



01

THE AUSTRALIAN LEGAL SYSTEM

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 of the High Court of Australia; and
 - understand alternative dispute resolution process and methods.
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jurist

A person recognised for their legal writing and scholarship.

federal

The system of government whereby all legislative, executive and judicial powers are divided between two levels. In Australia, provision is made for a federal system of government by the *Commonwealth of Australia Constitution Act 1901* (UK). Other examples of countries with a federal system of government are Canada and the USA. In comparison, the UK is an example of a unitary system of government, in which there is only one level.

state

The Australian states were formed from the original British colonies and together form the second level of government in the Australian federal system, sharing power with the Commonwealth.

Westminster system

The parliamentary system based on the English Parliament and consisting of three parts—the Crown, an upper house and a lower house—from which the party with the majority of seats forms the government.

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?

judicial

1. Concerning a judge.
2. Done with the authority of a court of law.

judge-made law

Law made by precedent.

statute law

Law created by legislation, in contrast to common law.

common law

1. The system of law developed by the English courts through the principles of precedent, in contrast with a civil law system.
2. The law laid down by the common law courts, in contrast with the rules of equity.
3. Unwritten law, including common law and equity, as distinct from written or statute law.
4. Historically, the rules of law common to all people in England

decision

A term for the judgment of a court.

law

A body of rules that is accepted by the society as binding.

business

For the purposes of income tax, any trade, profession, or employment other than being an employee.

statute law

Law created by legislation, in contrast to common law.

statutory

Concerning a statute.

Australian Competition and Consumer Commission (ACCC)

The federal administrative body established in 1995 by the merger of the Trade Practices Commission and the Prices Surveillance Authority, with responsibility for disseminating information, conducting research into issues concerning trade practices, and assessing and taking proceedings for violations against relevant trade practices and consumer legislation.

Australian Securities and Investments Commission (ASIC)

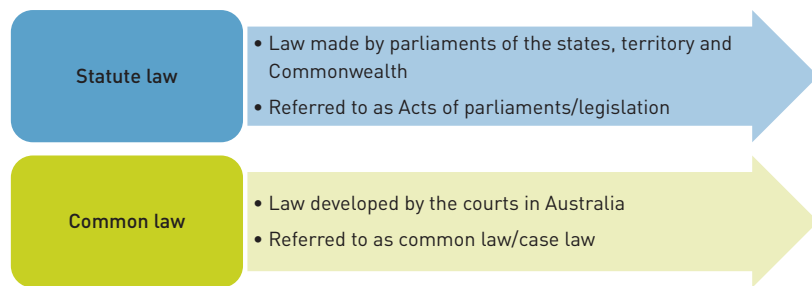
The body was established as a Commonwealth authority in 1989, replacing the Australian Companies and Securities Commission. It is responsible for the policy concerning the administration and regulation of Australian corporations and securities.

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 1986,¹ 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);²

court

1. A place where judicial proceedings are heard.
2. The arbitrator of a judicial proceeding.

High Court of Australia

The most senior court in the Australian judicial system. The High Court exercises original jurisdiction in both civil and criminal matters, although much of its time is spent deciding disputes involving the Commonwealth and states, which arise under Commonwealth legislation or require an interpretation of the Commonwealth Constitution.

customary law

A rule of conduct that is generally considered to be binding on the people who are affected by its scope because of its long usage. Customary law—for example, Aboriginal customary law—is usually oral and based on tradition and usual practice rather than written codes or principles.

¹ *Recognition of Aboriginal Customary Laws*, Report 31, Australian Law Reform Commission, 1986.

² The Queensland Parliament contains only the lower house.

parliament

The legislative arm of government. There are nine parliaments in Australia: the Commonwealth Parliament, six state parliaments and two territorial parliaments. The Commonwealth Parliament and the parliaments of each of the states, except Queensland, are bicameral (consisting of an upper and lower house). In Queensland, the Northern Territory and the Australian Capital Territory, the parliaments are unicameral, having only one legislative house.

enactment

An Act of Parliament.

lower house

In a bicameral parliament, generally the larger and more representative legislature in which the party with the majority of seats holds the government. In Australia, the lower house of the Commonwealth Parliament is the House of Representatives.

- 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)³ 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.⁴ 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

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* (Qld); *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 CCA⁷ 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.

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.

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.

House of Representatives

The lower house of the Australian federal Parliament. The party or parties that hold the majority of seats in the House of Representatives make up the Commonwealth Government of the day. Members of the House of Representatives sit for a three-year term.

Legislative Assembly

(Abbreviation: LA). The lower house of Parliament in New South Wales, Victoria and Western Australia. It is equivalent to the House of Assembly in South Australia and Tasmania. It is the sole house of Parliament in Queensland, and the Northern and Australian Capital Territories.

upper house

In a bicameral parliament, the upper house is generally the smaller and less representative legislature, acting as a house of review for the lower house. In Australia, the members of the upper houses of Parliament, in every jurisdiction where they exist, are elected. The upper house of the Commonwealth Parliament is the Senate.

Senate

The upper house of the Commonwealth Parliament whose members (senators) are elected as representatives of the states and territories. The Senate is the Commonwealth Parliament's house of review and it has no constitutional power to enact financial legislation.

federal

The system of government whereby all legislative, executive and judicial powers are divided between two levels. In Australia, provision is made for a federal system of government by the *Commonwealth of Australia Constitution Act 1900* (UK).

Legislative Council

(Abbreviation: LC). The upper house of Parliament in New South Wales, South Australia, Tasmania, Victoria and Western Australia. Queensland is the only state that does not have a Legislative Council, having abolished it in 1922.

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.⁹
- 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

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

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'.

¹¹ See J. Ponting, *Oxford Legal Study Dictionary*, Oxford University Press, Melbourne, 1998.

¹² Delegated legislation may be altered relatively easily.

¹³ *Legislative Instruments Act* 2003 (Cth), ss 38 and 42.

Governor-General

The representative of the English monarch, as the head of state at the Australian federal level. Under the *Commonwealth of Australia Constitution Act* 1900 (UK), the Commonwealth Parliament consists of the House of Representatives, the Senate, and the English king or queen, who delegates their functions as the executive head of the federal government to the Governor-General.

Governor

The representative of the English monarch, as the head of state in each Australian state.

Bill

A proposed law that is debated and passed through the legislative processes of parliament and becomes an Act of Parliament after receiving royal assent.

royal assent

The formal signing of a Bill that has already been passed by the parliament, by the Governor (at state level) or the Governor-General (at federal level), indicating the Crown's assent to the proposed law. Once a Bill has received royal assent it becomes an Act of Parliament.

Act of Parliament

A law made by Parliament, as opposed to common law, which is made by the courts.

statute

An Act of Parliament.

commencement date

The date on which an Act or parts of an Act come into operation. Very often an Act of Parliament will not become law until a certain date fixed by the Governor-General in Council (Commonwealth legislation) or the Governor in Council (state legislation).

deadlock

When a Bill is passed by one house of the Parliament but not by the other.

right

The entitlement, privilege or power to do something.

liability

A civil or criminal, legal responsibility or obligation.

Hansard

The official records of parliamentary proceedings. The reports are named after Thomas Hansard who printed the first report of the English parliamentary debates in 1803. The name 'Hansard' is used to describe any of the Australian Commonwealth or state parliamentary debates.

- **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.¹⁴ 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.¹⁵ Delegated legislation is interpreted according to the usual rules that apply to the interpretation of statutes.¹⁶

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?

¹⁴ Section 48(1)(b) of the *Acts Interpretation Act 1901* (Cth).

¹⁵ *Subordinate Legislation Act 1994* (Vic), Part 3; *Interpretation Act 1987* (NSW), s 39; *Statutory Instruments Act 1992* (Old), ss 32–34; *Subordinate Legislation Act 1978* (SA), ss 10, 10A, 10AA, 11; *Interpretation Act 1984* (WA), s 41; *Acts Interpretation Act 1931* (Tas), ss 38A, 47; *Subordinate Laws Act 1989* (ACT), ss 6, 7; *Interpretation Act 1978* (NT), s 63.

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 to you to demolish the flat or face a legal action. Have you breached any law? If so, which one?

explanatory memorandum

An executive report issued by a minister to explain the aims and operation of a proposed statute.

literal rule

The rule of statutory interpretation in which a court applies the provisions of legislation strictly as they are written. The literal rule is based on the assumption that parliament intends the text of legislation to be interpreted.

golden rule

This is the principle of statutory interpretation to the effect that where a strictly literal interpretation would lead to an inconsistent or absurd outcome, a court may rely on a more sensible approach. The golden rule may be applied where there is a clear understanding of the original intention of the legislation. The golden rule may be contrasted with the literal rule.

