

# **Part 1:**

# **The Legal System**

# Contents

<b>TOPIC 1 BASIC LEGAL NOTIONS.....</b>	<b>3</b>
BASIC LEGAL NOTIONS.....	3
<b>TOPIC 2 SOURCES OF LAW.....</b>	<b>5</b>
ABORIGINAL AND TORRES STRAIT ISLANDER CUSTOMARY LAW.....	5
SOURCES OF CONTEMPORARY AUSTRALIAN LAW.....	7
SOURCES AND FRAMEWORK OF INTERNATIONAL LAW.....	11
<b>TOPIC 3 THE CONSTITUTIONAL SYSTEM IN AUSTRALIA.....</b>	<b>12</b>
THE CONSTITUTIONAL SYSTEM IN AUSTRALIA.....	12
<b>TOPIC 4 THE OPERATION OF THE LEGAL SYSTEM.....</b>	<b>14</b>
OPERATION OF THE LEGAL SYSTEM.....	14
OPERATION OF THE LEGAL SYSTEM IN RELATION TO NATIVE TITLE.....	17

## Topic 1 Basic Legal Notions

### ■ Basic legal notions

#### 1.1 Perceptions of the law and lawmaking

**Law** is the set of rules that are seen as binding on the community as a whole. It is a set of rules that can be enforced and is officially recognised

Our perception of law of the law is affected by our socio-economic, cultural and ethic backgrounds, cultural and ethic backgrounds and our experiences in the legal system. Example: Young people find that the law restricts their access to experiences that adults are entitled to (such as drinking alcohol and smoking).

#### 1.2 The need for law

- i. Laws regulate society by telling us what we can do and when we can do it.
- ii. Laws enforce values that society consider to important.
- iii. Laws protect members of the community from harm.
- iv. When people come to conflict, the law defines the rules and provides a venue for finding a resolution.
- v. When rights have been violated, the law provides a means of enforcing rights and gaining compensation.

**Anarchy** means not having laws to control and regulate the behaviour of members of society. The state of disorder and chaos that can result from lawlessness is called anarchy.

#### 1.3 Customs, rules and laws.

- Customs are traditional ways of behaving and they are enforced by social pressure.
- Rules control the behaviour of people in particular areas or situations. They are displayed in written or symbolic form and are enforced by use of penalties.
- Laws are rules made by a \*sovereign power. They apply to everyone and are enforced either by sanctions or by requiring the victim to be compensated.

**The rule of law** means that everyone must follow the law, and that the law applies to everyone equally

\* A sovereign power is a person or institution that has the authority to make laws. E.g. the courts, parliament and organisations to which parliament have delegated lawmaking power.



**Sanction** is the general term used to describe all of the different punishments that we can impose on people who break the law.

#### 1.4 Equality, fairness and justice

- Equality involves treating people equally and providing people with equal opportunities.
- Fairness involves achieving equal outcomes for people, which may involve giving disadvantaged people opportunities that are not available to everyone.
- Justice aims to achieve both equality and fairness.

