Why Laws are needed –
- Cyberspace is an unguarded area in which there is an absence of external authority.
- **1995** – When eBay was first founded, complaints and praises were regulated from a feedback forum. But with the growth of the company also grew scams in which goods were paid for but not delivered. This resulted in eBay being faced with a lawsuit from victims of fraud.
- Without the threat of sanctions, cybercrime will increase and ruin online businesses.

Current status and sources of law in cyberspace –

<table>
<thead>
<tr>
<th>National</th>
<th>International</th>
</tr>
</thead>
</table>
| Statutes –
  → States have produced laws in order to govern the use of internet within their borders
  → Contained within; *Crimes Act 1900 (NSW)* | → There are few specific international treaties that deal with cyberspace.
| Court Decisions –
  → Superior courts can make precedents in relation to legalities of activities regarding cyberspace.
  → Even though foreign cases can’t be precedents, courts can still refer to foreign cases. | → Even though there has been a drastic rise in internet usage, law regarding this has not increased. |

United Nations
- They have little control over the internet except intellectual property
- No un-sponsored treaties or conventions that are specially designed to govern cyberspace.

World Intellectual Property Organization (WIPO)
- Specializes in agency of United Nations concerned intellectual.

European Union (EU)
- They reformulated it’s regulatory framework covering communication to cover ‘all electronic communication

Strategies for governments –
Achieving perfect legal control is expensive, thus the government’s strategies do not have to be completely effectively but adequately effective.

Intermediaries: Government can exert control by enlisting local intermediaries such as ISPs and companies that control physical internet connections.
- They can influence the policy of what goes on local portals for search engines.
- They can use financial intermediaries such as PayPal, to issue huge influence over an industry.
- Some countries that have utilized these methods are not known for their high regard for freedom of expression and rights.

Prosecution of individual criminals –
The government can assert control by physically arresting the individual committing crimes on cyberspace. The problem is that the criminal must be on the territorial borders of said government that the government is seeking. Otherwise extradition treaties must take place in order to remove the person from the country in which they committed the crime.

Challenges to government control of cyberspace –
The new technological innovation tends to make it easier to violate the law in some way.
- It can be costly for governments to chase and shut down illegal operation cyberspace.
- The developed world only has financial resources to do this.
- There is also the issue of controlling censorship of the internet without hindering on the freedom of expression of individuals.
- What is illegal in one country may be legal in another.
The absence of effective international conventions can deal with countries going against human rights; child pornography, ISP filtering.

**Global Laws**

**Challenge of transnational cybercrime**

- Large companies tend to under-report activities of cybercrime in their data as it would bring adverse publicity.
- ISPs cannot directly block criminal activity as they would have to know the exact individual committing the crime.
- Once the crime has been committed, action must be taken immediately since the criminal can regain anonymity quickly.
- **2015 metadata laws** - this was introduced in order to combat terrorism. The legislation requires that ISPs record a customer's phone and online usage for 2 years. Civil liberties argue that too much power has been given to the government.
- **Council of Europe's Convention on Cybercrime (2001)** - was difficult in getting countries to sign due to the sensitivity about sovereignty and authorising third parties to do cross-border searches. They are 47 signatures, leaving only 7 signatures unsigned to the treaty and thus unratified. This has not made a significant impact on fighting cybercrime.

**ICANN’s potential**

- Has the most potential to become the ultimate global authority over the internet.
- The US used to have oversight over the non-profit organization although this was rebounded as other countries believed that the main authority of the internet should be more independent and thus more international. The US has given up control over this organization.

**Achievements**

- Establishment of an effective method of resolving trademark disputes
- Reduction in the incidences of cybersquatting. Making profit off of someone’s domain name.
- Have stabilized the stability of the internet.

**8.3 – INDIVIDUALS AND TECHNOLOGY: DIFFICULTIES WITH ENFORCING RIGHTS**

**Disinhibition effect** – the tendency to say and do things in cyberspace that the person would not ordinarily do in real life.

**Digital dossier** – all types of information about a person that he or she has deliberately or intentionally put on the internet.

**Privacy**

- Individuals have little control over how the most powerful search engine use their information, there will always be cache of information.
- **Privacy laws**
- **Privacy Act 1988 (Cth)** - contains privacy principles which covers federal agencies and the handling of civilian’s person information such as social security, health insurance and taxation.
- Amendments; in 2000 extended the privacy regime to how businesses should collect, store, use and disclose personal information.
- There is no statutory tort for breach of privacy.
- **2008 Australian Law Reform Commission** – produced a report in which recommends extensive changes to privacy laws and practices to take account of the new technology, and to bring consequences to through civil action to individuals who breach privacy.
- The privacy act has worked, but without refinement it cannot keep up with developing technologies.
- **Cybercrime Legislation Amendment Act 2012** – allowed the federal government to tighten up privacy rules

**Metadata**

- Metadata is being used by governments and corporation alike to discover more about people’s tastes, interests and relationships.
- **Data and Goliath** – governments and mass corporation employ heavy camera surveillance to which we are passive in response to.
Safety –
- There can be online predators
- The expression of racial hatred is illegal in Australia. This became an issue when racists used the online platform in order to encourage racial hatred from other individuals. Thus in 2008, there were calls in Australia to toughen laws on cyber-racism.

Protecting Children –
- There are serious criminal offenders who victimize children.
- Child pornography is a legal and moral problem that goes beyond the legality of images or text on the internet or other media.
- If a law is too broad, then it would prohibit too much.

Internet Filtering –
There was a ‘clean feed’ proposal raised in Australia.
- This would have allowed the government and with the cooperation of ISPs to restrict certain website such as child pornography, and censoring information of social themes that would upset children, such as divorce and euthanasia.
- ISPs, dislike this proposal, as they think the restrictions can be easily bypassed and could accidently block information that has nothing to do with the restrictions.
- The clean feed proposal did not go through.

