CHAPTER 1

The Organisation of Law and Government in Australia

In this chapter:

- The concept, nature and purpose of law
- Law as a tool of social regulation
- The relationship between law and justice
- Law and ethics
- How law is classified and organised
- Key legal terms and concepts
- The origins of Australian law
- The structure of the Commonwealth of Australia
- The organs of Australian governments and their law-making powers
  - the Crown
  - legislatures
  - the executive
  - the courts
  - other organs of government.

[1.1] Introduction

Most students of business law have not studied law before. For you, the law may be a new subject with many strange concepts and a language all of its own. It is important, therefore, that some foundational facts, ideas and terminologies are explained at the start.

In this chapter, the concept of law, and its nature and purpose, are analysed and explained. The way in which laws are classified and organised is set out. The origins of Australian law are described. The relationship between government and law is explained. The organs of government in Australia are described and their law-making functions outlined. You will find that an understanding of these matters is essential to the study of law.

In addition to this chapter, there is an FPBL eStudy module *The organisation of law and government in Australia* that will help you learn and understand the legal concepts and rules outlined here. There is also a separate quiz in the module *Quizzes and case studies for revision* which you can use to test yourself when you think you have learned what you need to know.

[1.2] The Concept of Law

1.2.1 Different kinds of law

Everyone will have some idea of what law is and how it works. But not everybody will have thought about the true nature of law or how best to define it. We can begin to understand what law is by saying that law provides authoritative rules for how we are to behave. However, this description is not quite precise enough. This is because there are different kinds of 'law'. Reference is often made to concepts such as 'natural laws', 'moral laws', 'laws of God', 'custom' and 'national law'. What is the difference between these various kinds of law? The answer lies in how they are *identified* and how they are *enforced*.

- *Natural laws* are those rules of conduct that accord with our realised experiences of the physical world. We obey these laws because, in our experience, that is how things work. An example is the natural responsibility of parents to look after their offspring. This law of nature can be widely disregarded only at the peril of the species.
- *Moral and religious laws* are rules of conduct derived from belief systems, sometimes recorded in authoritative texts, sometimes passed on by oral tradition. Such rules are obeyed as a matter of individual conscience or as part of a religious community. An example would be the dietary rules prescribed by particular religions.
- *Custom* consists of rules of conduct that have been established by long usage and are obeyed because of peer pressure, or because they are convenient. An example would be the rituals, music and clothing styles commonly associated with marriage ceremonies. Obeying such rules provides continuity with tradition and a sense of shared identity.
- *National law* is made up of those rules of conduct that the government of a particular country or 'state' recognises and enforces as law. The key concept here is 'rules recognised and enforced by the authority of the state'. If the government of a state recognises a rule of conduct and enforces it, then that rule becomes part of the national law.

It is important to realise that there may be some overlap between the rules of national law and the rules of other kinds of law. Many rules of conduct originate as customary, moral or natural laws, but become part of the national law when a government decides to recognise and enforce those same rules. For example, most religions prohibit the killing of one human being by another, and governments in most countries recognise and enforce this same rule.

Each country has its own national law. Unless otherwise specified, the word 'law' in what follows is used to refer to the rules of national law that have been established and are enforced in Australia.

[1.3] Law as a Regulator of Behaviour

1.3.1 How law regulates conduct

Rules of law often regulate the behaviour of individuals to benefit the greater community. This is done in different ways. For example, particular rules of law might either restrict, prohibit, punish, permit or reward specified behaviour. For instance:

- The law generally *restricts the use of force* by individuals and forbids unauthorised violence. This is the foundation of peace and good order in society.
- Some laws *prohibit* and *punish* particular kinds of undesirable behaviour. For example, it is a rule of law that one person should not wrongfully take another person's property. This is called theft or stealing. It is prohibited, and people who are caught stealing are punished by the state.
- Other laws *permit* or *reward* particular behaviour that the government thinks is desirable. For example, a person may be allowed by law to import various kinds of goods into Australia. They may be further encouraged to do so by laws that give financial assistance (in the form of subsidies) to those who actually do so.
- Laws generally provide for the *creation of rights and duties* that can be enforced by an individual in court, without resorting to force. Laws provide appropriate remedies when rights are interfered with or when duties are not discharged. The creation of legally enforceable rights and duties allows individuals to plan for the future with reasonable certainty.

[1.4] 'Law' and 'Justice'

1.4.1 The relationship between law and justice

The relationship between law and justice is an important one, but it is not simple. It is a relationship that has to take account of practicalities and realities that sometimes may be in conflict.

1.4.1(a) Justice as the objective of law

It has often been suggested that the ideal purpose of law is to achieve outcomes that are considered good and fair by the community. This is what the Roman Emperor Justinian, a great law-giver, meant when he said: 'Law is the art of the good and the just'. It is the objective of achieving justice that morally underpins using the power of the state to enforce legal rules. And, on a practical level, a community will more willingly support and conform to laws that are considered just.

Of course, governments do not always make and enforce laws for good and just purposes. Governments can use their power to enforce unfair rules, such as discriminatory laws which favour one racial group or a particular gender. However, the fact that unjust laws exist from time to time does not diminish the validity of the idea that law *ought* to aim at achieving good and fair outcomes.

1.4.1(b) Balancing justice and predictability

One important aspect of modern law is that it can be discovered with a degree of clarity and certainty that makes its application predictable. This is very useful. If we can find out the rules that govern particular kinds of behaviour, then we can choose to act in accordance with those rules and avoid unwanted consequences. This means that law is most useful as a regulator of conduct when the rules are clear and their application is predictable. Sometimes, however, it is not possible to find a rule of law that clearly applies to the exact situation that has arisen. Many rules of law are expressed quite broadly and do not take account of special detailed circumstances. A rule of law that has worked well enough in the past might not seem to provide a fair or just outcome when additional or new circumstances are taken into account. When this happens, the requirements of justice and predictability may conflict and the judges who apply the law may have to make difficult choices. Sometimes justice is given preference; in other cases certainty and predictability are seen as more important. The old adage 'hard cases make bad law' is a reminder that treating too many cases as exceptional in the pursuit of justice can damage the predictability and certainty of the legal system overall.

