CHAPTER 1

Introduction to Business Law

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INTRODUCTION (¶1-010 – ¶1-026)

[¶1-010] What is law — the legal and regulatory environment of business

Let us assume you are reading this book in a study or office, home or library. The environment where you are is as much of a legal creation as it is bricks and mortar, timber, steel, glass and plastic.

- All the details of your surroundings are regulated by laws like building regulations, local government permits and town planning orders. These affect the size, shape and quality of rooms, driveways, stairwells, light fittings, doors and windows and the position of the building on the block of land as well as the building's power and sewerage.
- Legally enforceable agreements (contracts) make sure that the building is serviced by power supply, water and sewerage authorities. The construction of the building would have been carried out under many contracts.

Perhaps you are reading these lines on a train or bus. This transport is regulated by legislation (Acts of Parliament) covering railways and road traffic and the regulation which establishes standards for manufacturing vehicles. The fact that you are on a bus or train means that you have made a contract with the operating authority to be taken from one place to another.

This analysis could go on to as many pages as there are in this book if all the laws that govern what we do every day were to be listed in detail.

Business law is made up of the laws that set out the rights, duties and obligations of people in business. Business law balances the interests of those in business and people like producers and consumers, buyers and sellers, lenders and borrowers. It regulates business transactions under the law of contract, which explains when an agreement will be legally enforceable as a contract and is updated by competition and consumer law. It regulates those engaged in business (companies, partnerships, etc), their names, their funding (finance, credit), their banking and their insurance. Many aspects of criminal law (especially property offences) and tort (especially the law of negligence) impact on business.

What is law?

The law is a body of principles established by parliament (ie, by our representatives) and by the courts. Law is therefore made *by* us (the men and women who are parliamentarians and judges) *for* us, is legally enforceable and was developed to set standards of conduct between people, businesses and government. If these standards of conduct are not followed, the law sorts the conflicts that arise, and punishes those who breach these standards of conduct.

The law is made up of:

- *enacted law*

  This is the law made (enacted) by parliament known as statute law, legislation or Acts of Parliament and delegated legislation (¶1-180 – ¶1-200).
- *unenacted law*

  This is the judgments, usually written, of judges in cases heard by them, known as case law, precedent or sometimes common law (¶1-180 and ¶1-350 – ¶1-410).

Together, enacted law and unenacted law in the English-speaking world are often known as the 'common law'.

The common law

The expression 'common law' has five meanings which depend upon the particular context[1]:

(1) ***common to all of England*** — the original meaning of the common law was the law which the King made common to the whole of England in 1154, in contrast to local law

(2) ***an historic meaning of common law*** — the law administered in England until the end of the 19th century by the three royal courts of justice (the King's Bench, Common Pleas and Exchequer)

(3) ***not equity law*** — case law from the common law courts, in contrast to case law from the equity courts (below)

(4) ***case law, not statute law*** — unenacted law written by judges in judgments (case decisions, precedents: ¶1-350) not based on an analysis of authoritative texts, and not statute law enacted by parliament (enacted law)

(5) ***the common law world*** — statute law and case law, which originally developed in England, then later developed in Australia, New Zealand, Canada (except Quebec), the USA (except Louisiana) and the other former British colonies, in contrast to the 'foreign' law of non-English jurisdictions. One subset of foreign law is the 'civil law' of continental Europe.

As the common law develops in each jurisdiction, it results in the development of the common law of Australia in the same way that there is the common law of, say, England or Canada.

The common law, meaning enacted statute and unenacted case law (point (4) above), can be classified as follows:

Civil and criminal law

Civil law involves matters between person and person regarding the enforcement of rights and the carrying out of obligations. Most of the business law topics covered in this book involve civil law. Civil cases result in remedies for the person winning and liabilities for the person losing.

Criminal law includes all statute and case law which make certain conduct an offence. Criminal law is enforced by the government (federal, state or territory), and is discussed in Chapter 2.

Civil law in the common law is not the same as the 'civil law' in some countries (mostly in Europe), which is based on the civilian code of ancient Rome.

Common law and equity law

The main remedy of the common law is an award of damages (compensation), but this might be useless to stop harm or the continuing breach of a contract.

1 Based on *PGA v The Queen* [2012] HCA 21 [20]–[25].

Many years ago, some people (litigants) appealed directly to (petitioned) the King or Queen, or the Lord Chancellor, or the Chancery — later the Court of Chancery, and now the Equity Court or the court in its equitable jurisdiction. Equity law developed an alternative set of rules to the common law courts in areas to do with fairness and good conscience.

Maxims of equity

Equity means the rules (equitable remedies) originally developed and administered by the Court of Chancery (equity court) which supplement common law rules and procedures. The maxims (principles) of equity are the rules which are applied by the equity courts, such as:

- 'equity acts *in personam*' (equity acts on the conscience, not the property)
- 'equity aids the vigilant'
- 'equity does nothing in vain' (¶6-400)
- 'equity follows the law'
- 'equity never wants a trustee' (¶9-760)
- 'equity will not assist a volunteer' (¶5-040)
- 'one who comes into equity must come with clean hands'
- 'one who seeks equity must do equity'
- 'the person who is first in time has the stronger legal claim' and 'where the equities are equal, the law prevails' (¶3-270).

Equity can grant an injunction (¶6-410) or an order for specific performance (¶6-400). These are called 'equitable remedies'.

The law of equity continues and is now fused with the common law, and both systems are administered by the same courts. Equitable principles (eg, concerning unconscionability; ¶5-730) have made, and continue to make, an important impact on the development of modern business law.

Australian business law regulators and business law enforcement

Regulation to improve the legal environment of Australian business is in the hands of regulators such as:

- Australian Charities and Not-for-profits Commission (ACNC: ¶9-630)
- Australian Competition and Consumer Commission (ACCC: ¶8-725)
- Australian Crime Commission (¶2-270; ¶2-300)
- Australian Financial Security Authority (AFSA: ¶13-558), which regulates bankruptcy (¶13-558) and the Personal Property Securities Register (PPS Register: ¶13-170)
- Australian Prudential Regulation Authority (APRA) — a banking regulator (Chapter 16) and an insurance regulator (Chapter 17)
- Australian Securities and Investments Commission (ASIC: ¶9-380) — the Australia-wide one-stop shop for the regulation of areas like business names, banking, companies, credit, financial services, and insurance

- Australian Taxation Office (ATO)
- Australian Transaction Reports and Analysis Centre (AUSTRAC: ¶16-080)
- Director of Public Prosecutions (DPP: ¶2-110; ¶2-140), and
- IP Australia (<www.ipaustralia.gov.au>; ¶3-560, ¶3-580 and ¶3-660), which regulates Australian intellectual property (IP) laws.

Industry associations

Industry associations (self-regulators) introduced in this book include the Australian Bankers' Association (ABA), responsible for the Code of Banking Practice (¶16-041), the Franchise Council of Australia (FCA: ¶9-985) and the Insurance Council of Australia (ICA), responsible for the General Insurance Code of Practice (¶17-036).

Regulation

Regulation includes the legal rules set out in this book — including contract and competition and consumer law — and all the rules and legal restrictions imposed by government, the courts, regulators and industry.

Compliance

The bottom line of all this is the need for regulatory compliance — to comply with (fulfil) regulation.

There is now the compliance professional, who will have a good understanding of all topics in this book.

The peak body for the development and practice of compliance, and for working compliance, ethics, governance and risk into the fabric of organisations is the Governance Risk Compliance Institute (GRCI: <www.compliance.org.au>).

[¶1-015] The rule of law

Our legal system is built on the principle of the rule of law (supremacy of law) — that the authority of government (power) must be exercised according to law.

The rule of law has three aspects:[2]

(1) ***No arbitrary power.*** The rule of law excludes arbitrary power. Official actions (including judgments) must be done in accordance with the law. No person can be punished unless there is a breach of the law. Law must be public and published (¶1-370).

The power of government is separated — under the separation of powers — among the three branches of government (¶1-475).

(2) ***Equal before the law.*** All people are equal before the law. Nobody is above the law, for example, the Prime Minister, a judge or a soldier may be liable in criminal law (¶2-230). The rule of law is a prerequisite for democracy.

2 AV Dicey, *An Introduction to the Study of the Law of the Constitution* (London, Macmillan and Company Ltd, 10th ed, 1964) 202–203.

(3) ***Enforceable in court.*** The rights of citizens are enforceable in the courts. In addition, in some jurisdictions there are special constitutional safeguards and Bills of Rights (Charters of Rights).

[¶1-020] Law and justice

The principle of the rule of law (¶1-015) suggests that law and justice are the same thing — but is an unjust law even a law? Must an unjust law be obeyed? Can matters of justice or morality or conscience ever take precedence over the law?

Natural law

The *natural law* school of legal philosophy sees law as coming from nature. Natural law sees law as expressing a higher truth and a higher justice than that contained in man-made law, like in the US Declaration of Independence (4 July 1776):

> All men are created equal.

Christopher Saint-Germain, for instance, set out the criteria of a good law in *The Doctor and Student* (translated in 1530):

> Also to every good law be required these properties: that is to say, that it be honest, rightwise, possible in itself, and after the custom of the country, convenient for the place and time, necessary, profitable, and also manifest, that it be not captious by any dark sentences, ne mixt [nor mixed] with any private wealth, but all made for the commonwealth.

Positive law

In contrast, the *positivists* see law as the rules imposed by the sovereign power over the sovereign's subjects. The study and the theory of law to the positivists concentrates on things as they are instead of things as they should be:

- Jeremy Bentham (1748–1832), the father of positivism, claimed that because law is man-made, it can be whatever man chooses to make it.
- John Austin (1790–1859) also divorced law from justice, basing law — not on ideas of good and bad — but on the power of the superior.

In modern times, HLA Hart pointed out that one of the problems with this view of the moral authority of law is that respect for the principles of legality is 'unfortunately compatible with very great iniquity'.

The legal authority of the German Nazi state in the 1930s and 1940s sanctioned deportations, mass murders and ultimate forms of human degradation. However, these actions were 'legal' under the legal system then in force. Numerous war criminals were tried after the end of the Second World War in 1945 and some raised the defence of 'obeying the law'. War criminals can expect to be punished and any defence that their actions were legal at the time will not be successful because they breached basic morality.

Law is changeable, so some conduct (abortion, alcohol or drug use) could be considered criminal yesterday, legal today and criminal tomorrow: what is crime? (¶2-010).

[¶1-025] Law, morality and society

Some areas covered by law and morals overlap and are the same — for example, the moral principle that promises should be kept is the foundation for the law of contract.

Some conduct is immoral but not illegal — for example, cheating, selfishness.

Some conduct is illegal but not immoral — for example, disobeying a 'no parking' sign (¶2-010).

Without codes of conduct giving effect to society's underlying ideologies and ways of life, there would be uncertainty. In a pluralist society where values are not universally shared, law plays a crucial role in maintaining social cohesion because it recognises and gives effect to community values, provides for the settlement of potentially disruptive disputes, and (ideally) provides for the orderly adaptation of rules to social change.

[¶1-026] E-commerce and Australian business law

The enacted law (statutes, legislation) and the unenacted judge-made case law that make up Australian business law have adapted to and embraced the fast-developing world of electronic commerce (e-commerce) and the internet. This shows the continuity of the common law (¶1-010) and how it can apply existing legal principles to new technology. This is the same as how the common law adapted to the Industrial Revolution in the 18th century (when the economy moved from agriculture to industry) and the arrival of the steam train and later the motor car.

What is e-commerce?

E-commerce means commerce by means of computer, the internet and other telecommunications links like electronic data interchange (EDI).

Increasingly, business is being done electronically rather than by traditional means involving face-to-face business discussions using paper-based documents.

Australian business has already adapted to e-commerce, such as:

- computer crime (¶2-300)
- e-contract — acceptance of an offer by fax, email and SMS (¶5-045; ¶5-320)
- the computerisation of financial markets, including the development of electronic share trading and the Clearing House Electronic Subregister System (CHESS) for share ownership (¶5-030)
- the confirmation that email falls within the Commonwealth's power over 'postal services' under s 51(v) of the Constitution (¶1-475; ¶7-220), and
- electronic banking — financial institutions have been involved in closed-system e-commerce with their customers for the transfer of funds for many years for wholesale and retail transactions, including ATMs and EFTPOS terminals (¶16-650ff).

At a broader level, e-commerce refers to all business activity carried out with the aid of electronic devices, including telephone, fax, email, ATM and EFTPOS, which includes any transaction involving a card that uses electromagnetic data such as a prepaid phone card.

Very little data created today would not be in electronic form, and Australian business law has been revolutionised by e-commerce.

For example, with electronic publishing, most legal material is available electronically through the Australasian Legal Information Institute (AustLII) database (<www.austlii.edu.au>; ¶1-370) and subscriber portals or platforms, such as CCH Australia's 'IntelliConnect' platform (<www.cch.com.au>).

E-administration of the law

Information technology has revolutionised the administration of the law in the following ways:

- The electronic court (e-court) allows paperless electronic filing, case and document management and imaging of court processes, including registration, document lodging, e-searching, listing of cases for hearing, in-court processing of judgment orders and outcomes and enforcement procedures. Electronic trials, where all the trial documents are available electronically, go back to the mid-1990s.

  Service of documents has been allowed by Facebook (¶1-430).

  Initiatives include the Online Court in New South Wales (<www.onlineregistry.lawlink.nsw.gov.au/content>), which is like an internet bulletin board where parties can post submissions asking for directions or documents. Online Court has replaced the need for going to court for straightforward matters. It is run online, all the parties can participate and judicial officers can make court orders.
- Internet access among, and electronic data transfer between, courts and tribunals, law enforcement agencies such as the Director of Public Prosecutions (DPP: ¶2-140) and the legal profession continues to expand.
- Complex information can be processed and recorded more quickly.
- Evidence can be taken from absent witnesses by audio-visual technology.
- Judgments are published on the internet.
- Courts and tribunals have their own websites.

Will IT make legal advice redundant?

As an important regulator of e-commerce in Australian business law, ASIC (ASIC: ¶9-380) aims to ensure that:

- business regulation is technology-neutral
- regulatory requirements for e-commerce are no more onerous than those applying to traditional business, and
- consumers have at least the same levels of protection as with traditional business.

Geo-identification

It is said that the internet is 'borderless', but a contract made online — or defamation online — is sourced within a legal jurisdiction somewhere. Geo-identification helps to identify just where the internet user is located.

Australian Government Department of Communications

The Australian Government's Department of Communications is there to improve business awareness of the main issues to be considered when dealing with consumers by e-commerce. Its site *Digitalbusiness — your guide to getting online* is a good place to

start with information on getting online to take advantage of the opportunities of the internet.[3]

Getting online is where Australian business law kicks in with business to consumer e-commerce issues including consumer protection, information, customer management (contract), payment, privacy and redress.

Compliance with business regulation is monitored by ASIC (¶9-380).

Spam Act 2003 (Cth)

The development of e-commerce has led to a large amount of spam on the internet.[4]

Spam involves invasion of privacy (including the trading of addresses), misleading or deceptive conduct and unfair practices under the Australian Consumer Law (ACL: ¶7-250; ¶7-460), and illegal or offensive content.

Especially common is spam in areas like financial scams, pornography and promotions for dubious 'health' products. Spam may also be used to transmit computer viruses.

Spam threatens the effectiveness and efficiency of e-commerce because it is illegal, offensive and unscrupulous, and may involve tactics that would not be commercially viable if they were not electronic. Spam also imposes costs on the recipient.

The *Spam Act 2003* (Cth):

- regulates commercial email and other types of commercial electronic messages
- bans unsolicited SMS (¶5-320) and Multimedia Messaging Service (MMS) messages that advertise, offer or promote goods or services or suppliers of goods or services (s 16)
- requires that commercial electronic messages include accurate sender information (s 17)
- requires that commercial electronic messages contain a functional 'unsubscribe' facility (s 18)
- prohibits the supplying, acquiring or using of address-harvesting software and harvested-address lists (s 20–22)
- provides for remedies for breaches of the Act, including civil penalties, injunctions and enforceable undertakings (compare ¶7-520) (Pt 4–6).

Courts will also be able to compensate businesses which have suffered as a result of spam. For those organisations that choose to ignore the law, the penalties could be significant. The courts can award damages of up to $850,000 per day in the most severe circumstances (s 25(5)(b)(ii)).

Enforcement of the Spam Act is in the hands of the Australian Communications and Media Authority (ACMA: <www.acma.gov.au>).

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3 At <www.communications.gov.au/what-we-do/internet/digital-business>. Its publications now replace the earlier *Australian Guidelines for Electronic Commerce* (2006, archived at <www.treasury.gov.au>).

4 Spam is unsolicited commercial electronic messages, which range from commercial advertising and offensive material to messages which are part of criminal and fraudulent activity.

Case example: Spam Act

DC Marketing Europe Limited[5]

ACMA fined DC Marketing (a mobile phone marketing company) $149,600 for making 102 calls to mobile phones — only to hang up and leave a 'missed call' message. When mobile phone owners returned the calls, they received marketing information from DC Marketing. Consumers would not know who the missed call was from, so when they returned the call to DC Marketing, they were paying to receive DC Marketing's unsolicited marketing messages.

This case is a reminder of the importance of a Spam Act compliance program in modern businesses.

Internet Industry Spam Code of Practice (2005)

ACMA has registered a code of practice for internet service providers and email service providers with the Australian Communications Authority. The Spam Code aims to set up industry-wide practices and procedures relating to spam to balance industry interests and viability, and end user interests. The Code is available at <www.acma.gov.au>.

Do Not Call Register Act 2006 (Cth)

<www.donotcall.gov.au>

This Act established the Do Not Call Register so that individuals can block unsolicited and unwanted telemarketing calls to their home or mobile phone number.

The Act provides details on how to register, stops calls to registered numbers and sets out civil penalty offences for breaches enforceable by ACMA, including issuing infringement notices.[6]

E-commerce: future directions

The world continues to shrink as people increasingly connect through the internet, technology improves and e-commerce and e-contracts (¶5-045) expand. There is more efficiency for less cost.

Many business law issues and questions arise with these developments.

- Territorial, political and jurisdictional boundaries are irrelevant with e-commerce, yet the authority of regulators is limited to their home jurisdictions (a patchwork of regulation).
- Should the current free speech on the internet be restricted by censorship, or would this be impossible to police?

5 Australian Communications and Media Authority, *DC Marketing Europe Ltd*, *Enforceable Undertaking* (29 August 2007) <www.acma.gov.au>.

6 Telemarketing company FHT Travel Pty Ltd and its sole director Yvonne Earnshaw incurred a civil penalty of $120,000 for breaching the *Do Not Call Register Act 2006* (Cth) by making more than 12,000 marketing calls to people on the Do Not Call Register: Australian Communications and Media Authority (16 June 2011).

- With regards to jurisdiction in cyberspace for person v person disputes, should access to a website provide jurisdiction for legal disputes? Should jurisdiction be limited by the 'effects' test — that a dispute is dealt with in the jurisdiction where the effects of the conduct were felt?

AGIMO (Australian Government Information Management Office)

Details on many of these e-commerce issues are available from AGIMO (Australian Government Information Management Office) (<www.finance.gov.au/agimo>) — a government agency set up to promote the efficient and effective use of information and communications technology (ICT) by Commonwealth Government departments and agencies.

THE LEGAL SYSTEM AND THE ADMINISTRATION OF LAW (¶1-030 – ¶1-170)

[¶1-030] The legal system and personnel

The legal system is the framework within which the law operates. It is created by us, the people, who elect representatives from among ourselves to meet together in parliament as lawmakers (Members of Parliament (MPs), politicians, legislators) to pass laws to make up the legal environment within which business is conducted.

