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, will the offenders be 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:

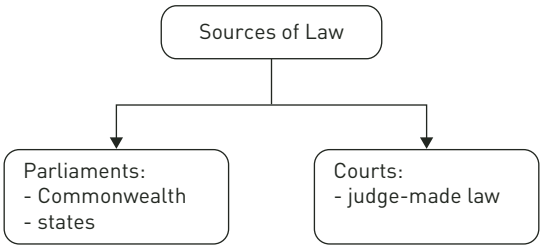
- Civil and criminal law. Civil law involves matters between one person and another regarding the enforcement of rights and the carrying out of obligations. A civil action is undertaken by an individual, and where successful, will result in the granting of a remedy. Criminal law includes all statute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

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.

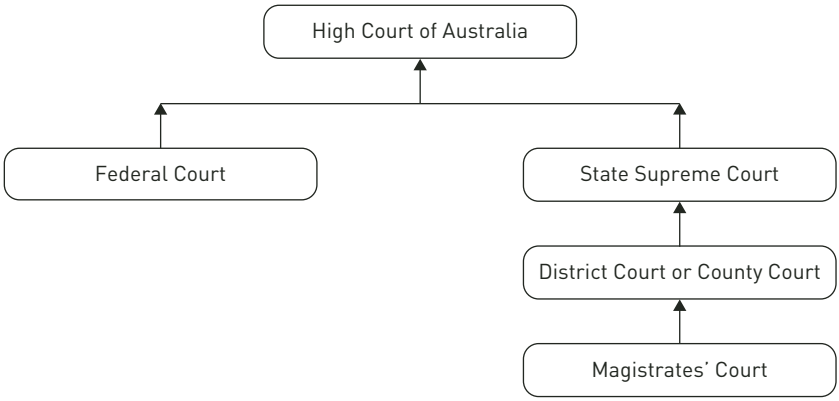
Where a matter goes to court for the first time, the court that hears the case is called a 'court of first instance' and is said to have an original jurisdiction. If the decision in the case goes on appeal to a higher court, the court hearing that appeal is known as the appeals or appellate court, and 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(xxi)
- immigration and emigration: s 51(xxvii)
- 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

Constitution to the Commonwealth remain with the states. Accordingly, in order to determine whether the Commonwealth has powers to legislate, we have to search the Constitution to find a specific grant of legislative power. Where the power is not given, then the Commonwealth cannot legislate.

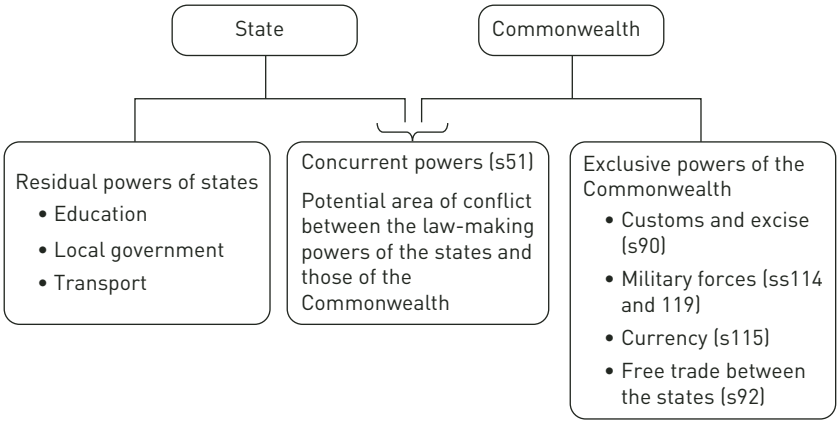
EXCLUSIVE POWERS

When the states agreed to federate, they decided that some laws should be exclusively made by the Commonwealth Parliament. The powers of the Commonwealth Parliament to make such laws are sometimes called the exclusive powers of the Commonwealth. Only the Commonwealth Parliament, not the states, can make valid laws in these areas—for example, customs and excise (s 90); military forces (s 114); currency (s 115) and free trade between the states (s 92).

CONCURRENT POWERS

As mentioned above, the Constitution also gives the Commonwealth Parliament the power to make laws in 39 areas as listed in s 51 under different headings called *placita* (the singular form is *placitum*). These are concurrent powers which are powers that allow both the Commonwealth and state parliaments to pass laws on the same matter. There is potential for conflict here. The Commonwealth may pass a law in one of these areas and so might a state. The question then arises: 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.