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

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.

mischief rule

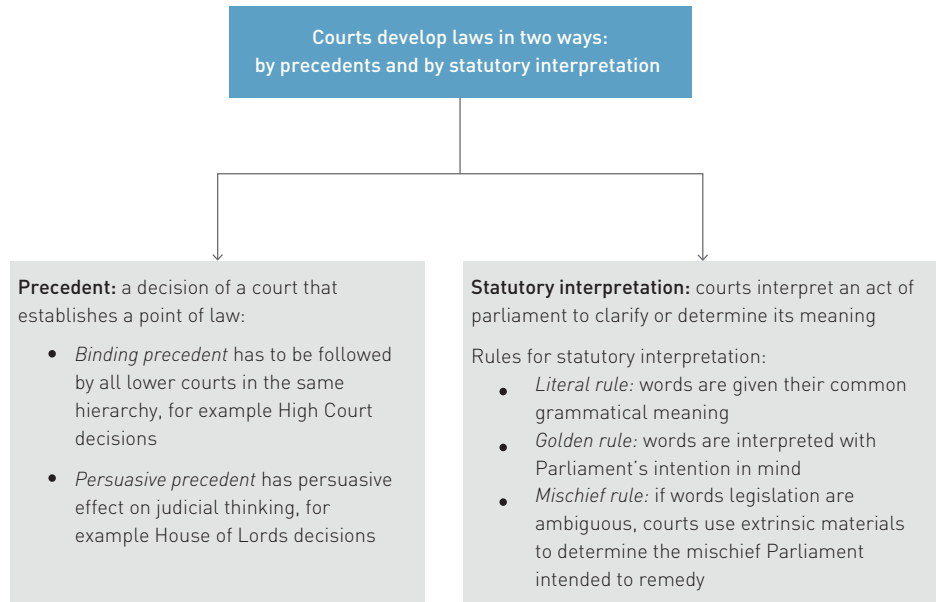
In statutory interpretation, where the meaning of a word in an act is ambiguous, the mischief rule allows the court to examine the Parliament's intention in originally passing the Act. To clarify the intent, the court will look at the common law before the legislation was passed to determine the mischief for which the common law did not provide. Then the court will use the text of the act and any extrinsic material available, including reports of law reform agencies and explanatory memoranda, to decide what remedy the legislation was intended to introduce.

law reform

The process of improving the law by updating it to reflect current social conditions, eliminating defects, and simplifying and making its administration more effective.

parliamentary debates

The official records of parliamentary proceedings, known as Hansard reports.

FIGURE 1.2 DEVELOPMENT OF LAWS BY COURTS

the facts of cases are similar in material respects, the law expounded in the earlier cases is followed in the later (similar) cases.¹⁸

More specifically:

- lower courts in any given judicial hierarchy are bound by earlier decisions of courts higher up in the same hierarchy; and
- decisions of courts at the very top of the hierarchy, such as the High Court of Australia, have greater weight than those further down in the hierarchy, such as those of a single judge of a state Supreme Court.

Decisions coming from the higher courts in a hierarchy are said to be **binding** on all the lower courts in the same hierarchy. This notion is known as the doctrine of *stare decisis*, or **binding precedent**. For example, decisions of the High Court of Australia are binding on all the lower courts of the states and territories, whereas a Magistrates Court decision would not bind the Supreme Court of a state.

It should be noted that the entire judgment of the higher court is not binding on the lower courts; only the reasoning for deciding the case (referred to as the *ratio decidendi*) is followed by the lower courts. The *ratio* of a case differs from what is called *obiter dicta* (or *obiter dictum*

¹⁸ Although no two cases are precisely similar on their facts, it is possible to avoid an earlier precedent by a finding that the facts of two cases are not similar 'in material respects'. This technique is known as 'distinguishing' cases that are based on fundamentally different factual scenarios.

in the singular). Flying references and passing statements by a judge or hypotheses created by the court to make a point (that has nothing or very little to do with the present case) are examples of *obiter dicta*.

In the past, decisions of the **Privy Council** (formerly the highest court of appeal for Australia) have been binding on the High Court of Australia. Since 1986, however, all appeals to the Privy Council from Australian courts have been abolished.¹⁹

Australian contract law, as we have seen, has its origins in English common law. Despite the fact that English decisions are no longer binding on Australian courts, they are still frequently relied on and cited by our courts. Indeed, Australian courts frequently have regard to decisions not only of the English **House of Lords** (the highest court of appeal for England), but also to decisions of the Supreme Court of the USA. In recent years, Australian courts have been influenced by decisions of the Canadian and New Zealand Supreme Courts.²⁰ Such decisions, which originate from other judicial hierarchies, are not binding on Australian courts, but they may be of great persuasive authority. Similarly, decisions of the Court of Appeal in Victoria are not binding on the Supreme Court of New South Wales, but may have persuasive effect on the judicial thinking of that court.

Although Australia has inherited the common law system from England and, in the past, courts within Australia have unquestionably followed the judicial reasoning of the House of Lords, the High Court of Australia has since made radical departures from the English common law. For example, the High Court of Australia has been engaged for many years in developing a uniquely Australian law of contract—a law that takes account of our own geographical, cultural and social reality.²¹ There is an awareness today of the need to adapt the common law to Australia's needs, circumstances and values, and with England's increasing involvement in the European Union, the cultural severance of Australian law from English law no doubt will increase. It is often said that the role of the **judiciary** is now more that of interpreting legislation than making law. Obvious exceptions are the High Court decisions in *Mabo* (confirming native title; see below) and *Wik* (that pastoral leases could coexist alongside native title).²² These cases are a prime example of the law-making power retained by the judiciary.²³

¹⁹ See the *Australia Act 1986* (Cth).

²⁰ Kirby J laments that Indian jurisprudence has been largely ignored by the Western common law systems: M. Kirby, 'The Future of the Judiciary', Australian Lawyers Conference, 17 July 1995, available at www.lawfoundation.net.au/judgments/kirby.

²¹ A. Mason, 'Australian Contract Law' (1988) 1 *Journal of Contract Law* 1; N. Sneddon & M.P. Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 7th Aust. edn, Butterworths, Sydney, 1997, p. 859.

²² *Wik Peoples v Queensland* (1996) 187 CLR 1.

²³ In 1997, Prime Minister John Howard was reported as having said that, in the process of interpreting laws, the High Court had become 'a little adventurous'. He also insisted that judicial appointments to the High Court were the federal government's prerogative and would remain so: *The Age*, 20 February 1997.

parliamentary committees

Various committees comprising members of the upper, lower or both (joint) houses of Parliament, established to inquire into specific matters. During the legislative process, the entire members of a parliamentary house or a smaller group (select committee) sit to debate the provisions of proposed legislation. Other parliamentary committees sit to investigate issues either on an ad hoc basis, or on an ongoing basis as a standing committee.

ultra vires

An action beyond the limits of the legal powers given to a parliament, public authority, company or other body.

invalid

Not valid, without legal force.

third party

A person who does not share a direct legal relationship with another person.

judge

(Abbreviation: J). An officer of the Crown whose function is to adjudicate disputes brought before a court. Judges are appointed to a state court by the Governor in Council, or by the Governor-General in Council to a federal court, and cannot be removed from office other than by the appointing body, and only after both houses of the appropriate parliament request their removal on the grounds of proven misbehaviour or incapacity.

case law

Principles of law established by judicial decisions and the doctrine of precedent, in contrast with legislation.

equity

The body of law developed by the Court of Chancery in England to ensure fairness in the legal system in areas where the common law failed to provide a just solution to a dispute. In the event of a conflict between common law and equity, the rules of equity prevail.

law court

A place where judicial proceedings are heard.

**MABO V QUEENSLAND (NO. 2)²⁴ FACTS****FACTS**

The plaintiffs were members of the Indigenous Australian group known as the Meriam people. In this case, the legal rights of the Meriam people to the land of the Murray Islands were in issue. The Meriam people had been in occupation of the islands for generations before the first European contact. They were a Melanesian people who probably came to the islands from Papua New Guinea. Their numbers had fluctuated between probably no more than 1000 and no less than 400. They lived in groups of huts strung along the foreshore, immediately behind the sandy beach. Although individuals other than the Meriam people had lived on the Murray Islands from time to time and had worked as missionaries, government officials, or fishers, they had not been permanent residents on the islands. Therefore, the Meriam people had a continuous relationship and connection with the Murray Islands.

In 1879 title to the Murray Islands passed to the State of Queensland. Queensland argued that, when the territory of a settled colony became part of the Crown's dominions, the Crown acquired the absolute beneficial ownership of all land in the territory.²⁵ Queensland relied on previous law (known as the *terra nullius* doctrine)²⁶ that held that Australia, prior to European settlement, had been unoccupied, which granted the Crown upon settlement absolute title and sovereignty over Australia.

ISSUE

The proposition that, when the Crown assumed sovereignty over an Australian colony, it became the universal and absolute beneficial owner of all the land therein, was the paramount issue to be decided in *Mabo*. The High Court was specifically asked to determine whether the Meriam people had lost their traditional native title to the Murray Islands when title to the islands passed to Queensland on 1 August 1879.