The legal system is built in the culture in which we live and it absorbs the values of the culture. Our culture supports and expects the honouring of contracts, the compensation of injuries, the protection of person and property; it supports the constitutional formula of peace, order and good government (¶1-475).

An effective legal system

The legal system 'works' when its laws are:

- *certain* — based on stability and predictability
- *flexible* — able to adapt to new situations
- *known* — available by being published (¶1-015; ¶1-370), and
- *reasonable* — having widespread acceptance as fair, just and necessary.

For a legal system to 'work', its laws must be respected, observed, obeyed and the authority of the lawmaker must be respected and supported.

The people in the legal system

The legal system involves many people:

Those who make the laws

Law is made by the members of the Commonwealth, six state and two territory parliaments (legislators).

The senior law officer of the Commonwealth, state and territory parliaments is the Attorney-General, who is an MP. The Attorney-General and the Attorney-General's department provide the legal support for the government.

Those who apply the laws

The judges, tribunal members, magistrates, judicial registrars, registrars and their supporting administrations apply the laws.

Those who enforce the laws

Prosecution can be started by authorities such as the Director of Public Prosecutions (DPP: ¶2-110; ¶2-140), the Australian Competition and Consumer Commission (ACCC: ¶8-725), the Australian Securities and Investments Commission (ASIC: ¶9-380), Australian Taxation Office (ATO), Australian Crime Commission (¶2-270; ¶2-300) and environment protection authorities. Law enforcement involves corrective agencies (including jails).

Those who advise on the law

Legal advisers include the legal profession (¶1-040), Legal Aid Offices and community legal services.

Those who administer the law

In addition to the administrative staff supporting all of the above, the law is administered in areas such as debt collection and process service (¶1-435), and by registration authorities such as those registering companies (ASIC: ¶9-380), land (Land Titles Offices: ¶3-300), names (¶12-010), patents, trade marks (¶3-660) and so on.

Those who research, write about and teach law

This happens in schools, universities, law reform commissions and by providers of continuing education (¶1-420).

[¶1-040] The legal profession

The legal profession includes all those who have passed a professional law course at most Australian universities (usually a Bachelor of Laws (LLB) or Juris Doctor (JD)) or, in New South Wales, the Legal Profession Admission Board course. (These legal qualifications are different to business law degrees usually attained in business schools, which do not qualify a graduate to work as a lawyer).

After graduation, and usually following an apprenticeship (as an articled clerk or by taking a short postgraduate professional practice or legal skills course, such as that provided at the College of Law in Sydney), a law graduate may be admitted by the court to practise as a lawyer, legal practitioner, barrister *or* solicitor, or as a barrister *and* solicitor (depending on the jurisdiction).

Judges

At the top of the legal profession are the judges, tribunal members, magistrates and registrars who apply the law to make a judgment or decision. There are about 1,000 judges and magistrates in Australia.[7]

Judges are appointed by Commonwealth, state and territory governments, usually from the senior ranks of practising barristers. All lawyers are eligible for judicial appointment, and solicitors, law professors, senior public servants and politicians such as attorneys-general have been appointed to the bench. There is talk of a national judiciary so that judges — especially those with specialist qualifications — may serve in any Australian jurisdiction.

The independence of the judiciary — and the whole legal profession — is important, and in most jurisdictions this is reinforced by a judge's appointment to retirement age or for life. Judges are an independent branch of government and must be free from political interference: 'judges are meant to be hard to get at'.[8]

The legal profession

The division of lawyers/legal practitioners into barristers and solicitors follows the English pattern.

Solicitors

Solicitors are legal practitioners who have offices which the public can go to for legal advice.

Many solicitors are the general practitioners of the law, giving legal advice to clients and doing work in areas such as:

- business law — covering all the topics in this book, like banking, competition, contracts, consumer law, finance and insurance
- conveyancing (transfer of land: ¶3-430 – ¶3-450)
- court work — appearing for clients, especially in magistrates' courts, and acting as an intermediary between client and barrister if a barrister has been briefed (contracted)
- drafting wills and administering the estates of deceased persons (¶3-700)
- workplace relations.

Some solicitors specialise in highly technical areas. Some specialise in advocacy and court work.

Barristers

Barristers are legal practitioners who usually specialise in advocacy and courtroom work, arguing cases in courts and tribunals.

7 About one third of Australia's judges are female: R McColl, 'Celebrating women in the judiciary' (2014) 52(3) *Law Society Journal* 68.

8 J Spigelman, 'Judicial independence' (2007) 45(2) *Law Society Journal* 60, 61.

Barristers are independent sole traders, free of the semi-corporate hierarchy of law firms. They are not allowed to form partnerships with other barristers or with solicitors (¶10-020).

In New South Wales and Queensland there is legal separation — a lawyer cannot be both a barrister and a solicitor. However, in the Commonwealth and the other states and territories there is a fused profession and all lawyers are admitted to practise as barristers *and* solicitors.

Even in a fused profession, some lawyers choose to practise only as barristers, so that an independent bar exists in all states and territories.

Going to a lawyer

Because there is legal (or de facto) separation of legal practitioners in all jurisdictions, a member of the public will generally go first to a solicitor's office.

Some matters may be 'sent to counsel' by the solicitor. This means that the solicitor briefs a barrister on behalf of the client (the member of the public). Together they go to the barrister's chambers, where the barrister takes over running the case on behalf of the barrister's client (the solicitor), who now acts as a kind of intermediary between the member of the public and the barrister.

In the past, a barrister could only act for a member of the public on the instructions of a solicitor, but recent pro-competitive reforms in some jurisdictions now allow for direct briefing by the public such as by accountants and tax advisers (direct access). Advocacy is the last speciality of the bar, but it faces competition with solicitors, especially if mega-firms comprised of many solicitors working together, continue to develop in-house expertise, undertake research and make court appearances, as is the case in Canada and the US.[9]

Some barristers and/or solicitors work in-house as legal advisers, corporate counsel, compliance officers and as company secretaries.

Legal academics, law reformers, commentators

Some lawyers are engaged in teaching and research full-time, whereas in the past much of the training of students was undertaken by practitioners who also taught on a part-time basis. There is now the full-time legal academic who may never have practised law at all. Some legal academics are expert advisers and consultants to government, business and law reform commissions.

Some academic lawyers research and write the legal commentaries and textbooks used by and relied on by both the legal and business communities. Indeed, an author's work may assist in the interpretation of a statute or a common law rule, and '[t]he courts of

9 The then Trade Practices Commission's (TPC, now the ACCC (Australian Competition and Consumer Commission)) final report on the legal profession (March 1994) recommended sweeping pro-competitive reforms to the legal profession for more efficient and competitively priced services: Trade Practices Commission, 'Final report — Study of the professions' (1993) 67 ALJ 891.

Australia are right to turn to … textwriters and others for assistance in arriving at a correct interpretation …'.[10]

Future directions of the legal profession

Australia's legal profession is changing:

National legal profession

The legal profession is rapidly moving towards a national practice of law extending over state and territory borders with a 'travelling' practising certificate, uniform regulation and interstate recognition of qualifications.[11]

Non-lawyers

Non-lawyers — such as accountants, conveyancers, compliance consultants, investment banks and tax agents — compete with lawyers in some areas.

Mergers of law firms nationally and internationally

Mergers of the larger capital city law firms have led to Australian business law now being dominated by a few national law firms with some of the firm names going back more than a century. The first global merger of an Australian law firm was in 2010 (with Norton Rose, originally founded in London in 1794), and now several of the national firms have merged with overseas firms from China, the UK and USA to form global law firms.

Some jurisdictions allow law firms to incorporate under the *Corporations Act 2001* (Cth) — eg, NSW from 2000 — with some restrictions such as the need for the directors to be solicitors. Slater and Gordon was the first law firm to list as a public company on the Australian Securities Exchange (ASX) in 2007 (¶9-350). Incorporation may limit personal liability (¶4-290; ¶9-460) but it will mean supervision by ASIC (¶9-380). The number of solicitors practising in small firms in the suburbs and in the country continues to decline.

Increasing numbers

Numbers of lawyers are increasing rapidly, and are expected to increase further.

Women in the legal profession

The proportion of women in the profession has grown from 0.2% in 1911 to about 30% currently. Approximately 60% of current law students and young lawyers are female. There are currently less women in the senior ranks of the profession, with only around 20% of females as partners and in principal roles in law firms. The first Australian full court of three female judges sat in 1999.

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10 *Day & Dent Constructions Pty Ltd (in liquidation) v North Australian Properties Pty Ltd (provisional liquidator appointed)* [1982] HCA 20 [6] (Murphy J).

11 The Legal Profession Uniform Law was drafted by the Council of Australian Governments (COAG). To commence the move to national regulation of the legal profession, the first two adoptions were in the *Legal Profession Uniform Law Application Act 2014* (Vic), *2014* (NSW).

Non-legal work

The legal profession was largely involved in private practice until the 1970s, but many lawyers are not in legal practice and are instead working in related areas, such as administration, banking (especially investment banking), compliance, insurance, tax (in accounting firms) and elsewhere in business. Some lawyers work in the public sector (government, law reform, Legal Aid Commissions, regulatory policy).

Globalisation

Globalisation of the legal profession is the next step, with local admission of foreign legal practitioners, and further development of transnational legal practices and transnational multi-disciplinary partnerships being made up of, for example, lawyers and accountants (¶10-020).

[¶1-060] Hierarchy of courts

Legal matters and legal disputes are heard (brought, litigated, tried) in a wide variety of courts and tribunals.

The court structure 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 'superior' courts, while minor offences, which can be solved quickly, are dealt with in readily accessible 'inferior' courts. In between there are the 'intermediate' courts.

The hierarchy of courts exists for at least four reasons:

(1) Geographic factors lead to the 90% of cases considered to be minor being dealt with locally in the local magistrates' courts.
(2) For administrative convenience regarding specialisation and economy of operation, cases of a similar nature are tried in similar courts.
(3) Because there is a hierarchy of courts, each court can specialise in certain types of cases.
(4) Finally, judges and juries (¶2-120) may make mistakes, and the hierarchy of courts allows an appeal (¶1-170) to a higher court to have an error of law corrected. This also means that the superior courts supervise the inferior courts.

The diversity is compounded by the division of courts and tribunals according to whether they are set up under Commonwealth (federal: ¶1-100) legislation or state/territory legislation.

Proceedings in Australian courts are 'adversarial' not 'inquisitorial' in nature (¶2-110).

[¶1-070] Courts of summary jurisdiction

Magistrates' courts[12]— or inferior courts, local courts, courts of summary jurisdiction or courts of petty sessions — are set up under Commonwealth, state and territory Acts to handle small civil and criminal matters. They handle most of the legal disputes going before Australian courts and provide an accessible location for civil and criminal cases.

12 There have been sittings in NSW since 19 February 1788.

Civil jurisdiction

The civil jurisdiction of magistrates' courts covers a wide range of disputes concerned with small debts and other small matters. These small disputes may cover claims arising under contract, claims for compensation for injuries received in car accidents, claims as to title to land, and some family law matters. An important prerequisite is the need to fall within the monetary jurisdictional level. These are outlined below.

ACT: $250,000	*Magistrates Court Act 1930* (ACT) s 257
NSW: $100,000 (General Division), $60,000 (personal injury or death), $10,000 (Small Claims Division)	*Local Court Act 2007* (NSW) s 29
NT: $100,000	*Local Court Act 1989* (NT) s 3
Qld: $150,000	*Magistrates Courts Act 1921* (Qld) s 2 'prescribed limit'; s 4
SA: $100,000	*Magistrates Court Act 1991* (SA) s 8
Tas: $50,000 ($5,000 for minor civil claims)	*Magistrates Court (Civil Division) Act 1992* (Tas), s 3 'prescribed amount'; s 7
Vic: $100,000	*Magistrates' Court Act 1989* (Vic) s 3 'jurisdictional limit'; s 100
WA: $75,000	*Magistrates Court (Civil Proceedings) Act 2004* (WA) s 4

Criminal jurisdiction

The criminal jurisdiction of magistrates' courts is of two types.

(1) ***Committal proceedings*** — this is the procedure where a preliminary hearing is held ('committal proceedings': ¶2-130) into cases of more serious crime, such as murder, theft, corporate crime (such as insider trading) and conspiracy.

Committal proceedings aim to work out whether the prosecution has sufficient evidence to show that the accused may be guilty and should be remanded for trial. If so, the accused will be sent to a higher court for trial ('committed for trial') by a judge and jury.

(2) ***Summary offences*** (in contrast to indictable offences: ¶2-050) — such as police prosecutions for 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 a period in jail. Magistrates can generally jail as well as impose fines.

Specialised jurisdictions

In addition, a magistrates' court may function as a coroner's court to investigate unexplained deaths and fires. In some jurisdictions, a magistrates' court sits as a specialist drug court, with both adult and juvenile jurisdiction (such as the Alcohol Court in the Northern Territory).

A further jurisdiction of the magistrates' court is that of the children's court (¶2-210) involving the hearing of all summary and indictable offences (except homicide) committed by persons under the age of 18 years.

In some jurisdictions, less formality and greater public access has been introduced to the magistrates' court through the introduction of:

- compulsory arbitration for smaller matters, where the magistrate is released from the technicalities of the rules of evidence and the adversary system, can actively seek information ('inquisitorial' not 'adversarial': ¶2-110), and is bound only by the common sense rules of natural justice
- in the case of larger matters over the arbitration limit, pre-hearing conferences conducted by a magistrate or senior court officer to promote settlement of the complaint, or at least clarification of the issues to speed up settlement, and
- in areas of high Aboriginal populations, 'circle sentencing', where Aboriginal elders and community members sit with the magistrate in determining an appropriate sentence.

In most jurisdictions, appointments to the position of magistrate are made from the ranks of barristers, solicitors, government and academic lawyers. In some jurisdictions, legally unqualified Justices of the Peace (JPs) can carry out administrative functions normally performed by magistrates, such as granting bail and issuing search warrants.

Federal Circuit Court of Australia

<www.federalcircuitcourt.gov.au>

The predecessor of the Federal Circuit Court — the former Federal Magistrates Court — was established in 1999.[13]

The Federal Circuit Court has jurisdiction in federal areas (¶1-475 – ¶1-480) such as appeals from administrative decisions, bankruptcy, consumer law, intellectual property, misuse of market power (¶8-300) and privacy. It can award damages up to $750,000. It does not deal with criminal matters.

[¶1-080] Intermediate courts

Intermediate courts — the District Court or County Court — exist in all jurisdictions except Tasmania, the Northern Territory and the ACT. Their jurisdiction is between magistrates' courts and the Supreme Court. Their practice and procedure is virtually the same as the Supreme Court, with the full range of pre-trial fact finding procedures such as interrogatories and discovery (¶1-430).

Civil jurisdiction

Differences with the Supreme Court include:

13 The change of name from Federal Magistrates Court took place in 2013.

(1) the upper jurisdictional level, which is in the middle range but extends to the same jurisdiction as the Supreme Court in South Australia. For example:

NSW: $750,000	*District Court Act 1973* (NSW) s 4
Qld: $750,000	*District Court of Queensland Act 1967* (Qld) s 68
SA: same as Supreme Court	*District Court Act 1991* (SA) s 8 (with some limitations)
Vic: unlimited civil jurisdiction	*County Court Act 1958* (Vic) s 37
WA: $750,000	*District Court of Western Australia Act 1969* (WA) s 6 'jurisdictional limit' s 50

(2) some restrictions on exercising jurisdiction in equity, admiralty and probate, and
(3) that they can usually administer justice more quickly and are cheaper in less complex litigation.

Criminal jurisdiction

The criminal jurisdiction of intermediate courts covers most indictable offences (¶2-050 — where there is trial by judge and jury) except capital offences like murder, and some crimes reserved for the Supreme Court like treason and sedition.

The intermediate courts also hear appeals from a magistrates' court sitting in its criminal jurisdiction.

Trials may be lengthy and protracted, and, as in the Supreme Court, indictable criminal offences (¶2-050) are tried by judge and jury.

[¶1-090] Supreme courts

The state supreme courts are 'superior' (higher) courts, compared to the 'inferior' (lower) courts (¶1-060).

Supreme courts have both an original and unlimited jurisdiction to hear all civil cases, and they handle the most serious criminal cases such as murder and drug charges.

Some have a common law division (negligence, contracts, land) and an equity division (¶1-010), the latter dealing with injunctions (¶6-410) and specific performance (¶6-400).

Some of their jurisdiction has been removed by statute, such as cases which go to the Federal Court.

Appeal courts

In all jurisdictions, appeals on questions of law go to intermediate appellate courts usually with three appellate judges.

Courts of Appeal (Full Courts, Courts of Criminal Appeal) exist in all Australian jurisdictions.

The benefits of a court of appeal include providing a permanent appellate court not disrupted by the rostering of judges to trial work and a court better able to develop the common law in a researched and principled way.

Now that Privy Council appeals (¶1-150) have been abolished, and the High Court has restricted appeals to those of public or general importance, intermediate appellate courts are important to keep up the 'oxygen of fresh ideas'.[14]

[¶1-100] Federal courts and tribunals

The Commonwealth Government has developed the federal court system since the mid-1970s in areas of Commonwealth (federal) law (¶1-475 – ¶1-480) including the:

- Administrative Appeals Tribunal (AAT; ¶1-160)
- Fair Work Commission (formed to set award pay rates and conditions, to help employers and employees work towards cooperative and productive workplace relations and to help workplaces prevent and resolve disputes)
- Family Court of Australia (¶1-140)
- Federal Circuit Court of Australia (¶1-070)
- Federal Court of Australia (¶1-110), and
- High Court of Australia (¶1-130).

The system of federal courts and tribunals has brought about a big change in the Australian legal system. These courts and tribunals were superimposed on the existing three-tier state court system (¶1-060), which originated in the pre-federation Australian colonies.

Other federal courts (the courts of the ACT and the Northern Territory) were created to administer justice in the two federal territories.[15]

The Australian Constitution sets out the authority for the federal courts. It empowers parliament to create federal courts or to give a state court federal jurisdiction:[16] in other words, questions arising by virtue of federal laws (for example, prosecution for breach of customs regulations) can be dealt with in a federal court or in state courts at any of the three tiers.

[¶1-110] The Federal Court of Australia

<www.fedcourt.gov.au>

The Federal Court of Australia covers areas of Commonwealth (federal, national) jurisdiction, such as administrative law, bankruptcy, competition and consumer law, corporations law, federal tax, industrial law, intellectual property and native title.[17]

14 *A presidential farewell* (2008) 82 ALJ 507.

15 Constitution s 71; ¶1-460; ¶1-475.

16 Constitution s 77(iii).

17 *Federal Court of Australia Act 1976* (Cth). The Federal Court was created in 1976 under Constitution s 71 (¶1-460; ¶1-475).

Full Court of the Federal Court

Appeals can be made to the Full Court of the Federal Court (appellate jurisdiction) from decisions of the Administrative Appeals Tribunal (AAT), the Federal Circuit Court, a single judge of the Federal Court and the Supreme Courts of the two federal territories (the ACT and the Northern Territory).

The creation of the Federal Court has also eased the work of the High Court by taking on certain areas like taxation appeals. These can now only be taken to the High Court by special leave.

In practical terms, judgments of the Federal Court now dominate Australian business law.

[¶1-130] The High Court of Australia

<www.hcourt.gov.au>

The senior court in the Australian judicial system is the High Court of Australia, which consists of seven judges. The High Court was created by the Commonwealth Constitution:

(1) to exercise an original jurisdiction (civil and criminal).

The court's original jurisdiction is wide, and includes indictable offences against the laws of the Commonwealth.