FIGURE 1.3 Division of law-making powers



EXAMPLE: THE OPERATION OF S 109

A hypothetical example of the operation of s 109 can be seen in a situation where the Commonwealth passes a law that the maximum speed on all roads is to be 90 kilometres per hour, and the Victorian State Parliament passes a law that the maximum speed on all roads in Victoria is to be 100 kilometres per hour. Let us assume that both the Commonwealth and the Victorian Parliaments have a right to make such a law. A motorist driving in Victoria is booked for driving at 95 kilometres per hour. There is an inconsistency between the two laws regarding the maximum speed allowable, and the motorist can argue this in a court of law. The court will in this instance allow the Commonwealth law to prevail over the Victorian law.

Where one law permits something and another law prohibits it, there is an inconsistency. The High Court has, in fact, gone beyond this and has applied a 'covering the field' test: if the Commonwealth expressly or by implication has made known that a Commonwealth statute is to be the whole law on a subject, then any state law on that subject is invalid under s 109.

FREEDOM OF INTERSTATE TRADE

There are limitations in the Constitution on the exercise of the law-making powers of the Commonwealth, and sometimes that of the states. For example, s 92 which applies to both the Commonwealth and the states, declares that interstate travellers, or anyone else who engages in any kind of business between states, shall be 'absolutely free'. This provision seems to imply that neither the Commonwealth nor a state can interfere with a trader going interstate. Accordingly, the High Court has over the years interpreted s 92 as capable of striking down laws that impede or burden interstate trade.

DOCTRINE OF SEPARATION OF POWERS

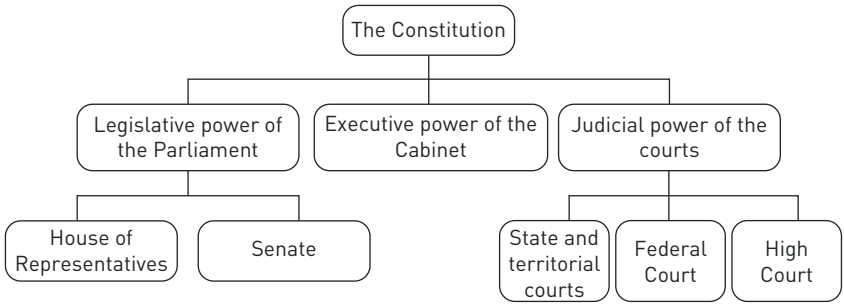
The Australian Constitution is based on the Constitution of the United States in a number of ways. One notable characteristic that the two constitutions share is a doctrine (a set of beliefs) known as the separation (or division) of powers, first formulated by the French philosopher and jurist Charles Montesquieu in 1784. Its main principle is that there are three distinct functions of government, which should be kept strictly apart.

The legislative power means the power to make laws. In Australia, the legislative power vests in the federal parliament (consisting of the House of Representatives and the Senate) and the respective state and territorial parliaments.

The executive power is the power to execute and administer the laws. This power primarily vests in the different ministers of the Crown.

Judicial power means 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.

FIGURE 1.4 Separation of powers



In practice, there is no strict separation 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.

DELEGATED LEGISLATION

Parliament enacts laws reflecting broad principles. It then authorises other bodies to pass more detailed laws. These laws are known as delegated legislation, and comprise the regulations of government departments and instrumentalities and of local government. Examples of delegated legislation are by-laws, ordinances, rules, proclamations, and orders. The legislative power often passes to a wide range of people or bodies, including ministers, government officers, government bodies, and local councils.

There are a number of arguments in support of delegated legislation:

- it saves parliamentary time for important matters of public concern
- relevant specialist or expert administrative bodies can make laws in areas where Parliament does not have the technical expertise
- it allows for flexible enactment and a quick response to changing circumstances.

Delegated legislation generally has the force of law and requires obedience to it. For example, Parliament may delegate to a municipal council power to make

laws about local issues to apply to all people who live in a certain area. These laws may be rules and regulations in respect of traffic, libraries, hospitals, schools and universities, with which Parliament may not have the time, expertise or inclination to be involved.

Parliament does have some degree of control over delegated legislation. Much of it must be tabled, that is, presented to Parliament. Each House of Parliament can then resolve to disallow it. If there is no disallowing resolution, the delegated legislation will become law.

