

# CHAPTER 1

## Legal Foundations

### LEARNING OBJECTIVES

On completion of this chapter, you should be able to:

- LO 1 Explain the importance of the law as a regulatory tool in society and business
- LO 2 Recognise and explain the characteristics of a legal system and the main sources of Australian law
- LO 3 Identify characteristics of different legal systems and define civil and criminal law under the common law system
- LO 4 Discuss the main types of law in Australia
- LO 5 Explain the division of powers under the *Commonwealth Constitution*
- LO 6 Explain the ways in which federalism has expanded and the role of the High Court in that expansion
- LO 7 Define the doctrine of the separation of powers and discuss its theoretical and practical functions.

This chapter provides an introduction to what is meant by ‘law’, how laws may be classified, the major and minor types of laws that make up the Australian legal system, Commonwealth and state powers and the growth of federal power, and the doctrine of separation of powers.

## INTRODUCTION

Law is basically a device to regulate the economic and social behaviour of the people who live in a society. If people lived in complete isolation, and didn’t carry on any economic activity or recognise any superior authority, there would be no need for laws to exist because there would be nothing to regulate or control. However, the reality is otherwise. People don’t live in complete isolation and economic activity is carried on regardless of whether people like it or not.

The law, as a regulatory device, provides the mechanism for society to function by prioritising needs and desires through tools such as legislation (Acts and regulations of Parliament) and, in the case of a common law system such as in Australia, case law (decisions of the courts).

## WHAT IS LAW?

There have been numerous unsuccessful attempts to produce a universally acceptable definition of ‘law’ over the centuries. All writers have their own views, in large part due to the fact that any definition of ‘law’ will be shaped by the writer’s moral, political, religious and ethical views, and influenced by the society in which the writer lives. Notwithstanding this lack of agreement on a precise definition of ‘law’, it is still possible to identify two common themes:

- control by humans; and
- human conduct, regulated by a superior authority or power—usually the state.

Given that it is difficult to provide a precise definition of ‘law’, a useful general definition of law is that it is:

*... a set of rules developed over a long period of time regulating people’s interactions with each other, which sets standards of conduct between individuals and other individuals, and individuals and the government, and that are enforceable through sanction.*

In the case of Australia, ‘the law’ consists of rules and principles of conduct that are enacted by governments, embedded in Constitutions and statutes, and embodied in decisions of the courts. It is worth noting at this point that when a reference is made to ‘the law’, it is a reference to the body of law generally, while a reference to ‘a law’ is a reference to a particular legal rule.

## ARE RULES ALWAYS LAW?

While it is generally true to say that the law is a set of rules, it should not be assumed that all rules are (or will be) automatically law. There are numerous examples of rules governing daily behaviour that are not laws and, as a general rule, will not become laws—for example, rules controlling sport, games, social behaviour, family behaviour, or how a person should behave at school and university. The list is endless.

To determine when a rule becomes law isn’t always an easy task. Consideration needs to be given to where the rule comes from. If the rule is made by a person or organisation rather than by parliament or the courts, it cannot be said to be a law. Consideration also needs to be given as to how a person will be dealt with when the rule is broken, how the person will be ‘punished’ and by whom. Legal rules are enforceable by prosecution (if it is a criminal matter) or litigation (if it is a civil matter). Breaches of non-legal rules have different consequences as they are not supported by the state. For example, if you are

playing Australian Rules football and you push an opponent in the back, you give your opponent a free kick. However, if you are playing Rugby League and you ‘spear tackle’ an opponent into the ground, because the offence is more serious than giving away a free kick, under the rules of the game you will be reported by the referee and suspended by the relevant Associations disciplinary tribunal.

## Law as a regulatory tool

In society generally, the law as a regulatory tool not only prescribes what people **cannot** do, it also informs people of what they **can** do and what they **must** do. For example, you **cannot** commit a crime, but you **can** own property, and you **must** pay taxes. In Australia, the law also plays a number of other roles, such as guaranteeing our freedoms, permitting free enterprise and providing a means to settle disputes peacefully.

### Could business exist without a legal system?

Business, as we know it, could not exist without the law. To operate effectively and efficiently, business needs laws to regulate business activities, to facilitate business transactions and to settle disputes that can arise between manufacturers, wholesalers, retailers and consumers of goods or services.

News stories involving business and the law appear frequently in the media, but often the stories are newsworthy only because they are extraordinary or controversial and they create the impression in the minds of many people that the law is largely removed from their everyday lives—for example:

- the proposed takeover or mergers of Australian companies by foreign owned companies;
- criminal investigations of insider trading and other market manipulation by those involved in mergers and acquisitions;
- corporate collapses, such as those of Dick Smith Electronics and Masters hardware stores;
- investment fraud (fraud is what is called a ‘dishonesty offence’ and involves the obtaining of a benefit by deception with no intention of ever giving it back—fraud can extend beyond money to stealing information, e.g. credit card details, status, knowledge or position); and
- corporate fraud—while high-profile Australians attract the majority of media attention, internal fraud is by far the bigger problem for corporate Australia, including asset and cash theft, cybercrime, procurement fraud, accounting fraud, bribery and corruption.

However, there are very few aspects of life—personal or business—that are not regulated by law, either directly or indirectly. For example, laws shape every stage of commercial enterprise. Because people are constantly engaged in business transactions, business law is relevant to all members of society. For example, the principles of contract law enable both individuals and businesses to rely on agreements:

- of employment;
- to purchase raw materials;
- for the purchase and sale of goods or services;
- for the purchase of a home or a business;
- to insure property; and
- for the appointment of an agent

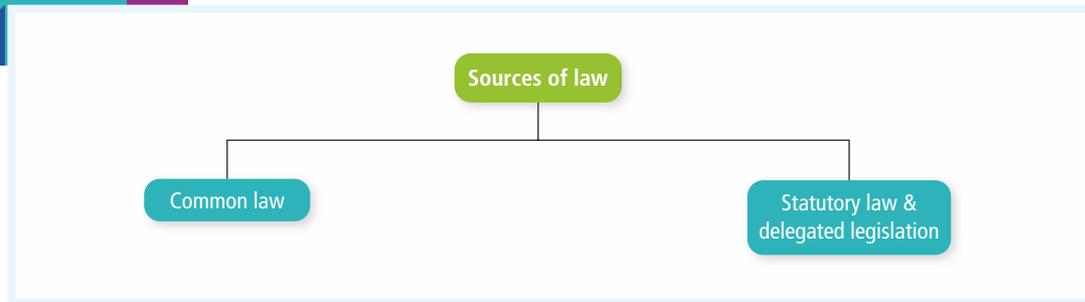
by providing a remedy to persons injured by another’s failure to perform an agreement.

To understand how contract law, and for that matter the law in general, operates, it is in the interests of everyone to have some understanding of the nature and sources of law, to be aware of what actions society as represented by government will take, why those actions have been taken, and how they will affect business and the community.

## SOURCES OF LAW

The two main sources of law are as shown in Figure 1.1.

FIGURE 1.1 Sources of law



The two main sources of law in this country are found in:

- case law or common law, which is found in the decisions of federal and state superior courts; and
- the laws made by the Commonwealth, state and territory parliaments in the form of Acts or statutes of Parliament.

IN BRIEF

## Common law

**Common law** is the law created through the **reported decisions of judges** (the doctrine of precedent) **in the higher courts**. It is non-statutory law, as it is law made by the courts (see Chapter 2 for more detail).

It is also known as:

- case law;
- precedent; or
- unwritten law.

The term 'common law' usually includes the principles of equity or equity law, which are discussed below.

## Statute law

These are laws made by federal, state and territory parliaments in the form of **statute law** or **legislation** (also known as **enacted law**), or by other government bodies in the form of by-laws, orders, rules and regulations, and known as **delegated legislation** (see Chapter 2 for more detail). Note that **in the event of a conflict between statute law and common law, statute law prevails**.

## CHARACTERISTICS OF A LEGAL SYSTEM

If the legal system under which we live is to be effective and have widespread community acceptance, then a number of characteristics must be present, including:

- clarity and certainty;
- flexibility;
- fairness; and
- accessibility.

## Clarity and certainty

The law needs to be as clear and certain as possible (it can never be absolute, but it should be predictable and flexible) so that people and businesses can conduct their affairs knowing what the law is, or being

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2  
Recognise and explain the characteristics of a legal system and the main sources of Australian law

able to find out what it is, and what the consequences of their actions will be. In part, this need for certainty helps to explain why parliaments are reluctant to pass retrospective laws, as such laws can have the effect of making an act that was lawful at the time it was done subsequently unlawful. This, in turn, can produce an element of uncertainty or unpredictability in the legal system. On the other hand, it is interesting to note that parliaments have been prepared to grant judges a wide discretion to determine, for example, what sort of conduct is ‘misleading or deceptive’ under a law such as the Australian Consumer Law (ACL) (see Chapter 17), creating a degree of unpredictability for businesses as they grapple with the meaning of those words and what they can and can’t do in the context of their business activities.

## Flexibility

If there is to be widespread community acceptance of the law, then the law must be seen as responsive, and adaptable, to changing circumstances—that is, it must be flexible. If the law cannot respond or adapt to change in a timely fashion, then there is a real risk that it will become redundant because it is not meeting the needs of the community it serves. Consider, for example, how the law has responded to the rapid advancement of technology or adjusted to changes in moral values within the community.

