

Cambridge University Press
978-1-108-72476-0 — Law and Ethics for Australian Teachers
Mark Butlin , Noeleen McNamara , Kerrie Anglin
Excerpt
[More Information](#)

Introduction: Overview of the Australian legal system

Noeleen McNamara

This introduction is designed to give readers an overview of or a refresher on the basics of Australia's legal system. While many readers will be familiar with these basics, others might not be so this material has been included to inform the specific discussion of law that follows in this book's substantive chapters.

SOURCES OF AUSTRALIAN LAW

The legal system of Australia in the 21st century has its origins in the English legal system. With the settlement of Sydney by the English in 1788 and the application of the legal doctrine of *terra nullius* ('nobody's land'), the English legal system was immediately adopted and put in place. The jurist Sir William Blackstone stated the principle of *terra nullius* as follows: 'if an uninhabited country be discovered and planted by English subjects, all of the English laws then in being, which are the birthright of every subject, are immediately there in force'. The consequence of this was that the laws of the Australian indigenous peoples, who had inhabited Australia for many thousands of years, were ignored. It was not until the landmark decision of *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 that indigenous customary law was recognised and the legal doctrine of native title to land was accepted into Australian law.

Common law

Common law is also known as judge-made law. A short history of the common law is necessary to understand its development. From about the 12th century in England the monarchs divided the country into geographical areas which would be serviced by a judge travelling around on circuit. Courts were not set up permanently in these areas but were convened from time to time as court business required. The judges who travelled on these circuits had no law as such to apply and so they applied the customs of the local people. These customs had developed since primitive times, initially covering such fundamental matters as the sharing of food and methods of protection. Later, as the society became more complex, the customs expanded to cover more matters such as marriage, ownership of property, and criminal offences. Often these customs started as habits which hardened into rules. It is interesting to note that in the very earliest times these customs or rules were obeyed as a result of habit or pressure from the community rather than by enforcement by the state.

When they finished a circuit, the judges would return to London and often discuss among themselves the various customs and eventually the best ones were selected and applied uniformly throughout the land. The intention was that these customs were to

be a law common to every part of the land; hence the name – the common law of England. So the customs became rules of common law when they were recognised and applied by courts.

Law reports

The development of the common law was greatly assisted by the growth of accurate and comprehensive records of decided cases. The first records were kept from the end of the 12th century (they were known as Rolls) and were maintained to the 16th century (they were eventually referred to as Year Books). The Year Books were superseded by reports of cases collected and published by individuals under their names. Judges also kept records of their own decisions and of their fellow judges. Slowly the system was regularised and in 1865 in England a Council of Law Reporting was set up to issue official law reports.

In Australia the most important reports are the Commonwealth Law Reports in which the decisions of the High Court are reported. Reports are also published for each state Supreme Court and Court of Appeal, such as the Queensland Reports and the Victorian Reports. Many decisions can now be found on the internet, on sites such as that of the Australasian Legal Information Institute. The various federal and state courts also have decisions available for access, such as the High Court's Judgments Database.

The doctrine of precedent

It has already been mentioned that the early judges saw it as their role to apply the customs of the land as a means of resolving disputes, and by their application the customs became law. However, as one would expect, there was not always a custom or a law to cover a particular set of circumstances and judges had to fill the gap themselves so that they could reach a decision. In this way judges created new law. To a greater or lesser extent, this process still goes on today.

From the earliest times judges saw great merit in trying to have a consistent law applicable to England. They tended to assist this process by selecting what they saw as the best customs and endeavouring to apply them uniformly. From this notion the principle of precedent arose and was to become one of the most significant features of the common law. The doctrine of precedent is that like cases should be decided alike. The use of precedent was initially regarded as a convention until early in the 19th century when it hardened into a rule of law. The effect of this was that courts were bound to follow decisions of courts above them in the same judicial hierarchy. That is, there are two issues to consider:

1. Which decisions of which courts in a legal system bind other courts? This requires knowledge of the court hierarchy.
2. What part of the decision is binding? This requires determining what is the *ratio decidendi* (usually shortened to ratio)

