

# PART 1

## The legal framework

**Part 1** provides the reader with a basic understanding of what 'law' is, the main sources of law, and the role of parliaments (federal, state and territory) as law-makers and the courts as administrators of the law in the law-making process. This will provide a framework in the following chapters for understanding how business law helps regulate business and the community.

# 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 *Australian Constitution*
- LO 5** Explain the ways in which you believe 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

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.

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## 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. The reality is that 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 using tools such as legislation (Acts and regulations of Parliament) and the common law through the 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 a 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.

Note 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 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. Begin by considering the source of the 'rule'. Where did the rule come from? Who made it? As **Figure 1.1** shows, the two main sources of legal rules in Australia are:

- ▶ laws made by the Commonwealth, state and territory parliaments (Acts or statutes of parliaments); and
- ▶ the common law (decisions of the courts).

**FIGURE 1.1** Sources of law



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 of breaking them are enforced through the judicial system.

On the other hand, rules made by persons or organisations apply only as guidelines for people belonging to the particular group, club or organisation that made the rule/s. For example, the rules of the various sports codes apply only to participants and members who agree to be bound by them when participating in the sport, **not** to the community in general.

**The rules are enforced by the organisation that makes them**, usually through a tribunal system. The consequences of a breach of the rules will often be different from those that might occur in the judicial system, such as the suspension of a participant.

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 and impartial hearing could result in an accused participant 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 extends 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, insider trading and corruption.

However, there are very few aspects of life—personal or business—that are not regulated by law, either directly or indirectly. 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 TIP

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, how they will affect business and the community, and how they may affect you personally.

## Where is the law found?

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

#### IN BRIEF

The two **main sources** of law in Australia 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. While the states and territories have the power to pass business-related legislation, including discrimination, work health and safety and workers' compensation legislation, today it tends to be the Commonwealth Government that passes most of the important business-related legislation. This includes:

- ▶ 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, which are found in Schedule 2 as the *Australian Consumer Law*).
- ▶ 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 law also has an important role to play in the area of franchising. It allows the owner (the franchisor) to license (and control the use of) intellectual property rights to franchisees (the person or organisation that buys the right to own and operate the business established by the franchisor, such as McDonald's, KFC, 7-Eleven) 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, industrial and anti-discrimination legislation—this includes Commonwealth legislation such as the *Fair Work Act 2009* (Cth) (governing employer–employee relationships and minimum entitlements of employees) and prevention of discrimination (including sex,

age and racial discrimination, as well as harassment and bullying). The *Insurance Contracts Act 1984* (Cth) provides businesses with protection of their assets against risk of loss.

## What are the 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.

## LO 2

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

### 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. 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*. This has created a degree of unpredictability for businesses as they grapple with the meaning of those words in the *Australian Consumer Law* and what they can and cannot do in the context of their business activities (see the chapter 'Other consumer protections under the *Australian Consumer Law*').

### 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, '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 criminal 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.)

**plaintiff**  
the party  
commencing a  
civil action in  
a court of first  
instance

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—this may involve a civil action and 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 hearing from the judge (trials in civil matters in all jurisdictions have been largely abolished).

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 all the law. But it can be assumed that **everyone has access to the law** and this can be through:

- ▶ textual copies of legislation (e.g. obtainable through the federal and state government printers and Government Gazettes);
- ▶ cases (e.g. law reports);
- ▶ electronic technology such as the internet (sites such as AustLII [www.austlii.edu.au](http://www.austlii.edu.au)—the website of the Australasian Legal Information Institute—as well as Commonwealth, state and territory government sites); or
- ▶ 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 In what ways, if any, does the law impact on your personal life?
- 1.2 In what ways does the law impact on business? Do you think that the law is sufficiently certain for business purposes?
- 1.3 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 of the game or a law? Discuss.

## What are the major types of laws found in the Australian legal system?

When the First Fleet arrived in 1788, Australia was considered to be a continent that was **terra nullius** (land belonging to no one). This view was based on the assumption that the indigenous inhabitants of the continent did not have a recognised legal system or lawful possession of the land. At that time, when '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.

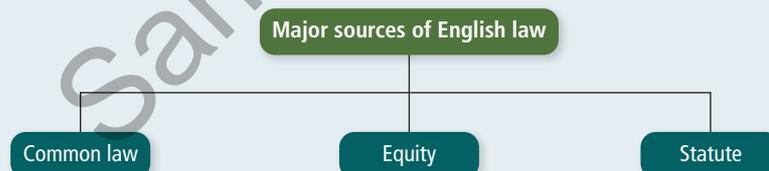
**Figure 1.2** shows the major types of law found in England, which Australia inherited.

