

A legal system arriving in Australia

Terra Nullius?

- There was a pre-existing Australian legal system before the British came to Australia
 - Each indigenous nation had their own legal system
- In 1992 (Mabo), common law first accepted the idea that Aus at the time of the English arrival that was not uninhabited land

Which law came w Governor Philip?

- English law
- Magna Carta = important development in English law as it ensured no delay of justice, no imprisonment or dispossession of property except by lawful judgment of their peers ("jury"), only those educated in the law were appointed as justices & sheriffs, secured court of common pleas in a fixed place

Rule of law

- According to Dicey, rule of law means:
 - Absolute supremacy of government by law as opposed to government by arbitrary fiat
 - Government can operate only if they have specific legal authority to do so (principle of legality)
 - A person can be punished only for a breach of the law & not otherwise
- The courts have a special duty to protect individuals by ensuring that the rule of law are adhered to

Sources of law in Australia

- Australian Constitution – written BUT no Bill of Rights
- State Constitutions
- State & federal statutes
- Judicial interpretations of those statutes
- Common law
- International law?

CONSTITUTION

What is the Constitution?

- Fundamental set of rules governing matters pertaining to its organisation, including delineation of the powers of its separate organs, the rights and duties of its citizen
- May be consolidated in 1 document, unconsolidated, or (although now rare) unwritten
- Where the constitution is established by a written instrument (like Aus), the instrument = Constitution
 - This is a document or statute laying down fundamental foundational rules of government & may be entrenched (unlikely to change) or unentrenched
 - It is generally only changeable in accordance w certain strict procedures
- Can be:
 - Unwritten (eg. UK, NZ) – based mainly on customs, norms, convention or traditional maxims of law
 - Written (eg. Aus, US, Canada)
 - Flexible – may be amended by ordinary legislative enactment
 - Entrenched – only capable of being altered by way of a special procedure such as a referendum
 - In Australia, s128:
 - The Australian Constitution can only be amended by a referendum which requires a majority vote from electors (Australians) AND a majority of states
 - If proposed amendment diminishes representation of, or alters territorial limits of a state, change must be approved by a majority of electors in that state

Australian Constitution

- Passed as a part of British Act of Parliament in 1900 > took effect 1 Jan 1901
- Fundamental law binding everyone including the Cth Parliament & Parliament of each state
 - Provides the basic rules for the government of Australia
 - Any action (including legislative action) is invalid if contrary to the Constitution
- Not a rights document
- Some thoughts from the framers of the constitution on: migrants, women, indigenous people
- A belief that through responsible government, common law & the political process, individual rights would be adequately protected

Rights in the Australian Constitution

Constitution has no equivalent to Bill of Rights preventing a legislature from passing laws that infringe certain basic freedoms & rights (eg. Freedom of speech) – hence:

1. Express rights

- Some express protections are given by the Constitution against legislative or executive action by Cth
- Very few express rights in the constitution:
 - S116: freedom of religion
 - S117: equal treatment of state residents – prohibits state Parliament from discriminating against non-residents of that state
 - S80: right to trial by jury
 - S51 (xxxi): acquisition of property must be 'on just terms'
- Very limited interpretation
- No express right to freedom of speech
 - BUT case law recognises this as an implied right
- No express right to vote
 - s41: a person who has a right to vote cannot be prevented from voting

2. Implied rights

- HC has recognised some implied restrictions on legislative power derived from the fundamental system of government established by the Constitution
- Examples:
 - Chapter III implied right = because of separation of powers, only a court may exercise judicial power of Cth – hence a law of the Cth Parliament cannot confer judicial power on any body other than a court
 - *Australian Capital Television v Cth (ACTV case)*
 - HC held a Cth law attempting to restrict broadcasting of political advertising invalid
 - Courts decided that the restrictions imposed by that law were inconsistent w a necessary aspect of representative government entrenched by the Constitution – specifically the right to freedom of communication on political matters
 - Example where the terms/structures of Constitution can restrict legislative power

SEPARATION OF POWERS

Sources of Australian law

Constitution divides government into a tripartite structure - laws are made by Parliament, Executive & Judges:

1. Law made by Parliament consists of:
 - Acts of Australian Parliament (federal, state/territory)
 - Commonwealth Ordinances (non-self-governing territories)
 - Received English statute law that remains in force
2. Law made by the Executive consists of:
 - Subordinate legislation (federal, state & territory, including under ordinances)
 - Eg. Regulations, bylaws
3. Law made by judges consists of:
 - Received English case law, to the extent that it remains relevant to Aus
 - Aus common law, developed by Aus courts from the English common law
 - Multiple jurisdictions BUT only 1 Australian common law – HC sits at the apex

Government functions

3 types of government function:

1. Legislative = power to make laws
2. Executive = power to administer laws & carry on the business of government through such bodies as government departments, statutory authorities, defence forces
3. Judicial = power of courts to hear & settle disputes, and issue writs requiring a person to do, not do, something, or making a declaration (eg. about the way in which a law applies to a particular set of facts)

Separation of powers

- Requires that each type of power should be vested in a separate branch of government
- Thus, there are 3 types of legal institution:
 1. Parliament/Legislature = makes laws (statutes/Acts)
 2. Executive = administers the law
 3. Judiciary = interprets or declares the law (statutory & common law) & settles disputes
- Underlying it all are the people – who vote, are governed, & are subject to the law

Why have separation of powers?

- Prevents/avoids concentration of government power in any 1 person or institution – thus prevents tyranny
 - Not only must functions be in separate institutions but the personnel in each branch must be independent of each other
- Allows each institution to place checks & balances on the other
- French revolution...
- US Constitution...

Separation of powers in the Australian Constitution

- Influence of US model
- Doctrine of separation of powers is clearly reflected in the Australian Constitution:
 - S1 Chapter I: vests legislative power in Federal Parliament
 - S61 Chapter II: vests executive power in the Queen which is exercisable by GG
 - S71 Chapter III: vests judicial power in HC & other courts established by Parliament or exercising federal jurisdiction

Actual separation in practice

- BUT in reality, Australian Constitution is based on the "Westminster tradition" & does not have complete separation of powers
 - No strict demarcation between legislative & executive powers:
 - Only Parliament can pass Acts BUT these often confer on the Executive, the power to make regulations, rules & by-laws in relation to matters relevant to the particular Acts
 - Exec government is generally formed by the political party which controls the legislature
 - Prime minister & other government ministers must be members of Parliament
 - This reflects the principle of responsible government under which government ministers must be members of & accountable to the Parliament
- Separation between judiciary & Parliament/Exec is strict – only a court may exercise judicial power of Cth

Instead of strict separation, Aus follows the principle of RESPONSIBLE GOVERNMENT

The Westminster System

The principle of responsible government

- The Crown (Queen/GG) acts only on the advice of its Ministers, who are members of & responsible to Parliament

- Thus:
 - S64: Ministers must be (or within 3 months become) MPs (in the Senate or the House of Reps)
 - aka Constitution requires ministers to be members of parliament
 - S63: References to the GG means the GG is acting on the advice of the Federal Executive Council

Conventions of responsible government

- Government retains office only so long as it commands a majority in the House of Representatives
- Majority required when submitting budget (to raise taxes & spend money)
- Parliament is representative & at elections is accountable to the people for its choice of executive

Westminster vs US Systems

Institution	Power	Personnel	Control
Parliament	Make laws	Representatives elected to lower house. Elected or appointed to upper House	(Royal Assent) Supervision and/or expulsion by the House
Executive Council (Cabinet)	Executive Power	Ministers appointed by the Crown with the support of the lower House. Must be members of Parliament	Maintain support of the lower House Parliamentary and Judicial Review
The Courts	Judicial Power	Judges appointed by the Executive	Superior Court justices removal by the Crown on an address from both Houses on certain grounds.

