LEARNING OBJECTIVES

This chapter provides an overview of the Australian legal system and shows how governmental and judicial legal systems operate both at the federal and state levels. Law-making at the federal and state levels by parliaments and courts is explained to highlight how the tensions between governments have been interpreted and balanced by the High Court of Australia.

On successful completion of this chapter, students should be able to:
- understand the meaning and main sources of law in Australia;
- describe the doctrine of precedent and the ways it operates in Australia;
- understand the basic court structure in Australia;
- describe the law-making process by parliaments;
- understand the main functions of the High Court of Australia; and
- understand alternative dispute resolution process and methods.
INTRODUCTION

Every society in our day and age requires a system of laws in order to function properly. Over the centuries many legal philosophers and jurists have attempted to define and describe law, and these definitions and descriptions have been highly influenced by the social, political, religious and moral views of the society in which they lived. Australian law has also been shaped by the political, economic, religious and moral considerations that shaped the English legal system.

The Australian political and legal systems, which operate on a two-tiered basis at both federal and state levels, are partly a function of history. Our English heritage, for example, has given us the legacy of the Westminster system of government and a judicial system based on the common law (judge-made law), with the result that Australian law comes from two main sources: statute law and common law.

The Australian political and judicial systems operate in a federal model that was established in 1901. Since governmental and judicial decision-making occur at both federal and state levels, sometimes this creates confusion in the mind of a student or observer of the Australian legal system as to how these parallel systems can work cooperatively. Historically, although the federal system has worked reasonably well in Australia, tensions between the governments at both levels have frequently surfaced in areas such as regulation of corporations and financial markets, health, education and the environment.

THE NATURE AND FUNCTIONS OF LAW

Law has been described as a body of rules, developed over a long period of time, that is accepted by a community as binding. This set of rules may be comprised of enacted and/or unenacted laws. At times, the rules may be contained in the customs and traditions of a society.

Although law may be described as a body of rules, not all rules are laws. For example, the private rules of a family, rules pertaining to sporting clubs and institutions, and rules created by your tutors to govern student behaviour are not laws. When we talk about law, we are referring to legal rules governing the interactions between the members of the society, and between individuals and governments.

The main purpose of law is to provide social cohesion by avoiding conflicts that may occur in a society, for if there is conflict there will be disorder, confusion and chaos. Since law is accepted by a community as binding, it reflects the values of a society and sets standards for its smooth operation. Law also dictates various sanctions if society’s standards are
transgressed and, where possible, provides the means for the peaceful settlement of disputes. By doing so, law provides stability, certainty and predictability to a society.

**BUSINESS AND THE LAW**

If law is a body of rules, then one could query how these rules apply to the commercial activities of *businesses* and what functions they serve for the business community. Generally speaking, business law comprises a body of rules that regulate the day-to-day commercial operations of businesses. In Australia, these rules are contained in laws pertaining to contracts, consumer protection, company and finance sector regulation, bankruptcy, agency and partnerships. The main function of business law is to regulate, facilitate and adjudicate commercial transactions.

As a regulator, business law regulates business activities by advising businesses (both companies and individuals) to be fair and ethical in their dealings with consumers. For example, the consumer protection and fair trading laws of the federal and state governments reflect the regulatory nature of business law.

As a facilitator, it facilitates business transactions. For example, contract law provides how legally binding agreements can be made and what remedies innocent parties can seek if binding agreements are breached.

As an adjudicator, it endeavours to settle disputes between business operators (manufacturers, wholesalers, retailers and distributors) and consumers, and between buyers and sellers of goods or services.

**ACTIVITY 1.1**

You attend your first class at university. Your lecturer advises you of the following class rules which she advises will be enforced strictly:

1. All students in her class must wear white T-shirts and black pants.
2. You must attend all lectures and tutorials.
3. You must submit your assignments on time and undertake an examination at the end of the semester.
4. You must meditate for ten minutes before the lecture begins.
5. You may use offensive language in class as long as others do not hear it.
6. You must not bother her in class by asking irrelevant questions and there is no consultation time for you for this semester.