Exclusive jurisdiction includes matters in which the state and Commonwealth are parties, matters involving residents of different states or matters between the states themselves.[18]

(2) to serve as the final Court of Appeal (civil and criminal) in the Australian legal system and to hear appeals from state and territory Supreme Courts.

As an appeal court (its appellate jurisdiction), the High Court can hear appeals from:

(a) single judges of the court
(b) cases from state and territory Supreme Courts (with special leave), and
(c) appeals from the Federal Court and the Family Court (with special leave or approval).

(3) to act as guardian and interpreter (arbiter) of the Australian Constitution.

The High Court is well known for its high level interpretations and its awareness of current issues. As a result, it is no surprise that there have been some 'radical' decisions in the development of the Australian common law (¶1-010)[19] in areas such as native title (*Mabo*: ¶3-425) and environmental law, unconscionability and the famous words of the High Court supporting the right to protest: 'Mr Neal is entitled to be an agitator'.[20]

18 Constitution s 75(iv).

19 Eg, JL Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006).

20 *Neal v The Queen* [1982] HCA 55 [14] (Murphy J).

[¶1-140] Family Court of Australia

<www.familycourt.gov.au>

The Family Court of Australia was set up to help work out complex legal family disputes. It administers the *Family Law Act 1975* (Cth) following a major update of the then fault-based divorce laws with the introduction of no-fault divorce.

The Family Court's jurisdiction in the business area includes financial cases such as settlement of financial relationships between the parties to the marriage and third parties, including such matters as winding up of family companies, partnerships and trusts.

Its jurisdiction includes the transfer to the Family Court of proceedings commenced in the Federal Court relating to bankruptcy, income tax appeals, consumer protection provisions under the Australian Consumer Law (ACL: formerly *Trade Practices Act 1974*) and proceedings under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

The Family Court has jurisdiction in family bankruptcy matters (¶13-630).

[¶1-150] Abolition of Privy Council appeals

The final abolition of appeals from Australian courts to the Privy Council in London was from state Supreme Courts exercising state jurisdiction based on the Crown prerogative (right) to decide disputes (an appeal to 'Her Majesty in Council') in 1986. This followed the earlier abolition of appeals in federal matters including taxation in 1968, and the abolition of appeals from the High Court in 1975.

[¶1-160] Challenging the bureaucracy: administrative tribunals

Governments sometimes set up specialist administrative tribunals to allow for review of government (administrative, bureaucratic, executive) decision-making.

Administrative tribunals

Administrative tribunals provide:

- *merits review* — like alternative courts — to reconsider decisions and stand in the shoes of (ie, exercise the same discretions as) the original decision-maker.
  Administrative agencies like ASIC (ASIC: ¶9-380) and the ATO often include a mix of the three branches of government under the doctrine of the 'separation of powers' (the legislature, the executive, the judicature: ¶1-475).
  Many administrative agencies can:
  (1) make rules
  (2) administer and manage the rules, and
  (3) investigate, prosecute, hold hearings and make rulings on alleged breaches of the rules — 'its' law rather than 'the' law.

  Administrative tribunals give the right to appeal from this internal and non-public decision-making to independent, external and publicly accountable administrative review tribunals and then to the courts.

- *procedural fairness* — tribunals try to resolve disputes cheaply, efficiently, fairly, informally and quickly and without the technical rules of evidence, but with procedural fairness (due process, natural justice).

Administrative tribunals operate like courts — with differences:

(1) In line with the constitutional theory of the separation of powers (¶1-475; ¶1-490), courts (the judicature) are independent of government (the executive). Tribunals are equally independent, but they are a branch of the executive (administration).
(2) Courts settle disputes between parties as equals, whereas tribunals usually settle disputes between person and government (minister, government agency).
(3) Courts are presided over by judges (lawyers) while tribunals are sometimes headed by non-legal experts.
(4) In contrast to tribunals, courts usually require legal representation of the parties, formal procedures, and following the rules of evidence.
(5) Courts are a permanent part of the constitution administering a wide body of law, whereas tribunals may have a limited jurisdiction.

Administrative agencies may advantage business and business regulation so long as checks and balances exist through an appeal system.

Litigation challenging an administrative decision usually challenges the validity of the delegation to the agency, or alleges that the agency has exceeded its authority. This judicial review may be initiated by one of the procedures discussed in ¶1-165.

The following are examples of tribunals.

Name of tribunal	Comments
Administrative Appeals Tribunal (AAT): <www.aat.gov.au>	The AAT was set up in 1975 to review administrative decisions of Commonwealth Departments and statutory bodies (or their 'delegates' — officers) in areas like bankruptcy, corporations and financial services regulation, freedom of information (FOI; ¶1-167), migration, social security and veterans' entitlements.[21] A person whose interests are affected by a government (administrative, bureaucratic, executive) decision may appeal to the AAT if their claim is within its jurisdiction. The AAT has jurisdiction over 400 different Commonwealth legislative instruments, including Acts. The administrative officer (decision-maker) should give detailed and clear reasons for the decision and a person who is not happy with the decision may apply to the AAT. The AAT has access to government files. The AAT then has the power to revoke or alter the original decision or substitute a new decision.

21 *Administrative Appeals Tribunal Act 1975* (Cth). The AAT is paralleled in some jurisdictions for matters within state/territory jurisdiction such as the ACT Civil and Administrative Tribunal (ACAT), the New South Wales Civil and Administrative Tribunal (NCAT), the Northern Territory Civil and Administrative Tribunal (NTCAT), the Queensland Civil and Administrative Tribunal (QCAT), the South Australian Civil and Administrative Tribunal (SACAT), the Victorian Civil and Administrative Tribunal (VCAT) and the State Administrative Tribunal (SAT) in WA.

Name of tribunal	Comments
AAT — Taxation and Commercial Division: <www.aat.gov.au>	The AAT can review decisions of AFSA (¶13-558), APRA (¶16-010), ASIC (¶9-380), the Australian Taxation Office, Companies Auditors and Liquidators Disciplinary Board (¶9-380) and the Tax Practitioners Board.
Australian Competition Tribunal (ACompT): <www.competitiontribunal.gov.au>	The ACompT has both legal and non-legal members (the latter including economists and business leaders). Its function is to hear applications for the review of various decisions of the Australian Competition and Consumer Commission (¶8-730).
Other administrative tribunals	At the federal level there is the Copyright Tribunal of Australia, National Native Title Tribunal (¶3-425), Superannuation Complaints Tribunal and the Veterans' Review Board. Most state and territory administrative review is done by the Civil and Administrative Tribunals listed above. In addition, there are the Crimes Compensation Tribunals (Victims' Rights, Victims of Crime Assistance Tribunal) and Industrial Relations Commissions.

[¶1-165] Challenging the bureaucracy: review of administrative decisions

The executive (bureaucracy, government administration) is one of the three branches of government (with the legislature and the judiciary: ¶1-475).

The executive includes commissions (eg, ASIC, the ACCC), government agencies, government departments, local authorities, public corporations and so on that are created to perform particular functions of the government or to carry out particular aspects of government business. Private bodies are also under administrative law.

The concept of ministerial responsibility under Australia's Westminster system of democratic government states that every action of a public servant is the action of the minister, and the minister is therefore responsible to the elected parliament for the conduct of that minister's department (¶1-475). While ministers are accountable to parliament individually for the actions of their departments, the Cabinet (all the ministers) is responsible to the parliament and to the electorate for the actions of the government.

It is the function of the executive to administer and manage government policy, and the activities of administrators may be scrutinised and reviewed by a court or tribunal through a branch of constitutional law called 'administrative law'.

Administrative law

Administrative law is the body of principles and rules that govern the functions and powers of public servants and government agencies — it provides judicial and extrajudicial review of the actions of administrative authorities.

Administrative law:

(1) focuses on the subordinate agencies of government and the application of governmental rules. In contrast, constitutional law focuses on the executive, the legislature and the activities of government

(2) targets the exercise of executive functions by public and private authorities and their officers. It is based on common law principles and legislation at federal and state

levels. Australian administrative law includes the decisions of the administrative agencies (eg, ASIC, ACCC) and tribunals, the Ombudsman (below), the activities of the Administrative Review Council, proceedings under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and freedom of information (FOI) legislation (¶1-167).

Examples of administrative law

The main principle of administrative law is that a public or private person or authority may not act beyond its powers — it may not act *ultra vires*. For example:

- The dismissal of the Chief Constable of Brighton without a fair hearing was void.[22]
- An ouster (excluding) of jurisdiction clause that a compensation determination 'shall not be called in question in any court of law' was beyond power (*ultra vires*) and invalid (a nullity) because it did not protect a determination which was outside jurisdiction.[23]
- An anti-pollution power to prohibit the emission of air impurities did not entitle the authority to prohibit open fires. The relevant regulation was invalid as it breached the Act and went beyond the statutory regulation-making power.[24]

Ultra vires extends from excesses of power to defects of power and misuse of power. *Ultra vires* gives rise to important presumptions:

- parliament does not intend to deny people access to the courts
- a tax may not be levied without the authority of parliament
- the privilege against self-incrimination may not be overridden except by authority of parliament, and
- there is a presumption against retrospective legislation.

A person with an administrative complaint has many possible remedies.

Judicial review at common law

By judicial review of administrative action, a court reviews the legality of the actions of the executive (public service). Judicial review is concerned with establishing whether correct procedures were followed and whether the law was correctly interpreted and applied.

Because judicial review at common law does not examine the merits of the administrative decision, and because judicial review cannot guarantee a decision to reverse an administrative decision, the administrative law remedies at common law are not adequate because they do not provide for proper review of questions of law or review on the merits of the decision.

22 *Ridge v Baldwin* [1964] UKHL 2.

23 *Anisminic Ltd v Foreign Compensation Commission* [1968] UKHL 6.

24 *Paull v Munday* (1976) 50 ALJR 551.

Judicial review may indirectly allow the merits of a decision to be reviewed on the grounds of:

- 'unreasonableness' — to make a decision *ultra vires* for being so unreasonable that no reasonable person could be expected to have taken it
- regard to irrelevant considerations or no regard paid to relevant considerations. Case law now tends to place the burden on the administrative decision-maker to show that the decision was based on relevant considerations.

Prerogative remedies

The prerogative writs (prerogative orders) were originally issued by the Crown to make orders to courts and authorities. Now they are available to anyone and include the:

- writ of *certiorari* (quashing order) — an order (writ) from a court for judicial review — to bring the matter before the court
- writ of *prohibition* (prohibiting order) — an order to forbid an act or decision which would be beyond power or *ultra vires*, and
- writ of *mandamus* ('we command'; a mandatory order) — an order to compel the performance of a public duty according to law.

Application of the rules of natural justice

A decision-maker must act fairly, in good faith, in a judicial manner and without bias, and give persons affected an opportunity to present their case.

Procedural fairness

A decision may be invalid if it does not fulfil the common law requirement of 'procedural fairness' — giving a person a chance to present their case — like the rights of a partner being expelled from a partnership (¶10-440).

ASIC has described procedural fairness using seven principles:

(1) the opportunity to be heard
(2) entitlement to a notice
(3) the right to an impartial decision-maker
(4) findings of facts to be made on sound basis
(5) there is no onus of proof
(6) court practice does not apply, and
(7) applying policy and precedents.[25]

Procedural fairness depends on the words of the statute and the particular facts, including the nature of the inquiry, the subject matter, the rules being applied and the interests of the individual as balanced against the 'interests and purposes, whether public

25 Australian Securities and Investments Commission, *Hearings practice manual*, Regulatory Guide 8, 2002, Pt 2, <www.asic.gov.au>.

or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations'.[26]

Procedural fairness includes the requirement to balance the interests of all the parties concerned including third parties.

Court declaration

A court can make a binding declaratory judgment to challenge and to test the validity of acts of public authorities.

The issue of an injunction

This equitable remedy (¶6-410) has moved into administrative law as an order to stop. The question of who may apply for an injunction has been interpreted broadly by the courts, especially in public interest cases. The wide-ranging parallel provision in the Australian Consumer Law (ACL) and in the *Competition and Consumer Act 2010* (Cth) (CCA) is discussed at ¶7-530 and ¶8-810.

Statutory judicial review

In addition to the above, major reforms to administrative law procedures have been brought about by the following legislation:

- *Administrative Decisions (Judicial Review) Act 1977* (Cth), which provides statutory judicial review of Commonwealth administrative decisions. It sets out the entitlement to judicial review of a person aggrieved by a decision covered by the Act, and in so doing limits available remedies. Importantly, it contains a general right to obtain reasons for Commonwealth administrative decisions.
- *Administrative Appeals Tribunal Act 1975* (Cth) (¶1-160).

[¶1-166] Other administrative law remedies: the Ombudsman

Other remedies include the democratic process — involving publicity and other persuasive pressures, questions in parliament, the Ombudsman and freedom of information (FOI: ¶1-167).

Ombudsman

The Commonwealth and all states and territories[27] have appointed Ombudsmen as public watchdogs of the bureaucracy.

The Ombudsman is an independent agency of the government, set up to:

- receive complaints concerning administrative actions of government departments, statutory authorities, universities and more
- investigate complaints
- establish the facts

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26 *Kioa v West* [1985] HCA 81 [31] (Mason J), discussed at (1994) 68 ALJ 297.

27 *Ombudsman Act 1976* (Cth); 1989 (ACT); 2009 (NT); 1974 (NSW); 2001 (Qld); 1972 (SA); 1978 (Tas); 1973 (Vic); *Parliamentary Commissioner Act 1971* (WA).

- express an opinion, and
- recommend the appropriate action.

By making the administration (bureaucracy, executive) more accountable, the Ombudsman can improve administration and make it more responsive and responsible.

The Ombudsman has no power to direct or to order correction of a wrong, although pressure can be exerted through publication of opinions and recommendations to parliament.

The purpose of the Ombudsman's investigation is to see if the action complained of is:

- contrary to law
- unreasonable, unjust, oppressive or discriminatory
- in accordance with a law or practice which may be unreasonable, unjust, oppressive or discriminatory
- based on a mistake of law or fact, or
- otherwise wrong.[28]

As a watchdog and go-between, the Ombudsmen provide an important protection for the citizen and promote better and fairer public administration.

There are at least two private industry-funded 'Ombudsman' schemes which build on the track record of the Ombudsman — the Credit Ombudsman (<www.cosl.com.au>; ¶14-250) and the Financial Ombudsman Service (FOS: ¶16-045).

[¶1-167] Other administrative law remedies: freedom of information (FOI)

Freedom of information (FOI) legislation gives members of the public rights of access to official government information.[29]

Access to government information is essential in a parliamentary democracy.

Our elected government should have nothing to hide from us (maybe with the exception of matters of national security, law enforcement, etc) and should be open and accountable to us. Its actions should not be hidden by secrecy.

An appeals system — which includes a review of administrative decisions on questions of law — is important because it gives the citizen access to information and it provides education and guidance for the administration (decision-makers, public servants), which raises the standard of decision-making.

The aim of FOI is to make the administration responsive to the interests of the persons affected by its decisions.

Australian law has responded to these challenges by establishing administrative review agencies such as the Australian Information Commissioner in Canberra, the Information and Privacy Commission in NSW and equivalents in the states and territories.

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28 *Ombudsman Act 1976* (Cth) s 15(1)(a) (Reports by Ombudsman).

29 *Freedom of Information Act 1982* (Cth); 1989 (ACT); 1991 (SA); 1982 (Vic); 1992 (WA); *Government Information (Public Access) Act 2009* (NSW); *Right to Information Act 2009* (Qld); 2009 (Tas).

[¶1-170] Courts and tribunals: the right of appeal

The hierarchy of courts and tribunals (¶1-060 – ¶1-165) allows for appeals to higher courts (¶2-190).

An appeal is a legal proceeding taken in a higher ('superior') court to review the decision of a lower ('inferior') court on the basis that there was an error. Appeals usually concern questions of law — not questions of fact — and the appeal judges usually review the law, which was applied to the facts by the trial judge in the lower court.

Law v fact

Question of law: does the manufacturer owe a duty of care to a consumer who has *not* bought the ginger beer from the retailer?
Question of fact: was there a snail in the bottle?
Donoghue v Stevenson (¶1-350; ¶4-080)

The right of appeal is a fundamental right, like free speech, *habeas corpus* (you have the body — bring the person to court) and the right to vote.

A person who lost a case (the original defendant) may appeal (and become the appellant) and the original plaintiff may have to defend the original decision (and become the respondent).

The right of appeal can involve several layers of courts and hearings, sometimes including applications to seek leave to appeal.

Costs and delays in appeals

There may be costs and delays in appeals and these raise as concerns:

(1) the time consumed, sometimes several years
(2) the emotional cost and financial costs to the litigant in preparing documentation and argument at each level of the appeal process
(3) the high costs to the taxpayer in providing the judges and court staff, buildings and facilities
(4) the issue of appeal as a weapon, not only for the deep pockets of big corporations, but also for government prosecutors and government departments, such as the ATO, ASIC, ACCC, etc:

> … the right of appeal now, in many instances, has an anti-citizen twist.[30]

An appeal court has the same powers as a court of first instance to decide an issue, but it must respect the findings of fact made by the trial judge who has seen and heard the witnesses. If the trial judge's finding 'depends to any substantial degree on the credibility of the witness', the finding must stand unless it can be shown that the trial judge has:

30 WZ Estey, 'The changing role of the judiciary' (1985) 59 *Law Institute Journal* 1070, 1081.

(1) 'failed to use or has palpably misused his advantage', or
(2) acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence', or which was 'glaringly improbable'.[31]

Miscarriage of justice

'Miscarriage of justice' may be another reason for appeal. This is a common law principle which refers to:

- errors in the procedure of a judicial tribunal, such as a serious departure from the rules of judicial procedure, or
- the failure to provide a fair or proper trial (where the relevant law is correctly explained to the jury and where the rules of procedure and evidence are strictly followed), so that the accused loses a chance of acquittal.

SOURCES OF THE LAW (¶1-180 – ¶1-420)

[¶1-180] Where does the law come from?

The sources of our law are:

- *parliamentary law* — the parliaments of the Commonwealth of Australia in Canberra, the six states and two territories (enacted law), and
- *judge-made law* — the courts, based upon legal principle, legal policy and legal authority (cases, precedents) (unenacted law).

Enacted law (parliamentary law, primary legislation, hard law)

Enacted law is law made by parliament to give effect to some public policy and is known as statute law, legislation or Acts of Parliament.

In addition, parliament, through its statutes, can and does authorise other bodies to make laws known as orders, regulations, rules or by-laws. All of these are known as delegated legislation.

Statute law has the following advantages:

- statute law takes precedence over case law
- a statute can communicate simple and carefully drafted instructions
- parliament can plan for the future, while unenacted case law decisions look to the past through precedents
- statutes can be created, amended, etc, whereas case law is, in theory, bound by the doctrine of precedent (¶1-400).

Enacted law — delegated legislation (subordinate legislation, secondary legislation)

A large amount of legislation (enacted law) is in the form of delegated legislation.

31 *Devries v Australian National Railways Commission* [1992] HCA 41; (1993) 177 CLR 472, 479.

Delegated legislation refers to the rules, regulations and by-laws made by experts — usually government departments and agencies — under the authority of legislation. They include, for example, the Market Integrity Rules made by the Australian Securities and Investments Commission (ASIC: (¶9-380) to help regulate financial markets. Delegated legislation is subject to disallowance by the parliament, and if not, it is signed off by the Governor-General (or by the Governor in the case of state delegated legislation). Commonwealth delegated legislation is registered and made publicly available on the Federal Register of Legislative Instruments at <www.comlaw.gov.au>.