Institution	Power	Personnel	Control
Congress	Power to make laws	Elected Representatives	Presidential veto; Supreme Court review of validity
President	Executive Power	Elected. Cannot be a member of Congress.	Senate ratification necessary for cabinet and diplomatic appointments, and treaties; Judicial review; Impeachment by removal by congress
Supreme Court	Judicial Power (including review of legislative and executive activity)	Appointed by President with Senate ratification	Impeachment by Congress

Parliament

1. Queen – as represented by the Governor-General (Federal) or Governor (State)
2. Upper House = Senate (s76) or Legislative Council
3. Lower House = House of Representatives (s150) or Legislative Assembly

Federal legislative capacity

- S51: heads of power – matters which Cth is authorised to make laws about
- S109: legislative inconsistency – Cth prevails

Distribution of powers

- S51 provides "heads of powers" which the Commonwealth is authorised to make laws about
 - States can also make laws about such matters = concurrent powers
- S52: only the Commonwealth can make such laws = exclusive powers
 - Everything else (powers not listed in s51 & 52) is left to the state = residual powers
- Why such an arrangement?
 - Protection of States Rights
 - An important feature of early constitutional interpretation – reserved state powers doctrine
 - *Engineers Case (1920)* abolished this

Separation of Judicial Power

Commonwealth power has increased:

- High court interpretation/characterisation:
 - HCA has the jurisdiction to interpret the constitution – often controversial
 - Many of court's interpretations have focused on s51 – from disputes between state & Cth Parliament
 - Eg:
 - S51 (xxix): gives Cth the right to legislate w respect to “external affairs”
 - S51 (vi): gives Cth Parliament the right to legislate w respect to defence of Aus & the control of the defence forces
- Vertical fiscal imbalance = mismatch in the revenue powers & expenditure responsibilities of Cth & states
 - States have greater responsibilities, but the Commonwealth has authority to raise more revenue
 - Cth Parliament has had a vastly larger budget than states AND can control state borrowings
 - Hence Parliament's powers have effectively been extended beyond s51 constraints & other explicit grants of legislative power (s52 & 90)
- Co-operation between the 2 levels of government

Executive

- Queen
- Governor General
 - Acts in accordance w advice from Cth ministers – principle of responsible government
 - EXCEPTION = reserve powers – in exercising it, GG ordinarily acts in accordance w “conventions” (established & generally accepted rules of practice)
 - Eg. power to appoint & dismiss a prime minister
- (Executive Council)
- Prime Minister & Ministers
- Departments, agencies, public servants

Queen is part of both the Parliament & Executive

- S1: Parliament consists of = Queen + Senate (s76) + House of Representatives (s150)
 - 12 senators p/state
 - Number of seats in HoR depends on size of state's population
- S61: Executive consists of = Queen (GG as her representative) + Federal Executive Council (s62) + Ministers of State appointed by GG (s64) + Civil Servants (s67)
 - No mention of Cabinet or Prime Minister
- Thus:
 - The Queen is part of both the Parliament & the Executive
 - Only the judiciary is truly separate, but appointed by the GG in Council (s72)

COMMONWEALTH & STATE LEGISLATIVE POWERS

Powers of the Commonwealth

- S51: Concurrent legislative powers = defined list of matters in respect of which the Parliament can make laws 'for the peace, order & good government' of the Commonwealth
 - States generally not precluded from making laws on same subjects
 - Subjects include tax, defence, external affairs, interstate & international trade, foreign, trading & financial corps, marriage & divorce, immigration, bankruptcy, interstate industrial arbitration
- S52: Exclusive legislative powers = Parliament has exclusive power to make laws for the peace, order & good government of the Cth w respect to:
 - Seat of government
 - Public service
 - Other
 - S90: customs, excise, bounties
 - Prohibits state Parliament from imposing custom duties
 - S114: defence forces
 - S115: coining of money
- S109: A valid Commonwealth law over-rides a state law to the extent of any inconsistency
- S122: Commonwealth Parliament may make laws for the government of any territory & may allow it representation in the Houses of Parliament (thus, seats for ACT & NT)