What is the validity of these rules?
SOURCES OF LAW

Let us look at where law comes from and how laws are created. There are two main sources of law in Australia:

1. **statute law**: the body of law enacted by the nine parliaments (one Commonwealth, six state and two territory), for example:
   - state legislation such as the *Goods Act 1958* (Vic), *Crimes Act 1958* (Vic);
   - Commonwealth legislation such as the *Competition and Consumer Act 2010* (Cth) and the *Corporations Act 2001* (Cth).
   - Parliaments can also delegate some of their law-making powers to subordinate or delegated bodies such as local councils, university councils and other **statutory** authorities established under relevant legislation. When these bodies produce rules, regulations, guidelines, by-laws, orders and ordinances pursuant to the provisions of the relevant acts, this is called ‘subordinate’ or ‘delegated’ legislation. For example, guidelines of the *Australian Competition and Consumer Commission* (ACCC) and rules of the *Australian Securities and Investment Commission* (ASIC) have the same force of law as statutes.

2. **common law**: the body of unenacted laws that emanate from the courts at federal, state and territory levels, for example:
   - decisions of the *High Court of Australia*;
   - decisions of the state and territory Supreme Courts; and
   - decisions of the federal and family courts of Australia.

**FIGURE 1.1 SOURCES OF LAW IN AUSTRALIA**

Because of the globalisation of contract and trade laws, Australian law is increasingly influenced by international law, which is reflected in multinational conventions and treaties, memoranda of understanding, and reciprocal and bilateral arrangements to which Australia is or will be a signatory.

**Customary law** refers to a body of unwritten rules that have been followed by a particular community or group of people for many generations, so much so that they become part of their way of life. Though customary law is an acceptable source of law in the English legal
system and has been incorporated in English common law, Australia has given little weight to this source of law. Since the Australian Law Reform Commission report of 1986, the debate continues as to whether Australia should recognise Indigenous customary law as part of Australian law. So far, there is only limited recognition of Indigenous law in Australia.

**Statute law/legislation**

In most liberal democratic systems, Parliament is the supreme law-making authority. Since laws made by parliaments undergo parliamentary scrutiny (meaning they are discussed, debated and widely published), they become an authoritative source of law. Laws made by parliaments are the most significant source of commercial law in Australia. This body of law is contained in numerous Acts of Parliament found in the raft of Commonwealth, state and territory legislation dealing with the regulation of different types of contracts. Examples are the *Competition and Consumer Act 2010* (Cth) (‘CCA’) and the *Goods Act 1958* (Vic) and equivalent statutes in other states and territories.

Contract law was traditionally the province of the states; however, the enactment of the *Competition and Consumer Act 2010* (Cth) (‘CCA’), replacing its predecessor *Trade Practices Act 1974* (Cth), marked the entry of the Commonwealth into the area of trade and commerce. All the sections of the CCA have been drafted so as to fall within the scope of the Commonwealth Parliament’s legislative powers, which are set out in s 51 of the Commonwealth Constitution. Thus the CCA primarily regulates the activities of ‘corporations’ as defined in s 51(xx). It also extends to the business and commercial activities of individuals who engage in interstate or overseas trade, or trade with the Australian Capital Territory or the Northern Territory.

The Commonwealth has also used its trade and commerce power and its postal power under the Constitution to establish and legitimate its presence in the business arena (see Chapter 2). Today, a significant number of areas of contract and commercial law are being developed in the Federal Court because of this jurisdiction.

**Law-making by parliaments**

The main function of a parliament is to make laws. There are nine parliaments (Commonwealth, state and territory) engaged in the law-making process in Australia.

Usually, each Parliament in Australia comprises three elements:

1. a **lower house** (that is, the House of Representatives in the federal Parliament and the Legislative Assembly at state and territory level);
2. an **upper house** (that is, the Senate in the federal Parliament and the Legislative Council at state and territory level).

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2. The Queensland Parliament contains only the lower house.
3. the Queen or her representative (that is, the Governor-General at federal level, the Governor at state level and the Administrator at territory level).

**TIP**

In order to become a law, a Bill must pass through various stages (readings) in the lower and upper houses of the parliament and receive royal assent. In the absence of this procedure, a Bill may not become a statute, thus will not be a source of law. The main function of parliament is to make law. Parliamentarians are the elected members of the public who represent the interests of the general population including the interests of their constituency, in the parliament. The proposal to make, amend or repeal law is initiated in the parliament in a form of a Bill.

