

# The Australian Legal Foundation

## Part 1: The Australian Government Environment

### Unit 1: Week 2 Tutorial

## Learning Objectives

At the end of this tutorial, you should be able to:

- Explain the role of the Australian Constitution in the Australian legal system.
- Explain the concept of division of power.
- Explain the doctrine of separation of power.
- Understand the different meanings of common law and civil law.
- Distinguish between statute law and common law.
- Develop critical thinking and collaboration skills through group work and presentations.

**Before** this tutorial, you should have:

- Attended Unit 1 lecture
- Read the assigned *Readings*
- Completed the *Tutorial Questions*
- Read the *In-Class Collaboration and Presentations* questions

**During** this tutorial, you will:

- Demonstrate an understanding of the topic in the unit
- Participate in tutorial activities by:
  - Contributing to group discussions
  - Asking questions
  - Listening actively
  - Working collaboratively with other students
- Complete the *In-Class Collaboration and Presentations* activity

**After** this tutorial, you should:

- Consider attending one of the scheduled consultations and attempt to resolve any questions that you have as soon as possible.



## Readings

### The Australian Government Environment

The Australian Government operates within a complex and structured framework designed to uphold democracy, law, and governance. Understanding this environment is crucial for businesses operating in Australia, as it directly impacts regulatory processes, legal obligations, and the broader political landscape. Central to this framework is the Australian Constitution, which outlines the division and separation of powers between different levels of government. These structures provide the foundation for Australia's legal system (See Unit 2). An awareness of these components is essential for comprehending how government decisions and legal rulings influence the business environment.

### Australian Democracy

Democracy means 'rule by the people'. The word comes from the ancient Greek words 'demos' (the people) and 'kratos' (to rule). In a democracy, the people have the power to participate in decision-making, such as voting at elections.

Each democracy is unique and works in different ways. Australia is a representative democracy where citizens choose representatives to make decisions on their behalf. All Australian citizens over the age of 18 must vote in elections.

The Australian Constitution of 1901 established a federal system of government (see below), based on the British (Westminster) tradition of government. Powers are distributed between a national government (the Commonwealth) and the six states (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia). The Australian Capital Territory and the Northern Territory have self-government arrangements.

Australia's elected national government is answerable to the Parliament for its actions. The Prime Minister leads a Cabinet of ministers, who are responsible for decisions made by their department.

### Australia as a Federation

Australia became a nation on 1 January 1901 when 6 British colonies (New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania) united to form the Commonwealth of Australia. This process is known as Federation. Before Federation, the colonies were almost like 6 separate countries; for example, each had its own government and laws, issued its own stamps and collected tariffs (taxes) on goods that crossed its borders. The colonies had even built railways using different gauges, which complicated the transport of people and goods across the continent. Each colony had its own government and laws, its own defence force. The colonies were ill-equipped to defend themselves. Each colony had its own militia consisting of a small permanent force and volunteers, but they all relied on the British navy to periodically patrol the Australian coastline. People feared the colonies could be vulnerable to attack from other nations with larger populations and military forces. The colonies thought a united defence force could better protect Australia.



By the 1880s the inefficiency of this system, a growing unity among colonists and a belief that a national government was needed to deal with issues such as trade, defence and immigration saw popular support for Federation grow.

Australia as a federation was established by an Act of the Imperial Parliament called the Commonwealth of Australia Constitution Act 1900 (Imp)72 – Australian Constitution is the schedule to this Imperial Act. The federation involves both the political integration of the former colonies, and a limited level of economic integration.

## The Australian (Commonwealth) Constitution

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The Australian Constitution of 1901 creates a new set of ‘federal’ (Commonwealth, national or central) authorities of the Commonwealth (national, central) government in Canberra, and outlines their functions and powers. It recognises the existence of the six Australian colonies as they were in 1900, confers status on them as states, and continues in force their constitutions and laws except as changed by the Commonwealth Constitution. It regulates the relations between Commonwealth authorities and those of the states.

The Australian Constitution established a federal system of government, under which legislative powers are distributed between the federal and state governments.

### Division of Power

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In contrast to the states, the only powers the Commonwealth has are the powers transferred to it by the colonial (later state) politicians and representatives in the 1890s listed in the Commonwealth Constitution. The Constitution gives the Commonwealth **concurrent powers** (existing together) and **exclusive powers**.

