Pearson

Chapter 1

Legal foundations

Review Questions

1.1 If you were asked to provide a definition of 'law', how would you define it?

The text suggests that any definition of law will be shaped by the writer's moral, political, religious and ethical views and influenced by the society in which they live.

Two common themes are identified:
- control by humans; and
- human conduct, regulated by a superior authority or power—usually the state.

The suggested definition is that law is:

> *… a set of rules, developed over a long period of time, regulating people's interactions with each other, which sets standards of conduct between individuals and other individuals, and individuals and the government, and that are enforceable through sanction.*

In Australia, 'the law' consists of rules and principles of conduct that are enacted by governments, embedded in constitutions and statutes, and embodied in decisions of the courts. It is worth noting at this point that when a reference is made to 'the law', it is a reference to the body of law generally, while a reference to 'a law' is a reference to a particular legal rule.

1.2 In what ways does the law impact on a person's personal life?

The law, as a regulatory device, provides the mechanism for society to function by prescribing what people cannot do, and by informing them of what they can do and also what they must do. There are very few aspects of life—personal or business—that are not regulated by law, either directly or indirectly.

Law is relevant to all members of society for:
- employment;
- the purchase and sale of goods and services;
- the purchase of a home or business;
- insuring property; and
- the appointment of agents.

In Australia, the law also plays a number of other roles, such as guaranteeing our freedoms, permitting free enterprise, and providing a means to settle disputes peacefully.

1.3 In what ways does the law impact on business? Do you think that the law is sufficiently certain for business purposes?

The law is basically a device to regulate the economic and social behaviour of society. Business, as we know it, could not exist without the law. The law shapes every stage of commercial enterprise. Because people are constantly engaged in business transactions, business law is relevant to all members of society. For example, the principles of contract law enable both individuals and businesses to rely on agreements:

- of employment;
- to purchase raw materials;
- for the purchase and sale of goods or services;
- for the purchase of a home or a business;
- to insure property; and
- for the appointment of an agent

by providing a remedy to persons injured by another's failure to perform an agreement. To understand how contract law, and for that matter the law in general, operates, it is in the interests of everyone to have some understanding of the nature and sources of law, to be aware of what actions society as represented by government will take, why those actions have been taken, and how they will affect business and the community.

The second part of the question calls for personal opinion, so responses will vary.

1.4 Is the decision of a national sporting organisation such as the National Rugby League or the Australian Football League to suspend a player for an offence under the '**rules of the game**' **a rule or a law? Discuss.**

While it is generally true to say that the law is a set of rules, it should not be assumed that all rules are automatically law. There are numerous examples of rules governing daily behaviour that are not laws and, as a general rule, will not become laws. For example, rules controlling sport, games, social behaviour, family behaviour, and schools and colleges.

It is not always easy to determine when a rule becomes law. One needs to consider where the rule comes from. If it is made by a person or organisation rather than Parliament or the courts, it cannot be said to be a law. Consideration also needs to be given as to how a person will be dealt with when the rule is broken, how the person will be 'punished', and by whom.

Legal rules are enforceable by prosecution (if it is a criminal matter) or litigation (if it is a civil matter). Breaches of non-legal rules have different consequences as they are not supported by the state.

As a result, the decision of a national sporting organisation such as the National Rugby League or the Australian Football League to suspend a player for an offence under the laws of the game is a rule not a law. However, the breach of the laws of the game may also trigger criminal prosecution if they offend criminal law, such as an assault, or civil litigation if they offend a civil law.

1.5 Discuss the following statements:

a. Common law ceases to be common law when it becomes codified.

b. Common law can exist without equity, but equity cannot exist without common law.

a. Common law is derived from case law and is based on the doctrine of precedent. A legal system that became codified would have a complete code of written laws whose primary source of law is legislation. It would therefore no longer be a common law system.

b. Equity was developed to provide a wider range of remedies than are available at common law. It has the effect of adding an additional jurisdiction to the legal system that sits alongside the common law. It does not apply to all civil disputes and has no application in criminal law. Remedies are discretionary and will apply only if damages would be inadequate. Equity could not exist without the common law. Common law, on the other hand, could exist without equity (although it would be less flexible and fair).

1.6 What is the main remedy for a plaintiff in a common law action?

The main remedy in a common law action is damages.

1.7 Explain the difference between a referendum and a plebiscite.

A referendum is a proposal that is put to a vote of the Australian voters. A plebiscite is not a vote, but rather a poll to find out people's views on a particular issue. A plebiscite might be taken to ascertain whether or not a referendum would be likely to pass. Parliament is not bound to act on the result of a plebiscite.