## Fairness

The law must be seen to be fair, at least by most members of the community. If the law is seen as inequitable, unfair or unreasonable, then it will not be accepted or obeyed by the community. Widespread community rejection of the law inevitably leads to civil unrest, with members of the community taking it on themselves to enforce what they perceive the law to be. In other words, they take the law into their own hands.

A concept that is closely identified with the law is **justice**. It is highly desirable that there be some sort of relationship between law and justice, but are ‘justice’ and ‘fairness’ synonymous? Unfortunately, like trying to give a precise definition of ‘law’, ‘justice’ can be a difficult term to define. As Lord Denning, one of England’s greatest judges, suggested:

*It [justice] is not a product of intellect but of spirit. The nearest we can go to defining justice is to say that it is what right-minded members of the community—those who have the right spirit within them—believe to be fair.*

The legal system embodies what society believes is right or fair. In simplistic terms, justice in our society means that everyone is entitled to be treated fairly. This means that if someone breaks the law, the punishment they receive should they be caught will be perceived by the community to be fair. (Note that often neither the victim nor the offender will think that is the case.) Similarly, if a person is injured because of the actions of another—for example, because of a person’s negligence or a breach of contract—the community assumes that the legal system will ensure that the **plaintiff** (the injured party) will receive fair compensation for the damage they have suffered. It is assumed by the community and the parties that they will receive a fair trial. But it is also unrealistic to believe that our legal system is absolutely foolproof and just, because it isn’t. Humans are not foolproof, and, as laws are made by humans, they will not be foolproof either. As society evolves, it is to be hoped that the legal system will also evolve and that existing injustices will gradually disappear and be replaced by fairness.

## Accessibility

The legal system is based on the premise that everyone is expected to know the law, which explains why it is not possible, in a court of law, to argue ignorance of the law as an excuse for breaking the law. But given the complexity of the legal system, is this expectation realistic? The fact is that no one knows it all. But it can be assumed that **everyone has access to the law**. This can be through textual copies of legislation (e.g. obtainable through the federal and state government printers and Government Gazettes) and cases (e.g. law reports), electronic technology such as the Internet (sites such as AustLII, the website

of the Australasian Legal Information Institute at [www.austlii.edu.au](http://www.austlii.edu.au), as well as Commonwealth, state and territory government sites), or through a solicitor or barrister.

Solving the problem of accessibility doesn't solve the problem of knowledge—that is, that everyone is expected to know the law. Accessibility doesn't equate with knowledge or understanding of the legal system. That only comes when a person or a business can:

- **identify** the legal issue;
- **determine** what area of law may apply;
- **know** where to find information about the relevant area of law;
- **understand** the relevant elements of legislation or a case;
- be able to **understand and interpret** what was read; and
- **apply** the relevant legal rules to the facts.

A basic understanding of how the legal system operates reduces the possibility of a serious legal issue arising. But if such a problem arises anyway, an understanding of some basic legal skills will result in dealing with the problem in a more timely manner, and hopefully producing a better result.

## REVIEW QUESTIONS

- 1.1 If you were asked to provide a definition of 'law', how would you define it?
- 1.2 In what ways does the law impact on a person's personal life?
- 1.3 In what ways does the law impact on business? Do you think that the law is sufficiently certain for business purposes?
- 1.4 Is the decision of a national sporting organisation such as the National Rugby League or the Australian Football League to suspend a player for an offence under the laws of the game a rule or a law? Discuss.

## CLASSIFICATION OF LAWS

Law can be classified in a number of different ways depending on the purpose of the classification and the needs of the classifier. Common classifications include:

- international law and municipal (or domestic) law;
- public law and private law;
- substantive law and procedural law;
- common law and civil law systems;
- common law and civil law.

In classifying the law into two legal systems—in this case, a common law system and a civil law system—it should not be assumed that these are the only two legal systems in the world. They could be considered to be the two dominant legal systems of the Western world but, as the 'In Brief' box on p. 9 illustrates, there are a number of legal systems in existence around the world (and even then the list is not exhaustive).

As a broad generalisation, it is possible to classify the legal systems of the world into four main groupings: Anglo-American common law, Romano-Germanic civil law, socialist law and Islamic (shariah) law. What can be said is that most other legal systems in the world possess characteristics that can be identified with one or more of these systems, and so they mark a convenient starting point when considering a modern classification of legal systems. The classification becomes important for businesses involved in international trade, as different legal principles can apply from those that they might be used

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3  
Identify characteristics of different legal systems and define civil and criminal law under the common law system

to in their own domestic jurisdiction, and a failure to appreciate these differences can mean the difference between a profit and a loss, or business success and failure.

## International and municipal (or domestic) law

### International law

Nation states (or countries) could not enjoy the benefits of trade and commerce, exchange of ideas, or even normal routine communication without some system of international law. **International law is that body of law concerned with regulating for the most part the conduct between nation states.**

While international law is principally concerned with relations between states (known as **public international law**), there are also laws that apply to individuals engaged in international transactions (referred to as **private international law**).

Two main sources of international law that can affect businesses are as follows:

- **Customary rules** of international law. These are derived from international custom and from established practices between nations—for example, the concept of **'terra nullius'**. Australian courts have recognised that these customary rules are deemed to be part of the law of the land, subject to the qualification that they must not be inconsistent with any statute or rule of common law.
- **Treaties and conventions.** These are agreements that have been ratified between nation states.

Since Federation, Australia has ratified over 900 international treaties and conventions. Some of the better-known trade agreements have been:

- **GATT**—the *General Agreement on Tariffs and Trade* is a multilateral treaty that aims to encourage free trade in goods.
- **The Vienna Sales Convention**—this is a multilateral treaty that sets out standards of conduct for sales agreements between traders of signatory countries.
- **APEC**—Asia-Pacific Economic Cooperation is a regional treaty, of which Australia is a member, that provides special trading advantages to its member states.
- **Korea–Australia Free Trade Agreement** (which came into force in December 2014), **the Japan–Australia Free Trade Agreement** (which came into force in January 2015) and **the China–Australia Free Trade Agreement** (which came into force in December 2015) will see the removal of trade barriers between Korea and Australia, Japan and Australia and China and Australia, opening up export opportunities for each country. A free trade agreement (or FTA) is a contractual agreement between two or more parties which gives each party preferential access to the other's markets.

International treaties and conventions are not part of municipal or domestic law unless they are given express legislative approval by the Commonwealth Government as they fall under its exclusive powers under the *Commonwealth Constitution*. However, the High Court has taken the view that ratification can create legitimate expectations that an administrative decision-maker would conform with a convention even though it might not have been incorporated into domestic law. See, for example, *Minister for Immigration v Ah Hin Teoh* (1995) 69 ALJR 423, where Mason CJ and Deane J said that ratification of a treaty is 'a positive statement by the [Commonwealth] government to the world and the Australian people that the government and its agencies will act in accordance with the treaty'.<sup>1</sup> At the end of the day, this could have the effect of making domestic policies invalid.

### Municipal (or domestic) law

**Municipal (or domestic) laws** come from statute or case law. They regulate the **relations or conduct between individuals** (or natural persons) and **organisations** (legal persons) that come **within the nation state's borders**. This doesn't mean that the individual or organisation must be a citizen of the state making the law, just that it must be within the nation state's borders. For example, if you visit the United States, you are subject to the municipal or domestic laws of that country, not the

## Major legal systems in the world

IN  
BRIEF

### Legal systems

### Characteristics

Civil law	Derived from Roman law, it is a complete code of written laws whose primary source of law is legislation. It is inquisitorial in nature and forms the basis of the legal systems of most Western European countries, Japan, and the former colonies of France, Spain and Portugal in Latin America, the near East, Indonesia, Thailand, Vietnam and parts of Africa.
Common law	Derived from case law (or precedent) and statute, it is accusatorial in form with an emphasis on remedies. It forms the basis of English law and can be found in the United States, as well as in Commonwealth nations, including Canada, Singapore, Malaysia, Australia, New Zealand, parts of Africa, India and Pakistan.
Sino-Soviet	Based on the philosophy of Karl Marx (i.e. the eradication of capitalism and the elimination of private ownership), its emphasis on codes means it is really only a variant of the civil law, but with an emphasis on public law. It applies to more than 30 per cent of the world's population.
Shariah (Islamic)	Shariah law is the body of Islamic law and is derived from the Qur'an. It comes from a combination of sources including the Qur'an (the Muslim holy book), sayings of the prophet Muhammad and fatwas (the rulings of Islamic scholars). It regulates the public and some private aspects of a Muslim's life, and coexists with other laws. It applies to approximately 20 per cent of the world's population.
Hindu	Hindu law is based on the doctrine of proper behaviour. It is followed by Hindus (who make up 20 per cent of the world's population), regardless of their nationality or where they live.
Talmudic	The Talmudic legal system is derived from the Old Testament and is the law of Jewish people, wherever they may be.

municipal or domestic laws of Australia. Similarly, a visitor from the United States to Australia is subject to the municipal or domestic laws of Australia, not the municipal or domestic laws of the United States.

## Public law and private law

Classification by public and private law is shown in Figure 1.2.