There are two safeguards regarding delegated legislation:

(1) problems arising under delegated legislation can be reviewed by the courts (judicial review: ¶1-165), and

(2) the administrative bodies and departments which parliament authorises to make delegated legislation are under the authority of parliament.

Arguments in favour of delegating powers to pass legislation include:

- parliament's time is saved for important matters of public concern
- it is better to leave regulations relating to technical matters to the specialists in the administrative bodies and departments
- it is faster for specialists to make regulations (delegated legislation) instead of drafting legislation to go through the formal process for passing by parliament.

Arguments against delegating powers to pass legislation include:

- delegation means giving legislative power to the unrepresented and unelected officers of the executive arm of government who are not directly answerable to the electorate (ie, public servants)
- delegated legislation is sometimes hard to find and goes against the proposition that law must be freely accessible
- administrative bodies and departments sometimes have overlapping jurisdictions, and it may not be clear who is responsible.

Soft law (rules)

Soft law refers to administrative quasi-legislation — which includes circulars, codes, codes of ethics, codes of practice, guidance notes, policy statements, practice notes, regulatory guides (eg, from ASIC) and stock exchange rules (eg, ASX). Technically soft law is not legislation because it is not usually made under the authority of parliament — but sometimes soft law is made under the authority of parliament, so sometimes it is loosely called tertiary legislation.

Unenacted law (judge-made law)

Unenacted law is made (handed down, written) by judges in courts. Unenacted law refers to the rules made by judges when they are deciding court cases or giving the reasons for their decisions.

Unenacted law (the common law, case law: ¶1-010) came from the first judges — who were churchmen of the King's court — after the Norman Conquest in 1066. At that time

there was no parliament, and the King supported his judges. The rules they built up have sometimes been added to and modified by parliament.

Judges interpret legislation (enacted law) passed by parliament as the legislator. Judges make law by their judgments (¶1-410).

Judges must follow legal principle and cannot act in an arbitrary way (the rule of law: ¶1-015).

It is natural that similar cases would be decided similarly. The doctrine of precedent says that lower courts must follow the decisions of higher courts (¶1-400).

[¶1-190] Sources of the law illustrated

The sources of the law can be illustrated by examining:

- *a statute (legislation, enacted law)* — the one chosen, the *Acts Interpretation Act 1901* (Cth), is one of the most important pieces of legislation ever passed (¶1-200)
- *a reported court case (unenacted law)* — again, the one chosen — *Donoghue v Stevenson* — is one of the most important case law decisions ever written (¶1-350 – ¶1-410).

[¶1-200] Sources of the law: (1) legislation

Legislation: Acts Interpretation Act

The *Acts Interpretation Act 1901* (Cth) sets out some rules on how to interpret statutes, and there is an equivalent statute in each jurisdiction.[32]

Their aim is to assist both the writer of legislation (staff at the Office of the Parliamentary Counsel/Parliamentary Draftsman where the statutes are written) and the reader of legislation with definitions of common words, commencement dates, etc.

These interpretations are helpful, but they must be read with the principles evolved by the courts and discussed below at ¶1-490 – ¶1-550.

Legislation: jurisdiction

- Commonwealth (Australian, federal, national) legislation is passed by the Parliament of the Commonwealth of Australia in Canberra.
- The states and territories pass state and territory legislation.
- All parliaments also pass regulations under the authority of the legislation as a 'subset' to the legislation.
- Local government passes 'statutes' in the form of council by-laws (¶1-180).

Legislation: short title

The short title is the name which identifies the Act such as the Contracts Review Act. It may or may not be debated by the parliament, and it may help statutory interpretation if there is ambiguity to help identify the general purpose of the Act (¶1-550).

32 Also *Legislation Act 2001* (ACT); *Interpretation Act 1987* (NSW); *1978* (NT); *1984* (WA); *Acts Interpretation Act 1954* (Qld); *1915* (SA); *1931* (Tas); *Interpretation of Legislation Act 1984* (Vic); interpretation of legislation is discussed at ¶1-490 – ¶1-550. Major amendments to the Commonwealth Act in 2011: see, eg, J Dharmananda, 'The Commonwealth strikes back: clarifying amendments to the Acts Interpretation Act 1901 (Cth)' (2011) 35 *Australian Bar Review* 116.

The Acts Interpretation Act does not include the short title as part of an Act (s 13).

Legislation: preamble and objects clause

Legislation sometimes contains a parliamentary statement setting out the reasons for making the Act, usually commencing 'Whereas …'.

A preamble may refer to an agreement or some background which gave rise to the Act.

Legislation sometimes contains an 'objects clause' which sets out the purpose and the objects of the legislation, such as the Preamble to the US Constitution (including 'to promote the general welfare').

The legal effect of a preamble and an objects clause is similar to that of the long title of an Act. In some jurisdictions, the enacting words are to be read as part of the Act.[33]

Legislation: long title

The purpose of an Act is often contained in the long title, and the long title may be referred to as an aid in the interpretation of the Act, so long as it does not contradict clear and unambiguous language contained in the Act.[34]

Legislation: enacting words or words of assent

The enacting words usually come after the title and the preamble, and before the first section of the Act.

> If an Act of Parliament be penned by assent of the King, and of the Lords Spiritual and Temporal, and of the Commons, or, it is enacted by authority of Parliament, it is a good Act … but if an Act be penned, that the King, with the assent of the Lords, or with the assent of the Commons, it is no Act of Parliament, for three ought to assent to it.[35]

In some jurisdictions, the enacting words are to be read as part of the Act.[36]

These words also contain a useful reminder of the source of the Act, namely, *ourselves* through our sovereign and our elected representatives. Law is man-made, and is made by us for us.

Legislation: headings

The heading might help with statutory interpretation if the legislation is not clear, but it will not take precedence over clear language in the section which is inconsistent with the heading.

Some interpretation legislation provides that the headings of the Chapters, Parts, Divisions or Subdivisions of the Act form part of the Act and can be considered in the interpretation of the legislation.[37]

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33 Eg, *Acts Interpretation Act 1901* (Cth) s 13(2)(b).

34 Eg, *Acts Interpretation Act 1901* (Cth) s 13(2)(a).

35 *Prince's case* [1606] EWHC Ch J6 (Lord Coke CJ).

36 Eg, *Acts Interpretation Act 1901* (Cth) s 13(2)(c).

37 Eg, *Acts Interpretation Act 1901* (Cth) s 13(2)(d).

Legislation: sections, subsections and paragraphs

Acts are divided into consecutively numbered sections usually only of one sentence. This is done for convenience, and the order and positioning might help with statutory interpretation (¶1-550). Sections may be divided into numbered subsections, and the subsections into paragraphs (numbered (a), (b), (c), etc) which may be divided into subparagraphs ((i), (ii), (iii), etc) and sub-subparagraphs (A), (B), (C), etc.[38]

Legislation: marginal notes

Marginal notes (sometimes called 'sidenotes') give a brief indication or summary of the subject matter of the section. They are not usually considered by parliament and they are usually not to be read as part of the Act.[39]

Sometimes marginal notes contain legislative history.

In legislation published by commercial publishers, marginal notes are sometimes reproduced in bold type in the first line of the section to which they relate.

Legislation: definitions

Acts often contain definitions of words used in the Act itself. Definitions may be grouped into a separate section. In the *Corporations Act 2001* (Cth) this section is called the 'Dictionary'.

Legislation: numbering of statutes

Statutes are identified by name, and they are sometimes identified by number as well. Numbering varies with jurisdictions. Legislation passed in a calendar year is numbered in the order of which it receives Royal Assent, such as No 83 of 2014 (*Clean Energy Legislation (Carbon Tax Repeal) Act 2014* (Cth)).

The Acts Interpretation Act was the second Act ever passed by the Commonwealth Parliament, first established in 1901. (Act No 1 of 1901 was the *Consolidated Revenue Act 1901* (Cth)).

Acts of the UK were cited by reference to the year of the reign until 1962, and citations would therefore appear as, eg, '1 Edw 8' (session held in the first year of the reign of King Edward VIII), 'c 3' (chapter 3), 's 1' (section 1).[40]

Legislation: deeming provision

A deeming provision lets the drafter of legislation confirm a particular meaning or interpretation. *To deem* means 'to count as' or 'to be taken as'. For example, s 19 of the Acts Interpretation Act deems (confirms) that the 'Minister' includes the acting minister.

At its most extreme, a deeming provision could provide what has been described as a statutory fiction, by deeming for the purposes of the Act, that white is black.

Legislation: commencement date

In earlier times (ie, from a UK statute of 1793) the law was that a statute operated from the day it received Royal Assent, and that is still a common rule.

38 The *Income Tax Assessment Act 1936* (Cth) gives many examples of the complexities of numbering: eg, s 128NBA (7)(b)(ii).

39 Eg, *Acts Interpretation Act 1901* (Cth) s 13 (Material that is part of an Act).

40 *His Majesty's Declaration of Abdication Act 1936* (UK).

Section 2B of the Acts Interpretation Act (added in 2011) contains a definition of 'commencement' of an Act of Parliament to mean 'the time at which the Act or provision comes into operation'.

Section 3A of the Acts Interpretation Act (added in 2011) provides that an Act (apart from an Act to alter the Constitution) will commence on the 28th day after it receives the Royal Assent (by the Queen or by her representative, the Governor General).

Some legislation provides that it will commence on a date to be set out by 'proclamation' (ie, usually in the *Gazette*).

[¶1-350] Sources of the law: (2) case law — *Donoghue v Stevenson*

Let us examine a reported court case as an example of unenacted law or case law (¶1-190).

Donoghue v Stevenson is the case which sets out the liability of a manufacturer in the tort of negligence (¶4-060) to the ultimate consumer of its product where there was no contract between them.

This decision changed the law as it then stood, and it laid the foundations for the whole of the modern law of negligence — a law which includes products liability (¶7-206ff), professional negligence (¶4-230ff) and motor accident law.

Case example

***Donoghue v Stevenson* [1932] UKHL 100**

On a summer evening on 26 August 1928, at about 9 pm, Mrs May Donoghue, a shop assistant from Glasgow, and a friend stopped at Mr Francis Minchella's Wellmeadow Cafe in Paisley, a town about 20 km from Glasgow.

It was Mrs Donoghue's friend who ordered ice cream and ginger-beer for her; it was Mr Minchella who poured the drink — with decomposed snail — into the glass for Mrs Donoghue.

Mrs Donoghue, who suffered severe shock, and later gastroenteritis, mental depression, and loss of wages following time off work, sued the defendant, David Stevenson, Aerated-Water Manufacturer of Paisley, for £500 plus interest as damages and £50 costs, alleging negligence. Mr Stevenson's defence was that no reasonable cause of action was disclosed, ie, that no law existed to support the plaintiff's claim.

The legal ramifications of Mrs Donoghue's success are discussed at ¶4-080ff.

The case was decided in her favour by a majority of the five members of the House of Lords. In her favour were Lord Atkin[41] and Lords Thankerton and Macmillan; against her were Lords Buckmaster and Tomlin. With her victory in the House of Lords on the preliminary legal point, Mrs Donoghue was in a position to take her case back to the lower court for proof of the facts. Before this was possible, Mr Stevenson died and it is reported that his executor settled the case for £200.[42]

41 James Richard (Dick) Atkin was born to Irish/Welsh parents in Brisbane in 1867. His family returned to Wales when he was four. He became a barrister in the UK in 1891, High Court judge 1913–1919, Lord Justice of Appeal 1919–1928, and was appointed a Lord of Appeal in Ordinary and a Life Peer in 1928. *Donoghue v Stevenson* followed four years later. He died in 1944.

42 Its 80th anniversary is detailed in J Plunkett, 'Snail in a bottle leaves trail' (2012) 86(7) *Law Institute Journal* 56. There are many links at <www.en.wikipedia.org/wiki/Donoghue_v_Stevenson>.

The case, which appeared in the English Law Reports in 1932, is extracted in ¶1-360, with some discussion of the style and method of law reporting.

What *Donoghue v Stevenson* stands for — its *ratio decidendi* — is discussed at ¶1-380.

[¶1-360] Case law: analysis of a law report

The extracts on the following pages are reproduced from the important case of *Donoghue v Stevenson* as an example of unenacted case law and how it is reported.

[¶1-370] Case law: reporting law cases

Law is made up of enacted law (statutes, legislation, Acts of Parliament) and unenacted law (judgments or cases). Some judgments are delivered orally in open court and are occasionally televised or streamed on the internet (eg, Federal Court). The most important judgments are researched and written ('reserved').[43]

One aspect of the rule of law (¶1-015) is that all people are equal before the law. To help achieve this, the law must be available and easily accessible.

Judgments could not make law if they were not known — they are made known by law reporting.[44] Early Australian reports were published privately, usually by lawyers, before official (authorised or semi-authorised) reports started in the 1860s.

There are now many series of Australian law reports. These include the authorised reports of the various courts by the Incorporated Councils of Law Reporting, which are published either by the council itself or by a commercial publisher on behalf of the council.[45]

Commercial publishers also publish law reports. Increasingly, law reporting is published electronically on the internet, and CD-ROM reports, statutes and databases.[46]

The final say on Australian law reporting is the free online database published by the Faculties of Law at the University of Technology Sydney and University of New South Wales on <www.austlii.edu.au>. It was established in 1995 and has almost one million hits per day. It also has free links to world legal resources.

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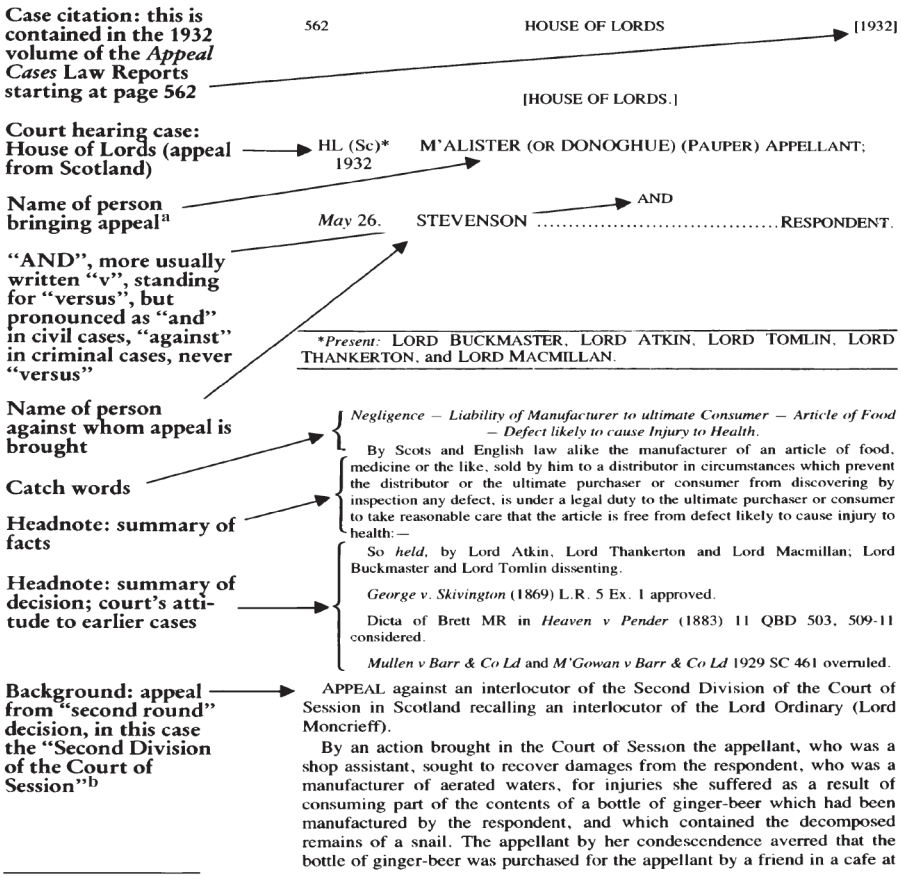
43 The judgment in *The Bell Group Ltd (in liq) v Westpac Banking Corporation* (No 9) [2008] WASC 239 was 2,643 pages, one million words, 404 days in court, judgment against the banks for $1.58b to the liquidators of The Bell Group and a court order of $82.5m in legal costs. A few years later, commentators can say that judgments need not be long and should focus on the real issues: 'Judgment writing' (2014) 88 ALJ 292.

44 Law reporting in the common law system began in England with the *Year Books* (written in 'law-French': ¶3-040) in the 14th century. These were followed by the *nominate reports*, a series of reports published privately by judges, barristers and other writers, and they were superseded by semi-official or 'authorised' law reports.

45 Eg, 'The danger of relying on unauthorised law reports' (1998) 72 ALJ 498 (incorrect word in WLR removed in revision published in the authorised reports (Appeal Cases — (AC)).

46 Eg, 'High quality law reporting is the building block on which the common law depends', *Current issues* (2000) 74 ALJ 415. See, eg, N Haxton, 'Law reporting: rebutting some assumptions' (2006) 80 ALJ 341.



a In Scotland, a married woman does not give up her unmarried name for legal purposes, although she takes her husband's name. In litigation, her unmarried name is placed first, and her married name is given as an alternative. The correct citation of the case is by the married name. Mrs Donoghue, the original plaintiff, is now called the appellant; Stevenson (the original defendant), the respondent. "Pauper" approximates a person suing today with legal aid. To sue *in forma pauperis* meant suing in the form of a pauper without liability for legal costs.

b This is in effect the Scottish High Court. A decision of a Divisional Court indicates that the Court comprised two or more judges. The appeal was an appeal from the "first round", the trial judge Lord *Moncrieff*. The background of the case was:

First round: trial judge (Lord *Moncrieff);* Mrs Donoghue (plaintiff) v Stevenson (defendant); judgment for plaintiff.

Second round: appeal to High Court (Court of Session); Stevenson (appellant) v Donoghue (respondent); judgment for appellant Stevenson.

Third round: appeal to House of Lords; Donoghue (appellant) v Stevenson (respondent); judgment for appellant Donoghue.

Paisley, which was occupied by one Minchella; that the bottle was made of dark opaque glass and that the appellant had no reason to suspect that it contained anything but pure ginger-beer; that the said Minchella poured some of the ginger-beer out into a tumbler, and that the appellant drank some of the contents of the tumbler; that her friend was then proceeding to pour the remainder of the contents of the bottle into the tumbler when a snail, which was in a state of decomposition, floated out of the bottle; that as a result of the nauseating sight of the snail in such circumstances, and in (p 563) consequence of the impurities in the ginger-beer which she had already consumed, the appellant suffered from shock and severe gastro-enteritis. (p 564) The appellant further averred that the ginger-beer was manufactured by the respondent to be sold as a drink to the public (including the appellant); that it was bottled by the respondent and labelled by him with a label bearing his name; and that the bottles were thereafter sealed with a metal cap by the respondent. She further averred that it was the duty of the respondent to provide a system of working his business which would not allow snails to get into his ginger-beer bottles, and that it was also his duty to provide an efficient system of inspection of the bottles before the ginger-beer was filled into them, and that he had failed in both these duties and had so caused the accident.

Arguments of counsel for appellant consumer: not all law reports provide a summary of the arguments of the lawyers appearing in the reported case, yet these arguments often lay the foundation of the court's decision

The respondent objected that these averments were irrelevant and insufficient to support the conclusions of the summons.

The Lord Ordinary held that the averments disclosed a good cause of action and allowed a proof.

The Second Division by a majority (the Lord Justice-Clerk, Lord Ormidale, and Lord Anderson; Lord Hunter dissenting) recalled the interlocutor of the Lord Ordinary and dismissed the action.