State Constitutions

- Parliament = Queen (Governor) + Legislative Council (not in unicameral QLD) + Legislative Assembly
- Each state has a general power to make laws for the peace, order & good government of the State
 - Wording of "general power" varies slightly in some states
 - Including laws w extra-territorial effect
 - Aus Constitution does not confine the subjects that States may make laws
 - State parliaments can pass laws on a wider range of subjects than Cth (eg. education, criminal law, road regulation)
- S106 & 107: states are bound by the Aus Constitution & the state constitutions must be read subject to it
- Limited (in law) only by what is taken away by the Constitution
 - Explicit limitations (eg. Ss114, 115, 90, 92)
 - S114 = states cannot raise defence forces without consent of Cth Parliament
 - S115 = states not to coin money
 - S90 = states not to impose customs duties & of excise
 - S92 = trade within the Cth to be free
 - Limitations consequent on other Commonwealth powers
 - eg. Franklin Dam case & the external affairs power s51(xxix)
 - Cth had taken a range of actions that they claimed was authorised under s51
 - BUT courts held that any constitutional restriction preventing Cth from inhibiting the functions of the states did not apply

Federal-state relations

- Aspirational nationalism? Cooperative federalism?
- Historical expansion of Federal power
- Vertical fiscal imbalance
 - Commonwealth has de facto greater revenue raising power
 - Exercises its taxing power to an extent that prevents concurrent exercise by the States
 - States have greater spending responsibilities
 - S96: Commonwealth can control State behaviour through conditional grants
 - By imposing conditions on how \$\$ is spent by the states, it allows Cth to influence the way things are done in areas over which it has no direct power to pass laws
 - Eg. Cth has exerted control over unis although it has no specific power for education
 - COAG – Intergovernmental Agreement (IGA) on Federal Financial Relations

THE JUDICIARY

Separation of judicial power

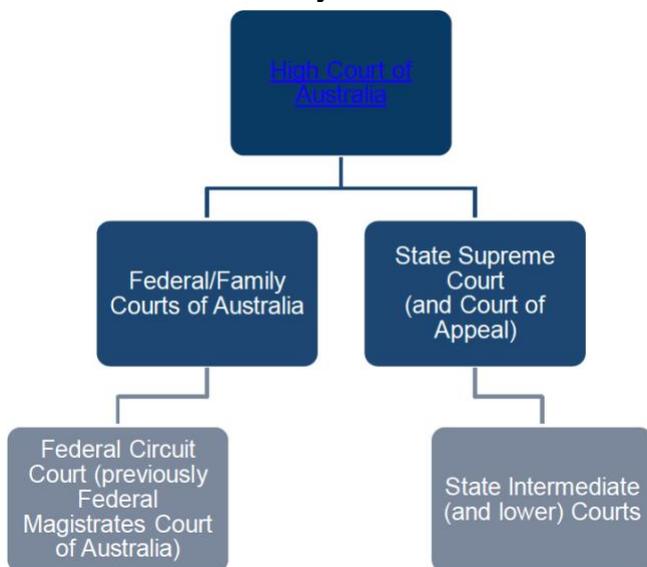
Chapter 3 (ss71-80):

- Provides for the establishment of HC in Aus
 - One of HC's principal function = decide disputes about meaning of Constitution – they ultimately determine whether an Act passed by Cth Parliament is within the legislative powers of Cth
- Gives Cth Parliament power to create other federal courts (eg. Federal & Family court) & vest federal judicial power in such courts

S71: The judicial power of the Cth shall be vested in a Federal Supreme Court – HCA, and in such other federal courts as the Parliament creates, and in such other courts as it invests w federal jurisdiction. The HC shall consist of a Chief Justice, and so many other Justices, not less than 2, as the Parliament prescribes.