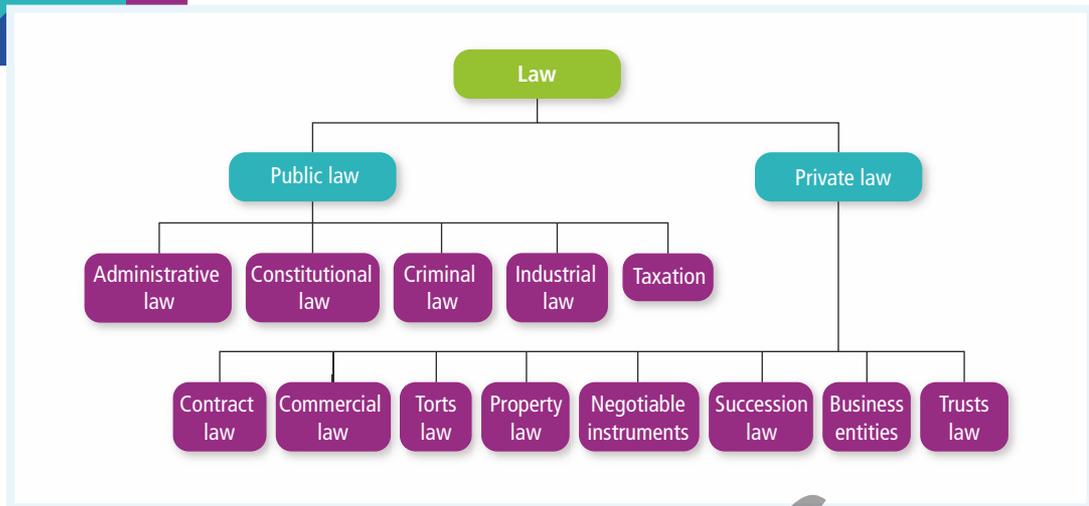
### Public law

**Public law** is concerned with the organisation of government and the relationship that exists between the government and the people. The areas of law that form part of public law—such as administrative law, constitutional law, criminal law, industrial law and taxation—are areas in which the public has a determining interest.

### Private law

While public law is especially applicable to or concerned with the state, **private law** is concerned with those areas of the law that deal with situations involving disputes over rights and

**FIGURE 1.2** Classification by public and private law



**obligations between people or organisations.** There are numerous branches of private law, but some of the more important areas (and that are relevant to business) include contract law, commercial law, law of torts, property law, negotiable instruments, succession, business entities and the law of trusts.

## Substantive law and procedural law

**Substantive law** refers to the actual rights and duties that people have under the law.

**Procedural law**, also known as **adjectival law** because it is subsidiary to substantive law, is concerned with the rules of civil and criminal procedure and evidence that must be followed in the enforcement of those rights and duties.

## The common law and civil law systems

### The common law system

The Australian legal system was inherited from England (Scotland's legal system continues to be separate from that of England, Wales and Northern Ireland), and similar systems can be found in former British colonies such as the United States, Canada, New Zealand, Malaysia and Singapore. It is what is known as a **common law system** because legal principles have been, and are being, developed by judges in courts of record—that is, through the reported decisions they make in determining cases (i.e. case law). These are what are known as 'superior' courts, and in the case of Australia consist of the state and territory supreme courts and the High Court.

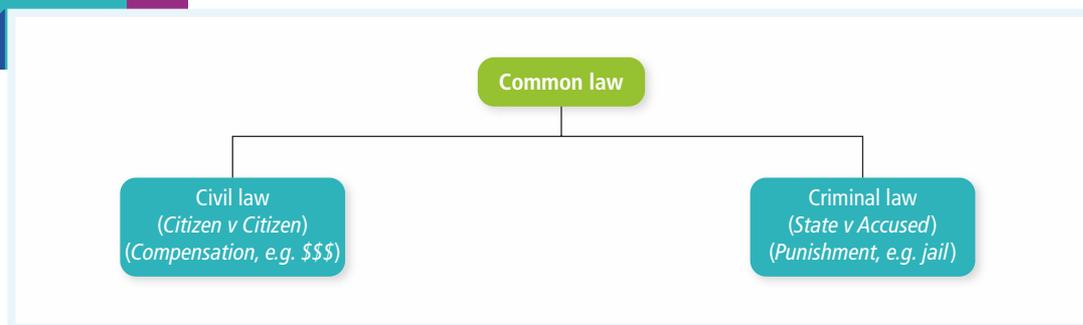
Within the common law system, two basic areas of law can be identified: **civil law and criminal law** (see Figure 1.3). Both impact on business, although the former has a far greater impact than the latter (see Figure 1.4).

### The civil law system

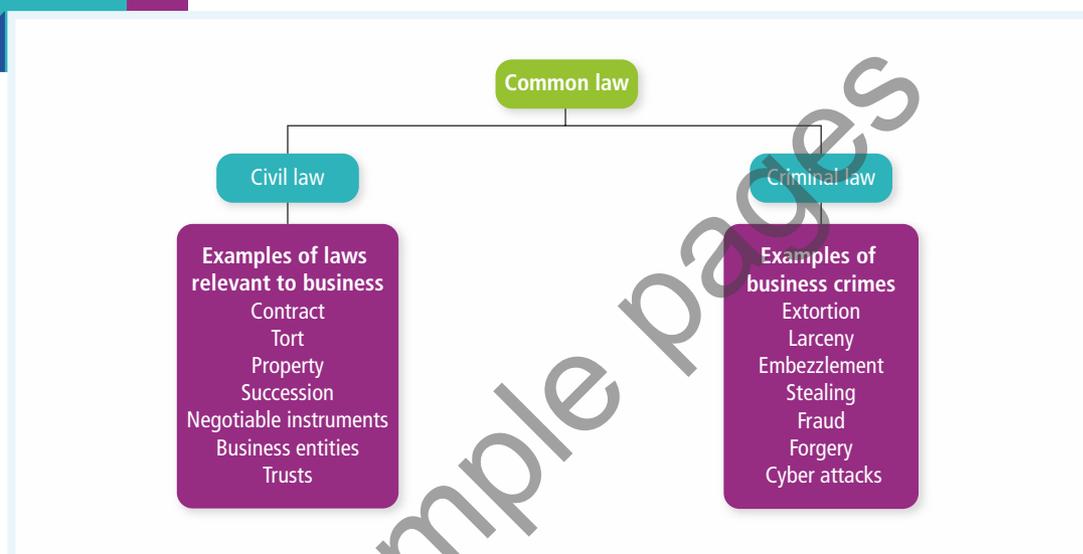
The term 'civil law' can have one of two meanings, depending on the context or way in which it is used, and the distinction is important. It can mean:

- a reference to a legal system—for example, the legal system used in Europe; or
- a reference to an area of law within the common law system governing relations between private individuals—for example, contract, tort, property, negotiable instruments, succession, business entities, trusts.

**FIGURE 1.3** A basic classification under common law



**FIGURE 1.4** Civil and criminal law



In the case of the former, the **civil law system** is a complete legal system with its origins in Roman and the (French) Napoleonic Codes. It is generally non-adversarial or inquisitorial. The law is set out in legislation that forms the primary source of law, with the courts basing their judgments on the provisions of codes and statutes.

Unlike the common law system, there is less reliance on case law (or judge-made law); however, it does appear that the two systems are converging. Common law jurisdictions are finding it increasingly difficult to rely on judge-made law and, as a result, are turning to codification of their laws, while the civil law systems are beginning to acknowledge the existence and use of precedent (a reference to the use of previously decided cases to assist in deciding a similar case today). It is possible that in the not-too-distant future the distinctions between the two systems may be sufficiently blurred to the point where they are effectively one and the same system.

## Civil law and criminal law under the common law system

### Civil law

Where the term '**civil law**' is used in the context of the common law system, it refers to an action brought by one individual against another. The **mode of procedure is accusatorial and the emphasis is on remedies**, usually an award of damages (monetary compensation) to the plaintiff if they can prove their claim on **the balance of probabilities**.

Business law is primarily about civil disputes that result in remedies for the winning party and liabilities for the losing one. Two of the better-known types of civil action that are relevant to business are:

- **tort law**, where the plaintiff must prove on the balance of probabilities that the defendant's actions caused injury or loss to the plaintiff (see Chapters 4–5); and
- **contract law**, where the plaintiff must prove on the balance of probabilities that the defendant broke a legally enforceable promise to the plaintiff (see Chapters 6–15).

## BUSINESS RISK MANAGEMENT ALERT

**Be a good record-keeper or else. In a civil action, the party that succeeds is usually the party that keeps a detailed account of what has happened (a paper trail if you like), with relevant dates and documents, and can produce it in a cohesive and comprehensive form for the court to establish what happened on the balance of probabilities.**

### Criminal law

In criminal cases the action is brought by the Crown on behalf of 'the people' (not the police, as they enforce the law) against a 'person' for the commission of an act that the state considers to be a crime and that should be **punishable by a penalty** if it can establish its case against the accused **beyond reasonable doubt**. Note that this is a higher degree of proof than is required in a civil case, where the plaintiff has to prove their case only on the balance of probabilities.