[1.5] 'Law' and 'Ethics'

1.5.1 The nature of ethics

Law is also influenced by what are called 'ethics'. Ethics refers to ideas about right and wrong conduct, or what is moral or immoral, based on the idea of avoiding unjustified and unnecessary harm to other beings. The word derives from the Ancient Greek word *ethos*, meaning habit or custom which reminds us that ethical views can, and do, differ between communities, depending on their circumstances and traditions. Ethics are concerned with identifying guiding values, such as honesty, fairness and empathy, and with establishing standards of conduct. An ethical question focuses on what is the right choice or conduct in a particular situation. This is a different question to what is legal or illegal: conduct may, strictly speaking, be legal (that is, within the law), but not ethical and vice versa. In some circumstances, where harm may be caused to another person, it may be necessary to choose between what the law allows or requires, and what ethical considerations dictate.

1.5.2 Ethics in specific settings

Particular ethical values and standards of conduct apply to specific activities or professions. For lawyers, ethical questions might be how best to represent a client's case while still fulfilling their duties, as lawyers, to the court. For accountants, ethical rules might relate to carrying out an audit accurately, or keeping a client's information confidential. For students at a university or college, ethical standards require honesty and completing one's own work to the best of one's ability. Submitting another person's work as your own for the purposes of assessment is called plagiarism and is clearly unethical.

1.5.3 Ethics and the world of business

We need to consider 'business ethics'—that is, the ethical values and standards relevant to business entities and business activities. Persons engaged in businesses tend to be

motivated by profit. But profit is not the only thing which should guide business activities. Businesses are also expected to act ethically, for example by treating their employees fairly, marketing their goods and services honestly, and providing customers with safe and appropriate products. Most people also expect businesses to minimise any harmful impacts that their activities may have more broadly, such as on the natural environment or on wider communities. Unfortunately there are many historical instances of business persons engaging in unethical conduct and causing widespread harm, for instance, by price-fixing, bribing corrupt government officials, or obtaining contracts through unethical means such as dishonesty or threats.

1.5.4 Ethics and law

Ethics are not created and enforced in the same way that law is. But ethical standards are sometimes compiled into what are called 'voluntary Codes of Conduct'. A business might agree to comply with such a Code and to be held accountable for behaving in accordance with the ethical principles contained in the Code.

It must also be remembered that many rules of law reflect ethical norms, by requiring or prohibiting specific kinds of conduct as acceptable or unacceptable. In this way, enforcement of the law reinforces what is seen as ethical or unethical. For instance, the Australian Consumer Law targets a range of dishonest or otherwise unethical business practices, like falsely offering gifts or prizes. In the chapters that follow, attention will be drawn to those circumstances where laws relate to particular aspects of business ethics.

[1.6] The Classification and Organisation of Law

1.6.1 Classifying laws

In a modern country, there are many thousands of legal rules. These rules arose over many years, and developed from traditional legal forms or processes. As a result, legal rules tend to be classified, organised and collected in particular ways. This has the benefit of making those rules manageable, orderly and easily locatable. Broadly speaking, each rule of law is classified as belonging to a particular category (or area) of law. These categories of law are named to indicate the theme or nature of the rules grouped within them. The categories of law are arranged systematically, in accordance with traditional and well-known legal concepts, to provide an overall structure.

1.6.2 Categories of law

There are many established categories (or areas) of law. Some may be familiar to non-legal audiences, for example, criminal law and contract law. Others may be less familiar, such as tort law or administrative law. The table below sets out some of the traditional categories of law and briefly describes the rules of law that are found within them. The basic categories will help you to put individual topics you study in business law into context and will help you to find particular rules of law when you need them.

[1.7] The Anatomy of Law

1.7.1 Terms and phrases that describe the law

While studying law, you will find references not just to 'the law' as a whole and to 'categories (or areas) of law', but also to things such as 'legal concepts', 'legal principles', 'legal rules' and 'legal meanings'. These terms help to describe how law is structured and organised. Knowing what these terms mean will help you to understand legal materials.

- *Categories (or areas) of law.* These are a convenient way of grouping together particular laws which are considered to be related, usually because they refer to the same type of concept, situation or conduct. The table opposite explains some of the commonly found categories of law.
- *Legal concepts.* These are the ideas that determine the scope and nature of a particular category of law. For example, in contract law, there is the broad concept of 'contract formation', under which fall the more precise concepts of 'agreement', 'intention to be bound' and 'consideration'. Identifying and organising key concepts will enable you to build a mental framework of a specific area of law.
- *Legal principles.* These are the broad precepts that recognise and give effect to a particular point of view, value or policy. For example, in Australian law, the concept of contract formation is based in part on the principle that a contract is only made if the parties intend to be legally bound by their agreement. It is a further principle that an intention to be legally bound is ascertained objectively rather than subjectively.
- *Legal rules.* These provide the detailed mechanisms by which legal principles are given effect. Rules specify particular requirements or provide what should happen in specific situations. For example, there are many rules in contract law that specify the different ways in which agreement may be reached or what should happen if performance of an agreement becomes impossible.
- *Legal meanings.* These refer to the particular meaning or significance that words or phrases have in law. For example, in contract law, the words 'party', 'consideration' and 'frustration' have specific legal meanings that differ from their ordinary meanings.
- *Legal authorities* are the sources of particular legal principles, rules or meanings. For example, a legal rule may originate in a particular decision of a court or in an Act of Parliament.