1.8 Explain the meaning of the terms 'exclusive powers', 'concurrent powers' and 'residual powers' in the context of the *Australian Constitution*.

‘Exclusive powers’: Those powers that, under the Constitution, only the Commonwealth Parliament may exercise. For example, the seat of government, the control of customs and excise duties, taking over state debts, military forces, currency matters, or the government of the territories.

‘Concurrent powers’: The bulk of the Commonwealth’s powers are concurrently held (i.e. shared) with the states, of which the most important is s 51. It confers 40 heads of power in relation to which the Commonwealth can legislate for the ‘peace, order and good government of the Commonwealth’. While both the Commonwealth and the states have the power to legislate in the areas set out in s 51, political reality and s 109 in practice make it difficult for a state to legislate in an area where the Commonwealth has already passed legislation.

‘Residual powers’: If nothing at all is said in the Commonwealth Constitution about an area, authority to legislate in that area remains exclusively with the states and is said to be a residual power—for example, local government, education and transport. Under s 107, the powers that the states had as colonies are preserved unless the Constitution has expressly taken away those powers. The effect of this is that if the Commonwealth attempts to pass a law in respect of a matter not within the powers conferred on it by the Constitution, the law would be ultra vires and therefore invalid.

1.9 What reasons can be put forward to explain the resistance by Australian voters to constitutional change in Australia?

The main reason to explain the resistance of Australian voters to constitutional change in Australia is their conservatism. Another reason is the procedural difficulty in getting both a majority of voters and a majority of states to approve any amendments to the Constitution.

Since Federation, only eight of 44 referendums have been successful. The last successful referendum was in 1977, when proposed amendments to fill Senate casual vacancies, to allow electors in the territories to vote in constitutional referendums and to provide retiring ages for judges of Federal Courts were all carried.

The most recent referendum to amend the Constitution was in 1999, when an attempt was made to alter the Constitution to establish the Commonwealth of Australia as a republic and to insert a preamble; neither a majority of voters nor a majority of states voted in favour. There have been a number of referenda where a majority of voters have approved a proposed amendment, but the amendment failed because it was not passed by a majority of states. For example, a proposal for simultaneous elections in the 1977 referendum had 62.22 per cent of voters in support of the proposed amendment, but only New South Wales, Victoria and South Australia supported it, so it was not carried.

Tutorial Questions

1. Why did common law become so rigid and inflexible?

During the reign of Henry II, writs (orders to answer charges before the King) came into wide use. They were purchased from the King's Clerks of Chancery and stated the complaint, ordering the named person either to right the wrong or to show the King's justices why they should not. The issuing of new writs to cover new wrongs meant that the common law was fairly flexible at this time, because it could easily adapt to meet changing conditions. However, the passing of the Provisions of Oxford in 1258 resulted in the common law losing much of its flexibility. From operating on the basis that 'where there is a wrong there is a remedy', the common law began to degenerate into a system of 'where there is no remedy, there is no wrong'. If the facts did not fit the standard form of the writ, the action could fail.

2. In what ways does equity law differ from common law?

The common law is a comprehensive system. Common law rights are available as a right. They are enforceable at any time, subject to the operation of a state or territory's Statute of Limitations and are valid against the whole world. Common law takes precedence over equity.

Equity law is not a comprehensive system. For example, it has never had a criminal jurisdiction. Remedies are discretionary and must be applied for promptly or they may not be enforceable. Equity acts only against the individual—that is, *in personam,* not against property, and equitable rights are valid only against those persons specified by the court.

3. What are the main differences between common law and statute law?

Common law is the law created through the reported decisions of judges in the higher courts. It is based on the application of the doctrine of precedent. It is also known as case law, precedent or unwritten law, and usually includes the principles of equity or equity law.

Statute law, also known as enacted law or legislation, is made by federal and state parliaments. It can also be made by other government bodies in the form of by-laws, orders, rules and regulations, in which case it is known as delegated legislation. It is important to note that, in the event of a conflict between statute law and common law, statute law prevails.

4. In the 21st century, what problems do businesses face under a federation model such as exists in Australia?

This question raises the issue of the division of powers between the states and the federal Parliament. The Australian Constitution establishes the basic rules for the operation of the

federation and sets out the powers of the federal Parliament to make laws. It provides the federal Parliament with limited powers to govern the conduct of business and business relationships in Australia. The states also have powers to make laws under their respective constitutions, and the continuing existence of the states and their powers is guaranteed by Ch 5 of the Australian Constitution.