DECISION

Native title to the Murray Islands survived the Crown's acquisition of sovereignty and radical title on 1 August 1879, and the rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title to the islands. However, native title could be extinguished if Queensland exercised its sovereign power in a manner that was inconsistent with the continued right of the Meriam people to enjoy native title. In this way, native title throughout Australia had been extinguished by

²⁴ *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 107 ALR 1.

²⁵ See *A-G v Brown* (1847) 1 Legge 312.

²⁶ See *ibid*; *Cooper v Stuart* (1889) 14 App Cas 286; *Williams v A-G (NSW)* (1913) 16 CLR 439; *Milirrpum v Nabalco* (1971) 17 FLR 141.

grants of traditional estates in land (such as freehold title), but not necessarily by the grant of lesser interests (for example, grants to authorities permitting them to prospect for minerals), where it could be shown that native title can mutually coexist with the lesser interest.

In this case, the native title belonging to the Meriam people had not been extinguished because there had been no grant of freehold title or any other interest in the Murray Islands by Queensland.

Native title has its origin in the traditional laws and customs observed by the Indigenous inhabitants of a territory, and the nature and incidents of native title are determined as a matter of fact by reference to those laws and customs. The *terra nullius* doctrine was described by the High Court as a legal 'fiction', by which the rights and interests of Indigenous inhabitants in land were treated as non-existent, and this 'fiction' was held to have no place in the contemporary law of this country. Native title could survive provided it could be shown that there existed a continuous association between the Indigenous inhabitants and the land in question. In *Mabo*, the Meriam people had established the customary link with the Murray Islands and, therefore, their native title to the Murray Islands had survived the Crown's claim of sovereignty.

Equity as a source of law

Historically, the law of equity developed in the Middle Ages largely as a response to the inadequacies of the common law. In the first place, the common law was very narrowly focused on certain types of cases—crimes, property, contract and tort. Second, as the doctrine of precedent developed, it became inflexible. Precedent would be applied rigidly even where the original decision was clearly wrong or unjust, or where it had simply become out of date. Furthermore, the common law provided remedies that were in many cases inadequate, inappropriate or unsatisfactory. For example, the common law remedy of damages for breach of contract may not be appropriate where the innocent party wants to prevent the breach from occurring, or where the innocent party wants the other to perform the contract in the way it was agreed. In some cases there were no common law remedies at all. The common law had become increasingly concerned with form and procedure rather than **justice**.

In such circumstances, dissatisfied **litigants** petitioned the Crown, as the highest judicial authority, to provide an appropriate remedy. In time, these petitions came to be considered by the Chancellor acting on behalf of the King or Queen and ultimately the petitions were directly addressed to him. The Chancellor, who was the highest clergyman of the country, acted as the conscience of the monarch. He had the practical power to override the rulings of the common law courts, and he resolved disputes that came before him on the basis of fairness and good conscience—the **merits** of the case and considerations of justice were paramount. As the volume of work increased, the Court of Chancery was established. The new court developed a distinct body of **equitable** rules and remedies, which operated alongside

Chancery

The Court of Chancery was established during the Middle Ages to hear appeals against remedies offered by the common law courts and was responsible for the development of the equitable remedies, such as specific performance.

civil law

1. The law regulating conduct between private citizens, such as in the law of negligence. Within this meaning, civil law is usually contrasted with other areas, including criminal or administrative law.
2. The law originating from Roman law, which is the basis for the legal systems in several European countries. Civil law, in this sense, is contrasted with common law. Typically the civil law system relies on the codification of areas of law instead of the principles of judicial precedent.
3. Law affecting civilians, as opposed to military law.

precedent

The law developed by the courts; judge-made law. Judicial precedent is the key feature in the development of common law, and laws made according to the doctrine of precedent are in contrast with legislation.

judgment

1. The decision of a court as to the rights and obligations of the parties in an action brought before it. 2. The court's reason for its decision and its pronouncement of the legal consequences of that decision. 3. The remedy resulting from the decision of a civil proceeding or the sanction imposed as the result of a criminal trial (for example, a judgment debt).

bind

Put under legal obligation.

binding precedent

A decision of a superior court that must be followed by an inferior court in the same hierarchy, in contrast with a persuasive precedent.

ratio decidendi

The legal reasoning of a court in reaching its decision. The ratio decidendi of cases heard in higher courts form the foundation on which the doctrine of precedent operates because they bind lower courts in the same hierarchy to follow the same rule of law. Contrast with obiter dictum.

the common law rules. In 1620, King James I declared that, in cases of inconsistency between the common law and equity, equity would prevail. Thus, equitable principles are superior to common law principles, as equity aspires to dispense justice to parties by removing the injustice, unfairness and harshness of the common law.

The two systems—common law courts and equity courts (also known as Chancery Courts)—existed side by side in England until 1873.²⁷ Since then, the two systems have been integrated and Australia has inherited the combined principles of common law and equity. In every Australian jurisdiction today all courts apply both common law as well as equitable principles,²⁸ and in the event of any inconsistency, the principles of equity prevail. Thus, lawyers continue to make a distinction between the common law and equity, even though the two bodies of law are now administered by the same courts.

There are, however, several differences between equity and the common law:

- The common law is a complete and comprehensive system of law, whereas equity comprises many isolated principles specifying when a particular remedy may be given. Equity does not apply to all civil cases and has no relevance in criminal disputes.
- Equitable rights are valid only against those people who are in conscience bound to recognise them (rights *in personam*). Common law rights are valid against the whole world (rights *in rem*).
- Common law rights are enforceable at any time, subject to statutory limitation periods. **Equitable remedies** must be applied for promptly. The equitable doctrine of *laches* prevents the enforcement of a right where there is negligence or unreasonable delay in enforcing it.
- Equitable remedies are discretionary.

By way of summary, we can say that equity is concerned with preventing unconscionable conduct—conduct that is not based on good conscience. A good example of equitable intervention is the doctrine of **estoppel** in contract law, which not only creates a mechanism for enforcing promises in the absence of consideration (or legal value, such as money: see Chapters 4 and 5), but also imposes on contractual parties an overarching duty of good behaviour or fair dealing in the market place. Another example is provided by the doctrine of **unconscionable bargains** expounded in the landmark case of *Commercial Bank of Australia Ltd v Amadio*.²⁹

The High Court in that case acknowledged that relief against unconscionable dealing is a purely equitable remedy. This decision, which was the predecessor of statutory developments relating to unconscionable conduct, has had a profound and far-reaching impact on standards of behaviour in commercial contracting. The statutory provisions contained in Schedule 2 of the CCA and equivalent provisions contained in the state and territory Fair Trading Acts³⁰

27 The *Judicature Act 1873* (Imp) combined the two parallel legal systems and set up a Supreme Court of Judicature that applies both principles of law (common law and equity) in their decisions.

28 See, for example, the *Law Reform (Law and Equity) Act 1972* (NSW).

29 (1983) 151 CLR 447. The facts of the case and commentary on the decision can be found in Chapter 9 on vitiating factors.

30 See, for example, the *Fair Trading Act 1999* (Vic).

reinforce and expand upon the norms of good behaviour expected of market participants originally established in *Amadio*.³¹ Accordingly, it is probably now true to say as a general proposition that contracting parties are not permitted to claim, or deny, legal rights when it would be unconscionable to do so.

As discussed earlier, sometimes the common law remedy of damages for breach of contract (which is the most popular and main remedy under the common law) may not be appropriate for the innocent party, and thus flexible equitable remedies may prove to be more appropriate for the party in dispute. For example:

- An injunction is an equitable remedy where a court directs the defendant to stop doing something that could harm the **interests** of the plaintiff (such as selling or disposing of the goods to someone else where the goods have already been sold to the plaintiff).
- The **remedy of specific performance** directs a person (the defendant) to carry out the contractual **obligations** as originally agreed by the parties (for example, to sell the goods to the plaintiff, perform the contract as per the agreement).

Relationship between common law equity and statute law

As discussed earlier in the chapter, common law has been developed by courts and statute law is the product of parliaments. The principles of equity on the other hand, had historically been developed by the Court of Chancery in a separate branch of law. Though equitable principles are now part of common law, the principles maintain their identity in contractual dealings.³² In case of contradiction between the common law and statute law, statute law will always prevail, as this branch of law develops through parliamentary debates discussions, analysis and scrutiny of both houses of the parliament. The common law, on the other hand, is developed by the unelected members of the public (judges, not parliamentarians) whose main role is to interpret and apply it. In interpreting and applying laws, the judges do develop laws. In legal terms, however, the actual law-making power has been bestowed on the Parliament.³³ Thus, statute law is superior to common law (judge-made or case law).