- Vests the judicial power of the Commonwealth in the HC & other Chapter III Courts
- Acknowledges that the Federal Parliament can invest State courts w Federal jurisdiction (s77(iii)) & provides foundation for cross vesting scheme
- Makes it clear that:
 - Judicial power of the Cth can only be exercised by these s71 courts
 - Judicial power is clearly separated from the legislative & executive powers

Australian Court Hierarchy



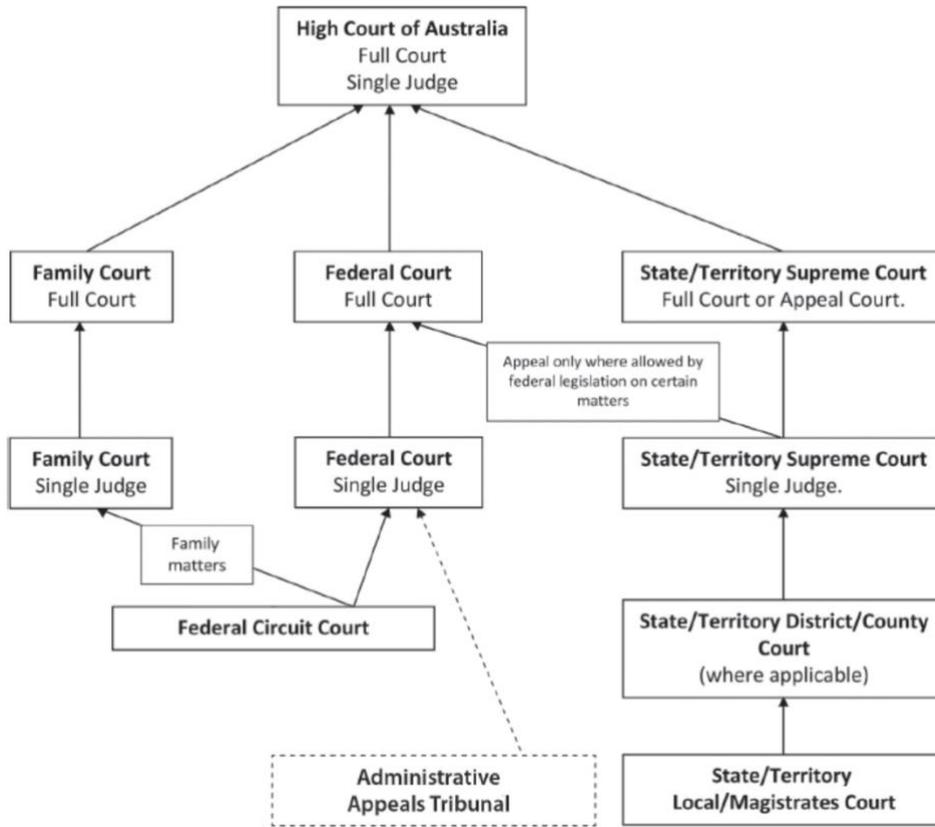
Commonwealth or Ch III Courts

- High Court of Australia
 - Constitution ss71-77
 - Judiciary Act 1903 (Cth)
- Federal Court of Australia
 - Federal Court of Australia Act 1976 (Cth)
- Family Court of Australia
 - Family Law Act 1975 (Cth)
- Federal Circuit Courts
 - Formerly the Federal Magistrates Court