Table 1.1 Categories of law

Category of law		Description
Jurisprudence		The science or philosophy of law.
International law		Agreements (treaties) between sovereign states and internationally observed customs.
National law		Law as applied within the borders of a particular country (state), eg Australian law.
National public law	Constitutional law	The organisation, powers and processes of government.
	Administrative law	Rules governing the processes of official decision making.
	Criminal law	The prohibition and punishment by the state of conduct considered harmful to the general community.
National private law Traditional categories of law	Civil law	The creation and enforcement of private legal rights and duties between individuals. This category of law is very large, encompassing some of the other categories, such as contract law, tort law and property law.
	Tort law	Liability for harm wrongfully caused by one person to another person or to their property.
	Contract law	Private agreements that give rise to legally enforceable rights and duties.
	Agency	The use of a representative to acquire or discharge legal rights or duties.
	Consumer protection law	Legal protections for consumers in their dealings with suppliers of goods or services.
	Corporations law	The creation, organisation and administration of companies.
	Property law	The acquisition and transfer of private rights in goods and land.
Specialist categories of law	Business law	Rules that are particularly relevant to business activities, taken selectively from the more traditional categories of law, such as contract law, agency, tort law, banking law, insurance law, employment law, corporations law and tax law.

[1.8] The Development of Western European Legal Systems

1.8.1 The origins of Australian Law

You have already learned that the law of a particular country (its national law) consists of the rules of conduct that are recognised and enforced by the government of that country. You might expect the laws of each country to be very different, but in fact they often turn out to be quite similar in many ways. This similarity suggests that they were not developed independently, but that they share a common origin, and this is in fact the case. The story of the development of the laws which have been adopted by so many modern states goes back a long way in western European history. It begins in the Roman Empire with Roman law (sometimes called 'Roman civil law' or *ius civilis Romanus*) and is continued later, in England, with what is known as English law (sometimes called 'common law'). If you examine the laws of the states that make up the modern political world, you will find that most of those laws have been derived from, or strongly influenced by, either Roman law or English law—and sometimes both. For that reason, a short explanation of the development and spread of Roman law, and then English law, is necessary for a proper understanding of modern law.

1.8.2 Roman law

Roman law began its development in 753 BC when Rome was established as a small city state. Over the next 1,200 years, as Rome expanded into a large and commercially active empire, its laws developed and grew until they became the most sophisticated or complex system of law the Western world had yet seen. In 533 AD, the Emperor Justinian decided that this vast body of law should be reorganised and collected in a Digest. This Digest, together with some other collections of law, are collectively known as the *Corpus Iuris Civilis* (Compendium of the Civil Law).

Not long before the completion of the *Corpus Iuris Civilis*, the western part of the Roman Empire was invaded by tribes from the north. In 476 AD, the Western Empire collapsed and Europe entered a period known as the Dark Ages. Roman law was largely forgotten for hundreds of years. Then, in the 12th century AD, copies of the *Corpus Iuris Civilis* were discovered in libraries in Italy. Scholars took a renewed interest in Roman law and knowledge of it quickly spread. As a result, Roman law became influential in the legal developments that took place in the emerging states of modern Europe. In particular, the *Corpus Iuris Civilis* served as the foundation for several new European codes of law: the French Code Napoleon of 1804, the Austrian code of 1811, the German code of 1889, and the Swiss codes of 1889 and 1907. In later years, these codes were used as models by countries outside of Europe. For example, the Code Napoleon was taken as the basis for the law of the French parts of Canada, the state of Louisiana in the USA and many countries in South America. The German code was the model for the law of Hungary, Brazil, Greece and Japan. Turkey has adopted the Swiss code. The Republic of South Africa, Sri Lanka, Zimbabwe and Scotland also have legal systems based on Roman law.

1.8.3 English law

English law also has a long history, going back to the 12th century. Instead of adopting Roman law as other European countries had done, England chose to develop its own

local laws and customs. Over the years, English common law (law that was 'common' to all of England) became a complex system of law. England also became a powerful nation with a large empire and worldwide trade relations. When England invaded and colonised various parts of the world, English law was introduced as the law of those colonies. These legal foundations have, in the main, been retained since the colonies have become independent. This is what happened in Australia. For the same reasons, common law is also the foundational law of most of the states that make up the United States of America, the English speaking parts of Canada and many countries in Africa and Asia.

Because modern Australian law derives much of its content from English law, Australian law is similar to the laws of other countries that share the same heritage. Australian law is less similar to the law of countries that have received or been influenced by Roman or other legal systems. As with most common law countries, there are two main sources of law in Australia: cases (legal disputes) decided by courts and legislative Acts created by parliaments.

The extent to which either English or Roman law has been received, and the extent to which that law has been modified since its reception, vary markedly between countries. A good example is Malaysia, whose legal system contains substantial elements inherited from English law, but whose sources of law also include legislation enacted in Malaysia, local laws deriving from custom and Muslim law (the last-mentioned being applied only to Muslims in sharia courts).

1.8.4 Indigenous custom and law

In Australia, the received English law, now considerably adapted and expanded since independence, exists alongside indigenous custom and law. Indigenous Australians, who occupied the land for tens of thousands of years before colonisation, lived in defined groups, each with their own laws and customs. These laws were not written down but were passed on orally to each generation and have survived to the present day. Indigenous law is particularly important in relation to family and community issues and land rights; less so in relation to commercial matters.

[1.9] The Establishment of the Australian Commonwealth, States and Territories

1.9.1 The first Australians and British occupation of Australia

Australia has been inhabited by its aboriginal peoples for thousands of years. European occupation of Australia began in 1788 when the British established the colony of New South Wales. Over the next 50 years or so, other colonies were established: Queensland, Victoria, Tasmania, Western Australia and South Australia. In more recent times, Australia's non-indigenous population has been further augmented by the arrival of people of many different nationalities, making modern Australians a diverse mix of cultural and ethnic identities.