Approaches to Rights –
The group Laissez-Faire is against the presence of the government in restricting websites. The interventionists argue that pornography and racial hatred should be blocked from individuals.

<table>
<thead>
<tr>
<th>Laissez-faire</th>
<th>Interventionists</th>
</tr>
</thead>
<tbody>
<tr>
<td>→ ‘Allow to do so’</td>
<td>→ Argue that the government’s role is to ensure that law deals with online phenomena such as race hatred and pornography.</td>
</tr>
<tr>
<td>→ They argue that individuals are capable of determining the quality of internet content and that governments should not intervene in the market place of ideas.</td>
<td>→ These advocates do not trust the market place of ideas.</td>
</tr>
</tbody>
</table>

Conclusion –
- Law’s effectiveness has been limited because the internet is a global medium and laws are limited by national boundaries
- When drafting legislation and agreements both national governments and international organizations must ensure that the law will accommodate to the fast pace of the technology advancements.
Alternate dispute resolution –
Since going to court can be expensive, there can be alternate ways to overcome disputes.

- The average civil court case costs $30 000 to $40 000

Thus, the ADR – **Alternate dispute resolution methods in which involve mediation, arbitration and conciliation they do not involve courts.** This saves both time and money.

1. **Negotiation** – a discussion between two or more parties with the aim of reaching a mutually beneficial outcome.
   Involves consideration of other party’s views with a degree of compromise.
   This is low cost.

2. **Mediation** - Has a neutral independent third party, the mediator is an expert in listening and negotiating.
   They will not have expertise in the subject area.
   They do not give advice; the parties will come up with their own solutions to settle the disputes.
   Or

3. **Conciliation** – Has a neutral independent third party, the conciliator can give advice and also give solutions to the dispute.
   They can be a legal practitioner or professionally qualified on the subject matter of the dispute.
   They will act as an umpire.
   Or

4. **Arbitration** – Disputing parties present their cases before an arbitrator who makes a decision that is binding on the parties.
   This is when a court-like procedure is desired.

**Mediation** -

**Community Justice Centers and Conflict Resolution Service:**
- Aim to resolve disputes through mediation
- NSW has six centers
- They offer informal impartial dispute resolution services to government agencies and to all sections of the community.
- Free of charge
- Deal with families, workplaces, neighborhoods, youth and community conflict.

**Courts** –

**NSW Land and Environmental Court:**
- A specialist court with wide jurisdiction
- Same status as the supreme court of NSW
- The court can rehear a case that has been decided by a body such as a local council
- Civil proceedings arising from a breach or potential breach of the law
- Criminal offences regrading environmental offences.
- ADR is integrated within it’s procedures

**Tribunals** –
- Offers less formal and expensive method of dispute resolution than the court system.

**NSW Civil and Administrative Tribunal:**
- They have four main divisions:
  Administrative and Equal Opportunity Division
  Consumer and Commercial Division
  Guardship division
  Occupational Division
- They deal with various types of disputes
- Disputes between individuals will often come under the Consumer and Commercial Division this can include property, pet ownership, excessive noise.

**7.3 RESOLVING DISPUTES – DISPUTES WITH THE STATE**
There are a number of methods in which the state power or government power decisions and polices can be challenged. Some can be non-legal others can be legal.

<table>
<thead>
<tr>
<th>Non-legal methods</th>
<th>Legal methods</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Media</strong></td>
<td><strong>Internal Reviews</strong></td>
</tr>
<tr>
<td>• Writing letter, emails, calling television and radio stations</td>
<td>• Government departments can review their decisions/procedures/behavior through internal review</td>
</tr>
<tr>
<td>• Major networks in the past have taken on a story and caused the government to overturn a decision</td>
<td>• This can be cost-effective.</td>
</tr>
<tr>
<td>• Releasement of children from a detention center</td>
<td>• But this can be biased as the people conducting the review could be involved in the process</td>
</tr>
<tr>
<td>• Enough pressure can trigger response from the government.</td>
<td><strong>External Review</strong></td>
</tr>
<tr>
<td>• Social media</td>
<td><strong>Administrative and other tribunals</strong></td>
</tr>
<tr>
<td></td>
<td>• Review specific administrative decisions of government agencies</td>
</tr>
<tr>
<td></td>
<td>• Time efficient and low-cost</td>
</tr>
<tr>
<td></td>
<td>• Different from courts as they have narrow jurisdiction and are less formal</td>
</tr>
<tr>
<td></td>
<td>• They do not allow legal representation and are not bound by rules of evidence</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Members of parliament</th>
<th><strong>NSW Civil and Administrative Tribunal</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• By voting for a member of parliament that best represents you.</td>
<td>• Between consumers and businesses or tenants and landlords as well as between individuals</td>
</tr>
<tr>
<td>• They can also speak to representative about issues relating to them.</td>
<td><strong>NSW Administrative Decisions Tribunal</strong></td>
</tr>
<tr>
<td></td>
<td>• Allegations of discrimination</td>
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<td></td>
<td>• Professional misconduct</td>
</tr>
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<td></td>
<td>• Community services</td>
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<thead>
<tr>
<th><strong>Trade Unions</strong></th>
<th><strong>Privacy Bodies</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• To protect their rights and conditions of employment</td>
<td><strong>Privacy Act 1988</strong></td>
</tr>
<tr>
<td>• Can challenge the rule and regulations the employers employ</td>
<td>• People can make complaints on the breach of privacy from the commonwealth government or private organization</td>
</tr>
<tr>
<td></td>
<td><strong>Privacy and Personal Information Protection Act</strong></td>
</tr>
<tr>
<td>• Builders Laborer’s Federation – ‘green ban’ which successfully prevented corporations from building property on heritage sites</td>
<td>• Individuals who feel that their personal information has been misused may either request an internal review or complain to Privacy NSW</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Non- government organizations</strong></th>
<th><strong>The Courts</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• Formation of groups with similar values or political beliefs</td>
<td>• State and federal level have the power to review administrative decisions</td>
</tr>
<tr>
<td>• Getup! Action for Australia is a group rallying against Woolworths and their employment of their poker machines.</td>
<td>• Natural justice – the individual must have the opportunity to be heard</td>
</tr>
<tr>
<td></td>
<td>• The decision must be based on relevant decisions.</td>
</tr>
<tr>
<td></td>
<td>• This decision must be justified by appropriate evidence</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Judicial Review</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• If a flaw can be found then the nature of the error will be provided with a consequence. Either prohibition or certiorari where the decision will be</td>
</tr>
</tbody>
</table>
5.1 LAW REFORM AND NATIVE TITLE: CONDITIONS THAT LED TO LAW REFORM RELATING TO NATIVE TITLE