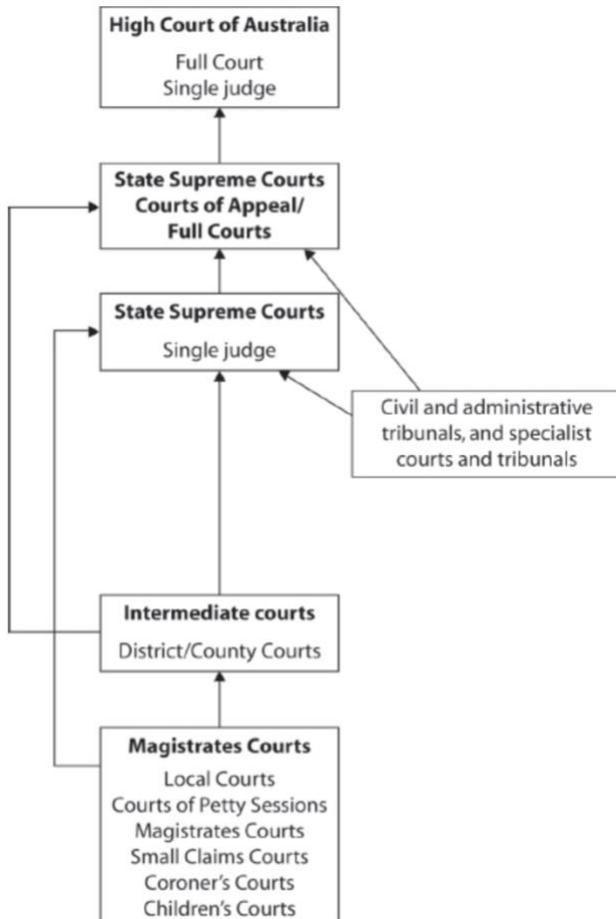
NSW Courts

- Court of Appeal
- Supreme Court of NSW
 - Supreme Court Act 1970 (NSW)
- District Court of NSW
 - District Court Act 1973 (NSW)
- Local Court
 - Local Courts (Civil Claims) Act 1970 (NSW)

Federal Court Hierarchy



State Court Hierarchies



ROOTS OF ENGLISH LAW

On the importance of legal history

'The study of legal history provides a valuable corrective to... simplistic ideas [that legal institutions are "fixed" or "settled" & that "policy" played little part in this state of affairs]. The truth of course, is that the law has never "stood still", the secret of the common law being its combination of persistence & dynamism. But unless 1 knows how the law to be in its present state, how can one set about w any proper assurance deciding what it ought to be?'

Early British Law & Custom

'1 feature of 'custom' which distinguishes it from the later common law tradition is its variability from 1 people to another & from 1 area to another. It follows that before the Normans, that any search for law & customs of England & before the centralisation of the nation itself are bound to fail. To the extent that common features may be discerned in the customs of diff people & places, the unifying force is not law but the general social & moral assumptions of the age, or even the natural instances of humankind at particular stages of development; the parallels often transcended national & geographic boundaries.'

On the various invasions of England & Wales

The Romans had an "anthropological interest" in British "communal justice"

- Celtic oral tradition (not written laws)
- Native priest-judges ("druids") enforced Celtic religion & customs
- Human sacrifices
- Druidical order competed w Christianity for spiritual order following Roman withdrawal
- Christianity prevailed
- First surviving legislation - King Aetherberht I of Kent (600AD)

Anglo-Saxon Invasion of England = Circa 500AD**Viking Invasions of England**

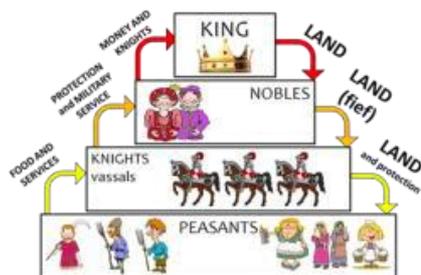
- JH Baker suggests that the word "law" is of Danish origin ("Danelaw") & came into use during the 9th century
- Danish invasion of Eastern England
- England largely governed by custom
- Great regional variation across England

William Duke of Normandy (aka William the Conqueror)

- Following the Battle of Hastings 1066, William the Conqueror declared that Anglo-Saxon laws pre-conquest would continue in force.
- Common law emerged in the 12th century as a result of the efficient Norman administration of previously underdeveloped institutions
- Note in particular the many French words (eg, plaintiff, defendant, jury) still used in the common law

Norman Administrative Framework

- Norman conquerors refined an existing system of economic & social organisation in Anglo-Saxon society
- Feudalism = hierarchical system of social & political organisation based on land ownership
- Hierarchy:
 - King w dominion over all lands in the kingdom
 - Tenants-in-chief ("land owning nobles") held title to land by direct grant from the Crown
 - Series of descending levels of sub-tenants each owing land by virtue of grant from next higher level in the chain
- Feudal loyalty was owed 1 level upwards:
 - Bond of loyalty from landholder to king & immediate superior in the chain (lord)
 - Includes obligation to provide share of crops to lord & military service on lord's behalf if necessary
- Feudal system of land tenure formed the basis of English property law until 1921



Feudal Pyramid of Power