1931. Dec 10, 11. *George Morton KC* (with him *WR Milligan*) (both of the Scottish Bar) for the appellant. The facts averred by the appellant in her condescendence disclose a relevant cause of action. In deciding this question against the appellant the Second Division felt themselves bound by their previous decision in *Mullen v Barr & Co Ld* (1929 SC 461). It was there held that in determining the question of the liability of the manufacturer to the consumer there was no difference between the law of England and the law of Scotland — and this is not now disputed — and that the question fell to be determined according to the English authorities, and the majority of the Court (Lord Hunter dissenting) were of opinion that in England there was a long line of authority opposed to the appellant's contention. The English authorities are not consistent, and the cases relied on by the Court of Session differed essentially in their facts from the present case. No case can be found where in circumstances similar to the present the Court has held that the manufacturer is under no liability to the consumer. The Court below has proceeded on the general principle that in an ordinary case a manufacturer is under no duty to any one with whom he is not in any contractual relation. To this rule there are two well known exceptions: (1.) where the article is dangerous per se, and (2.) where the article is dangerous to the knowledge of the manufacturer, but the appellant submits that the duty owed by a manufacturer to members of the public is not capable of so strict a limitation, and that the question whether a duty arises independently of contract depends upon the circumstances of each particular case.

Precedent: English and Scottish law the same

... yet English authorities are not consistent

Facts in present case are different

Law at date of case required a contract between consumer and manufacturer as basis of liability ... with two exceptions

Arguments of counsel for respondent manufacturer:[c] ... rejects a third exception to principle of manufacturer's liability to consumer

(p 565) *WG Normand*, Solicitor-General for Scotland (with him *JL Clyde* (of the Scottish Bar) and *T Elder Jones* (of the English Bar)) for the respondent. In an ordinary case such as this the manufacturer owes no duty to the consumer apart from contract. Admittedly the case does not come within either of the recognized exceptions to the general rule, but it is sought to introduce into the law a third exception in this particular case — namely, the case of goods

c The appearance of the Solicitor-General does not indicate government intervention in a public interest suit. Until 1946, the Scottish Solicitor-General retained the right to a private practice: Edwards, JLJ, *The Attorney-General, Politics and the Public Interest*, London, Sweet & Maxwell, 1984, pp 290-292.

intended for human consumption sold to the public in a form in which investigation is impossible.

(p 566) *George Morton KC* replied.

The House took time for consideration.

Judgment → 1932. May 26. LORD BUCKMASTER (read by LORD TOMLIN).

Date of judgment (note, date of hearing of appeal, 10 and 11 December 1931)

(p 576) So far, therefore, as the case of *George v Skivington* (LR 5 Ex 1) and the dicta in *Heaven v Pender* (11 QBD 503, 509) are concerned, it is in my opinion better that they should be buried so securely that their perturbed spirits shall no longer vex the law.

(p 577) The principle of tort lies completely outside the region where such considerations apply, and the duty, if it exists, must extend to every person who, in lawful circumstances, uses the article made. There can be no special duty attaching to the manufacture of food apart from that implied by contract or imposed by statute.

(p 578) LORD ATKIN. My Lords, the sole question for determination in this case is legal: Do the averments made by the pursuer in her pleading, if true, disclose a cause of action? I need not restate the particular facts.

Scots for plaintiff →

(p 579) I do not think a more important problem has occupied your Lordships in your judicial capacity: important both because of its bearing on public health and because of the practical test which it applies to the system under which it arises.

The law of both countries appears to be that in order to support an action for damages for negligence the complainant has to show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury. In the present case we are not concerned with the breach of the duty; if a duty exists, that would be a question of fact which is sufficiently averred and for present purposes must be assumed. We are solely concerned with the question whether, as a matter of law in the circumstances alleged, the defender owed any duty to the pursuer to take care.

It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The Courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. The result is that the Courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or

(p 580) landlord, customer, tenant, stranger, and so on. In this way it can be ascertained at any time whether the law recognizes a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist. To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials. The attempt was made by Brett MR in *Heaven v Pender* (11 QBD 503, 509), in a definition to which I will later refer. As framed, it was demonstrably too wide, though it appears to me, if properly limited, to be capable of affording a valuable practical guide.

At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of ''culpa'', is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour

becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine of *Heaven v Pender* (11 QBD 503, 509).

(p 599) My Lords, if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

It is a proposition which I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense. I think that this appeal should be allowed.

LORD TOMLIN. My Lords, I have had an opportunity of considering the opinion (which I have already read) prepared by my noble and learned friend, Lord Buckmaster. As the reasoning of that opinion and the conclusions reached therein accord in every respect with my own views, I propose to say only a few words.

First, I think that if the appellant is to succeed it must be upon the proposition that every manufacturer or repairer of any article is under a duty to every one who may thereafter legitimately use the article to exercise due care in the manufacture or repair. It is logically impossible to stop short of this point. There can be no distinction between food and any other article. Moreover, the fact that an article of food is sent out in a sealed container can have no relevancy on the question of duty; it is only a factor which may render it easier to bring negligence home to the manufacturer.

(p 600) I am unable to explain how the cases of dangerous articles can have been treated as "exceptions" if the appellant's contention is well founded. Upon the view which I take of the matter the reported cases — some directly, others impliedly — negative the existence as part of the common law of **(p 601)** England of any principle affording support to the appellant's claim, and therefore there is, in my opinion, no material from which it is legitimate for your Lordships' House to deduce such a principle.

Order of the court →

Interlocutor of the Second Division of the Court of Session in Scotland reversed and interlocutor of the Lord Ordinary restored. Cause remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment. The respondent to pay to the appellant the costs of the action in the Inner House and also the costs incurred by her in respect of the appeal to this House, such last mentioned costs to be taxed in the manner usual when the appellant sues in forma pauperis.

Lords' Journals, May 26, 1932.

Agents for the appellant: *Horner & Horner, for WG Leechman & Co, Glasgow and Edinburgh.*

Solicitors — London agents for Glasgow and Edinburgh principals →

Agents for the respondent: *Lawrence Jones & Co, for Niven, Macniven & Co, Glasgow, and Macpherson & Mackay, WS, Edinburgh.*

[¶1-380] Case law: the *ratio decidendi*/proposition of a case

How to write a judgment

Like students' essays, judgments written by people who are judges can vary from outstanding to a bare pass or worse.

Judgments are sometimes hard to read because of the traditional layout — they usually start with the facts, then they state the law, then they apply the law to the facts, and then they conclude. That is why some readers start at the end of the judgment.

The ideal judgment should be like a good student essay — or lawyer's letter — and start with a short statement of the issue, the conclusion (or a summary of the conclusion), the facts, the application of the law to the facts and then a final conclusion with a restatement or further elaboration. Having the conclusion up-front would give the context of the rest of the judgment.[47]

Judgments are written in formal language because they make the law. Sometimes there are light moments in judgments, like this opening from a drug case in the US Supreme Court, which flashed around the world on the internet:

> North Philly, May 4, 2001. Officer Sean Devlin, Narcotics Strike Force, was working the morning shift. Undercover surveillance. The neighbourhood? Tough as a three-dollar steak. Devlin knew. Five years on the beat, nine months with the Strike Force. He'd made fifteen, twenty drug busts in the neighbourhood.
>
> Devlin spotted him: a lone man on the corner …[48]

Ratio decidendi

The *ratio decidendi* (Latin for 'the reason for the decision') is what the case stands for (its proposition). This makes the case a precedent for the future.

Working out the *ratio* is not always an easy task, and it will usually involve:

- separating the unimportant facts from the important facts
- determining which precedents were applied and which were overlooked or overruled, and
- reading the case in the light of interpretations of the case in later decisions.

Determining the *ratio decidendi* may be further complicated if no reasons were given, or if differing reasons were given, or if the important facts were not separated from the unimportant facts. Furthermore, how far can one generalise from one decision?

What is the ratio of *Donoghue v Stevenson*?

What exactly did *Donoghue v Stevenson* (¶4-080) decide?

Is it only a case about snails? Drinks? Drink manufacturers? Manufacturers? Retailers? Or any person in a relationship with any other person requiring the exercise of a duty of care?

47 P Butt, 'The structure of judgments', *Letter to the Editor* (2009) 83 ALJ 75.

48 *Pennsylvania v Dunlap* 555 US (2008) (Roberts CJ).

Professor Julius Stone QC raised the following problems in determining the actual *ratio decidendi* of this case:[49]

> The assumption that 'the material facts' will thus yield only one *ratio* would imply, if true, that there is only one set of such 'material facts' which is to be related to the holding. And this immediately confronts the theory with a main difficulty. This is that, apart from any explicit or implicit assertion of materiality by the precedent court, there will always be more than one, and indeed many, competing versions of 'the material facts'; and there will therefore not be merely one but many *rationes*, any of which will explain the holding on those facts, and no one of which therefore is strictly *necessary* to explain it. For apart from any selection by the precedent court, all the logical possibilities remain open; and in the logician's sense it is possible to draw as many general propositions from a given decision (each of which will 'explain' it) as there are possible combinations of distinguishable facts in it. It is in these terms that, it has been said, the question — What single principle does a particular case establish? is 'strictly nonsensical, that is, inherently incapable of being answered'.
>
> If the *ratio* of a case is deemed to turn on the facts in relation to the holding, and nine fact-elements (a)–(i) are to be found in the report, there may (so far as logical possibilities are concerned) be as many rival *rationes decidendi* as there are possible combinations of distinguishable facts in it. What is more, each of these fact-elements is usually itself capable of being stated at various levels of generality, all of which embrace 'the fact' in question in the precedent decision, but each of which may yield a different result in the different fact-situation of a later case. The range of fact-elements of *Donoghue v Stevenson*, standing alone, might be over-simplified into a list somewhat as follows, each fact being itself stated at alternative levels.

(a) Fact as to the Agent of Harm

Dead snails, *or* any snails, *or* any noxious physical foreign body, *or* any noxious foreign element, physical or not, *or* any noxious element.

(b) Fact as to Vehicle of Harm

An opaque bottle of ginger-beer, *or* an opaque bottle of beverage, *or* any bottle of beverage, *or* any container of commodities for human consumption, *or* any container of any chattels for human use, *or* any chattel whatsoever, *or* any thing (including land or buildings).

49 J Stone, *Legal System and Lawyers' Reasonings* (Sydney, Maitland Publications Pty Ltd, 1968) 269–270.

(c) Fact as to Defendant's Identity

A manufacturer of goods nationally distributed through dispersed retailers, *or* any manufacturer, *or* any person working on the object for reward, *or* any person working on the object, *or* anyone dealing with the object.

(d) Fact as to Potential Danger from Vehicle of Harm

Object likely to become dangerous by negligence, or whether or not so.

(e) Fact as to Injury to Plaintiff

Physical personal injury, *or* nervous or physical personal injury, *or* any injury.

(f) Fact as to Plaintiff's Identity

A Scots widow, *or* a Scotswoman, *or* a woman, *or* any adult, *or* any human being, *or* any legal person.

(g) Fact as to Plaintiff's Relation to Vehicle of Harm

Donee of purchaser from retailer who bought directly from the defendant, *or* the purchaser from such retailer, *or* the purchaser from anyone, *or* any person related to such purchaser or donee, *or* other person, *or* any person into whose hands the object rightfully comes, *or* any person into whose hands it comes at all.

(h) Fact as to Discoverability of Agent of Harm

The noxious element being not discoverable by inspection of any intermediate party, *or* not so discoverable without destroying the saleability of the commodity, *or* not so discoverable by any such party who had a duty to inspect, *or* not so discoverable by any such party who could reasonably be expected *by the defendant* to inspect, *or* not discoverable by any such party who could reasonably be expected *by the court or a jury* to inspect.

(i) Fact as to Time of Litigation

The facts complained of were litigated in 1932, *or* any time before 1932, *or* at any time.'

[¶1-390] Case law: *obiter dicta*/non-binding observations of a case

In addition to the *ratio decidendi* (the proposition: ¶1-380) of a case, the judgment may contain observations or statements by the judge which have less force than the actual ruling in the case. These are known as *obiter dicta* (sayings by the way), often abbreviated as 'dicta'. A judge can hypothesise in dicta, and can also raise examples and comparisons in dicta. Because dicta are observations, they are not binding as precedents.

For example, the views of the judges in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[50] (¶4-240) on the existence of liability for negligent advice were said *obiter* because the disclaimer clause in that case stopped liability from being imposed on the bank which gave the negligent advice. This announcement by the judges that liability would extend to negligent advice in the right circumstances was applied three years later.[51]

The *obiter* of Denning LJ (in dissent) in the forerunner to *Hedley Byrne* shows the challenges for the judge as a law reformer:[52]

> This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress in our law, and it has always, or nearly always, been rejected. If you read the great cases … you will find that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed.

[¶1-400] Case law: legal cases as precedents

A precedent is a previous case which is used as an example (principle, authority) for later cases:

- in law, a precedent (the *ratio decidendi* of a previous case decision: ¶1-380) will be used as an authority for deciding a later legal case which involves a similar set of facts, and
- a judge who does not apply a relevant precedent is legally 'wrong' and the judge's decision may be *reversed* if there is an appeal to a higher court. A decision which does not follow precedent may be *overruled* if there is an appeal to another court of the same or higher status in the court hierarchy (¶1-060ff).

An appeal (¶1-170) which raises the correctness of a precedent may lead to the precedent being modified (distinguished, clarified, confined, refined) due to further research and analysis, or new developments, such as new approaches arising with the passage of time.

A court lower in the court hierarchy is bound to follow a precedent, yet may strongly *disapprove* of the decision.

However, the law is not stagnant and unchanging, and it does evolve over time. Some attitudes change. Some precedents fade over time. If this did not happen, the law would be 'bound to the morality and culture of a past age'.[53]

Precedents can be *distinguished* or limited in application to perhaps the identical facts. A later court could have limited *Donoghue v Stevenson*[54] to facts only involving snails in

50 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] UKHL 4.

51 *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850.

52 *Candler v Crane, Christmas & Co* [1951] 2 KB 164, 178; ¶4-240.

53 Justice Young, 'The aging of precedent', *Current issues*, (1997) 71 ALJ 483, 484.

54 *Donoghue v Stevenson* [1932] UKHL 100; ¶1-350, ¶1-360, ¶4-080.

ginger-beer bottles instead of applying it to the many circumstances where it has been applied.

If a precedent is thought to be wrong, it will be applied to cases raising exactly the same issue. If a precedent is thought to be correct, the lightest *obiter dictum* may be important.

Binding or persuasive precedents

Precedents may be:

- *binding* — a binding precedent is the *ratio* of a case decided by a court of a higher level in the court hierarchy. The Federal Court of Australia, for example, is bound by decisions of the High Court
- *persuasive* — a persuasive precedent does not bind the court but can influence its decision. This is how decisions of overseas courts (eg, the USA and Europe) can influence Australian law, but they are not binding precedents in Australia. In the words of Kirby J:[55]

> I was insistent that the Court should look beyond the traditional English sources of judge-made law. In an early case I tried this out on Mr RP Meagher QC, telling him that I had seen relevant authority in a recent decision of the Supreme Court of Iowa. His immortal response was: 'Your Honour is such a tease.' But nothing is stable in this uncertain world. He has been known of late to cite international human rights norms in support of his opinions. I am now patiently waiting for him to use feminist legal theory to overrule Lord Eldon.

[¶1-410] Case law: law-making by judges

Because of the separation of powers in the Constitution among (1) the legislature (parliament), (2) the executive (administration) and (3) the judicature (judges) (¶1-490), the constitutional model says that parliament makes law (enacted law, statutes, legislation and Acts of Parliament) and judges interpret the law that parliament makes (unenacted law and case law).

Sometimes it is said that judges do not make law — they only 'state' (declare) it — but this is not demonstrated by the lawmaking in so many cases — like in *Donoghue v Stevenson* (¶1-350; ¶4-080).

Does lawmaking by judges replace parliament?

Courts recognise that judges, as well as parliament, make law:[56]

> [26] The argument that judicial alteration of judge-made law is usurpation of Parliament's role is untenable. The fiction that 'the common law has never changed but is only declared by the judges' (see Blackstone, *Commentaries on the Laws of England*, vol 1, 15th ed 1809, pp 68–69) and that what might appear to be alterations are only corrections of judicial misunderstanding of the common law is a notion which should not be regarded seriously …

55 P Kirby, *Farewell speech*, Court of Appeal, 2 February 1996, reported (1996) 70 ALJ 271, 272.

56 *State Government Insurance Commission (SA) v Trigwell* [1979] HCA 40 [26] (Murphy J) (edited).

> [27] Some have accepted Blackstone's 'fiction' as a fundamental proposition. But he admitted, and this is sometimes overlooked, that a judge in a common law system may rightly refuse to follow a precedent which is absurd, contrary to reason, or plainly inconvenient … The virtue of the common law is that it can be adapted day by day through an inductive process which will achieve a coherent body of law. The legislatures have traditionally left the evolution of large areas in tort, contract and other branches of the law to the judiciary on the assumption that judges will discharge their responsibility by adapting the law to social conditions. It is when judges fail to do this that Parliament has to intervene. The extreme case is where the judiciary recognizes that a rule adopted by its predecessors was either unjust or has become so and yet still maintains it, suggesting that the legislature should correct it. This is the nadir of the judicial process. The results of legislative intervention often produce difficulties … because legislation does not fit easily with 'the seamless fabric of the common law'.
>
> [28] Before *Donoghue v Stevenson*, there were many areas in which it could have been said that it was 'settled' law that there was no liability in negligence … In 1932, *Donoghue v Stevenson* unsettled them all … *Donoghue v Stevenson* itself, which established the products liability of manufacturers, is a prime example of reversal without Act of Parliament of 'settled' common law.

[¶1-420] Sources of the law: (3) Law Reform Commissions, inquiries, reports

A new law or a change to the law may come about from a recommendation after planned and systematic research by a government law reform commission or inquiry.

There are law reform commissions in all jurisdictions.

For example, the Australian Law Reform Commission (ALRC) (established in 1975) has led the way in areas such as criminal investigation, privacy, sentencing of federal offenders and, of special importance in Australian business law, manufacturers' liability (¶7-215), insolvency (¶13-558) and insurance (¶17-035).

Law reform commissions in Australia are very active, and their work is detailed in the periodical *ALRC Reform Journal* published by the ALRC.

Royal Commissions, parliamentary committees, review committees and inquiries often lead to new laws and procedures.

There are many examples of new laws in the business law area resulting from the work of committees of inquiry, such as the Senate Committee on the national companies scheme (1987: ¶9-370), the Rae Committee on national stock exchange regulation (1974), the Wallis Committee on financial regulation (1997), the Ipp Committee on the tort law crisis (2002: ¶4-061), the Ripoll Committee which gave us the Future of Financial Advice reforms in 2012 (¶16-060), and the Cameron and Milne Committee review of insurance which led to big changes to insurance law in 2013 (2004: ¶17-035).

The Companies and Markets Advisory Committee (and its predecessors going back to 1984: ¶9-380) has researched many difficult areas and has been responsible for some important changes to the law.

These commissions and committees usually hold hearings and consult widely in the process of changing and reforming the law. Their work promotes the democratic process of law-making and law reform, and in so doing leads to further important demystification of the law.

LEGAL PROCEDURE (¶1-425 – ¶1-444)

[¶1-425] Using the courts

Courts and tribunals are open to any person — but only a few disputes go to court.