In Australia, the procedure for law-making by parliaments is as follows:

- Proposals for making (or amending) a law may come from government, pressure groups (such as consumer groups and environmental protection lobbies) or the media.
- Parliamentary drafters draft the Bill and the relevant minister initiates the Bill in parliament.
- The Bill undergoes various stages or readings (that is, a first, second and third reading) where it is discussed and debated in detail.
- If passed by the lower house of parliament with a majority vote, the Bill proceeds to the upper house for further debate and discussion.
- If passed by both houses with a majority vote, the bill is sent to the Governor (if it is a state bill) or the Governor-General (if it is a federal bill) for royal assent.
- The Bill then becomes an Act of Parliament (also called a statute).

Some acts may commence immediately, as specified in the Act itself, while others may commence at a later stage, on a date proclaimed by the Governor or Governor-General and published in the Government Gazette. Provisions about the commencement date of acts are not uniform. Section 3A of the Acts Interpretation Act 1901 (Cth), for example, provides that if a Commonwealth Act does not contain a commencement date, it should commence 28 days after the Governor-General gives the royal assent; in South Australia, Victoria and Queensland, it commences on the date of assent.

While the majority of bills pass through both houses smoothly, some may be rejected or refused by one house (usually the upper house, where the government may not hold a majority). This situation is called a deadlock and can prove to be problematic for those who...

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3 The Bill must pass through three ‘readings’: first, second and third reading in both houses of the Parliament. If the Parliament consists of one house only, the Bill will pass through three readings in one house and then is sent for royal assent.

4 See, for example, Interpretation of Legislation Act 1984 (Vic); Interpretation Act 1987 (NSW); Acts Interpretation Act 1954 (Old); Interpretation Act 1984 (WA); Acts Interpretation Act 1983 (Tas); Legislation Act 2001 (ACT); Interpretation Act 1978 (NT); Acts Interpretation Act 1915 (SA).
originally initiated the bill (usually the government of the day).\(^5\) Both Commonwealth and state constitutions contain provisions for resolving deadlocks between houses of parliament.\(^6\)

One of the important themes in law to be aware of is the interface or relationship between common law and statute law. In the event of inconsistency between common law and statute law, statute law will prevail.

**RISK MANAGEMENT TIP**

Businesses should be mindful of the provisions of the statute law. In case of contradiction between the common law rules relating to contracts and the provisions of statute law, the statute law always will prevail.

Although the courts are still an important source of law in Australia, the influence of this source is diminishing as more and more statutes are being enacted both at the state and Commonwealth levels to protect consumers from the unscrupulous activities of some businesses. Indeed, there is an argument today that, despite the historical pre-eminence of the common law in the area of contract law, statute—and in particular the consumer protection provisions of the *Competition and Consumer Act* 2010 (Cth) and predecessor *Trade Practices Act* ('TPA')—have undermined the significance of the traditional common law principles relating to contracts.

Since its enactment in 1974, the TPA (and now under the CCA) had a dramatic impact on the rights and remedies available to consumers dealing with businesses. Consumers today have greater protection under the CCA than at common law. To take one example, a party may now bring an action for misleading or deceptive conduct under the broad parameters of s 18 of Schedule 2 of the CCA\(^7\) and not have to rely on common law misrepresentation with all its restrictive technicalities.\(^8\) Indeed, the strict duty not to act in a misleading or deceptive manner under s 18 has imposed a far-reaching new regime of good faith on contract negotiations and on contractual dealings generally. This means that the strict application of the common law rules of contract law is no longer the sole consideration in resolving contract disputes between parties.

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5 For an example, read the Senate debates about amendments to the Rudd government’s Industrial Relations Bill. Consider the reservations of Senator Steve Fielding (Family First) and Senator Nick Xenophon (Independent) to the Bill at [www.feargalquinn.ie/index.php/What-I’ve-Said/Democracy-Governance](http://www.feargalquinn.ie/index.php/What-I’ve-Said/Democracy-Governance).

6 See, for example, *Constitution Act* 1975 (Vic); *Constitution Act* 1902 (NSW); *Constitution Act* 1934 (SA) and s 57 of the *Commonwealth of Australia Act* 1900 (Imp). The problem of deadlock does not arise in the Queensland Parliament, as it contains only the lower house. There are no such provisions in the Constitutions of Western Australia and Tasmania. The position in Western Australia and Tasmania seems to be that if the upper house rejects a Bill, the Bill does not become a statute.

7 Schedule 2 of the CCA contains the Australian Consumer Law ('ACL'). Consumers have wider remedies under ACL than common law.