History of Government policy –
- Aboriginal people used oral law, customs and traditions to maintain order and control behavior.
• Tribal elder employed negotiation, discussion, rulings and sanctions when it came to unacceptable behavior
• The British government established their rule over the ‘terra nulls’ concept in which land belonging to no one.
• The Colonial laws and polices relating to indigenous people did not serve their interests

1. **Dispossession** (1788 – 1800s) – It was legal to shoot and kill Aboriginals as they were not recognized as citizens.
   
   **Effect** – massive reduction in indigenous population.

2. **Protection** (1869 – 1909) – Protection Acts such as ‘Aboriginal Protection Act 1869 & 1909’
   
   **Effect** – This governed where Aboriginals would live, work, what jobs they could do, who they could marry and associate with.

3. **Assimilation and Integration** (1900 – 1962) Aboriginals were not dying out, thus initiated the policy to ‘Europeanize’ them so that they would have to leave behind their language and culture in order to become similar to Europeans.
   
   **Effect** - The Europeans attempted to teach the indigenous people to be ‘white’. This was met with both submission and resistance.

4. **Reconciliation** – (1967 -) The 1967 referendum amending the constitution
   
   **Effect** – the phrase ‘other than the Aboriginal Race in any state’ was removed. They were now counted in for the census.

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**5.2 LAW REFORM IN ACTION: OPERATION OF THE LEGAL SYSTEM RELATING TO NATIVE TITLE**

**Doctrine of Terra Nullius in Australia –**

- Under the doctrine of reception – to which English law become applicable to something else, as unhabituated land was colonised by the British and no other system of law was apparent, then the English law would dominate.
- Governor Arthur Phillip was under orders to establish friendly relations with the indigenous people, but because of the language barrier there was little success.
- Terra Nullius was the justification for acclaining the property

**The legal status of Indigenous Australians up to 1967 –**

- **1838** – A tribe of Aboriginal people were killed by a group of white men. The government investigated the matter, to which the 11 whites said that the victims were stealing cattle. As result the government were not found guilty, however a retrial rendered the hanging of all 11 men. This resulted in future tribe killing to become unreported.
- **First half of 19th century** – Criminal laws did not protect Aboriginals. Government polices tended to condone violence.
- **1967 referendum** – Before this there was no inclusion of Aboriginal regarding benefits.
  - Since there were no federal laws governing the welfare of indigenous people, majority states and territories interpreted their rights differently.
  - This referendum did not give Aboriginals the right to vote
  - It did not grant citizenship to Aboriginal and Torres Strait Islanders people.
  - Over 90% voted yes on the amendments to the constitution
  - After they were counted in the census and Aboriginal/Torres Strait Islanders affairs became a federal affair.

**Development of Native title –**

1963 – The Yolngu People protested the removal of 300 hectares of land for mining without their permission. This petition failed. This initiated the ‘Gove Land Rights’.

Justice Blackburn stated that if they did have any relation to native title, it would have been extinguished under common law, so terra nullius prevailed. Three years later, more protests risen, their action also a
protest against dispossessoin of their traditional lands by pastoralists. This legislated a process for traditional owners to claim various parcels of land that were listed as available.

**Law reform relating to native title:**

- The native title refers to the rights of indigenous people to their traditional lands.
- There has been progress in the area of law reform, but the progress is relatively slow.
- Laws concerning native title developed and improved since a variety of different cases, such as the Mabo case.

- The main obstacle to gain law reform was the concept of ‘terra nullius’
- The doctrine of the ‘Terra Nullius’ had a devastating impact on the status of indigenous people.
- This allows the British to take possession of the land and impose their own legal system. This further prohibited indigenous people from achieving native title.

**An agency of law reform: Mabo case:**

- The high court played a crucial role in recognizing the native title by overturning the doctrine of Terra Nullius
- Federal parliament acted as an effective legislature
  - As it enforced
  - The native Title act 1993 (CWLTH)
  - And the Native title amendment act 1998

- The **Native Title Act 1993 (CWLTH)** was established through the Mabo Case.
- It is significant as it brought recognition to the indigenous inhabitants of Australia.
- In this case, the High court recognized the existence of native title for a group of Murray Islanders in the Torres Strait.
- Eddie Mabo, a significant role in the case, argued that they could prove uninterrupted occupancy of traditional lands and the state legislation invading the islands did not extinguish their pre-existing rights to it.
- The case required the High court to consider the legality of the declaration of terra nullius
- The court ruled that the islanders were the traditional owners of the land, and that they had the right to possess and occupy the islands and enjoy the use of their traditional lands.
- As a result of the Mabo Decision; **The native Title Act (1993) (Cth)**. The act has the purpose of;
  - Providing for native title recognition and protection
  - Establishing methods and standards by which future dealings that affect native title may proceed
  - Creating a process in which can resolve native title claims validating past grants of property interests that may have been in doubt because of the recognition of the native title

**Yorta Yorta case**

- Although the concept of ‘terra nullius’ was overturned from the prior act.
- It still was a major block for those making native title claims
- The was depicted through the ‘Yorta Yorta people’s claim for traditional lands in Victoria.
- The court case took 8 years, and it was still denied
- The argument provided by the high court was that;
  - the Yorta Yorta people could not prove this history of ownership was because, when the British took over the land they excluded the Yorta Yorta community.
  - The high court then clarified the law with respect to the evidence necessary to prove native title.