1.9.2 Government of the Australian colonies

Though Britain initially ruled its Australian colonies directly, during the 1800s the colonies were allowed by Britain to become self-governing with general powers to administer,

enforce and make new law. Specifically, each colony was given the general power 'to make laws for the peace, welfare and good government of the colony', but with some important restrictions: they could not make law that was inconsistent with laws made by the British parliament, and they could not generally make laws to operate outside their own borders.

1.9.3 Establishment of the Commonwealth of Australia

The Commonwealth of Australia was formed in 1901 after lengthy negotiation during the 1890s between the Australian colonies and with Britain. The Commonwealth was established by the *Commonwealth of Australia Constitution Act 1900*, a law enacted by the British parliament. This law contains both the detailed provisions of the constitution of the Commonwealth and the 'covering clauses' that authorise the new arrangements for government in Australia.

1.9.4 The Australian states and territories

As part of the process of forming the Commonwealth of Australia, the colonies became 'states'. The states are New South Wales (NSW), Queensland (Qld), South Australia (SA), Tasmania (Tas), Victoria (Vic) and Western Australia (WA). The Commonwealth of Australia is a confederation of states rather than a unitary state. Notwithstanding the formation of the Commonwealth, each new state retained the power to govern within its own borders, with responsibility for a wide range of matters. But they also agreed to give specified powers to a new federal Australian government, which would have responsibility for matters of national importance throughout the whole of the Commonwealth.

In addition to the six states, there are 10 'territories' in the Commonwealth of Australia. The mainland territories are the Northern Territory and the Australian Capital Territory. The external territories are: Ashmore and Cartier Islands; Christmas Island; the Cocos (Keeling) Islands; the Coral Sea Islands; Jervis Bay Territory; Heard Island and McDonald Island; Norfolk Island; and the Australian Antarctic Territory.

[1.10] The Structure of Government in Australia

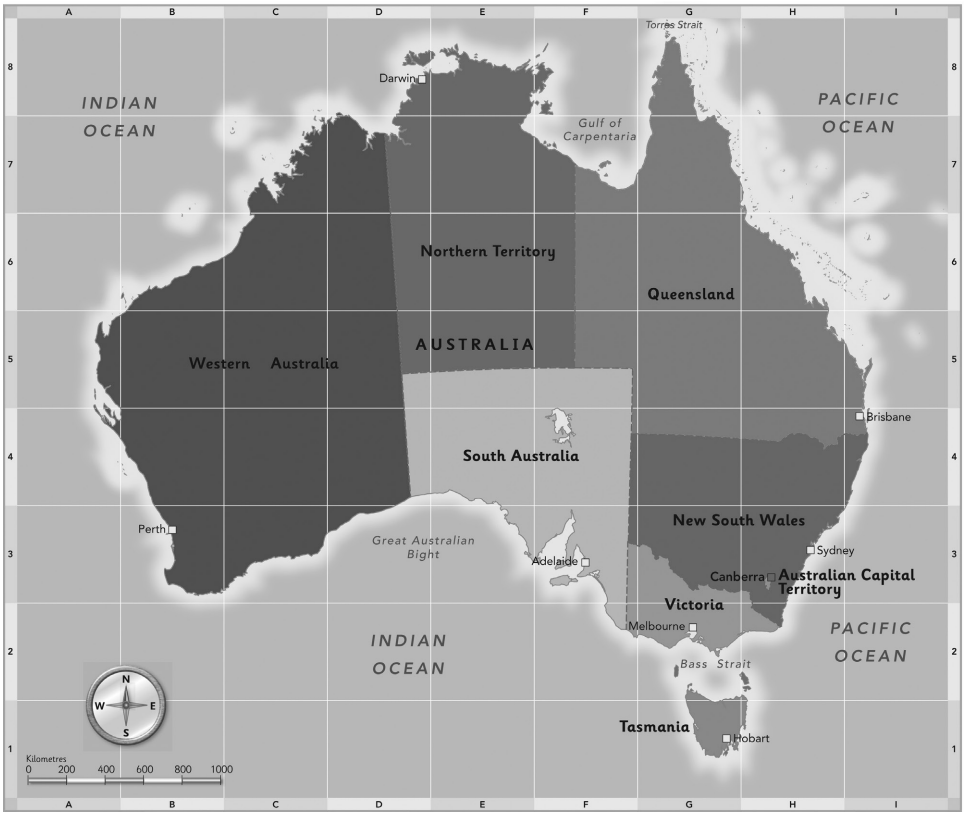
1.10.1 The meaning of 'government'

It is necessary, at this point, to explain the different meanings of the word 'government'. In one sense, the word refers to the institutions or 'organs' that have been created within the Australian states and territories. These institutions provide the formal structures of government and allow for the division of governmental power. Examples of organs of government are the Crown, the executive, the courts and legislatures. These are explained below.

In another sense, the word 'government' refers to the elected representatives, appointees and employees who, at any particular time, occupy positions within the institutions of government and exercise the day-to-day powers of governing.

As long as these possible meanings are kept in mind, the sense in which the word is used can normally be understood from its context.

Figure 1.1 Map of the Australian states and self-governing territories



1.10.2 Constitutions of the Commonwealth and the states

A 'constitution' consists of the rules by which a state is formed and governed. The Commonwealth of Australia has its own constitution, and so does each Australian state.[1] Australian constitutions are written documents, formally enacted as law. For historical reasons, the constitutional arrangements in Australia closely resemble the British model of government (in the sense of the formal institutions of governmental power), from where they were directly received. This is often called the 'Westminster' system of government, a name that refers to the site of the British parliament.