8 Common law distinguishes between an innocent, negligent and fraudulent misrepresentation. Section 18 of the ACL imposes direct liability on businesses for misleading or deceptive conduct and false or misleading representations.
Similarly, businesses advertising their goods or services at a particular price with no intention of supplying them at the advertised price may not be able to argue that such advertisements were ‘invitations to treat’ (invitations to make offers: see Chapters 4 and 5), as they may be caught under the ‘bait advertising’ provisions of the CCA. Thus the CCA imposes liability on businesses to engage in ethical and fair dealing by providing protections to consumers which the common law may otherwise not provide.

**Activity 1.2**

Tony runs a small shop of second-hand clothes. He has a notice displayed in his store which states “No refunds available” Customer Cozy demands that Tony must accept back the shirt he had bought from him because the shirt gives him ‘itch’ when he wears it. Tony refuses to return the shirt and reminds Cozy of the notice. Does Cozy have a remedy under the contract?

**Rules of statutory interpretation**

Courts are frequently called upon to adjudicate disputes where the language of a particular statute requires clarification. All statutes are written in general language which may need to be given a specific context. Sometimes the language of a statute is ambiguous, unclear or contains several meanings or messages. Statutory interpretation by courts may determine the meaning of a particular clause or a provision.

When interpreting statutes, courts are mindful of the Acts Interpretation Acts at state, territory and federal levels. These acts define many common terms and most of them stipulate that courts should have regard to the underlying purpose of the legislation. Courts are also permitted to take into account extrinsic materials such as *Hansard* reports and other explanatory memoranda where there is doubt about the meaning to be attributed to statutory language.

There are additional rules of statutory interpretation, which may assist the courts in their task:

- **The literal rule** represents the rule of statutory interpretation whereby a court applies the provisions of legislation strictly as they are written. Hence, words are given their ordinary and grammatical meaning by a court. The use of this rule may lead to an absurd result, particularly when the language of the statute is unclear or ambiguous.  

- **The golden rule** refers to the principle of statutory interpretation whereby a court may take a commonsense approach to a statutory provision in situations where a strict application of the literal rule would lead to an inconsistent, irrational or absurd outcome. The golden

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9 However, the ‘literal meaning of the legislative text is the beginning, not the end, of the search for the intention of the legislature’ (McHugh J in *Kelly v The Queen* [2004] HCA 12 at 24).
rule may be applied where there is a clear understanding of the original intent of the legislation.

- The mischief rule arises where the meaning of a word in a statute is ambiguous, illogical or incomplete. This rule allows the court to examine parliament’s intention in enacting the legislation, having regard to the ‘mischief’ that parliament intended to remedy; in other words, the court will look at the reason why parliament passed the act. To clarify this intent, the court will first look at the common law before the legislation was passed to determine the ‘mischief’ for which the common law did not provide a remedy. The court then will use the text of the act and any ‘extrinsic material’\(^{10}\) available—including reports of law reform agencies, explanatory memoranda, relevant materials in parliamentary debates, Hansard reports and ministers’ speeches on the Bill—to determine what remedy the legislation intended to introduce.\(^ {11}\)

Subordinate or delegated legislation

As noted earlier, the major source of Australian law is legislation, enacted at both federal and state/territory levels by parliaments. Given the volume of legislation and the pressures upon parliamentary time, it may not be possible or desirable for parliaments to make decisions regarding the detail of such legislation. This is especially the case where the subject matter of the legislation is technical, or is likely to change frequently.\(^ {12}\) In such cases, the parliament is given power to ‘delegate’ or refer the making of the detailed regulations to a subordinate body. This subordinate body is typically the Governor-General or Governor, a minister of the relevant government department responsible for implementing the act, or a local council, professional or statutory body. These bodies may in turn draw on the experience of experts in formulating the regulations made pursuant to the Act of Parliament (called the ‘enabling’ or ‘empowering’ statute).

Since subordinate or delegated legislation (referred to variously as rules, regulations, orders, ordinances, by-laws, statutory instruments, notices and proclamations) is made under the authority of the enabling Act of Parliament, the rules must be made in the way specified by the enabling act and must comply with all the formalities. A number of mechanisms ensure that delegated legislation has been properly made in accordance with the authority conferred by the parliament, and an explanation of these follows.

