

Lesson 1—What are the sources of law?

Inquiry question: How laws are made and applied in Australia?

Learning Objectives: By the end of the lesson the students will have an understanding of how law is made in the Australia and the ACT through parliaments and the courts.

Resources: Videos—[How laws are made—Parliament](#) and [How laws are made—Courts](#); access to a computer and internet for research, case study starting links (x3), teacher notes for case studies.

Australian curriculum

- How laws are made in Australia through parliament (statutory law) and through the courts (common law) (ACHCK063).
- Identify, gather and sort information and ideas from a range of sources (ACHCS055).

Lesson orientation

The lesson focuses on the sources of law in Australian, statutory law made through parliaments and common law made through the courts.

Class discussion on laws to establish prior learning—suggested prompt questions:

- What is a law? (A rule, made by a parliament, that is used to order how the community behaves).
- Can students provide examples of laws that affect them? (There are many, a few possible examples include the road rules; compulsory wearing of bicycle helmets; and movie/TV classification).
- Why do we have laws? (Keep order in society).
- What would happen if we didn't have laws? (Chaos—for example, imagine there were no road rules, no speed limit, no stop or give way signs, and you could drive on any side of the road!)
- Where are laws made? (parliaments and courts).
- Do the students know what statute law means? (Written law, passed in a parliament, known as an Act or statute).
- Do the students know that laws can be made through the court system? (Common law—Unwritten law that is based on custom and general principles as interpreted by a court and generally applied to situations not covered by statute).

Lesson body

Watch the two videos by the Legal Information Access Centre, State Library of NSW:

- [How laws are made—Parliament](#)—This video explains how parliaments make law, explaining the process of a bill to an Act, how legislation changes over time, why the Commonwealth makes some laws and the states others, and delegated legislation such as regulations (10 minutes 47 seconds).

- [How laws are made—Courts](#)—This video explains the court hierarchy, the jurisdiction of courts and tribunals, and how courts can make new law by interpreting legislation, filling gaps in legislation, and developing the common law when there is no legislation (8 minutes 31 seconds).

Students to break into groups and each once chooses to research one of the following influential cases in Australian law, a starting link is provided to assist students in looking at the issue:

- [Mabo and others vs Queensland \(No. 2\)](#) 1992—The Mabo case
- [Commonwealth vs Tasmania](#) 1983—The Tasmanian Dams case
- [Commonwealth vs ACT](#) 2013

For each case, groups should answer the following questions:

- What are the issue(s) being decided by each case?
- Can the students determine the common law being determined by courts in each case?
- Can the students determine the statute law/s made by parliaments either before and/or after each case?

The teacher should determine what format they would like the information presented in, could be a written report or oral presentations.

Lesson reflection

Feedback may be provided through an assessment item being submitted by students and/or by class discussion after written or oral presentations (depending on the selected method for presentation).

Teacher notes—Case study answers

Mabo and others vs Queensland (No. 2) 1992

- British colonies settled in Australia in 1788 under the concept “*terra nullius*”—indigenous people did not own the land;
- a high court was case bought by four Meriam men and one Meriam women, claiming 'native title' to the Murray Islands in the Torres Strait;
- common law—the High Court recognised the rights of Indigenous Australians to native title on 3 June 1992 the High Court deciding in favour of the Meriam people by determining that the land was not “*terra nullius*”:
 - [High Court decision](#)—“are in agreement that the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that, subject to the effect of some particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland.”; and
- common law decision resulting in a change to statutory law? Yes, the Commonwealth Government passed the statute law [Native Title Act 1993](#). This opened the way for claims by Aboriginal and Torres Strait Islander peoples to their traditional rights to land and compensation. With Eddie Mabo as the first named plaintiff, the case became known as the ‘Mabo Case’.

Commonwealth vs Tasmania 1983

- The Commonwealth Government passed a statute law—the [*World Heritage Properties Conservation Act 1983*](#);
- a High Court case bought by the Commonwealth Government to stop work on the dam under the Commonwealth's responsibility for external affairs (Australian Constitution—Chapter I, Part V, Section 51(xxix));
- common law—the High Court clarified the scope of the external powers given to the Commonwealth in the Australian Constitution Chapter I, Part V, section 51 (xxix)—as one that was broad enough to protect listed world heritage areas in Australia as part of the Australian Government's international treaty obligations to protect significant areas of the environment:
 - [**High Court decision**](#)—“The Court found that the *World Heritage Properties Conservation Act 1983* was supported by the external affairs power in part, and that the Commonwealth was able to list the Franklin dam area as a world heritage site. The HEC was a trading corporation under the Constitution and could be prohibited from undertaking construction activities.”; and
- common law decision resulting in a change to statutory law? No, statute law was passed prior to the high court case.

Commonwealth vs ACT 2013

- The ACT Legislative Assembly passed a statute law—the [*Marriage Equality \(Same Sex\) Act 2013*](#) on 22 October 2013;
- a High Court case bought by the Commonwealth Government resulted in the ACT statute law being struck down for inconsistency with its federal counterpart (Australian Constitution—Chapter V Section 109);
- common law—the High Court clarified the scope of the marriage power given to the Commonwealth in the Australian Constitution Chapter I, Part V, section 51 (xxi)—as one that was broad enough to include members of the same sex:
 - [**High Court decision**](#)—“The Court held that "marriage" in s 51(xxi) of the Constitution refers to a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations. "Marriage" in s 51(xxi) includes a marriage between persons of the same sex.”; and
- common law decision resulting in a change to statutory law? Yes, at the time of the High Court case the [*Marriage Act 1961*](#) defined marriage “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”. A postal vote of the Australian people was conducted on the issue of same-sex marriage resulting in a YES vote to allow it in Australia. The Act was changed by the Australian parliament which amended it by changing the definition of marriage to be “the union of 2 people to the exclusion of all others, voluntarily entered into for life”.