Unlike statute and common law, the principles of equity aspire for a higher goal to do justice to parties. Equity provides a remedy if parties enter into transactions which are harsh, unjust, unfair and oppressive, thus allowing the parties to set aside unjust and unconscionable bargains even when the parties had freely and voluntarily entered into those bargains. For example, common law may provide clear legal directions about how to enter into a legally binding contract. Courts over the centuries may follow these sets of principles through precedents. The principles of equity may state that if the contract is made under circumstances which are harsh or oppressive or the contract contains unfair and unconscionable terms, equity may allow the court to set aside the contract on basis of unconscionability. Similarly,

obiter dictum

(Plural: obiter dicta). A judge's reasoning behind a point of law that does not form part of the ratio decidendi and is not binding as a precedent.

Privy Council

(Abbreviation: PC). The Judicial Committee of the Privy Council is the most senior court in the British Commonwealth, historically hearing appeals from colonial and other courts of British Commonwealth countries. In 1986, the right of appeal from Australian courts to the Privy Council was abolished.

court of appeal

An appellate court.

House of Lords

The upper house in the English Parliament and the highest appellate court in England. The House of Lords as a court is composed of independent, legally qualified practitioners, called Law Lords, who are given life peerages and sit as an appellate committee of the House of Lords, with no original jurisdiction.

³¹ Sections 20, 21 and 22 of the Australian Consumer Law, contained in Schedule 2 of the CCA.

³² Read for example, in contract law, the doctrine of promissory estoppel, the principle of unconscionable conduct, remedy of rescission and specific performance.

³³ See Chapter I (s. 1) of the Australian Constitution that states: 'The legislative power of the Commonwealth shall be vested in a Federal Parliament which shall consist of the Queen, a Senate and a House of Representative ... called The Parliament ...'

terra nullius

'Land that belongs to no one'. In terms of international law *terra nullius* means territory that no one owns. Any nation that discovers such a territory is entitled to keep it.

justice

The principle of law that each person is entitled to legal rights and is bound by legal duties. ▶

litigant

A party to a civil proceeding.

merits

The relative strengths of the plaintiff's claim or the defendant's defence in a civil case.

equitable

Something that is fair.

equitable remedy

A discretionary remedy granted by the court where an award of damages is not sufficient to provide relief to a dispute, usually as a writ of specific performance or a restraining injunction.

under the promissory estoppel, courts may not allow parties to go back on their promises when one relies on the promise and suffers detriment.

This is to say that, in case of contradiction between common law and the principles of equity, equity prevails because equity is concerned with doing justice rather than following the strict application of the judge made rules.

Statute law can change the common law,³⁴ including of the principles of equity.

The relationship between common law, equity and statute law can be further understood by *Waltons Stores (Interstate) Ltd v Maher*.³⁵

TIP

Businesses should be careful of promises they make to others. If a person gives a promise or arouses an expectation in the mind of another that the contract exists or will be made in future, and the other person relies on the statement and suffers loss, court may not allow the promisor to go back on the promise because it will be unfair for him or her to do so.

ACTIVITY 1.4

On Monday, A, an antique dealer, agrees to sell a rare antique ring to B for \$5000. B is to collect the ring on Friday after work. On Thursday, A finds another buyer, C, who offers twice the price of the ring. Thinking that this is a lucrative deal, A sells the ring to C. Since it is the only ring of its kind, B may not be able to buy the ring elsewhere. Advise B of his rights and remedies under the agreement.

LAW IN A GLOBAL CONTEXT: THE INFLUENCE OF INTERNATIONAL LAW

A further source of law arises from the globalisation of trade, markets, and commercial and financial transactions. The globalisation and deregulation of trade barriers—along with technological developments, scientific and biotechnological innovations, and the 'information superhighway'—have created the need for uniform laws to govern international trade, which has vastly increased in scope and in significance to the world economy. International laws are created by multinational conventions, reciprocal arrangements, treaties and memoranda of

³⁴ Following the *Review of the Law of Negligence* report (Ipp Report, October 2002) all Australian states and territories' parliaments introduced statutes modifying the law relating to negligence. Up until then, there is little statutory intervention in the law of negligence as this branch of law has been entirely developed by courts. See, for example, *Wrongs and Other Acts (Law of Negligence) Act 2003* (Vic); *Trade Practices Amendment (Personal Injuries and Death) Act 2006* (Cth). The Ipp Report is available at www.amatas.com.au/assets/ipp_report.pdf

³⁵ (1988) 164 CLR 387.

understanding, along with bilateral arrangements (such as the free trade agreements (FTAs)) to which Australia is or will be a signatory.

Australia has ratified approximately 900 international treaties and conventions since Federation. These treaties have been implemented in Australia by the enactment of Commonwealth laws under the Commonwealth Parliament's 'external affairs' power (s 51(xxix) of the Constitution; see Chapter 2 for the full text of s 51). Some of the well-known agreements to which Australia is a party are as follows:

- the Vienna Sales Convention: a multinational treaty that sets out standards of conduct for sales agreements between traders of the parties to the Convention;
- the General Agreement on Tariffs and Trade (GATT): a multinational treaty which aims to encourage free trade in goods between countries;
- the Asia Pacific Economic Cooperation (APEC): a regional treaty that provides special trading status to its members; and
- the South Pacific Area Regional Trade and Economic Cooperation Agreement (SPARTECA): a regional treaty (like APEC) that provides special trading advantage to member states.

A convention may be implemented through Commonwealth or uniform state legislation, see:

- the *International Arbitration Act 1974* (Cth), which ratifies the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Arbitration;
- the *Foreign Judgments Act 1991* (Cth);
- the *Consular Privileges and Immunities Act 1972* (Cth), which ratifies the Vienna Convention on Consular Relations, signed by Australia on 24 April 1963;
- the *Sale of Goods (Vienna Convention) Act 1986* (Vic), *Sale of Goods (Vienna Convention) Act 1986* (NSW), *Sale of Goods (Vienna Convention) Act 1987* (NT), *Sale of Goods (Vienna Convention) Act 1987* (ACT), *Sale of Goods (Vienna Convention) Act 1986* (SA), *Sale of Goods (Vienna Convention) Act 1987* (Tas) and *Sale of Goods (Vienna Convention) Act 1986* (WA), which give effect to the convention on the international sale of goods;
- Part 5.6, Division 9 of the *Corporations Act 2001* (Cth), which implements the UNCITRAL Model Law on Cross-border Insolvency and Payment Netting;
- the *Cross-Border Insolvency Act 2008* (Cth), which gives effect to the UNCITRAL Model Law on Cross-Border Insolvency; and
- the *Electronic Transactions Act 1999* (Cth), which gives effect to the UNCITRAL Model Law on Electronic Commerce 1996. Australia adopted the *United Nations Convention on the Use of Electronic Communications in International Contracts* in 2011 by enacting the *Electronic Transactions Amendment Act 2011* (Cth).³⁶ States and territories are also passing similar legislation to adopt the reforms proposed in the Commonwealth Act, especially regarding traditional rules concerning the formation of a contract.³⁷

³⁶ www.comlaw.gov.au/Details/C2011A00033.

³⁷ See www.ag.gov.au/RightsAndProtections/ECommerce/Pages/UNConventionElectronictransactionsininternationalcontracts.aspx. The *Electronic Transactions Amendment Act 2011* (Cth) is available at www.comlaw.gov.au/Details/C2011A00033.

estoppel

The rule in civil procedure preventing a person from asserting a position contrary to one that already has been established. The estoppel rule may be demonstrated in three ways: where a fact in dispute has already been judicially determined; where a party seeks to deny a statement that they have made earlier in a deed; and where a party has previously acted in a manner consistent with the position that is now being denied.

unconscionable bargain

An agreement that is unfair and unscrupulous because it gives an advantage to a stronger party who has exploited the weakness of the other party. Typical areas of exploitation may include financial need, illness or disability, ignorance, or language difficulties. An unconscionable bargain is voidable in equity.

interest

A personal advantage or concern.

remedy

(Plural: remedies). Something that redresses a wrong.

obligation

A legal relationship between two people, where one person's right is the other person's duty.

federal courts

Any of the courts created in accordance with the Constitution by the Commonwealth Parliament to exercise the judicial power of the Commonwealth. Examples of Australian federal courts are the High Court of Australia, the Federal Court of Australia and the Family Court of Australia.

offence

A wrong that is prohibited by criminal law; a crime.

higher courts

Higher courts are courts that sit at the top of court hierarchy (that is, state and territory Supreme Courts and the High Court of Australia)

Magistrates Court

An inferior court in the Australian Capital Territory, Queensland, South Australia, Tasmania and Victoria, which has jurisdiction to decide minor civil and criminal cases and to conduct preliminary hearings. It is equivalent to the Local Courts of New South Wales and the Northern Territory.