Parliament itself exercises supervision over subordinate legislation.

- Delegated legislation must be ‘tabled’ or placed before parliament within a specified time of having been made.\(^ {13}\)

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\(^{10}\) See s 15AB of the Acts Interpretation Act 1901 (Cth) for the meaning of extrinsic material: ‘any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision’.


\(^{12}\) Delegated legislation may be altered relatively easily.

\(^{13}\) Legislative Instruments Act 2003 (Cth), ss 38 and 42.
- **Parliamentary committees** have been established to assess the validity of delegated legislation and to make recommendations to parliament.
- Either house of parliament may disallow the regulations by passing appropriate resolutions.
- Courts can also review delegated legislation and may find that it is invalid for the following reasons:
  - **Ultra vires**: This means that the delegated legislation is **beyond the power** of the authority that has been conferred by the enabling act. Ultra vires may be established by showing that the subordinate legislation is inconsistent with statute law or the common law. This is because, unless special provision has been made for delegated legislation to prevail, it normally does not override existing statute law or common law. If a regulation is held to be *ultra vires* by the court, it becomes **invalid** and has no legal force of the law.
  - **Lack of formalities**: This means that the delegated legislation was within the power of the subordinate body, but formalities were not met. Delegated legislation may be declared invalid where, for example, there has been a failure to follow mandatory procedural steps, or there has been an attempt to sub-delegate the power to a **third party** (it is an important principle of law that ‘who has been delegated power may not further delegate’).

Delegated legislation may be altered or repealed either by subsequent statutes, which is rare, or by subsequent delegated legislation. The repeal may be express or implied; delegated legislation is impliedly repealed if it is inconsistent with a subsequent statute or delegated legislation.

Federal regulations commence on the date of notification in the *Commonwealth of Australia Gazette*, unless a different date has been specified in the regulations. At state and territory level, delegated legislation must normally be published in each government’s *Gazette* and takes effect either from the date of publication or from the date specified in the regulations. Delegated legislation is interpreted according to the usual rules that apply to the interpretation of statutes.

**ACTIVITY 1.3**

1. You are told that you cannot smoke inside the university buildings or within three metres of any university building. On a wet rainy day, you are caught smoking in your office. What can happen to you? Who has made this rule and who can enforce it?

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14 Section 48(1)(b) of the Acts Interpretation Act 1901 (Cth).
16 Refer to the discussion above relating to the literal rule, the golden rule and the mischief rule.
2. The local municipal council by-law prohibits you to subdivide land to build a flat, townhouse, shed or other structure. You built a flat at the back of your house which you say will be used for meditation purposes. On your neighbour’s complaint, your local council inspector visits your property and asks you to demolish the flat or face a legal action. Have you breached any law? If so, which one?

The common law or case law

Common law is a source of law that has been primarily derived from the decisions of judges (in courts). It is therefore, appropriately called ‘case law’ or ‘judge-made law’.

It should be noted that the term ‘common law’ has various other connotations and has been used in a number of ways:

- **Common law meaning the system of law that was developed by English courts and applies in England:** Countries that have been English colonies in the past (for example, Australia, New Zealand, the USA, Canada, India, Singapore and Malaysia) or have adopted the English legal system (for example, Pakistan, Bangladesh, Sri Lanka and some African countries) are common law jurisdictions, as they derive their legal systems from England.

- **Common law as opposed to equity:** Essentially, common law refers to the law that was created by the older English common law courts, as opposed to the law that was developed at a later stage by the courts of equity (that is, the Chancery courts; equity as a source of law will be discussed later in this chapter).

- **Common law as opposed to civil law systems:** Civil law is used in many European (for example, France and Germany) and some Asian countries (for example, Indonesia, Japan and East Timor).

- **Common law as opposed to shariah law:** Shariah law is used in many Islamic countries.

The doctrine of precedent

**Precedent** means a judgment of a court that establishes a point of law. The doctrine of precedent is based on the principle that ‘like cases should be decided alike’, and the rationale behind the doctrine is certainty and predictability in laws, so that people should be able to plan their commercial affairs with a reasonable degree of certainty that what they are doing is legal.17 Under this doctrine—which forms the bedrock of our common law system—where

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17 Problems created by the doctrine of precedent should not be overlooked, however, and include multiple judgments on different grounds, overruling by later decisions at the same or higher level in the hierarchy, and abrogation by Parliament.