CHANGING THE CONSTITUTION

Section 128 of the Constitution provides that it can only be amended (changed) if all of the following requirements are met:

1. The proposed amendment is passed by an absolute majority (over 50 per cent of all elected members) in both the House of Representatives and the Senate.
2. The proposal is put to a referendum, which is a procedure of referring or submitting measures proposed or passed by the legislature to the vote of the Australian people for approval, within two to six months after the absolute majority vote referred to above.
3. The proposal is approved by a majority of voters—that is, more than 50 per cent of voters—and there is majority approval in a majority of states. In other words, more than 50 per cent of the voters and a majority of voters in four states must be in favour. A proposal would fail, for example, if 60 per cent of Australian voters were in favour but the only majority votes in favour were in Victoria, New South Wales and Queensland.
4. The Governor-General (representing the Queen) gives the royal assent to the amendment.

Since federation there have been 43 proposals to change the Constitution, but not surprisingly, in view of the strict requirements for amendment, only eight have been successful.

APPROACHES TO THE INTERPRETATION OF LEGISLATION

If any kind of communication is to be effective, the receiver of information must understand the message in the way the sender intended. Although great care is taken in the choice of words used to convey the information, the receiver may put a different interpretation on the message.

This problem applies equally to statute law. The courts have accordingly adopted a number of approaches or techniques to assist in the interpretation of statutes.

In theory, the object of the courts in the interpretation of statutes is to give effect to the intention of Parliament, but in practice the courts may have difficulty determining what the intention of Parliament is.

In giving effect to these propositions, the courts apply one or more of the following approaches to statutory interpretation.

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. This is premised on the assumption that Parliament's intention is expressed in the actual words used.

This strict and narrow approach to statutory interpretation can at times lead unfortunately to a result that may not have been intended by Parliament. Such an approach was more popular in the past than it is today. There is now a tendency for a court, especially the High Court, to take a more realistic and purposive interpretation of statutes, as will be discussed below.

THE GOLDEN RULE

A more commonsense approach to the interpretation of statutes is 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.

This means the court initially takes the ordinary, everyday meaning of the words. If this gives an absurd result or a result that is clearly inconsistent with the rest of the statute, the court must use a meaning that will remove the absurdity or inconsistency.

Applying the golden rule, the court is to read the whole statute and interpret it so as to give the words their ordinary significance, unless they clearly produce an absurd, inconsistent, unjust or meaningless 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 purpose approach is itself a development of the mischief rule. That rule seeks to discover the wrong that Parliament tried to fix or correct by the statute, and to interpret the Act accordingly. For this reason, the purpose approach is sometimes referred to as the 'avoidance of the mischief' rule.

The High Court in the 1980s recommended to the lower courts that the purpose approach is the preferable approach to the interpretation of statutes. The *Acts*

Interpretation Act 1901 (Cth) was amended in 1981 by the addition of s 15 AA (1), which provides that:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

THE USE OF EXTRINSIC MATERIALS

It is only in the event of ambiguity or doubt that legislation in some jurisdictions provides for the use of extrinsic materials (those outside the Act) to assist interpretation. It is important to note that the principle that extrinsic materials may be used does not operate to alter the correct technical construction of legislation or to rewrite the intention of Parliament as expressed in the legislation. The courts would generally refuse to consider materials such as parliamentary debates when interpreting an Act.

Nevertheless, an amendment to the *Acts Interpretation Act* now allows the court to take into consideration certain extrinsic materials in interpreting, for example, an ambiguous or obscure provision in an Act. Section 15AB (1) provides that materials that may be considered extrinsic include:

- all editorial and typographical additions to the text of the published Act, including margin notes, headings and endnotes and punctuation
- any tabled reports related to the legislation, including reports of Royal Commissions, Law Reform Commissions, committees of inquiry, etc.
- reports of parliamentary proceedings
- any international agreements referred to in the Act
- any explanatory memorandum to the bill before it became an Act, or other documents presented to Parliament.

BASIC PRINCIPLES OF STATUTORY INTERPRETATION

In addition to the general approaches already canvassed, judges have employed further principles of interpretation. These principles require that words should be:

- read and considered in their context
- interpreted consistently throughout the Act
- given their technical meaning if they have such a meaning
- given their legal meaning if they are not technical words.

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

1 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 include only

things of the same class as the specific words. Thus, a law that applies to 'any shrub, hedge, bush, bramble, or other plant' would not extend to a tree.

2 The *noscitur a sociis* rule, often referred to as the 'words of a feather flock together' rule, is the principle that a word or phrase is to be derived from its context. For example, a law that prohibits drinking alcohol in any home, canteen, or restaurant should not extend to drinking in a public lane because the previous specific places indicate that the law applies to enclosed areas.