COURTS AND TRIBUNALS IN AUSTRALIA

The hierarchy of courts

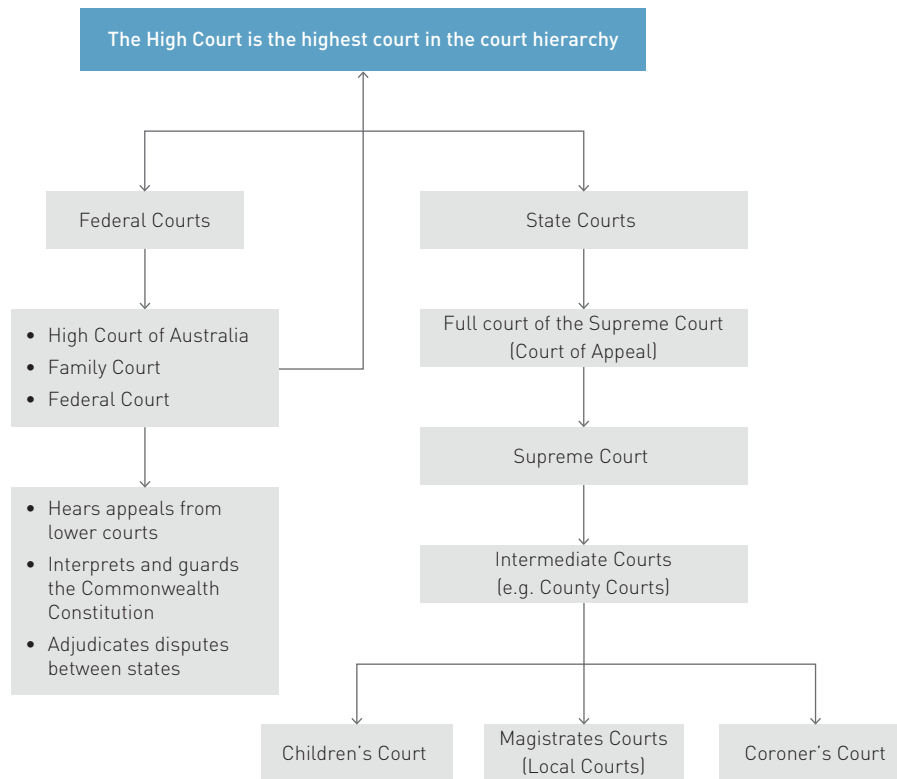
Courts and tribunals are vital to the operation of law as they dispense justice, resolve disputes, compensate innocent parties (victims) for their injuries and punish the wrongdoers for their offending conduct. In Australia, legal disputes are heard in a variety of state, territory and Commonwealth courts and tribunals. Each of the Australian states and territories, as well as the federal system, has its own hierarchy of courts. 'Hierarchy' refers to the ranking of courts according to their importance in the legal system. In Australia, we have a three-tiered system at state and territory level (with the exception of Tasmania, the Australian Capital Territory and the Northern Territory, which have two levels), with an overlay of **federal courts** and administrative tribunals.

The court structure essentially provides that the most serious and costly cases (in terms of seriousness of **offence** or value of money involved) are handled at the highest level by the '**higher**' courts, while minor offences that can be dealt with relatively quickly are handled in the readily accessible 'lower' courts. In between, in the middle band, there are the 'intermediate' courts. Each court in the court structure, or court hierarchy, has a specific jurisdiction; that is, it has specific functions and powers.

This structure facilitates the following:

- The vast majority of cases, both criminal and civil, are dealt with in lower jurisdictional courts such as the **Magistrates Courts**, the Courts of Petty Sessions and the Local Courts in the various states and territories.
- The **hierarchy** of courts and the division of jurisdiction allow for greater specialisation by judges and courts in specific areas of the law; for example, the Supreme Court of each state and territory has a number of divisions and 'lists', including the Commercial and Equity Division, the Probate Division and the Common Law Division.
- Decisions of the lower courts can be reconsidered through appeals to higher courts, provided the higher court grants special **leave to appeal** on a point of law.
- The ranking of courts provides for the sharing of the workload of higher courts, so that they can focus on cases that are of utmost importance for the state, the territory or the nation. For example, the state and territory Supreme Courts hear disputes that are serious in nature, either in terms of money or the offence itself, and the High Court of Australia hears disputes that require further clarity and certainty on legal principles that are important for the entire nation.

FIGURE 1.3 THE HIERARCHY OF COURTS

**hierarchy**

The grading of courts that enables the operation of the doctrine of precedent and an appeals system. In Australia, courts are ranked in ascending order from inferior, through intermediate, to superior.

leave to appeal

The permission to appeal granted either by the court from which a decision is being appealed or by the court to which an application is being made, depending on the courts involved.

courts of summary jurisdiction

Courts that handle small, civil and criminal matters.

matter

A civil proceeding.

debt

A sum of money owed by one person (the debtor) to another person (the creditor).

claim

The assertion of right that is not yet recognised by the law.

title

The right to ownership and possession of property, in particular real property.

Courts of summary jurisdiction

Courts of summary jurisdiction—Magistrates Courts (Victoria, Queensland, South Australia, the Australian Capital Territory the Northern Territory, Tasmania and Western Australia) and local courts (New South Wales)—are established under federal, state and territory acts to handle small civil and criminal **matters**.

They are referred to as summary courts because they handle minor or summary offences, as well as small **debt** claims and other small civil matters, such as **claims** arising under contract and tort, claims for victim compensation, compensation for injuries arising out of car accidents, claims as to **title** to land and some family law issues. An important prerequisite for access to courts of summary jurisdiction is the need to fall within the monetary jurisdictional level, which typically varies from jurisdiction to jurisdiction. Matters are usually heard quickly and relatively informally, and in criminal cases the magistrate typically imposes a bond or

hearing

The examination of a case in a court of summary jurisdiction (for example, a Magistrates Court).

evidence

Any material used in legal proceedings to prove or disprove a disputed fact. The testimony of witnesses, documents and objects may all be adduced as evidence of a fact that is being asserted by a party in support of their case. The rules of evidence govern the different types of evidence admissible (for example, circumstantial evidence and expert evidence) and which types are inadmissible (for example, hearsay evidence or opinion evidence).

community service order for minor convictions. Overall, such courts handle the vast majority of legal matters going before Australian courts and provide an accessible means for the adjudication of disputes.

Summary courts are presided over by a magistrate, who is not a judge but a more junior judicial officer. In most jurisdictions, members of the Bar, solicitors, and government and academic lawyers are appointed to the position of magistrate.

The criminal jurisdiction of the summary courts fall into two categories:

1. Summary courts hold preliminary **hearings** (committal proceedings) into serious crimes, such as murder, aggravated burglary, aggravated assault, and sexual offences, to determine whether the prosecution has sufficient **evidence** to proceed with a trial before judge and jury in a higher court.
2. Summary courts deal with summary offences (as opposed to indictable offences) such as failure to pay fines for traffic offences. These matters are tried 'summarily' by the magistrate and are disposed of in a summary manner by either the imposition of a fine or imprisonment.

At the same level as summary courts in the hierarchy are specialist courts, such as the Coroner's Court and the Children's Court.³⁸

The Coroner's Court investigates all suspicious deaths, including homicides and arson. Most Coroner's Courts also have a forensic division where evidence of the cause of death, including bodies, is stored until identified by the next of kin. The forensic evidence, along with the clinician's report, is used by the coroner to determine the cause of death.

The Children's Court (known as the Youth Court in South Australia and the Juvenile Court in the Northern Territory) hears most cases involving persons under the age of 18 years who have been charged with any offence (except homicide).

The Federal Circuit Court of Australia³⁹

The Federal Circuit Court of Australia, previously called the Federal Magistrates Court, was established by the *Federal Magistrates Court Act 1999* (Cth).⁴⁰ It was established to share some of the workload of the Federal and Family Courts and to provide a faster, less expensive, less formal and accessible alternative to litigation in those courts. The court is presided over by

³⁸ Each state and territory in Australia has its own courts and Divisions within Magistrates /Local Courts that deal with specialised matters. For example, in 2004, Victoria established the Koori Court of Victoria, which hears criminal cases against Indigenous children (juveniles) between the age of 10 and 17 years; Victoria also has a Children's Court which hears indictable and summary offences by children between the ages of 10 and 17 years. South Australia established the Family Violence Court at the Magistrates Court in Adelaide to deal with family violence; as part of the drug prevention policy, New South Wales and Western Australia have established a Drug Court to deal with the issues of use of illegal drugs. It should be noted that the role of the Coroner's Courts is only to investigate matters, but not to determine guilt or innocence or to prosecute the alleged offenders.

³⁹ Further up-to-date information about the functions and powers of the Federal Circuit Court is available at www.federalcircuitcourt.gov.au.

⁴⁰ *Federal Circuit Court of Australia Act 1999* (Cth), enacted on 12 April 2013, renamed the Federal Magistrates Court to the Federal Circuit Court of Australia. The Act is available at www.comlaw.gov.au/Details/C2013C00137.

a single federal magistrate and shares jurisdiction with the federal and family courts of the Commonwealth on matters relating to family law and child support arising from the *Child Support Act* 1991 (Cth), bankruptcy, copyright, consumer protection arising under the Australian Consumer Law, industrial law and privacy. The Federal Circuit Court's jurisdiction includes hearing appeals from tribunal decisions relating to visa issues for migrants and refugees and also hearing appeals from the Administrative Appeals Tribunal that are passed on by the Federal Court.