The constitution of the Commonwealth of Australia is contained in the British *Commonwealth of Australia Constitution Act 1900*. To change the provisions of this constitution requires obtaining the consent of the Australian voters in a national referendum.

1 *Commonwealth of Australia Constitution Act 1900*; New South Wales: *Constitution Act 1902*; Queensland: *Constitution of Queensland 2001*; South Australia: *Constitution Act 1934*; Tasmania: *Constitution Act 1934*; Victoria: *Constitution Act 1975*; Western Australia: *Constitution Act 1889*.

The state governments have each enacted their own constitutions, acting in terms of a power granted to them by the United Kingdom parliament. An example is the *Constitution Act 1975* (Vic). The relevant government can change state constitutions without the need for a special referendum.

The Australian Commonwealth and state constitutions do not contain all the necessary rules of constitutional law and practice—there are many other important laws that regulate the more detailed aspects of government, including some unwritten rules and practices (conventions).

1.10.3 Constitutional arrangement of the territories

Two of the Australian territories have been given the power of self-government by means of laws enacted by the Commonwealth (federal) government.[2] The self-governing territories are the Australian Capital Territory (ACT) and the Northern Territory (NT). Norfolk Island (NI) enjoyed limited rights of self-government between 1979 and 2015. However, the *Norfolk Island Legislation Amendment Act 2015* (Cth) put an end to self-government and placed Norfolk Island under similar governance arrangements as Australia's other offshore territories. The territories that are not self-governing are governed directly by the Commonwealth government.

1.10.4 Constitutional monarchy in Australia

The head of the Commonwealth of Australia, and of the various states, is not democratically elected but is a hereditary monarch. At present the monarch is Queen Elizabeth II. She will be succeeded by her lawful heirs in accordance with established rules. Somewhat unusually, the Australian monarch is also the monarch of the United Kingdom, a consequence of arrangements that seemed convenient when the Commonwealth of Australia was established.

Because Australia's hereditary monarch governs according to the rules and structures established by the constitution, Australia's government can be described as a 'constitutional monarchy'.

The self-governing territories do not have a constitutional monarch: they are headed by an administrator appointed by the Commonwealth government.

1.10.5 Local governments

In addition to the Commonwealth, state and territory governments, most regions of Australia have what are termed 'local governments'. Local governments are responsible for a particular region or district within a state or territory, and exist in the form of municipal councils, regional councils or district councils. Local governments, established under legislation enacted by state governments, typically have responsibility for looking after the social, economic and environmental needs of their particular area. They have a limited power to make laws, which are known as 'local laws' or 'by-laws'.

2 *Australian Capital Territory (Self-Government) Act 1988* (Cth); *Northern Territory (Self-Government) Act 1978* (Cth).

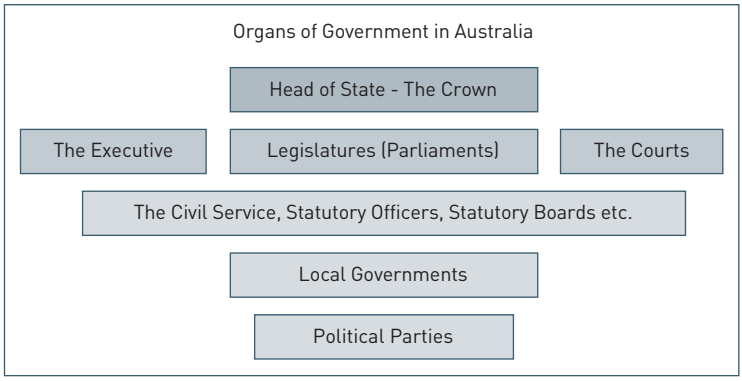
[1.11] The Institutions and Powers of Australian Governments

1.11.1 The law-related powers and responsibilities of governments

Australian law does not remain unchanged for long; it constantly grows and changes in response to ever-changing circumstances. In Australia, laws are declared, created or changed by the relevant government, acting through its various institutions, following recognised procedures and acting within its legal powers. As indicated above, in Australia there are nine separate governments with law-making powers.

Following the English model, Australian governmental power is separated between various branches that have different functions and responsibilities: this is known as the doctrine of 'separation of powers'. It is important to know about the structures of Australian governments, what law-making institutions exist, and what law-making powers and responsibilities those various institutions hold. The typical institutions (or 'organs') of Australian governments can be represented in a simple diagram. Each of these organs of government is explained below.

Figure 1.2



1.11.2 The Crown

A 'head of state' is the supreme authority in a government. In Australia, the head of state of the Commonwealth and state governments is Queen Elizabeth II. In her constitutional capacity, the Queen is referred to as 'the Crown'.

In Australia, most powers of government are exercised by organs of government other than the Crown, or by the Crown following the advice of other organs of government. For example, whereas the monarch originally decided disputes between his or her subjects, this function has been taken over by the courts. However, the Crown, which historically enjoyed complete and unrestricted power to rule, is considered to retain any powers that have not been given to other organs of government. These remaining powers are referred to as the Crown's 'reserve' powers and are exercised at the discretion of the Crown.

In Australia, the Queen acts through appointed representatives. At the federal level, the Queen's representative is called the Governor-General. At the state level, the

representative is called a Governor. As the Queen's representatives, the Governor-General and Governors have various specified powers in Australian constitutional law.

- They are the formal heads of state of the Commonwealth and the six states.
- They exercise certain executive powers on the advice of the government, such as appointing people to particular offices, signing treaties and granting licences and permits.
- They exercise some legislative powers. One of these is giving Royal assent to laws passed by the legislatures.
- They commission the judges who are appointed by the governments of the day to preside over the courts.