> The cost and delays involved in the litigation process are notorious. Fortunately, only a small proportion of proceedings commenced actually go to trial and judgment. The great majority is settled one way or the other. As a general principle fair and appropriate settlements are encouraged to reduce the burden of litigation on both public and private resources. Courts are frequently asked to play their part by accepting formal undertakings or making orders by consent which prohibit parties from certain conduct or require them to do certain things. Sometimes they are asked to impose agreed pecuniary penalties. In carrying out those functions, Courts are conscious of the public interest in the settlement of cases. They must also be conscious, however, that the laws they apply are public laws. It is in the public interest that, in considering agreements between parties requiring orders of a Court, the Court does not act as a mere rubber stamp. What is proposed must always be scrutinised to determine whether undertakings or consent orders are within power and are appropriate. There is sometimes a tension between these components of the public interest …[57]

The high cost (financial and emotional) is a deterrent to enforcement of legal rights for some individuals, but Alternative Dispute Resolution (ADR; ¶1-441), legal aid, Australia's modified contingency fee system and class actions help provide access to the law.

In civil proceedings, action is taken by the plaintiff (P) against the defendant (D).

In criminal proceedings, the Crown on behalf of the state prosecutes the accused or the defendant (¶2-140).

If there is an appeal, the loser (who becomes the appellant) appeals to a higher court against the original plaintiff (the respondent) (¶1-170; ¶2-190).

[¶1-430] Civil procedure

The aim of civil proceedings (a civil law case, civil action) is to provide compensation to the plaintiff for the act or omission by the defendant. Civil proceedings such as debt recovery (¶1-435) — unlike criminal proceedings — are not to punish the guilty.

First try to settle: *Civil Dispute Resolution Act 2011* (Cth)

The *Civil Dispute Resolution Act 2011* (Cth) (CDR Act) requires the parties to a legal dispute and their lawyers to go from being adversarial to being more sensible. For example, the Act requires the applicant to file with the court a 'genuine steps statement' setting out what

57 *ACCC v Real Estate Institute of Western Australia Inc* [1999] FCA 18 [3] (French J).

positive steps the parties took to try to resolve their dispute themselves before they started litigation — or if they have not, the reasons why they did not try to resolve the dispute. Failure to comply will not invalidate the proceedings, but it may influence the judgment.

The Commonwealth Government hopes that these 'pre-action protocols' in the CDR Act will speed up the development of an ADR (¶1-441) culture in the legal profession, and that they may be paralleled by the states and territories.

Starting a civil case

(1) A civil action is started by the plaintiff issuing a writ (summons, statement of claim). This requires the defendant to appear in court to answer the case of the plaintiff. The writ may include the plaintiff's statement of claim (the plaintiff's case).

If the defendant does not respond to the writ, there may be a court order in favour of the plaintiff against the defendant (a default judgment).

(2) The document starting the proceedings must be 'served' on the defendant, meaning that a copy is handed to the defendant personally, or a copy may be left at the defendant's home, business, etc, with a responsible person.

Service may be more indirect, such as service by registered mail, or newspaper advertisement, or service on the defendant's solicitor. This is called 'substituted service'.[58]

The defence

(3) In response to the writ and statement of claim, the defendant replies with a defence — this is a document which formally answers the points raised by the plaintiff.

The defence may:

(a) deny a material fact (*traverse*)

(b) confess (ie, admit) the truth of an allegation of fact, but avoid it (ie, deprive it of effect) by alleging new matter by way of justification (*confess and avoid*), and

(c) say that — even if the facts the plaintiff relies upon are true — they do not give the plaintiff any legal remedy (*object to a point of law*).

Access to documents

(4) After the general grounds of dispute between the parties have been worked out, the procedure of discovery (access to documents) helps each party to establish the details of the other side's case.

(5) In civil procedure, there are many pre-trial pleadings (the exchange of documents between parties), which also go on the court record and are designed to clarify the facts in dispute and to speed up the trial:

(a) *Interrogatories* are numbered questions on issues of fact delivered by one party to the other which must be answered on oath. They are designed to obtain admission of fact so that the areas in dispute are known before the trial.

58 Service by Facebook (¶1-026). Facebook was first used for substituted service in 2008 by a lender to serve a default judgment on borrowers after conventional methods of contacting them had failed (ACT Supreme Court, Master Harper).

This means that each party will know what the other disputes — the answers on oath are binding on the parties and are produced in evidence at the hearing.

(b) *Discovery* (access to documents, disclosure) of documents is a process which lets one party force the other party to provide a list of the documents relating to the dispute.

After seeing this list, the party discovering can demand that any of the documents be produced. The only documents that are excepted are those that are communications between a solicitor (legal adviser) and client.

(c) *Admission*. Finally, the parties can admit the truth of the whole, or any part of, the other side's case, or admit any specific fact or document. At this stage, the pre-trial procedure or pleadings are concluded and the matter can proceed to trial.

As more details are revealed during the pleading, the parties acquire a more realistic idea of the strength of their cases.

The parties may settle

(6) There may be an out-of-court settlement where the plaintiff is still compensated for the defendant's act or omission, and the court's time is freed up to deal with other cases. Incentives to settle at the 'door of the court' include avoiding the uncertainty of continuing the proceedings, and avoiding further expense, time, and possible problems of proof. Litigation may lead to a 'killer punch',[59] which might motivate a settlement.

(7) Outcomes in civil cases may involve:

(a) an award of damages (monetary compensation), for example, in tort (¶4-175ff) or for breach of contract (¶6-380ff)

(b) an injunction, an equitable order to stop (¶6-410; ¶8-810)

(c) an order for specific performance (an equitable order forcing completion: ¶6-400).

[¶1-435] Debt recovery

There are many legal ways to recover payment of debts, even if some debtors manage to avoid payment some of the time. Some entrepreneurs unscrupulously use legal technicalities to walk away from business failures and leave small investors and creditors unpaid.

Debt recovery can be a difficult process. Debt recovery for unpaid consumer credit is discussed at ¶14-250.

Debt recovery law tries to strike a balance between the rights of the creditor to payment, and the rights of the debtor to basic civil liberties:

- the creditor is entitled to be paid, but

59 *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239 [9734].

- debtors also have rights, including protection from dishonest, misleading or harassing tactics by debt collectors (such as making continual calls about the debt, and impersonating police officers and carrying weapons).[60]

How to encourage punctual payment of debts

An efficient credit control policy is the best way to ensure that debts are paid on time. This includes periodic statements of the account and prompt reminder notices.

The debtor should not be allowed to fall into arrears. If there are delays in payment, the creditor should contact the debtor. If the debtor has problems with payment, it is sensible to talk through the problems and arrive at some arrangement instead of letting the situation get worse.

One starting point is to confirm the contract. Make sure there are no ambiguities with 'he said …', 'she said …'. If the contract is oral, is it legally enforceable? The creditor should make sure who is the customer, and keep proof of the contract and correspondence including emails. The creditor could offer incentives to prompt payment (such as discounts for punctual payment) and disincentives for late payment (such as default interest for late payment) — so long as the interest is not unenforceable as a 'penalty'.

Be assertive early on to set expectations. Credit should not be extended without proper assessment of the risk. Applications for credit should be carefully examined for evidence of a satisfactory credit history and assessment of the applicant's ability to pay.

If this fails, outsource to legal, debt collectors to get the customer communicating with the creditor.

How to enforce payment

(1) Letter of demand

Once a creditor is satisfied that there is a bad debt, the debt recovery process starts with the creditor sending a letter of demand to the debtor (personally, or through an agent such as a solicitor or debt collection agency).

The letter of demand gives details of the amount due and what it is for, and demands that the debtor pay the debt. The creditor may also ask for its legal costs for recovery.

The letter says that if the amount is not paid within the time specified, legal action will be commenced without further notice.

(2) What can the debtor do?

In response to the creditor's letter of demand, the debtor may do the following:

(a) ***pay***

If the debtor does pay in response to the letter of demand, the debtor only has to pay the amount of the debt and cannot be forced to pay the creditor's legal costs.

(b) ***enter a scheme of arrangement with the creditor***

60 'Undue harassment' is prohibited by the Australian Consumer Law s 50 (¶7-485).

A creditor may prefer to accept a scheme of arrangement instead of risking further costs by taking legal action. (If the debtor is insolvent, this could be in the form of a personal insolvency agreement under the *Bankruptcy Act 1966* (Cth); ¶13-570). If the creditor goes to court, the creditor may lose and be ordered to pay the debtor's legal costs. For example, in court the creditor may not be able to prove the existence of the contract giving rise to the debt if the contract is an oral contract.

(c) ***settle***

This may be the result of a conference between creditor and debtor to sort out the issues. Settlement may be brought about by mediation or by arbitration (¶1-441 – ¶1-444).

(d) ***dispute the debt and go to court***

The jurisdictions of the courts are set out at ¶1-060ff. In some jurisdictions, small debts are arbitrated.

(3) How judgment is obtained and enforced: civil procedure

(a) ***preparation of summons***

Court proceedings start with a written claim. The claim has different names in different courts in the various jurisdictions and may be called a 'statement of claim' or a 'summons' or a 'writ'. The claim must:

- be served within six years of the debt, or it will be statute-barred under the *Statutes of Limitation* (¶6-500), and
- state the case — the facts and the whole history of the debt — and must be clear.

The creditor pays filing fees for the claim, and its own legal fees.

(b) ***court summons***

The court then issues a summons, and the creditor and debtor become the plaintiff (applicant, claimant) and the defendant respectively.

The summons may be:

- an ordinary summons

  This orders the debtor to appear in court to answer a claim for a liquidated (specified) or unliquidated (unspecified) claim.
- a special summons

  This saves time by requiring evidence from the defendant of a liquidated or unliquidated claim (such as under contract) by affidavit (a sworn statement) instead of requiring the defendant to appear in court. If the defendant does not reply, liability is admitted.
- a default summons

  A default summons is for a debt of a liquidated amount. It states that the plaintiff can obtain judgment by default without a court hearing unless the defendant enters a defence.

(c) ***service***

The creditor (or its representative) serves the claim on the debtor personally, with a copy to the court, and the debtor has a certain number of days (eg, 28) in which to lodge a defence. An 'affidavit of service' is then lodged with the court.

(d) ***defence***

Most debtors do not defend a claim for debt, but if the debtor does dispute the claim, the debtor may lodge a defence. Sometimes the defence is used as a tactic to 'buy' time to pay the debt. The defence must specifically answer and deny each of the allegations in the claim.

The debtor may have a case against the creditor, for example, for breach of contract. By a defence and counter-claim, the debtor may counter-claim against the creditor.

Sometimes the parties may serve interrogatories (questions) on each other and/or they may apply for discovery of documents in the possession of the other. These court processes must be answered.

(e) ***judgment***

Judgment may be:

- by default

  If no defence is entered within the time allowed on the claim, the creditor enters judgment by default. In the lower courts, this is signed over the counter, and the creditor gets an award of costs. In higher courts, the creditor may need an affidavit attached to the claim to support the default judgment and outlining the fact that the debt has not been paid.
- by hearing in open court.

(4) Processes to enforce judgment

Once a court has handed down a judgment in favour of the creditor, the debtor may still refuse to pay. Many judgment debtors pay promptly, but some still need encouragement to pay. The creditor may then have to enforce the judgment against the debtor.

Unsatisfied legal judgments may be enforced by solicitors, debt collectors and commercial agents, and can form grounds for bankruptcy (¶13-590).

There are many ways in which to enforce an unpaid judgment:

(a) ***examination process or examination summons or oral examination***

This requires the debtor to attend court to be questioned on assets and income. The court examines the evidence, and will normally make an order, but not if the debtor is insolvent.

(b) ***instalment order***

The creditor, the debtor or the court may approve payment of the judgment debt (and costs and interest) by instalments. A court will not approve an instalment order if the debtor cannot pay the interest owing.

(c) ***writ of execution (a warrant)***

This is a court order addressed to a court official (the sheriff) to auction the debtor's goods.

The sheriff's staff wear uniforms resembling those of police, but they have no authority to enter the debtor's premises unless they are allowed in. Some have been known to bluff their way in. They 'red tag' goods to be auctioned, and formally require the debtor to pay within a certain period (such as 14 days).

If the debtor does not pay, then the sheriff returns (there is a right of re-entry), collects the goods and puts them up for auction. The sheriff takes from the auction proceeds the amount of the judgment debt and interest, and gives the surplus proceeds to the creditor. Certain goods, such as tools and furniture, cannot be taken by the sheriff.

There are two types of writ of execution:

- writ over land, and
- writ of execution over goods — (*a writ of fieri facias, fi fa, distress*), which allows the seizure of personal property.

A uniformed sheriff serving a writ of execution over goods may shock the debtor into paying, but a writ may not lead to an auction of goods due to issues relating to difficulty of entry, doubts over ownership of goods and delays in the legal process. The creditor must pre-pay auction and storage costs. An auction will not go ahead if the debtor files an application to pay by instalments (above). In addition, the debtor may disappear or the goods may be lost or 'stolen'.

(d) ***garnishee order***

The creditor may get a court order called a garnishee order addressed to a third person, such as the debtor's employer or bank, to pay to the creditor funds due to the debtor (excluding salary or wages until actually due to be paid).

The garnishee (third person) order means notifying the third person of the debt, to the possible detriment of the debtor's reputation. Complying with a garnishee order also imposes burdens on the third person.

(e) ***charging order***

A charging order is issued against annuities, funds, shares or deposits of money in the debtor's name.

(f) ***writ of delivery and writ of sequestration***

These writs are directed to the sheriff to recover from the debtor property other than land or money (delivery) and keep it (sequestration) until the obligation is satisfied.

(g) ***committal***

This means jail, such as for contempt of court for disobeying one of the above orders or for not appearing for oral examination.

(h) ***bankruptcy/winding up***

These are the ultimate weapons discussed respectively at ¶13-558ff and ¶9-600ff.

Many of these means of debt recovery are of ancient origin, and some are rarely used.[61]

[¶1-440] Criminal procedure

In a criminal trial, the object of the proceedings is to determine whether the accused (the defendant) is guilty and, if so, to punish the accused (¶2-110ff).

61 See further in Australian Securities and Investments Commission (ASIC) and Australian Competition and Consumer Commission (ACCC), *Debt Collection Guideline: For Collectors and Creditors* (2015) <www.asic.gov.au>, with guidance for the debt collection industry on how to stay within the laws administered by ASIC (under its financial services jurisdiction) and ACCC.

In civil proceedings, the plaintiff's complaint is not hindered (and may be helped) by the defendant not responding.

In the criminal process, the defendant must be available to stand trial, to show that justice is being done and to avoid errors (ie, a wrongful conviction) due to the lack of a defence.

Criminal proceedings do not have the pre-trial fact finding process characteristic of civil procedure (¶1-430), and the cases of the prosecution and the defence are only fully known at the end of the trial.

There is one partial exception to this, however, in the case of indictable offences, where by virtue of the committal or preliminary hearing the prosecution's case is heard in some detail before the trial.

[¶1-441] Alternative dispute resolution (ADR)

Australian business people and their advisers sometimes avoid the courts and use alternative dispute resolution (ADR) solutions to resolve conflicts and disputes worked out by the parties themselves by agreement with the assistance of a third party.

The Alternative Dispute Resolution Association of Australia previously defined ADR as meaning 'dispute resolution by processes:

(1) which encourage disputants to reach their own solution, and
(2) in which the primary role of the third party neutral is to facilitate the disputants to do so'.

ADR methods, such as negotiation, expert appraisal[62], mediation (¶1-442) and arbitration (¶1-443), try to avoid the costs and delays of some court proceedings. External dispute resolution (EDR) is a feature of the National Credit Code (¶14-250).

Judges, mostly selected from among Senior Counsel, do not always have the qualifications or resources to deal with disputes involving complex economic, environmental, medical, scientific or technical problems. Some cases may be too technical for traditional courtroom adjudication.

Industry-based private dispute resolution: EDR

Industry-based schemes for ADR provide another alternative to the court system, sometimes as a result of privatisation and therefore a sell-off of public accountability. The *Corporations Act 2001* (Cth) calls these 'external dispute resolution' (EDR) (as opposed to 'internal dispute resolution' (IDR), starting with a hotline). Important examples of EDR schemes are the Credit Ombudsman Service Ltd (COSL: ¶14-250; <www.cosl.com.au>) and the Financial Ombudsman Service (FOS: banking: ¶16-045; insurance: ¶17-035).

Compromise, settlement or negotiation out of court

The parties to a dispute may agree to settle the dispute: one party agrees to pay or perform in return for an agreement by the other party to stop actual or threatened legal proceedings or to put aside actual or claimed legal rights arising from the dispute (a contract: ¶5-400).

62 Independent expert appraisal and other forms of expert determination of commercial disputes are not arbitration, and therefore not regulated by the Commercial Arbitration Act: *Age Old Builders Pty Ltd v Swintons Pty Ltd* [2003] VSC 307.

Compromise and the wish to avoid trouble is good business, and may be reinforced by the economics of avoiding potentially expensive litigation. Litigation may lead to damaging publicity and negative effects on ongoing business and customer goodwill.

[¶1-442] Mediation

Failure of the parties to settle a dispute may lead them to get the help of an impartial third party, such as a mediator or conciliator, to resolve the dispute.

Mediation is a structured negotiation process with a neutral, independent third party to help the parties reach their own solution by agreement. In comparison with arbitration, the parties have not agreed in advance to accept the decision of the mediator. For example:

- in some jurisdictions a judge at any stage may order that the court proceedings be referred to a mediator (or to an arbitrator) with or without the consent of the parties to try to reach settlement
- a building contract may refer any dispute to the architect in charge of the project
- in some jurisdictions, there are neighbourhood mediation centres to deal with local non-commercial or non-criminal matters
- mediation and arbitration procedure is progressively being introduced into some court procedures.

Although the proceedings may be informal, conciliators or mediators should act fairly and be neutral.

If mediation fails, the parties may then turn to formal arbitration or to litigation before a court or tribunal (without the need for agreement).

Many dispute resolution clauses in commercial contracts require a process of negotiation, mediation or conciliation, and then arbitration. These processes must be clear and unequivocal or they may be unenforceable.

[¶1-443] Commercial arbitration

Commercial and financial disputes may be worked out by commercial arbitration.

Arbitration (third-party determination with a binding decision) is the process of referring a dispute to an arbitrator as a private judge to make a decision, which the parties have agreed to accept as binding on them and final.[63]

Only civil disputes can be referred to arbitration (ie, no criminal cases), such as those arising from building contracts, partnership contracts and insurance contracts or under statute. (There can be no compulsory arbitration clauses under modern insurance law.)

63 Arbitration is regulated in Australia by essentially uniform legislation in each jurisdiction. The earlier Commercial Arbitration Acts of each state and territory are in the process of being replaced by new uniform legislation based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985, amended in 2006) agreed to by the Standing Committee of Attorneys-General (SCAG) in 2010. All jurisdictions have agreed to implement the model Commercial Arbitration Bill 2010. New South Wales was the first to do so with the *Commercial Arbitration Act 2010* (NSW); now eg, *Commercial Arbitration Act 2011* (Tas), *2011* (Vic), *2012* (WA). International arbitrations and the enforcement of foreign awards are regulated by the *International Arbitration Act 1974* (Cth).

The aim of an arbitration is to get finality and an enforceable award.

A benefit of an arbitration is to avoid the costs, delays and formalities of the court system. In addition, a dispute involving complicated technical or commercial problems may be handled more knowledgeably by an arbitrator who is an expert in the area, such as an engineer, architect, accountant or other specialist. The Institute of Arbitrators and Mediators Australia, Law Societies/Law Institutes, and some universities provide training and qualifications in the law and practice of arbitration.

The submission or the agreement to arbitrate may be in the existing agreement between the parties to arbitrate an existing dispute. The agreement does not require mutual or bilateral terms of reference. It may consist of the parties' agreement as a term of their contract to refer present or future differences to arbitration. The courts will generally enforce agreements to negotiate in good faith in an ADR process. The parties can turn to the arbitration legislation instead, which provides for the appointment of an arbitrator.