#### 1.5 Values and ethics

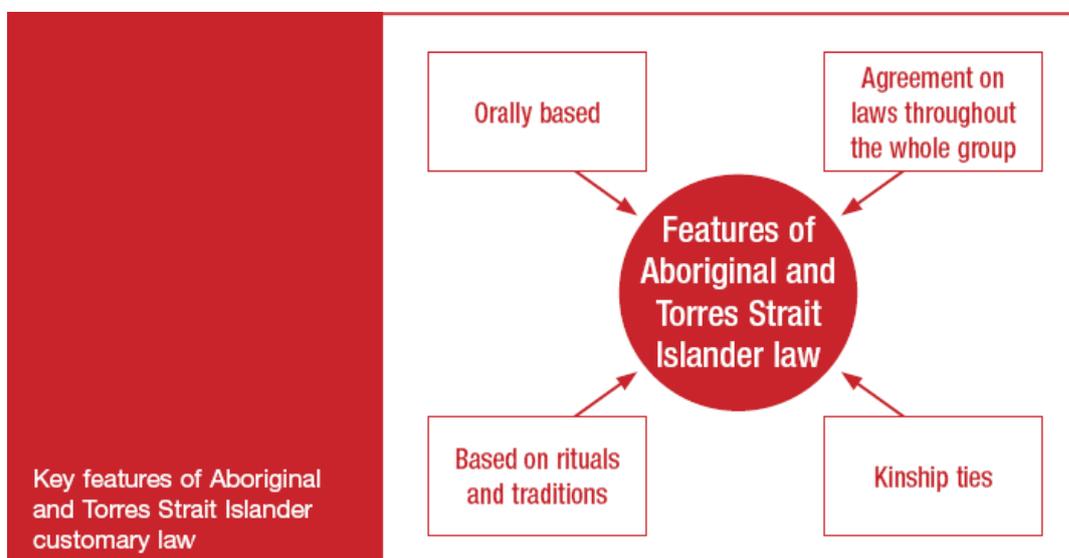
- i. The law needs to reflect the values of society; that is, the importance that we place on different things.
- ii. The law also needs to reflect our society's ethics, which are our beliefs about the right and wrong ways to behave.
- iii. The law must be capable of being reformed so that it can reflect the constantly changing values and ethics of society.

## Topic 2 Sources of law

### ■ Aboriginal and Torres Strait Islander customary law

#### 2.1 The spiritual nature of customary law for Aboriginal and Torres Strait Islander peoples

Aboriginal and Torres Strait Islander law is closely related to religion and belief in the spiritual importance of the land.



**Kinship** is the relationship between individuals and their extended family or clan. It describes the bonds of loyalty that tie the group together.

## 2.2 Diversity of Aboriginal and Torres Strait Islander laws

Despite the fact that there is great diversity in the law among the hundreds of tribal nations and clans, the Dreamtime is common and central to all.

## 2.3 Ritual and oral traditions within Aboriginal and Torres Strait Islander Societies.

Aboriginal and Torres Strait Islander customary law is **oral law**. Much of the law is remembered through story, dance and song.

**Oral law** is a legal system whereby laws are not written down, but passed from generation to generation by word of mouth.

### Pro/cons of oral law

One of the main problems associated with oral law is the danger that it will be forgotten or misinterpreted.

When a law had changed to the point that it had become unjust, Aboriginal people overcame the problem by simply ignoring it. This flexibility is one of the main advantages of oral law.

## 2.4 Conciliation and mediation within Aboriginal and Torres Strait Islander societies

As a consequence of the strong bonds between family members (and ultimately, the clan), conciliation and mediation are favoured methods of dispute resolution.

Conciliation involves the elders of the clan meeting with the people in conflict and attempting to assist them in resolving their dispute through discussion and dialogue.

## 2.5 Enforcement and sanction in Aboriginal and Torres Strait Islander societies



## 2.6 The significance of land and bodies of water to Aboriginal and Torres Strait Islander societies

The land is central to all Aboriginal and Torres Strait Islander cultures, forming the basis of their religious beliefs and their law, and is considered sacred.

The British declaration that Australia was *terra nullius* deprived Aboriginal and Torres Strait Islander peoples of their right to their own land.

### ■ Sources of Contemporary Australian law

#### 3.1 Common law and the different uses of the term 'common law'

**Common law** can be best described as a collection of legal principles and rules that are derived from the decisions of judges in higher courts.

**Statute law** is the body of law made by parliaments.

**A precedent** is a judgment made by a court that establishes a point of law.

**Equity** refers to rules developed that look at what is fair or just in individual cases.

Equity was developed by the court of Chancery in the 13<sup>th</sup> and 14<sup>th</sup> centuries to deal with injustices that had crept into the common law.

#### 3.2 The system of precedent

The aim of the doctrine of precedent is to ensure that people will be treated equally and fairly in their dealings with the legal system.

**Stare decisis** – To stand by a decision

**Ratio decidendi** – A statement made by the judge about the reason for their decision. This created precedent that the lower court must follow.

**Obiter dicta** – Other statements made by the judges (such as opinions) that create no precedent.

#### Binding precedent

When a precedent is binding, the court must follow it, whether the judge believes the decision is correct or not. Lower courts are bound to follow decisions in superior courts.

