A CUSTOM EDITION

BUSINESS LAW

2ND EDITION

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BRIEF CONTENTS

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

LO 3 Identify and explain the main types of laws in Australia

LO 4 Explain the division of powers under the *Commonwealth Constitution*

LO 5 Explain the ways in which the High Court has expanded Commonwealth powers at the expense of the states

LO 6 Define the doctrine of the separation of powers and explain its purpose

KEY TERMS

The following key terms are highlighted in the text and the accompanying definition can be found in the margin:

common law
concurrent powers
equity
exclusive powers
executive
judicature
native title
plaintiff
residual powers
separation of powers
statute law
terra nullius
ultra vires
writ

This chapter provides an introduction to what is meant by the word 'law', how laws may be classified, the 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.

WHAT IS 'LAW'?

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 did not 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 do not 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).

CAN WE DEFINE 'THE 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, as well as being 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 the difficulty in providing 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.*

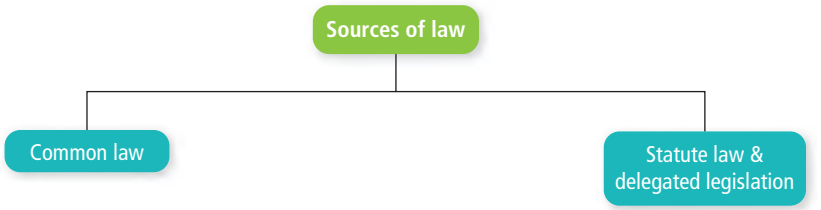
It is worth noting at this point that when a reference is made to '**the** law', it is a reference to the body of law generally, while a reference to '**a** law' is a reference to a particular legal rule.

ARE RULES ALWAYS LAW?

While it is generally true to say that the law is a set of rules, **do not assume** 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 reason for understanding the distinction between the two terms is found in the consequences associated with breaking them. Breach of a law generally carries heavier sanctions than breach of a rule.

To determine when a rule becomes law is not always an easy task. Where did the rule come from; that is, who made it? As Figure 1.1 shows, the two main sources of legal rules in Australia

FIGURE 1.1 Sources of law



are laws made by the Commonwealth, state and territory parliaments (Acts or statutes of parliaments) and the common law (decisions of the courts). These rules are recognised as legal rules (or the law) because they govern or regulate **all** community behaviour and **must be obeyed by everyone**. The consequences for breaking them are enforced through the judicial system.

On the other hand, rules made by persons (including organisations) apply only as guidelines for people belonging to a particular group or organisation. For example, the rules of the various sports codes apply only to participants who agree to be bound by them when participating in the sport, **not** to the community in general. In this type of case, **rules are enforced by the organisation that makes the rules**, usually though a tribunal system, and the consequences for a breach of the rules will often produce different outcomes from those you might get in the judicial system, such as the suspension of a player.

Even though a rule may not be law, the law can still become involved in the **manner** in which 'the rule' of a club or association is applied and enforced. Under an area of law known as administrative law, the courts expect disciplinary tribunals to follow their own rules (what is known as procedural fairness) and give an accused a fair hearing (what is known as natural justice). Failure of a tribunal to follow the rules for a fair hearing, or give the accused player a fair hearing, could result in an accused player seeking the intervention of the Supreme Court to have the original decision of the tribunal declared null and void and struck down, or the matter being sent back to the tribunal for a re-hearing.

LO 1 Law as a regulatory tool

Explain the importance of the law as a regulatory tool in society and business

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;
- 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.

BUSINESS RISK MANAGEMENT ALERT

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.

WHERE IS THE LAW FOUND?

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

IN BRIEF

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 which forms the basis of precedent); and
- the laws made by the Commonwealth, state and territory parliaments in the form of Acts or statutes of Parliament.

Note that **in the event of a conflict between statute law and common law, statute law prevails.**

Common law

common law
That part of English law developed from the common custom of the country as administered by the common law courts

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. Common law 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

statute law
Laws passed by Parliament

Statute law is law made by federal, state and territory parliaments in the form of **statutes** 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**.