1.11.3 The executive

Federal and state governments in Australia have what is called an 'executive' organ of government. An executive consists of the Crown, the chief minister and other ministers of government, and statutory bodies and offices.

- The Governor-General and Governors represent the Crown in the federal and state executives.
- The chief minister (called 'Prime Minister' at the federal level and 'Premier' in the state governments) is elected by the political party forming the government of the day. The chief minister appoints other ministers and allocates to them responsibility for specified departments of government.
- The chief minister and senior ministers of government form an executive body called the 'cabinet'. The cabinet decides the policies of the government of the day at any particular point in time.
- Statutory bodies or offices can be created to perform tasks which ministers or public servants are not well equipped to handle.

Members of an executive have important law-making powers and functions:

- The cabinet discusses any proposal for new legislation and approves it in draft form, ensuring that it has the necessary political support before it is introduced into the legislature.
- The Crown must formally assent to legislation enacted by a legislature before it becomes law.
- Ministers and other members of the executive may be given the power to make legal regulations on their own authority. These regulations are referred to as 'delegated legislation' because the power to make them is given (delegated) to the executive by the legislature.

1.11.4 Legislatures

A legislature is a body with authority to make law. The Commonwealth (federal) government of Australia, each state and each self-governing territory has its own legislature.

The Commonwealth and state legislatures can be called 'parliaments', but this term is not used for territory legislatures.

The persons who make up the legislatures are elected by winning the support of a majority of voters at an election. The members of the legislatures 'represent' the voters who elected them until the next election. For this reason Australian governments are generally described as 'representative democracies'.

Australian legislatures are generally 'bicameral', consisting of an 'upper' and a 'lower' House. Queensland is the exception, having a single (unicameral) legislature.

- The upper House of the Commonwealth legislature is called the *Senate* and the lower House is called the *House of Representatives*.
- The upper Houses of state parliaments are all called *Legislative Councils*. In New South Wales, Queensland, Victoria and Western Australia the lower Houses are called *Legislative Assemblies*. In South Australia and Tasmania the lower Houses are called *Houses of Assembly*.

When a legislature enacts law, the resulting document is referred to as 'legislation', an 'Act', an 'Act of Parliament' or a 'statute'. The *Constitution Act 1902* (NSW) is an example of this type of law. Law made by a legislature is distinguished from other types of law, such as the law laid down by judges when deciding cases (the common law or general law), and customary law.

The Commonwealth legislature is given its legislative power by the Commonwealth Constitution. Although it has legislative power only in relation to carefully specified matters, Commonwealth legislation applies throughout the whole of Australia.

State legislatures derive their power to enact laws from their various state constitutions. The legislative power is a general one, but state laws are subject to other limitations. Firstly, state laws generally operate only within the borders of that state. Secondly, the state governments have agreed to share some of their legislative power with the federal government and so have a 'concurrent' power in those matters, rather than an exclusive one. Thirdly, in relation to a few matters, the Commonwealth government has exclusive powers to legislate.

The legislative assemblies of the self-governing territories have a broadly expressed power to make law. In this sense, the self-governing territories have more governmental power than the other territories. However, under the Commonwealth Constitution, the Commonwealth government can override any territory legislation by enacting contrary legislation. As a result, the 'self-governing' territories have less legislative autonomy than the states.

1.11.5 Resolving conflicts arising from shared legislative powers

Because there is some overlap between the law-making powers of the Australian governments, it is possible for legislation on the same matter to be enacted by the legislatures of the Commonwealth and a state or territory. The provisions of such legislation may or may not conflict with each other. If there is no conflict or inconsistency between federal and state or territory legislation, both Acts co-exist, and either of them may be applied to any situation covered by their provisions.

However, if the provisions of Commonwealth legislation conflict with state legislation on the same matter, section 109 of the federal Constitution provides that validly enacted Commonwealth law prevails over state law, but only to the extent that the state law is inconsistent with the Commonwealth law.[3] This rule applies regardless of which legislation was enacted first. In effect, the rule means that if the conflicting sections in the state legislation can be excised or 'severed' without unduly affecting the remaining sections of the Act, then the remainder of the Act continues to be valid. But if excising the conflicting sections radically affects the remaining provisions, the entire Act will be invalidated. The following summary of a decision by the High Court of Australia illustrates the application of s 109.

Bell Group N.V. (in liquidation) v Western Australia; W.A. Glendinning & Associates Pty Ltd v Western Australia; Maranoa Transport Pty Ltd (in liq) v Western Australia [2016] HCA 21

Constitutional law; inconsistency between Commonwealth and state laws; application of section 109.

Facts: In 2015 the Parliament of Western Australia enacted the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act* 2015 (WA) ('the Bell Act'). This Act provided a framework for the dissolution and administration of property of The Bell Group Ltd and its subsidiary companies, all of which were insolvent and in the process of being wound up. The Bell Act set up a fund into which all of the assets of the companies would be transferred. The Act also created an 'authority' which was given an almost unlimited discretion to determine the liabilities of each company.

Issue: Was the Bell Act inconsistent with Commonwealth legislation, specifically federal tax legislation which determined the tax liabilities for companies?

Decision: The Bell Act was inconsistent with federal tax legislation and was therefore invalid.

Reason: By giving a new authority unlimited power to determine each company's liabilities, the Bell Act ignored and contradicted the tax liabilities which had already accrued for each company under federal tax legislation. The High Court found that many provisions of the Bell Act were inconsistent with federal tax legislation. The court said (at [70]) that merely severing these provisions, as allowed by s 109 of the Commonwealth Constitution, 'would result in a radically different and essentially ineffective residue' which the Western Australian parliament had never intended to create. Because the offending provisions were 'so fundamental to the scheme of the Bell Act', the entire legislation was invalid.