### Civil penalties

In addition to the criminal sanctions that can be found in the criminal law legislation of the Commonwealth, states and territories, an increasing amount of business-related legislation also carries civil penalties where there is a breach by a corporation (corporate crime) or an individual (if it is an employee, white-collar crime). Civil penalties are reserved for conduct that falls short of criminal behaviour. The legislation provides for pecuniary penalties for such conduct, but without the stigma attached to a criminal conviction, as an offence has not been committed. Civil penalty proceedings generally require proof only to the standard of the balance of probabilities unless there are serious allegations of impropriety, in which case the court must be satisfied to a higher standard of proof. Examples of where civil penalties can be found include the following:

- The *Competition and Consumer Act 2010* (Cth) makes it a criminal offence for executives and companies to engage in cartel conduct. If a person enters into an arrangement with a competitor to fix prices, restrict output, carve up markets or rig tenders with the intention of dishonestly obtaining a gain from customers, the criminal offence for that person is imprisonment for up to 10 years and/or a fine of up to 2000 penalty units (\$180 per unit) per contravention; while under the civil prohibition, a person who receives an infringement notice may be liable to a fine of up to 600 penalty units for a listed corporation or 60 penalty units for a non-listed corporation. A 'penalty unit' is defined in s 4AA of the *Crimes Act 1914* (Cth) and fines are calculated by multiplying the value of one penalty unit by the number of penalty units prescribed for the offence. Penalty units are reviewed every three years, with the next review due in late 2018.
- Corporations, directors and managers face criminal penalties for breaches under the *Corporations Act 2001* (Cth)—for example, for insider trading.
- Corporations, directors and managers also face criminal or civil penalties following the introduction of a multitude of Commonwealth and state environmental legislation. For example, for an unlawful action on a matter of national environmental significance the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) carries a maximum fine of up to \$5.5 million, or up to seven years' jail.
- Corporations, directors and managers may also face criminal or civil penalties under work health and safety legislation.

## BUSINESS TIP

### Who is a 'person' in law?

All rules of law are concerned with the activities of persons. For the purposes of the law, the reference to a 'person' includes not only a reference to human beings but also extends to entities or organisations that can have rights and obligations in much the same way as natural persons. Examples of entities include the Crown, companies and incorporated associations.

## REVIEW QUESTIONS

- 1.5 Explain the main differences, if any, between a common law system and a civil law system.
- 1.6 Indicate which of the following fall under the head of 'public law' and which fall under the head of 'private law': industrial law, contract law, tort law, constitutional law, taxation, the law of trusts.

## MAJOR AND MINOR TYPES OF LAWS IN THE AUSTRALIAN LEGAL SYSTEM

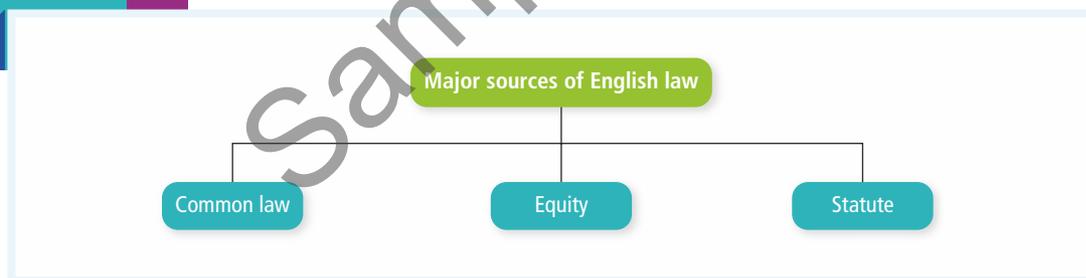
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Discuss the main types of law in Australia

Because the legal system of each state in Australia can trace its origins back to England, it is difficult to understand the Australian legal system unless there is an awareness of how the English legal system developed. In that context, it is possible to identify three major (see Figure 1.5) and at least two minor types of laws in the English legal system. While each is quite different, together they form a system of laws, and it is this legal system that Australia has inherited.

**FIGURE 1.5** Major types of laws found in England



## Origins of major sources of English law

### The growth of common law

The growth of common law can be traced back to 1066 when William, Duke of Normandy, later known as William the Conqueror, landed in England and claimed the English throne. In order to consolidate his position, William appointed a number of judges ('justices' in Eire) and sent them out to hold courts around the country. They were told to:

- administer a uniform system of law in the name of the King throughout the country;
- report to the King any potential threats from any nobleman or group of noblemen; and
- assess the wealth of the country so that taxes could be levied on the owners of land (the **Domesday Book**). In those days, wealth was measured in land holdings.

By the reign of Henry II (1154–89), the practice of sending the royal justices throughout the country ‘on circuit’ began to result in a fairly uniform body of law developing around the country—the **common law**. However, what had started as a flexible system began to lose much of its flexibility following the passing of the Provisions of Oxford in 1258, which provided, among other things, that if the facts in issue did not fit the standard form of the **writ** (an order to answer charges before the King), the action could fail.

## Equity

### IN BRIEF

#### Differences between common law and equity

##### Common law

A comprehensive system

Remedies are not discretionary

Common law rights are enforceable at any time, subject to the operation of a state or territory’s Statute of Limitations

Common law rights are valid against the whole world.

##### Equity

Not a comprehensive system—for example, it never had a criminal jurisdiction

Remedies are discretionary

Remedies must be applied for promptly or they may not be enforceable

Equitable rights are valid only against those persons specified by the court

Follows the common law; it will not override it

Acts only against the individual (i.e. in personam), not property

The growing inflexibility and rigidity of the common law resulted in many petitioners turning to the King to hear their pleas. The King was regarded as the ‘fountain of justice’ in the realm, and this belief was reinforced by his approach to dealing with the hardships and injustices resulting from the application of the common law on the basis of fairness and justice (**equity law**). By the 14th century, a Court of Chancery had to be set up to deal with the growing number of petitioners seeking just and equitable treatment, with the effect that an additional court system was created. When the *Judicature Act 1873* (UK) combined the two legal systems and created one Supreme Court of Judicature, it did not abolish the distinction between common law and equity; it simply directed the courts of common law to take into consideration the rules of equity. **Where the two systems came into conflict, equity would prevail over the common law**, and this is the position in Australia today.

**Equity law does not apply to all civil disputes**, and it has no application in criminal law. Where equity might apply—for example, where the injured party (the plaintiff) does not want damages because there will not be adequate compensation (which is the main remedy under common law and available ‘as of right’), or where there is an unconscionable dealing by a stronger party in a contractual situation (see, for example, *Commercial Bank of Australia v Amadio* [1983] HCA 14, in Chapter 11, pp. 299–300)—**an equitable remedy has to be specifically asked for by a party in court**. It can perhaps best be described as discretionary justice as **it is not available ‘as of right’** (as it is in a common law action) and it involves a plaintiff coming to the court in good faith (i.e. with ‘clean hands’), in good conscience and on the basis of fair dealing.

The two main types of equitable remedy are:

- an **injunction**—a court order that directs a person to stop doing something that could harm the interests of another and can be granted as a temporary order (an interlocutory injunction) before the court makes a final order in the matter, or as a final injunction; and
- **specific performance**—a court order directing a person to carry out an obligation that they have accepted, usually in a contract—for example, to complete a sale of land.

## Statute law

The laws created by Parliament are the highest ranking in the land, overruling all other laws. As noted earlier, **while statute law assumes the existence of common law, in the event of a conflict between common law and statute law, the latter will prevail.** The reason for this is that judges are independent of Parliament (and the people), while politicians, who are responsible for the making of statute law, are accountable to the people through the electoral process. If people don't like the laws that the politicians make in Parliament, they can vote them out at election time. There is, therefore, a degree of accountability as far as politicians are concerned which is absent in the case of judges.

A judge can be removed from power only by reaching the age of retirement, or by misbehaviour or incapacity and a process known as 'address' whereby the Governor-General (in the case of the Commonwealth) or a Governor (in the case of a state) removes a judge upon an address (a request) by both Houses of Parliament (or the lower House in Queensland, as there is no upper House). It is largely for this reason that in the event of a conflict between statute law and common law, statute law prevails. Common law principles will be maintained only to the point at which they conflict with statute law.

## What other sources of English law are relevant to business?

In addition to the three major types of law above, two other sources that have had a minor impact on the development of business law are **law merchant** and **Roman law**.

### REVIEW QUESTIONS

1.7 Discuss the following statements:

- a Common law ceases to be common law when it becomes codified.
- b Common law can exist without equity, but equity cannot exist without common law.

1.8 What is the main remedy in a common law action?

## COMMONWEALTH AND STATE POWERS

When reading the *Commonwealth Constitution* it should be remembered that it reflects the state (colonial) interests of the 1880s and 1890s and is essentially the product of a political process. At that time, Australia consisted of the six independent colonies, each with its own system of government and legal system. While it was becoming increasingly clear that a federal system could deal more efficiently with national issues such as defence and customs, the fact remained that there was considerable reluctance on the part of the colonies to give up any powers to a central body. (Even today the states are reluctant to give up any of their powers.) As a result, the only **exclusive powers** (i.e. powers controlled only by the Commonwealth, such as defence, customs and excise) are those few given to it by agreement of the state politicians (see Figure 1.6).