**The Wik case:**

- Because of the Mabo decision the native title act resulted in other indigenous groups claiming land
The Wik and the Thayyorre people launched a case against Queensland government (Wik people v Queensland) (1996)

They claimed that the native title was being used by pastoralists, under pastoral leases from the government.

The high court found that pastoral leases and native title could co-exist, but when conflict arose the pastoral leases would prevail.

Thus, the Federal government enacted the **Native Title amendment act 1998**
- this extinguished native title over land that was considered private property owner prior to 1994
- When native title exists alongside a pastoral lease, the pastoralist does not have to consult people who have native title interests
- At least one member of the claimants must prove a continuous link with the traditional lands

**Effectiveness of the Law reform** -
- The high court performed its judicial powers in accordance to the notion of justice. Allowing the act of **Native Title Act 1993 (cth)** from the recognition of the native title.
- Although the concept of terra nullius was overturned, communities such as the Yorta Yorta people could not claim their land because they were excluded when the British invaded.
- The need for evidence of ownerships complicated the process for Aboriginals to claim back their land leaving them with a further disconnection with the land

### 3.1, 3.2 CLASSIFICATION OF LAW: PUBLIC LAW, PRIVATE LAW

<table>
<thead>
<tr>
<th>Public law</th>
<th>Private law</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Criminal Law</strong></td>
<td><strong>Contract law</strong></td>
</tr>
<tr>
<td>→ These can be punished by the state</td>
<td>→ An agreement of promise between two or more parties that is recognized by the law.</td>
</tr>
<tr>
<td>→ Crime Acts have been amended to suit computer crimes.</td>
<td>→ When this is breached, legal action can be taken.</td>
</tr>
<tr>
<td>→ Criminal law is the responsibility of each state</td>
<td>→ This can be paid in damages.</td>
</tr>
<tr>
<td>→ Each state and territory has jurisdiction and legislations to cover.</td>
<td>→ The person who initiates the civil action is called the ‘plaintiff’ since they made the complaint.</td>
</tr>
<tr>
<td>→ The punishments of these laws are the same.</td>
<td>→ An injunction would occur; it is a order in which who prohibit the party to not do something. Or it can require the party to do something.</td>
</tr>
<tr>
<td>→ The criminal justice system of states and territories are similar.</td>
<td>→ Specific performance – this is a specific instruction in what the defendant has to do.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Administrative Law</th>
<th><strong>Tort Law</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>→ Looks after government powers and the decisions of government organizations</td>
<td>→ These are civil wrongs</td>
</tr>
<tr>
<td>→ Individuals can’t challenge the notion itself, e.g. increases in taxes but can challenge the departments who issued this policy.</td>
<td>→ But this is different from a breach of contract, as there was already a legal relationship beforehand.</td>
</tr>
<tr>
<td>→ An individual must be aware of which government body was responsible for the action before he or she can challenge it</td>
<td>→ The law of tort attempts to restore the plaintiff to the position he or she was in before the wrong was committed.</td>
</tr>
<tr>
<td>Internal review</td>
<td>Negligence</td>
</tr>
<tr>
<td>External review</td>
<td>Nuisance</td>
</tr>
<tr>
<td>Judicial Review</td>
<td>Trespass to land</td>
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<tr>
<td></td>
<td>False imprisonment</td>
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<tr>
<td></td>
<td>Defamation</td>
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<thead>
<tr>
<th>Constitutional Law</th>
<th><strong>Property law</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>→ Focuses on the rules governing the executive legislation and judicial functions of</td>
<td>→ Governs relations involving things and interests that can be owned and have</td>
</tr>
</tbody>
</table>
government.

This is divided between the commonwealth and the states, since the Aus. Constitution has given the commonwealth parliament power to make laws in retrospect to particular topics.

If a law violates the rule inside the Constitution then case must go high court of Australia.

Cases are heard by one or more judges.
Decisions are given after much deliberation.
Each judge makes an independent decision on the cases. If the decision is not unanimous the majority decision will prevail.
High court decisions are binding on all courts of Australia.

3.3 CLASSIFICATION OF LAW: CRIMINAL AND CIVIL COURT PROCEDURES

<table>
<thead>
<tr>
<th>Criminal</th>
<th>Civil</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Prosecutor and a defendant</td>
<td>• Plaintiff and defendant</td>
</tr>
<tr>
<td>• State brings case to court</td>
<td>• An individual or organization brings case to court</td>
</tr>
<tr>
<td>• Burden of proof goes to the prosecutor</td>
<td>• Burden of proof goes to the plaintiff</td>
</tr>
<tr>
<td>• Standard of proof must be beyond reasonable doubt</td>
<td>• Standard of proof is that they must meet a balance of probabilities</td>
</tr>
<tr>
<td>• Before an accused can tried they must have a committal hearing</td>
<td>• Straight to hearing although might require mediation at first</td>
</tr>
<tr>
<td>• Prosecutor makes the case</td>
<td>• Plaintiff makes the case</td>
</tr>
<tr>
<td>• Innocent till proven guilty</td>
<td>• Jury trials are rare</td>
</tr>
<tr>
<td>• Indictable offences via the jury trial. Jury will consider evidence</td>
<td>• Proof is within the balance of probabilities</td>
</tr>
<tr>
<td>• Prove beyond reasonable doubt</td>
<td>• Judge makes finding</td>
</tr>
<tr>
<td>• Jury makes finding</td>
<td></td>
</tr>
</tbody>
</table>

Legal Personnel:

Judges and magistrates make sure that the rules are followed and that the trial is fair.

