

10861NAT Diploma of Aboriginal and Torres Strait Islander Legal Advocacy

AUSTRALIAN LEGAL SYSTEM

PART 4: COMMON LAW AND THE COURT SYSTEM



Acknowledgement of Country

We acknowledge the traditional owners of the land on which Tranby stands, the Gadigal people of the Eora nation. We pay our respects to their Elders both past and present, who remain the traditional knowledge holders of this land.



We proudly extend this respect to all current and emerging leaders around Australia, for they hold the memories, the traditions, the culture and the future of their people.



Common Law and the Court System

- Even though many of the laws in Australia are made by the parliaments; Australia is known as a Common Law jurisdiction.
- The Common Law system reflects the English legal system which dates back to the eleventh century. Most other former British colonies around the world are also common law systems, most notably the United States of America.
- A Common Law system is distinct from a Civil Law jurisdiction which is found in most European countries and their former colonies (in fact in around 60% of the world) and which is based on codified law (or legislation) as opposed to case law.
- The distinctive feature of Common Law is that it represents the law of the courts as expressed in judicial decisions. The grounds for deciding cases are found in the principles provided by past court decisions, as contrasted to a system which is based solely on Acts of Parliament



Common Law and the Court System

➤ Common law applies in the following instances:

1. To decisions made by judges where no legislation or law applies. For example:

- Some crimes e.g. murder, common law assault
- Defences e.g. to strict liability offences
- Areas of contract law which deal with broken contracts, and
- Negligence which deals with harm or damage caused by lack of reasonable care for others (torts), and

2. To judges' interpretations or discussions about particular statutory laws and regulations which may be unclear or ambiguous.



Common Law and the Court System

➤ Case law is broken down into two categories:

1. Common Law, and
2. Equity Law

➤ These two branches came about because:

- Common law courts only recognized certain complaints (called **causes** of action) and only granted certain remedies (damages).
- If the complaint **did not** fit a recognized action, the court would not hear the matter (***no jurisdiction***) (Somewhat unfair).
- Thus, the law of equity arose in the 1400s when the Court of Chancery was prepared to provide relief in situations which the common law did not recognise.
- **Common law** and **equity** operated separately for many years. A person bringing a complaint had to choose between common law or equity; the wrong choice could have left the complainant with **no remedy** at all. ***Judicature Acts 1873- 1875*** unified common law and equity. Pleas heard on either one or the other or a combination .
- *However, the two bodies of law remain separate.*



Common Law and the Court System

➤ *Main Difference is in the Remedies*

➤ *Common Law Remedy*

- Only damages and only for – breach of contract, fraudulent misconduct, negligent misrepresentation
- But not for innocent misrepresentation or other unfair tactics not amounting to fraud

➤ *Equitable Remedies*

- Rescission of contract for - innocent misrepresentation, unconscionable dealing, mistake, breach of fiduciary duty
- Specific performance
- Injunctions



Common Law and the Court System

- Therefore, many of our primary legal principles have been made and developed by judges (rather than by Parliament) from case to case in what is called a system of **precedent**, where the lower courts are bound to follow principles established by the higher courts in previous cases.
- The common law (or judge-made law) is at least as important to us as the law made by Parliament. For example, in Victoria, there is no Act of Parliament that says that murder is a crime; it is a common law crime which has been refined over the centuries by judges



Common Law and the Court System

- Another important role played by the judiciary is that of statutory interpretation.
- Whilst the meaning of law in a statute should be clear and explicit, this is not always achieved.
- Many cases come before the courts because there is a dispute over the meaning or scope of a word in a statute (e.g. the external affairs power in the *Franklin Dam Case*).
- Judicial decisions remain important as they not only filled in the gaps where there was no statute law they interpreted the meaning of statutory law.



Common Law and the Court System

- A groundbreaking case in Australia's common law history is the *Mabo* land rights case (*Mabo & Ors. v State of Queensland* (1992) 175 CLR 1)
- The *Mabo* case demonstrated a major development in the common law's approach to land rights when it overturned the doctrine of *terra nullius* and recognised the traditional rights of the Meriam people to their islands in the eastern Torres Strait.
- This recognition of Indigenous Australian's claim to the land overruled Captain Cook's initial claim to it from his declaration of possession in 1770 and ruled that the Crown's radical title co-existed with a beneficial native title
- From this landmark case came the development of the [Native Title Act 1993 \(Cth\)](#) and the start of fairer land rights for Indigenous Australians.



Common Law and the Court System

- The *Doctrine of Precedent* is the basis of the common law
- Precedent is the rule that a legal principle that has been established by a superior court should be followed in other similar cases by that court and other courts
- The doctrine of precedent was developed to promote consistency in decision-making by judges, on the basis that like cases should be determined in a like manner.
- This is referred to as *stare decisis*, which is Latin meaning 'to stand by a decision'
- There are two kinds of precedent: binding and persuasive



Common Law and the Court System

- In order to be binding, a precedent must be a decision of a court:
 - in the same hierarchy of courts (i.e. same jurisdiction e.g. State or Federal), and
 - It must come from a court which is higher in the hierarchy - BUT note that courts are regarded as being part of one court hierarchy when they are linked by a right of appeal. For example the High Court is considered in the same jurisdiction as all the Supreme Courts.
 - Decisions of courts not forming part of the court hierarchy are not binding on courts within another hierarchy but can be persuasive.
 - The decision of the highest court in the hierarchy is, for example, binding on all the courts below it.