Although the Federal Circuit Court has concurrent jurisdiction with the many family and federal court matters, in practice the majority of its workload pertains to family law and child support matters.

Intermediate courts

Intermediate courts, called **County Courts** or **District Courts**, exist in all jurisdictions except Tasmania, the Northern Territory and the Australian Capital Territory. They fall into the so-called 'middle band' between Magistrates Courts and Supreme Courts. In terms of the way they operate, intermediate courts bear similarities to Supreme Courts, but their upper jurisdictional levels are in the middle band, with variations from jurisdiction to jurisdiction, and there are some restrictions on what they can do in the areas of equity, admiralty and probate.

These courts have an original jurisdiction (meaning they hear matters for the first time) over important civil matters that may involve substantial amounts of money. They also have an extensive criminal jurisdiction, but some of the more serious crimes (such as murder, rape and aggravated robbery) do not fall within their jurisdiction. The intermediate courts also hear appeals from the summary courts.

Supreme Courts of the States and Territories

The state Supreme Courts are the '**superior courts**': the highest court within a state or territory, with unlimited jurisdiction except for matters that fall within the jurisdiction of the federal courts or the High Court. Supreme Courts have both original and **appellate jurisdictions** to hear all civil and criminal cases (unless this has been removed by statute, such as most divorce matters). The appellate jurisdiction of the Supreme Courts allows them to hear appeals from lower courts.

The civil jurisdiction of the Supreme Courts usually covers large and complex cases where the monetary amounts involved exceed the levels of the intermediate courts. The Supreme Courts may also hear urgent matters such as applications for ex parte injunctions.

The criminal jurisdiction of the Supreme Courts encompasses very serious matters such as charges of murder, and is exercised by a judge and jury.⁴¹

jury

(Plural: juries). A body of randomly selected people, without legal expertise, summoned to court and empanelled to determine questions of fact on the basis of the evidence presented in criminal trials on indictment and in some civil proceedings and to determine the verdict. In a criminal trial the jury usually comprises 12 jurors (can be 10 in Victoria). If a jury is empanelled in a civil trial, its size may vary from four to 12 members who are also responsible for deciding the level of damages to be awarded if the plaintiff's case is successful.

County Court

An intermediate court in Victoria. The County Court is the equivalent of the District Court in New South Wales, Queensland, South Australia and Western Australia.

District Court

(Abbreviation: DC). An intermediate court in New South Wales, Queensland, South Australia and Western Australia, equivalent to the Victorian County Court.

⁴¹ In civil cases, a jury normally consists of four members. In criminal cases, a jury always consists of 12 members.

superior court

A term for a court that has the authority to supervise the decisions of lower courts in a hierarchy, through its appellate jurisdiction, and the power to issue the writs of certiorari, mandamus or prohibition. In Australia, the High Court is the superior court at the federal level. The Supreme Courts are the superior courts in the states and territories. A superior court may be compared with an inferior court.

appellate jurisdiction

An appellate court's power to hear a case on appeal. Because each court deals with different classes of civil and criminal appeals, their appellate jurisdiction varies; but appellate jurisdiction is available in most courts except Magistrates Courts, which cannot hear appeals.

Courts of Appeal

Three states (New South Wales, Queensland and Victoria)⁴² and both territories (the Northern Territory and the Australian Capital Territory) have established Courts of Appeal that exercise appellate jurisdictions and hear appeals from a single judge of the Supreme Court. In other states, such power is exercised by the Full Court of the Supreme Court (also known variously as the State Full Court and the Court of Criminal Appeal).

ACTIVITY 1.5

Which court may hear the following matters?

1. Tommy agrees to sell his car to Mario and now Tommy claims the agreement was never made.
 2. Li, aged 17, is caught speeding on police camera. She was travelling at 100 kilometres per hour in 50 kilometre per hour zone. When she is breath-tested, Li is found to have a blood alcohol content level of over 0.08.
 3. Sam's negligent driving has caused physical injury to Ana. Due to her injuries, she may never be able to work again.
 4. A headless body has been found in front of a suburban hospital.
-

Federal courts⁴³

The federal judicial system encompasses the Federal Circuit Court, the Federal Court, the Family Court and the High Court of Australia. In addition, there are a number of other federal tribunals, including the Commonwealth Administrative Appeals Tribunal, the Industrial Relations Tribunal, the Copyright Tribunal and the Small Claims Taxation Tribunal.

The Commonwealth Constitution governs the federal courts. It empowers the Commonwealth Parliament to create federal courts or to confer federal jurisdiction upon a state court.⁴⁴ In other words, questions arising out of federal laws may either be dealt with by a federal court, or by state-level courts with federal jurisdiction.

Against the background of these complex constitutional arrangements, and cases involving overlapping jurisdictional issues, the Commonwealth, states and territories designed a cross-vesting scheme in 1987, which enabled an entire case to be heard in the one court.⁴⁵

⁴² NSW established its own Court of Appeal in 1965, Queensland restructured its Supreme Court in 1991 to include a Trial Division and a Court of Appeal, and Victoria established the Victorian Court of Appeal in 1995.

⁴³ Federal courts consist of the High Court of Australia, the Federal Court and the Family Court of Australia. Each court has its own structure.

⁴⁴ Section 71 of Chapter III of the Australian Constitution, available at www.apf.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution. Section 71 of the Australian Constitution states that 'The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the parliament creates, and in such other courts as it invests with the Federal jurisdiction ...'. The transcript of the Australian Constitution can also be found at http://foundingdocs.gov.au/resources/transcripts/cth1_doc_1900.pdf

⁴⁵ *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth).

Essentially it purported to vest state and territory Supreme Courts with the civil jurisdiction of the Federal Court. However, the High Court declared the scheme invalid on constitutional grounds in 1999 in *Re Wakim*.⁴⁶ This created uncertainty in many areas, particularly corporate law and financial markets regulation. It further undermined the development of a fully national and integrated system of corporate administration and adjudication. Steps were taken by governments at all levels as a matter of urgency to repair the damage, with all jurisdictions passing remedial and **retrospective legislation** to validate pre-*Wakim* decisions of federal courts. Finally, after months of constitutional uncertainty, the states and territories agreed in August 2000 to ‘refer’ their powers over corporations to the Commonwealth Parliament (see Chapter 2).

The Federal Court of Australia

The **Federal Court of Australia** was established under the *Federal Court of Australia Act 1976* (Cth)⁴⁷. It consists of 30 judges and a **Chief Justice**. The Federal Court contains two divisions—General and Industrial—and exercises a wide jurisdiction covering intellectual property, corporations, trade practices, bankruptcy and insolvency, taxation, immigration and social services, and review of federal administrative law. The Industrial Division hears matters relating to industrial law, including industrial arbitration and **conciliation** hearings, which are attended by trade union delegates, employers and employees.

The Federal Court also has an appellate division, which hears appeals from a single Federal Court judge; from state courts on federal matters including taxation, copyright and trade marks, patents, immigration and refugee status and reviews, and trade practices; and from state and territory Supreme Courts. Appeals from the Full Federal Court (comprising three judges) are heard by the High Court with special leave to appeal.

The Family Court of Australia⁴⁸

In order to discuss fully the federal court structure, it is important to note the powers and importance of the Family Court of Australia. The Family Court was established in 1976 to administer applications made under the *Family Law Act 1975* (Cth).⁴⁹ This court has original and appellate jurisdiction over a wide range of family law issues—divorce proceedings, custody and contact with children, division of matrimonial property and financial support, including applications for the payment of maintenance allowances for spouses and children. It also has the power to hear cases that include family issues which would otherwise be dealt with

retrospective legislation

An Act of Parliament that applies to a situation that occurred prior to its commencement.

Federal Court of Australia

(Abbreviation: Fed Ct). Established in 1976, the Federal Court replaced the Federal Court of Bankruptcy and the Australian Industrial Court, which are reflected in its General Division and Industrial Division.

Chief Justice

(Abbreviation: CJ). The most senior justice in either a state Supreme Court or a federal court.

conciliation

A method of dispute resolution where an independent third person (conciliator) helps the parties to reach a mutual agreement between themselves, rather than making a decision in favour of one party. The process is considered to be more formal than mediation and less formal than arbitration or counselling.

46 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

47 Further information about the functions and powers of the Federal Court is available at www.fedcourt.gov.au.

48 Information about the functions and powers of the Family Court of Australia is available at www.familycourt.gov.au.

49 The *Family Law Act 1975* (Cth) introduced no-fault divorce laws in Australia. Such laws allow couples to make a divorce application if the relationship between them breaks down without any particular fault or reason.

by the Federal Court.⁵⁰ The High Court of Australia⁵¹ sits at the peak of the Australian judicial system. It is the highest court of appeal for all Australian jurisdictions. Established in 1903 under s 71 of the *Commonwealth of Australia Constitution Act 1900 (Imp)*, the High Court exercises both original and appellate jurisdictions and performs the following important functions:

- It hears appeals from the state and territory Supreme Courts and the Federal Court. In order for a case to be heard on appeal by the High Court, it is necessary to obtain special leave to appeal on a **question of law** that may also involve an issue of great public interest.
- It interprets and guards the Australian Constitution.
- It hears disputes between states and territories, and between states, territories and the Commonwealth.