Persuasive precedent

Persuasive precedent may influence a judge's decision, but the court is not bound to follow it. Superior courts do not have to follow decisions made in lower courts, though they may use them to help make a decision.

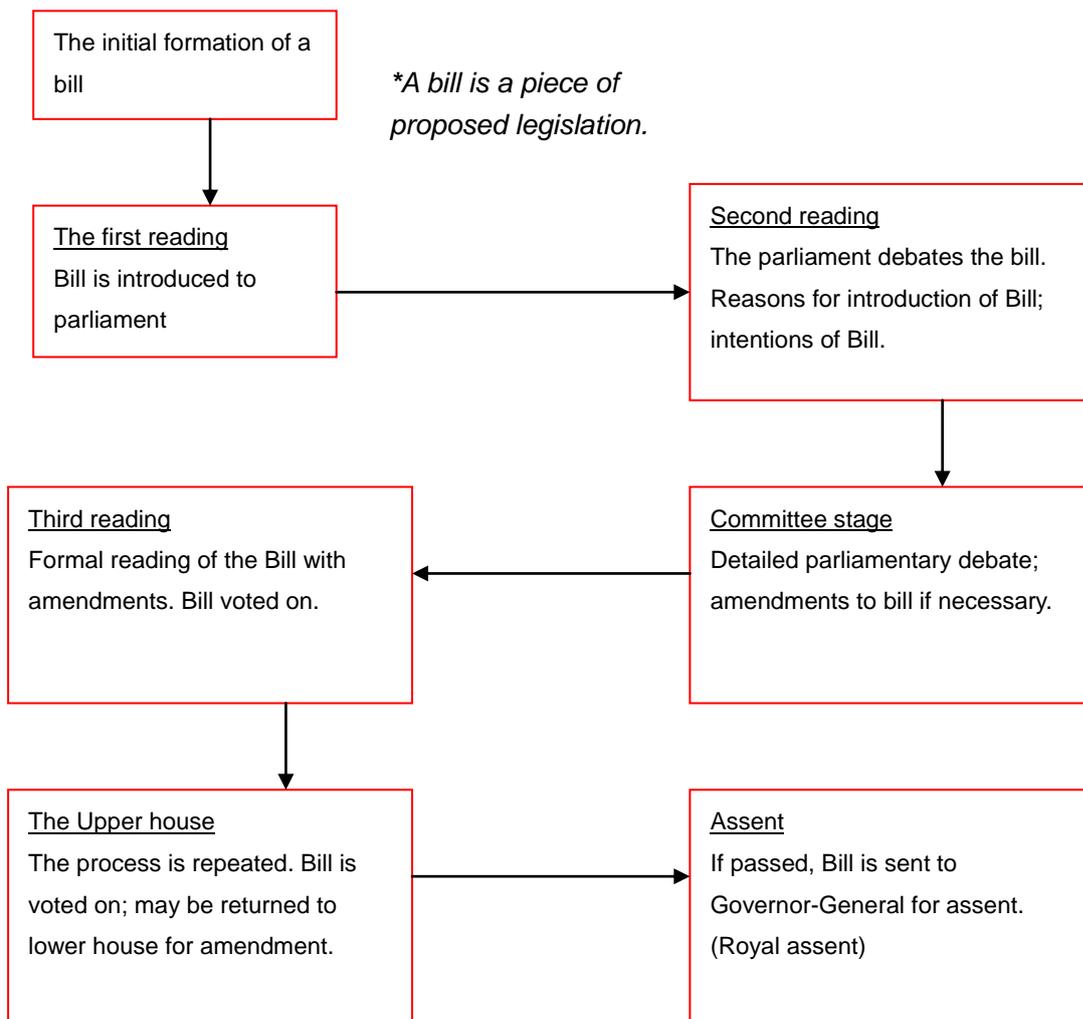
Avoiding precedent

- Distinguishing a case
- Reversing a judgement
- Overruling a decision
- Disapproving a decision

**3.3 Statute law and delegated legislation**

A **bicameral** parliament is a parliament with an upper and a lower house.