Concurrent powers (e.g. taxation, banking, insurance) are shared between Commonwealth and states. If there is any inconsistency between a state law and a Commonwealth law, s 109 of the Constitution provides that the Commonwealth law is to prevail. Inconsistencies may arise where it is impossible to obey both laws (a direct collision). For example, if a state law permits certain conduct, while a federal law prohibits it, s 109 provides that the state law is invalid to the extent of the inconsistency.

Exclusive powers (e.g. defence, customs, excise, currency, immigration and citizenship) are vested in the Commonwealth only. These powers are exclusive to the Commonwealth, which means that only the Commonwealth Parliament can make laws on that area.

The Commonwealth possesses most powers concurrently with the states, and some exclusively for itself.

If the Constitution has not given the Commonwealth specific powers to make laws in a certain area, only the states can enact valid laws. These powers are called **residual powers** (e.g. transport, schools and health/hospitals).



## The Doctrine of the 'Separation of Powers'

Australia has nine legal systems – the eight state and territory systems and one federal system. Each of the federal and state systems incorporates three separate branches of government:

- the legislature, consisting of democratically elected Members of Parliament, which makes statute law (legislation);
- the executive, which implements legislation and administers the affairs of government. In Australia, the executive is made up of the Queen and her Ministers. The Queen is represented at the Commonwealth level by the Governor-General and at the state level by the governor of the state; and
- the judiciary, which is responsible for making legally enforceable judgments about the legal rights and liabilities of people. The judiciary comprises judges and magistrates operating in the court system.

Because all three powers are, in theory, not held by one person or group, autocratic and arbitrary rule is not possible because each body provides a check upon the others to ensure that power is not abused or exceeded.

## What is Law?

The law is a body of principles established by parliament and by the courts. Law is legally enforceable and was developed to set standards of conduct between people, businesses and government. If these standards of conduct are not followed, the law sorts the conflicts that arise, and punishes those who breach these standards of conduct.

Business law is made up of the laws that set out the rights, duties and obligations of people in business. Business law balances the interests of those in business and people like producers and consumers, buyers and sellers, lenders and borrowers. It regulates business transactions under the law of contract, which explains when an agreement will be legally enforceable as a contract and is updated by competition and consumer law. It regulates those engaged in business (companies, partnerships, etc), their names, their funding (finance, credit), their banking and their insurance. Many aspects of criminal law (especially property offences) and tort (especially the law of negligence) impact on business.

## Sources of Law

The sources of our law are:

- **Enacted law** (statute law, legislation, Acts of Parliament – law made by the parliaments of the Commonwealth of Australia, the six states and two territories to give effect to some public policy), and
- **Unenacted law** (common law, case law, precedents – law made by judges in the courts, based upon legal principle, legal policy and legal authority).



## Enacted Law

Commonwealth (Australian, federal, national) legislation is passed by the Parliament of the Commonwealth of Australia in Canberra. The states and territories pass state and territory legislation. Statute law takes precedence over case law. Statutes can be created, amended, etc, whereas case law is, in theory, bound by the doctrine of precedent

### Unenacted law (Case law: legal cases as precedents)

Unenacted law is made (handed down, written) by judges in courts. Unenacted law refers to the rules made by judges when they are deciding court cases or giving the reasons for their decisions. A precedent is a previous case which is used as an example (principle, authority) for later cases.

Law-making by judges – Because of the separation of powers in the Constitution among (1) the legislature (parliament), (2) the executive (administration) and (3) the judiciary (judges), the constitutional model says that parliament makes law (enacted law, statutes, legislation and Acts of Parliament) and judges creates unenacted law and case law by interpreting the law that parliament makes.

## Recognising Enacted Law and Unenacted Law

As mentioned above, law is made up of enacted law (statutes, legislation, Acts of Parliament) and unenacted law (judgments or cases).

An example of enacted law or statute is *Acts Interpretation Act 1901* (Cth).

