



Miles and Dowler, *A Guide to Business Law 21st edition*

Study Aid – Chapter summaries

Chapter summary – ch 1 – introduction to the Australian legal system

1. Law may be described as a set of rules that control/regulate the way people behave toward each other. Sources of Australian law include:

- common law (judge-made);
- equity (judge-made);
- statute law;
- delegated legislation;
- international law.

2. Common law

The common law developed from the practice of the English kings of sending their judges around England to decide cases on a uniform basis.

3. Rules of equity

Laws are based on principles of fairness and justice and developed to overcome the inadequate remedies at common law.

In relation to these types of laws our system has a judicial process that we call the **doctrine of precedent**. Broadly, this means that when a higher court in a judicial hierarchy declares a principle of law to apply to a particular situation, then other lower courts in the same judicial system must apply that principle to similar situations.

4. Statute law

In New South Wales (as with the other States and Territories), there are various statutes that apply. These statutes are either State laws and/or the statutes of the Commonwealth.

The Commonwealth Parliament consists of the Upper House (Senate) and Lower House (House of Representatives) and the Governor-General. A proposed law is called a Bill; to become law it must be approved (passed) by both Houses and signed by the Governor-General.

Except for Queensland, all Australian State and Territory parliaments consist of an Upper House (Legislative Council) and Lower House (Legislative Assembly) and a Governor.

A statute can amend or repeal a principle of common law or of equity as it takes



priority over judge-made law and is considered paramount law.

5. Delegated legislation

In many areas of government, public administration and law, Parliament enacts broad principles of law and then delegates its power to make detailed laws to someone else who has the time, the interest and the expertise to frame the detailed laws. These delegates are often Ministers of the Crown but they can just as easily be government or semi-government officials, bodies or individuals. This delegated legislation generally has the force of law and requires obedience to it by citizens.

6. International law

International law governs the relationship between nations. In recent years, the community of nations has passed numerous treaties that require individual countries to pass domestic laws. Laws contained in a treaty do not become part of Australian law until passed by the Commonwealth Parliament.

7. The doctrine of reception

In 1788, Captain Arthur Phillip arrived in the new colony with the First Fleet.

The colony was considered to be terra nullius (“uninhabited lands”) and was immediately subject to the law of England, ie common law, equity and English statute laws.

8. Australian Constitution

In 1901, New South Wales joined with the other colonies to form the Commonwealth of Australia. In 1900, the British Parliament, at the request of the colonies, passed the *Commonwealth of Australia Constitution Act 1900* (Imp), which came into effect on 1 January 1901. This established the Commonwealth of Australia and gave us the Australian Constitution.

9. High Court of Australia

At the request of the Commonwealth and the States, the British Parliament, in 1986, passed the Australia Acts. These Acts expressly removed whatever legal powers the British Parliament had to make laws for any State or Commonwealth parliament in Australia. This Act also abolished appeals from State courts to the Privy Council, thereby making the High Court of Australia our final and most important Court of Appeal.

10. *Native Title Act 1993*

In 1992, the High Court made an important decision in *Mabo's Case*. The court held that the doctrine of terra nullius did not apply to the settlement of Australia and gave partial recognition to land ownership called “native title”. In 1993, the Commonwealth passed the *Native Title Act 1993* to recognise and protect certain land rights of the indigenous peoples.



11. Exclusive law-making powers

The Australian Constitution divides the powers to make laws between the Commonwealth and the State governments. Only the Commonwealth Government can pass laws about certain things. These are called **exclusive law-making powers**. There are very few of them; “customs and excise duties” is one example.

12. Concurrent law-making powers

Section 51 sets out certain areas where both the Commonwealth and State governments can pass laws. These are called **concurrent law-making powers**. If the Commonwealth and a State each pass a law in one of these areas and there is a conflict, s 109 of the Constitution says that the Commonwealth law prevails to the extent of the conflict.

13. Residual power

Anything that is not an exclusive power or a concurrent power is a **residual power**. Only the States can pass laws in these areas.

14. Commonwealth Parliament

The Commonwealth Parliament comprises two houses: the House of Representatives and the Senate. The NSW Parliament also consists of two houses: the Legislative Assembly and the Legislative Council.

15. Three arms of government

Under the Commonwealth Constitution there are three arms of government: the **legislative, executive and judicial**. To a large degree they are separated and there is a principle that no one person or body should exercise more than one of these functions or powers at the same time; ie only the Parliament can make laws, only the Executive (Government) can administer the laws and only the courts can interpret and enforce laws. This is known as the **doctrine of separation of powers**.

16. The Commonwealth Constitution can only be changed by **referendum**. The people of Australia vote and any change must be approved by a majority of the voters nationwide and in a majority of States.

17. Statutory interpretation

The courts in the past have used different approaches to the interpretation of statutes:

- the literal approach;
- the golden rule; and



- the purpose approach.

18. *Acts Interpretation Act 1901 (Cth)*

A new s 15AA was added to the Commonwealth legislation in 1981 directing the courts to apply the purpose approach if the words of a statute are ambiguous. In 1984, a further addition was made with s 15AB which allowed the courts to use extrinsic materials (material outside the statute) to help interpret the statute law.

19. Laws may be classified as:

- public law; and private; or
- civil law and criminal law.