Making of statute law:



Delegated legislation

**Delegated legislation** is legislation made by non-parliamentary bodies, such as local councils.

Delegated legislation

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>• The people making the legislation tend to be experts in the area to which the legislation applies; for example, pollution experts from the Environmental Protection Authority may draft pollution legislation.</li> <li>• Delegating some of the 'less important' legislation frees up parliamentary time.</li> <li>• Delegated legislation is far easier to amend and is therefore more flexible.</li> </ul>	<ul style="list-style-type: none"> <li>• There is often insufficient time and expertise amongst members of parliament to properly check the delegated legislation.</li> <li>• There is usually very little publicity about delegated legislation, making it hard for people to voice their views about it before it becomes law.</li> <li>• With many different bodies making delegated legislation it can be hard to ensure consistency.</li> <li>• Delegating lawmaking duties to non-elected bodies may be considered undemocratic.</li> </ul>

The four main types of delegated legislation are:

1. *Regulations*. Delegated legislation made by the Governor-General, State Governors or members of the **\*Executive Council**.
2. *Ordinances*. Laws made for territories of Australia such as the Australian Antarctic Territory, usually by the body governing the territory.
3. *Rules*. Delegated legislation made for government departments such as the Australian Taxation Office, usually by the departments.
4. *By-laws*. Laws made in accordance with the *Local Government Act 1993 (NSW)*. This Act allows local councils to make laws that apply within the boundaries of the local government area, such as parking laws.

\*The Executive Council is a body comprising the Governor-General and ministers of the Commonwealth of Australia or, at the state level, the state Governor and state ministers.

**3.4 The Constitution**

A **Constitution** is a set of fundamental rules that establish how a country is governed and how laws are made.

The main role of the Australian Constitution is to determine the powers that can be exercised by the Commonwealth Government and the powers that remain with the state governments. (Division of power)

### 3.5 Criminal law and civil law

#### Criminal law

Criminal law deals with the acts committed against the whole community. The primary focus of criminal law is the maintenance of public safety and order for the benefit of all of society.

#### Civil law

Civil law means law relating to disputes between private individuals or institutions. The aim of civil law is to regulate the relationship between individual citizens.

#### Comparison between civil and criminal law

	Civil law	Criminal law
Who is the offence committed against?	Individuals	An initial victim but crime considered against society
Aim of court appearance	To compensate victim	To punish offender and to protect society
Who brings the case?	Plaintiff	The Crown
What action can the court take?	Order a remedy, such as damages or injunctions	Order sanctions, such as a fine or imprisonment

In a civil court case, the person bringing the case to court is an individual. In a criminal case, the state (that is the government, often in the form of the police) brings the case to court, because a crime is seen as offence against the whole community.

#### Civil law system

The civil law system is used to describe the system of law that developed in ancient Rome. Laws in this legal system are almost entirely derived from statute law.

Under a civil law system there is no room for the development of judge-made law (common law). Judges must carry out investigations (gather evidence). This is known as an **inquisitorial system**. Under a common law system, judges can make law and do not seek evidence, but rather make their decisions based on the evidence presented to them by both sides. This is known as an **adversarial system**.

#### Ecclesiastical law

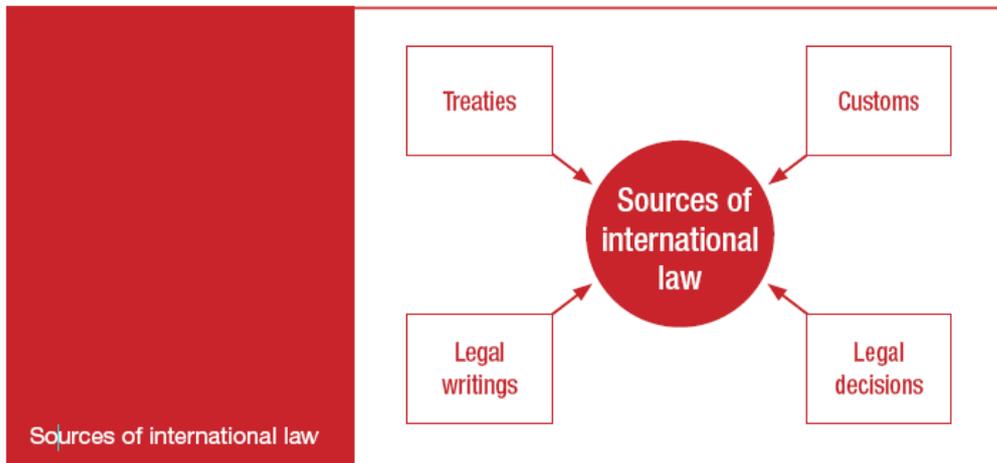
Ecclesiastical law is the body of law developed by the Christian church and enforced by ecclesiastical courts. For example, it is an offence to commit **bigamy**, a crime originally described in church law.

