical national and international significance and capable of World Heritage listing. The High Court had to decide whether it was lawful for the Hydro-Electric Commission of Tasmania, a trading company under the corporations power (s 51(xx)), to build the proposed dam.

**Decision:** As Australia was a signatory to the *Convention for the Protection of the World Cultural and Natural Heritage*, the Commonwealth could use the ‘external affairs’ power of the Constitution in s 51(xxix) to enact certain provisions (ss 9(1) and 10(4)) of the *World Heritage Properties Conservation Act 1983*. The external affairs power enables the Commonwealth Parliament to make laws with respect to any matter dealt with by an international convention.

On this basis, the Commonwealth would now have power to make laws for carrying out international agreements, even though the topic would not normally come within federal power.

The High Court upheld the validity of the Commonwealth legislation that gave effect to the World Heritage Convention. The result was that under the Act, the Commonwealth Government was able to stop the Tasmanian Hydro-Electric Commission’s preparatory construction work for the dam on the Gordon-below-Franklin River, an area that had been entered into the World Heritage List.

**RESIDUAL POWERS**

If the Constitution has not given the Commonwealth specific powers to make laws in a certain area, only the states can enact valid laws. These powers are called the residual law-making powers of the states. Powers that have not been given by the