Subject to a few exceptions—for example, defence and customs and excise powers—the Constitution does not restrict the areas about which the states can make laws. As a result, the state parliaments can pass laws on a wider range of subjects than the Commonwealth Parliament and, for this reason, areas such as education, health, criminal law, industrial law; transport and business have been the domain of the states. For example, the fair trading, consumer credit and sale of goods legislation are all areas of state legislation.

5. Numerous attempts have been made to arrive at a satisfactory test for identifying a law. Select one of the following and explain whether you think it is adequate for identifying a law:

a. The law is something that all people ought to obey.
b. Law is a command by a political superior to a political inferior.
c. Law is rules established by people who have control of organised power.
d. Law is the highest reason implanted in nature.
e. Law is a command from God that is recognised through the human intellect.
f. The law is what the courts say.

Explain why the other tests are unsatisfactory. If, in your opinion, none of the tests is satisfactory, explain why and try to make your own test.

This question is a matter of personal opinion.

The text begins by describing law as 'a device to regulate the economic and social behaviour of society' and goes on to give the definition of law as:

> *… a set of rules developed over a long period of time regulating people's interactions with each other, which sets standards of conduct between individuals and other individuals, and individuals and the government, and that are enforceable through sanction.*

The options given raise issues such as power and authority, politics, religion, enforcement and punishment. The question seems to suggest a wide approach and could lead to a discussion of the role of power and authority in a modern democracy.

With specific reference to business, the issue of the regulation (and deregulation) of business could be considered and contrasted with the need for regulation and control outlined in the beginning of the chapter, and the view expressed in the text that 'business, as we know it, could not exist without the law'.

In short, the correct test is probably a combination of all of the options listed, subject to one's views on religion, and, further, to be modified as appropriate to a given situation.

6. Why should an Act of Parliament override the common law in the event of a conflict between the two? Discuss.

The common law is the law created through the reported decisions of judges in the higher courts. Statute law is made by federal and state parliaments. The text points out that the laws created by Parliament are the highest ranking in the land, overruling all other laws. Thus, in the event of a conflict between common law and statute law, the latter will prevail. The reason for this is not considered. Students should be encouraged to note that the reason for this is that, in a democracy, the parliament is elected by the people, which effectively mean that the people have the final say over the laws that govern them.

7. Are 'law' and 'justice' one and the same thing? Discuss.

Justice is a concept that is closely identified with the law. The text quotes Lord Denning, who said that justice 'is what right-minded members of the community—those who have the right spirit within them—believe to be fair'.

The legal system embodies what society believes is right or fair. In simplistic terms, justice in our society means that everyone is entitled to be treated fairly. This means that if someone breaks the law, the punishment they receive should they be caught will be perceived by the community to be fair and reasonable in light of the relevant circumstances. If a person is injured because of the actions of another—for example, because of negligence or breach of contract—the community assumes that the legal system will ensure that the parties will receive a fair trial, and that the injured party will receive fair compensation for the damage they have suffered.

Despite the connection between the concepts of justice and law, they are not the same thing. For example, in a criminal trial for murder, the defendant may be convicted and sentenced for a period of time that is consistent with applicable law, but the family of the victim may not consider that sentence to reflect justice having been done.

8. Briefly explain the main sources of Australian law.

The two main sources of law in Australia are:

a. Case law or common law: found in the decisions of the federal and state superior courts.
b. Statute law: the laws made by the Commonwealth, state and territory parliaments in the form of Acts or statutes of Parliament.

Statute law prevails over the common law where the two are in conflict.

9. Briefly explain what effect, if any, the High Court's decisions, such as *Mabo* and *Wik*, have had on the doctrine of reception and the Australian legal system.

The High Court decisions in the *Mabo* and *Wik* cases, together with the passage of the *Native Title Act*, marked a watershed for Indigenous people in Australia. Until 1992, Australia was considered to have been acquired by settlement by the English of land that was unoccupied. These decisions recognised that Australia was not *terra nullius* at the time of settlement, and that Indigenous people have rights to native title under the common law.

10. With three tiers of government and a population of just on 25 million people, is Australia over-governed and over-taxed? Discuss.

The question seeks personal opinion.

The three tiers of government, which are referred to in the doctrine of separation of powers, are:
1. legislative power, which involves the enactment or making of the law and is held by Parliament;
2. executive power, which is held by the Cabinet and involves the formulation of policy and its administration; and
3. judicial power, which is held by the courts, whose function is the interpretation, application and enforcement of the law.

In theory, the doctrine of separation of powers means that no one person or body shall exercise more than one power, and so is a limitation on the powers of the parliament. As such, it could be argued that Australia is 'over-governed'. However, it should be noted that, in reality, in Australia there is no separation between the legislature and the executive functions of government, although the separation of power between the judiciary and the other branches is strictly maintained. This is perhaps an argument against the notion of Australia being 'over-governed'.