#### Mercantile law

Mercantile law is the body of law that regulates business dealings among traders.

## ■ Sources and framework of international law

### 4.1 Origins and sources of international law



**International law** is the body of law that governs the relationships between nations.

A **treaty** is best described as an agreement between nations that is entered into voluntarily.

There are two main types of treaty:

- i. **Bilateral treaties** are formal agreements between two states
- ii. **Multilateral treaties** are formal agreements between three or more states.

**Customary law** consists of principles and procedures that have grown up through general usage to the point where they are accepted as being fair and right by the international community.

**Legal decisions** of the international organisations such as the United Nations and International Court of Justice (ICJ) are also a source of international law. Decisions by these bodies often become part of international customary law and \*jus cogens.

**Legal writings** are usually well-respected writings of international lawyers, judges, or well respected participants in world affairs, such as journalists and politicians. Legal writings can be used by judges of the ICJ to help make their decision.

\* Jus cogen means a principle of international law that may not be contradicted by any nation.

## 4.2 Principal International Organisations.

- The United Nations is the principal international organisation. It has 191 member nations and its main role is the establishment and maintenance of world peace and order.
- The International Court of Justice is a part of the UN. Its main functions are to hear disputes between nations and to provide legal advice on matters of international law.

### Key UN bodies

#### The General Assembly

- The General Assembly is the main forum of the UN.
- Its primary role is to pass resolutions in relation to the operations of the UN.
- The assembly also passes resolutions relating to conflicts between nations, and has the power to create new UN bodies.

#### The Security Council

- Primary responsibility for maintaining peace.
- Article 39 of the UN Charter allows the Security Council to instigate military action if it feels there is a 'threat to the peace, breach of the peace, or an act of aggression'.

#### The international Court of Justice

- The main judicial organisation of the United Nations.
- The court has two main functions:
  - To decide on disputes brought before it by member nations
  - To offer legal advice on international law matter when a nation requests it.

## Topic 3 The Constitutional system in Australia

### ■ The Constitutional system in Australia

#### 5.1 Establishing the Australian Constitution

- The Australian Constitution was established by the *Commonwealth of Australia Constitution Act 1900 (UK)*.
- The Constitution established a federal system of government, with the Commonwealth Parliament sharing powers with the state parliaments.

#### 5.2 Constitutional division of power

One of the most important aspects of the Constitution is its role in ensuring **division of**

**power** between the states and the Commonwealth parliaments.

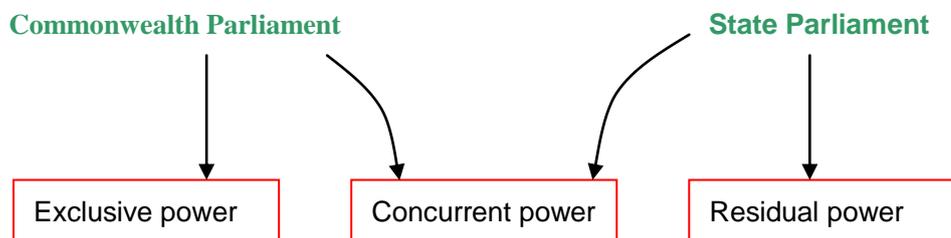
**Exclusive powers** are those powers that are granted to the federal parliament only. These powers fall into three categories: trade, foreign relations and defence.

Section 90 of the Constitution grants exclusive powers to the Commonwealth in the area of customs. This is an important power; it gives the Commonwealth power over immigration and international trade.