## The structure of the Australian Constitution

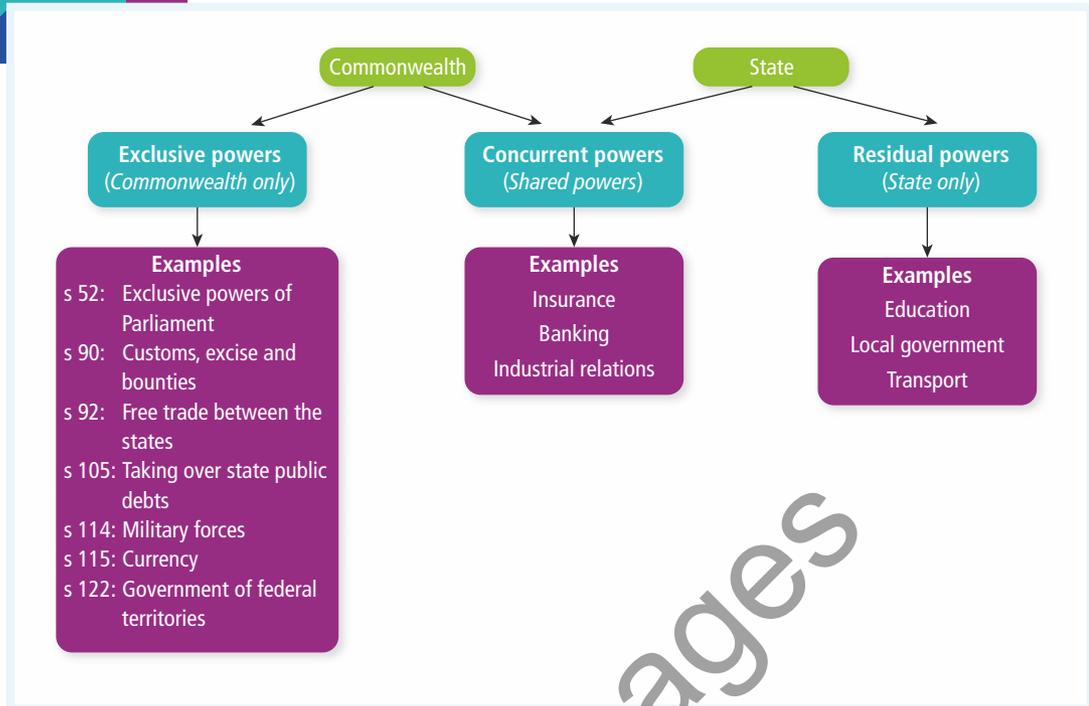
The *Australian Constitution* is divided into eight chapters (see Table 1.1).

### Chapter I—The Parliament

Chapter I vests **the legislative power of the Commonwealth** in a federal Parliament, consisting of (s 1):

- **The Queen**—represented by the Governor-General.
- **A Senate**—the **upper House** (known as the 'states House', because it consists of members elected from the states and territories and was set up to maintain and protect the interests of the states).

**FIGURE 1.6** Exclusive, concurrent and residual powers



**TABLE 1.1** Divisions of the *Australian Constitution*

CHAPTER	HEADING	PARTS
CHAPTER I	The Parliament	Part I—General; Part II—The Senate; Part III—The House of Representatives; Part IV—Both Houses of Parliament; Part V—Powers of the Parliament
CHAPTER II	The Executive Government	
CHAPTER III	The Judicature	
CHAPTER IV	Finance and Trade	
CHAPTER V	The States	
CHAPTER VI	New States	
CHAPTER VII	Miscellaneous	
CHAPTER VIII	Alteration of the <i>Constitution</i>	

Each state, regardless of size or population, is represented by 12 senators, while each territory has two senators.

- A House of Representatives**—the **lower House** (known as the ‘people’s House’) currently consists of members elected to represent the people in one of Australia’s 150 electorates. Unlike the Senate, electorate boundaries are based on population to ensure that each person’s vote has equal value and that voters have, as near as possible, equal representation. Changes in the distribution of Australia’s population make it necessary from time to time for the Australian Electoral Commission, which is completely independent of Parliament, to change the boundaries of electorates (or even create new ones) to ensure that each person’s vote continues to have equal value and voters have, as near as possible, equal representation.

Chapter I sets out not only the establishment of the two Houses of Parliament, but also the procedures and powers of Parliament (including the 40 concurrent powers shared with the states found in s 51, of which s 51(xxxvii) is becoming increasingly important—for example, in the areas of industrial relations and consumer protection) in five parts.

## Chapter II—The Executive Government

This chapter vests the executive power of the Commonwealth in the Queen through the Governor-General acting as the Queen's representative (s 61) with the advice of a Federal Executive Council (s 62). The Federal Executive Council consists of the Ministers of State for the Commonwealth who must also be Members of Parliament (s 64), although (the Prime Minister aside) they can be from either House.

## Chapter III—The Judicature

Chapter III vests the judicial power of the Commonwealth in a 'Federal Supreme Court, to be called the High Court, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction' (s 71).<sup>2</sup> Apart from the High Court, this includes the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia (formerly known as the Federal Magistrates' Court). Chapter III also sets out both the original (ss 75–76) and appellate (ss 73–74) jurisdictions of the High Court, as well as providing for the number of High Court judges (s 79) and their appointment, tenure and remuneration (s 72).

## Chapter IV—Finance and Trade

Chapter IV contains among the most contentious provisions in the *Constitution*, as it grants exclusive power to the federal Parliament over customs and excise duties (s 90) as well as providing that 'trade, commerce and intercourse among the States . . . shall be absolutely free' (s 92).<sup>3</sup>

## Chapter V—The States

Chapter V preserves the Constitutions of the states (s 106), the powers of state parliaments (s 107) and state laws (s 108). It also contains one of the most litigated sections in the *Constitution* in s 109, which provides that 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.<sup>4</sup> In *Mabo v Queensland* [1988] HCA 69 the High Court decided, by a majority, that the *Queensland Coast Islands Declaratory Act 1985* was inconsistent with the Commonwealth *Racial Discrimination Act 1975* and that, under s 109 of the *Constitution*, it was invalid to the extent of the inconsistency.

## Chapter VI—New States

Chapter VI provides for new states (s 124) to be admitted or established (s 121), and establishes the federal government's power to make laws with respect to the Australian Capital Territory and the Northern Territory and the seven external territories—Ashmore and Cartier Islands, Christmas Island, the Cocos or Keeling Islands, the Coral Sea Islands, Jervis Bay, Norfolk Island and the Australian Antarctic Territory (s 122).

## Chapter VII—Miscellaneous

Chapter VII provided that Parliament was to be initially in Melbourne and that the seat of government would ultimately be in territory granted or acquired by the Commonwealth in New South Wales, 'not less than one hundred miles from Sydney' (s 125).<sup>5</sup> An interesting section which was deleted in the successful 1967 referendum was s 127, which had provided that 'aboriginal natives shall not be counted' when determining the population of Australia. This event is sometimes referred to as the first stage of the reconciliation movement in Australia, and the referendum saw more than 90 per cent of eligible Australians vote 'yes' to count Aboriginal people and Torres Strait Islanders in the national census and to give the Commonwealth Parliament power to make specific laws for Indigenous people.

## Chapter VIII—Alteration of the *Constitution*

Chapter VIII sets out how the *Constitution* may be amended (s 128) and is as follows:

- The proposed amendment must be passed by an absolute majority of both Houses of Parliament.
- The proposed amendment must be put to the voters in the form of a referendum and be passed by:
  - a majority of voters; and
  - a majority of the states.
- The proposed amendment must receive Royal Assent.

Changing the *Constitution* is discussed in more detail on pp. 22–4.



## The division of powers under the *Constitution*

### Exclusive powers

As noted above, the **exclusive** powers granted under the *Australian Constitution* to federal Parliament are relatively few (see Figure 1.7) and are only able to be exercised by the federal Parliament; for example, s 52—the seat of government, s 90—the control of customs and excise duties, s 105—taking over state debts, s 114—military forces, s 115—currency matters, or s 122—the government of the territories. The states have no rights to legislate in respect of any of these matters.

#### IN BRIEF

The division of powers under the *Australian Constitution* is divided into three categories:

- **exclusive powers** are those granted under the *Constitution* to federal Parliament exclusively and, if there is a state law that conflicts with a federal (or Commonwealth) law, s 109 of the *Constitution* provides that the state law, to the extent of the inconsistency, will be invalid;
- **concurrent powers** are powers that the Commonwealth shares with the states, of which s 40 of the *Constitution* is the most important; and
- **residual powers** are those powers the states exclusively hold because the *Constitution* says nothing about them—for example, local government, education and transport.

Where there is any inconsistency between laws made under the exclusive powers of the *Commonwealth Constitution* by the Commonwealth and any state laws, s 109 of the *Commonwealth Constitution* provides that the state law, to the extent of the inconsistency, will be **invalid**. See, for example, *O'Sullivan v Noarlunga Meat Ltd (No 1)* [1954] HCA 29, where the High Court had to consider whether a South Australian meat company had to be registered under a South Australian law to slaughter lambs and under a Commonwealth law for the slaughter of meat for export purposes. Because the company didn't have a South Australian licence, it was fined. The High Court held that there was an inconsistency between the two laws and that under s 109 the state law therefore didn't apply.