Element	Description	Comments																				
<i>Acts Interpretation Act</i>	Short title	The formal name by which a piece of legislation may, by law, be cited.																				
1901	Year in which the Act was originally passed	Not necessary the year the Act is effective.																				
(Cth)	An abbreviated form of the jurisdiction in which the Act was passed (enacting legislature)  In this example, the enacting legislature is the Commonwealth Parliament	The following abbreviations should be used for Australian jurisdictions: <table border="1"> <thead> <tr> <th>Jurisdiction</th><th>Abbreviation</th></tr> </thead> <tbody> <tr> <td>Commonwealth</td><td>Cth</td></tr> <tr> <td>Australian Capital Territory</td><td>ACT</td></tr> <tr> <td>Northern Territory</td><td>NT</td></tr> <tr> <td>New South Wales</td><td>NSW</td></tr> <tr> <td>Queensland</td><td>Qld</td></tr> <tr> <td>South Australia</td><td>SA</td></tr> <tr> <td>Tasmania</td><td>Tas</td></tr> <tr> <td>Victoria</td><td>Vic</td></tr> <tr> <td>Western Australia</td><td>WA</td></tr> </tbody> </table>	Jurisdiction	Abbreviation	Commonwealth	Cth	Australian Capital Territory	ACT	Northern Territory	NT	New South Wales	NSW	Queensland	Qld	South Australia	SA	Tasmania	Tas	Victoria	Vic	Western Australia	WA
Jurisdiction	Abbreviation																					
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Unenacted law is made (handed down, written) by judges in courts. Unenacted law refers to the rules made by judges when they are deciding court cases or giving reasons for their decisions.

An example of unenacted law or case law is *L Shaddock & Partners Pty Ltd v Parramatta City Council* (1981) 150 CLR 225.

Element	Description	Comments
<i>L Shaddock &amp; Partners Pty Ltd v Parramatta City Council</i>	Parties' names	<i>Plaintiff v Defendant</i> – the “v” is pronounced “and” in civil cases. In appeal cases: <i>Appellant v Respondent</i>
(1981)	Year of law report	The judgment was published in 1981.
150	Volume number	The 150 <sup>th</sup> volume of the CLR.
CLR	Abbreviation of the law report series where the judgment is published	In this example: Commonwealth Law Reports which indicates this is a judgment handed down by the High Court of Australia.
225	Page number	In this example: page 225 of the law report.

## Types of Law

There are three types of laws that existed in England prior to 1788. They were common law, equity law and statute law.

### Common Law

English kings would send justices to travel the country to settle local disputes on a consistent basis. These justices would record their decisions. These records would then allow for a comparison of rulings made by the justices in an attempt to provide a more co-ordinated and cohesive method of settling disputes.

Over time these rulings became known as the common law of the land as they were applied to all disputes in the same way. As time went on these rules were followed rigidly and the **doctrine of precedent** (See Unit 2) was developed. However, with this rigidity came inflexibility and technicalities with the result that injustice sometimes occurred.

### Equity Law

As a result of the injustices that sometimes occurred with the application of the common law, citizens would often complain to the King. The King would then refer these cases to his Chancellor for resolution, giving the Chancellor the power to overrule the decision of the Common Law Court.

Eventually so many complaints were referred to the Chancellor that he began to function as a court (known as the Chancery). The Chancery developed its own system of rules which were separate and distinct from the common law rules. The Chancery rules were based on the principles of fairness and equity and this branch of the law became known as equity law. Consequently, there are now two streams of law (common law and equity law). They are both administered by the one court and often complement and add to each other. It should be noted however that equitable principles will override common law principles where there is conflict.

## Statute Law

Statute law is the law made by parliament and existed in England prior to 1788. In Australia we have a 'federal' or 'commonwealth' system which results in us having two levels of parliament. The two levels are known as the Federal or Commonwealth Parliament which make laws in specific areas for the whole of Australia, and State parliaments which make laws for their respective states. There is also territory parliaments for the Australian Capital Territory and the Northern Territory. These parliaments were created by Commonwealth legislation and have more limited powers than State parliaments.

Statute law is the supreme law and, in the case of conflict, overrides both common law and equity law. This is as it should be in a democracy because both common law and equity law are 'judge made law'. That is 'unelected' judges make laws that determine the way people live. Parliaments, on the other hand, are elected by voters so in this indirect way the electors can determine the laws that people live by.