As to the question of whether or not the population is 'over-taxed', one should look at the changes in transport and communication since Federation. Of particular importance is the fact that the Commonwealth gained significant financial leverage over the states through the income-taxing powers it acquired during the Second World War and through the introduction of the Goods and Services Tax (GST) in 2000. While the states can still rely on their own taxation powers for revenue-generating purposes, the political reality is that they do not. The result is that the states are now dependent on the Commonwealth for the funding of many of the services that, under the Constitution, they have exclusive responsibility for, such as health, transport, education and business. On this basis, one might argue that Australia is 'over-taxed'. However, one could

also look at the fact that these many services are provided for by way of revenue generated through taxation, and thus that taxation in Australia is reasonable and beneficial to its population.

11. List the three functions of government referred to in the doctrine of separation of powers, and consider whether you think that the distinction today is in fact artificial.

The three functions of government referred to in the doctrine of separation of powers are:
1. legislative power, which involves the enactment or making of the law and is held by Parliament;
2. executive power, which is held by the Cabinet and involves the formulation of policy and its administration; and
3. judicial power, which is held by the courts, whose function is the interpretation, application and enforcement of the law.

In theory, the doctrine means that no one person or body shall exercise more than one power, and so is a limitation on the powers of the parliament. In reality, in Australia there is no separation between the legislative and executive functions of government. However, the separation of powers between the judiciary and the other branches is strictly maintained.

12. Are judicial appointments to the Bench of the High Court consistent with the doctrine of separation of powers? Discuss.

The question seeks personal opinion.

The separation of powers doctrine provides that the legislative, executive and judicial powers should be exercised by separate and independent organisations within the system of government, thereby ensuring checks and balances against the misuse or abuse of power.

Students need to consider whether or not the involvement of the executive and the legislature in appointments to the High Court taints the principle of the separation of powers. Students should note that s 72 of the Commonwealth Constitution deals with the appointment, tenure and remuneration of federal judges in order to try to ensure their independence, rather than leaving those matters entirely to Parliament.

13. Explain what is meant by each of the following terms:

a. exclusive powers;
b. concurrent powers;
c. separation of powers;
d. terra nullius; and
e. native title.

a. Exclusive powers are those powers that, under the Constitution, only the Commonwealth Parliament may exercise. For example, customs and excise, free trade between the states, currency, and military forces.
b. Concurrent powers are those powers that may be exercised by either the Commonwealth Parliament or a state parliament. If there is an inconsistency between a state law and a valid Commonwealth statute, the Commonwealth statute will prevail.
c. The separation of powers is a doctrine that holds that the legislative, executive and judicial powers should be exercised by separate and independent organisations within the system of government, thereby ensuring checks and balances against the misuse or abuse of power.
d. *Terra nullius* is a territory that, at the time of settlement by English colonists, was considered to be unoccupied. It is considered empty land; land that belongs to no one.
e. Native title is a term used by the High Court in *Mabo,* but which was not defined. It could be said to be a term used to describe the common law rights and interests in land of any particular group of Aboriginal and Torres Strait Islander people according to their laws, traditions and customs.

14. What reasons can be put forward to explain why it is so difficult to get constitutional change in Australia?

This question seeks a personal opinion.

Two reasons could be put forward as to why getting constitutional change in Australia is difficult.

First, there is the procedural difficulty in getting both a majority of voters and a majority of states to approve any amendments to the Constitution. Chapter VIII sets out how the Constitution may be amended (s 128). The strict process required for an amendment presents a difficulty in getting a majority consensus from the Australian public for change to the Constitution.

Under s 128 of the Constitution, the following requirements must be satisfied:
- The proposed amendment must be passed by an absolute majority of both Houses of Parliament.
- The proposed amendment must then be put to the voters in the form of a referendum and be passed by a majority of voters and a majority of states.
- Finally, the proposed amendment must receive Royal Assent.

Second, the conservatism of the Australian voter is apparent when examining the success of referenda since 1906. Of the 44 questions that have been put since that time, only eight have received the necessary ‘double majority’ to be successful.

In recent years, the High Court has relied on specific powers under s 51 of the Constitution and increased judicial activism to expand federal law.

15. Discuss what reasons can be put forward to explain why a marriage plebiscite was so successful in 2017 when two previous plebiscites (on conscription) in 1916 and 1917 failed?

The two plebiscites in 1916 and 1917 failed narrowly, while the marriage equality plebiscite in 2017 passed with 61 per cent of voters approving the change. Perhaps this was due to the plebiscite lasting for one month. Also, the issue had bipartisan support.