### Concurrent powers

The bulk of the Commonwealth's powers are **concurrently** held (i.e. shared) with the states, of which the **most important is s 51**. It confers 40 heads of power in relation to which the Commonwealth can legislate for the 'peace, order and good government of the Commonwealth' (see Figure 1.7, but note that while the numbering in s 51 runs to xxxix, an additional power has been added to s 51, as xxiiiA, dealing with Commonwealth allowances and pensions).

While both the Commonwealth and the states have the power to legislate in the areas set out in s 51, political reality and s 109 in practice make it difficult for a state to legislate in an area where the Commonwealth has already passed legislation. See, for example, *Wallis v Downard-Pickford (North Queensland) Pty Ltd* [1994] HCA 17 (below).

PART V.—POWERS OF THE PARLIAMENT.

Part V.  
Powers  
of the  
Parliament.

51. The Parliament shall, subject to this Constitution, have power<sup>11</sup> to make laws for the peace, order, and good government of the Commonwealth with respect to:—

Legislative  
powers of  
the  
Parliament.

- (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:
- (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:

Inserted by  
No. 81, 1946,  
s. 2.

(continued)

Altered by  
No. 55, 1967,  
s. 2.

- (xxvi.) The people of any race, ~~other than the aboriginal race in any State~~, 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,<sup>12</sup> 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 either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

Source: Based on content from the Federal Register of Legislation at 2016. For the latest information on Australian Government law please go to [www.legislation.gov.au](http://www.legislation.gov.au).

## Wallis v Downard-Pickford (North Queensland) Pty Ltd [1994] HCA 17

**THE COURT:** High Court

**FACTS:** Goods belonging to Wallis suffered \$1663 worth of damage while being transported across Queensland by a removalist company. The company admitted liability but offered to pay only \$200, the maximum required under the now-repealed Queensland *Carriage of Goods by Land (Carrier's Liabilities) Act 1967*.

**ISSUE:** Was the state Act, with its limit on the amount of damages recoverable, invalid under s 109 of the *Constitution* because it clashed with the Commonwealth's *Trade Practices Act 1974* (now the *Competition and Consumer Act 2010* (Cth)) where there was no limit?

**DECISION:** The Queensland Act, which validly attempted to limit contractual liability for breach of warranty, was inconsistent with the Commonwealth Act.

**COMMENT:** While both Acts were proper exercises of legislative power, there was an inconsistency as the state Act limited the amount of damages to \$200. Therefore, s 109 of the *Constitution* made the state Act invalid and the removalist company was liable for the full loss—that is, \$1663.

**CASE REFLECTION:** Would the High Court have arrived at the same conclusion if the Queensland Act did not have a limit on the amount of damages recoverable?

## Residual powers

If nothing at all is said in the *Commonwealth Constitution* about an area, authority to legislate in that area remains exclusively with the states and is said to be a **residual power**—for example, local government, education and transport. Under s 107, the powers that the states had as colonies are preserved unless the *Constitution* has expressly taken away those powers. The effect of this is that if the Commonwealth attempts to pass a law in respect of a matter not within the powers conferred on it by the *Constitution*, the law would be **ultra vires** and therefore invalid.

## The role of the High Court in federal expansion

The High Court has, since inception, adopted a number of tests to settle the question of what happens in the event of a conflict between the provisions of state and Commonwealth laws. The ‘covering the field’ test is used most frequently. This involves consideration of whether:

- the Commonwealth law was intended to be supplementary to or cumulative upon state law, in which case both laws could coexist; or
- the Commonwealth law was intended to exclusively govern the particular conduct or matter, in which case the state law would be inconsistent and therefore invalid.

Much of the expansion of federal power in recent years has taken place through the High Court’s interpretation of the *Constitution*. A good example of the expansion of federal power in the area of business law was the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)), which extended beyond regulation of unfair trading practices of businesses to consumer protection. A careful examination of the *Constitution* would reveal that there was no power given to the Commonwealth to regulate trade practices or consumer protection as such. To get around this problem the Commonwealth relied on a number of specific powers in the *Constitution*, of which the most important was the corporations power (s 51(xx)). The Commonwealth also relied on other powers such as trade or commerce with other countries (s 51(i)), within a territory (or between territories or a state and a territory) (s 122), postal and broadcasting services (s 51(v)) and the external affairs power (s 51(xxix)). Individuals could also be caught under the postal and telecommunications power (s 51(v)), as Part V Division 1 (unfair practices) and Division 1A (product safety and product information) were based on this head of power.

Another area where Commonwealth power has increased through judicial activism of the High Court, and which has the potential to significantly expand Commonwealth legislative authority in a range of areas including business, is the use of the external affairs power (s 51(xxix)). For example:

- **Race:** The Queensland Government unsuccessfully tried to argue that the *Racial Discrimination Act 1975* (Cth) was invalid in *Koowarta v Bjelke-Petersen* [1982] HCA 27 (below).

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Explain the ways in which federalism has expanded and the role of the High Court in that expansion

### Koowarta v Bjelke-Petersen [1982] HCA 27

**THE COURT:** High Court

**FACTS:** In January 1977, representatives of the Winychanam Aboriginal people of Cape York had lodged a complaint with the Commissioner of Community Relations. They had sought, with the aid of the Aboriginal Land Fund Commission, to acquire a pastoral leasehold at Archer River, but the Queensland Minister refused to approve the transfer because it was for the use of Aboriginal people.

**ISSUE:** Was the *Racial Discrimination Act 1975* (Cth) invalid on the grounds that it extended the

Commonwealth’s external affairs power beyond that intended by the *Constitution*?

**DECISION:** The *Racial Discrimination Act* was a valid use of the external affairs power (s 51(xxix)) and it overrode state laws.

The majority held that as the Commonwealth was a signatory to an international convention (in this case, the International Convention on the Elimination of all Forms of Racial Discrimination), then the law implementing the goals of that treaty was a legitimate use of the external affairs power by the Commonwealth.



**COMMENT:** As the *Constitution* stood, the Commonwealth had not been given exclusive constitutional authority to legislate on racial discrimination in the states. However, the High Court held that when the Commonwealth entered into international obligations on behalf of Australia, it could legislate on matters that would normally

have been reserved to the states by the *Constitution*, if it were necessary to give effect to that obligation.

**CASE REFLECTION:** Do you think that it is reasonable that Australia's international obligations should override matters that traditionally have been reserved for the states?

- **Environment:** It was probably no surprise that the external affairs power was again relied on (although not totally) by the Commonwealth in 1982 when the Tasmanian Government decided to dam the Gordon River below the Franklin River and the then new federal Labor government passed the *World Heritage Properties Conservation Act 1983* prohibiting the action. In the *Commonwealth v Tasmania* [1983] HCA 21, the High Court again split, with a 4:3 majority, and held, among other things, that the Commonwealth had the power under s 51(xxix) to stop the dam based on Australia's international obligations under the UNESCO World Heritage Convention, which Australia had ratified in 1974.
- **Immigration:** The external affairs power was again used, this time in 1995 in *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20, where the High Court held, this time by a 4:1 majority, that the ratification of the United Nations Convention on the Rights of the Child gave rise to a legitimate expectation that administrative decision-makers would act in conformity with with the terms of the treaty, thus giving treaties an effect in Australian law which they didn't previously have.

## Other ways federalism has expanded

Apart from the widening of Commonwealth powers through favourable judicial interpretation by the High Court, the Commonwealth has gained significant financial leverage over the states through the income-taxing powers it acquired during the Second World War and the Goods and Services Tax (GST) in 2000. And while the states can still rely on their own taxation powers for revenue-generating purposes, the political reality is that they don't. The result is that the states are now dependent on the Commonwealth for the funding of many of the services that, under the *Constitution*, they have exclusive responsibility for, such as health, transport, education and business.

The Commonwealth has grant-making powers under s 96 (financial assistance to states) of the *Constitution*. Section 96 provides that in making grants to the states the Commonwealth may impose such terms and conditions as it sees fit. By attaching conditions to state grants, the Commonwealth has been able to expand its power over the states in a way not envisaged by the originators of the *Constitution*, as it does not have to rely on s 51 (which sets out the general powers of the Commonwealth).

Federal power could also be expanded by a state or states handing over any powers they have to the Commonwealth under s 51(xxxvii) of the *Constitution* (this is known as the 'referral power'). Examples include the South Australian and Tasmanian governments transferring ownership and control of their country railway systems to the Commonwealth in 1977, and the Victorian Government handing over its industrial relations powers in 1998. Another way is for the states to cooperatively enact legislation that is identical to or 'harmonises' with the relevant Commonwealth legislation in order to set uniform standards (e.g. air safety regulations, industrial relations and occupational health and safety). Alternatively, Commonwealth powers could be expanded through the use of s 128 of the *Constitution*, which allows the *Constitution* to be changed by referendum.

## Changing the *Constitution*

As noted on p. 18, the *Commonwealth Constitution* can only be formally changed (amended) if **all** of the following requirements set out under s 128 of the *Constitution* are satisfied:

- The proposed amendment is passed by an absolute majority of members in both the House of Representatives and the Senate, or is passed twice in either the House of Representatives or the Senate.
- A referendum must be held no sooner than two months and no later than six months after the bill is passed. In the four weeks after the bill is passed, the 'yes' and 'no' cases are prepared by those members and senators who voted accordingly, and these are then printed and sent to every voter. The Governor-General then issues a writ for a referendum, which must be held on a Saturday.
- The proposal is put to a vote of the Australian voters (a **referendum**).
- The proposal is approved by a majority of the voters **and** there is a majority approval in a majority of the states. In other words, more than 50 per cent of the voters nationwide, and a majority of voters in at least four states, must say 'yes'. The votes of people living in any of Australia's territories (internal or external) count towards only the national majority.
- The Governor-General gives Royal Assent to the amendment.