Today, legislation is the major source of law in Australia for business and its impact on business should never be underestimated. Some of the more important legislation that impacts on business includes the following:

- The *Competition and Consumer Act 2010* (Cth)—while this legislation has far-reaching implications for how businesses interact with each other, it also regulates how business does business with consumers (the consumer protection provisions of the Act are found in Schedule 2 as the *Australian Consumer Law* or ACL).
- The *Corporations Act 2001* (Cth)—this Act sets out the laws regulating what business entities such as companies and managed investment schemes can do in Australia.
- The *Business Names Registration Act 2011* (Cth)—this Act allows a person or other legal entity to register a name or title to identify their business to customers and competitors.
- The *National Consumer Credit Protection Act 2009* (Cth)—this Act regulates the provision of credit in Australia.
- Intellectual property legislation—this includes protection of patents (*Patents Act 1990* (Cth)), trade marks (*Trade Marks Act 1995* (Cth)), designs (*Designs Act 2003* (Cth)) and plant breeders' rights (*Plant Breeder's Rights Act 1994* (Cth)) in Australia. The legislation also protects new ideas and provides the legal holder with exclusive rights to sell, promote or develop their product while limiting the ability of other businesses to compete with it.

  Intellectual property also has an important role to play in the area of franchising. It allows the owner to license (and control the use of) intellectual property rights to franchisees by way of a franchising agreement.

  Copyright protection under the *Copyright Act 1968* (Cth) provides protection to both individuals and businesses over creative work they have created in electronic or hard-copy form.
- Employment law—this includes the Commonwealth *Fair Work Act 2009* (Cth) governing employer–employee relationships and minimum entitlements of employees, flexible working relationships, fairness at work and prevention of discrimination. There is also state and territory discrimination legislation as well as work health and safety legislation and workers' compensation.

WHAT ARE THE CHARACTERISTICS OF A LEGAL SYSTEM?

LO 2

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

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 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* (see Chapter 10), creating a degree of unpredictability for businesses as they grapple with the meaning of those words in the ACL and what they can and cannot 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, as when 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.

plaintiff
The party commencing a civil action in a court of first instance

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—as well as Commonwealth, state and territory government sites), or through a solicitor or barrister.

Solving the problem of accessibility does not solve the problem of knowledge; that is, that everyone is expected to know the law. Accessibility does not 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, if any, does the law impact on your 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 'rules of the game' a rule or a law? Discuss.

WHAT ARE THE MAJOR TYPES OF LAWS FOUND IN THE AUSTRALIAN LEGAL SYSTEM?

LO 3

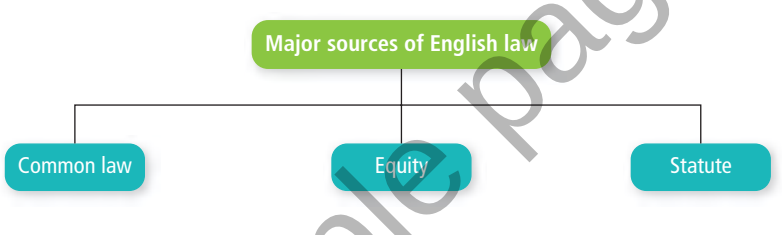
Identify and explain the main types of laws in Australia

terra nullius
Territory belonging to no one

When the First Fleet arrived in Australia in 1788 it was considered to be a continent which was **terra nullius** (land belonging to no-one). This view was based on the assumption that the Indigenous inhabitants of the continent were too primitive to have a recognised legal system or lawful possession of the land. At that time in history, where 'uninhabited' lands were settled by the English, English laws immediately applied to the settled lands. Indigenous laws and customs, including native title to land, were not recognised. The *Australian Courts Act 1828* (UK) made it clear that all laws in force in England at the date of enactment applied in the courts of New South Wales and Tasmania (then Van Diemen's Land), and as new colonies gained independence, they also became subject to English law, inheriting a court and parliamentary system based on the system in force in England.

Figure 1.2 shows the major types of law found in England, which Australia inherited.

FIGURE 1.2 Major types of laws found in England



Common law, also known as case law or precedent, developed out of decisions of judges in courts of record (historically these were courts where decisions were reported and recorded as law reports) and is an important part of the law inherited from England. The only courts that can create common law are 'superior' courts, and in the case of Australia they consist of the state and territory supreme courts, courts of appeal and the Commonwealth federal court and 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).