The court hierarchy and the doctrine of precedent

The following principles are relevant to the interplay between court hierarchy and precedent:

- Each court is bound by decisions of courts higher in the same hierarchy; for example, the District Court of New South Wales is bound to follow the decisions of the Supreme Court of New South Wales. The New South Wales Supreme Court must, in the same fashion, follow and apply the decisions of the High Court of Australia. This is the principle of binding precedent in operation.
- Most courts (including the High Court) are not bound to follow their own decisions.
- Courts are not bound to follow decisions of courts outside their own hierarchy, but they may find the decision of another court persuasive. For example, a judge in the District Court of Queensland would treat a decision of the New South Wales Court of Appeal as very persuasive in reaching a decision on a case before him or her. This is an example of persuasive precedent.
- A court, even if it is not strictly bound by its own decisions, will usually only refuse to follow its own decisions in clear cases of error.

The fact that a precedent is 'old' does not necessarily weaken its authority. Courts frequently rely on early 19th-century cases, as there are many areas of law, such as contract law, whose legal principles are derived from 19th-century cases.

What part of the decision is binding?

As suggested, the legal term for the part of a judgment which then becomes the precedent is the ratio. The meaning of *ratio decidendi* is 'reason for deciding'. It is the task of lawyers, judges in subsequent cases, and academics to read a judgment and extract from it the basis or reasoning on which the judge made his or her decision. This can be a complex task as judgments may run into hundreds of pages of reasoning and, in appellate courts, there may be a number of judges giving different reasons.

The High Court has a maximum of seven judges who may hear appeals. Thus some decisions of appeal courts with multiple judges are decided by majority. In the High Court this could be a split 4–3 decision. In these circumstances the ratio of the case is

found from the judgments of the majority. The judgments of those who did not agree with the majority are called dissenting judgments. The ratio will not come from the dissenting judgments.

In finding the ratio, the crucial question is: what are the material facts? These facts form the basis upon which a subsequent court might distinguish or expand a ratio. It is always open to any judge to distinguish the precedent by the way in which he or she interprets the material facts. There may be policy reasons why a judge might do this.

Statute law

In our discussion on the common law, reference was made to the fact that when judges first went out on circuit to dispense justice they had no law as such to apply. While the King of the day had power to pass laws he normally only did so to raise taxes to fund his wars and therefore there was no substantial body of statute law.

Over time, the power to make laws passed from the King to Parliament. The final victory of Parliament over the King as the supreme statutory law-making authority occurred in England with the Revolutionary Settlement in 1689. From that date onwards, there has been a steady increase in the number of statutes passed in England and other Commonwealth countries, to a point where it rivals the common law as a source of law.

The making of a statute

The basic outline of the procedure for ‘making’ an Act of Parliament is as follows:

- *Pressure to make a law.* This may come from party policies and election promises, community or media pressure, an administrative need that has been identified by the department administering the legislation, the courts suggesting a need for reform or from members of parliament themselves.
- *Preparation of Cabinet submissions.* Policy requiring legislation to implement it has to be submitted to, and win the approval of, Cabinet.
- *Drafting of a Bill.* The government department administering the legislation will provide instructions to the Office of Parliamentary Counsel to draft the Bill. The government department will also draft Explanatory Notes, to be tabled in the House with the Bill, and the Minister’s Second Reading Speech, which is used to introduce the Bill into Parliament.
- *Readings of the Bill.* The First Reading is a formality. The Bill is introduced by the Minister giving a Second Reading Speech, and the substance of the Bill is debated. The Bill might be referred to a Standing or Select Committee. At the end, a ‘Committee of the whole House’ considers the Bill in detail and scrutinises each

section. Members of the opposition and minor parties/independent members can move for amendments at this stage. The Third Reading is where the Bill is voted on. The Bill then goes through the same process in the Second House (for all states except Queensland) as well as the federal Parliament as all the Australian jurisdictions (with the one exception) have lower and upper Houses.