• Judges sit in the intermediate and superior courts (District and Supreme Courts) and umpire cases.
• They make decisions about the points of law and give instructions to the jury to make sure they understand the proceedings and evidence presented.
• They are required to hand out sentences and rulings.

• Magistrates are in charge of the lower courts.
• After hearing both sides the magistrate will decide whether the person is guilty or innocent.
• They can decide on the punishment for civil cases.
• And the amount of money awarded in civil cases.

Judge’s associate is a confidential secretary to the judge and performs clerical duties for the court. They generally have a law degree.

Tipstaff support the judge in matters of procedure and organization when court is in session.
**Barristers and Solicitors** people, seeking legal advice will normally go to a solicitor first.
- They can specialize in a number of areas
- Solicitors work in family law, real estate transactions, preparation of wills and contracts.
- They can also brief a barrister when a case must go before a court.
  - Barristers often specialize in one area of law this allows them to develop a depth of knowledge and expertise in that area
  - They can provide legal advice on the likely outcome of a court case
  - Present client’s case in court

**Witness** gives evidence regarding the case in court. They must swear and oath, and must not enter the court room until called

**Court Officers** are responsible for the court lists and calls the witnesses to the stand. They ensure that the public is seated at the right place.

**Court Reporters** report the procedure, as all court proceedings must be recorded. This may be either written or in audio/visual form.

### 2.3 SOURCES OF CONTEMPORARY LAW: COURT HIERARCHY

Australia has two overlapping jurisdictions of law
- Jurisdiction influences the **type of matters that it can decide**, and the **remedy** it can reward
- Australia = **State** and **Federal** jurisdictions of law, thus they have separate state and federal jurisdiction., they also have its own court structure
- All courts have the power to hear a case for the 1st time
- Some courts can hear appeals from lower courts
  - This means that they **reconsider the decision** of a lower court, where the **losing party believes** there has been a **error in legal reasoning**
- The state court system in NSW operates under this hierarchy
  1. **Lower Courts**
  2. **Intermediate Courts**
  3. **Superior Courts**
- Each court has its own jurisdiction, or area over authority.
- Minor matters are dealt in the lower court hierarchy
- Higher courts are reserved for more serious matters and appeals from the lower courts

**STATE:**

**STATE LOWER COURTS:** Deals with minor criminal offences and minor civil disputes

**LOCAL COURT OF NSW:**
- A magistrate will hear and decide the case and set the punishments for criminal offences.
- Most criminal matters are heard in Local or magistrate court, as only very serious crimes are referred to the district or supreme courts.
- ACT calls it ‘magistrate court’
- **Preliminary/committal Hearing** - In the case of indictable offences magistrate will listen to the outline of evidence given to determine whether the prosecution has a strong enough case to try the defendant in District court or Supreme court.
- **Jurisdiction** –
  - Summary offences
  - Civil matters with monetary value of up to $100 000
  - limited jurisdiction in family law; property settlements, residence orders. = in this area the local court has federal jurisdiction
  - ACT has a similar jurisdiction, and has a civil offence monetary value of $250 000
**CORONER’S COURT OF NSW:**
- Role is to ensure that (NSW & ACT) that unexplained, suspicious, suspected deaths are investigated.
- Fires and explosions are also investigated.
- The investigation of a death is a coronial inquest and allows the court to investigate whether there has been criminal offences.

**CHILDREN’S COURT OF NSW:**
- Deals with civil matters concerning the protection and care of young people and children.
- Deals with criminal cases involving persons under age of 18 at the time or under 21 when charged with a crime committed while under 18.

**STATE INTERMEDIATE COURTS:** Deal with more serious criminal matters.

**DISTRICT COURT OF NSW:**
- Involve larceny, manslaughter, sexual assault and large-scale drug importations. They cannot deal with murder, treason and piracy.
- A judge or sometimes a jury, will hear cases tried in a district court.
- They deal with criminal offences such as:
  - Dangerous driving
  - Assault
  - Offences related to property; embezzlement
  - Importing, supplying, possessing prohibited drugs
  - Fraud, forgery
- **Jurisdiction** –
  - Unlimited for claims for personal injuries from a car accident
  - Civil cases monetary value is below $750 000 or larger amounts if both parties agree
  - Appellate jurisdiction

**STATE & TERRITORY SUPERIOR COURTS:**

**SUPREME COURT OF NSW:**
- Highest court in the state & territory courts
- Deal with the most serious criminal matters and civil cases involving large sums of money (no monetary limits for civil matters)
- Deals with appeals from the lower courts in that state or territory
- **Jurisdiction** – for criminal matters regrading serious indictable offences
  - Manslaughter
  - Murder
  - Attempted murder
  - Kidnapping
  - Major conspiracy
  - Drug-related charges
  - Commonwealth prosecutions for major breaches of corporations’ law.
- Court hears matters on:
  - Claims for damages for; personal injury
  - Professional negligence
  - Breach of contract
  - Defamation
  - And possession of land
- Most civil matters are dealt with a judge alone, but a jury is used in some limited circumstances.
LAND AND ENVIRONMENT COURT:
- Responsible for interpreting and enforcing environmental law in NSW.
- Has a wide **jurisdiction** and deals with matters related to environmental planning
  - Zoning of park lands
  - Illegal polluting or dumping
  - Appeal against local council rulings