Commercial arbitration legislation based on the UNCITRAL Model Law

The uniform Australian commercial arbitration legislation is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration to improve the efficiency of commercial arbitration. It provides:

Chapter I General provisions — includes giving details of the party's place of business, definitions, how documents are to be served and how they are received (Art 3).

Chapter II Arbitration agreement — includes the definition and form of the arbitration agreement. The arbitration agreement must be in writing (Art 7(2): ¶5-030).

Chapter III Composition of arbitral tribunal — includes the number of arbitrators, the appointment of arbitrators and challenge to arbitrators.

Chapter IV Jurisdiction of arbitral tribunal — includes the competence and the power of the arbitral tribunal.

Chapter IVA Interim measures and preliminary orders.

Chapter V Conduct of arbitral proceedings — includes equal treatment of parties (Art 18), determining rules of procedure (Art 19), choice of language (Art 22), whether hearings will be oral, and written procedure (Art 24).

Chapter VI Making of award and termination of proceedings — includes decision-making (Art 29), settlement (Art 30), form and content of an award (Art 31).

Chapter VII Recourse against award — includes the procedure for application for setting aside an award (Art 34).

Chapter VIII Recognition and enforcement of awards — includes the rules on recognition and enforcement (Art 35), and grounds for refusing recognition or enforcement (Art 36).

Scott v Avery clause

Public policy, as interpreted by the courts, stops parties from agreeing to oust (exclude) the jurisdiction of the courts to settle disputes arising between them. In domestic (Australian) arbitrations, any contract provision which tries to exclude the jurisdiction of the courts, or to make arbitration a condition precedent to legal proceedings, is void. A clause in a contract, as in the leading case of *Scott v Avery*,[64] could lawfully provide for arbitration as a condition precedent (prerequisite) to legal action because it does not deprive the parties of possible court proceedings after the completion of the arbitration.

Scott v Avery clauses do not prevent court proceedings but they do provide obstacles if there are a number of defendants, such as a builder, engineer and architect, if the builder chooses to use the clause (as is the builder's right under a building contract). To overcome this restriction, s 55 overcomes the *Scott v Avery* clause. It provides that it does not operate, or cannot operate, to stop legal proceedings being maintained, and it prohibits any clause which tries to make arbitration a condition precedent to legal proceedings.

Advantages of arbitration

(1) arbitration may be cheaper than going to court
(2) confidentiality
(3) cross-border — arbitrations can provide a practical solution to cross-border disputes which may involve two or more legal systems, foreign court procedures, different languages and the difficulty of enforcing a foreign court judgment
(4) the decision of the arbitrator is final and can be enforced, just like a court judgment[65]
(5) expertise and 'choose the judge' — the parties can choose an arbitrator with technical and specialised knowledge/expertise, compared to a judge who may be a high level generalist
(6) arbitration may be faster and more flexible than the formalities of going to court
(7) maintain ongoing business relationship — arbitration can resolve a dispute and maintain an ongoing business relationship — compared to the acrimony (anger, bitterness) of court proceedings
(8) no lawyers are needed (they may be a good idea), and
(9) there may be limits on the right to appeal to the courts.

Disadvantages of arbitration

(1) enforcing the decision of an arbitrator and an award may be difficult
(2) expensive — arbitrations may be very expensive (eg, parties may have to pay to hire the room, etc)
(3) recovery of legal fees or costs may not be possible, and
(4) unequal bargaining power — an arbitration clause may be imposed in a standard form contract.

64 *Scott v Avery* [1853] EngR 250; ¶5-835.

65 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5.

[¶1-444] Alternative dispute wrap-up

The development of alternative dispute resolution (ADR) is an important extra for the legal system — with benefits and costs.

The advantages of ADR include:

(1) less formal, quicker and usually less expensive than court proceedings
(2) the creation of less hostility than traditional adversary proceedings, hopefully allowing the parties to carry on their business relationship both during the alternative dispute resolution process and after it
(3) avoidance of publicity of public court proceedings and a publicly reported case law decision (¶1-370) because the proceedings are private, and confidential information can be presented in part or whole, and
(4) technical experts to assist with (mediation), or to adjudicate, technical disputes (arbitration).

The disadvantages of ADR may include:

(1) incompetence or bias by the intermediary, which could lead to
    - a wrong settlement of negotiations (mediation)
    - a wrong decision or denial of natural justice (arbitration), and
    - the application of incorrect legal principles (mediation and arbitration — this could also be said of a judge). Some suggest that because of their training and independence, lawyers are better arbitrators than technical experts
(2) 'playing one's hand' and prejudicing later formal legal proceedings, and
(3) expense, delays and generally unproductive proceedings satisfying neither party and propelling them back to the traditional court system.

REGULATION OF BUSINESS (¶1-450 – ¶1-485)

[¶1-450] Commonwealth and state Constitutions

The Constitutions of the Commonwealth and each state are contained in Acts of the English (or 'Imperial')[66] Parliament, which provide the model for government.

Legislation (enacted law) regulating Australian business passed at any of the three levels of government (ie, federal, state or territory, and local) must come within the power (legislative authority) of parliament or local government.

Case law (unenacted law) regulating business is handed down by judges in courts set up by constitutions.

66 Meaning of the then British Empire.

[¶1-455] Regulation of Australian business law 1788–1900

When the British authorities established a convict colony in New South Wales in 1788, the occupied land was not considered by current constitutional theory to be owned by any group or state and no recognised legal system was considered to exist.

Aboriginal occupation for many thousands of years was not considered to give any land rights to those occupants at common law so the colony was first 'settled' by the British.

The received common law

Being a 'settled' colony, the then constitutional theory stated that the first settlers carried with them as their common law birth right so much of the existing common law as was applicable to their own situation and the condition of the infant colony. This was called the received common law (colonial transplant law), and it included the rules of inheritance, contract and the right to protection from personal injuries.[67]

Since the *Mabo case* in 1992, the Australian common law now 'recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands …' (¶3-425).[68]

Sydney 1788

The early governors of New South Wales were naval and army commanders with the complete powers appropriate to a military post and they ruled in a state of martial law. Economic life of the colony was dominated by the needs of the administration, and early business dealings in the first few years were regulated by the New South Wales Corps and its monopoly of the available supplies.

The common law rights of the growing number of free settlers were enforced in primitive courts, and conflict developed regarding the extent to which the received common law applied to regulate life and early Australian business dealings, enforceability of contracts, land rights, etc. In response, the English Parliament enacted the *New South Wales Act 1823*, giving New South Wales the status of a full colony.[69]

A limited legislature was established with members appointed by the King, but only the Governor could propose laws, and the legislature could only pass laws which were consistent with the laws of England as far as local circumstances would allow.

Sydney 1828

Doubts still remained about the applicability of English common law, and these were overcome with the enactment in London of the *Australian Courts Act 1828* (Imp),[70] which proclaimed that all English laws existing up to 1828 were in force in New South Wales

67 W Blackstone, *Commentaries on the Laws of England* (Oxford, Clarendon Press, 1765) vol 1, 105–106. If NSW had been considered a 'conquered' or 'ceded' colony, existing local law would have continued in force until altered by parliament or the Crown.

68 *Mabo v Queensland (No 2)* [1992] HCA 23 [2] (Mason CJ and McHugh J); National Native Title Tribunal.

69 4 Geo 4, c 96 (Imp, 1823).

70 Long title: An Act to provide for the Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof, and for other purposes relating thereto. 9 Geo 4, c 83 (Imp, 1828).

and Tasmania as far as they could apply to the conditions of the colonies. This would have included the *Statute of Frauds 1677* (Imp) (¶5-030), contract law, partnership law and the many still-accepted principles of modern business law evolved by Lord Mansfield in the late 18th Century (eg, the principle of good faith in insurance: ¶17-310).

From then on, English laws passed after 1828 could only apply in New South Wales and Tasmania if they were stated to apply by 'paramount force'. Rigid Imperial control remained because post-1828 English legislation, applying by paramount force, could not be amended or altered locally. All English law still applied in Western Australia (established in 1829) and South Australia (established in 1834).

Representative (responsible) government from 1842

As the colonies developed, responsible or representative government, with the elected leaders responsible to the electors for their decisions, was demanded and progressively granted by the various colonial Constitution Acts passed by the Imperial Parliament for New South Wales (1842, 1855); Victoria (1850); Tasmania (1856); South Australia (1856); Queensland (1867) and Western Australia (1870, 1890).

These Constitution Acts generally established independence and gave the colonial legislature the power to legislate for 'peace, order and good government'.

To settle remaining doubts on the jurisdiction of the colonial legislatures, the Imperial Parliament passed in 1865 what is considered the charter of colonial freedom. The *Colonial Laws Validity Act 1865*[71] (in force in Australia until 1986: ¶1-470; ¶1-485) established the rights of the colonies to legislate in any way:

- the only limit was s 2 which said that '[a]ny colonial law which is … in any respect repugnant' to any Imperial Act extending to the colony by paramount force is 'absolutely void'
- the power of colonial legislatures to alter their constitutions was confirmed in s 5 so long as consistent with the prescribed 'manner and form' requirements of the relevant Imperial or colonial law. In fact, this ultimate legal supremacy of the Imperial Parliament was never used to limit colonial legislation, but was used instead as a supplement and was no barrier to effective full self-government.

[¶1-460] The Commonwealth Constitution 1900

Economic development in the Australian colonies through the second half of the 19th Century improved communications as railways linked all centres from 1883, and development of some sense of Australian nationhood led to discussions on the federation of the Australian colonies (and possibly New Zealand and Fiji) to deal with common matters such as defence, internal customs barriers and immigration.

National business regulation was neither called for nor considered to be an issue (¶1-480) (there was no national capital).

Australia as a federation was established by an Act of the Imperial Parliament called the *Commonwealth of Australia Constitution Act 1900* (Imp)[72] — Australian Constitution

71 28 & 29 Vict, c 63 (Imp, 1865).

72 63 & 64 Vict, c 12 (Imp, 1900).

is the schedule to this Imperial Act. The federation involves both the political integration of the former colonies, and a limited level of economic integration.

The Australian (Commonwealth) Constitution:[73]

- creates a new set of 'federal' (Commonwealth, national or central) authorities of the Commonwealth (national, central) government in Canberra, and outlines their functions and powers
- recognises the existence of the six Australian colonies as they were in 1900, confers status on them as states, and continues in force their constitutions and laws except as changed by the Commonwealth Constitution
- regulates the relations between Commonwealth authorities and those of the states
- establishes an Australian common market by providing for free trade between the states and a common external customs tariff, and
- makes express provision regarding the individual and the Commonwealth Government (and to a lesser extent, state governments). The basic principles of government are established by fact and by the structure of the Constitution — representative democracy, an independent federal judiciary and it confers a number of safeguards on the people.

The Constitution establishes limited 'Bill of Rights' provisions such as the right to vote (s 41), the right to trial by jury (s 80), the right to no discrimination between states (s 99) and the right to freedom of religion (s 116).

Nowhere is there any concept of a 'federal balance' in the Constitution. The suggestion of any equilibrium between Commonwealth and state powers is not authorised and would advance ideas of 'reserved state powers' in the face of particular federal powers.

[¶1-470] Constitutional limits by the Commonwealth on the law-making powers of state parliaments

The existence of a parliament does not necessarily mean unlimited powers of law-making, and various constitutional limitations restrict the powers of the Commonwealth (¶1-475), state and territory parliaments to pass laws including laws for the regulation of business.

State Constitutions

State Constitutions authorise state legislation only for the peace, order and good government of the state, including laws having extra-territorial operation (*Australia Act 1986* (Cth) s 2(1)).

The *Colonial Laws Validity Act 1865* (Imp)

Until 1986, this made void (of no effect, inoperative) any state legislation repugnant to Imperial legislation intended to apply in the state — such as the *Merchant Shipping Act 1894* (Imp) and the *Australian States Constitution Act 1907* (Imp) which required that any amendment to a state Constitution must comply with the 'manner and form' procedural requirements set out in the relevant law (¶1-455).

The *Australia Act 1986* (Cth) provides that the *Colonial Laws Validity Act 1865* does not apply to any state law made after the commencement of the Act (¶1-485).

73 G Aitken and R Orr, *Sawer's The Australian Constitution* (Australian Government Solicitor, 3rd ed, 2002) 23.

The Commonwealth Constitution

The Constitution:

(1) gives the Commonwealth concurrent power (existing together) and exclusive powers. Concurrent powers (eg, taxation, banking, insurance) are shared between Commonwealth and states.
Exclusive powers (eg, defence, customs, excise) are vested in the Commonwealth only.
If there is any inconsistency between a state law and a Commonwealth law, s 109 of the Constitution provides that the Commonwealth law is to prevail.
Inconsistencies may arise where it is impossible to obey both laws (a direct collision), where the Commonwealth law allows and the state law prohibits, and where the Commonwealth law intends to cover the field to the exclusion of any state law.

(2) imposes restrictions on the states including:
- s 92 of the Constitution, which limits state taxation and regulation by providing that interstate trade is to be absolutely free
- s 114, which prohibits any state from having its own army or navy, or taxing Commonwealth property, without Commonwealth consent
- s 115, which prohibits a state from making its own money, and
- s 117, which protects a resident of one state from any disability or discrimination while in another state.

[¶1-475] Constitution limits the law-making powers of the Commonwealth Parliament

The Commonwealth Constitution reflects the agreement of the colonial (later state) politicians and representatives who drafted the Constitution in the 1890s and who jealously guarded their existing colonial powers. Section 107 provides that all the rights and powers of the states which they held as colonies before federation in 1900 are preserved unless expressly taken away by the Commonwealth Constitution. The Commonwealth's power to pass law is limited by the doctrine of the 'separation of powers' and by the legislative powers of the parliament under the Commonwealth Constitution.

The doctrine of the 'separation of powers'

Part of the rule of law (¶1-015) is the doctrine of the separation of powers — formulated by French philosopher and jurist Montesquieu in 1748 — which explains how the liberty of the citizen is protected under the common law because total power of government is divided among three branches of government (¶1-490):

(1) the legislature, which *makes* the laws
(2) the executive, which *administers* the laws, and
(3) the judicature, which *interprets, applies* and *enforces* the laws.

Because all three powers are, in theory, not held by one person or group, autocratic and arbitrary rule is not possible because each body provides a check upon the others to ensure that power is not abused or exceeded.

The following sections show how these three branches of government are set out in the Constitution:

> **Chapter I — The Parliament**
> **Part I — General**
> **1 Legislative power**
> **Section 1**
>
> 1 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 Representatives, and which is herein-after called 'The Parliament,' or 'The Parliament of the Commonwealth.'

> **Chapter II — The Executive Government**
> **Section 61**
>
> 61 The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth.

> **Chapter III — The Judicature**
> **Section 71 Judicial power and Courts**
>
> 71 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 federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

Judicial power of the Commonwealth

Only a court can exercise 'judicial power' — this is what courts and judges do and it includes judging, making binding judgments, and deciding on and imposing penalties.

If a non-court, like a tribunal or a commission, exercises judicial power, it breaches s 71 of the Constitution. For example, the power of the Takeovers Panel to make declarations of unacceptable circumstances under the *Corporations Act 2001* (Cth) s 657A(2)(a) involves an exercise of judicial power — this is unconstitutional and therefore illegal.[74]

74 *Australian Pipeline Limited v Alinta Ltd* [2007] FCAFC 55. Note, s 657A(2)(a) was amended on 13 May 2007.

Legislative powers of the Commonwealth Parliament

In contrast to the states, the only powers the Commonwealth has are the powers transferred to it by the colonial (later state) politicians and representatives in the 1890s listed in the Commonwealth Constitution.

The Commonwealth possesses most powers *concurrently* with the states, and some *exclusively* for itself — the Commonwealth cannot pass unlimited business law unless it is based on various Commonwealth powers.

Constitutional interpretation further limits the powers of the Commonwealth.

To work out whether a law is a law 'with respect to' a head of power in s 51, there are two questions:

(1) What is the character of the law? Refer to the rights, powers, liabilities, duties and privileges which it creates.
(2) Is the law connected to a head of power in s 51? This involves referring to practical as well as legal considerations.

If a connection exists between the law and a s 51 head of power, the law is a law 'with respect to' that head of power unless the connection is so insubstantial or distant that it cannot sensibly be described as such a law.

Commonwealth legislation must therefore fall within one of the following heads of power:

Part V — Powers of the Parliament
Section 51 Legislative powers of the Parliament

51 The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: —

(i) Trade and commerce with other countries, and among the States:
(ii) Taxation; but so as not to discriminate between States or parts of States:
(iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth:
(iv) Borrowing money on the public credit of the Commonwealth:
(v) Postal, telegraphic, telephonic, and other like services:
(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:
(vii) Lighthouses, lightships, beacons and buoys:
(viii) Astronomical and meteorological observations:
(ix) Quarantine:
(x) Fisheries in Australian waters beyond territorial limits:
(xi) Census and statistics:
(xii) Currency, coinage, and legal tender:
(xiii) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money:

(*continued*)

(xiv) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned:
(xv) Weights and measures:
(xvi) Bills of exchange and promissory notes:
(xvii) Bankruptcy and insolvency:
(xviii) Copyrights, patents of inventions and designs, and trade marks:
(xix) Naturalization and aliens:
(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:
(xxi) Marriage:
(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:
(xxiii) Invalid and old-age pensions:
(xxiiiA) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances:
(xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States:
(xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States:
(xxvi) The people of any race for whom it is deemed necessary to make special laws:
(xxvii) Immigration and emigration:
(xxviii) The influx of criminals:
(xxix) External affairs:
(xxx) The relations of the Commonwealth with the islands of the Pacific:
(xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:
(xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth:
(xxxiii) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State:
(xxxiv) Railway construction and extension in any State with the consent of that State:
(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:
(xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides:
(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law:
(xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia:

(xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in the either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

The more important of these 40 powers can be grouped as follows:[75]

- defence and foreign affairs — s 51(vi), (ix), (xxviii), (xxix), (xxx), (xxxii)
- fiscal powers — s 51(ii), (iv)
- population policy — s 51(xix), (xxvii)
- provision of public facilities and social services — s 51(v), (vii), (viii), (xi), (xxiii), (xxiiiA)
- family law — s 51(xxi), (xxii)
- commercial and industrial regulation — s 51(i), (iii), (x), (xii), (xiii), (xiv), (xv), (xvi), (xvii), (xviii), (xx), (xxxv)
- relations with states — s 51(xxiv), (xxv), (xxxiii), (xxxiv).

All of these powers are in theory held concurrently (in parallel) with the states, although in political reality and by law (s 109) it may be difficult for a state to pass or to enforce a law in an area already legislated for by the Commonwealth.

Some powers are exclusive to the Commonwealth, which means that only the Commonwealth Parliament can make laws on that topic.

Section 52 introduces the exclusive powers of the Commonwealth.

Referral of powers

More and more national business regulation is coming from the Commonwealth — passed because the states have 'referred' their powers to the Commonwealth under s 51(xxxvii). Referral of powers by the states has authorised the Commonwealth to legislate for, for example, corporations (¶9-370), business names (¶12-010ff), personal property securities (PPS: ¶13-050), mortgage brokers and consumer credit (Chapter 14).

Exclusive powers of the Parliament

Section 52

52 The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to —

(i) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes:

(ii) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth:

(iii) Other matters declared by this Constitution to be within the exclusive power of the Parliament.

75 G Sawer, *The Australian Constitution* (AGPS, 2nd ed, 1988) 24 — not in the 3rd ed, 2002.

Similar powers exclusive to the Commonwealth exist with respect to:

- customs, excise and bounties (s 90)
- naval and military forces (s 114)
- currency (s 115), and
- the government of federal territories (s 122).