## Civil and Criminal Law

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Another way of categorising law is to divide it into civil law and criminal law.

Civil law involves disputes between legal entities such as persons, corporations, or government. It involves one legal entity (plaintiff) being in dispute with another legal entity (defendant). The plaintiff in civil proceedings must usually prove his or her case on the balance of probabilities and the compensation awarded is usually damages, specific performance or injunction. The object of the court is to place the plaintiff in the position he or she would have been if the defendant had not breached the civil law. Examples are breach of contract or torts.

Criminal law involves a dispute between a legal entity and the Crown or government. The purpose of the proceedings is that the offender be punished either by fine or imprisonment for the breach of the criminal law. The Crown (or prosecution) must prove its case beyond reasonable doubt. Examples are the charges of murder, or fraud.

## Different Meanings of 'Common Law' and 'Civil Law'

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### Common Law

The expression "common law" has several meanings which depend on the context in which it is being used. Below are three meanings of "common law", amongst others:

1. *the common law world* – common law system consists of statute law and case law, which originally developed in England, then later in Australia, New Zealand, Canada and other former British colonies. This is in contrast to the civil law system of continental Europe.
2. *case law, not statute law* – unenacted law written by judges in judgments (case decisions, precedents) not statute law enacted by parliament.
3. *not equity law* – case law from the common law courts, in contrast to case law from the equity courts.

## Civil Law

The expression “civil law” has several meanings which depend upon the context in which it is being used. Below are two meanings of “civil law”, amongst others:

1. *the civil law world* – civil law system is based on the civilian code of ancient Rome.
2. *not criminal law* – civil law involves matters between person and person regarding the enforcement of rights and carrying out of obligations. Civil cases result in remedies for the person winning and liabilities for the person losing. The business law topics covered in this course involve civil law.

## References

Latimer, P 2016, *Australian Business Law 2016*, CCH Australia, Sydney, NSW, Australia.

Parliamentary Education Office (2023). *Democracy* – Parliamentary Education Office. [online] peo.gov.au.

Parliamentary Education Office (2024). *The Federation of Australia* – Parliamentary Education Office. [online] peo.gov.au.





## Tutorial Questions

Students must complete the following questions before coming to class

### Terms and Concepts

The following terms and concepts must be understood in the context of the tutorial.

Provide written explanations of these terms and concepts in the space provided.

Terms/Concepts	Explanation
Federation of Australia	
Division of power	
Exclusive powers	
Concurrent powers	
Residual powers	
Separation of powers	
Executive	
Legislature	
Judiciary	
Common law	
Statute law	

## Division of Power

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1. Complete the following table.

Division of Power			
Identify the 3 categories of legislative (law-making) powers?			
Identify the parliament/s which can exercise these powers.			
Examples:			
		Section 109 of the Australian Constitution:	

Using the information from the table above, explain the concept of division of power.

## Separation of Powers

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2. Complete the following table.

Separation of Powers			
What are the 3 arms of government?			
Who are they?			
What is their function?			

Using the information from the table above, explain the doctrine of separation of powers and how it operates in Australia.



## Sources of Law

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3. Categorise the following laws as either statute or case law. Further, answer each of the questions for each source of law.

	<b>The 2 Sources of Law</b>	
<b>Law</b>	<b>Statute Law</b> Who is the enacting legislature?	<b>Case Law</b> Who is the plaintiff? Who is the defendant?
<i>Harvey v Facey</i> [1893] AC 552		
<i>Competition and Consumer Act 2010</i> (Cth)		
<i>Carlill v Carbolic Smoke Ball Co.</i> [1893] 1 QB 256		
<i>Mutual Life and Citizens Assurance Company Ltd v Evatt</i> (1968) 122 CLR 55		
<i>Civil Liability Act 2002</i> (NSW)		



## In-Class Collaboration and Presentations

Students must read the following questions before coming to class.

### Sources and Classification of Law

Law can be categorised in different ways. The expressions “common law” and “civil law” have several meanings which depend upon the context in which they are being used.

In this activity, you are required to fill in the boxes in the flowchart below with ‘Common law’, ‘Civil law’, or ‘Statute law’, and present your answer to the class in small groups. You may use these options more than once. Use Readings on pp 7-8 to assist you in this activity.