3 In references to legislation, the word 'section' is normally abbreviated to the letter 's'.

As regards territory legislation, the Commonwealth constitution gives the Commonwealth government the power to override any territory legislation. It can do this simply by enacting contrary legislation.

The overall effect of these provisions is that state and territory parliaments are careful not to enact legislation that conflicts with existing federal legislation, or in relation to which the federal government clearly has a different policy. This helps maintain a uniformity of laws throughout Australia.

You should also note that law enacted by a local government is invalid to the extent that it is inconsistent with either Commonwealth law or the law of the state or territory within which that local government is situated.

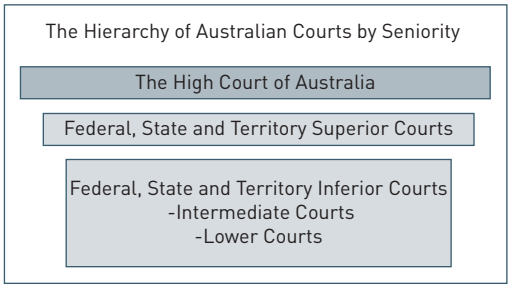
1.11.6 The courts

Australia has a large number of courts, each presided over by professional legal decision makers variously called judges, magistrates or Justices of the Peace. The courts are established under provisions in the relevant constitutions and other laws of the various Australian governments. The function of courts is to hear and decide disputes in accordance with the law. When a case comes to trial for the first time, the hearing is referred to as 'original' or a hearing at 'first instance'. When the decision of one court is taken to a higher court to be reconsidered, this is known as an 'appeal'.

There is a separate court system for the Commonwealth, for each of the states and self-governing territories, and for Norfolk Island. The courts in each system have carefully defined powers to hear cases brought before them and, depending on the nature of the case, to make and enforce orders or impose penalties. The power to hear and decide cases is broadly referred to as a court's 'jurisdiction'. The jurisdiction of different courts is based on factors such as the location where the dispute arose, the seriousness of the dispute or crime and whether the case is being heard for the first time.

The courts in each system (Commonwealth, state and territory) are ranked in a strict hierarchy, according to their power to hear cases and make orders. In outline, the courts in the Commonwealth, state and territory hierarchies consist of the High Court of Australia, superior courts and inferior courts. This structure is shown in a simple diagram below. For a more detailed diagram, see Chapter 3.

Figure 1.3



1.11.6(a) The High Court of Australia

The High Court of Australia is the highest court in all Australian court hierarchies. It consists of seven judges appointed by the Governor-General on the advice of the Prime Minister. One of the judges is appointed Chief Justice.

The High Court is given its power to hear and decide cases by the Commonwealth constitution. It has some original jurisdiction to hear cases at first instance, but most of the cases dealt with by the High Court are appeals. To bring an appeal in the High Court, the appellant must seek 'special leave' from the High Court. Leave will normally only be granted if the case involves an important or uncertain point of law.

All seven judges of the High Court sit to hear a case involving the interpretation of the constitution, a case involving an important principle of law, or a case in which a previous decision might be changed (an appeal). In other cases, a lesser number of judges make up the court. The judges presiding over a case are collectively referred to as 'the bench'.

1.11.6(b) Superior courts

In the Commonwealth court hierarchy, the superior court is the Federal Court of Australia. A special superior federal court called the Family Court also exists, with jurisdiction to hear and decide matters of family law. Federal judges are appointed by the Governor-General on the advice of the government.

In state and territory court hierarchies, the superior courts are called Supreme Courts. Judges are appointed to these courts by the state Governor on the advice of the state government. Territory judges are appointed by the executive branch of the territory government.

Superior courts have original jurisdiction, that is, the power to hear cases at first instance. When hearing cases at first instance, the superior courts are presided over by a single judge.

Superior courts may also sit as a court of appeal, to hear appeals from decisions made by lower courts or from a single judge of a superior court. A court of appeal is presided over by either three or five judges and is referred to as a 'Full Court'. In the Commonwealth, the appeal court is known as the 'Full Court of the Federal Court'. The Family Court also has a 'Full Court' to hear appeals. The state courts of appeal are organised in various ways and have different names, for example, 'Court of Appeal', 'Full Court of the Supreme Court' or 'Court of Criminal Appeal'.

1.11.6(c) Inferior courts

The inferior courts in Australia are ranked as either 'intermediate' or 'lower'.

- *Intermediate courts.* At the federal level, an intermediate court called the Federal Circuit Court is presided over by judges appointed by the Commonwealth government. This court hears cases involving family law and child support, administrative law, bankruptcy, human rights, consumer matters, privacy, migration, copyright, industrial law and admiralty law.

In the states, intermediate courts are called 'County' or 'District' courts. They are presided over by judges appointed by the various state governments. These courts have original jurisdiction in various kinds of cases, or in which the amount involved is less than $200,000 (the amount varies somewhat between states). They also have limited power to hear appeals from the decisions of lower courts such as magistrates' courts. The territories do not have intermediate courts.

- *Lower courts.* Lower courts are found in the states and self-governing territories. They are called either 'Magistrates" or 'Local' courts or 'Courts of Petty Sessions'. They are presided over by magistrates or Justices of the Peace. The most senior magistrate is called the Chief Magistrate. Magistrates and Justices of the Peace are not judges but are judicial officers of a lower rank than judges. They are appointed by the various state governments. Magistrates and Justices of the Peace have restricted powers. Under state law, they hear particular kinds of disputes, or disputes that involve a limited amount of money (typically $40,000–$60,000, depending on the particular jurisdiction). Magistrates' courts do not have the power to hear appeals.

1.11.7 How judges decide cases

It has already been stated that the function of courts is to hear and decide disputes in accordance with the law. Rules of law provide answers to cases that come before the courts. In criminal matters, the law identifies behaviour that is prohibited, the defences that might be available in some circumstances, and the appropriate penalties.