ETHICS AND BUSINESS LAW

This part of the chapter outlines some of the issues that are relevant in considering the role of ethics and how ethics should apply in business and the people and institutions that it interacts with.

In recent years there have been many examples where a business has been shown to not to have acted ethically but also illegally. Ethics applies to all parties in business, the corporation itself, the directors, employees and the advisers to a commercial transaction, that is, the lawyers, accountants, bankers, and various other parties who are involved in making decisions that affect others in the community, such as shareholders, clients and the public in general.

As a result of the recent cases of corporate collapses, such as that of HIH, the corruption issues in the Australian Wheat Board and the mismanagement of retirement funds whereby business persons were found to be engaged in questionable or illegal practices, ethics has become a subject of topical interest. Such practices have undermined business and investment confidence in Australia and have caused corporate managers, for example, to consider their legal responsibilities as well as their ethical ones, taking into account the social, political and environmental consequences of their decisions.

To determine appropriate business conduct for decisions that are not guided by a legal standard, businesses have begun to adopt industry codes of conduct to guide them when considering ethical issues during the decision-making process. For example, the Code of Banking Practice requires banks that subscribe to it to act fairly and reasonably towards their customers in a consistent and ethical manner: cl 2.2. The Homeworkers Code of Practice, which has been adopted by the Textile Clothing and Footwear Union and the Council of Textile and Fashion Industries, requires that homeworkers (workers who sew clothing in private dwellings or premises other than registered factories) are paid award wages and are entitled to workers' compensation and superannuation: Schedule 3.

The consumer protection provisions of the Australian Consumer Law prohibit unethical business practices such as misleading or deceptive conduct, passing off, unconscionable conduct, false representations, bait advertising, and pyramid selling.

The restrictive trade practices provisions of the *Competition and Consumer Act 2010* (Cth) proscribe (prohibit) unethical business practices involving, for example, price fixing, misuse of market power, resale price maintenance, and exclusive dealing.

The *Corporations Act 2001* (Cth) demands ethical behaviour from company directors by imposing certain duties, which include the duty to exercise reasonable care and diligence, the duty to act in good faith and for a proper purpose, the duty not to use inside information improperly, and the duty not to use one's position improperly.

Issues related to business law which have ethical implications include:

- the advantages to business of adhering to business ethics
- ethical aspects of general business law principles
- industry codes of practice
- respect for personal privacy
- respect for intellectual property rights, involving copyrights, patents, designs and trademarks
- the ethical obligations of business managers
- the importance of ethical forms of investment
- employees' use of employers' time for personal gain
- discrimination against employees on grounds such as race, gender or marital status.

It is now accepted that businesses conducted according to ethical standards will in the long run achieve an enhanced reputation, and will do better in terms of profits than businesses that are unethical. The value of adopting good business ethics is aptly expressed in the following terms:

> A good reputation … is of enormous financial benefit to the companies that continue to maintain their good name. Although individual transactions may be foregone, other customers will continue to use such companies because they know that if a poor purchase has been made it is easy to exchange or get a refund. The basic issue here is whether or not one wishes to foster a continuing relationship: it would be as well to behave as if one had such a relationship in mind. (Ronald D Francis, *Ethics and Corporate Governance*, UNSW Press, Sydney, 2000, p.2).

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?
2. Explain what the doctrine of precedent (*stare decisis*) is and how it operates.
3. What is the *ratio decidendi* of a case? What is the difference between *ratio decidendi* and *obiter dicta*?
4. Distinguish between a binding precedent and a persuasive precedent.
5. Explain briefly the difference between concurrent and exclusive legislative powers of the federal parliament.
6. Explain what is meant by saying that there is an inconsistency between a state law and a Commonwealth law.
7. Discuss the doctrine of separation of powers. Explain how this doctrine applies to the different arms of government in Australia.
8. What is a court hierarchy? Explain its importance.
9. In interpreting statutes, what rules will the court follow?
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.
11. Explain what is meant by native title.
12. Explain the effect of the *Mabo* case (*Mabo v State of Queensland (No 2)* (1992) 175 CLR 1) on native title.
13. What was the finding of the High Court in the *Tasmanian Dam* case (*Commonwealth of Australia v Tasmania* (1983) 158 CLR 1)?
14. It is said that there are benefits for people in the business world to be ethical. Discuss.

For answers to the Test Your Knowledge questions, please refer to:
www.oup.com.au/chew2e.