Structure of a statute

Acts are usually divided into smaller parts. Depending on the size of the Act these may be referred to as chapters, parts and divisions in descending order of size. These have a heading which refers to the subject matter they contain. The basic core of a statute is the section. This is the actual law. Sections are numbered consecutively throughout an Act. Sections may be further broken down into subsections, paragraphs and even subparagraphs. When it is necessary to refer to a specific part of an Act, then its section number is referred to: for example, *Education Act 1996*, s 437(2). This is verbally stated as section 437, subsection 2.

Acts will also usually contain schedules which are parts at the end of the statute. If there are more than one, they are numbered. These are convenient for putting together lists of information which are referred to in the Act. It is usual modern drafting practice to include a dictionary schedule which gives the definitions of particular words used in the Act.

Subordinate legislation

There is a need for Parliament to delegate some of its legislative powers to the public service, which administers the legislation. Subordinate legislation, as the name suggests, gets its authority from a parent Act which is normally cast in general terms, with a provision enabling the subordinate authority, such as the Minister and government departmental officers, to flesh out the general scheme of the parent Act by drawing up technical requirements and procedural details. Subordinate legislation is published in the form of regulations or statutory rules as distinct from Acts of Parliament (statutes). Various items of subordinate legislation may be introduced during the currency of the Act.

What law applies - statute or common law?

Legislation is a particularly important source of law because, apart from its volume (at all levels of government in Australia), the rule is that if common law and statute conflict, the statute law prevails. Moreover, if there is a perceived need for new laws

to deal with an issue, Parliament can pass a law in the area. However, even if a piece of legislation applies in an area of law, case authorities are still relevant, as they assist in interpreting the legislation. Accordingly, both statutes and case law references will be included in this text.

CIVIL LAW AND CRIMINAL LAW

In legal proceedings a fundamental distinction is drawn between civil and criminal matters. Civil proceedings are broadly defined as those between citizens. The tort of negligence (the subject matter of Chapter 1) is an example of an important area of the civil law for education professionals. The word ‘tort’ means ‘a civil wrong’.

The party taking an action is referred to as the ‘plaintiff’ and the person being sued is referred to as the ‘defendant’. The case is cited as ‘*Brown v Black*’ (where Brown is the plaintiff and Black is the defendant) and is referred to as ‘Brown and Black’. Sometimes the decision that is being reported is the hearing of the appeal, rather than the ‘first hearing’. In this instance, the parties will be referred to as the ‘appellant’ (who is the party initiating the appeal) with the other party(ies) being called the ‘respondent’.

Criminal proceedings are prosecutions undertaken by the state or its representatives, such as the police or a government department, against a person or body whose behaviour has breached a law in the Criminal Code/Crimes Act or other legislation. An action taken by the police against a person who has stolen school property is an example of a criminal proceeding.

The party taking an action is generally referred to as the ‘Crown’, written as ‘R’, meaning Regina (or Rex), and the person being prosecuted is referred to as the ‘defendant’. The case is cited ‘*R v White*’, also referred to as ‘The Crown against White’. (There are some regulatory offences where the prosecuting officer’s name is used, rather than the Crown.)

Other differences between civil and criminal proceedings include the following:

- The function of the criminal law is to punish the wrongdoer while the aim of the civil law is to compensate the party suffering loss or injury.
- There are a number of procedural differences such as a criminal prosecution often commencing with the arrest of an offender by the police. Civil action commences with the service of a claim or writ. There is usually a preliminary or committal hearing for serious criminal charges. Serious criminal matters are decided by a judge and jury whereas there is usually not a jury in civil matters.

- The sanctions imposed are different. In civil matters the usual order is an award of money (damages) to the successful litigant whereas an accused found guilty in criminal proceedings may be fined or imprisoned; as well, there are a range of other different measures which the criminal law can impose on a person found guilty.
- There is a different standard of proof required. In criminal proceedings the prosecution must prove its case beyond reasonable doubt while in civil proceedings the plaintiff must prove his or her case on the lesser standard of the balance of probabilities.