# Session 4 – SOURCES OF LAW: LEGISLATION

# 1. Legislation as a source of law

# (a) Parliament and our constitutional system

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| **Legislative Power**  Chap 1  Parliament  ‘Make law’  Senate (upper Hse)  House of Reps (lower Hse)  Elected members of Parliament  S.o.P Incomplete | Gov-Gen  **Executive Power**  Chap 2  Government and administration  ‘Administer law’  PM  and Cabinet  (Heads of Govt Depts)  Ministers in charge of govt depts and employees (Public Service)  S.o.P Incomplete | **Judicature**  Chap 3  Courts  ‘Interpret law’  Federal Hierarchy  HCA and Fed Courts  Judges  S.o.P Complete |

# *Executive and Parliament*

* Parliament gained its real pre-eminence after the constitutional struggles in the 17th century.
* Outcome of those struggles still determines fundamental limitations on government today:
* money can only be raised by govt by the imposition of taxes with the authority of Parliament
* once revenue has been raised it can only be spent with the authority of Parliament
* penalties and other enforceable obligations cannot be imposed on citizens unless authorised by law

# *Courts and Parliament*

* Courts are final arbiters of the meaning of legislation (and, of course, the common law).
* But Parliament can pass laws overriding a court decision (except Constitutional matters)
* But how practical?
* Should courts be more proactive in fulfilling intent of Parliament?

# (b) Legislative power

* Ch I Constitution deals with Parliament > s 1:*‘The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives’*
* Goes back to **source** – body recognised as having authority to make laws that bind us.
* But it must observe a particular *process* in making those laws – broadly:
* pass through both **Houses of Parliament** (Senate + House of Reps)
* receive **Royal Assent**

How does this actually work?

# *Senate*

* Powerful upper House; equal power with lower House save for a few exceptions.
* Why did framers of Constitution create such a powerful upper House?
* Has its practice accorded with its theory?

# *House of Reps*

* More representative of the people > so where our government is formed and why it has greater power than the Senate when it comes to initiating and amending money bills

# *Governor-General*

* Technically has immense power
* By convention, always acts on the advice of the government of the Prime Minister

# (c) Pre-eminence of legislation

* Vast increase in legislation over the past century, particularly in recent decades.
* Perceived benefits over case law
* can be proactive rather than simply reactive
* can bring about legal ‘U-turns’ (ie major law reform) with democratic legitimacy
* can systematically regulate a vast area in painstaking detail (cf case law) - expected of government in modern era and often warranted by pace of technological / social change
* can be changed (arguably) more readily than case law - to amend or repeal existing legislation the very same process is used (i.e. it is another Act.)

# (d) Subordinate or Delegated Legislation

* Includes regulations, rules, by-laws, statutory instruments, ordinances.
* Made according to process described in the enabling Act.
* Not a ‘lesser’ form of law! Vast quantities.
* Traditionally not for creating new rights or offences but rather for detailed rules within expertise of public service (relevant govt department) and potentially requiring frequent change– in modern times this theory has not always been followed.

# 2. Interpreting legislation – ‘statutory interpretation’

# (a) Introduction

* Can be difficult to work out the meaning of a statute:
* inherent imprecision of words
* often long and technical
* may not be well thought through from policy perspective or produced hurriedly or reflect a compromise to accommodate several conflicting interests
* cannot envisage every situation to which it will apply
* Courts interpreting statutes typically try to identify, and then proceed from, ‘Parliament’s intention’. How feasible is that?

# (b) Overview of the process

* Aim to interpret in a way that you think a court would i.e. by following the same rules of interpretation that the courts follow. Traditionally, these rules were common law rules. Many still are, but we also now have interpretation legislation – i.e. *Acts Interpretation Act 1901* (Cth) (‘**AIA’**) and state/territory equivalents.
* Modern approach is to interpret consistently with *purpose* – necessitates a number of steps

1. Looking at the ‘**ordinary and natural’** meaning of the words ‘**in context’**

* ‘Context’ includes a variety of things including: surrounding words/provisions, whole Act, dictionaries, maxims, presumptions, interpretations provided in previous cases, *AIA,* previous case law on the meaning of the words, existing state of the law

1. Reading them in light of the ‘**purpose’** of the legislation (s 15AA *AIA*):

* ‘Purpose’ can be gleaned from reading the Act (esp. some particular sections) as a whole and sometimes by looking at extrinsic materials (under common law rule)
* Looking at purpose might:
  + *confirm* ordinary and natural meaning in context
  + *resolve* ambiguity that existed on ordinary and natural meaning in context
  + *give rise* to an ambiguity (ie a new meaning)
* If competing meanings available, prefer that which best promotes purpose

1. (Optional) Consulting ‘**extrinsic materials’** (s 15AB AIA):

* *Confirm* ordinary meaning in light of context and purpose (cannot change the interpretation)
* *Determine* the meaning where ambiguity exists or manifestly absurd or unreasonable outcome exists on the ordinary meaning in light of context and purpose

# (c) Purposive approach in more detail

* Brief background: common law approach focused on literal meaning – purpose only consulted if ambiguity existed. Prompted Parliament to pass s 15AA.
* If impossible to find any ‘purpose’ to an Act you may simply have to rely on literal/ordinary and natural meaning (this can happen) – s 15AA is not a licence to ‘rewrite’ the legislation!

# (d) Context in more detail

* High Court has repeatedly emphasised that the words in a statute must be read in context: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.
* What is the ‘context’?
* Surrounding words in a section
* Other sections of Act as a whole (esp. definitions sections)
* Existing state of the law (eg. in light of any related legislation in existence, or previous cases considering that provision or similar provisions)
* Dictionaries
* Interpretation legislation ie. AIA or state/territory equivalent
* ‘Maxims’ of interpretation used by the courts eg.:
* *noscitur a sociis*
* *ejusdem generis*
* *expressio unius est exclusio alterius*
* words are assumed to be used consistently
* all words are assumed to have some interpretative significance
* Presumptions of interpretation used by the courts eg.:
* presumption that Parliament does not interfere with fundamental rights (Hall & Macken p 102);
* presumption against retrospective operation (Hall & Macken p 104)
* presumption that Parliament does not intend to violate rules of international law (Hall & Macken p 104)
* presumption that penal provisions (ie provisions imposing criminal liability) will be construed strictly (ie in favour of the accused) (Hall & Macken p 105)
* presumption that re-enactment constitutes approval of interpretation.

# (e) Extrinsic materials in more detail

* Historically courts were reluctant to use extrinsic materials as aids to construction. Legislation has intervened in recent times: s 15AB AIA *allows* (but does not mandate) use of extrinsic materials in statutory interpretation.
* Even under common law rules, courts now more willing to consider extrinsic materials – but for limited purpose of helping to determine *the purpose of the Act* (rather than the meaning of an individual word/provision).
* To use extrinsic material to help determine the meaning of a word/provision, you need to invoke s 15AB. Allows use of extrinsic materials in ***three situations***:
* to confirm the ordinary and natural meaning of provision in light of context and purpose s 15AB(1)(a);
* to determine the meaning of provision that is ‘ambiguous or obscure’ s 15AB(1)(b)(i); or
* to determine the meaning of provision when ordinary and natural meaning in light of context and purpose ‘leads to a result that is manifestly absurd or is unreasonable’   
  s 15AB(1)(b)(ii)
* Explanatory Memoranda are often the most enlightening type of extrinsic material. Here’s a recent example: <https://www.legislation.gov.au/Details/C2021B00040/Explanatory%20Memorandum/Text>