FEDERAL:

FEDERAL LOWER COURTS:

FEDERAL CIRCUIT COURT OF AUSTRALIA:
- Established by Federal Magistrate court
- Began operation in July 2000
- Established to relieve some of case load from Federal and Family courts
- Also, to reduce cost and time required to deal with more minor federal matters
- Deals with less complex disputes under commonwealth law
- **Jurisdiction** –
  - Family laws
  - Child support
  - Human rights
  - Copyright
  - Bankruptcy
  - Migration
  - Consumer protection
  - Trade practices
- Shares jurisdiction with Family court of Australia and Federal court of Australia – depending on the complexity of the issues

FEDERAL SPECIALIST COURTS:

FAMILY COURT OF AUSTRALIA:
- Is a superior federal court
- Deals with complex family law matters
- Established by Australian parliament in 1975
- Rule on cases related to specialized areas in family law; divorce, parenting orders, division of property and spousal maintenance
- Has appellate jurisdiction
- Can hear appeals from a decision of a federal magistrate or single family court judge

FEDERAL SUPERIOR COURTS:

FEDERAL COURT OF AUSTRALIA:
- Deals with matters arising under federal law
- **Jurisdiction** – bankruptcy, industrial relations, taxations and trade practices
- Hear appeals from decisions made by a single judge and from the Federal Magistrate court

HIGH COURT OF AUSTRALIA
2.5 SOURCES OF CONTEMPORARY LAW: THE CONSTITUTION

The constitution
- Australia gained a constitution on January 1\textsuperscript{st}, 1901
- Outlines legal framework and rules that apply to governance of Australia
- Before the constitution, Australia consisted of 6 colonies. They had the right to govern within their own borders

1800s – concept of one centralized government shifted
1880s – 1901: the road to federation

\textit{Federation}
There were different viewpoints and the fears of the smaller colonies of being consumed by NSW & Victoria played a prevalent role in shaping the final constitution.

Politicians have to persuade the public to vote for their proposals.

Sometimes they had to make trade-offs to gain voter confidence, this was essential to get the necessary votes in each of the federation referendums.

The series of referendums throughout 1898, 1899 and 1900 led to a proposed constitution.

But before this could take place, Approval British parliament was required.

The commonwealth of Australia Constitution act 1900. And thus, Australia came into existence as a nation.

Features of this act were:
- Nation consisting of 6 states
- Bicameral federal parliament
- High court of Australia was established to oversee ‘final and conclusive’ judgements over any appeal
- Outlined the division and separation of powers
- Enabled the constitution to be altered by a referendum

### Arguments for federation vs Arguments against Federation

<table>
<thead>
<tr>
<th>Arguments for federation</th>
<th>Arguments against Federation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Economics: the removal of trade barriers between colonies would promote a more efficient economy</td>
<td>Trade: Tariffs would be used to protect industries in certain colonies from competition in other colonies</td>
</tr>
<tr>
<td>Transport: A national rail network would overcome problems caused by the colonies having different rail gauges</td>
<td>Fear: Smaller states believed that more rich and populous states would override their interests</td>
</tr>
<tr>
<td>Defence: A unified military force would reduce vulnerability</td>
<td>Expense: Federation would be expensive to achieve. And a national government would be expensive to run</td>
</tr>
<tr>
<td>Nationalism: The desire to foster a unique Australian identity and culture distinct from their mother country</td>
<td>Cheap Labor: Queensland was determined to protect its sugar industry by allowing pacific islander ‘kanakas’ to work there</td>
</tr>
<tr>
<td>Racial Purity: Implementing national policies restricting immigration would keep Australia white’</td>
<td></td>
</tr>
</tbody>
</table>

### Division Of Powers:

- **Section 51** – of the constitution specifies the legislative powers of the federal parliament.
  - The Federal parliament has the power to make laws in respect to all of the matters listed in s51.

- Some states can also make laws in many of the areas listed in s51; this means that the federal government and state have concurrent powers.

- It also specifies those areas over which the federal and state governments have concurrent powers.

- **Section 52** – outlines the exclusive powers of the federal governments.

### Exclusive Powers Of The Federal Government

- Areas of trade and commerce with other countries, foreign relations ('external affairs') and national defence.

- **Section 90** – states clearly that federal government has exclusive power over customs.

- **Section 114** – forbids states from raising or maintaining any military force.

- As technology, values and ethics have evolved over time, it’s up to the high court to interpret how the constitution applies in a modern context.

- When a law of a state is inconsistent with a law of the commonwealth, the latter shall prevail and the former shall become invalid.

- E.g. **Commonwealth v Tasmania (1983)** 'Tasmanian Dam Case'
基本上，塔斯马尼亚想在弗兰克林和戈登河系统上建造水力发电大坝。

环保人士反对这个想法，全境的抗议活动开始。

塔斯马尼亚政府认为建造大坝是剩余权力，因此不涉及公众。

1983年大选，工党表示他们会阻止大坝的建设，但建设继续。

联邦政府随后介入，因为它被公认为是‘野生河流地区’；这个区域具有特别意义并被列为世界文化遗产。

联邦政府随后通过了《世界遗产（财产保护法）1983年》。

现在有州法律允许建设大坝，而联邦法律要求停止。案件上诉到高等法院。

裁判是联邦政府是有效的，使用宪法第51条的外交事务权力。

剩余权力：
- 这些权力属于单个州，称为剩余权力。
- 这是所有国家权力中未被联邦政府专有之外的权力。
- 各州都有自己的宪法——这使州可以制定涉及各种领域如：
  - 妥协关系（新南威尔士州可以是同性婚姻）
  - 犯罪
  - 医院
  - 公共交通
  - 环境保护