FIGURE 1.3 A basic classification under common law

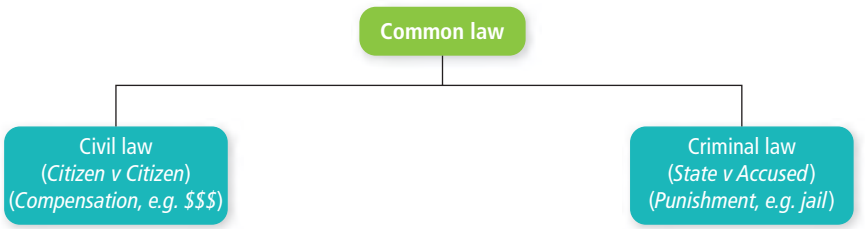
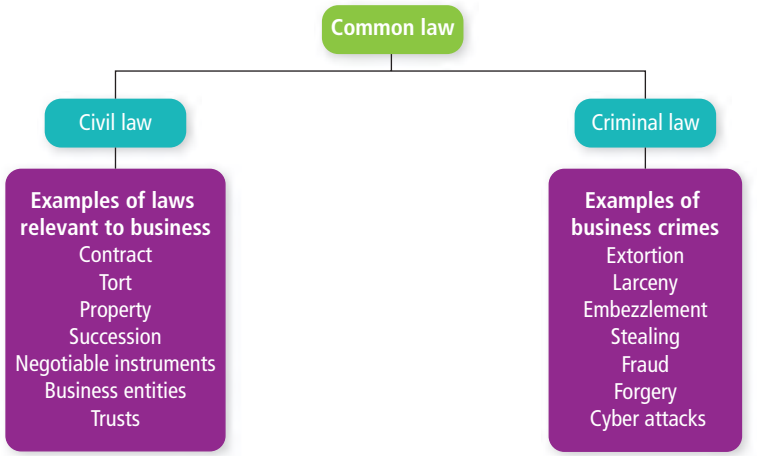


FIGURE 1.4 Civil and criminal law



Equity

IN BRIEF

DIFFERENCES BETWEEN COMMON LAW AND EQUITY

COMMON LAW	EQUITY
A comprehensive system	Not a comprehensive system; for example, it never had a criminal jurisdiction
Remedies are not discretionary	Remedies are discretionary
Common law rights are enforceable at any time, subject to the operation of a state or territory's Statute of Limitations	Remedies must be applied for promptly or they may not be enforceable
Common law rights are valid against the whole world	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

equity
Fairness or natural justice

Equity grew out of the growth of inflexibility and rigidity of the common law by allowing a person who could not a get a remedy in the common law courts, often because they were too poor, to ask the King to hear their plea. 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. The *Judicature Act 1873* (UK) combined the two legal systems and created one Supreme Court of Judicature, and 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 6)—**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'** (unlike compensation in a common law action, which is a legal entitlement and does not require the permission of the court) 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 as follows:

- An **injunction**—a court order that directs a person to stop doing something that could harm the interests of another. It can be granted as a temporary order (an interlocutory or interim injunction) before the court makes a final order in the matter, or as a final injunction. Do not assume that getting an injunction is easy. The onus is on the plaintiff to establish that, based on existing evidence, there is a serious question to be tried, the balance of convenience favours them, and they can provide an undertaking as to damages if the court grants an injunction but later decides that the plaintiff is not entitled to enforce the rights claimed. And even if these conditions are satisfied, the court still has discretion over the decision whether or not to grant an injunction.
- **Specific performance**—a court order directing a person to carry out an obligation that they have accepted, usually in a contract (e.g. to complete a sale of land). It will be awarded only if damages will not provide adequate compensation. It will not be awarded if the contract is one for personal services (e.g. compelling an employee to remain in their job), as the court cannot supervise the carrying out of the order by the defendant.

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—or where the common law has been restated in the form of a statute, or codified—**statue law will prevail**. Common law principles will be maintained only to the point at which they conflict with statute law. 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.

REVIEW QUESTIONS

1.5 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.