Exclusive power over customs, excise, and bounties

> 90 On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.
>
> On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise.

Trade within the Commonwealth to be free

> 92 On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.
>
> But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

Inconsistency of Commonwealth and state laws

The Commonwealth Constitution and the laws made under it override state constitutions and laws made under them in the case of any inconsistency between them.

If a state law permits certain conduct, while a federal law prohibits it, s 109 provides that the state law is invalid to the extent of the inconsistency.

[¶1-480] Business regulation under the Commonwealth Constitution

The Commonwealth does not have full authority over national business and economic regulation because of the powers of the six states.

The colonial (later state) politicians and representatives who drafted the Constitution in the 1890s jealously guarded their existing semi-independence, and they only agreed to transfer limited national matters to the proposed Commonwealth, such as the power

over defence, postage and immigration (¶1-475). At that time, Australia was made up of six colonies, each with well developed relationships with the UK, and there was little national (inter-state) business or call for national business regulation by the proposed Commonwealth Government. Limited business regulation powers which were granted to the Commonwealth included those in s 51(iv), 51(xii), 105 and 115.

With pro-Commonwealth legislative drafting, High Court centralist constitutional decisions and/or Commonwealth/state cooperative agreements, areas of Commonwealth business regulation now include:

Commonwealth competition and consumer legislation

The Commonwealth has no direct power to regulate unfair and anti-competitive conduct although the CCA and the ACL (¶7-220) have been passed by agreement of the Commonwealth, state and territory governments under the National Partnership Agreement to Deliver a Seamless National Economy (2008), brokered by the Council of Australian Governments (COAG).

Commonwealth corporations power: 'constitutional corporations'

The Commonwealth Parliament can pass Commonwealth companies and financial services law because the states referred their powers to the Commonwealth under s 51(xxxvii) in 2001 (¶1-475, ¶9-370).

In addition, the Commonwealth can regulate any aspect of corporations under the corporations power (s 51(xx)). This was confirmed in the workplace relations case in 2006[76] where the High Court rejected challenges by the states and unions to the constitutional validity of the Commonwealth Government's workplace relations laws which are based on s 51(xx). The court held that the power under s 51(xx) includes regulation of any aspect of foreign, trading or financial corporations, including relationships with third parties or with its employees (¶7-220; ¶9-370).

Commonwealth crimes legislation

There is no direct authority in the Constitution for the making of Commonwealth law on crime, but there are many Commonwealth criminal statutes based on varying sections.

There is the *Crimes (Taxation Offences) Act 1980* (s 51(ii)); the *Crimes Act 1914* (Cth) (based on s 51(vi), the power of self-protection, as well as s 51(xii), s 51(xxix) and s 51(xxxix)). These sections also authorise the *Financial Transaction Reports Act 1988* (Cth) and the *Proceeds of Crime Act 1987* (Cth) (¶16-080).

Commonwealth insurance legislation

The 1984 reforms of insurance law (Chapter 17) would be based on at least s 51(xiv) (perhaps augmented by the sections used for the former TPA such as s 51(i) (trade and commerce); s 51(v) (post and telegraph) and s 51(xx) (corporations), set out at ¶1-475.

Only the most determined 'states' righters' would not accept that in modern Australia the Commonwealth Parliament should have power to prevent lack of uniformity in business regulation across Australia, and sufficient macro-economic powers to manage the national economy.

76 *New South Wales v Commonwealth of Australia* [2006] HCA 52.

[¶1-485] The Australia Act 1986

Some statutes of the English Parliament were part of the Constitution of the Australian Commonwealth (the *Statute of Westminster 1931* (Imp)) and of the Australian states (such as the *Colonial Laws Validity Act 1865* (Imp): ¶1-455).

The Statute of Westminster 1931 (Imp)

This Imperial statute, adopted by Australia in 1942,[77] was an important step to Australian legal independence. It removed the then-existing Imperial limitations on the authority of the Commonwealth to legislate and provided that:

- the *Colonial Laws Validity Act 1865* (Imp) (¶1-470) does not apply to Commonwealth law (s 2), and
- the Commonwealth Parliament has full power to pass laws having extra-territorial effect (s 3).

Amendment or repeal of the *Colonial Laws Validity Act 1865* (Imp) and the *Statute of Westminster 1931* (Imp) could not be achieved unilaterally in or from Australia, and required the process of:

- 'request' by the Commonwealth and all states of Australia, and
- the 'consent' of the UK Parliament.

This process commenced at Commonwealth/state conferences in 1982 and finished in 1986 when the Queen signed the Australia Act legislation.[78]

The *Australia Act 1986* (Cth) ended any powers that the UK Parliament may have had to make laws having effect in Australia (s 1). It declared that the legislative powers of state parliaments include full power to make laws having extra-territorial effect (s 2(1)).

INTERPRETATION OF STATUTES (¶1-490 – ¶1-550)

[¶1-490] Constitutional model of the separation of powers

As covered earlier in this Chapter, the Australian legal system (and other common law legal systems) is based on the model (theory) of the separation of powers among the three branches of government:

(1) the legislature (the parliament) makes the laws
(2) the executive (the administration or the public service) administers the laws, and
(3) the judiciary (the courts) enforces the laws (¶1-475).

This means there are checks and balances on authority. Each branch of government has powers and responsibilities, and each can place limits on what the others can do but no one person or group can control all three branches of government.

77 *Statute of Westminster Adoption Act 1942* (Cth).

78 The *Australia Act 1986* (Cth), which duplicates the *Australia Act 1986* (UK), and the *Australia (Request and Consent) Act 1985* (Cth).

(1) The parliament, elected by the people, is the supreme law-maker (it passes enacted law/statutes: ¶1-180; ¶1-200).
(2) The executive administers the laws passed by parliament.
(3) The laws made by parliament are given effect by the courts, which interpret, apply and enforce those laws. Parliament has passed no laws in many areas of law, such as equity and most of tort and contract, and the courts — through their judgments — are able to make judge-made law (unenacted or common law: ¶1-180; ¶1-350).

Sometimes it is said that the media — a free and independent media — is a fourth branch of government because it can investigate and report and keep everyone informed.

Statutory interpretation

Statutory interpretation (interpretation of legislation) is what a judge does when deciding what is the meaning is of a statute (legislation, Act of Parliament). The judge decides questions of law — the jury decides questions of fact (¶2-120).

Sometimes there are difficulties of interpretation (construction) of statutes — what exactly do particular words or expressions mean?

Because the words in a statute may have more than one meaning, 'interpreting' statutes is an example of law making by judges, especially in test cases when they aim to achieve justice. This sometimes means upsetting the status quo and changing the law. One of the ways the law has evolved over the centuries is by new interpretations of legislation in response to new situations (¶1-410).

Definitions

Statutes usually contain definitions of words used in the Act.

The Acts Interpretation Act of each jurisdiction (¶1-200) also contains 'official' meanings of words like 'month', 'person', 'court of summary jurisdiction', 'minister', etc, and rules on the interchangeability of singular and plural words, and gender inclusiveness of words.

Interpretation

Statutory interpretation is a matter of trying to give effect to the words used by the parliament.

A court (ie, a judge) tries to interpret legislation to be in line with what parliament has intended — to achieve the purpose of the legislation and to avoid an irrational result.

In theory, the aim of the courts is to give effect to the intention of parliament set out in the legislation, but in practice, the courts may have difficulty determining the intention.

Rules for statutory interpretation

The courts apply one or more of the following approaches to the interpretation of statutes:

- literal (plain meaning, grammatical) approach (¶1-500)
- golden rule (¶1-510)
- mischief rule (¶1-520)

- purposive approach (¶1-530)
- contextual approach (¶1-535)
- use of extrinsic material for statutory interpretation (¶1-540)
- other rules of statutory interpretation (¶1-550).

[¶1-500] The literal approach to statutory interpretation

Under the literal (plain meaning, mechanical, grammatical) approach to statutory interpretation, the court gives a literal (plain, actual, strict) interpretation to the words used in the statute.

- The words in the statute must be precise and unambiguous.
- The literal approach is in line with the separation of powers (¶1-475) — the judge must give effect to the words the parliament has used in the statute, and they must not apply their own personal ideas about justice or public policy (this is judicial activism).

However, a strict interpretation of a statute may lead to an interpretation which was surely not intended by the parliament. This 'exploitation' or 'loopholing' of the words used in a statute was the basis of some tax planning schemes upheld by the High Court in the 1970s which promoted 'legal formalism' or 'the triumph of form over substance'.[79]

This approach has now been rejected by the High Court in favour of the following sensible interpretations of legislation.

[¶1-510] The golden rule of statutory interpretation

The golden rule of statutory interpretation follows the literal approach (¶1-500) — and then qualifies it by letting the courts override (disregard) the actual meaning of the words used in the statute if it would produce a result which parliament would not have intended such as:

- an absurd result, and/or
- an inconsistency.

Case example

Re Sigsworth, Bedford and Bedford [1935] 1 Ch 89

A son who murdered his mother could not inherit her estate under legislation which left the estate to the 'issue' of the deceased. As a matter of public policy, no-one can benefit from their own wrong.

Under the golden rule, the court must read the whole statute together and interpret it so as to give the words their ordinary meaning.

79 *Coles Myer Finance Ltd v FC of T* [1993] HCA 29 [9] (McHugh J).

[¶1-520] The mischief rule for statutory interpretation

If a literal approach (¶1-500) does not make sense, or if the words used by the parliament do not make sense under the golden rule (¶1-510), a court may interpret a statute under the mischief rule.

Under the mischief rule, a judge can identify the problem (mischief, defect) which existed before the legislation was passed and interpret the legislation so as to advance the remedy set out in the legislation.

The mischief rule involves:

- understanding the law before the legislation was passed
- analysing the problem which existed before the statute was passed
- applying the remedy of the legislation, and
- understanding the policy behind the legislation.[80]

Because the mischief rule tries to advance the remedy of the legislation, it is wider than the purposive approach (¶1-530), which focuses on the aim (purpose) of the legislation.

The courts can research what was the 'mischief' because they can access extrinsic materials such as *Hansard* debates, government reports, etc (¶1-540).

[¶1-530] Purposive approach to interpretation

Under the purposive approach, courts try to interpret the words in the legislation to give effect to the purpose of the legislation.

The purposive (liberal, facilitating, context) approach focuses on the purpose (the remedial purpose).[81]

In contrast, the mischief approach focuses on the defect that the legislation was trying to fix (¶1-520).

The courts will use the purposive approach if a literal (grammatical) meaning of words does not fit with the presumed intention of the legislation. It does not authorise a judge to redraft legislation to fit the assumed intention of parliament. Part of the judge's role is to promote the purpose of the legislation, to read it in its context, and to avoid a literal meaning (¶1-500) if the literal meaning would lead to a crazy result or defeat the objects of the legislation.

There are limitations on the operation of the purposive approach:

(1) What is the problem (mischief) which the purpose of the Act aims to overcome?
(2) Is it obvious that the draftsman (counsel) and parliament overlooked this purpose by mistake (inadvertence)?
(3) What are the additional words that would have been inserted if the draftsman/parliament had thought about them?

Section 15AA

In the 1980s, many parliaments took steps to instruct the courts to interpret legislation according to a 'purposive' reading.

80 Eg, *Heydon's case* [1584] EngR 9.

81 Eg, S Lumb and S Christensen, 'Reading words into statutes: When Homer nods' (2014) 88 ALJ 661.

For example, s 15AA of the *Acts Interpretation Act 1901* (Cth) (as amended in 2011) says:[82]

> **Interpretation best achieving Act's purpose or object**
>
> 15AA In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

Reasons for purposive interpretation

Judges must:

- recognise universal suffrage (the right to vote) and respect the 'will' of parliament (the people)
- understand the context and the purpose in human communication
- give a construction which promotes the purpose and the object of legislation (instead of one which only gives effect to the grammatical words), and
- recognise that if parliament tries to simplify legislation and make it concise, then the courts should try to give effect to the purpose of the parliament.[83]

Criticism of the purposive approach to the interpretation of legislation

The purposive approach to the interpretation of legislation has been criticised for at least three reasons:

(1) This is an attempt by the legislature to interfere with the courts and it blurs the separation of powers (¶1-475). Because one branch of government is trying to direct another branch of government, it is theoretically invalid.
(2) Ordinary principles of statutory interpretation will still apply to the meaning of s 15AA and equivalents and to statutes in general.
(3) The apparent plain meaning of a law will still predominate over any general statement of aims. No amount of explanation can alter the law as it stands.

[¶1-535] The contextual approach to interpretation

Under the contextual approach, the meaning of words used in legislation cannot be worked out by taking a word in isolation and interpreting the word in a vacuum. The context rule is also called the *noscitur a sociis* rule (a word is known by the company it keeps). This is an important rule if a word has many meanings because it can limit the word and stop the statute being read too widely.

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82 To similar effect are the *Australian Securities and Investments Commission Act 2001* (Cth) s 234A (auditing standards); *Legislation Act 2001* (ACT) s 139; *Interpretation Act 1987* (NSW) s 33; 1978 (NT) s 62A; *Acts Interpretation Act 1954* (Qld) s 14A; 1915 (SA) s 22; 1931 (Tas) s 8A; *Interpretation of Legislation Act 1984* (Vic) s 35(a); *Interpretation Act 1984* (WA) s 18.

83 *Australian Finance Direct Ltd v Director of Consumer Affairs Victoria* [2007] HCA 57 [35] (Kirby J); ¶14-180.

The context (surroundings) of the word is critical, because a word which is not defined in a statute usually gets its meaning from all the surrounding circumstances and text. A word should not be taken out of context.

[¶1-540] Use of extrinsic material for statutory interpretation

If there is ambiguity or doubt, legislation sometimes allows extrinsic (external) material to help with interpretation. External material can also help with the interpretation of contracts (¶5-030).

This does not change the technical construction of legislation or rewrite the intention of the legislature as shown in the legislation. 'Such materials may not contradict the statutory text.'[84]

Section 15AB of the *Acts Interpretation Act 1901* (Cth) and the equivalent in the states and territories sets out the threshold and other restrictions on the using of extrinsic materials:

> **Use of extrinsic material in the interpretation of an Act**
>
> 15AB(1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
>
> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
>
> (b) to determine the meaning of the provision when:
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

The legislation lists material which may help the interpretation of legislation:

- headings, marginal notes, end notes and punctuation as printed by the government printer (¶1-200)
- reports of Royal Commissions, Law Reform Commissions, committees of inquiry, etc (¶1-420)
- reports of parliamentary proceedings (*Hansard*)
- explanatory memoranda or other documents presented to parliament.

Early criticisms of this law — for example, that reliance on extrinsic materials would lengthen proceedings and add to costs — have proved wrong, and case law now confirms:

- The plain meaning rule (that the ordinary meaning of a statute must be followed) remains unaffected.

84 *Palgo Holdings Pty Ltd v Gowans* [2005] HCA 28 [38].

- Reference to extrinsic material is only for assistance, and it does not interpret the statute. For example, 'the explanatory memorandum cannot override the clear purpose of the Act as deduced from its own language.'[85]
- A purposive approach for tax legislation — the earlier presumption of a literal construction and an interpretation in favour of the taxpayer is now being balanced with parliamentary intent of protection of the revenue as evidenced in extrinsic materials.

[¶1-550] Rules of construction — general principles

The basic rule for statutory interpretation is to search for the purpose of the legislation.

In addition to the general principles discussed above, there are many rules of interpretation (construction) which help with the interpretation of statutes, contracts and any legal document (¶6-015, ¶6-240 and ¶17-620).

Sixteen rules of construction

The following are some of the rules of construction — to work out what something means:

(1) The Act or document must be read as a whole or in context, and in the order in which it appears.

(2) The meaning of the same word is assumed to be consistent.

(3) General words must be given their primary and natural significance:

> Because of the nuances of language, it is generally safer … to use *The Macquarie Dictionary* in preference to overseas dictionaries in providing meaning to words used in the Australian context.[86]

(4) Words in statutes and documents are not limited to their meaning when they were passed, and they must be interpreted according to their current meaning.[87]

(5) Technical words must be given their technical meaning.

(6) Technical legal words must be given their technical legal meaning, unless the context shows a different intention. For example, the *Wik case* held that the word 'lease' used in a pastoral lease must be defined by reference to the actual rights given, instead of by reference to all of the features of a common law lease.[88]

(7) The class rule (*ejusdem generis*). When general matters are referred to in conjunction with a number of specific matters of a particular kind, the general matters are limited to things of the same kind to the specific matters.

(8) *The list rule*. If there is a list, things left out are excluded (*expressio unius est exclusio alterius*): an express reference to one matter shows that other matters are excluded.

(9) The general does not take away from the specific (*generalia specialibus non derogant*): where there is a conflict between general and specific provisions, the specific provisions prevail.

85 *Walker v In Line Couriers Pty Ltd* (1999) 73 ALJR 1084, 1085.

86 *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (1991) 25 NSWLR 541, 553 (Kirby P).

87 Eg, 'A statute always speaks' (2003) 77 ALJ 105.

88 *Wik Peoples v Queensland* [1996] HCA 40; (1996) 187 CLR 1, 245 (Kirby J); ¶3-425.

(10) A statute should not be given retrospective operation if this would affect an existing right or obligation unless the statute expressly or by necessary implication requires this interpretation.[89]

(11) The extent to which later legislation can be used to interpret the superseded legislation is 'debatable … care must be taken to determine whether the amending legislation merely makes clear what was implicit in the previous law or resolves doubts about its construction'.[90]

(12) Penal provisions must be interpreted in favour of the accused and against the prosecution.

(13) Legislation and documents must be interpreted in accordance with common law and equitable principles.[91]

(14) When interpreting legislation, the courts assume that parliament did not intend to abolish or to affect fundamental principles, rights and the general system of law without the parliament clearly stating that it intended to do so.[92]

(15) *'Means'* v *'includes'*. Definitions of words and expressions usually commence with either 'means' or 'includes' (¶1-200).
For example:
- The Australian Consumer Law (ACL) states that ''supply' … includes … exchange, lease, hire or hire-purchase'. The word 'includes' enlarges the ordinary meaning of the defined word by giving examples and otherwise leaving the definition of 'supply' open. For example 'supply' in this legislation includes what might not normally be thought of as supply. In the words of Lindgren J, 'Inclusory definitions are commonly used in order to enlarge or to clarify; to catch that which would not otherwise fall within the defined term, or to remove doubt as to whether something is or is not within the defined term'.[93]
- The *Competition and Consumer Act 2010* (Cth) states that ''Commission' … means the Australian Competition and Consumer Commission'. This means that the defined words have exact meanings, so that, for example, Commission in this legislation means the ACCC and no other Commission. The effect of 'means' is therefore to give an exhaustive or a limited definition.

(16) *'And'* v *'or'*. 'And' means that words or phrases are joined together and must be read together or conjunctively, whereas 'or' means that words or phrases must be read as alternatives, separately or disjunctively. Courts do not like the conjunction 'and/or' because it conceals meaning and can lead to confusion and ambiguity.

89 Eg, *Rodway v The Queen* [1990] HCA 19.

90 *Sun World Inc v Registrar, Plant Variety Rights* (1997) 148 ALR 447, 459 (French J), noted 'Plant variety rights — what is a "sale"?' (1998) 72 ALJ 115.

91 Eg, Interpretation of statutes in consonance with equitable principles (1991) 65 ALJ 375.

92 Eg, *X7 v Australian Crime Commission* [2013] HCA 29 [86].

93 *Plimer v Roberts* (1998) Australian Trade Practices Reports ¶41-602, 40, 540.