分离权力：
立法：立法者
- 在澳大利亚：议会，众议院和参议院
行政：政府的部长和行政部门
- 在澳大利亚：这是总督，总理和内阁是行政的一部分。
司法：解释和执行法律的法院

高等法院的角色：
- 第三章=司法，通过这个章节建立了联邦司法系统。
- 第71条-创建了澳大利亚高等法院，并规定必须有一个首席法官和另外两位法官。

高等法院的管辖权：
- 同时具有原审和上诉管辖权。
- 第76条-联邦议会可以制定法律，将原始管辖权授予高等法院在任何案件。
- 当社会条件、标准和态度改变时，这应该反映在司法的视角和决定。
- 高等法院是澳大利亚司法系统的最高法院，自1996年起。

向高等法院的上诉：
- 第73条-规定高等法院的上诉管辖权。它规定高等法院有权力听取和决定所有从下级法院提请的案件的判决。
  - 高等法院：行使原审管辖权
  - 联邦法院：行使联邦管辖权
  - 高等法院：行使州的管辖权
- 第73条-也规定，在所有这类案件中，高等法院的‘判决’是最终和有约束力的。
- 目前所有上诉案件都将由高等法院审理。
Question Of Law:
- Generally, appeals relate to question of law or a matter that is important enough to have the attention of the High Court.
- Or a dispute between the opinions of various courts that require a final decision.

Judicial Review:
- The system reviews involve the review of the actions of a government official or department by a court of law.
- The high court exercises judicial review whenever it makes a decision about whether a particular law is constitutional valid or not.
- It has almost unlimited jurisdiction to review commonwealth administrative decisions.

Natural Justice:
- Judicial review involves the court investigating whether a government official or department has acted ‘ultra-vines’ or whether he or she or it has followed the rules of natural justice (procedural fairness).

2.7 SOURCES OF CONTEMPORARY LAW: INTERNATIONAL LAW

International Law:

Differences Between Domestic And International Law:

<table>
<thead>
<tr>
<th>Domestic Law</th>
<th>International Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Laws made in Australia are called; status or precedents</td>
<td>Law made by international bodies Is also ‘soft law’</td>
</tr>
<tr>
<td>Individuals do not possess locus standi to appear before the I.C.T</td>
<td>it is difficult to enforce</td>
</tr>
<tr>
<td>Have compliancy attendance</td>
<td>laws made internationally are called; treaties, conventions, declaration</td>
</tr>
<tr>
<td>Australian agencies are used to ensure compliancy</td>
<td>the law made by the UNO is a combination of all the legal systems</td>
</tr>
<tr>
<td>States are powerful entities, they can force another state to take a particular course of action</td>
<td>compliancy with international is hard to enforce</td>
</tr>
<tr>
<td>States are interdependent in many ways</td>
<td>governs the relationships between states.</td>
</tr>
<tr>
<td>States are powerful entities, they can force another state to take a particular course of action</td>
<td>Allows states to participate trade and commerce and provides mechanisms for the maintenance of peace and security and the reduction of conflict.</td>
</tr>
<tr>
<td>States are interdependent in many ways</td>
<td>It lacks the power to enforce the constraints contained in this law.</td>
</tr>
<tr>
<td>States are interdependent in many ways</td>
<td>Human rights can be breached.</td>
</tr>
<tr>
<td>States are interdependent in many ways</td>
<td>International law could not prevent genocide</td>
</tr>
</tbody>
</table>

State Sovereignty:
- Is the ability for a state to make laws for the nation and to control its own population.
- They operate interdependently of the international community and independently.
- States implement international agreements by ratifying their conditions into their domestic law.
- States can choose not to implement an international treaty.
- There are sanctions for failing to abide by international treaties.

Sources Of International Law:

International Law
- Law is made up by UNO, combination of all different legal systems in the world today.
These legal systems include features of common law, statute law, equity and customary law.

Sources of international law also include legal decisions of the ICJ and the writing of learned jurists.

<table>
<thead>
<tr>
<th>Hard Law</th>
<th>Soft Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Difficulties in enforcing, but is possible to make countries comply</td>
<td>Leaves large amount of discretion to nation states to comply</td>
</tr>
<tr>
<td>Once treaty is agreed; it has the status of law and is enforceable to an extent</td>
<td>Law made by united states, known as international law, is usually descanted as soft law</td>
</tr>
<tr>
<td>Hard law → treaties, conventions and customary international law</td>
<td></td>
</tr>
<tr>
<td>But, usually domestic law, delegated legislative would be implemented as hard law</td>
<td></td>
</tr>
</tbody>
</table>

**International Customary Law** –

- Based on long-established traditions or common practices.
- International customary law has been regulating war- Hague (1989) and Geneva Conventions (1864, 1906, 1929, 1946) outlines rules governing the conduct of states in conflict such as the manner in which prisoners of war and civilians were treated.
- This form of international law develops over time, as it requires ‘constant and uniform’ practice of states in order to be accepted as law.
- It should be noted that, even if there is a constant and uniform practice, it is still not considered law unless the states accept that the practice is binding upon them.

**Declarations** –

- Are international instruments that state and clarify the parties’ position on particular issues, but do not impose legally binding provisions.
- E.g. Universal declaration of human rights (1948)
- Drafted after the 2nd world war and the holocaust.
- It was to address ‘human rights’ and ‘fundamental freedoms’
- 48 countries voted in favored of it.