## LO 3

Identify and explain the main types of laws in Australia

**terra nullius**  
territory belonging to no one

**FIGURE 1.2** Major types of laws found in England

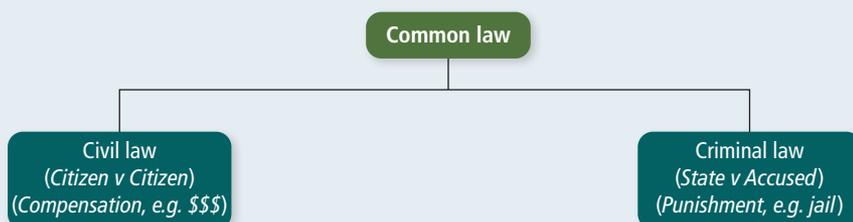


**Common law**, also known as case law or precedent, developed out of decisions of judges in courts of record (historically these were courts where decisions were reported and recorded as law reports) and is an important part of the law inherited from England.

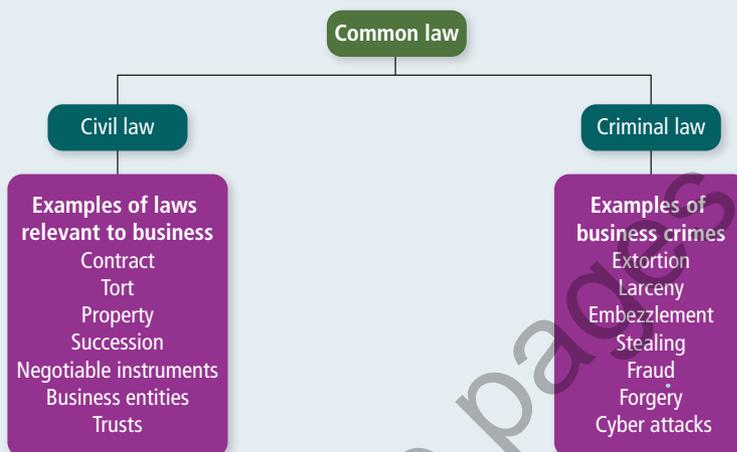
The only courts that can create common law are 'superior' courts. In the case of Australia, superior courts consist of the state and territory supreme courts, courts of appeal and the Commonwealth Federal Court and High Court.

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

**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 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, creating 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 they will not provide adequate monetary 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 the chapter ‘Validity’)—**an equitable remedy has to be specifically asked for by a party in court**.

Equity 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). 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.

## 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 Where equity and the common law clash, equity prevails Acts only against the individual (i.e. in personam), not property

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.

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 overrule 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—**statute law will prevail.**

**Common law principles will be maintained only to the point at which they conflict with statute law.** The reason 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

1.4 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.

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

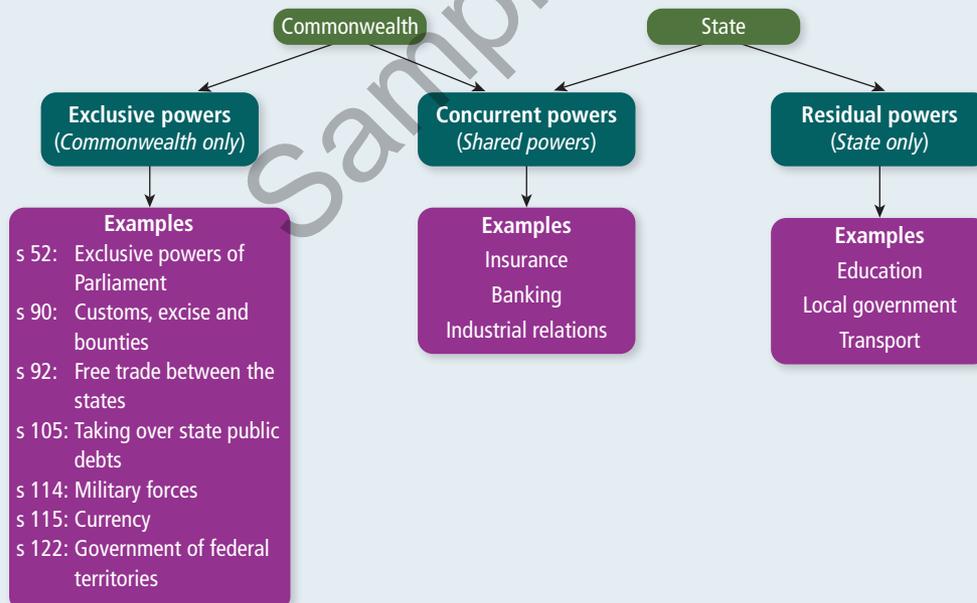
## What are Commonwealth and state powers?

When reading the *Constitution of the Commonwealth of Australia* (also known as the *Australian Constitution* or *Commonwealth Constitution* or *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 six independent colonies, each with its own system of government and legal system.

**exclusive powers**  
those powers able to be exercised only by federal Parliament

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**).

**FIGURE 1.5** Exclusive, concurrent and residual powers



## The structure of the Australian Constitution

Section 9 of the *Commonwealth of Australia Constitution Act 1900* (UK) granted permission to the six Australian colonies to form their own national government. It is interesting to note that in s 6, the ‘Definitions’ section, one of the colonies that may be admitted into the Commonwealth was New Zealand!

Section 9 of the *Commonwealth of Australia Constitution Act* sets out the *Australian Constitution*, which is divided into eight chapters (see **Table 1.1**).