Since Federation there have been 19 referenda in which 44 questions have been put; however, only eight proposals have received the necessary 'double majority' and have been successful (see Table 1.2). A further five proposals, while receiving an overall majority of votes, did not gain a majority in a majority of the states. Such has been the conservatism of the Australian voter! The last successful referendum was in 1977 when proposed amendments to fill Senate casual vacancies, to allow electors in the territories to vote in constitutional referenda, and to provide retiring ages for judges of federal courts were all carried. The most recent attempt to amend the *Constitution* was in 1999 when an attempt was made to alter the *Constitution* to establish the Commonwealth of Australia as a republic and to insert a preamble, with neither a majority of voters nor a majority of states voting in favour.

**TABLE 1.2** Referenda since 1906

SUBJECT	DATE OF REFERENDUM	STATES WHERE A MAJORITY OF ELECTORS VOTED IN FAVOUR	% OF VOTERS IN FAVOUR	APPROVED
1. Senate elections	12/12/1906	All	82.65	YES
2. Finance	13/04/1910	Qld, WA, Tas	49.04	
3. State debts	13/04/1910	All but NSW	54.95	YES
4. Legislative powers	26/04/1911	WA	39.42	
5. Monopolies	26/04/1911	WA	39.89	
6. Trade & commerce	31/05/1913	Qld, SA, WA	49.38	
7. Corporations	31/05/1913	Qld, SA, WA	49.33	
8. Industrial matters	31/05/1913	Qld, SA, WA	49.33	
9. Railway disputes	31/05/1913	Qld, SA, WA	49.13	
10. Trusts	31/05/1913	Qld, SA, WA	49.78	
11. Nationalisation of monopolies	31/05/1913	Qld, SA, WA	49.33	
12. Legislative powers	13/12/1919	Vic, Qld, WA	49.65	
13. Nationalisation of monopolies	13/12/1919	Vic, Qld, WA	48.64	
14. Industry & commerce	04/09/1926	NSW, Qld	43.50	
15. Essential services	04/09/1926	NSW, Qld	42.80	
16. State debts	17/11/1928	All	74.30	YES

SUBJECT	DATE OF REFERENDUM	STATES WHERE A MAJORITY OF ELECTORS VOTED IN FAVOUR	% OF VOTERS IN FAVOUR	APPROVED
17. Aviation	06/03/1937	Vic, Qld	53.56	
18. Marketing	06/03/1937	None	36.26	
19. Post-war reconstruction & democratic rights	19/08/1944	SA, WA	45.99	
20. Social services	28/09/1946	All	54.39	YES
21. Organised marketing of primary products	28/09/1946	NSW, Vic, WA	50.57	
22. Industrial employment	28/09/1946	NSW, Vic, WA	50.30	
23. Rent & prices	29/05/1948	None	40.66	
24. Power to deal with communists & communism	22/09/1951	Qld, WA, Tas	49.44	
25. Parliament	27/05/1967	NSW	40.25	
26. Aborigines	27/05/1967	All	90.77	YES
27. Prices	08/12/1973	None	43.81	
28. Incomes	08/12/1973	None	34.42	
29. Simultaneous elections	18/05/1974	NSW	48.30	
30. Mode of altering the <i>Constitution</i>	18/05/1974	NSW	47.99	
31. Democratic elections	18/05/1974	NSW	47.20	
32. Local government bodies	18/05/1974	NSW	46.85	
33. Simultaneous elections	21/05/1977	NSW, Vic, SA	62.20	
34. Senate casual vacancies	21/05/1977	All	73.32	YES
35. Territory voting in referenda	21/05/1977	All	77.72	YES
36. Retirement of judges	21/05/1977	All	80.10	YES
37. Terms of senators	01/12/1984	NSW, Vic	50.64	
38. Interchange of power	01/12/1984	None	47.06	
39. Parliamentary terms	03/09/1988	None	32.91	
40. Fair elections	03/09/1988	None	37.59	
41. Local government	03/09/1988	None	33.61	
42. Rights and freedoms	03/09/1988	None	30.79	
43. Republic	06/11/1999	None	45.13	
44. Preamble	06/11/1999	None	39.34	

Source: Referendum results, *The 44th Parliament, Parliamentary Handbook of the Commonwealth of Australia 2014*, Canberra, Parliamentary Library, Department of Parliamentary Services, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22handbook%2Fnewhandbook%2F2014-10-31%2F0048%22>.

Governments can also hold a plebiscite, or a poll, to find out people's views on a particular issue (for example, the Turnbull federal government was going to hold a plebiscite on marriage equality in 2016). However, they are not bound to act on the result.

In reality, the expansion of federal power has been more a result of the interpretation of the *Constitution* by the High Court and the Commonwealth's use of its grant-making powers under s 96.

## The powers of the territories

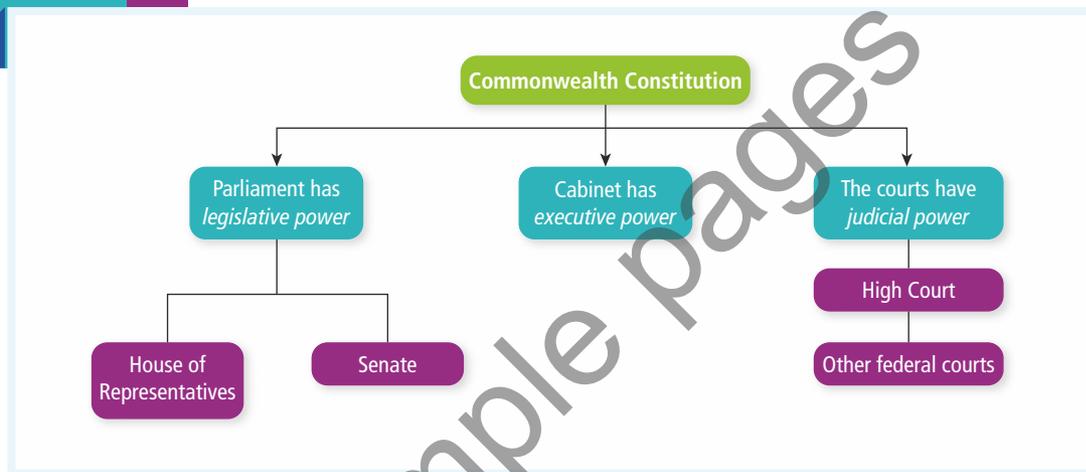
The Northern Territory and the Australian Capital Territory both have a form of self-government, but they have not achieved state status (in 1998 the voters of the Northern Territory rejected a statehood proposal, although the Northern Territory is currently making another bid for statehood). They both have an elected Legislative Assembly (they are unicameral parliaments), which may pass laws unless they are blocked (vetoed) or modified by the House of Representatives or Senate of the Commonwealth Parliament. For example, the Northern Territory had its voluntary euthanasia legislation blocked in 1997 and its **native title** legislation blocked in 1999.

## SEPARATION OF POWERS

One of the features of the *Australian Constitution* is that it provides for separation between the legislative, executive and judicial powers of the Commonwealth (see Figure 1.8).

LO 7  
Define the doctrine of the separation of powers and discuss its theoretical and practical functions.

FIGURE 1.8 Doctrine of separation of powers



Under the *Australian Constitution*, the doctrine of separation of powers provides for separation between the legislative, executive and judicial powers of the Commonwealth:

IN BRIEF

- the **legislative power**—the making of law through parliament;
- the **executive power**—the formulation of policy and its administration through Cabinet; and
- the **judicial power**—the interpretation, application and enforcement of the law through the court system.

While there is a clear separation of the judicial powers from the legislative and executive powers, in reality there is no separation between the legislative and executive powers.

The doctrine of **separation of powers** has been enshrined in the *Commonwealth Constitution* (but **not** in the state Constitutions) in Chapters I (the Parliament), II (the Commonwealth Executive) and III (the Federal Judicature):

- In **Chapter I, s 1** vests **legislative power** in a federal Parliament, consisting of the Queen, the House of Representatives and the Senate.
- In **Chapter II, s 61** vests **executive power** in the Queen and is exercisable by the Governor-General at the Commonwealth level and by governors at the state level. The body that advises the

Governor-General is the federal Executive Council (s 62). As a matter of convention the Governor-General will generally act as advised by the Prime Minister.

- In **Chapter III, s 71** vests **judicial power** in the High Court and such other federal courts as the Parliament creates. To try and ensure their independence, s **72** deals with the appointment, tenure and remuneration of federal judges, rather than leaving it entirely to parliament.

The functions of the three branches are:

- the **legislative** function—the enactment or making of the law through the Commonwealth or state parliaments;
- the **executive** function—the formulation of policy and its administration through the Cabinet (or the Ministers within the Cabinet) of the elected Commonwealth (or state) Government; and
- the **judicial** function—the interpretation, application and enforcement of the law through the court systems of the Commonwealth (and the states).