**Treaties** –

- Commonly used source of international law
- Established by the Vienna Convention on the Law treaties (1969)
- An agreement between two legal officials
- Treaties can either be:
  - Bilateral – between two nations
  - Multilateral – between many states
- The more states that sign a treaty the more powerful it becomes
- They are used to make specific laws and to control conduct and to create cooperation between and within states
- They are created through direct negotiations between states
- If all parties agree the treaty will be signed
- The treaty only becomes binding on the state when that state ratifies it.

**Role Of United Nations:**

- There are two major agencies concerned with international law
- Legislative arm;
  - The united nations or the UNO, this body is located in new York city
- The judicial arm:
  - The international court of justice of the ICJ.
- The united nations makes treaties, conventions, and declarations as part of the law
- The treaties which are made cover many international issues such as;
  - Human rights – the declarations of human rights
  - Ocean – the law of the sea convention
Discrimination – the convention in the elimination of discrimination against women

**Courts And Tribunals:**
- The international court of justice is the primary judicial body of the united nations.
- The ICJ can only hear disputes if the nations involved accept the jurisdiction of the court.

**Intergovernmental Organisations**
- IGOS, they are organized groups of states established to pursue mural interests in a wide variety of areas.

**Non-Governmental Organisations**
- Associations based on common interests and aims and which have no connection to any government.

**Revelance Of International Law to Australian Law:**
- International law does not dictate the way Australia implements the obligations it has under treaties.
- Treaties influence Australian law in the development of the common law, judicial review of decisions.

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**WOMEN AND THE SYDNEY SIEGE**

<table>
<thead>
<tr>
<th>Women</th>
<th>Sydney</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Legal Response</strong></td>
<td></td>
</tr>
<tr>
<td>United Nations</td>
<td>Office of the Director of Public Prosecutions</td>
</tr>
</tbody>
</table>

The United Nations has responded to issues regarding women by initiating the 'Convention on the Elimination of Discrimination against Women'. This has been important in forwarding the rights of women throughout the world. The intentions of the United Nations for women go unnoticed as it cannot be effective unless states ratify the treaty into their domestic laws. As states normally

The foundation of the errors taken place in the Sydney Siege, rooted from the inadequate measure taken during Monis's application for bail on a murder charge. This legal response has proven non-effective as his application for bail was granted, allowing his to kill Tory Johnson and indirectly kill Katrina Dawson. The bail had been granted to Monis, as it he was thought not to depict 'exceptional
act out of self-interest, and the United Nations can only pressure state to an extent – majority states have not signed the treaty as a result. Thus, the United Nations cannot meet the international obligation in achieving justice for women. The extensive treaty is limited in it’s power as majority states focus on the economic or political benefits.

CEDAW would have had the power to battle sexual harassment, discrimination and violation of human rights, increased education for women and domestic violence. Women around the world still face violence and injustice despite the existence of this treaty as; four million girls are sold into sex slavery; 130 million women are victims of genital mutilation and two thirds of adults are illiterate women because of the lack of education allowed to them. Indravani Pamela Ramjattan is one of the many case studies in which a woman was sentenced to death for killing her abusive husband; during the trial, her lawyer uncovered the violent past of beatings, rape and death threats, thus her sentence was reduced to manslaughter, and was given 13 years imprisonment.

<table>
<thead>
<tr>
<th>Non – legal Response</th>
<th>Trade Union</th>
<th>The media</th>
</tr>
</thead>
<tbody>
<tr>
<td>Today, unions are strong advocates for the rights of women. The Australian Council of Trade Union has achieved justice for women in contrast to the United Nation’s response to women issue.</td>
<td>• The principal for equal pay for equal work  • Women’s parental leave  • Improved child care  • Universal superannuation  • Anti – discrimination and affirmative action  • Equal employment opportunity legislation  The ACTU campaigned for maternity leave, which they believe to be a fundamental human right. They also take the necessary measures to address the discrimination and disadvantage suffered by women who choose to become parents. This is a women issue as without paid maternity leave, women face lack of job security and income loss if they take time off bearing a child. In 2011, the Federal government introduced 18 weeks of paid parental leave for working women. This will ideally become on the norms for women in the workplace, and thus they have effectively</td>
<td>The media response to this issue was also ill-effective as the broadcasting of the Sydney siege brought potential compromise to the safety of hostages and to undermine the police strategy. As there was not a effective mechanism in which the police force and media could arrange in order not to compromise the situation any further.</td>
</tr>
<tr>
<td>circumstance’ in which would paint him a threat to society. This is directly at fault of Office for Public Prosecutions as they had failed to comply with office polices which could have prevented the Sydney Siege.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Conclusion</td>
<td>In comparison of the United Nation’s movement and the Australian Council of Trade Unions, the ACTU has impacted the level in achieving justice for women. This is since, the states aren’t as compelled to fight women’s issues than a organization whose foundation is to fight these issue. The priorities of the legal response is what is limiting them in achieving justice for women.</td>
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</table>

**DRUG LAW REFORM**

**Reasons for reform –**
- Drugs can affect lives and the lives surrounding the drug users. For example, the use of drugs and driving can have detrimental effects on themselves and those surrounding
- It gives unfair advantage for those in the sporting fields.
- If a reform does not take place then there will only be an increase of drug usage.
- From 2007 -2011 it showcases how there has been a 3 million increase of drug users.

**Agencies that give rise to reform –**
- State and Federal government have continued to introduce new laws in the hope of introducing new laws in the hope of confiscating illicit drugs. This is since it can have many negative side effects on individuals and society.

**Effectiveness of Law Reform –**
- Law reform’s purpose is to improve laws to make it more just and equitable also to further update laws in our ever-changing society.
- This reform is somewhat effective as there are harsher punishments affiliated with drugs which creates a deterrent for those involved with drugs.