In civil cases, the law sets out the legal rights and duties that an individual person can acquire and how these rights can be enforced. For example, if one person (a creditor) claims that another person (a debtor) owes them a sum of money, and the debtor denies that the money is owed.

Legal cases are normally resolved in the following way:

- First, all the important (material) facts of the case are ascertained. The important facts are those that reveal the origins, scope and nature of the case.
- Second, the relevant rules of law are found and interpreted. The relevant rules are those that apply to the particular kind of legal case in question.
- Third, the relevant rules are applied to the material facts, to work out (deduce) what the appropriate outcome should be. A result should be sought that is consistent with similar cases decided in the past, and which will generally be considered to be fair and reasonable.

To carry out these processes, a court begins a trial by hearing each party's evidence. This is how the facts of the case are established. The court then reviews the relevant rules of law and applies these rules to the facts to work out what the result of the trial should be. Finally, the court makes an order in favour of one party or the other.[4]

4 This is an extremely abstract description of the judicial reasoning process. It takes no account of the more detailed procedures and practices followed in Australian courts. Generally, when a case comes before a court, each of the parties, usually represented by a lawyer, presents the evidence they rely on, either through the testimony of witnesses or the production of documents. Each party also has the right to question and test the evidence led by the opposing

It is important to realise that, although the courts do not have a direct power to make new law in the way that legislatures do, judges create law indirectly when they decide particular cases. How this happens is explained in Chapter 3. For now, it is sufficient to know that law can be made by judges when they decide cases and that this law is referred to as 'case law', 'common law' or 'general law' to distinguish it from legislation.

1.11.8 The public service, statutory officers and statutory bodies

The Commonwealth, states and territories each have a 'public service' consisting of persons employed and paid by the government to carry out various aspects of government administration. A public service is organised into departments with specified areas of responsibility, such as the federal Department of Health; the Department of Education and Training; the Attorney-general's department; and the Department of Infrastructure and Regional Development. Departments have responsibility for providing relevant services to the public. They are responsible for administering legislation, implementing government policies and managing finances. They also provide advice to government ministers. Public services are large organisations and an essential part of effective government.

Statutory officers are persons who have been appointed to an office, created by legislation, with specified responsibilities. Examples are the offices of the Auditor General (responsible for the management of government finances and resources); the Electoral Commissioner (responsible for the conduct of voting in elections and referenda); and the Ombudsman (responsible for investigating the actions of public authorities).

Statutory bodies are organisations, created by legislation, consisting of persons appointed to their positions by government. Statutory boards can be responsible for ensuring compliance with particular legislation, for coordinating activities and planning, or providing advice. Examples of statutory boards are the Australian Broadcasting Corporations (ABC); the Australian Accounting Standards Board; and the Australian Competition Tribunal.

1.11.9 Local government

Each of the six states and the Northern Territory has established a third level or 'tier' of government known as 'local' governments. The various local government bodies are referred to by different names: city councils, rural councils or shire councils, depending on the area they serve. They are made up of elected councillors.

There are a large number of local government bodies in each state and the Northern Territory. They each typically have responsibility for looking after the social, economic and environmental needs of their area. For example, they provide streets and street signs, footpaths, drains, traffic control, sporting grounds and libraries. Local government bodies also monitor and control things such as local business activities, land zoning, parking and building standards.

party. Both parties also have the right to argue what law is relevant and what the outcome should be. The presiding judicial officer (sometimes assisted by a jury) then decides what evidence to accept, what law is relevant to the case, and what the outcome should be.

1.11.10 Political parties

There are a number of political parties in Australia. Most members of parliament belong to one of the two major parties—the Australian Labor Party and the Liberal Party of Australia. A few belong to smaller parties, such as the Australian Greens, or are elected as independents.

The political party with the majority of seats in the lower House of a parliament is the party that forms the government of the day. Its voting majority in parliament enables it to control the legislative process and, by enacting laws, to give effect to its policies. The political party with the second largest number of seats in the lower House is known as the opposition. If no political party has enough seats in the lower House of parliament to form a majority in its own right, two or more political parties may join forces in a 'coalition' government. An example of this is the current coalition between the Liberal Party of Australia and the National Party of Australia.

[1.12] Questions for Revision

The following questions will help you to decide whether or not you have understood and can remember the things you should have learned from this chapter. You can also improve your knowledge by discussing these questions with another student or with your teacher.

1. What is 'law'? What distinguishes a legal rule from other rules of conduct? What are 'ethical' rules of conduct?
2. How is the law organised? What is meant by an 'area' or 'category' of law?
3. Where does modern Australian law come from? How is law used to decide cases?
4. What is the Commonwealth of Australia? How was it created? What is the relationship between the Commonwealth of Australia and the Australian states and territories?
5. What is a constitution? Is there more than one constitution that operates in Australia? What matters are dealt with in a constitution?
6. What are the institutions (or organs) of the various governments in Australia? Which people are members of these different organs?
7. What functions do the various organs of government have in relation to the creation, administration and enforcement of the law?
8. What law-making powers does each of the nine Australian legislatures have? What is a 'shared' and an 'exclusive' power? What provisions exist to resolve potential conflicts when the law-making powers of different governments overlap?
9. What is a 'hierarchy of courts'? Is it true to say that the High Court of Australia is the highest court in each of the Australian court hierarchies?
10. Explain broadly the different powers of the various courts. What is meant by 'inferior' and 'superior' courts? What is an 'appeal'?

[1.13] Interactive learning

Once you have read through this chapter, you should work through the eStudy module *'The organisation of law and government in Australia'*. It will help you learn what you need to know by asking you questions and giving immediate feedback to your answers.

Visit www.alcware.com for more information on how to access the FPBL modules.