#### Instructions:

##### 1. Group Formation:

- Your tutor will divide the class into 3 groups of students.
- Each group will be assigned with one of the following categories:
  - **Group 1:** System of Law
  - **Group 2:** Sources of Law
  - **Group 3:** Branches of Law

##### 2. Task:

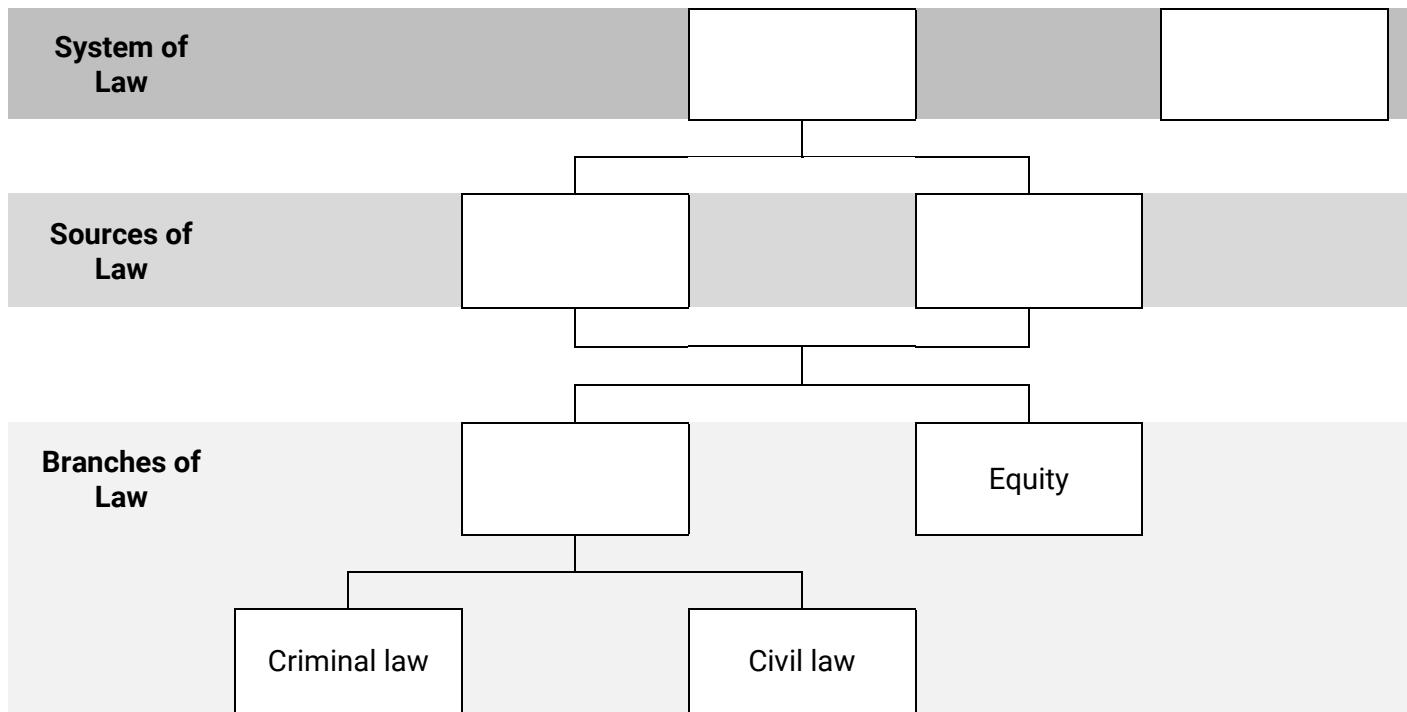
- Each group will discuss and fill in the blanks in the flowchart below.
- Students must be able to explain their answers for their assigned category. For example, if you choose “Common Law” for a particular blank, be prepared to explain what “Common Law” means in that context.

##### 3. Presentation:

- Each group will present their answers to the class.
- Ensure that your explanations are clear and concise.
- Be prepared to answer questions from your classmates and your tutor.



## Legal Framework Flowchart



Explanation of answers

### System of Law:

### Sources of Law:

### Branches of Law:

