INTRODUCTION

This revision notes can be divided into four sections.

1) Purposes and Nature of Laws

2) Sources of Law
   ◦ Aboriginal Customary Law
   ◦ Common Law system
   ◦ Statute Law and delegated legislation
   ◦ The Constitution
   ◦ Criminal Law and Civil Law
   ◦ International Law

3) Constitutional System of Australia
   ◦ Division of power between federal and states
   ◦ Separation of power between three branches of government
   ◦ Role of High Court in reviewing the Constitution
   ◦ Brief legal history from terra nullius to Mabo

4) How our legal system operates
   ◦ Criminal Court hierarchy and Civil Court hierarchy
   ◦ Personnel involved in our court system
   ◦ Enforcement agencies
   ◦ Legal Aid
Section 1: Purposes and Nature of Laws

Ever since ancient past, societies have needed laws to function. Laws have served some important purposes. Some of these include:

- Protect communities from harm;
- Provide clear guidelines for social conducts and behaviours;
- Provide a clear and impartial mean of resolving disputes;
- Outlines punishments for those who disobey the set rules.

The very opposite of the rule of law is Anarchy.

Historically, there have been three kinds of social rules. These are:

1) Customs: guidelines for conducts developed within a community over the years. E.g. Aboriginal customary laws, wedding traditions etc.
2) Rules: guidelines for conducts that are prescribed for particular situations. E.g. rules for a rugby game.
3) Laws: these are rules that are created by a governmental authority (e.g. parliament, court etc.)

There are some very important characteristics of Laws. These are:

- Laws are discoverable. (i.e. Anyone can find out about it.)
- Laws are binding on the whole community.
- Laws can be enforceable. (i.e. there are penalties for breaking the law.)
- Laws are recognised officially (by governments and courts).
- Laws concerns public interests.
- Laws reflects rights and duties.

Some key concepts when judging the effectiveness of a law are:

- Equality
- Fairness
- Justice

Laws should also reflect the common values and ethics of the community.
A) Aboriginal Customary Law

Prior to 1788, Australia was in fact ruled by Aboriginal customary laws.

Key characteristics of Aboriginal customary laws include:

− The fact that it is based on Aboriginal spiritually (i.e. Dreamtime).
− The fact that it is tribally based. (I.e. each tribe have their own customary laws.)
− It is passed down orally (i.e. it is not a written tradition).
− It is focussed on mediation and conciliation as the end goal of dispute resolution.
− It is enforced by elders and members of the tribes.
− It is closely linked to the land.

There are some noticeable differences between English law and Aboriginal law.

<table>
<thead>
<tr>
<th>Aboriginal law</th>
<th>English law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Focused on mediation and conciliation in dispute resolution</td>
<td>Focus on figuring out who's right and who's wrong in dispute resolution</td>
</tr>
<tr>
<td>Sees themselves as custodians of the land</td>
<td>Sees the land as a property that can be owned, bought and sold</td>
</tr>
<tr>
<td>Collective tribal ownership of the land</td>
<td>Land can be owned by individuals</td>
</tr>
</tbody>
</table>

Is Aboriginal law still in force after British settlement in 1788? The simple answer is perhaps, 'no', due to 'terra nullius'.

However, Aboriginal customary laws still find itself reflected in current Australia legal system. E.g.

− Native title legislation
− Circle sentencing
B) Common Law System

Since the British “settled” in Australia in 1788, officially the fully body of the English legal system was applied to Australia. This legal system is commonly referred as 'Common Law'.

The word 'Common Law' can be quite confusing. Basically it can refer to

a) The English 'Common Law' System that is often found in many English speaking countries, including Britain, Ireland, US, Canada, Australia, Hong Kong, New Zealand etc.

This 'Common Law' System is distinct from the 'Civil Law' System that is found in European countries like France and Germany.

Or

b) Case law, or laws derived from the decisions of judges made on cases. This 'common law' is distinct from 'statute law', which are laws made by parliament.

As you will see, 'Common Law' is closely related to 'common law', which can be quite confusing.

Key characteristics of the 'Common Law System'

Our Common Law System has several key characteristics.

I) It is based on 'precedents'.

Whenever judges make decisions on cases, they write out long arguments that explain their decisions. In essence, the legal principles behind their arguments are called 'ratio decidendi'.

'Ratio decidendi' is distinct from 'obiter dicta', which can be defined as 'side comments by judges on cases that do not form part of a legal principle.'

If judges established a new legal principle in their ratio decidendi, then this is known as 'precedent'.

Precedents are binding on subsequent judges, unless they
are overturned by judges in a higher court. This concept is known as *stare decisis*.

**Case Study: Donahue v Stevenson [1932] (UK)**

Let see how this work in a famous case, *Donahue v Stevenson [1932] (UK)*. In this, Ms Donahue was drinking a glass of ginger beer in a café. To her dismay, she found a decomposed snail in the bottom of her ginger beer bottle after she drank the ginger beer, and subsequently got sick. Since the café owner couldn't possibly know that there was a decomposed snail in that bottle, she couldn't sue the café owner. Therefore she decided to sue the manufacturer of that ginger beer bottle, Mr. Stevenson.

Donahue's claim was that Stevenson owed his end customer, Ms Donahue, a *duty of care*. However, there hasn't been any law in 1932 that specifies any contractual relationship between the manufacturer and the end customer. In essence, the judges are in unexplored legal territory.

In the end, the judges decided that there was a contractual relationship between a manufacturer and the end customers, thus the manufacturer owes a duty of care to its end customers. Therefore, Stevenson owed Donahoe compensation. Thus, this *ratio decidendi* set a precedent which many judges would refer to the basis for their decisions.

**Note:**

Precedents set by a higher court are binding on judges in lower courts. I.e. the lower court judges must follow those precedents.

II) It is adversarial.

This means in a Common Law System, one side is pitted against another, and the focus is on which side can come up with a more satisfactory argument.

I.e. the judge's role is similar to that of a neutral referee in a courtroom. A judge makes sure that the court proceedings are fair and effective, so that the jury can decide which side wins.
How is this different from Civil Law System?

There are two main differences between the Common Law System and the Civil Law System.

<table>
<thead>
<tr>
<th>Common Law System</th>
<th>Civil Law System</th>
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<tbody>
<tr>
<td>- based on case precedents and legislation</td>
<td></td>
</tr>
<tr>
<td>- judges play the role of neutral referees</td>
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</tr>
<tr>
<td>- barristers can call on witnesses</td>
<td></td>
</tr>
<tr>
<td>- based primarily on legislation</td>
<td></td>
</tr>
<tr>
<td>- judges play the active role of truth finders</td>
<td></td>
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<tr>
<td>- both barristers and judges can call on witnesses</td>
<td></td>
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</tbody>
</table>
C) Statute Law and delegated legislation

Statute Law is also known as 'legislation'.

The primary body of making statute law in Australia is the parliament. Thus the parliament is also known as a legislative body.

Examples of legislation:

- *Crimes Act 1900* (NSW)
- *Family Law Act 1975* (Commonwealth)

Legislation made by parliament are always titled as an Act.

In practice, not all statute laws are made by parliament. Quite often, parliament delegates its authority to departments and councils and allow them to make their own laws. These laws are known as delegated legislation.

For example,

- Minister of the Tax Department can make regulation with respect to certain areas of taxation matters.
- Bankstown City Council can make by-laws with respects to local issues within Bankstown.
- Department of Health can issue rules, usually affecting personnel within the department.

**Important:**
- Please check your workbook to learn how a law is passed through parliament.
D) The Constitution

Constitution is a set of law(s) that defines how a government operates.

In Australia, we have an actual law called the Constitution of Australia. No laws passed within Australia can contradict this constitution.

Our constitution is therefore the Supreme Law of the nation. Some of its key features include:

i) Division of power between state and federal government
ii) Separation of power between executive, judiciary and legislative
iii) Structure of our federal parliament
iv) Our head of state (Governor-General)
v) Way to change our constitution (referendum)
vi) Court of resolving constitutional dispute (High Court of Australia)

Structure of our parliaments

Aside from Queensland and Tasmania, both federal and state parliaments are bicameral. This means there are two houses of parliament.

<table>
<thead>
<tr>
<th>Federal</th>
<th>State</th>
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<tbody>
<tr>
<td>Lower house: House of Representatives</td>
<td>Lower House: Legislative Assembly</td>
</tr>
<tr>
<td>Upper house: Senate</td>
<td>Upper House: Legislative Council</td>
</tr>
<tr>
<td>Leader: Prime Minister (Rudd)</td>
<td>Leader: Premier (Keneally)</td>
</tr>
<tr>
<td>Head: Governor-General</td>
<td>Head: Governor</td>
</tr>
</tbody>
</table>

The Upper House acts a House of review. All bills must pass through both houses by a majority because they can be sent to the Governor (or Governor-General) to be enacted as laws.
E) Criminal Law and Civil Law

Our set of case laws and legislation can alternatively be divided into 'criminal law' and 'civil law'.

Here are the basic differences between the two.

<table>
<thead>
<tr>
<th>Criminal law</th>
<th>Civil law</th>
</tr>
</thead>
<tbody>
<tr>
<td>• concerns with offences committed against the community</td>
<td>• concerns with wrongs done by one against another</td>
</tr>
<tr>
<td>• prosecutor versus defendant</td>
<td>• plaintiff versus defendant</td>
</tr>
<tr>
<td>• defendants are charged with offence by state</td>
<td>• defendants are sued by the plaintiffs</td>
</tr>
<tr>
<td>• the <strong>burden of proof</strong> is on the prosecutor</td>
<td>• the <strong>burden of proof</strong> is on the plaintiff</td>
</tr>
<tr>
<td>• the <strong>standard of proof</strong> is 'beyond reasonable doubt'</td>
<td>• the <strong>standard of proof</strong> is 'balance of probabilities (i.e. who is most probably right.)'</td>
</tr>
<tr>
<td>• can result in these possible outcomes:</td>
<td>• can result in these possible outcomes:</td>
</tr>
<tr>
<td>- a defendant found innocent</td>
<td>- the judge/jury find in favour of the plaintiff</td>
</tr>
<tr>
<td>- a defendant found guilty</td>
<td>- the judge/jury find in favour of the defendant</td>
</tr>
<tr>
<td>• possible punishments ranges from fines, community service to being locked up in jails</td>
<td>• possible punishments ranges from compensation or compensation plus legal costs</td>
</tr>
</tbody>
</table>

Examples of criminal offences:
- murder, armed robbery, violent assault, tax fraud

Examples of civil wrongs:
- negligence, defamation, libel, breach of privacy
F) International Law

The last source of our laws is the international law. These are laws that can be found in

- Treaties (international agreements)
- Conventions
- Declarations
- Decisions of International Court of Justice
- Decisions of International Criminal Court
- UN General Assembly resolutions
- Resolutions from UN General Assembly Standing Committees
- UN Security Council resolutions
- International customary law
- Academic writings by influential scholars in international law

It is important to understand that international laws are generally NOT automatically binding on a country.

I.e. if Prime Minister Rudd signs an international agreement tomorrow, that international agreement does not automatically become Australian law.
That international agreement becomes Australian law only when the Australian government ratifies the international agreement.

This limit to the power of international law is due to an important concept in international law called state sovereignty.

State sovereignty is best defined as 'supreme and independent authority over a territory'.
I.e.:

- The Australian government is a sovereign government, meaning that it is the supreme authority over the territory called Australia.
- United Nations cannot, with some exceptions, force the Australian government to adopt a policy unless Australian government agrees to do so.

State sovereignty is a key foundation of international law. However, it also creates problems for enforcement of international law.
Section 3: Constitutional System of Australia

A) Key Features of our Constitution

There are certain parts of the Australian Constitution that you ought to memorise.

i) Division of Power
In Australia, legislative power is divided between federal and state governments. This is known as the 'division of powers'.

Section 52 of the Constitution defines which areas belong exclusively to the federal government. For example,

- taxation
- defence
- coinage
- foreign policy
- immigration
- coinage

These are known as 'exclusive powers' of the federal government.

Then there are areas that are shared between the federal and state government. These are listed in Section 51 of the Constitution. For examples,

- health
- education
- transport

These are known as 'concurrent powers' between state and federal governments.

The Constitution does not define the powers of the state governments. The assumption is that the State gets what's taken by the federal government. This is known as 'residual powers'.

Section 109 states that if a state law comes into conflict with federal law, then the federal law will override state law.
ii) Separation of Power

The Constitution of Australia also defines the three branches of government and how they relate to one another. These are

<table>
<thead>
<tr>
<th>Legislative</th>
<th>Executive</th>
<th>Judicature</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parliament</td>
<td>Prime Minister or Premier Ministers</td>
<td>Courts</td>
</tr>
<tr>
<td>- makes laws</td>
<td>Departments</td>
<td>- judges cases based on existing laws</td>
</tr>
<tr>
<td>s1-60 of the Constitution</td>
<td>- carry out the laws</td>
<td>s71-80 of the Constitution</td>
</tr>
<tr>
<td></td>
<td>- sets policies</td>
<td></td>
</tr>
<tr>
<td></td>
<td>s61-70 of the Constitution</td>
<td></td>
</tr>
</tbody>
</table>

One of the important bedrock of our democracy is that the three branches should be separated.

E.g. a premier cannot tell the judge how to judge a case. Judges have high degree of judicial independence in Australia. This is why judges are appointed for life (till retirement).

Separation of power is very important, because it helps to prevent concentration and abuse of power.

iii) High Court of Australia

According to our Constitution, only the High Court has the jurisdiction to deal with legal disputes over constitutional matters. I.e. it has the original jurisdiction to hear constitutional legal disputes. This means it can hear constitutional cases at first instance.

Examples of constitutional legal disputes:
- *Mabo v Queensland* [2002]
- Franklin River Dam case
- The media report involving cross river shooting across NSW-VIC border

When a legal dispute involves interpreting the Constitution, all seven judges of the High Court hear and decide on the case.

The High Court also has appellate jurisdiction on other criminal and civil cases. This means it can hear appeals
from State Supreme Court.

However, not all cases from the Supreme Court can be automatically appealed to the High Court. For a case to be appealed to the High Court, the appellant (the person who appeals) must apply for a grant of special leave from the High Court. If the High Court considers the appeal to have merit, then it will hear the case.

According to Section 75 of the Constitution, the High Court also has the specific powers to issue writs (court orders), such:

- **mandamus**: court order forcing an official to do something
- **prohibition**: court order forbidding a court official from a lower court from taking action on a case
- **injunction**: a court order stopping an individual from taken a particular action

iv) **Changing our constitution**

Section 128 outlines how our constitution can be changed.

Basically, the chief way of changing our constitution is through the referendum.

For a referendum to pass, it must pass by a majority in all six states (NSW, VIC, SA, WA, QLD, TAS).
B) Brief legal history

Before 1788, Aboriginal customary law exists in Australia.

When the Captain Arthur Philip landed on Botany Bay, Sydney in 1788, the British established the colony on the legal basis that Australia was terra nullius. This means the land had no previous legal system in place.

As we now know, terra nullius was in fact legal fiction. However it had several major legal consequences for the future of Australia.

1. The colony of NSW received the full body of English Common Law system.
2. The legal assumption, at least until Mabo 1992, would be that Australia was settled, not invaded.

English legal system

When colonial NSW received the full body of English legal system in 1788, it in effect received the fullness of English legal history. This includes:

Laws of Equity
These are English laws developed in 13th century by the Court of Chancery to deal with injustices that crept into common law.
The royal chancellor would use a set of rules to change the court rulings in the interests of fairness.
This body of laws have since been incorporated into English common law.

Mercantile law
Originally developed by merchants in settling trade disputes. These laws have since been incorporated into English common law.

Federation of Australia

In 1901, six colonies agreed to join together to form one nation, called Australia.

This involved six colonies agreeing to give up part of their powers to the federal government. These become known as the exclusive powers of the federal government.
Some key milestones

1901: Commonwealth of Australia Constitution Act 1900 (UK) passed. Australia became a nation.
1917: Referendum on conscription in World War One failed.
1967: Referendum passed to change our Constitution so that Aboriginals are counted in the census, and that Federal government has the power to make laws affecting Aboriginal Australians.
1992: Mabo v Queensland, in which the High Court of Australia effectively overturns terra nullius.
1999: Referendum on turning Australia into a republic failed.
Section 4: How our legal system operates

A) Court Hierarchy

There are different kind of court hierarchy for different court systems.

i) Criminal court structure

```
LOCAL COURT
  └── DISTRICT COURT
        └── SUPREME COURT
          └── COURT OF CRIMINAL APPEAL
                └── HIGH COURT OF AUSTRALIA
```

- On minor criminal matters (summary offences), the Local Court has original jurisdiction. This means it can try summary offence.
- E.g. of summary offence: parking tickets, graffiti.
- On serious criminal matters (indictable offences), the Local Court has no jurisdiction to try the case. However, it must have a committal hearing. This means the magistrate needs to decide if the criminal case have enough merit to go to trial. This is known as prima facie.
- If the magistrate decides that the prosecutor's evidence seems so poor that the defendant is unlikely to be found guilty, the case would not go to trial!
- District Court deals with more serious criminal matters. These can include theft, sexual assaults, manslaughter, or illegal drug trade.
- Supreme Court deals with really serious criminal matters, like murder, kidnapping or treason.
- Trial by jury exists in District and Supreme Court.
- One higher court can hear appeals from the court below it.
- Appeals cannot go beyond High Court of Australia.
ii) **Civil court structure**

![Diagram of court structure]

- Local Court deals with civil lawsuits value up to $60000.
- It can hear child care proceedings.
- District Court deals with civil lawsuits value up to $750000.
- Supreme Court can deal with civil lawsuits beyond that value.
- Trial by jury only exists in major civil lawsuits.
- One higher court can hear appeals from the court below it.
- Appeals cannot go beyond High Court of Australia.

iii) **Federal court structure**

![Diagram of court structure]

- Federal court structure exists to deal with matters related to Federal Law.
- Federal Magistrate Court deals with less serious cases.
- Federal Court deals more serious cases.
- Family Court deals with family law cases, such as serious divorce proceedings.
iv) **Alternatives to courts**

1. Tribunals

Tribunals are very similar to courts, in the sense they exist to resolve legal disputes. However they are very limited in jurisdiction and very specialised.

Examples:
- Migration Review Tribunal
- Administrative Appeals Tribunal
- NSW Consumer Trading Tenancy Tribunal

Tribunals are less formal than courts.

2. Alternative Dispute Resolution (ADR)

These are alternatives to the judicial system. They are cheaper and quicker than courts, and are less intimidating. A good example would be the Community Justice Centres, which resolve disputes through mediation.

Another example of ADR is the Ombudsman. Ombudsman are set up by governments to investigate complaints about government agencies. Ombudsman can investigate complaints and write recommendation. Ombudsman's findings can become subject of a civil/criminal proceeding, but it has no power to issue a civil/criminal proceeding.

B) **Personnel involved in our court system**

i) **Local Court Level**

Magistrate acts as the judge.

Solicitors appear on behalf of their clients.

In summary offences, the prosecution is usually represented by the Police Prosecutor.

In some committal hearing, both sides might be represented by barristers.

ii) **District Level and beyond**

Barristers appear on behalf of their clients. They are assisted by solicitors.

In criminal cases, the prosecution is represented by the Crown Prosecutor from the government.

Many barristers these days are quite specialised.

Juries are used in criminal trial in District and Supreme Courts. They are chosen from the electoral roll.
C) Enforcement Agencies

There are two main kinds of personnel involved in law enforcement. These are:

I) Police
There are State Police and Federal Police.

II) Some government departments
Examples:
- Australian Tax Office has power to investigate prosecute matters in relation to tax.
- Rail Authority personnel has power to issue fines for ticket evasion.

D) Legal Aid

In order to make sure that people who cannot afford lawyers can have legal representations and advice, Legal Aid was set up.

In NSW, legal aid is provided by the Legal Aid Commission, in accordance with the Legal Aid Commission Act 1979 (NSW).

Legal Aid Commission provides free legal advice to the public on general legal matters. However, you must be able to prove to be a disadvantaged person to qualify for free legal representations in courts.

The existence of Legal Aid is important to the broader concept of natural justice. Natural justice can be defined as procedural fairness. If disadvantaged people cannot afford legal representations, then one might argue they won't get a fair trial. Legal Aid helps to remedy that.