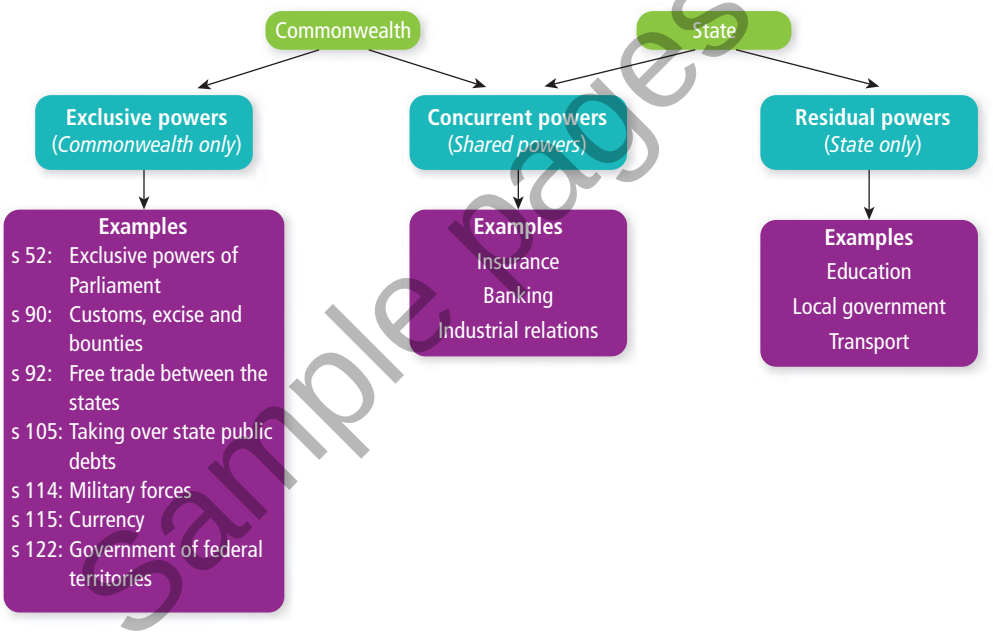
1.6 What is the main remedy for a plaintiff in a common law action?

WHAT ARE COMMONWEALTH AND STATE POWERS?

When reading the *Constitution of the Commonwealth of Australia* (also known as the *Australian* or *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 1.5).

exclusive powers
Those powers able to be exercised only by federal Parliament

FIGURE 1.5 Exclusive, concurrent and residual powers



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). 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'). It currently consists of members elected to represent the people in one of Australia's 150 electorates.

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 *Constitution*	

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 voter representation and the value of individual votes remain equal.

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

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; sourced from the Federal Register of Legislation at 15 February 2017). 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 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; sourced from the Federal Register of Legislation at 15 February 2017).

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' (sourced from the Federal Register of Legislation at 15 February 2017). 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 Territory, 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; sourced from the Federal Register of Legislation at 15 February 2017). 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 later in this chapter.

LO 4

Explain the division of powers under the *Commonwealth Constitution*

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 (s 51; see Figure 1.6) 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.

FIGURE 1.6 Extract from s 51, *Australian Constitution*

PART V.—POWERS OF THE PARLIAMENT.

Part V. Powers of the Parliament.

51. The Parliament shall, subject to this Constitution, have power[11] 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: Inserted by No. 81, 1946, s. 2.

(xxiv.) The service and execuiton 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:

FIGURE 1.6 Extract from s 51, *Australian Constitution*

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,[12] 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: Federal Register of Legislation at 15 February 2017. For the latest information on Australian Government law please go to www.legislation.gov.au.

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 51 of the *Constitution* is the most important.
- 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 did not 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 did not 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 contained within 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 1.6, 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).

concurrent powers
Those powers able to be shared between the federal and state parliaments

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.

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.

residual powers
Those powers able to be exercised only by state parliaments

ultra vires
Beyond legal power and therefore invalid

LO 5 The role of the High Court in federal expansion

Explain the ways in which the High Court has expanded Commonwealth powers at the expense of the states

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.

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 it 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* (Cth) prohibiting the action. In *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 the terms of the treaty, thus giving treaties an effect in Australian law that they did not 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.