**Residual powers** are those powers retained by the states after federation. These powers are outlined in the constitutions of the various states, and include powers to act in regard to health, transport, education and (importantly) law and order.

**Concurrent powers** Concurrent powers are those that are shared between the Commonwealth and state governments.

For example, in relation to health care, the state governments have the responsibility for running hospitals and ambulance services, but the Commonwealth is responsible for health care funding through the running of the Medicare system.



The Constitution can only be changed by a referendum, which requires approval by an overall majority of voters, and a majority of voters in a majority of states.

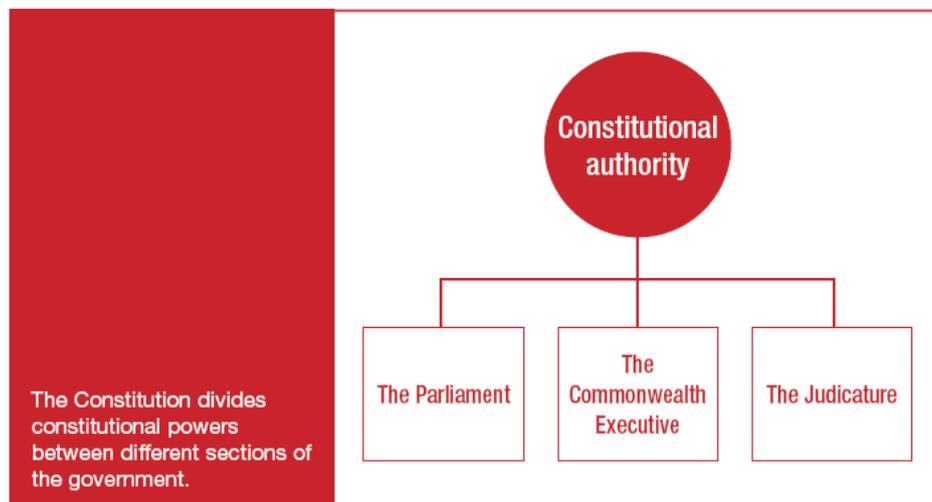
### 5.3 The high court and the separation of powers

- The High Court is the highest court in Australia. Its main functions are to interpret and protect the Constitution and to act as the final court of appeal.
- Power is separated between the parliament, the executive and the judicature. This ensures that there is no abuse of constitutional power by any one group in the government.

#### Judicial review and the separation of powers

**The separation of powers** ensures that no one group within the government can dominate. Power is distributed between the three arms of government that is, the legislature, the executive and judiciary.

The aim of the separation of powers is to ensure that authority is evenly distributed between these three groups. Each acts as a check on the others, to ensure that there are no abuses of power and that constitutional authority is not exceeded.



**Parliament** ---- The legislature

**The commonwealth/Federal Executive Council** ---- Governor-general, P.M and members of the cabinet

**The Judicature** ----- The courts

#### 5.4 The transfer of legislative power

- Before 1823, martial (military) law existed in New South Wales. It was not until this time that the general laws of England began to apply.
- The *Statute of Westminster 1931 (UK)* granted Australia the right to make its own foreign policy, and the *Australia Acts 1986 (Cwlth)* completed total autonomy for Australian parliaments.