Under the doctrine of separation of powers, the **legislature** (Parliament) is the **supreme law-maker** (and—as noted earlier in this chapter, on pp. 5 and 15—where there is a conflict between the common law and statute law, statute law must prevail). The **judicature** is meant to give effect to the laws.

In theory, the doctrine of the separation of powers means that no one person or body will exercise more than one power, which is a limitation on the powers of the Commonwealth Parliament. In essence, the doctrine is based on the idea of checks and balances. However, in reality, there is no separation between the executive and the legislative functions of federal (or even state) government in Australia. The Prime Minister and the executive Ministers must be elected Members of Parliament, which is the arm that exercises the legislative function. Executive power generally rests with those Ministers in government who form the Cabinet. By contrast, the separation between the judicature on the one hand and the parliament and the executive on the other is strict: see *A-G for Australia & Kirby v R and the Boilermakers Society* [1957] AC 288 (the ‘Boilermakers’ case).

While the Commonwealth Parliament is supreme in making the laws, it is the responsibility of the High Court to interpret the legislation that Parliament makes and to assess whether it is within the guidelines set down in the *Constitution*. Judges are not allowed to be part of either the executive or legislative arms of government. They are unelected, deriving their power from the executive of the day, and can only be removed in exceptional circumstances—that is, by impeachment. There is, then, both independence from and a clear separation of the judicial power from both the executive and legislative powers. Only a court may exercise the judicial power of the Commonwealth.

## REVIEW QUESTIONS

- 1.9 Explain the meaning of the terms ‘exclusive powers’, ‘concurrent powers’ and ‘residual powers’ in the context of the *Australian Constitution*.
- 1.10 What reasons can be put forward to explain the resistance by Australian voters to constitutional change in Australia?

## Acknowledgments

<sup>1</sup> *Minister for Immigration v Ah Hin Teoh* (1995) (69 ALJR 423), *Australian Law Journal Reports*. Reproduced with permission of Thomson Reuters (Professional) Australia Limited, <http://legal.thomsonreuters.com.au>. This publication is copyright. Other than for the purposes of and subject to the conditions prescribed under the *Copyright Act (Australia) 1968*, no part of it may in any form or by any means (electronic, mechanical, microcopying, photocopying, recording or otherwise) be reproduced, stored in a retrieval system or transmitted without prior written permission. Enquiries should be addressed to Thomson Reuters (Professional) Australia Limited, PO Box 3502, Rozelle NSW 2039, <http://legal.thomsonreuters.com.au>.

<sup>2</sup> Sourced from the Federal Register of Legislation at 15 February 2017. For the latest information on Australian Government law please go to [www.legislation.gov.au](http://www.legislation.gov.au).

<sup>3</sup> Sourced from the Federal Register of Legislation at 15 February 2017. For the latest information on Australian Government law please go to [www.legislation.gov.au](http://www.legislation.gov.au).

<sup>4</sup> Sourced from the Federal Register of Legislation at 15 February 2017. For the latest information on Australian Government law please go to [www.legislation.gov.au](http://www.legislation.gov.au).

<sup>5</sup> Sourced from the Federal Register of Legislation at 15 February 2017. For the latest information on Australian Government law please go to [www.legislation.gov.au](http://www.legislation.gov.au).

Sample pages



## KEY TERMS

An understanding of the following terms will help you to better understand the material in this chapter.

**Civil law system:** a complete legal system with its origins in Roman law and the Napoleonic Code.

**Common law:** that part of English law developed from the common custom of the country as administered by the common law courts.

**Concurrent powers:** those powers able to be shared between the federal and state parliaments.

**Equity:** fairness or natural justice.

**Executive:** also known as the Cabinet.

**Exclusive powers:** those powers only able to be exercised by federal Parliament.

**International law:** that body of law concerned with regulating conduct between nation states.

**Judicature:** a collective term for judges.

**Law merchant:** that part of the common law relating to mercantile matters.

**Municipal (or domestic) law:** that body of law concerned with regulating the relations or conduct between individuals and organisations within a state's borders.

**Native title:** the term used to describe the common law rights and interests of Indigenous peoples in land according to their laws, traditions and customs. It is a pre-existing right that evolved over thousands of years and is not a grant or right created by governments, but can be extinguished by the Crown or if the traditional title holders lose their connection with the land.

**Plaintiff:** the party commencing a civil action in a court of first instance.

**Private law:** that body of law concerned with regulating the relationships between individuals within the state—for example, contract law and tort law.

**Public law:** that body of law concerned with the relationship between the state and the individual—for example, criminal law and constitutional law.

**Residual powers:** those powers able to be exercised only by state parliaments.

**Roman law:** civil codes that form the basis of the civil law system.

**Separation of powers:** the vesting of the legislative, executive and judicial arms of government into three separate branches, with none of the three branches able to exercise total power.

**Statute law:** laws passed by Parliament.

**Terra nullius:** territory belonging to no one.

**Ultra vires:** beyond legal power and therefore invalid.

**Writ:** a document issued by a court commanding the person to whom it is addressed to do, or stop doing, a particular act.

## KEY POINTS

An understanding of the following points will help you to better revise material in this chapter.

- 1. What is law?** There is no universally accepted agreement on what law is, but a starting point is that the law is a set of rules, developed over a long period of time, regulating people's interactions with one another.
- 2. What are rules and what is law?** It does not automatically follow that rules are always law. To determine whether a rule is law, consider where it came from, how it deals with an offender who has broken the rule, the type of punishment and by whom it is handed out.

- 3. What are the various classification of law?** Laws may be classified in a number of ways, including:
- the **common law system** (based on precedent and statute law) and the **civil law system** (based on a code-based system);
  - **international law** (which regulates conduct between states) and **municipal or domestic law** (a state's internal laws);
  - **public law** (concerned with the organisation of government and with the relationship that exists between people and the government—for example, constitutional law, industrial law, taxation);
  - and **private law** (concerned with relations between natural and legal persons—for example, contract law, torts law, property law, company law); and
  - **substantive law** (actual rights and duties under the law) and **procedural law** (the rules of civil and criminal procedure, and evidence).
- 4. What is the distinction between civil law and criminal law?** Civil law involves an action between individuals, where the plaintiff has to establish on the balance of probabilities that their case is the more believable, and aims at compensating the injured party. Criminal law involves an action brought by the state, with the state having to establish beyond reasonable doubt that the accused has committed a wrong for which they should be punished.
- 5. What are the major and minor sources of law that together make up the Australian legal system?** Three major types of laws are common law, equity and statute law, while minor types include law merchant and Roman law.
- 6. How are Commonwealth and state powers divided under the *Commonwealth Constitution*?** Under the *Constitution*, three types of powers can be identified:
- **exclusive powers** of the Commonwealth—for example, defence and customs—where only the Commonwealth can legislate;
  - **concurrent powers**, forming the bulk of the Commonwealth's powers, with both the Commonwealth and the states having the power to legislate in these areas; and
  - **residual powers**, which are powers exclusive to the states as the *Constitution* is silent on particular areas—for example, education and transport.
- 7. What is meant by 'separation of powers'?** The doctrine of separation of powers identifies three kinds of powers:
- **legislative power**, which involves the enactment or making of the law;
  - **executive power**, which involves the formulation of policy and its administration through the Cabinet; and
  - the **judicial function**, which involves the interpretation, application and enforcement of the law.

Under the doctrine of separation of powers, the **legislature** (Parliament) is the **supreme law-maker**.

## TUTORIAL QUESTIONS

1. Why did common law become so rigid and inflexible?
2. In what ways does equity law differ from common law?
3. What are the main differences between common law and statute law?
4. In the 21st century, what problems do businesses face under a federation model such as exists in Australia?

- 
5. Numerous attempts have been made to arrive at a satisfactory test for identifying a law. Select one of the following and explain whether you think it is adequate for identifying a law:
    - a. The law is something that all people ought to obey.
    - b. Law is a command by a political superior to a political inferior.
    - c. Law is rules established by people who have control of organised power.
    - d. Law is the highest reason implanted in nature.
    - e. Law is a command from God that is recognised through the human intellect.
    - f. The law is what the courts say.

Explain why the other tests are unsatisfactory. If none of the tests is, in your opinion, satisfactory, explain why and try to make your own test.

6. Why should an Act of Parliament override the common law in the event of a conflict between the two? Discuss.
7. Are 'law' and 'justice' one and the same thing? Discuss.
8. Briefly explain the main sources of Australian law.
9. Explain the main difference/s between a common law system of law and a civil law system of law.
10. Briefly explain what effect, if any, the High Court's decisions, such as *Mabo* and *Wik*, have had on the doctrine of reception and the Australian legal system.
11. With three tiers of government and a population of a little over 24 million people, is Australia over-governed and over-taxed? Discuss.
12. Will Australia ever become a republic? Research the debates that took place in 1999, and consider whether they are more or less valid today.
13. List the three functions of government referred to in the doctrine of separation of powers, and consider whether you think that the distinction today is in fact artificial.
14. Are judicial appointments to the Bench of the High Court consistent with the doctrine of separation of powers? Discuss.
15. Explain what is meant by each of the following terms:
  - a. exclusive powers;
  - b. concurrent powers;
  - c. separation of powers;
  - d. terra nullius; and
  - e. native title.
16. What reasons can be put forward to explain why it is so difficult to get constitutional change in Australia?