Common Law and the Court System

- In regards to previous decisions of a court at the same level, the general rule is that the decision is not binding but it will only be departed from if the earlier decision is regarded as wrongly decided.
- The High Court has never regarded itself as bound by its own previous decisions (see *Nguyen v Nguyen* (1990) 169 CLR 245 at 269)
- The High Court also accepts that State Courts of Appeal and the Full Federal Court should not regard themselves as strictly bound by their own previous decisions either.
- Likewise, a State Supreme Court is not bound by decisions of other State Supreme Courts, but again great persuasive value is given to the decision, especially if an Appellate Supreme Court is involved.
- In practice, these Courts exercise great caution in overruling previous decisions



Common Law and the Court System

- Whether a precedent is binding or not also depends on the hierarchical structure within a particular court. For example - the Supreme Court may consist of a:
 - A single judge of the Supreme Court.
 - 3 judges representing a Full Court of Supreme Court.
 - 5 or more judges representing a Full Bench of the Supreme Court
- There have been decisions that a Full Court of a State Supreme Court is not bound by a decision of a single judge of the High Court but it will carry great persuasive value.



Common Law and the Court System

- A binding precedent does not have to be followed if a court accepts that the earlier decision is still good law but that it does not apply to the present case because of some material factual difference which distinguishes it from the earlier case.
- This is an important tool for developing the common law. Sometimes a court faced with a binding precedent which it believes to be wrong or outdated, will attempt to show that the facts in the case before it are different, with the result that the precedent does not apply.
- This is the only way in which a court can refuse to apply a **binding precedent**.
- Mason CJ said in *H.C. Sleigh Ltd. V. South Australia* [1977] HCA, 'If it is not distinguishable, then this Court has no alternative but to follow its earlier decisions.'



Common Law and the Court System

- Courts are able to follow previous decisions only because they are reported comprehensively and authoritatively in an official system of law reports.
- Each jurisdiction has a comprehensive and authoritative collection of decided cases printed and bound in volumes.
- To use precedents as a source of law, a reliable and readily accessible means of referring to previous court decisions or judgments is required.
- There is an official or authorised law report for each of the superior courts in Australia and thus can be accepted as an accurate record of the judgment of a court
- Law Reports set out in a published form in detail, the Judge's reasoning and comments.



Common Law and the Court System

- Parliament can, of course, override the decisions made at common law by enacting legislation to cover the area of law previously covered by the common law.
- Increasingly, Acts are replacing or complementing judge-made law, but the common law still applies in many areas, and the doctrine of precedent continues today.
- Where an Act of Parliament is passed that contradicts Common Law, the Common Law will no longer be valid and the courts must follow the Act. This is called *Parliamentary Sovereignty*.
- Judges may not rule against Statutory Law to develop new precedents either; however, they do have the power to interpret Statutory Law, and these interpretations may become precedents.



Common Law and the Court System

➤ FEDERAL COURTS

- **High Court of Australia**

- The High Court of Australia is the highest Court in the Australian Court hierarchy. It is the final Court of Appeal in Australia. It hears matters involving disputes about the interpretation of the Australian Constitution as well as final appeals of criminal and civil matters from all Courts in Australia.

- **Federal Court of Australia**

- The Federal Court is a superior Court with jurisdiction to hear civil disputes governed by Federal laws. It hears matters on a range of different subject matter including bankruptcy, corporations, industrial relations, native title, taxation and trade practices laws, and hears appeals from decisions (except family law decisions) of the Federal Circuit Court.

- **Federal Circuit Court of Australia**

- The Federal Circuit Court hears less complex disputes than the Federal Court of Australia. Its jurisdiction extends to matters including family law and child support, administrative law, admiralty law, bankruptcy, copyright, human rights, industrial law, migration, privacy and trade practices.



Common Law and the Court System

➤ In most Australian states and territories, the Court hierarchy is as follows:

- **Supreme Court**

- The Supreme Court is the highest State Court (in New South Wales it deals with all civil claims over \$750,000). It also hears serious criminal matters. The Supreme Court of Appeal hears all civil appeals from the Supreme Court, District Court, Land and Environment Court and some tribunals. Appeals from the Supreme Court of Appeal are heard by the High Court.

- **District Court (or County Court)**

- The District Court deals with civil claims (in New South Wales between \$100,000 and \$750,000) and all motor accident cases. It also hears serious indictable criminal offences (except murder, treason and piracy). The District Court determines all appeals from the Local Court.

- **Local Court (or Magistrates Court)**

- The Local Court has criminal and civil jurisdiction, dealing with lesser value civil claims (of up to \$100,000 in New South Wales) and criminal summary offences.



Common Law and the Court System

➤ Tribunals

- Tribunals are created by both federal and state legislation. The advantages of tribunals over courts are that they are generally less expensive, less time consuming and use less formal methods of resolving disputes, particularly mediation.
- The **Administrative Appeals Tribunal (AAT)** reviews administrative decisions by a range of government and not-government bodies.
- This tribunal has expanded to include a **Migration and Refugee Division**, which reviews certain decisions about visas to travel to, enter or stay in Australia
- **Social Service and Child Support Division**, which hears appeals against Centrelink and most Child Support Agency decisions.
- **Veteran Appeals Division**, which hears some decisions by the Department of Veterans' Affairs.
- **Australian Competition and Consumer Commission** which regulates Australian business competition, fair trading, consumer protection and pricing matters
- **Australian Human Rights Commission** which investigates and tries to resolve complaints about discrimination
- **Fair Work Commission** which deals with workplace disputes about such things as wages, employment conditions and termination of employment.



Common Law and the Court System

➤ **State Civil and Administrative Tribunals (e.g. VCAT)**

- Deal with a wide range of everyday legal disputes such as discrimination, building debt, guardianship, health, privacy, legal practice, mental health, owners corporations, tenants and landlords, and the purchase and supply of goods and services.
- The tribunal process encourages parties to settle disputes before the matter reaches a hearing. This can be done by attending a hearing, by attending mediation or a compulsory conference.