## Topic 4 The operation of the legal system

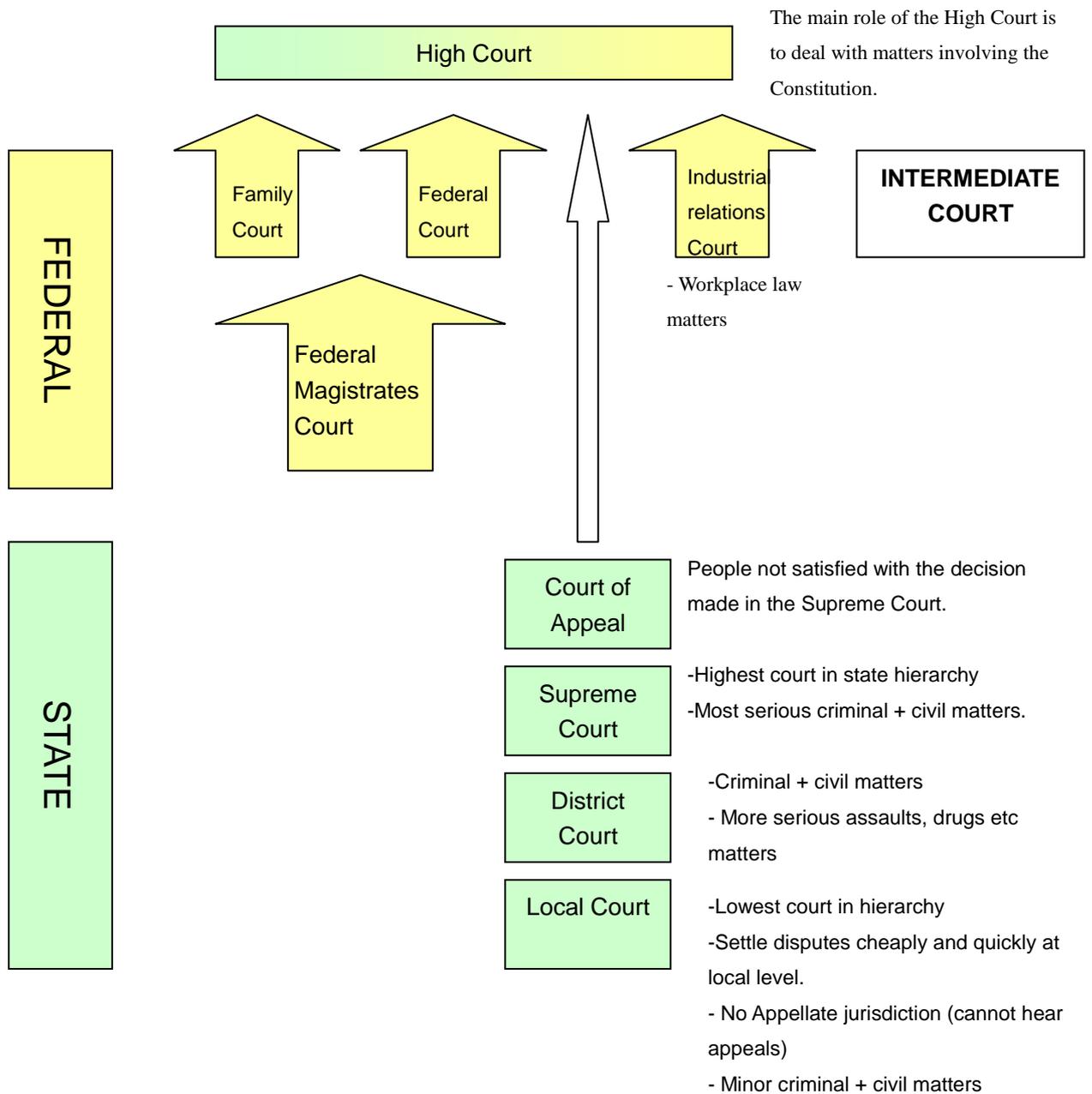
### ■ Operation of the legal system

#### 6.1 Structure of state and federal courts

**Original Jurisdiction** is the power of a court to hear a case for the first time.

**Appellate jurisdiction** is the power of a court to hear a matter on appeal from a lower court.

### Court Hierarchy



Family Court

Deals with matters of family law, in particular divorce, residency of children, maintenance and the division of property.

Federal Court

Its jurisdiction is broad and includes matters involving trade practices, intellectual property (copyright), taxation and immigration.

### Federal Magistrates Court

The service mostly deals with less complex family law matters, although it also has jurisdiction in areas of bankruptcy, trade practices law, administrative, immigration and human rights law.

## 6.2 The adversary system and legal profession

Key features of the adversary system:

- i. Opposing sides
  - ii. Each side will introduce their own evidence and witnesses
  - iii. The opposing side may test the opposition evidence through cross examination and by introducing counter-evidence
  - iv. The judge or jury will not test the validity of the evidence
- The adversary system involves two sides attempting to convince the magistrate, judge or jury that their evidence is the most accurate. In coming to their decision, the decision makers can use only the evidence presented to them.