The High Court consists of seven justices (a Chief Justice and six other justices) and usually sits in Canberra, although it can also sit elsewhere within Australia if required. Most appeals are heard by a bench (or court) of three justices. Important cases are usually heard by a Full Bench or Full Court including all available justices of the Court (for example, the *Mabo* case, discussed earlier, was heard by the Full Court).

Decisions handed down by the High Court are particularly significant as they are binding on all Australian courts under the doctrine of precedent. It is important to note, however, that the High Court is not bound by its own previous decisions, but will override them only in exceptional circumstances.

The Privy Council

The constitutional arrangements linking the Australian judicial system with the UK have been incrementally removed over time. Initially, the Privy Council (the highest appeal court in the UK) heard appeals both from the High Court and Supreme Courts of the states and territories in Australia, but the right of appeal to the Privy Council from any court within Australia was abolished in 1986.⁵² This means that the High Court of Australia is the highest court of appeal for all courts within Australia and is not bound by earlier decisions of the Privy Council, although Privy Council decisions may be considered as persuasive authority.⁵³

ACTIVITY 1.6

Which court may hear the following matters?

1. Mary and Terry have been married for 25 years and have five children. Terry's long absences from Australia have caused tensions in the family. Mary wants to divorce Terry and says that she has run out of love for him.

⁵⁰ Recent examples of cases include the hearing of applications made on behalf of children who have been detained in Australian detention centres. The appeals were later heard by the High Court of Australia.

⁵¹ For further information on the powers and functions of the High Court of Australia, see www.hcourt.gov.au.

⁵² *Australia Act 1986* (Cth).

⁵³ See *Barns v Barns* (2003) 214 CLR 169 at 31, 99, 101 and 123.

2. Aron, the owner of a petrol station, employs Debo as his employee. The law requires an employer to pay minimum award wages to all his employees. Aron pays much less than the award wage. Debo and her friends protest in front of Aron's petrol station. Aron dismisses Debo.
 3. There is a dispute between the states of New South Wales, South Australia and Victoria over water in the Murray River. Each state argues that the others overuse the water in the river.
 4. The opposition party alleges that a particular government minister is providing trade and military secrets to another country.
-

Tribunals and commissions

Tribunals exist at both federal and state/territory levels, and represent an important dispute resolution avenue in the Australian legal system. Since the late 1980s and 1990s there have been a proliferation of tribunals that cater for a diverse range of matters including residential tenancies, building, equal opportunity and discrimination, industrial relations, migration, native title, remuneration, consumer affairs and superannuation.

Tribunals are less formal than courts and have proven to be popular because they offer a relatively inexpensive, quick and fair resolution to disputes. Generally, tribunals are not bound by formal rules of evidence and individuals need not be represented by lawyers.

Because of the separation of powers doctrine contained in the Constitution, Commonwealth tribunals are limited to exercising non-judicial functions. Both Commonwealth and state/territory tribunals offer **applicants** the opportunity to have administrative decisions made by government bodies and departments reviewed. This administrative review of decisions provides an important means by which individuals have a right of appeal in decisions made by bureaucrats that may affect their lives. Entities such as companies and partnerships are also given a right of appeal to have decisions that impact on their financial and business practices reviewed by administrative appeals tribunals.

Numerous judicial and **quasi-judicial** tribunals have been established at federal and state/territory levels. The most significant tribunals for our purposes are:

- the **Australian Competition Tribunal** and Australian Competition and Consumer Commission (ACCC) at federal level; and
- the Small Claims Tribunals at state and territory level.

While the ACCC can initiate proceedings for contraventions of the *Competition and Consumer Act* (CCA) and may also institute prosecutions for offences under the consumer protection provisions of that act, the Australian Competition Tribunal may review the decisions of the ACCC, especially regarding authorisation (allowing certain anti-competitive practices on public grounds, which are otherwise prohibited under the CCA).

tribunal

Any adjudicative body set up to hear and decide disputes by arbitration. The term is usually reserved to indicate a body responsible for administrative review. Tribunals are not necessarily bound by the same rules of evidence that bind the courts.

applicant

The party who seeks to have a judicial decision reviewed.

quasi-judicial

Statutory authorities, such as small claims and other administrative tribunals, which are given specific judicial powers although they are not strictly courts.

Australian Competition Tribunal

The federal administrative body whose main function is to review the determinations made by the ACCC.

Small Claims Tribunals provide consumers with quick, inexpensive and informal methods of dispute resolution if their claim involves a small sum of money:

- In Queensland, the Australian Capital Territory and the Northern Territory, the monetary limit is \$5000.
- In Victoria, the monetary limit is \$10 000.
- In Tasmania and South Australia the monetary limit is \$2000.
- In Western Australia the monetary limit is \$6000.
- In New South Wales the monetary limit is \$10 000 (for building disputes the limit is \$25 000).

In addition, there are several specialist tribunals and commissions at both state/territory and federal level, for example:

- the Victorian Civil and Administrative Tribunal (established under the *Victorian Civil and Administrative Tribunal Act 1998* (Vic));
- the Commercial and Consumer Tribunal of Queensland (established under the *Commercial and Consumer Tribunal Act 2003* (Qld));
- the Administrative Appeals Tribunal (created under the *Administrative Appeals Tribunal Act 1975* (Cth));
- the ACT Civil and Administrative Tribunal (established under the *ACT Civil and Administrative Tribunal Act 2008* (ACT));
- the federal Administrative Review Tribunal (established under the *Administrative Appeals Tribunal and Other Measures Act 2003* (Cth));
- the Australian Securities and Investment Commission (established under the *Australian Securities and Investments Commission Act 2001* (Cth)): ASIC is an independent body that regulates and enforces company and financial services laws; and
- the NSW Civil and Administrative Tribunal (established under *Civil and Administrative Tribunal Amendment Act 2013* (NSW)).

ACTIVITY 1.7

Which tribunal has jurisdiction to deal with the following matters?

1. You buy an expensive second-hand fur coat from a shop for \$3000. The sales assistant advises you that the shop has a 'no return policy'. You have an allergic reaction to the fur of the coat. You want to return the coat, but the sales assistant refuses.
2. The Department of Immigration and Citizenship refuses your study visa on the basis that you look like a suspected terrorist.
3. You enter a 12-month lease agreement with a landlord. A provision of the agreement provides that the landlord can evict you from the property at any time without notice. Late one night, you find your belongings outside your rented house. The landlord advises you that he needs the house for his family.

4. The owners of two petrol stations in Melbourne meet to discuss the fluctuations in petrol prices. They agree to offer 75 cents per litre for the petrol all days of the week. They believe that it is the cheapest price that has been offered to customers with an intention to help them save money.

ALTERNATIVE DISPUTE RESOLUTION

Though most of us think that courts are the most effective way of settling disputes between parties, there are various other ways that the disputes between parties may be resolved. Dispute resolution processes that are 'alternative' to traditional court proceedings are often referred to as alternative dispute resolution (ADR).⁵⁴ In recent years, governments both at the federal and state levels prefer parties to engage in alternative dispute resolution methods before they initiate proceedings in a court. Alternative dispute resolution bodies employ a variety of ADR methods to help parties to resolve their dispute. Some of the ADR methods that have been proven to be effective in resolving disputes between the parties include arbitration, mediation, conciliation and ombudsman.⁵⁵

Arbitration

Arbitration is a process whereby parties to a dispute agree to be arbitrated by an independent third party (an arbitrator) who assists the parties to settle their dispute and reach an agreement. Whether agreement is optional or compulsory will depend on the nature of the dispute. The parties present their arguments to an arbitrator, who makes a determination on the dispute. Arbitration is a less formal way of settling disputes than courts and has been used to resolve complex industrial disputes.⁵⁶

arbitration

A process whereby parties to a dispute present their arguments and evidence to an arbitrator. After hearing both sides of the arguments, the arbitrator makes determination on the dispute.

Mediation

Mediation involves a third party (a mediator) who assists the disputing parties to resolve their conflict. The mediator's role is to bring the disputing parties to the table and assist them to identify issue which caused or is causing the conflict, and to explore options to resolve the dispute. Mediators are often trained to seek cooperation from both parties and help the

⁵⁴ T. Sourdin, *Alternative Dispute Resolution*, 4th edn, Law Book Company, Sydney, 2012.

⁵⁵ For further information about alternative dispute resolution, read *Guide to Dispute Resolution* at www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx.