**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	

### Chapter I—The Parliament

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

- ▶ **The King**—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 151 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 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.

Two useful sites for obtaining further information on the federal Parliament and its functions are the Parliamentary Education Office ([peo.gov.au](http://peo.gov.au)) and the Home of Australian Parliament ([www.aph.gov.au](http://www.aph.gov.au)).

## **Chapter II—The Executive Government**

Chapter II vests the executive power of the Commonwealth in the King through the Governor-General acting as the King's representative (s 61) with the advice of the 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 the Senate or the House of Representatives.

## **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 Federal Circuit and Family Court of Australia (formerly the Family Court of Australia and the Federal Circuit Court of Australia).

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 *Australian 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 *Australian 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).

In the 1967 referendum, s 127, which had provided that ‘aboriginal natives shall not be counted’ when determining the population of Australia, was deleted. 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 *Australian 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:
  - ▶ majority of voters; and
  - ▶ a majority of the states.
- ▶ The proposed amendment must receive Royal Assent.

Changing the *Australian Constitution* is discussed in more detail later in this chapter.

## The division of powers under the Australian Constitution

**LO4**

### Exclusive powers

As previously noted, 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.**

Where there is any inconsistency between laws made under the exclusive powers of the *Australian Constitution* by the Commonwealth and any state laws, **s 109** of the *Australian 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 and licensed 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, and therefore the fine, did not apply.

Explain the division of powers under the Australian Constitution

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. 31, 1946,  
s. 2.

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: Federal Register of Legislation at 29 May 2022. For the latest information on Australian Government law, see the Federal Register of Legislation ([www.legislation.gov.au](http://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 *Australian Constitution* to federal Parliament exclusively and, if there is a state law that conflicts with a federal (or Commonwealth) law, s 109 of the *Australian 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 *Australian Constitution* is the most important.
- ▶ Residual powers are those powers the states exclusively hold because the *Australian Constitution* says nothing about them; for example, local government, education and transport.

## Concurrent powers

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

The bulk of the Commonwealth's powers are **concurrent powers**; that is, they are concurrently held (i.e. shared) with the states. The **most important concurrent power is contained within s 51** of the *Australian Constitution*. 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). (Note that while the numbering in s 51 runs to xxxix [39] sections, an additional power has been added to s 51, as xxiiiA [23A], 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.

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

**THE COURT:** High Court of Australia

**FACTS:** Goods belonging to Wallis suffered \$1,663 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 *Australian Constitution* because it conflicted 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 *Australian Constitution* made the state Act invalid and the removalist company was liable for the full loss; that is, \$1,663.

**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**  
those powers  
able to be  
exercised  
only by state  
parliaments

## Residual powers

If nothing at all is said in the *Australian 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 *Australian 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 *Australian Constitution*, the law would be **ultra vires** and therefore invalid.

## LO 5

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

## 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. A good example of this test can be seen in the case of *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2, where a woman died while boarding a hot air balloon in the Northern Territory. A complaint was filed against

the hot air balloon company under the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT). The complaint was initially dismissed on the basis that the *Civil Aviation Act 1988* (Cth) covered the field, but on appeal a majority of the High Court held that the two laws were not inconsistent as the Commonwealth Act expressly provided, among other things, that it did not affect any duty by a state or territory.

This case involved 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 *Australian 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 *Australian 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 *Australian 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 pt V div 1 (unfair practices) and div 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.
- ▶ **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.

**THE COURT:** High Court of Australia

**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 *Australian 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 *Australian 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 *Australian 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?

## 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.

While the states can still rely on their own taxation powers for revenue-generating purposes, the political reality is that they do not. The result is that the states are now dependent on the Commonwealth for the funding of many of the services that, under the *Australian 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 *Australian 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 *Australian 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 *Australian 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 that federal power could be expanded 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 *Australian Constitution*, which allows it to be changed by referendum.

## Changing the Australian Constitution

The *Australian Constitution* can be formally changed (amended) only if **all** 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 is 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.

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

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 *Australian Constitution* was in 1999, when an attempt was made to establish the Commonwealth of Australia as a republic and to insert a preamble. However, neither a majority of voters nor a majority of states voted in favour.

In December 2022, the Commonwealth Government announced its plans to hold a referendum in 2023 to enshrine an Aboriginal and Torres Strait Islander Voice in the *Australian Constitution*.

Governments can also hold a **plebiscite**, or a poll, to find out people's views on a particular issue. For example, the Hughes federal government floated the idea of conscription via two plebiscites in October 1916 and December 1917 during the First World War, and the 'no' campaign triumphed narrowly.

The Turnbull federal government successfully held a month-long postal plebiscite on marriage equality in October–November 2017, with 61 per cent of voters approving the change. Although Parliament is not bound to act on the result of a plebiscite, bipartisan support saw a Marriage Equality Bill, amending the *Marriage Act 1961* (Cth) to redefine marriage as 'a union of two people', passed by both Houses of Parliament and receiving Royal Assent in less than a month.