**Judges** sit in intermediate and superior courts, and their role is to adjudicate in cases; that is, to decide on points of law and issue instructions to the jury. The judge is also required to hand down sentences and rulings.

**Magistrates** sit in the inferior courts and their role is to determine cases; that is, to reach a verdict. (Hand down rulings and sentences)

When a case must go before a court, the **solicitor** prepares the case (known as a brief) for a barrister. A person seeking legal advice will usually go first to a solicitor.

**Barristers** have two main functions:

- To provide legal advice (known as an opinion) on the facts presented to them. This advice usually includes some indication of the likely outcome, giving the client the opportunity to decide which course of action is best for them
- To present the client's case in court.

## 6.3 Court procedures and observation of cases in the Local Court

- In civil matters the plaintiff must prove the case on the **balance of probability**. In criminal cases the prosecution must prove the case **beyond reasonable doubt**.
- All criminal matters begin in the Local Court. Summary cases are dealt with by the magistrate, who also conducts committal hearings for indictable cases. Civil matters

involving less than \$40 000 are also dealt with by the Local Court.

#### 6.4 Enforcement agencies and Legal Aid

Enforcement agencies are bodies that have the role of enforcing certain laws. These agencies are created by Acts of Parliament and include bodies such as the police and government departments.

The main roles of the police are to prevent crime, investigate crime and arrest the perpetrators of crimes.

Some Commonwealth and state government departments have powers to enforce specific laws.

For example, under the *Income Tax Assessment Act 1936 (Cwlth)*, the Australian Taxation Office has the power to investigate and prosecute matters in relation to taxation.

##### Legal Aid

The role of the Legal Aid Commission is to provide legal assistance, especially in the areas of criminal and family law, to people unable to afford their own legal representation.

#### 6.5 Alternatives to the court system and alternative dispute resolution

- The aim of tribunals is to deal with matters outside of courts in a more informal and less expensive manner. Tribunals exist at both state and federal levels.
- Primary dispute resolution places a greater emphasis on the parties in a dispute discussing the reasons for their problems and attempting to resolve issues before the matter goes to court.

### ■ Operation of the legal system in relation to native title

#### 7.1 The doctrine of terra nullius in Australia

*Terra nullius* means 'land belonging to no one'. Under British law in the seventeenth and eighteenth centuries, any land whose inhabitants had no organised system of law or government could be declared *terra nullius*.

**The Doctrine of Reception** is the legal notion under colonial British law that a land without an organised system of government would be declared to be *terra nullius*.

#### 7.2 The growth of recognition of native title in some countries

- Throughout the world, particularly in developed nations, there has been a growing

recognition of the hunting, fishing and native title rights of indigenous people.

- In Europe, the Saami people have gained greater native title rights in Sweden, Finland and Norway.

### 7.3 The Mabo and Wik native title cases

- The Mabo case (*Mabo v. Queensland (No. 2)* (1992) 175 CLR 1) made Australian legal history by recognising the existence of native title and removing the declaration of *terra nullius* from Australia.
- The Wik case (*The Wik People v. The State of Queensland & Ors, The Thayorre People The State of Queensland & Ors* (1996) 187 CLR 1) established the possibility that native title could exist on the same land that was held by pastoral lease.

**Native title** is the collection of individual or group rights and interests held by Indigenous people in relation to land and water.

### 7.4 Subsequent legal developments in common and statute law

#### **Native Title Act 1993 (Cwlth)**

Passed by the Commonwealth Parliament in response to the Mabo decision, the *Native Title Act 1993 (Cwlth)* recognised the existence of native title. It also provides a mechanism for determining native title claims.

#### **Native Title Amendment Act 1998 (Cwlth)**

The *Native Title Amendment Act 1998 (Cwlth)* was passed in the wake of the Wik case, and attempted to create certainty for farmers on pastoral leases. Some have criticised the Act for being too supportive of pastoralists' rights over those of native title claimants.

### 7.5 Native title as a collective right

Collective rights are those rights that are shared by a group of people. Native title is such a right; the benefits from native title extend to the whole Aboriginal group making the claim, not just individuals in the group.