⁵⁶ Section 51 (xxxv) of the Australian Constitution provides 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any on State'.

mediation

A process whereby parties to a dispute attempt to resolve the dispute by negotiation with the help of a mediator.

conciliation

A method of dispute resolution where an independent third person (conciliator) helps the parties to reach a mutual agreement between themselves, rather than making a decision in favour of one party. The process is considered to be more formal than mediation and less formal than arbitration or counselling.

ombudsman

A public official who investigates complaints about the public departments and agencies.

parties to find their own solutions to the dispute. A mediator may suggest a possible solution to how their dispute may be resolved, but ‘has no advisory or determinative role in regards to the content of the dispute or the outcome of its resolution’.⁵⁷ Mediator helps parties to make their agreement considering all options available to them under their circumstances.⁵⁸

Conciliation

Conciliation is a process where parties to a dispute, with the help of a third party (conciliator) identify the issues in dispute, develop options, consider alternatives and make an agreement to resolve the dispute. The conciliator may make recommendations and present various options to parties so that they can settle a dispute. Though a conciliator has an advisory role in guiding the parties to settle their dispute, they cannot force the disputing parties to reach an agreement.

TABLE 1.1 DIFFERENCES BETWEEN ARBITRATION, MEDIATION AND CONCILIATION

ARBITRATION	MEDIATION	CONCILIATION
Disputing parties agree to have their dispute arbitrated by the arbitrator.	One party may refuse to undergo mediation (voluntary process).	One party may refuse to undergo conciliation.
Both parties present their argument.	Help parties to explore options to resolve the dispute.	Make recommendations and explore options for parties.
Arbitrator makes a determination.	No advisory or determinative role.	Advisory but not determinative role.

Ombudsman

Though not technically ADR, the federal and state governments have appointed ombudsmen to act as independent reviewers of administrative decisions of government departments or agencies. Ombudsmen investigate complaints by individuals who allege they have been subject to unfair and unreasonable treatment by government department or agencies. Ombudsmen act as impartial bodies and endeavour to resolve the dispute in an informal manner.

Though ombudsmen may not have any power to override decisions made by the government department or its agency, they can make recommendations to the government as to how the matter in dispute could have been handled in a better way. Each state and territory has its own ombudsman.

⁵⁷ T. Sourdin, above n 54.

⁵⁸ Many family, neighbourhood and building disputes have been effectively resolved by mediation.

In recent years, various industry ombudsmen have been appointed to investigate complaints within the industry.⁵⁹

▶▶ RISK MANAGEMENT TIP

The investigation by an ombudsman can lead to substantial changes in the work ethics and complaint handling policies in a government department or industry. It is advisable that departments, organisations, agencies or industries must have just, fair and reasonable dispute resolution policies and mechanisms.

SUMMARY

- Law has been described as a body of rules developed over a long period of time that is accepted by the community as binding.
- All laws are rules, but not all rules are laws. This means that rules which receive wider societal acceptance through parliamentary processes, and procedures which culminate in a statute, become law. On the other hand, rules which bind certain sections of the society (church, sporting organisations, social or cultural groups) and may not have wider societal outside that group or organisation acceptance cannot be called laws.
- In Australia, law comes from two main sources: statute law and common law. Statute law is made by parliaments and common law is developed by courts.
- Parliaments may delegate some law-making powers to subordinate authorities such as local councils, police, professional or statutory authorities. When these authorities make rules, regulations, orders, by-laws, ordinances, notices and proclamations and so on, they are called delegated legislation.
- Courts develop laws by precedents and statutory interpretation. Precedent is the decision of a court that establishes a point of law (such as *Mabo v Queensland (No. 2)* [1992] 175 CLR 1).
- Courts are frequently called upon to adjudicate disputes where the language of a particular statute may require clarification. Statutory interpretation may be necessary because the language of the statute is unclear, ambiguous, vague or contain several meanings.
- When interpreting statutes, courts are guided by the Acts Interpretation Act of the particular state, territory or Commonwealth which enacted the statute when considering matters which courts should have regard to for determining the underlying

⁵⁹ Fair Work Ombudsman available at www.fairwork.gov.au; Financial Ombudsman Service available at www.fos.org.au; Telecommunications Industry Ombudsman available at www.tio.com; Credit Ombudsman Service available at www.cosl.com.au.

purpose of the statute. Courts use literal, golden or mischief rules to determine the meaning of a word, phrase or clause used in the statute (the rule of statutory interpretation).

- In Australia, there are various courts at the state, territory and Commonwealth levels. At the state or territory levels, there are lower, intermediate and upper level courts (Magistrates Court, County Court, Supreme Court and Court of Appeal). The Commonwealth courts include the Federal Court, Family Court and High Court.
- The High Court is the highest court in Australia and sits at the peak of the Australian court hierarchy. The main functions of the High Court of Australia are:
 - a. hearing the appeals from the lower courts from the states and territories;
 - b. adjudicating disputes between states and between states and the commonwealth; and
 - c. interpreting the Australian Constitution.
- Tribunals offer an inexpensive, fair and quick resolution of disputes than courts.
- Alternative dispute resolution may involve settling disputes by arbitration, mediation, conciliation and ombudsman.

TUTORIAL EXERCISES

MULTIPLE-CHOICE QUESTIONS

1. The Australian law comes from the following sources:
 - a. UK Parliament
 - b. United Nations Constituent Assembly
 - c. Courts and parliaments
 - d. None of the above.
2. The doctrine of precedent is based on a principle that 'like cases should be decided alike', which means that:
 - a. Laws should be flexible.
 - b. Laws should be predictable.
 - c. A court must decide the case in the same way as was done by a higher court.
 - d. None of the above.
3. The term 'common law' has been used to refer to a legal system that has been developed by:
 - a. English courts, but has not been followed elsewhere
 - b. Chancery Courts in England, but has been adopted by the Australian courts
 - c. English courts and followed by all Islamic countries
 - d. Courts.

4. The following is true for a binding precedent:
 - a. It affects the judicial thinking in a way that all judges must take this into consideration when deciding a case.
 - b. It may come from other court hierarchies.
 - c. The decisions of the higher courts are binding on the lower courts.
 - d. None of the above.
5. Equity is based on the principles of fairness, justice and good conscience. This means that:
 - a. Unfair and unjust agreements may be set aside by courts.
 - b. Equity has no place in the common law.
 - c. Only English courts are bound by its principles.
 - d. None of the above.
6. The Supreme Court of Victoria is bound by the decisions of the:
 - a. International Court of Justice
 - b. High Court of Australia
 - c. Supreme Court of New South Wales
 - d. Federal Court of Australia.
7. The states of New South Wales, Victoria and Queensland are embroiled in a dispute involving the water in Murray River each one claiming that they misused the water in a way that there is no water left in the river. The dispute can be initiated in:
 - a. The Supreme Court of Queensland
 - b. The Privy Council
 - c. Courts of Appeal in the NSW and Victoria
 - d. The High Court of Australia.
8. 'Hierarchy' refers to the ranking of courts according to their importance in the legal system. This means that:
 - a. International courts and tribunals are superior to all other systems.
 - b. All common law countries must follow the English legal system.
 - c. The High Court is the top court in Australia, thus superior in its ranking.
 - d. None of the above.
9. The difference between arbitration and mediation is:
 - a. Arbitration is always mandatory, but mediation is voluntary.
 - b. Arbitration forces the parties to enter an agreement, but mediation advises them to make agreements.
 - c. The arbitrator makes the determination, but the mediator facilitates the conversation.

10. Delegated legislation refers to the body of rules, regulations and orders which has been developed by:
- Local councils
 - Statutory bodies such as the Australian Competition and Consumer Commission
 - University councils
 - All of the above.

SHORT-ANSWER QUESTIONS

- What are the main sources of law in Australia?
- How do courts and parliaments make law? What are the strengths and weaknesses of each law-making process?
- Explain the basic court structure in Australia. What are the functions of the High Court of Australia?
- Why is it necessary to interpret a statute and what rules do courts apply to interpret a statute?
- What are the advantages and disadvantages of settling disputes in tribunals?

DISCUSSION QUESTIONS

- We say that Australia has inherited its legal system from the United Kingdom; however, the decisions of the House of Lords and the laws made by the UK Parliament are not binding on the Australian people. Explain the validity of laws made by the UK and Australian parliaments and courts. Discuss how these laws reflect our legal inheritance.
- In recent years alternative dispute resolution (ADR) is a preferred way of settling disputes between parties. Discuss how the settlement of disputes by ADR differs from that of courts. In your answer, examine the role of the tribunals, commissions and ombudsmen in settling disputes.

USEFUL INTERNET SITES

www.aph.gov.au—Parliament of Australia

www.austlii.edu.au—Australasian Legal Information Institute (AustLII)

www.comlaw.gov.au—ComLaw, the most complete and up-to-date collection of Commonwealth legislation and includes notices from the Commonwealth government (*Notices Gazette* from 1 October 2012)

www.fedcourt.gov.au—Federal Court of Australia

www.federalcircuitcourt.gov.au—Federal Circuit Court of Australia

www.highcourt.gov.au—High Court of Australia

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